

A BLUEPRINT FOR THE LEGALISATION AND REGULATION OF THE SHARING ECONOMY: THE ROLE OF THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

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The sharing economy has dominated a large part of the regulatory literature and agenda of the past three years. Scholars, lawyers, economists and policy-makers have engaged in a fruitful debate over, among others, the need for specific rules and reforms to capture the benefits of the sharing economy, the risks and benefits for competition,¹ the cost of regulatory inaction, the role of innovation in economic reforms, the social impact of the sharing economy,² and the political dimension of established regulatory regimes.³ This level of attention is not surprising: disruptive technology, powered by widespread adoption of smartphones and the acceleration of mobile internet access has impacted the lives of millions of individuals, well beyond the convenience of ordering food delivery from mobile phones and renting out free rooms for extra cash. But perhaps nowhere more than in Australia has this debate produced as clear and concrete outcomes as it has. Under the guidance of the Australian Competition and Consumer Commission (ACCC), the sharing economy is being regulated by Australian policy makers. More important, Australian policy-makers have embraced solutions to solve some of the conflicts inherent to the emergence of disruptive business models.

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1 Deni Vitkovic, 'The Sharing Economy: Regulation and the EU Competition Law' (2016) *Global Antitrust Review*.

2 Brishen Rogers, 'The Social Costs of Uber' (2015) *University of Chicago Law Review*.

3 Rashmi Dyal-Chand, 'Regulating Sharing: The Sharing Economy as an Alternative Capitalist System' (2015) *Tulane Law Review*, 241.

In attempting to discuss regulation and the sharing economy, it is important to first define it. The sharing economy is sometimes referred to as the ‘new economy’, the ‘gig economy’, the ‘collaborative economy’ or ‘peer to peer markets’. Some of the most prominent companies in this sector, Uber and Airbnb, have been adopted into the entire concept of the new economy, and new companies offering new economy services are regularly referred to as, e.g. the ‘Uber of cleaning services’ or the ‘Airbnb of baby strollers’. The sharing economy encompasses multiple forms of businesses and business models, which share two main characteristics. First, new economy services or goods are exchanged over an online platform, which is designed to facilitate transactions and reduce transaction costs. Second, the assets which are the object of the transaction (a car used for transportation, a dock-less rental bicycle, the skills and labour of workers providing cleaning services) are not owned or controlled by the platform but are operated by independent traders who use the platform to find buyers. This second characteristic has two consequences: (a) a triangle relationship between platforms, traders and consumers, and (b) the platform may or may not be regulated as a provider of the goods or services in question (e.g. taxi services, cleaning services), and for cost efficiency reasons will attempt to not be regulated as such.

In their attempt to avoid sector regulation and general regulatory regimes, sharing economy companies are bound to encounter legal hurdles. Regulations in recent decades have been re-designed as goal-oriented, rather than rule-oriented: less prescriptive rules aim at capturing evolving situations, while shifting the regulatory effort onto the regulated party. For instance, when anti-corruption rules mandate companies to self-report corruption issues they encounter, the rules leave it to the companies to decide whether and when to report – rather than determining strict reporting thresholds. Similarly, competition law guidelines in recent years have moved away from strict thresholds to determine dominance. Whilst guidelines explain how regulators will interpret the law, they simultaneously incentivise companies to decide, based on market shares and other factors, whether they can be considered dominant.⁴ Often, by focussing on regulatory objectives rather than on normative frameworks, these more modern rules aim at capturing *more* situations rather than less.⁵ In this context, some new economy companies are claiming that

4 See for instance the Hong Kong Guideline on substantial market power: Hong Kong Competition Commission, *Guideline on the Second Conduct Rule*, 2015), 15.

5 See also the reform of Article 46 of the *Australian Competition and Consumer Act 2010*: Treasury, ‘Delivering strengthened competition law – Section 46 legislation introduced’ (Media Release, 1 December 2016) <<http://sjm.ministers.treasury.gov.au/media-release/125-2016/>>.

regulations (including more modern, objective-driven regulations) do not apply to them because they do not provide a service to end-users other than the right to use a platform, and because they do not own or control the assets used to provide end-user services. In many cases, this has triggered conflicts between platforms, users, traders, and regulators. These conflicts are often useful as they result in the clarification of applicable level of regulation for platforms.⁶ Whether sector regulations should apply to these services – e.g. whether hotels and hospitality laws apply to Airbnb – depends, to a large extent, to how these rules are worded. Legislators, regulators and law enforcement agencies are then in charge of drawing the line between innovative business models and regulatory breaches. However, the question of whether new economy companies and their platforms – and to a lesser extent the private traders using these platforms – are subject to consumer protection rules, remained fairly untouched by decision-makers.

This paper argues that the Australian case demonstrates the positive impact of clarifying the extent to which consumer protection rules apply to the new economy. It further argues that the Australian model of regulatory adjustments to sharing economy services is successful, in part because regulatory changes put consumers at the centre of the policy debate. This paper assesses the role of the ACCC in achieving the changes necessary to successfully transition from disruption to regulation, and finds that the consumer-centric approach characterising Australia's approach can be credited to the agency.

The first part of this paper looks at how the ACCC addressed the sharing economy, and details the 2015 report commissioned by the agency on the topic. The second part summarises the guidance published by the ACCC for the sharing economy, underlying the ACCC's focus on consumer protection rules. The third and final part looks at the legalisation of ride-sharing services in Australia, and argues that the ACCC's actions have created a space for the acceptance and regulation of some new economy services.

6 See for instance one of the lawsuits over the law passed by the city of Seattle, allowing Uber and Lyft drivers to unionize: *Chamber of Commerce of the United States of America et al. v. City of Seattle et al.*, case number 17-35640, in the U S Court of Appeals for the Ninth Circuit.

I CHARTING THE NEW ECONOMY: THE ACCC REPORT

In 2015, the ACCC published a study titled '[t]he sharing economy and the *Competition and Consumer Act*'.⁷ The 63-page study compiled by Deloitte is made of five parts. The first part defines the sharing economy. The second part looks at the (then) current state of play in sharing economy markets. The third part outlines the different ways the sharing economy impacts regulation. The fourth part anticipates the future of the sharing economy, and the final part assesses the effectiveness of self-regulation.

The overall tone of the report is balanced, yet welcoming of new and emerging business models. However, as is discussed below, the report also sheds light on some of the risk areas at the crossroads of competition law, consumer law, and the sharing economy. Importantly, the ACCC was one of the first regulatory agencies to directly address sharing economy issues, particularly so pro-actively. This paper argues that the ACCC Report was the first step in the process of acceptance and legalisation of sharing economy services. This process ultimately resulted in new, light and state-level regulations which enabled sharing economy platforms to deliver the efficiencies and increased productivity made possible by technological advances. As a first step to this process of regulatory innovation in Australia, the ACCC report achieves four essential goals, which are outlined here in turn.

A *Paving The Way For Rational Approach*

The ACCC Report came at a very particular time in the development of sharing economy services. In 2015, companies such as Uber and Airbnb were facing a fierce backlash in their plans to expand globally. Most of the attacks against the sharing economy came from governments, regulatory agencies, and from traditional sectors threatened by the new economy. These traditional actors either enlisted government and regulators to enforce the regulations which they captured to defend their traditional business model, or turned to the courts to seek similar outcomes.⁸ At the peak of this global regulatory and enforcement backlash, the ACCC Report came as a rational, analytical and ultimately positive set of findings. Whilst Australian regulations arguably have a limited influence on the global scene, the ACCC and Australian rules in general do have a regional impact. Several jurisdictions in the APAC region, such as Singapore, Hong Kong or New Zealand, regularly get

7 Australian Competition and Consumer Commission, *The sharing economy and the Competition and Consumer Act* (2015), ('Report').

8 See for instance one of the many lawsuits by taxi companies in the US alleging that Uber breaches taxi regulations: *Malden Transportation Inc., et al. v. Uber Technologies Inc., et al.*, case number 1:16-cv-12538-NMG in the U S District Court for the District of Massachusetts.

inspiration from Australia on how to address new regulatory issues. At the national level, too, the Australian authorities were hesitant, at the time of the Report's publication, to embrace disruptive business models. Australian national and local governments were struggling to balance the promises and public expectations of innovative and more convenient services, with the lobbyism ability of traditional economy services. The ACCC Report showed that a soft regulation approach was a possible path to integrating new economy services into the wider economy.

The Report did not address all of the issues raised by the sharing economy. The economic impact on traditional sectors, and the possible ways to mitigate them, were not addressed. Also absent from the scope of the Report were licensing issues, for instance for transportation and housing rental services. However, these omissions possibly reflect the limitations of the ACCC – a regulatory and enforcement agency, not a legislator – rather than crucial loopholes.

B Quantifying Benefits

The second effect of the Report, doubtlessly purposefully pursued by the ACCC, is the quantification of the benefits of the sharing economy for the wider economy. At the time of the Report (2015), several of the benefits outlined by the ACCC had not been spelt out clearly, let alone by a competition authority, or in the specific context of the Australian economy. The authors outline some of the positive effects produced by the sharing economy, such as lowered transaction costs, coordination benefits, and the establishment of minimum standards through peer reviews. However, the Report fails to mention some of the economic gains generally associated with the new economy: higher utilisation of otherwise dormant assets, and employment opportunities for individuals and communities.

These benefits, together with the recognition of a demand on the part of the public, point at increased acceptance of sharing economy services. Without taking sides at this stage of the debate (the Report pre-dated any decision by the ACCC to intervene in the regulation of the sharing economy) the ACCC clarified that these services were unlikely to disappear, and that these constituted the natural evolution of e-commerce, considering technological advances and access to smartphones.

C Laying Out Regulatory Issues

The third major achievement of the Report's authors is to have laid out clearly a number of regulatory issues presented by the new economy – albeit with the omissions identified in the above sub-section. Whether, when and how to regulate the new economy are the central issues faced by all regulators and policy-makers worldwide. The ACCC Report makes a genuine contribution on this point. The 'regulatory' section of the Report is the most analytical overall. Its success in presenting and addressing this central issue is down to three points. First,

the authors begin by defining what ‘regulation’ means, noting that a number of publications on the new economy fail to do so. They note that ‘regulation is not about the pursuit of competition for its own sake – rather, it seeks to facilitate competition to promote efficiency and economic growth, whilst accommodating situations where competition does not achieve efficiency’.⁹ Second, they build on the existing and burgeoning literature on the topic to summarise the arguments for and against regulation, not in a vacuum but in the context of the existing Australian regulatory landscape. This aspect of the Report succeeds in avoiding a simple dichotomy regulation/no regulation, by distinguishing between several types of regulation, namely those which create regulatory burdens versus those which ‘are in place to make markets work better’.¹⁰ Third, the Report puts economics at the centre of the analysis of the existing Australian regulatory framework. The topic of efficiencies illustrates this third point: the authors begin by identifying the link between competition and consumer rules, and economic efficiencies. They then look at recent government-commissioned studies and reform proposals to capture the dynamic nature of existing regulations. Finally, the authors link the efficiencies targeted by these reforms to the regulations in place or contemplated, in an attempt to find how technological disruption alters the finding of previous government studies.

D Spelling-Out The Consumer Perspective

Finally, the fourth achievement of the Report is the centralisation of the sharing economy debate on consumers. This is remarkable, as a large part of the regulatory discussion prior to 2015 had been centred on the threat posed by the new economy to traditional sectors. This is partly due to the traditional sectors’ efforts to maintain the privilege bestowed upon them by existing regulations and licensing regimes. These actors (for instance taxi associations and companies and hospitality trade groups) have captured the debate over the new economy early on, mostly through protests, and demands for increased law enforcement or outright bans.¹¹ The ACCC Report not only slowed the trend of considering the sharing economy purely from the perspective of the minority which stands to lose from it, but was helpful in addressing consumer issues. As explained above, the Report summarises applicable consumer protection rules, and takes the view that, should sharing economy services

⁹ Ibid [21].

¹⁰ Ibid [18].

¹¹ See for instance, the lawsuit by taxi drivers against the Western Australian government for not prosecuting Uber for allegedly breaching taxi regulations. The lawsuit was ultimately dismissed by the Western Australia Supreme Court. The Hon. Justice Paul Allan Tottle, ruling against taxi drivers, wrote that ‘[a] policy of “no Uber prosecution” does not exist.’ *Martin v Nalder* [2016] WASC 138, [85].

become more widely accepted, consumer protection rules should apply through self-regulation, direct enforcement, or adaptation of the rules where necessary.

The ACCC Report relies on earlier reviews commissioned by other governments, such as in the UK, to determine that consumer protection issues were likely to be key in striking the balance between the new and the traditional economy. The Report poses two questions in this regard: whether ‘the sharing platform and/or the supplier should be subject to obligations under [Australian consumer rules]’ (i.e. whether there is a need to protect users), and whether existing rules already cover the need identified.¹²

II ACCC GUIDELINES ON THE SHARING ECONOMY

Less than a year after the publication of the Report discussed in the previous section, the ACCC published a series of guidelines for the sharing economy (the ‘Guidelines’). The Guidelines are resolutely consumer-oriented: the ACCC’s introduction to the Guidelines is addressed to consumers (‘[w]hen you buy from someone you connected with through a sharing economy platform, you generally have the same rights as you have when buy in a store.’). The ACCC’s effort aims at ensuring consumer protection in all the situations in which existing rules did not apply, or did not clearly apply, to new economy services.

The Guidelines are made of three documents: a checklist of tips for consumers, a compliance guide for private traders, and a compliance guide for platform operators. To a large extent, the publication of the Guidelines by the ACCC represents a genuine regulatory innovation by a competition authority. The Report discussed in the previous section was a welcome addition to the Australian debate, but was by no means a novelty internationally. The UK government had already commissioned a study on the new economy, whose content and conclusions were close to that of the ACCC Report.¹³ Several competition authorities have since then followed suit, publicising their views on the sharing economy.¹⁴

¹² Ibid [31].

¹³ Debbie Wosskow, *Unlocking the sharing economy: Independent Review* (2014).

¹⁴ See for instance the 2017 report by the Italian competition authority on new technology mobility services, advocating for a reform of the entire non-scheduled mobility sector. Autorita Garante della Concorrenza e del Mercato, *S segnalazione ‘in merito alla riforma del settore della mobilità non di linea’* (‘on the merits of reforming the non-scheduled transportation sector’), (2017); see also the Italian authority had already expressed its support for reforms allowing Uber-like services to operate in Italy, in its response to a question by the Ministry of the Interior at the request of the State Council. See Autorita Garante della Concorrenza e del Mercato, *The Italian Antitrust Authority to Parliament: ‘New set of rules for Uber and for digital apps for urban transport’*, (2015).

A A Reminder Rather Than A New Regulation

Importantly, the Guidelines do not purport to close any existing loophole, nor to impose additional obligations on any of the actors of the new economy. The ACCC's effort can be summarised in two ways: a reminder to all actors of their rights and obligations, and a guide on how to comply with these obligations.

The compliance guide for private traders (e.g. people who rent a spare room on Airbnb, or drivers who offer rides on Uber) pursues a single aim: information. It is designed to help private traders understand when Australia's consumer laws apply, understand the relationships involved among actors in the sharing economy, understand the obligations which private traders have to consumers, and understand the obligations owed by platform operators to private traders. The private trader guide outlines ten rights and obligations which private traders must be aware of, and which stem from existing consumer protection rules. The first of these points is that private traders must '[a]void misleading or deceptive statements about the goods or services [they] offer, including creating a misleading impression'. This point illustrates the objectives of the Guidelines – information – and the ACCC's reliance on existing principles of consumer protection.

B A Consumer-Centric Approach

Consumers are omni-present in the three documents which make the Guidelines. The compliance guide for private traders is geared towards traders' relationship with consumers, and only addresses private traders' relationships with platform operators after detailing the consumer protection provisions applicable to the new economy. Similarly, the platform operator compliance guide lists nearly every category of consumer protection obligations which operators must comply with: misleading or deceptive conduct, misrepresentation, unconscionable conduct, consumer guarantees, unfair contract terms and competition obligations.

The strength lies in the way the ACCC deals with two issues in a single act. First, to the detractors of the new economy, the ACCC signals that consumer protection applies to sharing economy services as it would to any other transaction. This addresses one of the major concerns of regulators and lawmakers (and one of the main arguments of traditional sectors' proponents): that consumers are left out of the new economy because they lack the safety net offered by the rules traditional sectors must follow. Second, the ACCC reminds private traders and platform operators of their obligations. This warning message is all the more effective as it comes from the authority in charge of enforcing most consumer protection rules.

C The Limits Of Soft Regulation

The ACCC Guidelines are not a solution to all the regulatory issues posed by the sharing economy. As identified above, the ACCC's role as an enforcer and a regulatory agency (as opposed to a legislator) limits the extent to which it can solve regulatory issues. The Report discussed in the previous section of this paper was already the product of these limitations, and the ACCC focus on consumer-protection issues is even more visible in the Guidelines. For instance, the guide for private traders says nothing about whether a private driver can ever benefit from the protections reserved for employees,¹⁵ despite the issue having received as much attention (and attracted as much litigation) globally than licensing issues for taxi services, or accusations of collusion.¹⁶ Even the licensing issues (e.g. whether renting a room may require a specific permission from the authorities, or even possibly contravene the law in some instances) is not mentioned at all in the Guidelines. This focus on consumer-protection issues is understandable from the perspective of the ACCC. The authority is reminding actors of their obligations, and the Guidelines' scope is limited to these obligations which the ACCC enforces – and understands. However, not addressing the state of more general regulation vis-à-vis the sharing economy represents a missed opportunity, and a risk. a missed opportunity as the ACCC could have extended its information mission to letting traders and platforms know when they risk breaching some sort of rule, such as licensing obligations and a risk, as traders (and, to a lesser extent, platform operators who have a better access to legal advice than private traders) may be under the impression, from reading the guidelines, that they need simply complying with the Guidelines to comply legally. This is not the case, as some actors of the sharing economy have been found to run afoul of regulatory regimes, licensing obligations and other existing laws.¹⁷

15 Nayeem Syed, 'Regulating Uberification' (2016) 14, *Computer and Telecommunications Law Review*, 14: 'A critical feature of a crowd-sourced business model which enables it to operate and expand at relatively low cost is the designation of workers as independent contractors and not employees. This means that these firms avoid a range of costs that employers are typically responsible for, such as job-related expenses'.

