



Australian Government

australian consumer law 

The Australian Consumer Law

A guide to provisions



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GLOSSARY OF TERMS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACL Regulations	Trade Practices Amendment (Australian Consumer Law) Amendment Regulations 2010 (No.1)
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
BRCWG	Business Regulation and Competition Working Group
CCA	<i>Competition and Consumer Act 2010</i>
COAG	Council of Australian Governments
FTA	Fair Trading Act of a State or Territory
IGA	<i>Intergovernmental Agreement for an Australian Consumer Law</i> , signed by members of the Council of Australian Governments on 2 July 2009.
MCCA	Ministerial Council on Consumer Affairs
MINCO	Ministerial Council for Corporations
PC	Productivity Commission
SCOCA	Standing Committee of Officials of Consumer Affairs
The first Commonwealth Act	<i>Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010</i> . This Act received the Royal Assent on 14 April 2010. It includes measures to implement: <ul style="list-style-type: none">• a national unfair contract terms law; and• new enforcement powers, penalties and redress options in the TPA. The measures of this Act are incorporated into the schedule version of the ACL. The Act also makes consequential amendments to the ASIC Act. The Act took full effect on 1 July 2010.
The second Commonwealth Act or the Act	<i>Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010</i> was passed by both Houses of the Australian Parliament on 24 June 2010 and received the Royal Assent on 13 July 2010.
TPA	<i>Trade Practices Act 1974</i> , which will be called the Competition and Consumer Act 2010 from 1 January 2011.

THE ROLE OF THIS GUIDE

This guide to the provisions of the Australian Consumer Law (ACL) is a companion to *The Australian Consumer Law: An introduction*, which explains the general outline and context of the ACL.

Purpose of this Guide

This guide is intended to provide an accessible description of the contents of the ACL. It is not intended to be, nor is it, a substitute for the Explanatory Memorandum and Supplementary Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (available at www.consumerlaw.gov.au).

This brief guide reflects the ACL as it is on 1 January 2011.

THE DRAFTING OF THE ACL

The ACL has been drafted in accordance with the requirements of plain language drafting.

Existing *Trade Practices Act 1974* (TPA) provisions included in the ACL have, in most cases, been modified and reordered to make the law clearer and also to reflect changes in drafting conventions since they were initially inserted into the TPA. With the exception of those areas where there have been policy changes, these drafting changes are not intended to alter the legal effect of these provisions.

Plain language drafting

For an explanation of plain language drafting, please refer to www.opc.gov.au.

THE AUSTRALIAN CONSUMER LAW

The ACL is a single, national law covering consumer protection and fair trading which applies in the same way nationally and in each State and Territory.

For the first time, Australian consumers have the same protections and expectations about business conduct wherever they are in Australia. Similarly, businesses have the same obligations and responsibilities wherever they operate in Australia.

The Productivity Commission (PC) estimated that this reform could provide benefits to the Australian community of between \$1.5 billion and \$4.5 billion a year.

The ACL:

- replaces a wide range of existing national and State and Territory consumer laws and clarifies understanding of the law for both Australian consumers and businesses;
- is a schedule to the *Competition and Consumer Act 2010*, which is the new name of the *Trade Practices Act 1974* (TPA);
- is applied as a law of the Commonwealth. Each State and Territory also apply the ACL a law of its respective jurisdiction. This means that the same provisions apply across Australia;
- is enforced by all Australian courts and tribunals, including the courts and tribunals of the States and Territories; and
- is administered by the ACCC and each State and Territory's consumer law agency.

The *Australian Securities and Investments Commission Act 2001* (ASIC Act) continues to apply, separately, to financial products and services, with the Australian Securities and Investments Commission (ASIC) as the national regulator. This reflects the current subject matter referral by the States and Territories set out in the *Corporations Agreement 2002* and administered by the Ministerial Council for Corporations (MINCO). Where appropriate, the consumer protection provisions of the ASIC Act have been amended to maintain consistency with the ACL. Relevant amendments to the ASIC Act are included in Schedule 3 of the second ACL Act.

What does the ACL cover?

The ACL includes:

- **Chapter 1 – Introduction:** a single set of definitions and interpretative provisions about consumer law concepts.
- **Chapter 2 – General protections:** general protections, which create standards of business conduct in the market. Specifically, Chapter 2 includes:
 - a general ban on misleading and deceptive conduct in trade or commerce;
 - a general ban on unconscionable conduct in trade or commerce and specific bans on unconscionable conduct in consumer and some business transactions; and
 - a provision that makes unfair contract terms in consumer contracts void.
- **Chapter 3 – Specific protections:** specific protections which address identified forms of business conduct. Specifically, Chapter 3 includes provisions on:
 - banning specific unfair practices in trade or commerce;
 - provisions dealing with consumer transactions;
 - the safety of consumer goods and product-related services;
 - the making and enforcement of information standards; and
 - the liability of manufacturers for goods with safety defects.
- **Chapter 4 – Offences:** criminal offences relating to certain matters covered in Chapter 3.
- **Chapter 5 – Enforcement and remedies:** national enforcement powers and remedies relating to consumer law.

What are the principal changes that are introduced by the ACL?

The main changes being implemented in the ACL are:

- a single set of definitions and interpretative provisions, some of which differ from those currently used in the TPA (Chapter 1);
- a new national law on unfair contract terms (Chapter 2, Part 2-3);
- a single set of provisions about unfair practices and fair trading, including amendments and additions which reflect existing provisions in State and Territory consumer laws (Chapter 3, Part 3-1);
- new national consumer guarantees provisions, which replaces laws on statutory conditions and warranties (Chapter 3, Part 3-2, Division 1);
- a new national regime for unsolicited consumer agreements, which replace existing State and Territory laws on door-to-door sales and other direct marketing (Chapter 3, Part 3-2, Division 2);
- simple, national rules for lay-by agreements (Chapter 3, Part 3-2, Division 3);
- a new national product safety legislative regime (Chapter 3, Part 3-3); and
- new national provisions on information standards, which apply to services as well as goods (Chapter 3, Part 3-4).

CHAPTER 1: INTRODUCTION

Chapter 1 of the ACL contains the definitions that apply to terms used in the ACL.

The definitions in the ACL are discussed, where relevant, in the parts of this guide that deal with the provisions to which they mainly relate. However, further detail is set out below on the definition of 'consumer', which has a broad application in the ACL.

Definition of 'consumer'

The ACL generally provides protections to any person or corporation as a consumer of goods and services. In some cases, protections only apply to a defined class of 'consumers'.

Some provisions of the ACL are limited to a defined class of 'consumers', where there is a policy reason to limit the extent of consumer protection to the acquisition of goods and services to exclude certain commercial transactions.

The definition of 'consumer' in the ACL applies particularly to consumer guarantees, unsolicited selling and lay-by agreements.

Section 3 of the ACL defines 'consumer'. For the purposes of the ACL, a person is a 'consumer' if they acquire goods or services that are priced at less than \$40,000. A person is also a 'consumer' if they acquire good or services that are priced at more than \$40,000 but they are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. A person who acquires a vehicle for use in the transport of goods on public roads, irrespective of price, is also considered to be a consumer for the purposes of the ACL.

Section 3 of the ACL defines 'consumer' in the same way as section 4B of the *Trade Practices Act 1974* (TPA). In many cases, the protections provided by the ACL apply to all individuals and businesses, rather than being restricted to 'consumers' as defined, where the relevant conduct is in trade or commerce.

CHAPTER 2: GENERAL PROTECTIONS

Chapter 2 of the ACL deals with consumer protections which apply generally and which are intended to create general standards of conduct in trade or commerce.

Structure of Chapter 2 — General protections

- **Part 2-1 – Misleading or deceptive conduct**
 - A broad prohibition on misleading or deceptive conduct in trade or commerce.
- **Part 2-2 – Unconscionable conduct**
 - A broad prohibition on unconscionable conduct in trade or commerce plus more specific prohibitions on unconscionable conduct in consumer and certain business transactions.
- **Part 2-3 – Unfair contract terms**
 - Unfair contract terms in standard form consumer contracts are void.

PART 2-1 MISLEADING OR DECEPTIVE CONDUCT

The ACL prohibits misleading and deceptive conduct in trade or commerce.

Section 18 of the ACL prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct. This prohibition is not limited to the supply of goods or services and creates a broad, economy-wide norm of conduct.

The ACL retains the general prohibition on misleading and deceptive conduct that existed in section 52 of the TPA and all State and Territory fair trading Acts (FTAs). The drafting of section 18 is in the same form as section 52 of the TPA, except for the reference to ‘persons’ rather than ‘corporations’.

Will section 18 of the ACL apply differently to section 52 of the TPA?

The effect of section 18 remains unchanged and, accordingly, the existing jurisprudence on section 52 and its State and Territory equivalents remains applicable under the ACL.

Enforcement and remedies

A contravention of the prohibition on misleading and deceptive conduct is subject to remedies including injunctions, damages and compensatory orders, as set out in Chapter 5 of the ACL.

Civil penalties and criminal sanctions do not apply to section 18, because of its very broad scope. Section 18 of the ACL creates a norm of business conduct, and allows persons to seek remedies for harm caused by breaches of that norm, rather than giving rise to a contravention that attracts punitive sanctions. Other prohibitions against specific forms of false or misleading conduct may also apply to instances of misleading conduct and have specific penalties and criminal sanctions.

PART 2-2 UNCONSCIONABLE CONDUCT

The ACL prohibits unconscionable conduct in trade or commerce. The ACL also specifically prohibits unconscionable conduct in consumer and business transactions.

Section 20 of the ACL prohibits unconscionable conduct within the meaning of the unwritten law, from time to time. This means that actions relating to unconscionable conduct, which is a concept that has developed in the common law and the principles of equity, may be commenced under the ACL and the remedies provided by the ACL may be applied to a breach of the provision.

Section 21 of the ACL prohibits unconscionable conduct in connection with the supply of goods or services to a person. Section 22 of the ACL prohibits unconscionable conduct in connection with the supply of goods or services, or the acquisition of goods or services, in business transactions.

The concept of unconscionable conduct in sections 21 and 22 of the ACL is not bound by the common law and equitable principles, and while courts may consider any relevant matters, the ACL specifies a guiding list of factors.

The content of Part IVA of the TPA is to remain, in substance, the same in the ACL.

Enforcement and remedies

Remedies applicable to the unconscionable conduct provisions of the ACL include injunctions, damages, compensatory orders and other remedies, such as non-punitive orders and adverse publicity orders. There are also civil pecuniary penalties with maximum penalties of \$1.1 million for a body corporate and \$220,000 for a person other than a body corporate, as well as disqualification orders, redress for non-parties and public warning notices.

PART 2-3 UNFAIR CONTRACT TERMS

Unfair contract terms in standard-form consumer contracts are void.

The ACL provides that unfair terms in consumer contracts are void. A 'consumer contract' is a standard-form agreement for the supply of goods or services which is wholly or predominantly for personal, domestic or household use or consumption.

A term is 'unfair' when it:

- causes a significant imbalance in the parties' rights and obligations arising under the contract; and
- is not reasonably necessary to protect the legitimate interests of the supplier; and
- causes financial or non-financial detriment to a party.

A court must have regard to the transparency of the term and the contract as a whole in determining whether a term is 'unfair'.

Terms which relate to the main subject matter and upfront price of the contract are not able to be challenged under these provisions. However, payments made under a contract which are contingent on the occurrence or non-occurrence of an event are examinable under the unfair contract terms provisions.

The unfair contract terms provisions are also included in a new Part 2, Division 2, Subdivision BA of the ASIC Act, with respect to financial products and services. The ACL provisions apply to all other consumer contracts, except for:

- certain shipping contracts; and
- the constitutions of companies and managed investment schemes.

As a consequence of the operation of section 15 of the *Insurance Contracts Act 1984*, the provisions do not apply to insurance contracts regulated by that Act. The Government is examining whether this exclusion should continue. An Options Paper *Unfair Terms in Insurance Contracts* was released on 17 March 2010 and is available at www.treasury.gov.au. This consultation closed on 30 April 2010 and the Government is considering this issue.

A non-exhaustive, indicative 'grey-list' of examples of types of terms that may be unfair is included in the provisions. These examples are subject to the unfair terms test and provide statutory guidance on issues of concern. They do not deem or presume particular types of terms to be unfair. Further examples may be added to this list by regulation.

The unfair contract terms provisions are supported by consistent national guidelines on their enforcement, developed by the national, State and Territory consumer agencies (available at www.accc.gov.au). ASIC has also issued specific guidance on unfair contract terms and exit fees for residential loans, available at www.asic.gov.au.

Existing law

Part 2B of the Victorian Fair Trading Act (FTA) currently regulates unfair contract terms. These provisions have been replaced by the ACL provisions on unfair contract terms.

Enforcement and remedies

A contract term which is declared to be unfair is void and a person has access to any remedies which may apply under the common law.

For the purposes of the ACL, certain other remedies are made available, namely:

- injunctions;
- compensation orders; and
- orders for the provision of redress to non-parties.

What is the status of the unfair contract terms provisions?

The new national unfair contract terms law is part of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*, which was passed by both Houses of the Australian Parliament on 17 March 2010 and received the Royal Assent on 14 April 2010. The unfair contract terms provisions commenced on 1 July 2010 at the Commonwealth level, with mirror provisions applying from that date in Victoria and NSW until the commencement of the entire ACL on 1 January 2011.

The second ACL Act simply changed the numbering of those provisions, compared with those implemented by the first ACL Act.

From 1 July 2010, the unfair contract terms law applies in the Commonwealth, Victoria and NSW to terms in new contracts, terms in renewed contracts and individual terms in existing contracts that have been varied after that date. In all other jurisdictions the provisions apply in the same way, from 1 January 2011.

CHAPTER 3: SPECIFIC PROTECTIONS

Chapter 3 of the ACL prohibits specific forms of conduct and regulates specific practices in consumer transactions.

These provisions support the general prohibitions in Chapter 2 of the ACL. They are based on provisions in Part V, Divisions 1, 1AAA, 1A, and 2A of the TPA as well as provisions in State and Territory fair trading Acts (FTAs).