16 *Aslam, Farrar and Others v Uber* (2015), 2202551.

17 See for instance the decision of the Paris Appeal Court against Uber Pop: Cour d'appel de Paris [Paris Appeal Court], Pôle 4 – Chambre 10, 7 December 2015.

III REGULATORY IMPACT CASE STUDY: THE REGULATION OF UBER IN AUSTRALIA

This section uses tests the hypothesis developed above (that the ACCC's actions have created a favourable environment for an acceptance by decision-makers of the benefits of the sharing economy) in a case study centred on the regulation of Uber and other ride-hailing services in Australia.

A The Victoria Taxi Services Commission Inquiry

On 28 March 2011, the Victorian State Government announced a major independent inquiry into the Victorian taxi and hire car industry.¹⁸ The Victoria Inquiry was led by Professor Allan Fels AO. The authors of the report received over 1,600 submissions in the course of a 16-month investigation. The inquiry undertook a comprehensive investigation into all aspects of the taxi and hire car industry, including safety, competition, customer satisfaction, innovation, barriers to entry and access for people with disabilities, among others. The inquiry recommended a set of reforms to the government, focusing on achieving better outcomes for the travelling public. The Victoria Inquiry's conclusion was that taxi services need to improve in terms of quality, reliability, cost, availability and accessibility of services for poor people and for people with disabilities. The report concluded that driver quality has declined, that safety is a serious concern, that taxi booking services are unsatisfactory, and that longstanding and entrenched problems (the restriction on the number of taxi licenses, and restriction on hire cars) hinder competition and innovation and prevent new services from emerging.

Importantly, this study does not mention Uber-like ride sharing and ride-hailing services, since these services only became available in Australia at the end of 2012, when the report had just been published. However, this does not mean that the Victoria Inquiry is entirely disconnected from new technology services. First, the report highlights the industry conditions which favoured the introduction and the success of Uber-like services: poor services, lack of competition, lack of innovation, low customer satisfaction and pricing issues. All these elements explain, in part, Uber's meteoric growth, in Australia and beyond. They also point at a need for radical solutions to transportation issues, considering the dire state of the industry painted by the Victoria Inquiry. Second, the Victoria Inquiry does look at the issues of competition, innovation, caps on the number of cars and barriers to entry for car-hire. These issues are relevant to the regulation of Uber-like services: Uber's entry into the Australian market brought the promise of innovation (the use of a

18 Victoria Taxi Services Commission, *Taxi and Hire Car Reform*, ('Victoria Inquiry') (2012).

reliable technology platform to book a car), competition (among drivers and against existing transportation solutions), and a bypass solution to the licensing restrictions which the Victoria Inquiry found are hindering the development and improvement of transportation solutions in the State.

However, the report's unfortunate timing (two months after the launch of Uber in Sydney), means that most of the recommendations of the Victoria Inquiry fail to take into account the transportation revolution offered by transportation apps. Some of the findings of the inquiry are made obsolete by the presence of Uber. For instance, the Victoria Inquiry decries the lack of incentive for taxi companies to innovate and improve the quality of services, something that has obviously changed drastically since Uber and other services are offering an alternative to consumers. Other recommendations of the Victoria Inquiry could even work against Uber: the authors advocate a 'crackdown on touting', whereby the Taxi Services Commission 'would be given adequate powers to deal with unlicensed operators and other vehicles touting for work'. The authors add that penalties these unlicensed vehicles 'would be reviewed and increased'.¹⁹

B The Compensation Debate And The Adoption By Australian States

Part of the debate over the reform of taxi and car hire services in Australia concerned a possible compensation for taxi drivers. At the heart of the debate is the idea that taxi drivers, having purchased a license with expectations about its value and expected returns, could be compensated for the loss in value triggered by the legalisation of transportation apps, or by the reform of the licensing regime.

Opponents to compensation argue that there is little justification to compensate a monopolist for the introduction of competition – since competition economics dictate that competition increases overall welfare. However, the drivers' perspective is understandable – for instance many taxi drivers, who do not benefit from employees' benefits, rely on the sale of their license as a 'retirement package' when they cease operating. The right amount of compensation, funded by the state or by a tax on transportation app services, can alleviate the heavy social costs of imposing a large loss on taxi drivers: ensuring that people have sufficient income and savings post-employment is an essential mission of the state, and has an impact on welfare at large.

The Victoria Inquiry remained cautious on this topic, finding that '[w]hile the inquiry has found no legal, economic or policy grounds for compensating licence

¹⁹ Ibid [17].

holders, it has suggested that the Victorian Government consider providing tightly targeted assistance to licence holders who suffer significant financial difficulties as a consequence of the reforms'.²⁰ As with other recommendations, this represents a pre-Uber position, which may have been different after the game-changing introduction and large-scale public adoption of transportation apps.

In the end, the compensation mechanism was adopted by most of the Australian states when they legalised ride-sharing services. Although the principle of compensation was developed originally in the context of licensing reform, it turned out to be an adequate way of easing the social tensions around the adoption of transportation apps. The Australian Capital Territory was the first Australian State to introduce regulations clarifying the legal position of transportation apps, at the end of 2015. To meet the concerns of taxi drivers and car-hire drivers, the government included in the regulations a reduction of the taxi licensing fees by 50%, followed by another 50% decrease two years later. The government set an AUD150 licensing and accreditation fee, to be paid by drivers for Uber and other ride-sharing drivers.²¹ Drivers are required to acquire a 'D' licence, a new category of license created by the government for drivers of ridesharing vehicles.²² South Australia followed on 1 July 2016, setting aside AUD60 million for driver compensation, funded by an AUD1 passenger levy on rides. Today, virtually all Australian states have authorised and regulated ride-sharing, most of them through a compensation mechanism for taxi drivers and car-hire drivers. Compensation mechanisms have facilitated not only the legalisation of transportation apps, but also what an early observer of the impact of Uber on regulation deemed the need to shift 'from an exclusively legalistic discussion as to whether the business is (1) a fancy eBay-like technology or (2) a slick update of a radio taxi service, to a wider transport policy one, exploring what are the opportunities it offers to better fulfil regulatory objectives and improve local citizens' lives'.²³

C The Complementarity of the ACCC Guidelines And The Australian State Regulations

The initial Report on the new economy and the publication of the Guidelines proved helpful in clearing some of the uncertainties around the scope of application of consumer protection rules. The acceptance by nearly all Australian state

20 Ibid [24].

21 *Road Transport (Public Passenger Services) Regulation 2002*, (ACT) pt 3A.3.

22 Ibid, s 164Q; *Road Transport (Driver Licensing) Regulation 2000* (ACT) s 11.

23 Syed, above n 15.

governments of Uber-like services subsequently reveals the additional strength of the ACCC's approach. Indeed, in their regulation of ride-sharing, the state governments almost entirely avoid consumer protection issues. The reason behind this restraint is to be found no further than in the ACCC's Guidelines: consumer protection rules apply fully. The Guidelines themselves clarify not only where, but how these existing rules must be complied with. This leaves no motive for state governments to give in to the temptation to create special rules and regimes for the sharing economy.

In this combination of guidance and new regulations, it is possible to see a blueprint for a wider acceptance of new business models in Australia, and abroad. In contrast, some of the services offered by Uber were found to be in breach of existing regulations in other jurisdictions. In France for instance, taxi companies and the government agency in charge of fraud enforcement won a court battle in December 2015 against UberPop, the low-cost service of the ride-hailing company. Interestingly, the Paris Appeal Court ruling banning UberPop focussed not on breach of transportation regulations, but on consumer protection grounds.²⁴ This illustrates how the actions of the ACCC, which clarified the scope of application of consumer protection rules to the sharing economy, probably acted as a shield against some of the most commonly used arguments against these services from being raised in court.

D Charting The Australian Success Through Comparison; Singapore, Hong Kong, United Kingdom

In this final sub-section, this paper looks at the situation in other jurisdictions, to identify the role played by competition authorities and decision-makers. The objective of this comparison is to determine whether the interaction and the dynamics between legislators and competition authority can be replicated. To a lesser extent, this comparison should reinforce the construction of an Australian model of sharing economy-regulation, by identifying additional successful elements which may be visible in other jurisdictions.

1 Singapore

The Competition Commission of Singapore ('CCS') has been active in the sharing economy space. Eager to support the development of Singapore as a regional hub for innovation and smart regulation, the CCS worked with the Land Transport

24 Cour d'appel de Paris [Paris Appeal Court], Pôle 4 – Chambre 10, 7 December 2015.

Authority to develop a new regulatory framework for ‘taxi apps’. The CCS’s approach is different from that of the ACCC: the competition authority did not separately address the sharing economy in a stand alone set of documents, as the ACCC did with the Guidelines. However, the CCS’s role is different from that of the ACCC: it is not a consumer-protection authority, and instead its role is limited to competition advocacy and competition law enforcement.

Notwithstanding this different setting, the CCS’s role in ensuring the acceptance and development of ride-sharing apps remains similar to that of the ACCC. Working within the confines of its powers, the Singaporean regulator managed to advocate and push for regulations, through its government advisory role for competition matters. Since September 2015, providers of third-party taxi booking services over a certain size must hold a certificate from the Land Transport Authority in order to operate. At the time of writing, six companies had been issued a full certificate under this regime, including Uber and Grab, its main rival in south-east Asia.

2 United Kingdom

In December 2015, the UK Competition and Markets Authority (the ‘CMA’) published a written comment on the Transport for London (‘TfL’) proposed rules for Private Hire Vehicles (‘PHV’) – which includes services such as Uber.²⁵ The CMA is the competition and consumer protection authority for the UK. The TfL is the regulatory authority for land transport in London, and is in charge of regulating car-hire and taxi services. The CMA was concerned that some of the proposed changes could affect entry, expansion or innovation in the PHV market. For instance, the TfL’s proposed rules included an obligation for any ride in a private vehicle ordered through an app to be delayed by five minutes. The CMA criticised this requirement in heavy terms, which was justified by the TfL as ‘reducing the risk of a customer getting into the wrong car and/or into an unlicensed vehicle, enabling the driver to ensure the passenger is in a safe pick-up location and giving more certainty that the driver and vehicle information has been successfully sent, delivered and read by the passenger, and that the driver has had sufficient time to plan an appropriate route’.²⁶ Unsurprisingly, the CMA noted that ‘this proposal reduces the competitiveness of PHVs in contrast to black cabs by artificially hampering the level of service that PHVs can provide’.²⁷ The CMA concluded that the proposed changes could lead to services of a lower quality and/or higher prices for consumers. TfL ultimately adopted most of the proposed rules, including the most controversial ones.

25 CMA, Competition and Markets Authority response to Transport for London’s private hire regulations proposals (‘response to TfL’), (2015)

26 Ibid [9].

27 Ibid [10].

The lack of impact of the CMA in the case of the UK may be explained by the lack of a pro-active stance on the part of the competition authority. The CMA waited for TfL to propose anti-competitive regulations, to come out against it and defend consumers, choice and innovation. This is in contrast to the ACCC, which actively sought to clarify the benefits and risks associated with the sharing economy, before writing in the Guidelines that all existing rules were already applying to services such as Uber.

3 Hong Kong

The Hong Kong competition authority, the Hong Kong Competition Commission ('HKCC'), is purely focussed on competition advocacy and enforcement. Similarly to the CCS in Singapore, it is not a consumer protection authority. In parallel, the Hong Kong government has taken a less-than-welcoming stance toward sharing economy services. The police raided the offices of Uber in 2015 and arrested several dozen Uber drivers in 2015 and 2017, for driving a car for hire without a permit and for carrying passengers without third-party insurance. Five drivers were subsequently fined HKD10,000 each for driving passengers for reward without a permit, and for driving without third-party insurance. To attempt to alleviate the concerns of the public, which found in Uber the quality and service lacking in the taxi market, the government is pushing for the introduction of a premium taxi service.²⁸ Whilst the Hong Kong government is actively pursuing cases against new economy services, or contemplates doing so, the HKCC has been entirely silent on the topic of the new economy. The competition authority has so far not used its advocacy powers (including the ability to undertake and publish market studies) to assess whether the new economy has an impact on competition in Hong Kong. Similarly, the HKCC has not publicly taken position against the various operations mounted by the Hong Kong governments against Uber drivers. The fact that the HKCC is a young competition authority (the Competition Ordinance was passed in 2012, and entered into force in 2015) may partly explain this. However, the difference between the situation in Hong Kong, where the new economy is targeted by law enforcement, and Australia and Singapore, where the government has gradually accepted and legalised the new economy, leaves open the question of whether the HKCC missed the opportunity to actively participate in the policy debate.

28 Government of the HKSAR, Press Release, Question by the Dr Hon. Priscilla Leung and a written reply by the Secretary for Transport and Housing, Professor Anthony Cheung Bing-leung, in the Legislative Council, (2016). In addition, in a recent move, the government hinted at a crackdown on short-term rental services such as Airbnb, including the introduction of a 'strict liability' offence for persons engaged in short-term rentals. See: Government of the HKSAR, Press Release, Question by the Dr Hon. Elizabeth Quat and a written reply by the Secretary for Home Affairs, Mr Lau Kong-wah, in the Legislative Council, (2017).

The HKCC, not being a consumer-protection authority, is arguably not the only authority whose silence can be linked to the government's rejection of innovative services. The Hong Kong Consumer Council, a consumer agency with no enforcement powers, whose mission is centred on information and dispute-resolution in consumer disputes, has also been almost entirely silent on the sharing economy. In November 2018, the Consumer Council published a report on the ride-sharing market. Rather than taking a page from the ACCC's playbook, the Consumer Council stuck to its habitual method of suggesting new legislation, which the Hong Kong government is free to ignore. In its report, the Consumer Council does not address the consumer protection aspects of the new economy (despite being the agency in charge of advocating consumer protection), and instead proposes that the government adopts a licensing scheme for ride-sharing companies, allowing for the legalisation of Uber-like services in a phased way.²⁹ The criticisms addressed to the HKCC in this paper apply to the Consumer Council as well: if the Consumer Council had taken a stance on, for instance, the extent to which consumer protection rules apply to the sharing economy, it would be harder for the government to justify cracking-down on these services.

IV CONCLUDING REMARKS

This paper mapped the gradual acceptance and legalisation of sharing economy services in Australia, tracing it back to the ACCC's public advocacy and no-nonsense soft regulation approach. Markedly, the pro-active nature of the ACCC's actions defused many of the arguments used against the services of the new economy, and allowed for a rational debate over the need for updated regulations. This contrasts with some jurisdictions in the region, such as Hong Kong, where the competition authority has been silent on this topic, and where consumers continue to pay the cost of entrenched interests, and state-ruled monopolies and outdated licensing regimes.

The main finding of this paper is that competition authorities have a role to play in creating the conditions for a dispassionate and consumer-centric debate over the regulatory needs triggered by new business models. Governments are not neutral in their regulatory calculations, and leaving the regulatory and policy debate entirely to lawmakers risks allowing private interests and electoral arbitrage to interfere

²⁹ Consumer Council, *More Choices, Better Service - A Study of the Competition in the Personalised Point-to-point Car Transport Service Market* 28 November 2017.

with the needs of consumers. Competition authorities, whilst not always entirely independent from government, are in contrast driven by the pursuit of economic welfare, be it in the form of increased competition, or economic efficiencies.

At the heart of these findings are serious questions about the role of competition authorities and consumer agencies in the economy at large, and in the evolution of society. The internet, smartphones, applications, and people's desire to make a living by providing services for which there is a demand are not going to go away. Competition authorities and other regulatory agencies have the power to help decision-makers to come to rational conclusions which benefit consumers. Focussing on enforcing competition laws against cartels and abuse of dominance risks missing the point about what is harming consumers, and the economy.

COLLABORATIVE CONSUMPTION, AIRBNB AND LAND TAX – TIME FOR A NATIONAL APPROACH

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ABSTRACT

With the exception of the Northern Territory, land tax is a core measure used by states and territories to raise revenue. In all jurisdictions that levy the tax, the principal place of residence of the owner is exempt from imposition. In this article, we consider this exemption and whether that exemption is lost when part of a house is let on Airbnb. As will be shown, the states and territories differ in their approach, and it is our view that these differences cannot be justified. At the very least, a national solution should encompass a collective view as to when the exemption should apply. It should also embody this view in legislation, rather than in the policy rulings of revenue offices.

I INTRODUCTION

This paper considers two interrelated questions: what is the common law definition of a principal place of residence; and what uses of a property fall within that scope? While these questions may have once been largely considered settled in the common law, they have regained importance with the growth of the so-called ‘sharing economy’. With the rise of collaborative consumption¹ services like Airbnb, consumers can also be transformed into entrepreneurial suppliers. The sharing economy has allowed homeowners to use their properties to generate income without much more than registration on an internet website. Whether such

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1 For a discussion of the possible interpretations of this, see Alexander Traum, ‘Sharing risk in the Sharing Economy: Insurance Regulation in the Age of Uber’ (2015-2016) 14 *Cardozo Public Law Policy and Ethics Journal* 511, 513-514.

activity deprives the property of its principal residence status will have legal and financial consequences for both the homeowners and the government which seeks to regulate and tax them. In effect, this paper seeks to address whether the principal place of residence exemption to land tax is lost when the homeowner lets part of the premises to short-term holiday makers.

The sharing economy, and the fluid contemporary nature of the consumer-entrepreneur paradigm, has created significant regulatory challenges to governments across Australia. With economic structures becoming more horizontal by nature, entrepreneurs see the opportunity to transact directly with consumers, without regulatory oversight. From the legislative perspective, there has been a marked level of conservatism and uncertainty about how to respond to these challenges. This lack of legislative certainty, however, has not slowed the spread of the sharing economy, especially for services such as Airbnb.² Faced with the effects of the transition, some regulatory agencies have taken pro-active steps to bring such services to heel, even while the actual law struggles to catch up. The question is just how far those agencies can appropriately stretch the law to cover sharing services without improperly encroaching on legislative power. That is especially the case for revenue raising in the form of taxation, a subject where the separation between legislative and executive power is more important and defined in our legal system.

Thus far, much of the regulatory discussion about home sharing services has centred on consumer protection. There has been less scholarly focus on government revenue raising. While there is no question that any revenue generated from such lodging arrangements is liable to income tax, the question of land tax is much more fraught. That is because current land tax laws do not apply to a principal place of residence in all the state and territory jurisdictions where it is levied.

Despite the general immunity of the principal place of residence from land tax, there appears to have been an upswing in tax investigations and debt notices to homeowners renting parts or all of their homes.³ These largely computer-driven investigations operate on a rather binary assumption that when a room is rented in a principal place of residence, that area is no longer used for principal residence purposes. While the focus of this paper is limited to Airbnb, the underlying questions relate directly to the wider issue of the use of data dragnets to investigate the behaviour of citizens. Readers would be acutely aware of the Centrelink debt

2 For example see the following material which details the extraordinary growth of Airbnb: Gregory Ferenstein, 'Uber and Airbnb's incredible growth in 4 charts' (June 19, 2014). <https://venturebeat.com/2014/06/19/uber-and-airbnbs-incredible-growth-in-4-charts/>.

3 See the discussion by the authors in *The Conversation*, 'Airbnb hosts beware: it's not just Centrelink using robo-debt systems' January 24, 2017, <http://theconversation.com/airbnb-hosts-beware-its-not-just-centrelink-using-robo-debt-systems-71488>.

scandal, the opportunities for the Australian Tax Office to seek information from other sources, and the possibility of this information being shared between state and commonwealth agencies.⁴ Given this, and recognising that state tax laws have not yet been reformed to deal with collaborative consumption, what is discussed here will have relevance to all jurisdictions. The discussion here also has much wider relevance beyond Airbnb. The data dragnet captures a much broader range of activities than Airbnb. Homeowners renting any part of their properties for short or long periods of time have been subject to investigations. Those taking lodgers, homestay students, short term tenancies whilst overseas, and so on, are affected.

We will argue that it is incorrect to say that, under existing legislation and common law, renting parts of a person's home automatically deprives that part of the property of its principal residence status. To say otherwise misrepresents the nuanced indicia-based approach of the common law to demarcating principal residence and other uses of a property. The analysis proceeds as follows:

- First, we will provide a background to sharing economy services like Airbnb and how this part of the sharing economy creates both benefits and challenges for state and territory governments.
- Secondly, we will discuss the response by legislative and executive branches. This will highlight the lack of significant progress towards substantive law reform by legislatures versus the proactive adoption of information technology in response to the sharing economy by executive agencies.
- The majority of the paper examines the current law as it relates to land tax on principal places of residence: first by considering the statutory mechanism by which principal places of residence are exempt from land tax; and secondly by considering the statutory and common law definition and scope of this term.
- Finally we conclude that, while there are several reasons that land tax should apply in the future to home sharing arrangements, the current law does not support the dualistic approach in the current investigations. We warn that such an approach potentially constitutes an executive encroachment into the legislative function by effectively altering the law in the absence of legislative support. Equally problematic from a constitutional position is that the dragnet investigations are often backdated, and as such, constitute a retrospective reinterpretation of the law against homeowners who may have acted in good faith, on advice that their homes were not amenable to land tax.

4 The issue of data mining and the taxing of the collaborative economy has been widely reported (this lists only a small selection of the media commentary on this issue): <<http://www.smh.com.au/money/tax/the-sharing-economy-is-in-the-taxmans-crosshairs-this-year-20160721-gqaf5d.html>>, <<http://www.sbs.com.au/news/article/2016/02/23/ato-has-airbnb-users-its-sights>>, <<http://www.abc.net.au/news/2015-05-20/tax-office-issues-gst-warning-for-uber-and-airbnb/6482590>>, <http://www.grantthornton.com.au/client-alerts/2015/state-revenue-offices-and-the-ato-information-sharing/>.

II BACKGROUND, JUSTIFICATION AND SCOPE

Given the near ubiquity of Airbnb in the holiday rental market, there are likely to be few readers of this journal who are not familiar with the service. That familiarity, however, belies the relatively recent addition of the service to the market and its extraordinary path to market dominance. In fact, the company behind Airbnb launched less than a decade ago in 2008 as a San Francisco based internet start-up. It only began corporate operations in Australia in 2012.

Originally titled 'Airbed & Breakfast' the internet company established an entirely web-based 'collaborative consumption' of living space in the crowded downtown San Francisco area during peak times when conventional accommodation was not available. Collaborative consumption allows consumers to deliver and purchase goods and services through an intermediary service (a transactional peer-to-peer arrangement). In the case of Airbnb, or Airbed and Breakfast, that was initially the collaborative consumption of airbeds on apartment room floors. The website allowed owners to advertise beds for free, and potential guests to 'advertise' themselves for free (both using a user rating system to ensure quality control), and making its money from booking fees on both sides of the transaction.

The site quickly gained popularity – in 2017 its value is estimated at US\$31billion⁵ – and expanded from airbeds to any form of accommodation within a homeowner's property, including the whole property itself, and now includes the offering of experiences. It remains, however, a transactional intermediary in a peer-to-peer relationship between host and guest, without holding or managing any physical rental property of its own.

But the market created by this new activity had effects beyond increasing the number of beds available at times of high demand. It also led to palpable tension between the regulators, governments, existing tourism operators, and this new breed of supplier to the consumer seeking accommodation. The particular focus of this paper can be found in an identified upswing in land tax investigations into homeowners. As noted, as part of the apparent 'crack-down' on Airbnb, homeowners may be informed in auto-generated debt investigation notices that land tax is being apportioned to that part of the home that is being advertised on Airbnb. While there may be different jurisdictional processes in places, the thrust is that homeowners are required to identify what parts of the home they have been using for 'purposes

5 Lauren Thomas, 'Airbnb just closed a \$1 billion round and became profitable in 2016 (March 9, 2017): <http://www.cnn.com/2017/03/09/airbnb-closes-1-billion-round-31-billion-valuation-profitable.html>.

other' than principal residence use. Under the legislative regime in each state, this can potentially lead to the imposition of backdated taxes, interest and penalties. We will argue in this paper that both the assertion as to the meaning and nature of a principal place of residence and the subsequent calculation of land-tax may well be, in many cases, incorrect.

III THE COMMON LAW UNDERSTANDING OF PRINCIPAL PLACE OF RESIDENCE

In answering this query, all readers would understand that the common law has always accepted that land might be put to multiple uses, by multiple persons, without altering the residential purpose of the occupation of that residence. For instance, persons entering onto the property by way of direct or implied license of the owner and occupier such as delivery persons, tradespeople, employees, or agents do not alter the residential use of the owner at common law or statute. Similarly, guests, family members, and au pairs may stay at the property, freely or for valuable consideration, without altering the residential use of the owner. All the circumstances surrounding the use of the property are relevant to its legal characterisation.⁶ The most important legal question in characterising the purpose of that use is whether the owner, as a matter of fact and law, exercises continuing exclusive control and possession over the residence.⁷

As a common law expression, 'principal place of residence' has an established jurisprudence.⁸

- 'Residence'⁹ at common law has two primary elements: 'physical presence in a particular place and the intention to treat that place as home'.¹⁰ The conduct of any business or other financial activity or relationship at that residence is irrelevant.¹¹ Principal place of residence should be given their ordinary meaning, and 'principal' denotes that a person may have more than one place of residence.¹²

6 *Commissioner of State Revenue v Burdinat* [2012] WASC 359, [31].

7 *Thompson v Ward* (1871) LR 6 CP 327, 361. Hence, where a person was only able to occupy, control and possess units when they were not rented out the land was no longer being used for residential purposes, but commercial ones. *Holcombe and Chief Commissioner of State Revenue, Re* (2009) 77 ATR 260; [2009] NSWADT 82.

8 Taxation laws are interpreted by the ordinary rules of statutory interpretation. *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98, [39].

9 *Re Willis*; *In Re Hood* [2004] VC 328; *Ashe v Sorrento Hotel Pty Ltd* [1951] VLR 214; *Morley v R* (1999) 166 ALR 487.

10 *Hafza v Director-General of Social Security* [1985] FCA 164.

11 *Ibid.*

12 *Chief Commissioner of State Revenue v McIlroy* [2009] NSWADTAP 21, [27], [44].

- The question of which residence is an owner's principal one is a question of fact and degree, considering whether the person 'usually', 'dominantly' or 'habitually' lives or treats it as home.¹³ It is to be determined objectively,¹⁴ though this is not necessarily determinative of the issue.¹⁵
- The term 'use' in relation to principal residence is framed from the position of the owner; specifically the aim or purpose of conduct carried on by, or with the permission of an owner of a property.¹⁶ A person's absence from the principal residence may be outside of the control of the owner, with this a factor to be taken into account.¹⁷

An example of the operation of these principles can be seen in *Jackman v Commissioner of Land Tax*.¹⁸ Jackman was the owner of two properties on the Gold Coast – the more valuable of these properties was used as the residence, the other was a holiday home. A major renovation of the residential property was commenced with the family then moving into the holiday home during this period of construction. When that holiday home did not allow them to continue their life in the manner they needed, they then moved into a rented property. When land tax was levied on the residence undertaking renovation, Jackman successfully challenged this imposition. A multi-faceted approach was required to determine principal place of residence, and while physical occupation was one factor, other elements needed to be considered and in this instance, these had greater weight. The additional factors included the subjective belief of Jackman that it was his home, that he never parted with possession, that the furniture remained in the premises, water and electricity continued to be connected, and electoral and mail details remained unchanged.¹⁹

Another example is *Commissioner of State Revenue v Burdinat*.²⁰ A married couple were the owners of a property in Bicton, Western Australia, though for the year ending June 30, 2011, they were vacationing in Broome, where they lived in a caravan. During this period, they had rented out the Bicton property at less than market value, with one of the significant reasons for doing this to maintain the

13 That will take into account all the surrounding circumstances, such as the person's occupation (a sailor or FIFO worker might be expected to be away for months on end), continuity of living arrangements, use of electricity and services; the presence of furniture *Commissioner of State Revenue v Burdinat* [2012] WASC 359, [31]; *Deane v Commissioner of Stamp Duties* (Qld) [1996] 2 Qd R 557 at 567; *AAT Case 8769* (1993) 26 ATR 1051.

14 *Chief Commissioner of State Revenue v McIlroy* [2009] NSWADTAP 21, [44].

15 *Ibid.* See also *Ward v Commissioner of State Revenue* [2016] VCAT 1307.

16 *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1, 4.

17 *Chief Commissioner of State Revenue v McIlroy* [2009] NSWADTAP 21, [44].

18 [2010] QLC 0003.

19 [2010] QLC 0003, [27]-[31].

20 [2012] WASC 359.

security of the property. As they were not living in the Bicton property at June 30, the Revenue Office assessed them as liable to land tax. When the taxpayer successfully appealed against this before the State Administrative Tribunal of Western Australia, the matter was then appealed by the Commissioner of State Revenue to the Supreme Court. In dismissing the appeal, the following factors were relevant – the attachment of the property to the owners was permanent; the renting of the property for security purposes was a relevant consideration, as was the length and the nature of the lease. Given these factors, at June 30, the Bicton property was still the principal place of residence of the Burdinats.²¹

Added to this is the common law view that the presence of a lodger within a residence, the occupation by the lodger of rooms, the sharing of common areas, and the payment of valuable consideration does not limit the exclusive possession and control of the owner, or their use of the land as a principal residence. The fact that the lodging is provided for valuable consideration does not change that legal fact. As noted in the High Court of Australia:

[T]he bare fact of occupation - even sole occupation - of the room will not make the person a tenant. Despite the sole occupation, the landlord may have the right at any time to enter the room. If so, the occupier is a lodger ... 'A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.'²²

Case law is replete with examples where this has been endorsed:

- Servants/employees who are provided lodging within an owner's house in exchange for services such as housekeeping, gardening, or care of children.²³
- Occupation of a property by a caretaker while the owner is away for holiday, honeymoon, work,²⁴
- Leasing of a property for valuable consideration while the owners are on holiday;²⁵

21 Ibid, [31]-[37].

22 *Western Australia v Ward* (2002) 213 CLR 1, [519], quoting *Allens v Overseers of Liverpool* (1874) LR 9 QB 19=80, 191-192.

23 *Thompson v Ward* (1871) LR 6 CP 327.

24 *Stone v Commissioner of State Taxation*, Appeals No 56 of 1989/90 and 69 of 1989/90, reasons delivered 15 February 1991, in which the Tribunal held that the land was used solely as the appellant's place of residence and at all material times the residence was occupied by his nephew – who was not entitled to take the land for any estate but was merely an occupant in a caretaker's capacity.

25 *Commissioner of State Revenue v Burdinat* [2012] WASC 359.

- Rental of rooms in a house in a share-house arrangement²⁶ (although it does require the owner declare the income for the purpose of income tax).²⁷

The legal status afforded share house lodging arrangements in relation to land tax was most recently considered by Gzell J, in *Flaracos v Chief Commissioner of State Revenue*,²⁸ who determined that:²⁹

Notwithstanding the contemporaneous presence of a tenant ... [if the owner/occupier] was also in possession and he had the right to control that possession ... [then they] continuously used and occupied his land ... for residential purposes and for no other purposes.

This analysis of the common law might have been thought to be definitive in suggesting that no liability for land tax would arise upon the owner of a freehold property, living in her or his own premises, but letting part of the property for short-term rentals on Airbnb. Nevertheless, our research indicates that a different thought process is needed.

Perhaps coincidentally, the upswing in revenue office home-use investigations occurred around the same time the governments are considering their support,³⁰ or otherwise, of services such as Airbnb. What has not been announced was the potential that homeowners generating income in such a manner would open themselves to investigation, particularly if they declare the arrangements to agencies such as the Australian Tax Office. It would be remiss, however, to think that this was something unique to any one jurisdiction. With the exception of the Northern Territory, which does not levy land tax, all Australian states and territories do. The same issues for the government agency, the government, and the homeowner, are clearly applicable to the citizens of those jurisdictions that impose land tax — the question is whether the state revenue office has the power to do this, and whether it should.

With this context in mind, can it be said that the previously mentioned common law meaning of ‘principal place of residence’, the main exemption from the requirement to pay land tax on the ownership of land, has somehow been altered by

26 *Flaracos v Chief Commissioner of State Revenue* 2003 ATC 4348; (2003) 52 ATR 318.

27 *Re Walter v Federal Commissioner of Taxation* (1998) 39 ATR 1052, Beddoe SM at [23]-[26].

28 (2003) 52 ATR 318.

29 *Ibid.*, 323.

30 Rosemary Bolger “Tasmanian Government backs ‘sharing economy’” ABC News (Online) 7 Sep 2015, 6:10am <http://www.abc.net.au/news/2015-09-06/liberal-party-members-urged-to-back-online-sharing-services/6753048> (accessed 1/2/2016). It has been recently commented that the New South Wales government is about to endorse Airbnb in that jurisdiction: <http://mashable.com/2016/10/16/airbnb-new-south-wales/#v65rJB.mvSqA>. South Australia is seen to be very supportive of Airbnb: <<http://www.premier.sa.gov.au/index.php/john-rau-news-releases/664-airbnb-boost-to-sa-tourism>>.

legislative fiat? This phrase, even before the arrival of Airbnb, has been one of some dispute³¹ and litigation is likely to increase. What the current actions indicate is the tension that can exist within government policy on this issue. On the one hand, the government will seek to protect its revenue base, part of which emanates from land tax. On the other hand, the government will also be keen to utilise vacant rooms to encourage tourism, particularly when tourism is at a peak and hotel rooms are in short supply. The consequences are not just in the government sphere though, current regulated and taxed tourism businesses, as well as the neighbour within a residential community seeing the property next door utilised as a business, may also have legitimate cause for concern.³² As to how governments balance the need for the revenue that it needs with the non-interventionist flexibility offered by these online non-jurisdictionally specific services remains an open question. What we do know is that the arguments in respect of the provision of land tax represent just one plank in the legal revolution that will take place over the next decade.

IV LEGISLATIVE AND REGULATORY IMPOSITION OF LAND TAX

Broadly speaking land tax is levied on the value of all land in a jurisdiction.³³ It is payable by the owner of the land.³⁴ As mentioned, land used or occupied as the principal place of residence of the owner is exempt.³⁵ While this broad exemption exists in all states and territories where the tax is levied, as is typical with the federation of Australia, each state and territory has its own idiosyncratic differences.

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- 31 At the time of writing, a search of Thomson Reuters database Firstpoint revealed 108 decisions on this phrase – with NSW dominating. Of these 108 decisions, 68 emanated from New South Wales, 12 from Western Australia, 12 from the Commonwealth jurisdictions, 9 from Victoria, 4 from the ACT and 3 from Queensland.
- 32 Evidence of this concern can be seen where short-term letting is now routinely part of strata developments. Long-term owners within those developments have been aggrieved at what they see as the ‘party hotel’ culture of short-term letting. See the comments at <http://www.domain.com.au/news/strata-owners-opposed-to-shortterm-letting-need-to-pass-bylaws-now-20160324-gnmxtl/>. The fierceness of the dispute between long term residents and short term lets can be seen in the Victorian decision of *Owners Corporations PS 501391P v Balcombe* [2016] VSC 384 (22 July 2016).
- 33 The key legislation and provision in each state and territory is *Land Tax Act 2004* (ACT) s 9; *Land Tax Act 1956* (NSW), *Land Tax Management Act 1956* (NSW) s 7; *Land Tax Act 2010* (Qld) s 6; *Land Tax Act 1936* (SA) s 4; *Land Tax Rating Act 2000* (Tas), *Land Tax Act 2000* (Tas) s 10; *Land Tax Act 2005* (Vic) s 8; *Land Tax Assessment Act 2002* (WA) s 7.
- 34 *Land Tax Management Act 1956* (NSW) s 7; *Land Tax Act 2010* (Qld) s 8; *Land Tax Act 1936* (SA) s 4; *Land Tax Act 2000* (Tas) s 10; *Land Tax Act 2005* (Vic) s 8; *Land Tax Assessment Act 2002* (WA) s 7. The ACT legislation defines liability to pay land tax in terms of the renting of the property, rather than making the owner liable and then exempting for the principal place of residence: *Land Tax Act 2004* (ACT) s 9.
- 35 *Land Tax Management Act 1956* (NSW) s 10(1)(r), which then references Schedule 1A of the same Act; *Land Tax Act 2010* (Qld) s 39; *Land Tax Act 1936* (SA) s 5; *Land Tax Rating Act 2000* (Tas) s 26; *Land Tax Act 2005* (Vic) s 54; *Land Tax Assessment Act 2002* (WA) s 21.