Structure of Chapter 3 — Specific protections

- **Part 3-1 – Unfair practices**
 - The ACL prohibits certain false or misleading representations, the supply of unsolicited goods or services, participating in pyramid schemes, and practices involving the display of prices, referral selling, harassment or coercion.
- **Part 3-2 – Consumer transactions**
 - Consumer guarantees
 - : The ACL provides guaranteed consumer rights for goods or services.
 - Unsolicited consumer agreements
 - : The ACL introduces national rules for unsolicited sales transactions.
 - Lay-by agreements
 - : The ACL sets out five basic rules for lay-by agreements.
- **Part 3-3 – Safety of consumer goods and product-related services**
 - The ACL creates a new consumer product safety law and regulatory framework, which applies nationally.
- **Part 3-4 – Information standards**
 - The ACL creates a single national law that prescribes information standards for consumer goods and for services.
- **Part 3-5 – Liability of manufacturers for goods with safety defects**
 - The ACL creates national rules governing the liability of manufacturers for safety defects.

PART 3-1 UNFAIR PRACTICES

The ACL prohibits specific unfair practices in trade or commerce. These specific prohibitions are based on those currently set out in Part V of the TPA and, in some cases, draw on existing provisions in State and Territory consumer laws.

Structure of Part 3-1 — Unfair Practices

- **Division 1 — False or misleading representations, etc.**
 - Division 1 prohibits specific false or misleading representations, etc. about goods or services, land and employment, and also prohibits specific conduct concerning the offering of rebates, gifts or prizes, bait advertising, wrongly accepting payment and other forms of conduct.
- **Division 2 — Unsolicited supplies**
 - Division 2 prohibits specific conduct relating to the unsolicited supply of goods and services, as well as unsolicited credit cards and debit cards.
- **Division 3 — Pyramid schemes**
 - Division 3 prohibits participation in pyramid schemes, and inducing people to participate in pyramid schemes.
- **Division 4 — Pricing**
 - Division 4 applies rules to pricing practices to ensure that the total price is always presented where possible, and to ensure that there is only one applicable sale price.
- **Division 5 — Other unfair practices**
 - Division 5 prohibits certain practices to do with referral selling and also harassment or coercion.

Reforms drawing on State and Territory consumer laws

Some of the existing provisions of the TPA have been amended to reflect approaches that currently exist in one or more State and Territory's consumer laws. In addition, there are also new provisions which draw on existing provisions in State and Territory consumer laws.

False or misleading representations about goods or services

A person must not make false or misleading representations in connection with the supply or possible supply of goods or services or in connection with promotion by any means of the supply or use of goods or services.

Under section 29 of the ACL, a person is prohibited from making false or misleading representations in connection with the supply, possible supply or promotion of goods or services.

False or misleading representations banned by the ACL

A false or misleading representation that:

- goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- services are of a particular standard, quality, value or grade;
- goods are new;
- a particular person has agreed to acquire goods or services;
- purports to be a testimonial by any person relating to goods or services;
- concerns a testimonial by any person; or a representation that purports to be such a testimonial, relating to goods or services;
- goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;
- the person making the representation has a sponsorship, approval or affiliation;
- is with respect to the price of goods or services;
- concerns the availability of facilities for the repair of goods or of spare parts for goods;
- concerns the place of origin of goods;
- concerns the need for any goods or services;
- concerns the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy; or
- concerns any actual or implied requirement for a person to pay for a contractual right equivalent to a statutory consumer guarantee or any other statutory right or benefit that person may enjoy.

The types of representations above reflect those types that were already covered by section 53 of the TPA. Two new types of representations are included which relate to areas of concern for consumers – testimonials and statements about guarantees, conditions and warranties for goods and services.

Other false or misleading representations or misleading conduct

The ACL also specifically prohibits the following types of misleading representations or conduct:

Section	Conduct prohibited
30	Certain types of false or misleading representations made in trade or commerce in connection with the sale or grant of an interest in land.
31	Conduct liable to mislead a person as to the availability, nature, terms or conditions or any other matters in relation to employment.
33	Conduct liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for their purpose or the quantity of goods.
34	Conduct liable to mislead the public as to the nature, characteristics, suitability for their purpose or the quantity of services.
37	False or misleading representations concerning the profitability, risk or other key aspect of certain business activities.

Bait advertising

A person must not trick customers by offering only a few items at a very low price.

Section 35 of the ACL prohibits a person from advertising goods or services at a specified price if there are reasonable grounds for believing that the person will not be able to offer reasonable quantities of the goods or services at that price for a reasonable period, having regard to the advertisement and the nature of the market. A person who offers goods or services at a specified price must also do so for a reasonable period and in reasonable quantities, having regard to the advertisement and the nature of the market.

Clearly disclosing that there are only a certain number of items at a particular price, or that the offer is only for a specific time period, can be important for compliance with this provision.

Offering gifts and prizes

A person that offers rebates, gifts, prizes or other free items in connection with the sale of goods or services must honour that offer.

Section 32 of the ACL prohibits a person from offering rebates, gifts, prizes or other free items in connection with the supply or possible supply or promotion by any means of goods or services:

- with the intention of not providing them; or
- not providing them, as offered, within the time specified in the offer, or, if no time is specified, within a reasonable time.

Section 32 of the ACL expands the scope of section 54 of the TPA by requiring that provision is timely. Section 32 also includes a defence for suppliers where the failure to provide was not the fault of the supplier.

What is a 'reasonable' time?

Section 32 provides that a specified time for provision of the rebates, gifts, prizes or other free items will be considered a reasonable time if communicated in the offer. Where no time is specified before a transaction takes place, a 'reasonable' time will need to be considered by a court or tribunal on a case-by-case basis, based on the nature of the gifts and prizes offered and representations made about their availability.

Wrongly accepting payment

A person must not accept payment for goods or services if the person does not intend to supply the goods or services, know they cannot supply the good or service or cannot supply the goods or services in a timely manner.

Section 36 of the ACL prohibits a person from accepting payment or other consideration for goods or services where the person:

- intends not to supply the goods or services,
- intends to supply materially different goods or services, or
- there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing the person will not be able to supply the goods in the time specified or, if no time is specified, within a reasonable time;

and requires that the person deliver the goods or services within the specified time, or if no time is specified, within a reasonable time after accepting payment. Reasonableness is based on the court's interpretation of what is reasonable in all the circumstances.

Will the supplier break the law if there is a delay or it cannot supply at all?

Section 36 of the ACL provides that if a person exercises due diligence and the failure to supply within a reasonable time is beyond their control, they will not be liable under the ACL. The ACL does not limit any specific other contractual liabilities the supplier might have as a result of the failure.

Unsolicited cards

Credit and debit cards should only be sent to people if they have specifically requested them.

Section 39 of the ACL prohibits a person from sending a credit card or a debit card to another person unless it is at the written request of the other person.

Assertion of right to payment for unsolicited goods or services, or unauthorised entries or advertisements

A person must not assert a right to payment for unsolicited goods or services, or unauthorised entries or advertisements.

Section 40 of the ACL prohibits a person from asserting a right to payment for unsolicited goods or services.

Section 43 of the ACL prohibits a person from asserting a right to payment for unauthorised entries, and extends this prohibition to assertions in respect of similar entries that are not placed in a directory, as well as unauthorised advertisements.

Under section 10 of the ACL, a trader must include a prescribed warning statement in documents that purport to be invoices for unsolicited goods or services, and for unauthorised entries or advertisements.

The ACL Regulations specify that the warning statements for sections 10, 40 and 43 of the ACL must include the text 'This is not a bill. You are not required to pay any money', and this must be the most prominent text in the document.

How will section 43 of the ACL impact on publications that publish many advertisements, such as newspapers?

Section 64 of the TPA does not apply to newspapers. This exclusion continues to operate in section 43 of the ACL, and has been extended so that the provisions do not apply to publications with a circulation audited by the Audit Bureau of Circulations of 10,000 copies or more per week.

The ACL Regulations also provide section 43 does not apply to a listed or large proprietary corporation or its subsidiaries provided it has not previously been convicted for asserting a right to payment for unsolicited goods or services.

Liability of recipient of unsolicited goods or services

In general, a person does not have to pay for unsolicited goods or services.

Section 41 of the ACL provides that a person is not liable to pay for unsolicited goods supplied to them, nor for any loss or damage to those unsolicited goods unless the loss or damage is due to a wilful and unlawful action by the person. The supplier of the goods is entitled to retrieve the unwanted goods from the person within a certain time period.

Section 42 of the ACL provides that a person is also not liable to pay for unsolicited services supplied to them, nor for any loss or damage as a result of the supply of the unsolicited services.

Pyramid selling

A person must not participate in, or induce participation in, a pyramid scheme.

Section 44 of the ACL prohibits a person from participating in a pyramid scheme or inducing or attempting to induce a person to participate in one. Section 45 of the ACL defines a pyramid scheme and various concepts associated with a pyramid scheme, including participation payments, recruitment payments, and a new participant in a scheme. Section 46 provides guidance to the courts for differentiating between unlawful pyramid schemes and legitimate multi-level marketing schemes.

The ACL provision operates in much the same way as the TPA provisions with some minor amendments to clarify the issues the court must take into account.

Multiple pricing

If a supplier displays multiple prices for goods at the same time, it must either sell the goods for the lowest price or they can withdraw the goods from sale until the pricing is corrected.

Section 47 of the ACL provides that, where goods have more than one displayed price, they must not be supplied at a price higher than the lowest displayed price. However, other amounts such as a unit price per quantity are not 'displayed prices'.

The section also applies to catalogues and advertisements in the geographical areas to which they relate and for the period they cover. Mistakes in catalogues and advertisements will be able to be overcome by publishing a retraction of a similar circulation to the original representation.

Does a business have to sell at the lowest displayed price, even if the multiple price representations are a genuine error?

To ensure that genuine pricing errors are not penalised by section 47, a business may sell at the lowest displayed price, but the provision does not exclude their right to withdraw the item from sale, correct the price and then offer it for sale again.

Component pricing

Prices should be inclusive of all quantifiable, compulsory fees or charges.

Section 48 of the ACL prohibits a person from representing a component of a price when making a representation about the price of a good or service, without also prominently specifying the single figure price a person must pay to obtain the good or service, to the extent that a single figure price is quantifiable at the time of making a representation.

Referral selling

Inducing purchases by promising future commissions for subsequent sales is prohibited in certain circumstances.

Section 49 of the ACL prohibits a person from inducing a consumer to buy goods or services by representing that they will receive some benefit for assisting the person to supply goods or services to other customers, when the receipt of this benefit is contingent on an event occurring after the contract for the initial sale is made.

Harassment and coercion

A person must not harass or coerce another person in connection with a supply of goods or services.

Section 50 of the ACL prohibits a person from using physical force, undue harassment or coercion in connection with either the supply of goods or services to a person or payment by a person for goods or services.

Offences, remedies and penalties

Breaches of the ACL's criminal offences are subject to criminal fines of a maximum of \$1.1 million for a body corporate and \$220,000 for person other than a body corporate for many of the offences. These criminal fines are based on the amounts of fines in the TPA.

Contraventions of the unfair practices provisions of the ACL have remedies which include injunctions, damages, compensatory orders and other remedies, such as non-punitive orders and adverse publicity orders. There are also civil pecuniary penalties with maximum penalties of \$1.1 million for a body corporate and \$220,000 for a person other than a body corporate (except for \$5,000 and \$1,000 respectively for multiple pricing), as well as disqualification orders, redress for non-parties and public warning notices.

PART 3-2 CONSUMER AGREEMENTS

Consumer guarantees

The ACL introduces a new national law guaranteeing consumer rights when consumers acquire goods and services.

The ACL replaces the existing national, State and Territory laws on implied conditions and warranties with a single national system of statutory consumer guarantees.

Where the pre-existing law required consumers to enforce their rights as breaches of contract, the ACL sets out the remedies that apply to breaches of statutory consumer guarantees. The approach in the ACL to the terms of consumer transactions will also eliminate the distinction between 'conditions' and 'warranties'.

Statutory consumer guarantees eliminate the need for consumers to understand contract law in order to enforce their rights. Any failure by a supplier of a statutory consumer guarantee is directly enforceable as a breach of the ACL.

The consumer guarantees provisions of the ACL are aligned with the New Zealand *Consumer Guarantees Act 1993*. Guidance on that Act will further assist in understanding these provisions and can be found on the website of the New Zealand Ministry of Consumer Affairs – www.consumeraffairs.govt.nz.

Warranties for financial services provided by section 12ED of the ASIC Act continue to apply.

Guarantees relating to the supply of goods

The ACL creates a basic set of protections for consumers who acquire goods from Australian suppliers, importers or manufacturers.

These guarantees apply if goods are supplied in trade or commerce. They do not apply to private sales by individuals to other individuals or businesses. They also do not apply to sales made by way of a traditional auction where an auctioneer acts as an agent for a person to sell goods. They would, however, apply to sales made by businesses on the internet by way of online 'auction' websites when the website operator does not act as an agent for the seller. Second-hand goods are also covered by consumer guarantees.