The source of the exemption is to be principally found in the legislation exemptions, though the state revenue offices have sometimes supplemented this with policy rulings.³⁶ These rulings add to the legislative framework, though questions might be asked as to the source of the power to do this, particularly when the policy rulings move beyond and outside what is written in the legislation. While it is intuitively understandable as to why these policy rulings and extensions have occurred, Airbnb was not extant at the time the current legislation was enacted, the adoption of these rulings and associated actions of the revenue office begs the question as to whether practical legislative amendment has occurred by administrative stealth, a practice that undermines the Rule of Law.³⁷

For example, the legislation in New South Wales indicates that land does not cease to be a principal place of residence because there is one other residential occupancy on the land, provided no more than two rooms are separately occupied, or, if there is one flat plus another room, that it is not a self-contained flat. 'Accordingly, land does not cease to be residential land because there is on the land one, but not more than one, such excluded residential occupancy, even if income is derived from the residential occupancy'.³⁸ This is then supplemented by a policy ruling which, with perhaps a hint of recognition of the influence of Airbnb, indicates that property can also be used as a bed and breakfast if the guest accommodation is limited to the areas as noted above.³⁹ Queensland is somewhat similar to New South Wales in that the State Revenue Office may consider whether the occupation is a non-exempt purpose and whether that use is substantial.⁴⁰ Examples given within the legislation include two rooms of a house set aside for a hairdressing business, a shed used on the land for a repair enterprise, and a retail shop being operated from the front of the premises.⁴¹ Other factors include the extent of the letting, (eg it must not occupy more than 50% of the residential area), whether it is a work from home arrangement, and whether the income from the other activities is greater

36 The danger of these types of administrative rulings achieving a de-facto status of law, when they are obviously not, has led some to call for an independent rule-maker: Diana Scolaro, 'Tax Rulings: Opinion or Law? The Need for an Independent Rule-Maker' (2006) 16(1) *Revenue Law Journal* 109.

37 Recent academic contributions on the Rule of Law include David Hume, 'The Rule of Law in reading down; Good Form for the Bad Man' (2014) 37(3) *Melbourne University Law Review* 620; Martin Krygier, 'The Rule of Law: Past, Present, and Two Possible Futures' [2016] *University of New South Wales Faculty of Law Research Series* 31.

38 *Land Tax Management Act 1956* (NSW) Schedule 1A, 4(3).

39 NSW Office of State Revenue, Revenue Ruling No. LT 082 Version 4, *The Principal Place of Residence Exemption*.

40 *Land Tax Act 2010* (Qld) s 39. See also Queensland Treasury, LTA000.1.2 'The Land Tax Exemption for a Home' 6 June 2011.

41 *Land Tax Act 2010* (Qld) s 39(3)(c).

than \$30,000/year.⁴² The Victorian legislation provides a broad exemption for the principal place of residence.⁴³ Again, it is the ruling or interpretation of the State Revenue Office in that jurisdiction that provides the meat as to what this means, though as noted, the common law's view was reasonably clear. The policy ruling for Victoria provides that if less than 30% of the land or the area of the building is used for business or commercial purposes, the exemption will apply, with the income generated from the building also another factor (> \$30,000/annum likely to demonstrate a substantial business activity).⁴⁴ In the Australian Capital Territory, rented residential land is liable to land tax, with exemptions for retirement villages, rural land and nursing homes,⁴⁵ without any clear or evident ruling in relation to lettable areas within the primary residence of a person.⁴⁶ In South Australia, the exemption applies where less than 25% of the total floor areas of all buildings are used for a commercial or business purpose,⁴⁷ and in line with this, and with some consideration towards holiday letting, the legislation provides that the land may be wholly exempted where the buildings are used for serviced holiday apartments or other similar accommodation, if more than 75% of the total floor space is used as the principal place of residence. A partial exemption applies where the land used by the owner for their residence is greater than 25%.⁴⁸ Although the legislation seems clear in South Australia, the State Revenue Office retains a discretion, with s 5(5) providing that the Commissioner may 'if satisfied that proper grounds exist for doing so, wholly or partially exempt land from land tax (whether or not an application for exemption has been made)'.⁴⁹ In Western Australia, a proportionate exemption is allowed where the property is used for dual purposes though this is permissively expressed and is open to the State Revenue Office to disallow.⁵⁰ In Tasmania, if land is used for purposes other than domestic reasons, the payment of land tax is assessed by way of determining the floor space used for domestic purposes.⁵¹

42 *Land Tax Act 2010* (Qld) s 39(3).

43 *Land Tax Act 2005* (Vic) s 54.

44 State Revenue Office (Vic), Principal Place of Residence Exemption – Substantial Business Activity' LTA.001 (version 2) 5 December 2012.

45 *Land Tax Act 2004* (ACT) ss 9-10.

46 *Land Tax Act 1936* (SA) s 5(10)(ba).

47 *Land Tax Act 1936* (SA) s 5(10).

48 *Land Tax Act 1936* (SA) s 5(10)(bb).

49 *Land Tax Act 1936* (SA) s 5(5).

50 *Land Tax Assessment Act 2002* (WA) s s21. http://www.finance.wa.gov.au/cms/State_Revenue/Land_Tax/Exemptions.aspx#residential.

51 *Land Tax Act 2000* (Tas) s 26.

With each jurisdiction addressing the issue of dual use purposes in somewhat different ways, it's perhaps illustrative to reflect on comments state parliaments made when passing the legislation that would apportion land tax between the business or commercial purpose of which land was used, and the exempt part of the property for the residential land owner. For example, we see the following comment from the Parliament of Western Australia when exemptions for the principal place of residence were being apportioned.

I place on the record that I do not disagree with the notion of land tax being payable on rural land that is used primarily for holiday purposes and on which there may be an agricultural pursuit that does not result in a high proportion of income. However, there is a lack of clarity about which part of the property will be subject to land tax and how it will be assessed. I am concerned about people whose principal place of residence is on rural zoned land, whose other activities are quasi-rural or not rural and who may be assessed for land tax. These could be bed and breakfast and farm stay properties.⁵²

Similarly, in Tasmania, and in recognition that some people's homes might be collocated with commercial dwellings, an 'apportionment' provision, section 26, was inserted into the Land Tax Act 2000. It states:

If principal residence land is used for other purposes ... in addition to the principal residence of an owner ... the Commissioner is to apportion the land value of the land between principal residence land and general land.

And in Queensland, a question on notice to the then Minister for Small Business, Information Technology and Multicultural Affairs in March of 2006 drew this response:

Legislation has been introduced to change the Land Tax Act 1915 to extend the principal place of residence exemption for land tax. This will allow for either a full or partial exemption where land is used as a principle place of residence and for some other purpose, such as operating a home based business. There are approximately 58,300 of these home based businesses operating in Queensland.⁵³

In New South Wales, the apportionment provisions were explicitly stated as designed to 'allow a proportionate exemption for the couple's home in cases where the property is also used for business purposes, such as a combined shop and dwelling or a farming property'.⁵⁴

52 Parliament of Western Australia, Hansard, Legislative Assembly, 17/4/2002, 9702b – 9705a; the Hon Mr Barnett MP.

53 Parliament of Queensland, Question on Notice, No. 226, asked March 2, 2006, the Hon Mr Cummins MP.

54 Parliament of New South Wales, Hansard, Legislative Assembly, 3 April 2012, 1047, the Hon Greg Pearce MP.

Finally, in Victoria, the apportionment provision was included to provide for the imposition of land tax where the home ‘rents out a separate residence on the same land as the family home’.⁵⁵

While the legislative intent would seem to be clear – the full exemption for the principal place of residence will not apply where a business is also run on the premises, there never was any suggestion that the mere lodging or use of the premises by, for example, Airbnb customers, would, in any way, remove that exemption from the landowner. Despite this, current policy seems to indicate that ‘renting any part’ of a home can be a non-residential use, ‘even if it is your Principal Residence Land’.⁵⁶ That, and the additional practicality of a dragnet investigation, appears to result in a broader interpretation than that suggested by the common law or the wording of the legislation. Not surprisingly, given the recent advent of Airbnb, the issue of short-term rentals was not mentioned in the second reading speech or the debates of the Parliaments, and as noted above, only generally mentioned in passing. For example, in reference back to Tasmania, it was the House Committee responsible for the drafting of the legislation that raised the issue of rentals or businesses generally, with the Government minister tabling the (then) bill explaining its purpose as being to:

[P]rovide for where there is a shop maybe and a residence in the same location or ... it could be a home or living quarters on top of the AMP building, for instance. It would not be expected that that person would pay the whole of the tax for the AMP building.⁵⁷

In response, a Committee MP queried:

There would be a high proportion of people, I would think, who would claim a part of their residence off their tax for home use ... I am trying to ensure that innocent people are not caught up in this net which you have in the new bill. I am advised and assured that it is not the intention of [cl 26] to cover those types of situations ... it is to accommodate the other circumstances ... a shop and a residence associated with the shop, because there are a lot of those situations around.⁵⁸

55 Parliament of Victoria, Hansard, Legislative Assembly, 24 October 2012, 4721, the Hon Mr Wells (Treasurer).

56 State Revenue Office (Tasmania) *Land Tax Guideline 2014-2015* (2015) Department of Treasury and Finance (LTX_0041 September 2014), 2.

57 Tasmania, Hansard of Representatives, 17 October 2000, (Hon. David Edward Llewelyn AM, *Land Tax Bill 2000* (No. 73), in Committee), 75.

58 Ibid.

The tabling Government Minister responded:

I am advised and assured that it is not the intention of [cl 26] to cover those types of situations ... it is to accommodate the other circumstances ... a shop and a residence associated with the shop, because there are a lot of those situations around.⁵⁹

The Committee and both Houses of Parliament subsequently agreed to the apportionment provision (now s 26) in identical terms to its current expression, without any further debate. Our research has indicated that as with Tasmania, the other jurisdictions have not considered, the topic of Airbnb and the effect this might have on the principal place of residence exemption, and we were not surprised by this. While Airbnb is, of course, the current focus, as noted the same issues arise in relation to lodgers within private residences, boarders, school-based homestays, and host families for international students.

Our purpose in highlighting this has been to raise three points. First, there seems little justification for different interpretations of the phrase 'principal place of residence' existing from state to state. Our initial suggestion would be that to advance investment across multiple jurisdictions and to establish a jurisprudence consistent throughout the federation of Australia, the Council of Australian Governments should work with the states and territories to develop a consensus on this topic. The internet-based developments of Airbnb do not work on the traditional physical boundaries of the states and territories – our law must catch up to this development. Second, the expanding use of data dragnets to support and fertilise the activities of one government department from compulsory information supplied to another, serves as a chilling reminder of the power and importance of governments. The administrative arms of government must act in a way that is supportive of what the community is expecting. To undermine the trust that can exist in elected democratic institutions and the people that those institutions serve, a matter of some angst already within society,⁶⁰ serves no one well. Third, the collaborative consumption or sharing economy brings new challenges for the governments of the day and forces us to re-examine our understanding of who or what is a consumer, entrepreneur, and supplier of goods and services. States and territories must find a way to fund their activities with this, then allowing the government of the day to distribute the generated revenue of the Crown in line with the priorities of the elected officials. Land tax is part of that source for all but one territory. The imposition and collection of tax, must, however, be done in line

59 Ibid.

60 For a discussion of the importance of this topic, see Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224.

with legislative direction after debate through the parliamentary processes. The use of policy rulings that appear to expand upon the ambit of the legislation, and the application of current legislation, drafted in a time before Airbnb was established, cannot be unilaterally adapted to retrofit the existing rules if that power does not exist. Change, if it is to occur, must be done through parliamentary processes.

For even were power-wielders' intentions beneficently public oriented, the possibility of arbitrary exercise of power would still be a perennial concern ... If we are left merely to the will or pleasure of the powerholder ... arbitrariness will be a constant possibility, and if so a constant worry.⁶¹

V CONCLUSION

The letting of rooms to short-term lodgers through Airbnb, the typical sharing economy arrangement, is unlikely (from the position of a court if not the state revenue office) to displace the assumption of principal residence use by the owner. The longer the rental, the larger the space occupied, and the more displaced the owner, the greater the chance that the owner cannot be said to use the property as their principal residence. What is most important to note is that:

[The] relevant cases ... demonstrate the range of factors that are taken into account ... there is no one factor which clearly stands out as determinative.⁶²

The problem we raise here stems from the association of a number of forces. One force is the existence and ready availability today of data dragnets that allow the unnuanced matching of income to property, without consideration of the centuries of common law jurisprudence that has evolved to understand the many uses to which a principal residence can be put. Data nets are an homogenous, blunt instrument in a world of heterogeneity and need to be used with sensitivity, transparency, and understanding. When this capacity is combined with State Revenue Offices, which working with outdated legislation that struggles in its applicability to modern scenarios that could not have been foreseen, place the dedicated individuals of those offices in an invidious and extraordinarily difficult position – they face a task that is incapable of balanced resolution. Beyond the rule of law questions involved, the inherent unfairness of retrospectively penalising people who acted in good faith is likely to undermine efforts to foster collaborative consumption. Law may well follow innovation, but in so doing, it must respond with fairness and with an understanding that intrusion will always have a cost.

61 Martin Krygier, above n 40, 5.

62 *Commissioner of State Revenue v Burdinat* [2012] WASC 359, McKenzie J.

CONSUMER CREDIT INSURANCE: A LEGISLATIVE MUDDLE FOR A JUNK PRODUCT

Gail Pearson*

I INTRODUCTION

Consumer credit insurance (CCI) is the third in a series of transactions. Typically, first comes the sale of goods, followed by the sale of credit, and finally the sale of insurance to cover risk to the consumer in repaying the credit. The risks insured are usually loss of employment, illness and death. CCI may cover credit card debt, loans for items such as cars or smaller items, and even mortgage repayments for housing. This paper examines how CCI is regulated and provides some suggestions.

There is a problem with CCI as a financial product and with its sale. This can result in over-insurance, and denied claims, and further credit problems. The product problem is with out-dated definitions and cover that does not meet the needs of consumers. The mis-selling problem is with the timing of the sale following the credit transaction, how it is sold and to whom it is sold. CCI is often hastily sold, with inadequate disclosure. When buyers acquire a product they do not know they have acquired, with terms patently unsuitable for their circumstances, failure to disclose unusual terms or even protection from unfair terms is of little use. Consumer debtors are protected by the 'not unsuitable' credit test, which should limit the need for insurance. Credit providers can protect themselves without CCI by taking security or other credit related insurance. In some circumstances, CCI is a worthy product for both borrower and lender. It is certainly a better option than the nineteenth century debtor's prison. In others, it is simply exploitative.

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Australia is reassessing insurance for consumers.¹ This follows the decision in *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)* [2014] FCA 926 ('Cash Store'), banned brokers,² reports by the Australian Securities and Investments Commission (ASIC) and on 'junk' insurance.³ It is not the only jurisdiction doing so. The payment protection insurance (PPI) scandals in the UK resulted in changes to legislative requirements and massive compensation payments by banks for mis-selling the products.⁴ In particular, the UK has banned PPI sales at the same time as the sale of credit, and also single premium PPI policies.⁵ In *Plevin v Paragon Personal Finance Limited* [2014] UKSC, 61 non-disclosed commissions of nearly 75% on a capitalised PPI premium resulted in a finding of an unfair creditor-debtor relationship. The *Insurance Contracts Act 1984* (Cth), the *Corporations Act (2001)* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') and the *National Consumer Credit Protection Act 2009* (Cth) ('NCCP Act') incorporating the National Credit Code as Schedule 1, are all relevant to CCI and their different requirements depend on different definitions and applications. For this reason, these definitions are discussed below. Overlapping laws involving credit and insurance have been on the agenda since at least 1999.⁶

- 1 Commonwealth of Australia, *Financial System Inquiry Final Report* (2014) ('Murray'); John Trowbridge, Life Insurance and Advice Working Group, *Review of Retail Life Insurance Advice Final Report* (2015) ('Trowbridge'); Insurance Council of Australia, *Too Long; Didn't Read Enhancing General Insurance Disclosure Report of the Effective Disclosure Taskforce to Insurance Council Board* (2015). Senate Economics Committee, Australia's General Insurance Industry (2017); Senate Economics Committee, Consumer Protection in the banking, insurance and financial sector (2017).
- 2 ASIC, 'Esanda Compensates Consumers for Conduct by Finance Broker' (Media Release, 15-312MR, 27 October 2015); ASIC, 'Westpac to Refund Premiums for Unwanted Insurance Cover' (Media Release, 15-318 MR, 29 October 2015).
- 3 ASIC, *Consumer Credit Insurance: A Review of Sales Practices by Authorised Deposit-Taking Institutions*, Report No 256 (2011); ASIC, *Consumer Credit Insurance Policies: Consumers' Claims Experiences*, Report No 361 (2013); ASIC, *Buying Add-on insurance in car yards: Why it can be hard to say no*, Report No 470 (2016); ASIC, *The sale of life insurance through car dealers: Taking consumers for a ride*, Report No 471 (2016); Consumer Action Law Centre, *Junk Merchants: How Australians Are Being Sold Rubbish Insurance and What We Can Do about It* (2015).
- 4 According to the Financial Conduct Authority, since 2011 compensation has been paid to 12 million people. Bank fines and administrative costs have been over 31 billion pounds and compensation payments by 2012 were already at 6.3 billion pounds. Inmann, Phillip 'PPI payouts knock down Lloyds profits but boost British shoppers' *The Guardian* 26 February 2016 <http://www.theguardian.com/money/2016/feb/25/ppi-payouts-knock-down-lloyds-profits-but-boost-british-shoppers>.
- 5 Competition Commission (UK), 'Payment Protection Insurance Market Investigation Order 2011'.
- 6 Ministerial Council on Consumer Affairs, *Uniform Consumer Credit Code Post Implementation Review* (1999) 63-68.

II THE CCI SALE - BUSINESS MODELS AND PRACTICES

There are two major sales channels for CCI - financiers (ADIs and others), and car dealers. In general and in contrast with, say, home contents insurance or travel insurance, there is no consumer demand for CCI. It is sold to consumers, often without them even knowing.⁷ CCI is usually sold at the same time as credit is arranged. It can be paid for by further credit in the form of instalment payments or commonly by a lump sum payment that is rolled in to the credit for the purchase of the goods.⁸ The person selling CCI will be an insurance intermediary, representative or distributor.⁹ This may be the supplier of the goods and services; a representative of the 'linked credit provider' who is different from the goods and services supplier; a 'credit assistant' who is a finance broker or mortgage broker; or the credit provider itself.

CCI is highly profitable and we know this from ASIC research of mis-selling and claims issues.¹⁰ It is sold under a general advice model rather than via personal financial advice.¹¹ This limits costs. There is vertical integration between insurance companies and ADIs, and the car dealer network is so valuable that insurers compete for access.¹² In car yards, CCI is usually sold for general insurers. Life insurance may be bundled with the CCI and the general insurers will be responsible for the life insurance authorised representatives.¹³ In 2014, life insurers had about 5,900 authorised representatives of whom 96% were car dealers.¹⁴ By ADIs, CCI is sold through telemarketing, when consumers contacted the ADI for a credit product, and, following the sale of a credit product, when the consumer contacts the ADI for some other purpose.¹⁵ Nearly 20% of those acquiring credit cards or personal loans purchase CCI, mostly for personal loans.¹⁶ In car dealerships, consumers buy CCI

7 ASIC, *Sales Practices*, above n 3, 20; Consumer Action Law Centre, above n 3, 14.

8 ASIC, *The sale of life insurance through car dealers*, above n 3, 11, 20; Consumer Action Law Centre, *Junk Merchants*, above n 3, 6. Note that both of these practices, sale of insurance and credit together and premiums financed by the credit provider have been banned in the UK.

9 Intermediaries must be licensed. Insurers, as financial services licensees, are responsible for the conduct of their representatives. *Corporations Act 2001* (Cth) s 761A 'authorised representative', ss 911A, 911B, 917B, 917C. Note the modification of s 911B for distributors of consumer credit insurance in ASIC Class Order 05/1070. See also Ian Enright and Robert Merkin, *Sutton on Insurance Law* (Law Book, 4th ed, 2015) ch 5.

10 ASIC, *Consumers' Claims Experiences*, above n 3, 16, 17.

11 ASIC, *The sale of life insurance through car dealers*, above n 3, 14, 25.

12 ASIC, *Buying Add-on insurance in car yards*, above n 3, 4.

13 ASIC, *The sale of life insurance through car dealers*, above n 3, 5; *Corporations Act 2001* (Cth) s 916E.

14 ASIC, *The sale of life insurance through car dealers*, above n 3, 29.

15 ASIC, *Sales Practices*, above n 3, 20.

16 ASIC, *Sales Practices*, above n 3, 6. The exact figure is 19.4%

at the end of a long process focused on the purchase of the primary product, the car, and suffer from information overload and decision fatigue. There are different salespersons for the car and the CCI.¹⁷

Although sales by ADIs and car dealers are different, ASIC's findings identify remarkably similar problems.¹⁸ Consumers did not realise that taking out consumer credit insurance was optional;¹⁹ some consumers believed they had not consented to buying CCI, and some ADIs did not obtain and retain evidence of consent to the sale of CCI.²⁰ Consumers were often hazy about CCI, and some did not even know they had purchased it.²¹ Even if consumers knew they had bought CCI, they did not know what they had bought, as they were unaware of product features.²² Consumers were concerned about high pressure sales even when they said they did not want CCI.²³

Some consumers believed they were misinformed about the cost of CCI in the course of the sales process and induced to take it out. Mis-statements included: there was only a one-off payment when it was actually payable monthly, there was no premium payable if the consumer paid off the loan balance in full each month, the premium payment was lender's mortgage insurance or another cost of the loan, that during the cooling-off period the CCI was free.²⁴ In some cases, there was no disclosure that premiums were capitalised into the cost of the loan, which meant interest was paid on the premium. This could affect the loan to value ratio leading to a requirement for lender's mortgage insurance.²⁵

17 ASIC, *Buying Add-on insurance in car yards*, above n 3, 29.

18 The ADI and car yard reports used different methodologies. The report on ADI sales practices was based on data from 2009, prior to the suitability tests and revamped hardship provisions for credit in the *NCCP Act* and looked at CCI for home loans, personal loans and credit cards. It surveyed 15 ADIs but no lenders who were not deposit takers. It examined how CCI is sold, the volumes of sales and claims, how the ADIs train staff and monitor sales, and complaints and breaches. The reports on car yard insurance were based on qualitative research with a behavioural economics approach to plumb the actual experience of consumers in making decisions on add-on insurance, and on data from five major life insurers offering this product in car yards. ASIC, *Sales Practices*, above n 3; ASIC, *Buying Add-on insurance in car yards*, above n 3; ASIC, *The sale of life insurance through car dealers*, above n 3.

19 ASIC, *Sales Practices*, above n 3, 7; Consumer Action Law Centre, above n 3, 17.

20 ASIC, *Sales Practices*, above n 3, 21; ASIC, *The sale of life insurance through car dealers*, above n 3, 9.

21 ASIC, *Consumers' Claims Experiences*, above n 3.

22 ASIC, *The sale of life insurance through car dealers*, above n 3, 26.

23 ASIC, *Sales Practices*, above n 3, 24.

24 Ibid 25.

25 Ibid 25, 26.

A further problem related to the characteristics of the product sold. The benefits of CCI are debateable.²⁶ The sale to consumers of products patently unsuitable for their circumstances was noted in the junk insurance report and by ASIC.²⁷ Some CCI policies were sold to people who were unable to claim on the policy due to the exclusions of standard cover such as voluntary unemployment, or age. The risk of this was greater when CCI was sold as a packaged product where consumers were not able to select the particular aspect of CCI they needed.²⁸ Consumers were not asked questions about their eligibility at the time of sale of the product.²⁹ They took out the policy very quickly and generally were not well informed about the terms and conditions of the policy. This can result in over-insurance as many consumers already have insurance for death, disability and unemployment, through products linked to compulsory superannuation. In particular, MySuper has basic life insurance.³⁰ ASIC discovered a link between the sales channel and the quality of life insurance sold. Consumers obtained better policies directly from life insurers or from ADIs than from car yards.³¹

In October 2015, ASIC permanently banned two Western Australian finance brokers who had brokered motor vehicle finance. The brokers had organised loans for customers who did not meet the lender's lending criteria by having a friend or relative of the customer as the nominated borrower. They also sold add-on insurance to the customers without their knowledge or consent, thus increasing the amount of the indebtedness. The finance company paid compensation to the consumers. The ASIC media release characterised this simply as 'unfair conduct'.³² In addition to initial mis-selling, there was also evidence of collecting premiums for CCI products before the credit was drawn down, after the credit was repaid, and even when the consumer did not go ahead with the credit arrangement.³³

26 The poor value of add-on insurance is a target of the UK Financial Conduct Authority which has debated the claims ratio as an indicator of poor value. See Financial Conduct Authority, *General Insurance Add-Ons: Final Report—Confirmed Findings of the Market Study* MS14/1 July 2014.

27 Consumer Action Law Centre, *Junk Merchants*, above n 3; ASIC, *The sale of life insurance through car dealers*, above n 3 27.

28 ASIC, *Sales Practices*, above n 3, 23.

29 ASIC, *Consumers' Claims Experiences*, above n 3, 16, 17.

30 ASIC, *The sale of life insurance through car dealers*, above n 3, 27.

31 *Ibid* 32.

32 ASIC, 'Esanda Compensates Consumers for Conduct by Finance Broker' (Media Release, 15-312MR, 27 October 2015).

33 ASIC, 'Westpac to Refund Premiums for Unwanted Insurance Cover' (Media Release, 15-318MR, 29 October 2015).

In *Cash Store*, a payday lender sold consumer credit insurance to social security recipients. Despite making no assessment as to the suitability or affordability of the loans as required by the legislation, Cash Store sold insurance to the borrowers in case they could not pay and did not explain the terms of these policies to the insureds. The procedure was simply to tell customers that insurance had been arranged for them.³⁴ The ‘credit assistant’ (usually a broker) and ‘credit provider’ were found liable for failure to meet the disclosure obligations and suitability assessment requirements of the *NCCP Act*.³⁵ The credit provider had out-sourced its obligations to the credit assistant and that liability was attributed to the credit provider.³⁶

By selling consumer credit insurance the payday lender had engaged in statutory unconscionable conduct.³⁷ The finding of unconscionability was based on three factors related to the characteristics of the borrower, the loan, and the insurance: the relationship between the coverage and the length of time of the loan, the sale of unemployment insurance to those who were unemployed, and the ratio of premiums collected to claims paid.

The Court said it was extremely unlikely that an insured event of, say, death or disablement would occur in the loan period of one to 36 days, the average being 13 days;³⁸ and that the unemployed were ineligible to claim for the main parts of the coverage, that is disability and unemployment.³⁹ The payday lender collected \$2 million in premiums and paid out claims of \$25,000.⁴⁰ This was a ratio of claims to premiums of 1.1%. The industry average was 20.7%.⁴¹ There was no question of indifference or inadvertence by the payday lender, who appears to have been predatory.⁴² The decision is striking for an absence of discussion of the disclosure

34 *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)* [2014] FCA 926 *Cash Store* [84].

35 The relevant credit assistant provisions were the *NCCP Act* ss 113, 115, 116, 117, 118, 119, 123; *Cash Store* [14]–[29], [30]–[62], [66].

36 The relevant provisions were the *NCCP Act* ss 128, 129, 130, 131, 133, 126; *Cash Store* [68], [75].

37 *ASIC Act* s 12CB; *Cash Store* [83].

38 *Cash Store* [90].

39 *Ibid* [91].

40 *Ibid* [94].

41 *Ibid* [89].

42 See *Schultz v Bank of Queensland Ltd* [2015] QCA 208, [51]; *Kakavas v Crown Melbourne (Limited)* (2013) 250 CLR 392, [142].

provisions for insurance in either the *Insurance Contracts Act 1984* (Cth) or the *Corporations Act 2001* (Cth) coupled with extensive discussion of the *NCCP Act* disclosure provisions for credit. Nor was there consideration of other protective provisions in the *ASIC Act*, such as the general misleading or deceptive conduct prohibition.⁴³ While the suitability of the credit was at issue, misleading borrowers about the suitability of the insurance was not.⁴⁴

III THE PRODUCT

Insurers are innovative in the way they package CCI and require certain combinations of insurance. This is very different from the model ‘standard cover’ insurance policy plus room for unusual terms as envisaged by public policy underlying the *Insurance Contracts Act* which is discussed below.

The insurer manufactures the CCI product. This may be a life policy that covers death and sometimes permanent disability. As sold in car yards, this is commonly walkaway insurance for accidental death and trauma insurance for a major illness.⁴⁵ The CCI may be a hybrid with life and general insurance components.⁴⁶ These bundled products may include insurance for unemployment or injury.⁴⁷ Some CCI policies on credit card debt have ‘price protection’ which covers the consumer if an item purchased by credit card is subsequently promoted at a lower price.⁴⁸

CCI is not available on the websites of all insurers. The Insurance Council of Australia website shows four insurers who offer consumer credit protection insurance.⁴⁹ A random selection of Product Disclosure Statements (PDS) shows a variety of products. GE Money provides Account Protection⁵⁰ a credit card insurance product that combines shopper’s cover protection with repayment protection. The repayment protection includes life cover, critical illness, disability cover and involuntary unemployment cover. For personal loans the GE Money Loan Protection product is badged ‘peace of mind made simple’ because the premium is a single amount added to the loan. The cover is for involuntary unemployment,

43 *ASIC Act* s 12DA.

44 *ASIC Act* s 12DF. This provision rests on misleading the public.

45 ASIC, *The sale of life insurance through car dealers*, above n 3, 5.

46 ASIC, *Sales Practices*, above n 3, 13.

47 ASIC, *The sale of life insurance through car dealers*, above n 3, 5.

48 ASIC, *Consumers’ Claims Experiences*, above n 3, 40.

49 These are GE Money; Great Lakes Australia; Swann Insurance; Virginia Surety Company Inc. <http://www.findaninsurer.com.au/category/12137> accessed 17/03/2016.

50 Account Protection Everything you need to know about credit card insurance for your GE Money MasterCard Combined Financial Services Guide, Product Disclosure Statement and Policy Prepared 27th October 2015.

disability and death cover. Involuntary unemployment is not offered on its own or solely with death cover so it must be taken with disability cover. In both cases the life component is offered under a binder with Hallmark Life Insurance.⁵¹

Swann Insurance offers Protection Plus Consumer Loan Insurance to help the insured dispose of a vehicle and provide the balance owing to the financier in the event of accidental death, specified illness, disability, inability to drive due to a medical condition, an international job transfer or involuntary unemployment.⁵² Swann also offers Loan Protection Insurance for loans where the outstanding balance reduces as each repayment is made. The policy may cover life insurance, disablement, hospitalisation, involuntary employment and cashAssist. Here also, involuntary unemployment cover cannot be taken out on its own as it must be taken out with disability and hospitalisation cover. Neither can cashAssist be taken out on its own. The premium is payable by the debtor and with the exception of cashAssist benefits, payments are made to the financier. This PDS states that Swann Insurance holds an insurance policy for life and cashAssist benefits issued by National Mutual Association of Australasia on trust for Loan Protection Insurance customers.

IV STANDARD COVER AND OTHER DEFINITIONS OF CCI

CCI is defined differently in different pieces of legislation, though some echo each other. There are also differing requirements as to whether or not the CCI must be for a consumer or retail client. These different definitions and requirements have a significant impact on ensuing obligations, and are set out for this reason.

CCI is a form of standard cover insurance, one of a class of prescribed insurance contracts with prescribed coverage for prescribed events and governed by the *Insurance Contracts Act 1984* (Cth).⁵³

The idea of standard cover was to outline a model insurance policy to provide some certainty for consumers but then allow competition in the market by requiring disclosure of policy features that differed from the standard cover. The point was that an insured should know of unusual terms in the policy. Insurers could vary the terms from standard cover but insureds should know of these and not be 'surprised'.⁵⁴ The Law Reform Commission on insurance contracts referred to model policies⁵⁵ rejecting self-regulation in favour of standardisation prescribed

51 Peace of Mind Made Easy. All you need to know about insurance for your personal loan. Loan Protection Insurance Combined Financial Services Guide Product Disclosure Statement and Policy Prepared on 27th October 2015 GE Money.

52 Swann Insurance Protection Plus Consumer Loan Insurance Product Disclosure Statement and Insurance Policy Preparation Date 31 January 2015.

53 *Insurance Contracts Regulations 1985* (Cth) regs 2A, 21, 22.

54 Law Reform Commission, *Insurance Contracts, Report No 20* (1982), xix, xxii, 44, 45.

55 Ibid 36.

by regulation.⁵⁶ There was little opposition and considerable support for standard cover when it was introduced.⁵⁷

The other forms of prescribed standard cover insurance are motor vehicle, home buildings, home contents, sickness and accident and travel insurance. Unlike these other areas, there was no pre-standard cover industry model policy for consumer credit insurance.

The events covered by standard cover CCI are the death of the insured; or where the insured contracts a sickness or disease; sustains an injury; or becomes unemployed.⁵⁸ The prescribed events are:

the total disablement of the insured person from carrying out all the normal duties of his or her usual occupation as a result of the insured person contracting a sickness or disease, being disablement that occurs within 12 months after the insured person contracted the sickness or disease ... [and] the death of the insured person, or the total disablement of the insured person from carrying out all the normal duties of his or her usual occupation, as a result of the insured person sustaining an accidental injury, being death or disablement that occurs within 12 months after the insured person sustains the injury ... [and] the insured person becoming unemployed.⁵⁹

There are a number of prescribed exclusions. These include death, disablement or unemployment resulting from a deliberately self-inflicted injury or the insured being addicted to alcohol or drugs, or unemployment at the end of a contract where the insured is employed for a specified period.⁶⁰

The repayments of the insured debtor are covered only for the prescribed events but not if they occur because of the exclusions. This is not the whole story because insurers can offer insurance on different terms from those prescribed. As we saw above, contemporary consumer credit insurance policies may have additional features such as protection for the goods or services sold such as ‘merchandise protection’.⁶¹

The *Insurance Contracts Act, 1982* (Cth) applies to contracts of insurance.⁶² The application of the *Insurance Contracts Act* does not depend on supply of insurance

⁵⁶ Ibid 44.

⁵⁷ Ibid 35.

⁵⁸ *Insurance Contracts Act 1985* (Cth) s 11; *Insurance Contracts Regulations 1985* (Cth) regs 2A, 21.

⁵⁹ *Insurance Contracts Regulations 1985* (Cth) reg 22.

⁶⁰ *Insurance Contracts Regulations 1985* (Cth) reg 23.

⁶¹ ASIC, *Consumers' Claims Experiences*, above n 3, 11.