Table 3.1: Consumer guarantees relating to the supply of goods

Guarantee	Description
<p>Guarantee as to title</p> <p>Section 51</p>	<p>Consumers have a guarantee that the supplier has the right to sell the goods to the consumer.</p> <p>Consumers should not be disadvantaged by claims that might be made against goods when the seller has no right to sell the goods. In some cases, a supplier and a consumer might agree to supply goods on the basis of 'limited title'. This is where a supplier tells a buyer that they cannot be sure of all claims that might be made over the goods and that they are selling only the title that they personally have over the goods.</p>
<p>Guarantee as to undisturbed possession</p> <p>Section 52</p>	<p>Consumers have a guarantee of undisturbed possession of goods.</p> <p>Consumers should not be inconvenienced by others seeking to reclaim the goods, for example, because the goods have been pledged as security for a loan. If the consumer is told about securities, charges or encumbrances that relate to the goods, the guarantee to undisturbed possession does not apply.</p> <p>If a supply is of limited title, the guarantee to undisturbed possession only applies to prevent the supplier, or a person whose title the supplier is transferring (a deceased estate, for example), from interfering with the goods. Other persons might still seek to repossess the goods, for example, if they were owed money by the deceased and the goods were pledged as security for the amount owing.</p>
<p>Guarantee as to undisclosed securities</p> <p>Section 53</p>	<p>Goods must be free from any security, charge or encumbrance that was not disclosed to the consumer or created with their consent.</p> <p>A floating charge involves a borrower providing a lender with the right to possess all of the goods of the borrower that fall into a particular category in the event that the borrower defaults on the loan. A common example involves a retailer or manufacturer granting a floating charge over its inventory of goods. The lender does not have a right to claim the goods under a floating charge unless the borrower defaults on the loan and the charge becomes 'fixed and enforceable'. Accordingly, a buyer of the goods will not be adversely affected unless a default has occurred.</p> <p>Suppliers do not need to disclose floating charges in order to comply with their obligation to provide a guarantee as to undisclosed securities.</p>
<p>Guarantee as to acceptable quality</p> <p>Section 54</p>	<p>Goods must be of 'acceptable quality'. Acceptable quality is defined in section 54(2) of the ACL such that goods are of acceptable quality if they are:</p> <ul style="list-style-type: none"> • fit for all the purposes for which goods of that kind are commonly supplied; • acceptable in appearance and finish; • free from defects; • safe; and • durable. <p>This definition is subject to a 'reasonable consumer' test, such that goods are considered to meet those standards if a reasonable consumer, who is fully acquainted with the state and condition of the goods, would regard them as acceptable.</p> <p>In determining whether goods are of 'acceptable quality', a number of issues need to be considered: the nature of the goods, the price of the goods (if relevant), any statement made about the goods on any packaging or label on the goods, any representation made about the goods by the supplier or manufacturer of the goods and any other relevant circumstances relating to supply of the goods.</p> <p>Consumers often want to buy goods that have defects, particularly if goods are available for lower prices due to those defects. Some stores specialise in selling 'seconds' — goods that have minor defects that otherwise do not interfere with their usefulness to consumers.</p> <p>Goods will be taken to be of 'acceptable quality' if the reason they are not of acceptable quality was specifically drawn to the consumer's attention.</p> <p>In addition, where a repairer accepts goods for repair, the ACL Regulations provide that notice must be given to the consumer if it is the repairer's usual practice to use refurbished parts and that, if relevant, user-generated data stored on a device being repaired may be lost.</p>
<p>Guarantee as to fitness for any disclosed purpose</p> <p>Section 55</p>	<p>Goods must be reasonably fit for a purpose that a consumer, expressly or by implication, makes known to the supplier or manufacturer.</p> <p>There is an exception for situations in which it is unreasonable for the consumer to rely on the skill or judgment of a supplier or manufacturer.</p>

Table 3.1: Consumer guarantees relating to the supply of goods (continued)

Guarantee	Description
Guarantee relating to supply of goods by description Section 56	Goods must correspond with their description. This guarantee applies irrespective of the fact that goods were displayed and selected by the consumer.
Guarantees relating to the supply of goods by sample or demonstration model Section 57	Where goods are supplied by reference to a sample: <ul style="list-style-type: none"> the goods must correspond with the sample; the consumer will be given a reasonable opportunity to compare the goods with the sample; and the goods must be free from any defect that is not apparent from reasonable examination of the sample.
Guarantees as to repairs and spare parts Section 58	A manufacturer must take reasonable steps to make repairs and spare parts reasonably available for a reasonable period after the goods are supplied. The period of time that is reasonable will depend on the circumstances and the nature of the goods.
Guarantee relating to express warranties Section 59	A manufacturer must comply with an express (or 'manufacturer's') warranty. The ACL Regulations specify that must be included in any warranty against defects offered by a supplier. A consumer must be given notice that all products come with statutory guarantees that cannot be excluded by law as well as certain information about any express warranty, including any requirements the consumer must fulfil for the warranty to be honoured, the procedure for a consumer to claim under the warranty and contact details of the person who is giving the warranty.

Table 3.2: Consumer guarantees relating to the supply of services

Guarantee	Description
Guarantee as to due care and skill Section 60	Services must be rendered with due care and skill. Exclusions, which already exist in the TPA, for transport and storage of goods for the purpose of a business and contracts of insurance will be retained.
Guarantees as to fitness for a particular purpose Section 61	Services must be reasonably fit for a purpose that a consumer, expressly or by implication, makes known to the supplier. Services must also be of a nature, quality, state and condition such that they can be expected to achieve a result that the consumer makes known to the supplier. There is an exception for situations where it is not reasonable for the consumer to rely on the skill or judgment of a supplier. The current TPA exception for services of a professional nature provided by a qualified architect or engineer from the guarantee as to fitness for purpose will be maintained, pending a review of that exemption three years after the commencement of the ACL.
Guarantee as to reasonable time for supply Section 62	Services must be provided to consumers within a reasonable time if the time is not otherwise fixed in a contract or agreed between the consumer and supplier. The time period that is reasonable would depend on the particular type of services and the circumstances applicable to the agreement.
Guarantees not to be excluded by contract Section 64	A person may not exclude any of the guarantees provided for in the ACL. Suppliers may exclude liability in respect of personal injury or death that results from the supply of recreational services. Recreational services include sporting activity or similar leisure-time pursuit, or any other activity that involves a significant degree of physical exertion or physical risk that is undertaken for the purposes of recreation, enjoyment or leisure.
Application of consumer guarantees to supplies of gas, electricity or telecommunications Section 65	This provision allows the Minister to make regulations for exemption of supplies of gas or electricity or telecommunication services. Due to the special policy considerations that apply to these essential services, industry-specific legislation has been developed at both the Commonwealth and State and Territory levels to deal with consumer issues in relation to these supplies.

Unsolicited consumer agreements

The ACL introduces a national law on unsolicited selling, replacing existing State and Territory laws on door-to-door sales and other unsolicited sales practices.

The ACL includes a single national law covering unsolicited sales practices, including door-to-door selling, telephone sales and other forms of direct selling which do not take place in a retail context. This national approach replaces the eight State and Territory regulatory regimes and simplifies the rules that apply to unsolicited sales.

The national unsolicited consumer agreements law is in Chapter 3, Part 3-2, Division 2 of the ACL and contains the following key rules:

- supplier obligations about the way in which consumers are approached;
- supplier disclosure obligations about the making of contracts;
- consumer rights, including a 10-day cooling-off right and the right to terminate a contract after the 10-day cooling-off period in various circumstances; and
- supplier obligations about post-contractual behaviour.

How does the ACL interact with industry-specific unsolicited marketing laws?

Telemarketing

The *Telemarketing Industry Standard*, which regulates the conduct of calls offering or advertising the supply of goods or services, sets out standards in four areas: the times when a telemarketer may call a consumer; specific information a telemarketer must provide during a call; termination of calls; and requiring telemarketers to enable calling line identification.

The ACL does not duplicate or overlap with the *Telemarketing Industry Standard* or the *Do Not Call Register Act 2006* in respect to the conduct of telemarketing calls. However, the requirements of the ACL concerning consumers' and suppliers' rights and obligations under agreements formed through telemarketing calls, such as cooling-off periods, will apply.

Further information about the *Telemarketing Industry Standard* is available from the Australian Communications and Media Authority at www.acma.gov.au.

Energy marketing

In November 2009, the Standing Committee of Officials of the Ministerial Council on Energy released a second exposure draft of the National Energy Customer Framework (NECF).

The NECF includes provisions governing marketing activities of energy retailers, including permitted calling times and the conduct of marketers towards customers at the customer's premises. The industry-specific NECF complements the generic consumer protections provided by the ACL.

Unsolicited consumer agreements

The ACL regulates the making of unsolicited offers to supply goods and services to a consumer and the agreements arising from such offers.

Definition of an ‘unsolicited consumer agreement’

Under section 69(1) of the ACL, an ‘unsolicited consumer agreement’ has four elements:

1	The agreement must be for the supply, in trade or commerce, of goods or services to a consumer.
2	The agreement must have resulted from negotiations between a dealer and the consumer either in person (at a place other than the supplier’s place of business) or by telephone.
3	The consumer must not have invited the dealer to approach or telephone them for the purpose of entering into negotiations to supply goods or services. An invitation to quote a price for a good or service is not taken to be an invitation to enter into such negotiations. Providing contact details by entering competitions or contacting a supplier in response to a missed call or other attempt by a supplier to contact a consumer is not taken to be an invitation to enter into such negotiations.
4	The total price paid or to be paid under the agreement is over \$100 or cannot be determined at the time the agreement is made.

There is a rebuttable presumption that an agreement (or a proposed agreement) is an unsolicited consumer agreement (or would be one if it were made).

Agreements that are not unsolicited consumer agreements

The ACL provides for regulations being made that specify that certain agreements are not unsolicited consumer agreements. To the extent that a type of agreement is specified in the regulations, the unsolicited selling provisions do not apply at all to those agreements.

The Regulations specify agreements that are not unsolicited consumer agreements.

Business contracts Regulation 81(1)(a)	A business contract is an agreement for the supply of goods or services that are not of a kind ordinarily acquired for personal, domestic or household use or consumption. Examples of goods and services that would be covered by this exemption include supplies of industrial chemicals and servicing of aircraft engines.
Discontinued negotiations agreement Regulation 81(1)(b)	A discontinued negotiations agreement is an agreement that results when a consumer discontinues negotiations with a supplier but subsequently initiates negotiations with the same supplier.
Party plan events Regulation 81(1)(c)	An event is a party plan event if a person invites three or more consumers to attend the party plan event for the purpose of negotiating for the supply of goods or services. The invitation must include either an express or implied statement that the purpose of the event is for the supply of goods or services. If the statement is implied, a reasonable consumer must understand it to indicate that the purpose of the event is for negotiating for the supply of goods or services. During the party plan event the person who issued the invitations, or their representative, must be present.
Renewable agreements of the same kind Regulation 81(1)(d)	A renewable agreement of the same kind is an agreement entered into whilst another agreement remains in force, with the same supplier, for the supply of goods or services that are of the same kind as the goods or services supplied under the existing contract. Examples of renewable agreements include those for the supply of electricity and telecommunications services.
Subsequent agreements of the same kind Regulation 81(1)(e)	A subsequent agreement of the same kind is an agreement entered into for the supply of goods or services of the same kind as those supplied under an earlier agreement between the supplier and the consumer. This exemption applies if the subsequent agreement is entered into within 3 months of the initial agreement. The total value of all agreements entered into as subsequent agreements must not exceed \$500.

Do the unsolicited selling provisions apply to suppliers who do not have an established ‘place of business’?

The provisions apply to all forms of unsolicited selling which take place in a non-retail, face-to-face context, regardless of whether a supplier has a traditional ‘bricks and mortar’ business or trade premises. This includes business models such as selling on the doorstep, from trucks or out of car boots.

Do the unsolicited selling provisions apply to agreements arising from an initial invitation by a consumer?

The unsolicited selling provisions do not apply to situations where a consumer invites a trader to their home or other premises for the purpose of supplying goods or services. For example, the ACL does not apply to situations where a tradesperson comes to a home, finds that a task they have been asked by the consumer to perform is more complex than initially thought, and must provide additional services immediately.

The unsolicited selling provisions do apply to situations where a consumer invites a trader to their home or other premises for a purpose other than to supply goods or services, and the supplier enters into negotiations with the consumer for supply.

Negotiating unsolicited consumer agreements

The ACL sets out express obligations about the way in which consumers are approached by dealers for the purpose of negotiating an agreement (or for an incidental or related purpose) and about the negotiation of agreements.

<p>Who is a dealer? Section 71</p>	<p>The meaning of ‘dealer’ is based on whether the person who contacts a consumer intends to make an agreement to supply goods or services. A dealer does not need to be the supplier of the goods and services.</p>
<p>Is a supplier liable for contraventions by dealers? Section 77</p>	<p>A supplier is liable for breaches by a dealer of the express dealer obligations, in circumstances where the dealer is not the supplier.</p>
<p>When can a dealer call on a person? Section 73</p>	<p>The ACL sets out the default permitted hours for calling on (as opposed to telephoning) a consumer:</p> <ul style="list-style-type: none"> • Monday to Friday—from 9am to 6pm; and • Saturday—from 9am to 5pm. <p>Dealers are prohibited from calling on a consumer on a Sunday or a public holiday.</p> <p>The permitted hours specified in the ACL are default times and may be varied by individual States and Territories by regulation under their respective application laws.</p>
<p>What does a dealer need to do in disclosing their purpose and identity? Section 74 Regulations 82 and 93(2)</p>	<p>A dealer who calls on a consumer must, prior to commencing negotiations, clearly advise their purpose for calling, and provide information about their identity that is specified in the regulations.</p> <p>Regulation 82 specifies that a dealer must provide their name. The address of the supplier of the goods or services must also be provided. If that address is the dealer’s address, it may be a business/workplace address, post-office box address or any other address associated with the dealer. If the dealer is not the supplier, the address must not be a post-office box.</p> <p>From 1 January 2011 to 30 June 2011, a dealer or supplier is deemed to comply with regulation 82 if they comply with a specified law of a State or Territory dealing with providing information about their identity. The relevant State and Territory laws are specified in a table in regulation 93(2). The relevant State and Territory laws are saved for the purpose of this transitional provision. This transitional arrangement will provide businesses with time to adjust to the new law.</p>
<p>Does a dealer have to</p>	<p>A dealer who calls at any premises must leave immediately if so requested by the occupier,</p>

<p>leave premises on request?</p> <p>Section 75</p>	<p>any person acting with the occupier's authority, or the prospective consumer.</p> <p>If such a request is made by the prospective consumer, that consumer must not be contacted for a similar purpose for at least 30 days after the request was made, but only in relation to that supplier.</p>
<p>What does a dealer need to say about 'termination periods'?</p> <p>Section 76</p> <p>Regulations 83, 84 and 93(3)</p>	<p>Prior to making an agreement with a consumer, a dealer must give the consumer information about:</p> <ul style="list-style-type: none"> • the consumer's right to terminate the agreement during the termination periods; • the way in which the person can exercise that right; and • other matters specified in the regulations. <p>Regulation 83 specifies that a consumer must be provided with information about the prohibition, in section 86 of the ACL, on accepting payment or supplying goods or services during the 10 business-day cooling-off period. The method of providing this information is not prescribed, to allow businesses flexibility in the way in which they comply. Regulation 84 specifies that information that must be provided in writing must be:</p> <ul style="list-style-type: none"> • attached to an agreement or agreement document; • transparent, that is, it must be expressed in reasonably plain language, legible and presented clearly; and • in text that is the most prominent text in the document, other than the text setting out the dealer's or supplier's name or logo. <p>From 1 January 2011 to 30 June 2011, a dealer or supplier is deemed to comply with regulations 83 or 84 if they comply with a specified law of a State or Territory dealing with information that must be provided in agreements made as a result of unsolicited selling. The relevant State and Territory laws are specified in a table in regulation 93(3). The relevant State and Territory laws are saved for the purpose of this transitional provision. This transitional arrangement will provide businesses with time to adjust to the new law.</p>

Requirements for unsolicited consumer agreements

The ACL sets out the express disclosure obligations and other obligations about the making of agreements.