⁶² *Insurance Contracts Act 1984* (Cth) s 8. In section 9 of the Act there are exceptions which include insurance entered into for the purpose of a law and covering death from a motor accident and employer's liability for work related injury.

to a consumer and does not define it. Presumably the credit in 'consumer credit insurance' depends on credit supplied to a consumer. Both the *National Consumer Credit Protection Act* and the *National Credit Code* define a consumer as a natural person.⁶³

CCI may have aspects of both general insurance and life insurance. General insurance is insurance that is not life insurance.⁶⁴ A life insurance policy includes payment of money contingent on death.⁶⁵ A life insurance policy may also include continuous disability insurance.⁶⁶ However, this latter is specifically excluded from the meaning of standard cover CCI.⁶⁷

For the purposes of Chapter 7 of the *Corporations Act 2001* (Cth), both general insurance and life insurance are 'financial products'.⁶⁸ For this Act, managing risk is a financial product and insurance manages risk.⁶⁹ More specifically, this includes contracts of insurance and certain life policies, and would cover the life (or death) cover provided in connection with consumer credit.⁷⁰ There are two definitions of CCI in the *Corporations Act*, one for the purposes of the distinction between a retail client and a wholesale client and the other for enhanced PDS obligations. For the first purpose, CCI is defined more simply than in the *Insurance Contracts Act*. It is cover (whether or not that is restricted in some way) for death, illness, injury or unemployment.⁷¹ It does not depend on a link to the person's 'normal' occupation as in the standard cover definition. In the second case, for the PDS, CCI is a general insurance product that is as prescribed as consumer credit insurance in the *Insurance Contracts Act* and thus aligns with the *Insurance Contracts Act* definition.⁷²

63 A strata corporation is also a consumer. *NCCP Act 2009* (Cth) s 5; *NCCP Act* Sch 1 s 5(1)(a).

64 *Insurance Contracts Act 1984* (Cth) s 11(6).

65 A contract of life insurance is a life policy within the Life Insurance Act: *Insurance Contracts Act 1984* (Cth) s 11(1). A life policy includes a contract for insurance for the payment of money on death: *Life Insurance Act 1995* (Cth) s 9 (1)(a). It is not a life policy if the contract is for one year or less and the payment is contingent on death by accident or by specified sickness: *Life Insurance Act 1995* (Cth) s 9(2).

66 *Life Insurance Act 1995* (Cth) s 1(e). A continuous disability policy must be for more than three years and payment contingent on death by accident of the person whose life was insured, injury or disability as a result of sickness or accident, or discovery of a stated condition or disease: *Life Insurance Act 1995* (Cth) s 9A(1).

67 A consumer credit contract within the meaning of the *Insurance Contracts Act* is not a continuous disability policy: *Life Insurance Act 1995* (Cth) s 9A(6).

68 *Corporations Act 2001* (Cth) s 764A(1)(d)? (f).

69 *Corporations Act 2001* (Cth) s 763C.

70 Excluded Life policies include those provided by trade unions, employers for their employees, and funeral and cremation policies. *Corporations Act 2001* (Cth) s 764A (1) (d) (e); *Life Insurance Act 1995* (Cth) s 11 (3)(c).

71 *Corporations Regulations 2001* (Cth) reg 7.1.15. Exclusions include workers' compensation and compulsory third party insurance.

72 *Corporations Regulations 2001* (Cth) reg 7.9.16.

Certain disclosure protections in Part 7 of the *Corporations Act* apply only to the 'retail client'.⁷³ If a product is, or a service relates to, a general insurance product and it is a CCI product as defined, then the product is provided to a retail client, provided that person is an individual or the product is for a small business.⁷⁴

The *ASIC Act* applies to CCI but does not define it. For the *ASIC Act*, insurance is a financial product as it manages risk and is also specifically included as a financial product.⁷⁵ This is a wide definition for the purposes of consumer credit insurance.⁷⁶ There is no retail client or consumer requirement for the general application of the *ASIC Act*. However specific protections are limited to consumers.⁷⁷ In these cases, the definition of 'consumer'⁷⁸ is different from the definition of 'retail client' and different also from the requirements for the application of the *National Credit Code*.

The *NCCP Act* and the *National Credit Code* also define CCI. Here, CCI is to insure the capacity of the debtor to make repayments under the 'credit contract'.⁷⁹ Thus it is specifically related to a credit contract within the meaning of the Code.⁸⁰ It insures the debtor against sickness, injury, disability or death or unemployment.⁸¹ The definition also includes life insurance to cover outstanding amounts on the death of the debtor.⁸² Here, life insurance specifically includes insurance under a group policy.

The *National Credit Code* applies to CCI only if the insurance secures the obligations of the debtor under the 'credit contract'.⁸³ The debtor must be a natural person (or a strata corporation).⁸⁴ The Code requires a credit contract to which the Code applies.⁸⁵ For this purpose, the credit must be provided by a person who is in the business of providing credit, and provided or intended to be provided wholly or predominantly for personal, domestic or household use or for residential investment purposes.⁸⁶ These are also the requirements for a credit contract under the *NCCP*

73 *Corporations Act 2001* (Cth) ss 761G, s 941A, s 944A. This does not include a Product Disclosure Statement.

74 *Corporations Act 2001* (Cth) s 761G (5)(b)(v), s 761G (5)(a).

75 *ASIC Act* ss 12 BAA(5) Note 1 (a), 12BAA(7)(d)(e).

76 It also includes those life policies which are not contracts of insurance. *ASIC Act* ss 12 BAA (7) (e), 12BAA (9).

77 For instance, *ASIC Act* s 12BF (unfair terms in a consumer contract); *ASIC Act* s12DJ (harassment and coercion in connection with supply); *ASIC Act* s 12ED (warranties in relation to supply).

78 *ASIC Act* s 12BC.

79 *NCCP Act* sch 1 s 204.

80 *NCCP Act* s 5; *NCCP Act* sch 1 ss 204, 4, 5.

81 *NCCP Act* sch 1 s 204.

82 *Ibid.*

83 *NCCP Act* sch 1 s 142 (3).

84 *NCCP Act* sch 1 s 5 (1)(a).

85 *NCCP Act* sch 1 s 4.

86 *NCCP Act* sch 1 ss 5 (1)(d)(b).

Act.⁸⁷ The *National Credit Code* does not apply if the insurer provides credit for the payment of premiums by instalment.⁸⁸

The *National Credit Code* uses the concept of 'credit related insurance' to encompass different types of insurance. Credit related insurance is insurance related to a 'credit contract' and includes CCI and insurance over mortgaged property.⁸⁹ Some provisions apply specifically to CCI, others apply to credit related insurance of which CCI is one type.

V REGULATION OF SALE OF CCI

It is sometimes stated that consumers cannot be forced to take out consumer credit insurance or deal with particular insurers. This protection applies only if the insurance relates to a 'credit contract' that falls under the *NCCP Act*.⁹⁰ Most CCI is likely to do so. The prohibitions apply to suppliers of goods and services and to credit providers. Neither a supplier nor a credit provider can require the debtor to take out insurance, pay for insurance if the supplier or the credit provider takes out or arranges it, or represent to the debtor that they must pay.⁹¹ The exceptions are compulsory insurance, mortgage indemnity insurance or insurance over mortgaged property. CCI is not one of the exceptions as it is not compulsory and does not insure the lender or cover property. If it is one of these exceptions, then neither the credit provider nor supplier can require insurance with a particular insurer, or require unreasonable insurance terms.⁹² These are strict liability prohibitions that may have either criminal or civil consequences.⁹³ If it were represented to a debtor that they had to pay for or take out CCI, either the credit provider or the supplier may have to refund the whole of the premium to the debtor.⁹⁴

While the *Insurance Contracts Act* has no specific provisions on selling insurance, the reciprocal duty of utmost good faith is relevant as the insurance contract must be based on this obligation.⁹⁵ Absence of good faith is not limited to dishonesty and the insurer's obligation may require adherence to commercial standards of decency in fairness towards the insured.⁹⁶ The Law Reform Commission warned that a debtor should not have CCI taken out without his knowledge, particularly as

87 *NCCP Act* s 5.

88 *NCCP Act* sch 1 s 6(8).

89 *NCCP Act* sch 1 s 142(1).

90 *NCCP Act* sch 1 ss 142, 5.

91 *NCCP Act* sch 1 s 143(1).

92 *NCCP Act* sch 1 ss 143(1)?(2).

93 *NCCP Act* sch 1 s 143.

94 *NCCP Act* sch 1 s 143(4).

95 *Insurance Contracts Act 1984* (Cth) s 13.

96 *CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36 [15] (Gleeson CJ and Crennan J) [257] (Callinan and Heydon JJ).

without that knowledge the insured debtor would not be able to meet his duty of good faith towards the insurer.⁹⁷ As we saw above, this is still a problem over three decades later. The duty also applies to third party beneficiaries but only after the contract has been entered into.⁹⁸ Thus, under this provision, creditors of insureds to whom CCI benefits may be paid directly, have no obligation for selling practices which occur prior to the contract.

The 'legislative morass'⁹⁹ of the multiple provisions in the *Corporations Act* and the *ASIC Act* relevant to selling practices focuses on false, dishonest and misleading behaviours. With the exception of the general misleading or deceptive provision, they may have civil or criminal consequences.¹⁰⁰ While these provisions mostly require the impugned behaviour to be in relation to a financial product or service, and insurance is a financial product, they have largely been used in the context of investment and advice rather than insurance. The general prohibition against misleading or deceptive conduct in the *Corporations Act* and the *ASIC Act* is substantially the same, the first applying to products and services and the second applying only to products.¹⁰¹ Neither applies to defective disclosure documents, that is, Financial Services Guides (FSG) and PDSs. As CCI is not sold via personal advice, the Statement of Advice is not relevant.

There are another four pertinent provisions: the prohibition on a person who does not care or should reasonably know, who makes materially false or misleading statements that induce a person to apply for a financial product;¹⁰² engaging in dishonest conduct in the course of carrying on a financial services business, that is conduct that is dishonest according to the standards of ordinary people and known by the business to be dishonest according to these standards;¹⁰³ falsely representing that financial services are of a particular standard or that a particular person has agreed to acquire them;¹⁰⁴ conduct liable to mislead the public as to the characteristics or suitability for purpose of financial services.¹⁰⁵ It is also worth

97 Law Reform Commission, *Insurance Contracts*, above n 54, 64.

98 *Insurance Contracts Act 1984* (Cth) ss 13 (3), (4).

99 *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in Liq)* [2012] FCA 1028 [948] (Rares J).

100 *Corporations Act 2001* (Cth) s1041H.

101 *Corporations Act 2001* (Cth) s 1041H, *ASIC Act* s 12DA.

102 *Corporations Act 2001* (Cth) s 1014E.

103 *Corporations Act 2001* (Cth) s 1014G.

104 *ASIC Act* s 12DB.

105 *ASIC Act* s 12DF. In *Stevens v Colonial Mutual Life Assurance Society & Commonwealth Financial Planning* [2012] NSWDC 94 [128] a representation by Colonial Mutual trading as Commisure to a retail customer of the CBA that a new CML life insurance policy was better than the individual's existing Westpac life insurance policy was treated as conduct liable to mislead the public.

noting the prohibition on undue harassment or coercion in connection with the supply of financial services.¹⁰⁶ These provisions were not used in *Cash Store*.

The 'morass' includes the complex definitions of a financial product or a financial service of which it was said 'Why does the Court have to waste its time to wade through this legislative porridge to work out which one or ones of these provisions apply even though it is likely the end result will be the same'.¹⁰⁷ Issuing an insurance policy is a financial service as it is the issue of a financial product.¹⁰⁸ Despite this, the warranty provisions that a financial service be provided with due skill and care and be fit for a communicated purpose do not apply to a contract of insurance.¹⁰⁹ There is no such exclusion of insurance from the unconscionable conduct provisions,¹¹⁰ which were used to good effect in *Cash Store*.

There is an even further complexity as a contract of insurance is also a service for the purposes of the *ACL*¹¹¹ and the *Competition and Consumer Act*.¹¹² However, the *ACL* does not apply to financial services and a financial service includes insurance.¹¹³ None of the *ACL* provisions, apart from those regarding the liability of suppliers and linked credit providers, applies to financial services.¹¹⁴ The provisions regarding misleading conduct and unfair contract terms do not apply to conduct engaged in or in relation to financial services.¹¹⁵

The new voluntary Life Insurance Code of Practice applies to CCI, if issued by a life insurer.¹¹⁶ It goes some way in addressing sales problems with new sales rules and requiring evidence of consent if a person applies for CCI.¹¹⁷

The prohibitions on requiring a debtor to take out CCI or representing that the debtor must pay for it, do not extend to representations that it is desirable to have it. The widespread evidence of sales practices that seek to sell CCI in ways that do not benefit the buyer suggests that close attention should be given to a more coherent legislative framework and better enforcement.

106 *ASIC Act* s 12DJ.

107 *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in Liq)* [2012] FCA 1028 [948] (Rares J).

108 *ASIC Act* ss 12BAB (1)(b), 12BAB (7), 12BAB (8).

109 *ASIC Act* ss 12ED (2A), (3); Neither do the consumer guarantees in the *ACL* apply to a contract of insurance: *Competition and Consumer Act 2010* (Cth) Schedule 2 s 63 (b).

110 *ASIC Act* ss 12CA, 12CB, 12CC.

111 *Competition and Consumer Act 2010* (Cth) Schedule 2 s 2, services (iv).

112 *Competition and Consumer Act 2010* (Cth) s 4.

113 *Competition and Consumer Act 2010* (Cth) s 131A; *Competition and Consumer Act 2010* (Cth) sch 2 s 2 defines financial service and financial product to have the same meaning as *ASIC Act* ss 12BAB, 12BAA.

114 *Competition and Consumer Act 2010* (Cth) s 131A(1).

115 *Competition and Consumer Act 2010* (Cth) s 131A(2).

116 Life Insurance Code of Practice 2.10 (h)

117 Life Insurance Code of Practice 4.3, 4.7

VI SUITABILITY OF CCI

There is no suitability test for insurance in Australia.¹¹⁸ Because CCI is sold under a general advice model and not a personal advice model, sales do not trigger the ‘best interests’ duties and ‘appropriate’ advice standard in the *Corporations Act*.¹¹⁹ Nevertheless, the insurer or its representative must warn the retail client that it has not taken into account the person’s objectives, financial situation or needs and for this reason, the client should consider the appropriateness of the advice and consider the PDS before taking a decision.¹²⁰ The lack of a suitability test for insurance, contrasts with consumer credit where both the credit assistant and the credit provider must assess whether the proposed credit meets the needs and objectives of the proposed debtor.¹²¹ Further, in the event of unforeseen circumstances (including those covered by CCI), the revamped hardship provisions complement the suitability provisions and allow a credit contract to be reopened on the initiative of the consumer.¹²² The Financial System Inquiry identified the failure of CCI to meet the needs of consumers.¹²³ It recommended strengthening issuer accountability via a new product design obligation which would take target markets into account.¹²⁴ This has been taken up in the Life Insurance Code of Practice which requires adherents to state the consumers for whom policies are suitable and information to enable consumers to assess the suitability of a product for their own needs.¹²⁵

VII CONSUMER CREDIT INSURANCE AND DISCLOSURE

The point of disclosure is to enable persons to compare products and choose whether or not to enter transactions. Given knowledge of high pressure sales of CCI, particularly in car yards, and the questionable utility of disclosure in the light of cognitive biases,¹²⁶ the disclosures described below offer limited protection. Both the insurer and the credit provider have disclosure obligations. An insured must receive disclosure documents. For CCI this may involve three

118 This contrasts with German law that generally requires the insurance to be suitable and UK law that requires the advice about the insurance to be suitable. Leander D Loacker, *Informed Consumer Choice? The Insurer’s Pre-Contractual Information Duties in General Consumer Insurance* (Edward Elgar, 2015) 195, 240, 243, 247.

119 *Corporations Act 2001* (Cth) ss 961B (1), 961G.

120 *Corporations Act 2001* (Cth) s 949A.

121 *NCCP Act* s 115, s 128.

122 *NCCP Act* sch 1 s 72.

123 Murray, above n 1, 200.

124 *Ibid* 198.

125 Life Insurance Code of Practice 3.1 (a), 3.1 (d)

126 Omri Ben-Shahar and Carl E Schneider, *More Than You Wanted To Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014).

sets of legislation. Insurance is a financial product.¹²⁷ Like many other financial products these obligations rest on a combination of the *Corporations Act 2001* (Cth) with the specific Act, in this case the *Insurance Contracts Act 1984* (Cth). If a credit provider finances the insurance there are also disclosure obligations under the *National Credit Code*.¹²⁸ However, if the insurer provides credit for the CCI premium to be paid by instalments, the general disclosure provisions in the *National Credit Code* do not apply.¹²⁹

What information must an insured receive? The first is information about the provider. General insurers should provide a FSG or at least the information in the FSG as the insured debtor will be a retail client.¹³⁰ The name of the insurer and the amount payable to the insurer should also be provided by the credit provider in certain circumstances. This is if a credit provider also provides credit to purchase the CCI, and the credit provider knows the debtor is to enter such an insurance contract.¹³¹

The second type of required information is about the product. There is a Key Facts Sheet for home insurance but not for consumer credit insurance.¹³² In general, retail clients must receive a Product Disclosure Statement (PDS).¹³³ An exception for insurance allows the PDS to be combined with the insurance policy.¹³⁴

Since CCI is standard cover general insurance, there must be disclosure of any term that differs from standard cover, including terms about the amounts payable.¹³⁵ The policy reason was to promote competition in products while protecting informed consumer choice.¹³⁶ As we saw above, insurers now offer products that depart significantly from the prescribed events of standard cover. In addition, specifically for CCI, the PDS must include a statement of the purposes of CCI, a statement that it is important to read the PDS to understand the extent of cover under the policy

127 *Corporations Act 2001* (Cth) ss 763A(1)(b), 763C.

128 *NCCP Act* sch 1 ss 17, 146, 147.

129 *NCCP Act* sch 1 s 6(8).

130 *Corporations Act 2001* (Cth) ss 941A, 941B, 941D.

131 *NCCP Act* sch 1 s 17 (15) (a) (b) (e).

132 *Insurance Contracts Act 1984* (Cth) ss 33A, 33B; *Insurance Contracts Regulations 1985* (Cth), regs 4A, 4B, 4C.

133 *Corporations Act 2001* (Cth) s 1013D.

134 *Corporations Act Regulations 1985* (Cth) reg 7.9.15D, 7.9.15E, 7.9.15F.

135 *Insurance Contracts Act 1984* (Cth) s 35. It is sufficient to provide the proposed policy with the relevant wording in clear and unambiguous language, understandable by a person of average intelligence and education. It is not necessary to flag this with bold typeface or on the front cover. This is not straightforward as there can be definitional problems around prescribed terms, for example 'flood' (now resolved). See *Max Hams & 1 Ors v CGU Insurance Limited* [2002] NSWSC 273 at [14] – [17], [211] – [234], [235] – [248]; *Marsh v CGU Insurance* [2004] NTCA 1 at [11]

136 The Law Reform Commission, above n 54, 45, xxvi.

and its limitations.¹³⁷ It must also include statements that the retail client is not obliged to buy CCI, and can buy CCI from a different insurer, statements about contingencies, and a table of the benefit limits.¹³⁸ The insured's duty to be truthful and a statement of commissions must be included.¹³⁹ When insurance is financed by the credit provider, the credit provider also must disclose information about the kind of insurance to the debtor.¹⁴⁰

If payment of the premium is financed under the credit contract, the debtor (the insured) must receive a copy of the insurance policy within fourteen days of the insurer accepting the insurance proposal. It is the insurer's obligation to ensure that the debtor receives the policy.¹⁴¹ This disclosure obligation of the insurer does not apply to compulsory insurance.¹⁴² CCI is not compulsory insurance, so every insured who is paying for CCI under the credit contract should receive a copy of the policy from or organised by the insurer. Contravention of this provision can be a criminal offence. If the contract of insurance is with the credit provider (the insured) and the debtor has a beneficial interest under the insurance contract (which would mean it is not CCI), the credit provider must inform the debtor giving particulars of the insurance.¹⁴³ Presumably this is to assist in preventing over-insurance if a debtor is contemplating or is already insured.

There are provisions to inform and protect the debtor if the insurer rejects a CCI proposal that the credit provider is to finance. The insurer must inform both the credit provider and the debtor that it has rejected the proposal.¹⁴⁴ This should ensure the debtors know they are not yet insured. If this happens, the credit provider must return any monies paid by the debtor unless insurance is to be arranged with a different insurer.¹⁴⁵ Failure to do so is a criminal offence.¹⁴⁶ The cooling off regime for CCI in the *Insurance Contracts Act 1984* (Cth),¹⁴⁷ was replaced by the generic provision in the *Corporations Act 2001* (Cth).¹⁴⁸ Generally there is a fourteen day window.¹⁴⁹ There are particular insurance provisions so that an insurance product

137 *Corporations Regulations 2001* (Cth) reg 7.9.16.

138 *Corporations Regulations 2001* (Cth) reg 7.9.16.

139 *Corporations Regulations 2001* (Cth) reg 7.9.16(f), (g).

140 *NCCP Act* sch 1 s 17(15).

141 *NCCP Act* sch 1 s 146(1).

142 *NCCP Act* sch 1 s 146(1).

143 *NCCP Act* sch 1 s 146(2).

144 *NCCP Act* sch 1 s 147(1).

145 *NCCP Act* sch 1 s 147(2). If the insurer pays the debtor directly the credit provider can recover from the debtor: s 147(4).

146 *NCCP Act* sch 1 s 147(3).

147 *Insurance Laws Amendment Act (No 2) 1994* (Cth) sch ss 64A, 71A(5).

148 *Corporations Act 2001* (Cth) s 1019B.

149 See *Corporations Act 2001* (Cth) s 1019B(3); *Corporations Regulations 2001* (Cth) reg 7.9.65.

cannot be returned after a claim is made and, if the insurance is for one week only, it cannot be returned at the end of the week.¹⁵⁰ The seller of CCI must confirm the transaction by notice to the retail client 'as soon as is reasonably practicable after the transaction occurs'¹⁵¹ and give 'the information that the responsible person reasonably believes the holder needs (having regard to the information the holder has received before the transaction) to understand the nature of the transaction'.¹⁵² The right of return may be exercised only by 'notifying the responsible person in a way permitted by the responsible person'.¹⁵³

Once the contract has been entered into there are further disclosure requirements if the insurance is being paid for by credit. Credit providers have an obligation to account via the mandatory information in the statement of account.¹⁵⁴ If the credit contract is financing CCI, then the statement of account must include name of the general insurer, the total amount payable to the insurers and the kind of insurance, as well as the total amount of commission to be paid by the insurers.¹⁵⁵ There is a disclosure obligation for the debtor's right to terminate credit related insurance over mortgaged property.¹⁵⁶ There is no disclosure obligation regarding the automatic termination of CCI.¹⁵⁷

Disclosure provisions specifically for CCI should be reviewed. This should be in line with the Financial System Inquiry recommendation to improve disclosure in general insurance to help consumers understand policies, key features, caps, limits and exclusions in order to make better decisions.¹⁵⁸ The Inquiry considered standardised or default insurance products and opted for innovation and enhanced guidance.¹⁵⁹ More thought should be given to the purpose of standard cover insurance. It is worth recalling the Law Reform commission: 'While standardisation of contracts might inhibit competition, standard cover should positively contribute to it by ensuring the provision of information necessary for the making of an informed choice'.¹⁶⁰ Updating standard cover regulation has been on the agenda since 2004.¹⁶¹ Something more than bald disclosure may be necessary to guide consumers towards suitable CCI.

150 *Corporations Act 2001* (Cth) s 1019B(5) Note.

151 *Corporations Act 2001* (Cth) s 1017F(5)(a).

152 *Corporations Act 2001* (Cth) s 1017F(7).

153 *Corporations Regulations 2001* (Cth) reg 7.9.64A.

154 *NCCP Act* sch 1 s 33.

155 *NCCP Act* sch 1 s 34 (10)(c)(d).

156 *NCCP Act* sch 1 s 149(2).

157 *NCCP Act* sch 1 s 148.

158 Murray, above n 1, 227.

159 *Ibid* 230.

160 *Law Reform Commission*, above n 54, 45.

161 Alan Cameron and Nancy Milne, Treasury (Cth), *Review of the Insurance Contracts Act 1984 (Cth) Final Report on Second Stage: Provisions Other than Section 54* (2004) 39ff.

VIII CCI AND COMMISSIONS

Commissions drive sales of financial products, including insurance. Conflicted remuneration models have been the subject of investigations of the financial services industry.¹⁶² Even if CCI were sold with advice, the ban on conflicted remuneration for financial advice does not apply to the sale of CCI. This is because there is an exemption from the ban for benefits given solely in relation to general insurance, CCI being sold as general insurance.¹⁶³ The total amount of commission the insurer can pay regarding CCI to which the *NCCP Act* applies is 20% of amount or value of the premium. This is the sum total accepted by all or any of the credit provider, the supplier, or an agent.¹⁶⁴ It is an offence to pay or accept such a commission.¹⁶⁵ The insured can recover the commission from the credit provider or supplier if there is a contravention of these provisions.¹⁶⁶ ASIC estimated commissions paid by insurers to car dealers can be 50 per cent or 75 per cent of the premium.¹⁶⁷

The old model of protection was to disclose commissions, the assumption being that if consumers knew of the extent of the commission being paid on a product they were contemplating, they could decide not to acquire the product. This model has been discredited as a way of limiting conflicts of interest, hence the Future of Financial Advice Reforms.¹⁶⁸ Nevertheless, disclosure of commissions still has an important role to ensure transparency although there is evidence which suggests such disclosure might confuse consumers and result in worse choices.¹⁶⁹

In general, a FSG must include a statement about payable commissions, but this information is required to the extent that it can be ascertained at the time the FSG is given by the insurer or its intermediary.¹⁷⁰ In any case, the FSG may be combined

162 Eg Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry Into Financial Products and Services in Australia*, (2009) ('Ripoll'); Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014); Murray, above n 1; Trowbridge, above n 1.

163 *Corporations Act 2001* (Cth) s 963B(1)(a), *Corporations Regulations 2001* (Cth) regs 7.7A.12G, 7.7A.12H; ASIC, 'Conflicted Remuneration' (Regulatory Guide, RG 246, 4 March 2013) Appendix, 60. There are also prospective caps for life insurance. *Corporations Amendment (Life Insurance Remuneration Arrangements) Act* (Cth) 2017.

164 *NCCP Act* sch 1 s 145(2).

165 *NCCP Act* sch 1 s 145(3).

166 *NCCP Act* sch 1 s 145(5).

167 Peter Kell, 'Regulatory Update to Insurance Industry' (ASIC speech delivered at the Insurance Council of Australia, Sydney, 27 February 2015) 6; Consumer Action Law Centre, *Junk Merchants* above n 3, 23 n 37.

168 Ripoll above n 162, 116f; *Corporations Act 2001* (Cth) ss 963E, 964A, 964D.

169 Oxera, *Review of Literature on Product Disclosure*, prepared for Financial Conduct Authority, (UK) 29 October 2014, 8 n 11.

170 *Corporations Regulations 2001* (Cth) reg 7.7.04.

with the PDS.¹⁷¹ If the CCI is financed by the credit provider and the credit provider knows the insurer is to pay a commission for the introduction of the business and the amount, the credit provider must disclose this.¹⁷² If the credit provider is to pay commission for the introduction of credit business, this should also be stated, together with the name of the person to whom it is to be paid and the amount.¹⁷³ The credit provider has ongoing disclosure obligations as the total amount of commission to be paid by the insurers must be included in statements of account.¹⁷⁴

The National Credit Code does not apply to extended warranties over mortgaged goods.¹⁷⁵ If a debtor uses finance to buy goods, gives security as is common with cars, and takes out both CCI and an extended warranty, there may be commissions built into both the insurance and the warranty. The cap on commissions on CCI does not apply to other forms of insurance associated with credit and the purchase of goods such as add-on insurance.

IX CCI CLAIMS

The point of CCI for a debtor is to claim on the policy in the event of being unable to meet debt repayments. The claims ratio was identified as a factor in finding unconscionability in *Cash Store* and is said to be an indicator of the poor value of CCI.¹⁷⁶ The Law Reform Commission commented on claims denied particularly due to exclusions from coverage,¹⁷⁷ still an ongoing issue. Both ASIC and the Consumer Action Law Centre have examined data generated in the Financial Ombudsman Service on denial of claims. This shows that there are fewer claims made on CCI policies than other forms of consumer insurance and more CCI claims are denied.¹⁷⁸ There is an increasing not diminishing rate of denial of claims.¹⁷⁹ Australian Prudential Regulation Authority (APRA) statistics show that insurers keep a higher proportion of CCI premiums than those from other forms of general insurance.¹⁸⁰

The rates of denial of CCI claims range around 12 per cent to nearly 16 per cent compared with around 2 per cent for other insurance products.¹⁸¹ For CCI sold with

171 *Corporations Act 2001* (Cth) s 942DA (1), *Corporations Regulations 2001* (Cth) reg 7.7.08A(3) (b).

172 *NCCP Act* sch 1 s 17(15).

173 *NCCP Act* sch 1 s 17(14).

174 *NCCP Act* sch 1 s 34(10)(c)(d). The commission can be expressed as a money amount or as a proportion of the premium.

175 *NCCP Act* sch 1 s 142(2)(a).

176 Financial Conduct Authority, above n 26.

177 The Law Reform Commission, above n 54, 42.

178 Consumer Action Law Centre, above n 3, 8, 9; ASIC, *Sales Practices* above n 3, 5, 6.

179 Consumer Action Law Centre, above n 3, 9.

180 *Ibid* 10.

181 ASIC, *Sales Practices*, above n 3 5?6.

credit cards, one ADI had a denial rate of 46.9% and nearly half of the ADIs had a denial rate of 30 per cent or more.¹⁸² In 2013, based on qualitative research, ASIC published a report on consumer's experiences with CCI.¹⁸³ It focused on denial of claims with respect to credit card debt and in particular denial of claims because the consumer had to stop work, usually for illness, injury or retrenchment. In 2011–12 there were 983 648 CCI policies sold and 27 388 claims of which 11.6% were denied.¹⁸⁴

There seemed to be a correlation with making enquiries and having a better understanding of the policy and a successful claim.¹⁸⁵ Most insureds did not know how to make a claim and confused the insurer with the financial institution.¹⁸⁶ Those whose claims were denied were surprised to discover eligibility criteria they did not know of.¹⁸⁷ When a claim is denied, a consumer risks further indebtedness. The premium for credit card CCI is usually calculated at \$X per \$100 of the outstanding credit card balance.¹⁸⁸ Consumers were paying between \$20 and \$120 per month for CCI.¹⁸⁹ When claims were denied, consumers' debt problems were exacerbated by continuing payment of the CCI premium.¹⁹⁰

Claims handling and settlement is excluded from the definition of a financial service which means insurers do not have to meet licence obligations to provide services efficiently, honestly and fairly.¹⁹¹ The General Insurance self-regulatory Code of Practice requires claims to be dealt with in an honest, fair, transparent and timely manner.¹⁹² Few claims and high claims denial are not just a proxy for unconscionability as in *Cash Store*. They indicate that consumers did not understand their unsuitable policies. In turn, this shows disclosure by insurers and credit providers did not ensure consumers made good choices. Given the many measures in place to prevent over-indebtedness, it is ironical that for some, CCI will make the situation worse. The solution is with what is sold, more than with how claims are handled.

182 Ibid 6.

183 ASIC, *Consumers' Claims Experiences*, above n 3.

184 Ibid 11.

185 ibid 18.

186 Ibid 5.

187 Ibid 6. For a detailed account of claim denials, see 32f, 41f.

188 Ibid 19.

189 Ibid .

190 Ibid 23f.

191 *Corporations Act 2001* (Cth) s 766A(2) (b); *Corporations Regulations 2001* (Cth) reg 7.1.33. Insurance claims handling is not excluded from the *ASIC Act* definition.

192 Insurance Council of Australia, *General Insurance Code of Practice*, 2014 cl 7.2

X INSURANCE AND UNFAIR CONTRACTUAL TERMS

Currently, the provisions in the *ASIC Act* which prohibit unfair contractual terms do not apply to contracts for insurance. This is not evident from the *ASIC Act*. When the old *Trade Practices Act 1974* (Cth) created carve-outs for insurance, it did so explicitly in the Act. The exemption for insurance is found in the *Insurance Contracts Act 1984* (Cth).¹⁹³ The Final Report of the ACL Review has again recommended insurance contracts should not be exempted from the prohibition on unfair terms.¹⁹⁴

XI LINKED PROVIDERS: CCI AND SALE OF GOODS AND CREDIT TRANSACTIONS

There are linked liability rules for credit, and goods and services. Should there be linked liability for CCI insurers? One of the justifications for the joint liability regime for sales and credit is that without the finance, there may be no sale, so the linked credit provider should bear some responsibility. CCI is not sold in a vacuum. A typical consumer transaction will involve, say, the sale of goods such as a car, finance for the goods and CCI to protect repayments for the car. The supply of the goods and services will fall under the *Competition and Consumer Act 2010* (Cth) sch 2 (ACL), which provides protection against unsafe goods and via consumer guarantees. The finance to buy the car would be subject to the *NCCP Act* and in particular the obligations of a credit assistant and the credit provider to assess whether the loan was 'not unsuitable', matters that were at issue in *Cash Store*. If there is a problem with the goods, in addition to recourse against the supplier or manufacturer, a consumer will have a potential action against the 'linked credit provider' under two sets of legislation: the *ACL* and the *NCCP Act*.¹⁹⁵ The linked credit provider may also be liable for statements made by the goods supplier about the loan.¹⁹⁶ In addition to credit for, say, the car, this may be particularly relevant if the loan is also for CCI premiums.

The definitions of a linked credit provider in both Acts are substantially the same.¹⁹⁷ In essence, a person is a linked credit provider if that person is a credit provider who has an understanding with a supplier regarding the provision of

193 *Insurance Contracts Act 1984* (Cth) s 15.

194 *Australian Consumer Law Review Final Report* March 2017 Proposal 10, p 53f

195 *Competition and Consumer Act 2010* (Cth) sch 2 s 278(1), s 280(3), s 280(4), s 282, s 281; *NCCP Act* sch 1 s 129(1).

196 *NCCP Act* sch 1 s 128(1). The linked credit provider is entitled to an indemnity from the supplier: s 128(2).

197 *Competition and Consumer Act 2010* (Cth) sch 2 s 2 'linked credit provider'; *NCCP Act* sch 1; *NCCP Act* sch 1 s 127(1).

credit to persons for payment for goods or services which are supplied by the supplier. This may involve the supplier referring persons to the credit provider, having applications forms at the supplier's premises, or provisions for signing at the supplier's premises. CCI is sold alongside credit and may also involve referral, the availability of application forms and provisions for signing at the supplier's premises, or at the credit provider's premises. Is there any impediment to a concept of the 'linked consumer credit insurer' to further distribute responsibility? Liability beyond the remote possibility of a successful insurance claim may give insurers who provide CCI pause for thought.

XII CONCLUSIONS

This paper outlines the context of the sale of CCI. In some instances this insurance serves a useful function but too often is sold to those who do not need it, are not covered by it and cannot claim on it. The concept of standard cover should be revisited and the definition of CCI made consistent between legislation. It is unacceptable that some individuals do not know they have bought CCI. Knowledge that CCI is not compulsory should be widely disseminated and legislative provisions to protect against misconduct, such as the supply of unsolicited financial services, more strictly enforced.¹⁹⁸ Debt that was once suitable may become difficult to service due to changes in life circumstances. The hardship provisions in the *NCCP Act* are designed for this. Not all borrowers need CCI. This should be publicised. CCI should not be sold to those who cannot claim. This should be more than unconscionable as in *Cash Store*, and criminal sanctions should be invoked.¹⁹⁹ There should be consistent disclosure provisions for CCI and a useful Key Facts Sheet. It should not matter how the payment for the insurance is made. If Standard Cover were standard, the role of disclosure as a moderator of potential insurer liability would be reduced. Ideally, commissions for all CCI (including life insurance components) should be banned and the exemption from the ban on conflicted remuneration for general insurance removed. If all this were done, the extent of denied claims would likely drop, along with further consumer indebtedness. The bar on review of CCI contracts for unfair terms in CCI contracts should be resolved. The liability of all actors in the sale of CCI, credit providers, insurers, representatives and distributors, and sellers should be made clear and consideration should be given to linked insurer liability. Consideration should be given to banning CCI sales at the point of sale of a credit contract and also to whether capitalised premiums should still be permitted. Virtually worthless commission-driven contracts are not good for society.