<p>Requirement to give document to the consumer</p> <p>Section 78</p>	<p>A dealer must give the consumer either:</p> <ul style="list-style-type: none"> • if the agreement was made in person — a copy of the agreement after the agreement has been signed by the consumer; or • if the agreement was made by telephone — a document evidencing the agreement within 5 days after the agreement was made (or a longer period agreed by the parties). This document can be given personally, by post or, with the consumer's consent, by email.
<p>Requirements for a valid agreement</p> <p>Sections 79, 80 and 81</p> <p>Regulations 85, 86, 87 and 93(3)</p>	<p>There are formal requirements for a valid agreement. The documents that are required to be given to the consumer under section 78 must comply with all of the requirements set out in sections 79 and 81. If an agreement was made in person, section 80 provides that the agreement given to the consumer must comply with additional requirements.</p> <p>Regulation 85 provides that the front page of an agreement or agreement document must include the following text:</p> <p style="padding-left: 40px;">Important Notice to the Consumer You have the right to cancel this agreement within 10 business days from and including the day after you signed or received this agreement. Details about your additional rights to cancel this agreement are set out in the information attached to this agreement.</p> <p>Regulation 86 provides that the front page of an agreement must be signed and dated by the consumer.</p> <p>Regulation 87 provides for a termination notice being approved by the Commonwealth Minister. This notice will be available from consumer protection agencies prior to 1 January 2011.</p> <p>From 1 January 2011 to 30 June 2011, a dealer or supplier is deemed to comply with regulations 85, 86 or 87 if they comply with a specified law of a State or Territory dealing with requirements for agreements made as a result of unsolicited selling. The relevant State and Territory laws are specified in a table in regulation 93(3). The relevant State and Territory laws are saved for the purpose of this transitional provision. This transitional arrangement will provide businesses with time to adjust to the new law.</p>

Terminating unsolicited consumer agreements

The ACL contains express consumer rights, including a 10-day cooling-off right and the right to terminate an agreement after the 10-day cooling-off period in various circumstances, as well as provisions outlining how consumers may exercise their termination rights and the effect of termination.

<p>Termination periods Section 82</p>	<p>Consumers have a right to terminate the agreement during four time periods:</p> <ul style="list-style-type: none"> • The consumer can cool-off on their decision to enter into the agreement within 10 business days. • If one or more of the obligations in Subdivision B and Subdivision C are contravened, the consumer can terminate the agreement during either 3 months or 6 months, depending on the obligation that is contravened. • The consumer can terminate the agreement within a period stated by the agreement.
<p>Notice of termination Section 82</p>	<p>A consumer can terminate the agreement in each of the circumstances outlined above by giving oral or written notice of termination to the supplier by using:</p> <ul style="list-style-type: none"> • the termination notice that the consumer is required to be given under section 79(c); or • another form of written notice, regardless of its form or content. <p>A consumer can give the supplier written notice personally or by post, fax or email.</p>
<p>What is the effect of terminating the agreement? Section 83</p>	<p>An agreement that is terminated is deemed to have been rescinded by mutual consent and any related contract or instrument is void.</p> <p>The agreement is terminated even if the supplier has not received the notice of termination, or the consumer has used or consumed the goods and services.</p>
<p>If the supplier does not receive the notice of termination, does the consumer have to prove that they sent it?</p>	<p>A consumer will need to prove that they have sent a written notice of termination. Evidence to support the consumer's claim might include a post office receipt, a fax transmission record, a copy of the email and/or a copy of the written notice of termination.</p>
<p>What are the obligations and rights of consumers on termination? Section 85</p>	<p>The ACL sets out the entitlements of a supplier and consumer in respect of returns and payments for goods or services supplied prior to the termination date.</p>
<p>What are the supplier's obligations about post-contractual behaviour? Sections 84, 86, 87 and 88 Regulation 94</p>	<p>Suppliers have a number of post-contractual supplier obligations, including in respect of:</p> <ul style="list-style-type: none"> • prohibitions on supplying goods or services, or accepting any consideration (including trade-ins or other payment) during the 10-day cooling-off period; • repayment of payments received prior to and after termination; and • prohibitions on recovering amounts after termination. <p>From 1 January 2011 to 31 December 2011, dealers and suppliers are deemed to comply with sections 76(a)(iii), 86 and 179 of the ACL if they comply with pre-existing laws that deal with prohibitions on supply and payment. The pre-existing prohibition on receiving payment and/or supplying goods or services during the 10-day cooling-off period varied significantly between the States and Territories of Australia. Regulation 94(3) provides a list of State and Territory laws that prohibited payment and/or supply during the cooling-off period. The relevant State and Territory laws are saved for the purpose of this transitional provision.</p>

Emergency repairs and supplies of electricity when no supply is in place

Emergency repairs

The unsolicited selling provisions prohibit supply and payment for goods and services for 10 business days from the time an unsolicited consumer agreement is entered into. In the aftermath of a natural disaster, such as a cyclone or flood, tradespersons sometimes go from place to place offering to assist persons affected by the disaster.

The Regulations provide an exemption from the prohibition on supply and payment, and associated information requirements, for emergency repairs that:

- result from an earthquake, fire, flood, storm, or similar event;
- follow the declaration of a state of emergency for the area in which a person's property is located;
- are required to rectify a hazard or potential hazard on the person's property, to protect the health and safety of persons on the person's property or to prevent substantial damage to the person's property;
- are performed by a person licensed to perform the work.

Electricity supplies

The Regulations provide an exemption from the prohibition on supply and payment for 10 business days for the supply of electricity or gas if the relevant service is not connected to a premises or a premises is connected, but no electricity or gas is being supplied.

Offences, remedies and penalties

Contraventions of the express supplier obligations under the unsolicited consumer agreements provisions of the ACL are subject to criminal fines of up to a maximum of \$50,000 for a body corporate and \$10,000 for a person other than a body corporate.

Contraventions of the unsolicited consumer agreements provisions of the ACL can attract injunctions, damages, compensatory orders, non-punitive orders and adverse publicity orders. The provisions are also subject to civil pecuniary penalties (with maximum penalties of \$50,000 for a body corporate and \$10,000 for a person other than a body corporate), as well as disqualification orders, redress for non-parties and public warning notices.

Lay-by sales

The ACL sets out five basic rules about lay-by agreements.

Table 3.3: Rules on lay-by agreements

<p>A lay-by agreement must be in writing Section 96</p>	<p>A lay-by agreement must be in writing, a copy of which must be given to the consumer.</p> <p>A lay-by agreement is one where goods are delivered to the consumer only when the total price of the goods has been paid, and the transaction involves payments spread over at least three instalments (including any deposit), unless both the consumer and supplier agree that an agreement involving two payments is a lay-by agreement.</p>
<p>The consumer's right to terminate Section 97</p>	<p>A consumer may cancel a lay-by agreement at any time, subject to the payment of a termination charge, which must not be more than an amount equal to reasonable costs incurred by the supplier.</p>
<p>The supplier's right to terminate Section 98</p>	<p>A supplier may cancel a lay-by agreement only if:</p> <ul style="list-style-type: none"> • the consumer has breached a term of the agreement; • the supplier is ceasing to engage in trade or commerce; or • the goods are no longer available.
<p>Effect of termination of a lay-by agreement Section 99</p>	<p>In the event of cancellation by either party, the consumer is entitled to a full refund of amounts paid.</p> <p>Where a consumer cancels a lay-by agreement, the supplier is entitled to recover a reasonable termination charge. This amount may be withheld from any money repaid to a consumer or recovered from the consumer if the total amount paid by the consumer under the lay-by agreement is not enough to cover it.</p> <p>The supplier is not otherwise entitled to recover any amounts other than as permitted under section 99 of the ACL.</p>
<p>Consumers may have to pay a termination charge Section 97(2)</p>	<p>In the event of cancellation by the consumer, the consumer may be required to pay a cancellation charge reflecting the business's reasonable costs.</p>

Offences, remedies and penalties

Contraventions of the lay-by sales rules of the ACL are subject to criminal fines of up to \$30,000 for a body corporate and \$6,000 for a person other than a body corporate.

Contraventions of the lay-by sales rules of the ACL can attract injunctions, damages, compensatory orders, non-punitive orders and adverse publicity orders. There are also civil pecuniary penalties, with maximum penalties of \$30,000 for a body corporate and \$6,000 for a person other than a body corporate, and public warning notices.

Miscellaneous provisions

Requirements for a proof of transaction and an itemised bill

A proof of transaction must be given to a consumer for supplies of goods or services valued at or above \$75 or, if below that value, on request. Also, an itemised bill must be provided to a consumer who has been supplied with services at their request.

Section 100 of the ACL provides that a consumer must receive a proof of transaction if the total price of the goods or services supplied to them is \$75 or more, or if the total price is less than \$75 and the consumer requests such proof, being:

- the supplier of the goods or services, and the Australian Business Number (ABN) of the supplier, if applicable;
- the date of the supply; and
- the goods or services supplied to the consumer, and the price for those goods or services.

Do these new requirements overlap with the existing requirements for tax invoices under the Commonwealth goods and services tax (GST) law?

Tax invoices provided under the GST law meet the requirements of a proof of transaction under the ACL.

Section 101 of the ACL provides the right for a consumer to request an itemised bill within 30 days of receiving a bill or account for services performed by a supplier. A supplier is not permitted to charge a consumer for the preparation of an itemised bill. Such a bill must be provided within seven days, be clear and legible, and must specify how costs to perform a particular service are calculated, including, where applicable:

- the hourly rate and number of hours comprising the labour component;
- a list of the various materials used; and
- the amount charged for each item.

Other relevant legislation

The GST law requires that a tax invoice include the ABN and name of the supplier, the words 'tax invoice' stated prominently, the date of issue of the tax invoice, and the price and description of the taxable supply. If the total amount on the tax invoice is \$1,000 or more, it must also include the ABN and name of the recipient, and a brief description and quantity of the goods or services supplied.

PART 3-3

SAFETY OF CONSUMER GOODS AND PRODUCT-RELATED SERVICES

Chapter 3, Part 3-3 of the ACL introduces a new national consumer product safety law for Australia. It is based on the existing TPA, with changes to implement reforms agreed to by COAG.

In July 2008, COAG agreed to create a national consumer product safety regulatory framework, with the following characteristics:

- a single national law to be implemented as part of the ACL, based on the existing provisions of the TPA;
- the Commonwealth having sole responsibility for making safety standards and permanent safety bans which will both apply nationally;
- the Commonwealth, States and Territories having the power to make interim safety bans which will usually last for 60 days unless extended for up to a further 60 days; and
- joint enforcement of safety bans, standards and mandatory recalls amongst regulators.

In addition, the national consumer product safety framework incorporates the following elements based on recommendations by the PC in its 2006 *Review of the Australian Consumer Product Safety System* (2006 Review):

- product safety laws in all jurisdictions should cover services related to the supply, installation and maintenance of consumer products;
- safety bans and recalls should cover goods that are of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person;
- suppliers should be required to report products which have been associated with a serious injury or death; and
- governments should have the power to undertake a recall directly where no supplier can be found to undertake the recall.

Operational features to complement the national framework

In addition to the legislative reforms contained in the ACL, the Ministerial Council of Consumer Affairs (MCCA) has charged Australia's product safety regulatory agencies with making significant administrative and operational improvements to product safety regulatory arrangements based on recommendations of the PC in its 2006 Review.

- A 'one-stop shop' website, Product Safety Australia (www.productsafety.gov.au), has been developed to provide consumers and businesses with access to regulatory information concerning the safety of particular products and services.
- The ACCC is developing a hazard identification system based on a 'clearing house' approach. The clearing house will consist of a centrally managed database of incident data and information from a range of sources, including Commonwealth, State and Territory government agencies.
- The ACCC has established a new product safety extranet where information about regulatory and enforcement activities is posted and discussions can take place between regulators.
- The ACCC, ASIC and the State and Territory have entered into a Memorandum of Understanding (MOU). The MOU sets out the administrative and enforcement relationships and protocols between the agencies, including in relation to product safety.

Threshold test for regulatory action — 'reasonably foreseeable use'

Part 3-3, Divisions 2, 3 and 4 of the ACL set out triggers under which safety bans, recalls or warning notices may be issued in respect of particular goods or services.

These triggers apply to consumer products that appear as if: (i) they will or may cause injury to any person; or (ii) a reasonably foreseeable use (including a misuse) of that product will or may cause injury to any person.

The first part of this test simply continues the current criteria for making bans, standards, recalls or safety warnings. The second part of this test clarifies that a Minister may take action where common uses of a good, even if not the normal or intended use for that good, may pose a safety risk.

The concept of 'reasonably foreseeable use' is already part of the product safety laws in Victoria, NSW and WA, and is a concept used in duty of care cases at common law. In its 2006 Review, the PC recommended that the triggers for taking regulatory actions should include where the reasonably foreseeable use of a product poses an unacceptable safety risk.

What is ‘reasonably foreseeable use’?

Research undertaken on behalf of the Standing Committee of Officials of Consumer Affairs (SCOCA)¹ indicates that the vast majority of accidents involving consumer products arise through misuse of the product by the consumer. In some cases, this misuse of a product could represent a common use of that product or a use that would readily be foreseen by the manufacturer or supplier. This can often be the case in respect of children’s products.

The PC² found that the definition of ‘reasonably foreseeable use’ should reflect both the predictability of the use and the reasonableness of the use. A reasonably foreseeable misuse is not limited to unintentional errors in use by a consumer.

Product safety regulatory action under the ACL (such as bans, recalls or warning notices) can be taken where a product may pose a risk of injury even if used in a way that is different to that product’s intended or normal use. It is not the intention of the ACL to allow regulatory action to be taken where a consumer has unreasonably used a product, taking into account the ordinary use that that kind of product is safely put to and the presence of any warning or other information.

Safety of services

Chapter 3, Part 3-3 of the ACL applies to services which relate to the supply, installation, maintenance assembly or delivery of consumer goods (product-related services). Product safety regulatory action (bans, standards, recalls or warning notices) can be taken in respect of both consumer goods and product-related services. Previously, product safety action under the TPA could only be taken for safety of goods and was silent on safety of services.

What services are covered?

Services may be unsafe because of the nature of the service itself, or because of the relationship between the service and a particular good, such as the assembly or installation of a product, like installing looped blind cords within easy reach of small children and infants, or the assembly of a bicycle.

In its 2006 Review, the PC found that there are net benefits in extending safety regulation in certain situations to cover particular kinds of services. The ACL allows product safety regulatory action to be taken with respect to product-related services where appropriate in the circumstances. A regulatory impact analysis on a case-by-case basis would be undertaken before a new standard is made for services.

In the absence of extending regulation to product-related services, governments would not be able to act to protect the safety of consumers in relation to services.

Mutual recognition arrangements

The *Mutual Recognition Agreement* (MRA) and the *Trans-Tasman Mutual Recognition Agreement* (TTMRA), amongst other things, are designed to remove barriers to the supply of goods

1 *Baseline study of Consumer Product-Related Accidents*, 2007, Access Economics.

2 PC 2006 Review, page 142.

between Australia's States and Territories and between Australia and New Zealand, respectively.

In its January 2009 review of the MRA and TTMRA³, the PC recommended that the temporary exemption procedures apply automatically whenever an interim safety ban is made under the ACL, and in respect of the TTMRA, whenever an interim or permanent safety ban is made.

Mutual recognition and temporary exemption procedures

The MRA and TTMRA are implemented through the *Mutual Recognition Act 1992* and the *Trans-Tasman Mutual Recognition Act 1997*, respectively. In general terms, these Acts allow certain goods that can be lawfully sold in one jurisdiction to be sold in another jurisdiction without meeting additional regulatory requirements. Jurisdictions can make temporary exemptions under these Acts in certain circumstances, including for product safety purposes.

In certain circumstances, particular goods can be temporarily exempted from the MRA and/or the TTMRA for a period of up to 12 months. Where a jurisdiction considers that the characteristics, use or foreseeable use or misuse of particular goods could threaten public health or safety or the environment, then it may unilaterally invoke a temporary exemption on that good from the MRA and/or the TTMRA for its jurisdiction.

Temporary exemptions are resolved by the relevant Ministerial Council, either by revoking the temporary exemption or aligning regulation in all jurisdictions.

Safety standards

Chapter 3, Part 3-3, Division 1 of the ACL specifies the grounds on which safety standards may be made for consumer goods and product-related services, and the matters they can deal with.

<p>Grounds for making a standard</p> <p>Sections 104 & 105</p>	<p>The responsible Commonwealth Minister may make a safety standard in relation to particular kinds of goods or product-related services. Alternatively, a standard developed by Standards Australia Limited or another prescribed body may be declared by the Commonwealth Minister to be a safety standard under the ACL.</p>
<p>Content of a standard</p> <p>Section 104</p>	<p>Safety standards may relate to the design, construction or testing of products or presence of warnings on products, and to the skills and qualifications of product-related service providers or testing of product-related services.</p>
<p>Harmonisation of existing standards</p>	<p>MCCA is engaged in a project to harmonise product safety standards that currently exist in each jurisdiction. From the commencement of the ACL on 1 January 2011, existing safety standards will continue in force, subject to the repeal of any standards that are no longer necessary or are duplicative across jurisdictions</p>
<p>New standards under the ACL</p>	<p>New safety standards made after the commencement of the ACL on 1 January 2011 will be subject to regulatory impact analysis and the governance requirements of the ACL IGA on a case-by-case basis.</p>

3 Review of Mutual Recognition Schemes, 2009, Productivity Commission Research Report.

Safety bans

Chapter 3, Part 3-3, Division 2 of the ACL sets out the procedures for banning the supply of particular consumer goods or product-related services. Two types of bans can be made – interim bans and permanent bans.

Interim bans

Chapter 3, Part 3-3, Division 2, Subdivision A of the ACL deals with interim bans, and sets out the procedures for making an interim ban and the key features of interim bans.

<p>Making an interim ban Section 109</p>	<p>The responsible Commonwealth Minister and the responsible State or Territory Minister may make an interim ban if it appears that:</p> <ul style="list-style-type: none"> particular consumer goods will or may cause injury to any person; a reasonably foreseeable use (including a misuse) of particular consumer goods will or may cause injury to any person; or there exists an interim ban for consumer goods or product-related services of that kind in another jurisdiction.
<p>Application of an interim ban Sections 110 & 112</p>	<p>Interim bans made must be published on the internet. Interim bans made by the Commonwealth Minister apply nationally in all jurisdictions, while interim bans made by a State or Territory Minister apply in that State or Territory only. A State or Territory interim ban will cease to have effect if there is a Commonwealth interim ban for the same good or service.</p>
<p>Time limits for interim bans Section 111</p>	<p>Interim bans last for 60 days and can be extended by the responsible Minister for 30 days and a further 30 days by the Commonwealth Minister if necessary.</p>

Permanent bans

Chapter 3, Part 3-3, Division 2, Subdivision B of the ACL sets out the procedures for making permanent bans and the key features of permanent bans. Subdivision B is structured in a similar way to Subdivision A for interim bans, however, only the Commonwealth Minister may make permanent bans.

<p>Making a permanent ban Section 114</p>	<p>A permanent ban can only be made by the responsible Commonwealth Minister. A permanent ban can be made where it appears that:</p> <ul style="list-style-type: none"> particular consumer goods will or may cause injury to any person; or a reasonably foreseeable use (including a misuse) of particular consumer goods will or may cause injury to any person; or there exists an interim ban for consumer goods or product-related services of that kind in another jurisdiction.
<p>Application of permanent bans Sections 115 & 117</p>	<p>Permanent bans apply nationally in all jurisdictions and remain in force until revoked by the responsible Commonwealth Minister.</p>

MCCA has engaged in a project to rationalise and harmonise product safety bans in each jurisdiction. This project is being led by the ACCC. Existing bans continue to be in force from the commencement of the ACL on 1 January 2011, with the repeal of any bans that are no longer necessary or are duplicative across jurisdictions.

Product recalls

Chapter 3, Part 3-3, Division 3 of the ACL sets out the procedures for Ministers to order the mandatory recall of consumer goods. Division 3 also sets out the reporting requirements for suppliers who undertake voluntary recalls.

Mandatory recalls

Chapter 3, Part 3-3, Division 3, Subdivision A sets out procedures for mandatory recalls.

Ordering a mandatory recall Section 122	The responsible Commonwealth Minister or a responsible State or Territory Minister may order a supplier, or a regulator where the supplier cannot be found, to recall consumer goods.
Grounds for ordering a mandatory recall Section 122	A mandatory recall can be ordered if it appears: <ul style="list-style-type: none"> particular goods will or may cause injury to any person; a reasonably foreseeable use (including a misuse) of particular goods will or may cause injury; a safety standard for those goods has not been complied with; or there is an interim or permanent ban in force for those goods; and no supplier has taken satisfactory action to prevent the goods from causing injury.
Contents of a recall notice Section 123	A recall order can require a supplier to do any or all of the following activities: <ul style="list-style-type: none"> recall and remove certain goods from the market; inform the public of the dangers associated with certain goods; and/or replace, repair or provide a refund for the recalled goods.
Requirements on suppliers Sections 124 & 125	A supplier that repairs or replaces a recalled good must ensure that the replacement good does not contain any defects and complies with the relevant safety standards. Further, where a recalled good has been supplied to a person overseas, the supplier must notify that other person about the recall and report this to the Commonwealth Minister.
Interaction between recalls Section 126	A State or Territory recall notice ceases to have effect where a Commonwealth recall is made for those same goods.

Voluntary recalls

Chapter 3, Part 3-3, Division 3, Subdivision B of the ACL provides that, where a supplier voluntarily undertakes a recall because of concerns about the safety of its products, the supplier must notify the responsible Commonwealth Minister with details of the voluntary recall.

Notification requirements Section 128	The supplier must notify the responsible Commonwealth Minister (through the ACCC) of the details of a voluntary recall, within two days of the recall.
Information to be reported Section 128	The supplier must report the following information to the Commonwealth Minister about a voluntary recall: <ul style="list-style-type: none"> the defect or dangerous characteristic in the recalled goods; how a reasonably foreseeable use or misuse of the recalled goods could be dangerous; whether a relevant safety standard has not been complied with; and whether a relevant interim or permanent ban exists.

Safety warning notices

Chapter 3, Part 3-3, Division 4 of the ACL allows responsible Commonwealth, State and Territory Ministers to publish safety warning notices in relation to potentially unsafe goods and product-related services.

Section 129 sets out the grounds for making, and the contents of, a safety warning notice. Unlike with safety standards, bans and recalls, safety warning notices do not restrict the supply of goods or services. Rather, they are designed for situations where investigation is needed to determine whether a product or service pose an unacceptable risk of injury to any person, and whether any further regulatory action in the form of a ban, standard or recall is necessary. They also enable responsible Ministers to warn consumers of the potential dangers with using certain products.

Mandatory reporting of accidents

Sections 131 and 132 of the ACL set out the mandatory reporting requirements for consumer goods and product-related services, respectively. A supplier must notify the Commonwealth Minister if it becomes aware that a product or service which it has supplied caused, or may have caused, a death, serious injury or illness. A supplier must also report if they become aware that another person (such as a consumer) considers that the product either caused or may have caused the accident. All suppliers in the supply chain involved in supplying the particular product or service in question must report the prescribed information to the ACCC.

Triggers for mandatory reporting

The mandatory reporting obligation in Division 5 is triggered where a supplier becomes aware that a good or service it has supplied caused or may have caused a death, serious injury or illness of another person, or becomes aware that another person considers that the supplier's good or service caused or may have caused a death, serious injury or illness. Suppliers are not required to make themselves aware of anything that they would not become aware of in the ordinary course of their business.

However, a supplier is not required to report information where it is clear that their product did not cause the accident or is very unlikely to have been the cause. The supplier is also not required to report if they or another person have a similar obligation under another law or under a prescribed industry code.

Information reported under Division 5 is not an admission of liability by suppliers.

Information reported to the Commonwealth Minister is required to be treated confidentially and cannot be disclosed except in certain specified circumstances. A report provided is not an admission of liability of a supplier that its product was the cause of an accident.

Exemptions from mandatory reporting

The ACL provides that specific kinds of goods and services may be exempt from the mandatory reporting requirement where a similar reporting requirement already applies via another law of the Commonwealth or a State or Territory or an industry code of conduct.

The ACL Regulations specify Commonwealth, State and Territory legislation that has similar reporting requirements. These relate to four broad categories of goods and incidents:

- motor vehicle accidents;
- certain kinds of food poisoning;
- therapeutic goods; and
- agricultural and veterinary chemicals.

The ACL Regulations also provide an exemption for incidents required to be reported pursuant to a State or Territory coroner's Act.

Offence provisions

Criminal offences are contained in Part 4-3 of the ACL for serious contraventions of the consumer product safety provisions, including supplying goods and product-related services that do not comply with a relevant product safety standard, interim or permanent ban or mandatory recall order. These contraventions carry maximum fines of \$1.1 million for a body corporate or \$220,000 for a person other than a body corporate.

Part 4-3 of the ACL also provides fines of \$16,650 for a body corporate or \$3,330 for a person other than a body corporate for failing to comply with the notification or reporting requirements of the product safety provisions.

Remedies and penalties

Remedies available for breaching a product safety provision include injunctions, damages, compensatory orders, non-punitive orders and adverse publicity orders. Civil pecuniary penalties may also apply with a maximum penalty of up to \$1.1 million for a body corporate and \$220,000 for a person other than a body corporate. Disqualification orders, redress for non-parties and public warning notices are also available.

Enforcement relating to the safety of consumer goods and product-related services

The ACCC has been given stronger powers to undertake market surveillance and enforcement of the new national product safety law. These powers are based on existing powers in the States and Territories, but are available to the ACCC for the first time in connection with the ACL.

PART 3-4 INFORMATION STANDARDS

Chapter 3, Part 3-4 of the ACL provides the responsible Commonwealth Minister with a power to prescribe standards about the information required to be provided by suppliers. Part 3-4 replaces the existing information standards provisions in Part V, Division 1A of the TPA, but with a number of amendments.

Information standards making power Sections 134 & 135	Only the responsible Commonwealth Minister has the power to prescribe information standards in respect of any good or service under the ACL. Alternatively, the Minister may declare that a standard made by Standards Australia or another prescribed body is an information standard under the ACL.
Publication of information standards Section 134	Information standards must be published on the internet.
Non-compliance with an information standard Sections 136 & 137	It is a breach of the ACL for a supplier of a particular good or service to sell, offer, possess or manufacture goods, or to supply or offer services, without complying with the requirements of an information standard in force for such goods or services.
Status of existing standards	Existing Commonwealth information standards will continue to be in force when the ACL commences on 1 January 2011. SCOCA is currently considering a process to retain, revise or repeal existing State and Territory information standards. From 1 January 2011, a single set of information standards will apply nationally under the ACL.

Offence provisions

The supply of goods or services in breach of a relevant information standard is a criminal offence under Chapter 4, Part 4-4 of the ACL. Maximum fines of \$1.1 million for a body corporate and \$220,000 for a person other than a body corporate can apply.

Remedies and penalties

Remedies available for a breach of an information standard requirement include injunctions, damages, compensatory orders, non-punitive orders and adverse publicity orders. Civil pecuniary penalties of up to \$1.1 million for bodies corporate and \$220,000 for persons other than bodies corporate can also apply. Disqualification orders, infringement notices, redress for non-parties and public warning notices are also available.

PART 3-5

LIABILITY OF MANUFACTURERS FOR GOODS WITH SAFETY DEFECTS

Chapter 3, Part 3-5 of the ACL sets out the statutory rules for dealing with liability claims for loss or damage, including economic loss, caused by supplying goods which contain a safety defect.

Any person, as well as a regulator on behalf of a consenting individual, may commence an action against a manufacturer to recover compensation where the person has suffered loss or injury as a result of defective goods being supplied.

<p>Grounds for bringing a liability action against a manufacturer Sections 138-141</p>	<p>A liability action can be brought against a manufacturer where:</p> <ul style="list-style-type: none"> • loss or damage was suffered as a result of injuries sustained because of defective goods; • loss or damage was suffered as a result of another individual sustaining injuries because of defective goods; • loss or damage was suffered as a result of another good being destroyed or damaged because of defective goods; and/or • loss or damage was suffered as a result of land, a building or a fixture being destroyed or damaged because of defective goods.
<p>Unidentified manufacturer Section 147</p>	<p>For the purposes of bringing a liability action against the manufacturer of a defective good, a plaintiff can request other suppliers of the good to provide information to help identify the manufacturer. A failure to provide such information could make the supplier liable to provide compensation for the loss or damage suffered.</p>
<p>Defences for manufacturers Sections 142 & 148</p>	<p>The following defences are available to manufacturers:</p> <ul style="list-style-type: none"> • the safety defect did not exist at the time the goods were supplied; • the defect arose only because a mandatory standard was complied with; • the state of scientific and technical knowledge did not enable the manufacturer to discover the defect; and/or • the good was part of another good, and the defect arose only because of the design or packaging of that other good. <p>Where a good is defective only because it complied with a Commonwealth mandatory standard, then the Commonwealth and not the manufacturer will be liable for the loss or damage suffered.</p>

Differences in drafting and the order of provisions between Part 3-5 of the ACL and Part VA of the TPA reflect changes to the drafting conventions since Part VA was originally included in the TPA in 1992. These changes have no effect on the operation of the provisions and do not interfere with the previous judicial interpretation of these provisions.

Offences

There are no offence provisions in the ACL relating to Part 3-5.

Remedies and Penalties

Part 3-5 of the ACL provides for a statutory regime for commencing liability actions against manufacturers to recover compensation. Accordingly, the ACL does not set out the remedies and penalties available for breaching a provision of Part 3-5 since the provisions provide guidance to the courts.

CHAPTER 4: OFFENCES

The ACL provides that certain breaches of the law are sufficiently serious such that they may be treated as criminal offences, to which criminal sanctions apply.

Chapter 4 of the ACL provides that some contraventions of the ACL may also be criminal offences. A conviction may only be recorded and a criminal sanction may only be imposed by a court where the breach has been proved to the criminal standard of proof (beyond reasonable doubt). Chapter 4 is based on provisions in Part VC of the current TPA as well as relevant provisions of State and Territory consumer legislation.

The existence of these criminal offences does not displace the ability of a consumer law enforcement agency to seek lesser penalties, which require the breach to be proved to the civil standard of proof (on the balance of probabilities). These remedies and penalties are discussed in Chapter 5 below.

Defences

Part 4-6 of the ACL sets out defences that apply to all of the offence provisions. These are:

- reasonable mistakes of fact, including reliance of information given by another person;
- conduct of third parties that the person took reasonable steps to avoid;
- publication of advertisements where the publisher did not know and had no reason to suspect the advertisements were in breach of the consumer laws; and
- the supply of goods or product-related services that do not comply with safety or information standards for the purposes of resupply, where they were not acquired from outside Australia and the person could not have known they were non-compliant, or relied on information from the person they bought them from that there was no such standard.

Other procedural rules

Part 4-7 of the ACL sets out a number of procedural matters, including:

- a limitation of three years on the time for commencement of criminal proceedings after a breach;
- the court is to give preference to compensation for victims over payment of fines;
- if a person's conduct results in the commission of a particular offence more than once at almost the same time, the court must not impose a total aggregate fine of more than the maximum for one contravention; and
- the court must consider past fines in setting the level of a fine for a contravention.

Table 4.1: Offences and maximum fines under the ACL

ACL provisions	Maximum fine for bodies corporate	Maximum fine for other persons
Part 4-1 Unfair practices	\$5,000 for section 165 (multiple pricing) \$1.1 million for all other offences	\$1,000 for section 165 (multiple pricing) \$220,000 for all offences
Part 4-2, Division 1 Consumer guarantees	\$50,000 for section 169 (display notices)	\$10,000 for section 169 (display notices)
Part 4-2, Division 2 Unsolicited consumer agreements	\$50,000 for all offences	\$10,000 for all offences
Part 4-2, Division 3 Lay-by agreements	\$30,000 for all offences	\$6,000 for all offences
Part 4-2, Division 4 Miscellaneous	\$50,000 for all offences	\$10,000 for all offences
Part 4-3, Division 1 Safety standards	\$1.1 million for all offences except: \$22,000 for section 196 (requirement to nominate a safety standard)	\$220,000 for all offences except: \$4,400 for section 196 (requirement to nominate a safety standard)
Part 4-3, Division 2 Bans on consumer goods and product related services	\$1.1 million for all offences	\$220,000 for all offences
Part 4-3, Division 3 Recall of consumer goods	\$1.1 million for compliance with recall orders \$16,650 for sections 200 (Notification of persons who supply consumer goods outside Australia if there is no compulsory recall) and 201 (Notification requirements for a voluntary recall of consumer goods)	\$220,000 for compliance with recall orders \$3,330 for sections 200 (Notification of persons who supply consumer goods outside Australia if there is no compulsory recall) and 201 (Notification requirements for a voluntary recall of consumer goods)
Part 4-3, Division 4 Consumer goods, or product related services associated with death or serious injury or illness	\$16,650	\$3,330
Part 4-4 Offences relating to information standards	\$1.1 million for all offences	\$220,000 for all offences
Part 4-5 Offences relating to substantiation notices	\$16,500 for section 205 (compliance with substantiation notices) \$27,500 for section 206 (false or misleading information in response to a substantiation notice)	\$3,300 for section 205 (compliance with substantiation notices) \$5,500 for section 206 (false or misleading information in response to a substantiation notice)

CHAPTER 5: ENFORCEMENT AND REMEDIES

The ACL creates national enforcement powers, to be used by all consumer law regulators, including civil penalties and remedies for breaches of the ACL.

The ACL introduces:

- a suite of national enforcement powers for the use of consumer law enforcement agencies in administering the ACL. These powers will be supported by national guidance on their use;
- a range of national penalties which apply to breaches of the ACL, for use by consumer law enforcement agencies in pursuing non-criminal breaches of the law. These penalties may be imposed by a court when the breach has been proven to the civil standard of proof (on the balance of probabilities); and
- a range of national remedies which apply to breaches of the ACL, for use by consumer law enforcement agencies and private litigants in enforcing their rights under the ACL.

These powers, penalties and remedies apply to the majority of the consumer protection provisions in the ACL. Each enforcement provision states to which consumer protection provisions (whether sections, Divisions or Parts) of the ACL it applies.

Section 18 (misleading and deceptive conduct) is a particular exception because, as is the case currently, it is not the subject of punitive measures such as criminal sanctions, civil pecuniary penalties or disqualification orders.

PART 5-1 ENFORCEMENT POWERS

Undertakings

A regulator may accept a court-enforceable undertaking in connection with conduct regulated by the ACL.

Under section 218 of the ACL, a regulator may accept court-enforceable undertakings in connection with a matter for which the regulator has a power or function under the ACL.

In practice, if a person becomes aware they may have breached the ACL, they will be able to offer an undertaking to the regulator to the effect that, for example, they will not engage in the conduct again and will institute a compliance program. Failure to comply can result in the undertaking being enforced by the court.

Can undertakings always be used?

A person can always offer an undertaking to a regulator. However, a regulator is not obliged to accept undertakings.

For instance, the regulator may believe that the undertaking is not detailed enough, does not include an admission of a breach where it believes there should be one, or the regulator may believe the breach is too serious not to take court action.

Substantiation notices

Regulators can issue a notice to a business requesting information relevant to substantiating claims made in the marketplace.

Part 5-1, Division 2 of the ACL allows a regulator to issue a substantiation notice. When a regulator becomes aware of a representation that may appear to contravene the ACL, it can require a person to provide information which could be capable of supporting the claim, or ask for particular documents that may be relevant to the claim.

This is a preliminary investigative tool to seek information about claims or representations that may assist a regulator in determining whether to take action for a suspected breach of consumer protection provisions of the ACL. Substantiation notices do not require the person to prove that a representation is true or is not misleading.

Public warning notices

A regulator may issue a public warning notice to inform the public about conduct which may be detrimental.

Section 223 of the ACL allows a regulator to issue a public warning notice, provided certain conditions are satisfied.

Public warning powers allow regulators to issue a warning notice to the public in respect of a suspected breach of certain provisions in the ACL.

Table 5.1: Criteria for issuing a public warning notice

1	The regulator has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of Chapters 2, 3 or 4 of the ACL.
2	The regulator is satisfied that one or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct.
3	The regulator is satisfied that it is in the public interest to issue the notice.

The ACL also allows public warning notices where a person refuses or fails to respond to a substantiation notice and the regulator believes it is in the public interest to issue a notice.

Infringement notices

The ACCC or ASIC may issue infringement notices for alleged breaches of the ACL, as applied as a law of the Commonwealth.

Alleged breaches of certain provisions of the ACL, as applied as a law of the Commonwealth and enforced by the ACCC and ASIC, can be the subject of an infringement notice.

Table 5.2: Commonwealth infringement notice amounts

Provisions	Infringement notice amounts for listed corporations	Infringement notice amounts for other bodies corporate	Infringement notice amounts for other persons
Part 2-2 Unconscionable conduct	600 penalty units (currently \$66,000)	60 penalty units (currently \$6,600)	12 penalty units (currently \$1,320)
Part 3-1, Divisions 1 and 2 Unfair practices (except subsection 32(1), 35(1), 36(1), (2) or (3), section 40 or 43)	600 penalty units (currently \$66,000)	60 penalty units (currently \$6,600)	12 penalty units (currently \$1,320)
Part 3-1, Division 3 Pyramid schemes	600 penalty units (currently \$66,000)	60 penalty units (currently \$6,600)	12 penalty units (currently \$1,320)
Part 3-1, Division 4 Pricing	10 penalty units (currently \$1,100) for section 47(1) (multiple pricing) 600 penalty units (currently \$66,000) for section 48 (component pricing)	10 penalty units (currently \$1,100) for section 47(1) (multiple pricing) 60 penalty units (currently \$6,600) for section 48 (component pricing)	2 penalty units (currently \$220) for section 47(1) (multiple pricing) 12 penalty units (currently \$1,320) for section 48 (component pricing)
Part 3-1, Division 5 Other unfair practices	600 penalty units (currently \$66,000)	60 penalty units (currently \$6,600)	12 penalty units (currently \$1,320)
Part 3-2, Division 1 Consumer guarantees	55 penalty units (currently \$6,050) for section 66(2) (display notices)	55 penalty units (currently \$6,050) for section 66(2) (display notices)	11 penalty units (currently \$1,210) for section 66(2) (display notices)
Part 3-2, Division 2 Unsolicited consumer agreements (except section 85)	60 penalty units (currently \$6,600)	60 penalty units (currently \$6,600)	12 penalty units (currently \$1,320)
Part 3-2, Division 3 Lay-by agreements (except subsection 96(2))	55 penalty units (currently \$6,050) for section 66(2) (display notices)	55 penalty units (currently \$6,050) for section 66(2) (display notices)	11 penalty units (currently \$1,210) for section 66(2) (display notices)

Table 5.2: Commonwealth infringement notice amounts (continued)

Provisions	Infringement notice amounts for listed corporations	Infringement notice amounts for other bodies corporate	Infringement notice amounts for other persons
Part 3-2, Division 4 Miscellaneous	20 penalty units (currently \$2,200) for sections 100(1), 100(3), 101(3) or 101(4) 60 penalty units (currently \$6,600) for sections 102(2) or 103(2)	20 penalty units (currently \$2,200) for sections 100(1), 100(3), 101(3) or 101(4) 60 penalty units (currently \$6,600) for sections 102(2) or 103(2)	4 penalty units (currently \$440) for sections 100(1), 100(3), 101(3) or 101(4) 12 penalty units (currently \$1,320) for sections 102(2) or 103(2)
Part 3-3, Division 1 Safety standards (subsections 106(1), (2), (3) or (5) or 107(1) or (2))	600 penalty units (currently \$66,000)	60 penalty units (currently \$6,600)	12 penalty units (currently \$1,320)
Part 3-3, Division 2 Bans on consumer goods and product related services (subsections 118(1), (2), (3) or (5) or 199(1) or (2))	600 penalty units (currently \$66,000)	60 penalty units (currently \$6,600)	12 penalty units (currently \$1,320)
Part 3-3, Division 3 Recall of consumer goods	30 penalty units (currently \$3,300) for sections 125(4), 128(2) or 128(6) 600 penalty units (currently \$66,000) for sections 127(1) or (2)	30 penalty units (currently \$3,300) for sections 125(4), 128(2) or 128(6) 60 penalty units (currently \$6,600) for sections 127(1) or (2)	6 penalty units (currently \$660) for sections 125(4), 128(2) or 128(6) 12 penalty units (currently \$1,320) for sections 127(1) or (2)
Part 3-3, Division 5 Consumer goods or product-related services associated with death, serious injury or illness	30 penalty units (currently \$3,300) for sections 131(1) or 132(1)	30 penalty units (currently \$3,300) for sections 131(1) or 132(1)	6 penalty units (currently \$660) for sections 131(1) or 132(1)
Part 3-4 Information standards	600 penalty units (currently \$66,000) for sections 136(1), (2) or (3) or 137(1) or (2)	60 penalty units (currently \$6,600) for sections 136(1), (2) or (3) or 137(1) or (2)	12 penalty units (currently \$1,320) for sections 136(1), (2) or (3) or 137(1) or (2)
Part 5-1, Division 2 Substantiation notices	30 penalty units (currently \$3,300) for section 221(1) 50 penalty units (currently \$5,500) for section 222(1)	30 penalty units (currently \$3,300) for section 221(1) 50 penalty units (currently \$5,500) for section 222(1)	6 penalty units (currently \$660) for section 221(1) 10 penalty units (currently \$1,100) for section 222(1)

A person issued with a notice can pay the stated amount and avoid liability to court action (which can include penalties) by the Commonwealth, including the ACCC or ASIC, for the alleged breach of the law. Payment of a notice does not avoid possible action by private parties, such as affected consumers.

Unlike infringement notices in State and Territory laws such as parking infringements, failure to pay does not result in enforcement of the notice through the courts. The only impact of non-payment of a notice is that the Commonwealth retains the right to pursue the alleged breach of the ACL in court, which may expose the person to civil pecuniary penalties much higher than the amount of the infringement notice (up to \$1.1 million for bodies corporate and \$220,000 for a person other than a body corporate for some provisions of the ACL).

Infringement notice regimes are legislated individually by each jurisdiction, rather than in the ACL. This reflects differences in the legislative powers of the Commonwealth and States and Territories with respect to the imposition of court-enforceable penalties by non-judicial agencies.

PART 5-2 REMEDIES

Civil pecuniary penalties

A court may impose civil pecuniary penalties for specified breaches of the ACL.

A person who breaches specified provisions of the ACL may be liable to pay a civil pecuniary penalty under section 224 of up to \$1.1 million for bodies corporate and \$220,000 for persons other than a body corporate. A civil pecuniary penalty may only be imposed by a court which has found that, at the civil standard of proof, a breach of the ACL has occurred. Civil pecuniary penalties enable a targeted and proportionate regulatory response, in addition to increasing the deterrent effect of consumer law provisions.

Table 5.3: Maximum civil pecuniary penalties under the ACL

Provisions	Maximum civil pecuniary penalty for bodies corporate	Maximum civil pecuniary penalty for other persons
Part 2-2 Unconscionable conduct	\$1.1 million	\$220,000
Part 3-1, Divisions 1 and 2 Unfair practices	\$1.1 million	\$220,000
Part 3-1, Division 3 Pyramid schemes	\$1.1 million	\$220,000
Part 3-1, Division 4 Pricing	\$5,000 for section 47(1) (multiple pricing) \$1.1 million for section 48 (component pricing)	\$1,000 for section 47(1) (multiple pricing) \$220,000 for section 48 (component pricing)
Part 3-1, Division 5 Other unfair practices	\$1.1 million	\$220,000
Part 3-2, Division 1 Consumer guarantees	\$50,000 for section 66(2) (display notices)	\$10,000 for section 66(2) (display notices)
Part 3-2, Division 2 Unsolicited consumer agreements (except section 85)	\$50,000	\$10,000
Part 3-2, Division 3 Lay-by agreements (except subsection 96(2))	\$30,000	\$6,000
Part 3-2, Division 4 Miscellaneous	\$15,000 for sections 100(1), 100(3), 101(3) or 101(4) \$50,000 for sections 102(2) or 103(2)	\$3,000 for sections 100(1), 100(3), 101(3) or 101(4) \$10,000 for sections 102(2) or 103(2)
Part 3-3, Division 1 Safety standards (subsections 106(1), (2), (3) or (5) or 107(1) or (2))	\$1.1 million	\$220,000
Part 3-3, Division 2 Bans on consumer goods and product related services (subsections 118(1), (2), (3) or (5) or 199(1) or (2))	\$1.1 million	\$220,000

Table 5.3: Maximum civil pecuniary penalties under the ACL (continued)

Provisions	Maximum civil pecuniary penalty for bodies corporate	Maximum civil pecuniary penalty for other persons
Part 3-3, Division 3 Recall of consumer goods	\$16,500 for sections 125(4), 128(2) or 128(6) \$1.1 million for sections 127(1) or (2)	\$3,300 for sections 125(4), 128(2) or 128(6) \$220,000 for sections 127(1) or (2)
Part 3-3, Division 5 Consumer goods or product-related services associated with death, serious injury or illness	\$16,500 for sections 131(1) or 132(1)	\$3,300 for sections 131(1) or 132(1)
Part 3-4 Information standards	\$1.1 million for sections 136(1), (2) or (3) or 137(1) or (2)	\$220,000 for sections 136(1), (2) or (3) or 137(1) or (2)
Part 5-1, Division 2 Substantiation notices	\$16,500 for section 221(1) \$27,500 for section 222(1)	\$3,300 for section 221(1) \$5,500 for section 222(1)

Injunctions

A regulator or an affected person may seek an injunction to stop a business from engaging in conduct in breach of the ACL, or to require the business to do certain things.

Part 5-2, Division 2 of the ACL allows a court to issue injunctions with respect to contraventions or attempted contraventions of the ACL or conduct which relates to either of those things.

The injunctive power in the ACL is very broad and may be used to either restrain a person from doing something or require a person to do a particular thing. Section 232 provides some guidance as to the types of injunctions that may be made under this broad power.

Damages

A person may apply to a court for damages, to compensate for their loss or damage resulting from a contravention of the ACL.

Section 236 of the ACL provides a right for a person to apply to a court for damages to compensate them for their loss or damage resulting from a contravention of the ACL.

The right of a person to apply to a court for damages for a breach of the ACL reflects a similar right which has existed under the TPA since its commencement in 1974.

Compensation orders

A person may apply to a court for a compensation order to compensate for loss or damage suffered, or likely to be suffered, as a result of a contravention of the ACL.

Part 5-2, Division 4, Subdivision A of the ACL provides a right for a person to apply to a court for a compensation order, to compensate the person for loss or damage suffered, or likely to be suffered, as a result of a contravention of the ACL.

The court may make any order it considers appropriate to compensate the person or reduce their loss or damage. Orders that might be made under this provision are listed in section 43 of the ACL in a non-exhaustive way, and may include orders to vary contracts, refund money, return property or pay compensation.

These orders can be sought by a person, or by a regulator in representative proceedings.

Orders for non-party consumers

In proceedings for a contravention of the ACL, a regulator may, if other persons who are not named in the proceedings are affected, seek orders giving those other persons redress.

Section 239 provides a regulator with the power to apply to a court for orders to give redress to persons not named in the proceedings, where there has been a contravention of the ACL.

A court may make any order it considers appropriate. Redress could include, in this context, refunds, contract variations and non-financial redress such as apologies. In making an order for non-party redress the court may not make an award of damages. This is because it is necessary, in assessing damages, to consider the particular circumstances of the individual to whom the award of damages is to be made.

Orders that might be made under this provision are listed in section 243 of the ACL in a non-exhaustive way, and may include orders to vary contracts, refund money, return property or pay compensation.

Under section 241 of the ACL a person is not obliged to accept redress under a non-party order, but if the person does so, they will forfeit any other right of action they may have.

Non-punitive orders

A regulator may apply to a court for a non-punitive order in respect of a contravention of the ACL.

Section 246 of the ACL gives a regulator the power to seek a non-punitive order in connection with a contravention of the ACL. The court may impose a remedy to redress harm suffered in the community from a contravention, and which will help those in breach to comply with the ACL in the future.

Non-punitive orders are directed at redressing the harm caused by a contravention of the ACL rather than punishing the person.

Punitive orders — adverse publicity

A regulator may apply to a court for an adverse publicity order in respect of a contravention of the ACL. A court may order corrective advertising.

Section 247 of the ACL gives a regulator the power to seek an adverse publicity order in connection with a contravention of the ACL.

An adverse publicity order is an order to publish or disclose particular information, is punitive in nature and is aimed at deterring future contraventions and encouraging compliance.

Disqualification orders

A regulator may apply to a court for an order disqualifying a person from managing a corporation in respect of a contravention of the ACL.

Section 248 of the ACL provides that a court may disqualify a person from managing a corporation in connection with contraventions or offences under the ACL. This penalty can apply to any person engaged in the management of a corporation – including directors and officers – which is engaged or involved in contraventions or offences under the ACL.

This penalty can be particularly effective in dealing with individuals who engage in 'phoenix company' activities or 'fly-by-night' behaviour.

PART 5-3 COUNTRY OF ORIGIN REPRESENTATIONS

Existing law

Part V, Division 1AA of the TPA provides a set of rules that protect certain claims about the country of origin of goods from legal action alleging that they are false or misleading for the purposes of section 52 and 53(a) of the TPA.

How does the ACL differ from the TPA?

Part 5-3 of the ACL replaces Part V, Division 1AA of the TPA.

The ACL incorporates the existing country of origin defences in the TPA as well as a new defence for claims that goods, or components or ingredients of goods, are grown in a particular country.

PART 5-4 REMEDIES RELATED TO GUARANTEES

Consumers have clearer rights and remedies for consumer guarantees for goods and services under the ACL.

Under the ACL, consumers can seek a refund, replacement or repairs if a supplier fails to satisfy its obligations in relation to consumer guarantees. Under pre-existing laws, consumers were required to pursue any failure by suppliers to comply with implied conditions and warranties as breaches of contract.

The remedy available to consumers will depend on which guarantee has been breached and the nature of that breach. A consumer will be able to seek damages from a manufacturer if a manufacturer fails to meet its guarantee obligations.

As is the case under existing laws, suppliers are entitled to be indemnified by manufacturers in respect of any costs incurred in providing consumers with remedies related to consumer guarantees.

Table 5.4: Consumer rights concerning guarantees for the supply of goods

Right of action Section 259(1)	A consumer has a right to take action if a supplier of goods fails to comply with a guarantee that applies under Chapter 3, Part 3-2, Division 1, Subdivision A of the ACL.
Right to require that a failure to honour a guarantee be remedied Section 259(2)	If a failure to comply with a guarantee is not a major failure and is capable of being remedied by the supplier, the consumer may require the supplier to remedy the failure within a reasonable time. What is a 'reasonable time' will vary depending on the nature of the goods and the nature of the failure.
Consequences for a supplier of failing to remedy a failure to honour a guarantee Section 259(2)	If a supplier fails to remedy a failure within a reasonable time a consumer may have the failure remedied elsewhere and recover all reasonable costs incurred from the supplier, or reject the goods. The costs that will be recoverable under the section if goods are remedied elsewhere would likely include any amount paid to the alternative repairer, and any costs of transporting the goods to and from that repairer, such as postage and handling costs.
Rights of a consumer if a failure to comply with a guarantee is major or is not capable of remedy Section 259(3)	If a failure to comply with a guarantee is major or the failure is not capable of being remedied, the consumer may reject the goods or seek compensation from the supplier for the reduction in the value of the goods below the price paid or payable for the goods.
Consumer's right to recover damages Section 259(4-6)	The consumer may also recover damages for any loss incurred that was reasonably foreseeable as a result of the failure. This will include the costs of inspection and transportation in respect of seeking to have the failure remedied. The consumer does not have a right to claim damages if the failure occurred because of a cause independent of human control that occurred after the goods left the control of the supplier.
Original packaging Section 259(7)	The right of consumers to seek remedies from suppliers is not affected by whether or not the goods are in their original packaging.
When is a failure to honour a guarantee a 'major failure'? Section 260	A failure to honour a guarantee is a 'major failure' if the goods would not have been acquired by a reasonable consumer fully acquainted with the extent of the failure, or the goods depart, in a significant respect, from their description, or from a sample or demonstration model. A failure to honour a guarantee is also a major failure if the goods are substantially unfit for the purpose that goods of the same kind are commonly supplied for and they cannot be remedied within a reasonable time, or they are unfit for a disclosed purpose and cannot be remedied within a reasonable time. A major failure also occurs if goods are unsafe.

Table 5.4: Consumer rights concerning guarantees for the supply of goods (continued)

<p>Ways in which a supplier may remedy a failure Section 261</p>	<p>A supplier may remedy a failure to comply with a guarantee, by:</p> <ul style="list-style-type: none"> • if a failure relates to title, curing the defect in the title. • if a failure does not relate to title, repair the goods, replace the goods or provide the consumer with a refund. <p>Whilst there is no restriction placed on a consumer requesting a particular remedy, the method of remedying a failure will be at the option of the supplier.</p>
<p>When consumers are not entitled to reject goods Section 262</p>	<p>A consumer may reject goods in certain circumstances. That right may be lost in certain circumstances. These include:</p> <ul style="list-style-type: none"> • if the rejection period for the goods has ended — the rejection period is defined as a reasonable period given the type of goods, the use to which the consumer is likely to put them, the length of time it is reasonable for them to be used and the amount of use to which it is reasonable for them to be put before the failure becomes apparent. What is reasonable will vary on a case-by-case basis. • If the goods have been lost, destroyed or disposed of by the consumer — in these circumstances it is impossible for the consumer to reject the goods and return them to the supplier. • the goods were damaged after being supplied to the consumer — suppliers cannot be required to accept goods that have been damaged by consumers; accordingly, the right to reject goods is lost if damage occurs after they are supplied. • the goods have been attached to other property and they cannot be detached without damaging them — in these circumstances a consumer will not be able to reject the goods, but will need to seek another remedy, such as a repair.
<p>Consequences of rejecting goods Section 263(1)</p>	<p>If a consumer rejects goods the consumer must return the goods to the supplier. Exceptions to this rule apply if the goods have already been returned to, or retrieved by, the supplier.</p> <p>Any goods returned become the property of the supplier when the consumer tells the supplier of their intention to reject the goods.</p>
<p>Supplier to pay for costs of returning goods in certain circumstances Section 263(3)</p>	<p>If the goods cannot be returned without significant cost to the consumer, because of the nature of the failure or due to their size or height, or because the goods are attached to other property (such as land or a building), then the supplier must collect the goods at their own expense.</p>
<p>Refund or replacement goods Section 263(4)</p>	<p>If goods are rejected the consumer will have the right to choose between a refund or replacement and the supplier will have an obligation to comply with the consumer's request.</p>
<p>Replaced goods Section 264</p>	<p>If goods are replaced, the replacement goods are subject to the guarantees set out in Chapter 3, Part 3-2, Division 1 of the ACL.</p>
<p>Termination of contracts for the supply of services that are connected with rejected goods Section 265</p>	<p>Certain goods are often supplied in conjunction with associated services. A common example is mobile telephones and associated network services. When goods are supplied to a consumer under a contract and that contract also provides for services to be provided to the consumer, the consumer will often have no use for the associated services if the goods are rejected and returned to the supplier.</p> <p>If a consumer rejects the goods and the supplier is required to provide a refund in respect of a supply of goods, then the consumer may also choose to terminate the contract for the supply of any services that are connected with the rejected goods. A consumer will not be required to make any further payments to the supplier of the services after the time that the contract is taken to have been terminated.</p>
<p>Rights of gift recipients Section 266</p>	<p>A person who is provided with goods as a gift from a consumer has the same rights and remedies as would be available to the consumer under Chapter 5, Part 5-4, Division 1, Subdivision A of the ACL.</p>

Table 5.5: Consumer rights concerning guarantees for services

Right of action Section 267(1)	A consumer has a right to take action if a supplier of services fails to comply with a guarantee that applies under Chapter 3, Part 3-2, Division 1, Subdivision B of the ACL.
Right to require that a failure to honour a guarantee be remedied Section 267(2)	If a failure to comply with a remedy is not a major failure and is capable of being remedied by the supplier, the consumer may require the supplier to remedy the failure within a reasonable time. What is a 'reasonable time' will vary depending on the nature of the services and the nature of the failure.
Consequences for a supplier of failing to remedy a failure to honour a guarantee Section 267(3)	If a supplier fails to remedy a failure within a reasonable time, a consumer will be able to have the failure remedied elsewhere and recover all reasonable costs incurred from the supplier, or terminate the contract for the supply of the services.
Rights of a consumer if a failure to comply with a guarantee is major or is not capable of remedy Section 267(3)	If a failure to comply with a guarantee is major or the failure is not capable of being remedied, the consumer may terminate the contract for the supply of the services or seek compensation from the supplier for the reduction in the value of the services below the price paid or payable for the services.
Consumer's right to recover damages Section 267(4)	The consumer may also recover damages for any loss or damage incurred that was reasonably foreseeable as a result of the failure. The consumer does not have a right to claim damages from the supplier of services if a failure occurs because of an act, default or omission, or a representation made by a person other than the supplier, or an agent or employee of the supplier. A supplier is also not liable for a failure if it is caused by something that is independent of human control.
Termination of contracts for the supply of services Section 269	A termination of a contract for the supply of services takes effect from the time when a consumer tells a supplier that they are terminating the contract. When a consumer terminates a contract for the supply of services the supplier must refund any money paid for the services.
Termination of contracts for the supply of goods that are connected with terminated services Section 270	If a consumer terminates a contract for the supply of services and goods are inextricably linked to the services, the consumer may also choose to reject the goods at the same time as terminating the contract for the services. The consumer must return the goods to the supplier and the supplier must provide the consumer with a refund.

Table 5.6: Actions for damages against manufacturers of goods

Respective positions of suppliers and manufacturers Section 274	Consumers purchase goods directly from suppliers and have only indirect dealings with manufacturers. Accordingly, the primary source of remedies under the statutory consumer guarantees would be suppliers. Consumers will be able to seek repairs, refunds or replacement goods from suppliers. Suppliers will be able to recoup any costs of providing those remedies from the manufacturers of goods. In certain circumstances, consumers will not be able to obtain a remedy from the supplier of goods. Examples of such circumstances include those whereby a supplier has become insolvent, is no longer in business or refuses to provide a remedy.
Rights of action against manufacturers Section 271(1)	To allow for circumstances whereby consumers need to seek a remedy directly from a manufacturer, a consumer may recover damages from a manufacturer if goods are not of acceptable quality.
Consumer's right to claim damages Sections 271(2), (3) and (5)	A person may also recover damages from a manufacturer if goods do not match a description that is applied by, or on behalf of, the manufacturer. The right to recover damages is subject to exceptions if the cause of the failure to comply with a guarantee is independent of the supplier (that is, it is caused by someone else or by causes independent of human control). If a consumer requires a manufacturer to repair or replace goods under an express warranty, they cannot seek damages from the manufacturer in respect of a failure to honour a guarantee.
Damages that may be recovered by action against a manufacturer of goods Section 272(1)	A consumer may recover the price paid for the goods and any loss that is reasonably foreseeable as a result of the failure. This will include any costs incurred by the consumer to transport the goods back to the manufacturer and any costs of inspecting the goods to ascertain whether they are faulty.

Table 5.6: Actions for damages against manufacturers of goods (continued)

<p>Manufacturer's requirement to make spare parts and repairs reasonably available Section 271</p>	<p>One remedy that is available only from a manufacturer relates to the guarantee to make spare parts and repairs reasonably available. A consumer may seek damages from a manufacturer in respect of a failure by a manufacturer to make spare parts and repairs reasonably available.</p>
<p>Original packaging Section 271(7)</p>	<p>A consumer may commence an action against a manufacturer for damages irrespective of whether the goods are in their original packaging.</p>
<p>Time limit for actions against manufacturers Section 273</p>	<p>A consumer may commence an action against a manufacturer for a period of three years after they became aware that a guarantee has not been complied with.</p>

PART 5-5 LIABILITY OF SUPPLIERS AND CREDIT PROVIDERS

Part 5-5 sets out a regime which provides joint and several liability for actions against suppliers and linked credit providers where there has been a:

- misrepresentation in relation to a sale contract or a linked credit contract;
- breach of the contract;
- failure of consideration in relation to the contract;
- failure to comply with a consumer guarantee for the goods or services; or
- breach of an implied warranty for financial services.

Joint liability means that a consumer can seek a remedy from either the lender or the supplier of goods or services in the event of a contractual dispute. Part 5-5 of the ACL replaces the repealed section 73 of the TPA so that consumers retain the ability to pursue actions against suppliers and linked credit providers jointly in appropriate circumstances.

To allow such issues to be dealt with expeditiously in a single proceeding, the ACL provides that, if a consumer is entitled to terminate a linked credit contract under section 135 of the National Credit Code, he or she is entitled to recover the same amount in the proceedings as if action were taken under section 135.

APPENDIX 1: COMPARATIVE TABLE OF PROVISIONS

Table A1: Comparative table of provisions

	ACL	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	Tas	ACT	NT
Chapter 1											
Meaning of consumer	3	4B, 60	12BC	5	6		48	6	5	6	5
Misleading representations with respect to future matters	4	51A	12BB	41	37	4	54	9	3(7)-(9)	11	41
When donations are treated as supplies	5										
Related bodies corporate	6	4A(5)			5G						
Meaning of manufacturer	7	74A		40T							
Goods affixed to land or premises	8	74A(8)		40T(8)							72(8)
Meaning of safety defect in relation to goods	9	75AC						54(1)			
Asserting a right to payment	10	64	12DM	58	52	24, 28	72	29, 30		29	58
References to acquisition, supply and re-supply	11	4C		4(2)	5C		49			7	4(2)
Application of Schedule in relation to leases and licences of land and buildings	12	4H					51	7	8		
Loss or damage to include injury	13	4K		4(5)	5D		52	5(5)	9	8	4(5)
Continuing credit contract	14	73A								28A(5)	84
Severability	16	4L			108		53		10	9	

	ACL	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	Tas	ACT	NT
Part 2-1: Misleading or deceptive conduct											
Misleading or deceptive conduct	18	52	12DA	42	38	9	56	10	14	12	42
Application of this Part to information providers	19	65A	12DN	60	51	32	74	63	28	31	60
Part 2-2: Unconscionable conduct											
Unconscionable conduct within the meaning of the unwritten law	20	51AA	12CA(1)			7					
Unconscionable conduct	21	51AB	12CB(1)	43	39	8	57	11	15	13	43
Unconscionable conduct in business transactions	22	51AC	12CC			8A			15A		
Part 2-3: Unfair contract terms											
Unfair contract terms	Part 2-3					Part 2B					
Part 3-1, Division 1: False or misleading representations etc.											
False or misleading representations about goods or services	29	53	12DB	44	40	10-12, 14	58	12, 13	16	14	44
False or misleading representations about sale etc. of land	30	53A	12DC	45	40A		59	12, 13	17	15	45
Misleading conduct relating to employment	31	53B		46	41	13	60	14	18	16	46
Offering rebates, gifts, prizes etc.	32	54	12DE	48	43	16	62	16	19	18	51
Misleading conduct as to the nature etc. of goods	33	55		49	44	10	63	17	20	19	47
Misleading conduct as to the nature etc. of services	34	55A	12DF	50	45	11	64	18	21	20	48

	ACL	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	Tas	ACT	NT
Bait advertising	35	56	12DG	51	46	17	65	19	22	21	52
Wrongly accepting payment	36	58	12DI	53	48	19	67	21	24	24	54
Misleading representations about certain business activities	37	59		54	49	20	68	22	25	25	49
Application of provisions of this Division to information providers	38	65A	12DN	60	51	32	74	63	28	31	60
Part 3-1, Division 2: Unsolicited supplies											
Unsolicited cards etc.	39	63A	12DL	57	-	23	71	28	27	28	57
Assertion of right to payment for unsolicited goods or services	40	64	12DM	58	52	24, 28	72	29, 30		29	58
Liability etc. of recipient for unsolicited goods	41	65	-	59	53	25	73	31	-	30	59
Liability of recipient for unsolicited services	42					26					
Assertion of right to payment for unauthorised entries or advertisements	43	64 (directory entries)		58 (directory entries) 58A (ads)	52 (both)	27, 28 (both)	72 (directory entries)	29, 30 (directory entries)		29 (directory entries)	58 (directory entries)
Part 3-1, Divisions 3 to 5: Pyramid schemes, pricing and other unfair practices											
Pyramid schemes	44-46	65AAA-65AAE	12DK	60S, 60T, 60U	55D	22	70	24	26B	25A, 25B, 25C, 25D	60A, 60B, 60C, 60D
Multiple pricing	47			40						22	
Single price to be specified in certain circumstances	48	53C	12DD	47	42	15	61	15	21A	17	50
Referral selling	49	57	12DH	52	47	18	66	20	26A	23	53

	ACL	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	Tas	ACT	NT
Harassment and coercion	50	60	12DJ	55	50	21	69	23	26	26	55
Part 3-2, Division 1: Consumer guarantees											
Guarantees as to title, undisturbed possession and undisclosed securities etc.	51-53	69		40O	15 (<i>Sale of Goods Act 1896</i>)	32G, 32GA	6 (<i>Consumer Transactions Act 1972</i>)	36	17 (<i>Sale of Goods Act 1896</i>)	12 (<i>Sale of Goods Act 1952</i>)	62
Guarantees as to acceptable quality and fitness for any disclosed purpose etc.	54, 55	71		40Q	17 (<i>Sale of Goods Act 1896</i>)	32I	6(4) (<i>Consumer Transactions Act 1972</i>)	38	19 (<i>Sale of Goods Act 1896</i>)	19 (<i>Sale of Goods Act 1954</i>)	64
Guarantee relating to the supply of goods by description	56	70		40P	16 (<i>Sale of Goods Act 1896</i>)	32H	6(3) (<i>Consumer Transactions Act 1972</i>)	37	18 (<i>Sale of Goods Act 1896</i>)	18 (<i>Sale of Goods Act 1954</i>)	63
Guarantees relating to the supply of goods by sample or demonstration model	57	72		40R	18 (<i>Sale of Goods Act 1896</i>)	32HA	6(4)(b) (<i>Consumer Transactions Act 1972</i>)	39	20 (<i>Sale of Goods Act 1896</i>)	20 (<i>Sale of Goods Act 1954</i>)	65
Guarantee as to repairs and spare parts	58	74F		40Y							77
Express warranties	59	74G		40Z							78
Guarantee as to due care and skill and fitness for a particular purpose etc.	60, 61	74	12ED	40S		32J	7 (<i>Consumer Transactions Act 1972</i>)	40			66
Guarantee as to reasonable time for supply	62										
Guarantees not to be excluded etc. by contract	64	68	12EB	40M	79	32L	8 (<i>Consumer Transactions Act 1972</i>)	34			68
Application of this Division to supplies of gas, electricity and telecomm.	65										

	ACL	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	Tas	ACT	NT
Display notices	66										
Conflict of laws	67	67	12EA								
Convention on Contracts for the International Sale of Goods	68										
Part 3-2, Division 2: Unsolicited consumer agreements											
Unsolicited consumer agreements	69-95			Part 4, Division 3	Part 3, Division 4	Part 4, Division 2 (face-to-face) Part 4, Division 2A (telephone)	Part 3	Door to Door Trading Act 1987	Door to Door Trading Act 1986	Door-to-Door or Trading Act 1991	Part 7
Part 3-2, Divisions 3 and 4: Lay-by agreements and miscellaneous provisions											
Provisions relating to lay-by agreements	96-99			60F, 60G, 60H, 60I		83, 85, 86, 89				5, 15-17 (Lay-by Sales Agreement Act 1963)	
Supplier must provide proof of transaction etc.	100					161A					
Consumer may request an itemised bill	101					161A					
Prescribed requirements for warranties against defects	102										
Repairers must comply with prescribed requirements	103										

	ACL	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	Tas	ACT	NT
Part 3-3: Safety of consumer goods and product related services											
Safety standards	104-108	65C, 65E		26, 27	83-84A	33-35	22, 23	50, 51, 53 23U, 23V, 23W <i>Consumer Affairs Act 1971 (WA)</i>		24-25	25-27
Interim bans	109-113	65C		30	85, 85A	35-37, 45	24, 25, 26A	23Q <i>Consumer Affairs Act 1971 (WA)</i>	6, 7	26, 29	30, 32
Permanent bans	114-117	65C		31		39-43, 45	24, 25	23R <i>Consumer Affairs Act 1971 (WA)</i>	7, 8	27, 29	30, 32
Supplying etc. consumer goods covered by a ban	118	65C		32	85-86	38, 44	24	52 23S <i>Consumer Affairs Act 1971 (WA)</i>	6-8	30	31
Supplying etc. product related services covered by a ban	119				85-86	38, 44					
Temporary exemption from mutual recognition principles	120, 121										
Compulsory recall of consumer goods	122-127	65F-65H		34-36C, 36E, 36F		50-55		54-56		37	33-37
Notification requirements for a voluntary recall of consumer goods	128	65R		36D		49	27C	54(9)-(11), 56		37(10)-(11)	36
Safety warning notices	129, 130	65B, 65S		36E			27	49			8A, 36

	ACL	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	Tas	ACT	NT
Suppliers to report consumer goods associated with the death or serious injury or illness of any person	131										
Suppliers to report product related services associated with the death or serious injury or illness of any person	132										
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