¹⁹⁸ *ASIC Act* s 12DMA.

¹⁹⁹ For instance, *ASIC Act* s 12DB.

DO CONSUMERS NEED A ‘BIT’ MORE PROTECTION UNDER AUSTRALIAN CONSUMER LAWS? THE REGULATORY RISKS AND CHALLENGES OF BITCOIN

Chinelle Van Der Westhuizen*

ABSTRACT

The creation of Bitcoin, as a digital currency, has been a significant development in the world of finance, in that it provides an alternative method of payment to consumers and businesses who use Bitcoin as a means to buy or sell goods or simply as an investment arrangement. The use of Bitcoin, as a decentralised peer-to-peer network, provides numerous benefits as a payment system, but at the same time, creates challenges for consumers due to its unregulated nature and volatile status. Therefore, when Bitcoin users enter into agreements with Initial Coin Offering (ICO) hosted companies and Bitcoin exchange platforms, the conduct by these ICOs and exchanges may be misleading and unconscionable in relation to the information they disclose to the Bitcoin user (as a consumer). This paper will consider the application of the Competition and Consumer Act 2010 (Cth) and whether the Australian Consumer Law is suited to take into consideration Bitcoin transactions under the misleading and unconscionable provisions.

I INTRODUCTION

From traditional barter to new age payment systems like Bitcoin, technology has developed over the centuries in making it possible for society now to trade in goods and services with digital currencies. The use of digital currencies, in particular Bitcoin, has provided many consumers, whether individuals or businesses, with an alternative payment method; however, the regulatory challenges associated with

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this type of payment system are still a concern. Some governments, including the Australian Government, have issued guidance notes to individual consumers and businesses relating to the use of Bitcoin as a payment system. The aims of these guidelines are to ensure that consumers and businesses are informed about the advantages and disadvantages of Bitcoin's use. Nonetheless, whether these guidance notes are sufficient to protect a consumer from unwanted failures in this payment system is still in question. Should there be 'something more' than guidelines for the use of Bitcoin and the challenges it creates for consumers? As noted by Tu and Meredith, regulation of Bitcoin 'does not fit neatly into existing models of regulation'.¹ Therefore, the challenges and need for regulation within a consumer framework will be considered in this paper in order to establish a suitable approach to regulating Bitcoin as a payment system when purchasing and trading.

The first part of this paper will consider what Bitcoin is and how this digital currency operates within the Blockchain network. Part two will be focusing on the predicaments Bitcoin raises for consumers when dealing with it as a payment system. The last part of this paper will pay attention to the Competition and Consumer Act 2010 (Cth) and how the Australian Consumer Law² regime applies to the buying, selling and/or investing of Bitcoin. This is central to the discussion on how a consumer's rights will be affected under the Australian Consumer Law (ACL), when false and misleading information is provided to the consumer (user of Bitcoin) through unconscionable conduct.³

II THE CONCEPT AND FRAMEWORK OF BITCOIN

A Introduction

Bitcoin, as a modern form of payment system, has been expressively described as 'a masterpiece of technology – a work of genius on par with the *Mona Lisa*⁴ as well as a 'phenomenal invention'.⁵ Therefore, different consumers, whether individuals

1 Kevin Tu and Michael Meredith, 'Rethinking Virtual Currency Regulation in the Bitcoin Age' (2015) 90 *Washington Law Review* 271, 271.

2 *Competition and Consumer Act 2010* (Cth) sch 2.

3 *Ibid.*

4 Joshua Doguet, 'The Nature of the Form: Legal and Regulatory Issues Surrounding the Bitcoin Digital Currency System' (2013) 73 *Louisiana Law Review* 1119, 1119.

5 Reuben Grinberg, 'Bitcoin: An Innovative Alternative Digital Currency' (2011) 4 *Hastings Science & Technology Law Journal* 159, 161.

or businesses, are able to use this technological invention as an additional form of payment system when buying or selling goods and/or investing in Bitcoin. Furthermore, Bitcoin as a 'phenomenal invention' is summarised by Tucker as follows:

There is something special about Bitcoin that makes it inherently resistant to government control. It is built on code. It lives in the cloud. It is globalised and detached from the nation state, has no own institutional owner, operates peer to peer, and its transactions are inherently pseudonymous. It cannot be regulated in the same way as the stock market, government currency markets, insurance, or other financial sectors.⁶

It is therefore considered an appealing development in the technological world for consumers, in that Bitcoin provides consumers with an alternative to purchasing goods or services instead of the use of traditional fiat such as the Australian Dollar. In this regard, it is fundamental to understand the development of Bitcoin and how consumers use Bitcoin as an alternative payment system to purchase goods or services or use it for investment purposes.

B The development of Bitcoin

Bitcoin, as a digital currency, was created and introduced in 2009 by an individual identified as Satoshi Nakamoto.⁷ Nakamoto participated in numerous technological projects with different entities; however, has been silent on Bitcoin projects since 2010.⁸ The true creator of Bitcoin remains to be seen, besides the fact that controversy was sparked in 2016 when Dr Craig Wright, an Australian technology entrepreneur, acknowledged that he was the creator of cryptocurrencies and the well-known 'Satoshi Nakamoto'.⁹ However, these claims still remain unclear. Since the creation of Bitcoin and its software, it has attracted numerous consumers and businesses to take advantage of this type of technology and the ample benefits it delivers such as privacy, anonymity and low or no transaction fee costs.

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- 6 Jeffrey Tucker, *Should Bitcoin Be Regulated Like Dollars* (May 2013) in Daniela Sonderegger, 'A Regulatory and Economic Perplexity: Bitcoin Needs Just a Bit of Regulation' (2015) 47 *Washington University Journal of Law and Policy* 175, 175.
 - 7 Noel Yahanpath and Zeb Wilton, 'Virtual Money: Betting on Bitcoin' (2014) 17(1) *University of Auckland Business Review* 37, 38.
 - 8 Coindesk, *Who is Satoshi Nakamoto* (19 February 2016) <<https://www.coindesk.com/information/who-is-satoshi-nakamoto/>>.
 - 9 Australian Broadcasting Company, 'Bitcoin: Australian Craig Wright Confirms he is Creator of Digital Cryptocurrency in Confession to Media' ABC (online), 2 May 2016 <<http://www.abc.net.au/news/2016-05-02/bitcoin-creator-craig-wright-publicly-identified/7377554>>; *Sydney Morning Herald*, 'Australian Craig Steven Wright Reveals Himself as Bitcoin's Mysterious Mastermind Satoshi Nakamoto' *Sydney Morning Herald* (online), 2 May 2016 <<http://www.smh.com.au/technology/innovation/australian-craig-steven-wright-reveals-himself-as-bitcoins-mysterious-mastermind-satoshi-nakamoto-20160502-goke5e.html>>.

In general, Bitcoin can be labelled as a 'digital currency'.¹⁰ It is referred to as a decentralised payment system that makes use of a peer-to-peer network when making payments or transactions.¹¹ Peer-to-peer networks can be defined as 'distributed systems consisting of interconnected nodes able to self-organise into network topologies with the purpose of sharing resources...without requiring the intermediation or support of global centralised servers or authorities'.¹² Similarly, the Financial Action Task Force (FATF) defines digital currencies as 'a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status'.¹³ Thus, a complex mathematical code or so-called cryptography is used to make sharing of resources, specifically trading of currencies, between users possible without the intervention of a third-party banking institution because of the lack of legal tender status.¹⁴ It is therefore an unconventional method of payment compared to other traditional payment methods such as credit cards and EFT payments used by consumers or businesses.

It is also a system that uses pseudonyms and cryptography,¹⁵ in order to make these online payments.¹⁶ In developing this system, Satoshi Nakamoto's aim, purportedly, was to remove the third party financial observer, for example the Reserve Bank of Australia, from the three-way party transaction.¹⁷ Therefore, no legal entity governs the process of Bitcoin transactions and because of the lack of government regulation, the development and nature of Bitcoin has made consumers vulnerable to numerous legal issues.

10 Grinberg, above n 5, 162.

11 Nicole Swartz, 'Bursting the Bitcoin Bubble: The Case to Regulate Digital Currency as a Security or Commodity' (2014) 17 *Tulane Journal of Technology and Intellectual Property* 319, 320.

12 Stephanos Androutsellis-Theotokis and Diomidis Spinellis, 'A Survey of Peer-to-Peer Content Distribution Technologies' (2004) 36 *ACM Computing Surveys* 335, 337.

13 Financial Action Task Force, *Virtual Currencies: Key Definitions and Potential AML/CFT Risks*, FATF Report (June 2014) <www.fatf-gafi.org>.

14 See, eg, Jeffrey Simser, 'Bitcoin and Modern Alchemy: In Code We Trust' (2015) 22 *Journal of Financial Crime* 156-169.

15 Makes use of mathematical equations to transfer money. A 64-digit algorithm needs to be solved in order to obtain at least 50 Bitcoin in a transaction.

16 Francis Mann, *The Legal Aspect of Money: With Special Reference to Comparative Private and Public International Law* (Clarendon Press, 4th ed, 1982) 8. See also Catherine Christopher, 'Why on Earth do People use Bitcoin?' (2014) 2(1) *Business & Bankruptcy Law Journal* 1-3. After 2010, the first pizza could be bought. The value was \$25 in exchange for 10,000 BTC – Loredana Maftai, 'Bitcoin – Between Legal and Informal' (Working Paper VI, University of Iasi, Romania, 2013) 53, 57.

17 Doguet, above n 4, 1122.

C *The players and operation of Bitcoin*

The operation and use of Bitcoin as a means of payment may seem basic; however, in order to facilitate a payment through this network, Bitcoin will need to complete a number of stages in order for a Bitcoin user to access those funds when buying or selling items. Bitcoin are not traded through traditional banking methods but through a process called ‘mining’ on the Blockchain network. This network allows users to create and open electronic wallets, on the user’s computer, to store Bitcoin, and is effectively seen as a stand-alone payment system.¹⁸ In brief, the ‘mining’ process works as follows.¹⁹ A computer with distinct and unique software will ‘mine’ or create a Bitcoin using specific mathematical calculations. Baros compares this mining process to mining gold and adds that ‘mining is a competitive process in which Bitcoin “miners” use special network processors and hardware to process transactions, secure the network, and solve algorithms that generate new Bitcoin’.²⁰ This process can further be explained as follows:

A user, wishing to make a payment, issues payment instructions that are disseminated across the network of other users. Standard cryptographic techniques [mining] make it possible for users to verify that the transaction is valid – that the would-be payer owns the currency in question. Special users in the network, known as ‘miners’, gather together blocks of transactions and compete to verify them. In return for this service, miners that successfully verify a block of transactions receive both an allocation of newly created currency and any transaction fees offered by parties to the transactions under question.²¹

Therefore, once the algorithm is solved by using the mining process, the software network will mark the transaction as a ‘block’.²² The ‘block’, also referred to as the ‘Blockchain’, is only a record-keeper of all the transactions solved. The Blockchain

18 Cara R Baros, ‘Barter, Bearer, and Bitcoin: The Likely Future of Stateless Virtual Money’ (2014) 23 *University of Miami Business Law Review* 201, 212.

19 See Chris Rose, ‘The Evolution of Digital Currencies: Bitcoin, A Cryptocurrency Causing a Monetary Revolution’ (2015) 14(4) *International Business and Economics Research Journal* 617; Rainer Böhme, Nicolas Christin, Benjamin Edelman and Tyler Moore, ‘Bitcoin’ (2014) *Journal of Economic Perspectives* 6-7; LS, ‘How Bitcoin Mining Works’, *The Economist* (online), January 2015 <<http://www.economist.com/blogs/economist-explains/2015/01/economist-explains-11>>; Ken Tindell, ‘Geeks Love the Bitcoin Phenomenon Like They Loved the Internet in 1995’, *Business Insider Australia* (online), April 2013 <<http://www.businessinsider.com.au/how-bitcoins-are-mined-and-used-2013-4?r=US&IR=T>>.

20 Cara Baros, ‘Barter, Bearer, and Bitcoin: The Likely Future of Stateless Virtual Money’ (2015) 23 *Miami Business Law Review* 201, 213.

21 Robleh Ali, John Barrdear, Roger Clews and James Southgate, ‘Innovations in Payment Technologies and the Emergence of Digital Currencies’ (2014) 54(3) *Quarterly Bulletin* 266.

22 Ibid.

is also a public record-keeping system of all Bitcoin transactions shared between all Bitcoin miners and users. This public ledger was included into the 'mining' system in order to keep a footprint of transactions and circulation of coins in the system.²³ The Blockchain will then send the 'miner' a confirmation that the transaction occurred. This confirmation only reveals to the miner that the transaction was processed.²⁴

As soon as a confirmation is sent and confirmed, a private key will be delivered to the user's Bitcoin wallet, which is similar to a bank account but only within an online computer application.²⁵ This private key provides the Bitcoin user with an online address (similar to an account number within traditional banking) to spend and trade the Bitcoin within that account. This is a very significant feature of the Bitcoin system because the private key is sent directly to the user's wallet and not stored on the Blockchain, which indicates users are anonymous in their private dealings with one another.²⁶ However, as mentioned, Bitcoin also includes a public ledger which signifies that there is a public key available when operating Bitcoin on the Blockchain network.²⁷ Therefore, according to Luther and Olson, Bitcoin 'functions as a public record-keeping device'.²⁸

The public and private keys are different in that the public key will be displayed on the public ledger (record) whereas the private key is used to make anonymous payments using the Bitcoin wallet. Once the Bitcoin are sent to the user's wallet and the user has access with the private key, the user can make use of different Bitcoin exchange platforms to store and exchange their Bitcoin.²⁹ Once the Bitcoin are sent to a wallet, it is necessary to exchange the Bitcoin to, for example, Australian Dollars on a Bitcoin exchange platform if the user wishes to use Bitcoin as traditional fiat currency.³⁰ Although the process of 'mining' is needed to generate and trade Bitcoin, the supply and circulation of Bitcoin is limited to 21 million.³¹

23 Ibid. See also Stephen Small, 'Bitcoin: The Napster of Currency' (2015) 37 *Houston Journal of International Law* 581, 582.

24 Ibid 213. See also Larissa Lee, 'New Kids on the Blockchain: How Bitcoin's Technology Could Reinvent the Stock Market' (2016) 12 *Hastings Business Law Journal* 81, 87.

25 Ibid. See also Danton Bryans, 'Bitcoin and Money Laundering: Mining for an Effective Solution' (2014) 89 *Indiana Law Journal* 441, 443.

26 Ibid.

27 Franco Pedro, *Understanding Bitcoin* (Wiley, 2014) 56.

28 William Luther and Josiah Olson, 'Bitcoin is Memory' (2013) 3(3) *Journal of Prices and Markets* 22.

29 Some exchange platforms include Flexcoin and Mt Gox, but both these platforms have been shut down due to Bitcoin disappearing from the system as a result of online hacking.

30 See for example Coinbase.

31 The Statistics Portal, *Number of Bitcoin in Circulation 2011-2017* (2017) <<https://www.statista.com/statistics/247280/number-of-bitcoins-in-circulation/>>.

There could be a number of reasons why the number of Bitcoin is capped, but mainly it may include that Bitcoin is meant to only have value for a certain period of time before it becomes devalued.³² This is a key point to consider when taking into account regulation of Bitcoin within Australian consumer laws.

As soon as Bitcoin have been processed through the mining process, that circulation is captured onto a Blockchain system in order to trace the amount of Bitcoin in circulation. However, there is a difference between Bitcoin and Blockchain in that the Blockchain network is not dependent on Bitcoin. Therefore, Blockchain technology is readily available to any consumer to use without acknowledging Bitcoin as a payment system. According to Tyle and Kausai:

The elegance of the Blockchain is that it obviates the need for a central authority to verify trust and the transfer of value. It transfers power and control from large entities to the many, enabling safe, fast, cheaper transactions despite the fact that we may not know the entities we are dealing with.³³

Likewise, Kiviat describes Blockchain as ‘trustless technology’ simply because it is not regulated as traditional payment systems.³⁴ Therefore, as a fast and cheap method for conducting transactions, Blockchain has been in the limelight for the past couple of years and consumers have been taking advantage of using Blockchain technology as a way of doing business, which is centralised on one system.³⁵ Anyone can use Blockchain and all transactions are recorded on a public ledger, which is permanently recorded for all users to see and access.³⁶

In addition to Bitcoin miners and users operating this system, one of the crucial players in the Bitcoin system is a virtual and digital currency exchange platform, also referred to as exchanges. In order for a Bitcoin user to exchange Bitcoin to traditional fiat currency, the exchange must occur through these exchanges. Therefore, the exchanger is ‘a person or entity engaged as a business in the exchange of virtual currency for real currency, funds, or other forms of virtual currency and also precious metals, and vice versa, for a fee (commission)’.³⁷ With

32 T.S, ‘How does Bitcoin Work?’, *The Economist* (online), 11 April 2013 <<http://www.economist.com/bitcoinexplained>>.

33 Sheel Tyle and Mohit Kaushal, *The Blockchain: What It Is and Why It Matters*, (13 January 2015) Brookings <<https://www.brookings.edu/blog/techtank/2015/01/13/the-blockchain-what-it-is-and-why-it-matters/>>.

34 Trevor Kiviat, ‘Beyond Bitcoin: Issues in Regulating Blockchain Transactions’ (2016) 65 *Duke Law Journal* 569, 574.

35 Tyle and Kaushal, above n 33.

36 Kevin Petrasic and Matthew Bornfreund, *Beyond Bitcoin: The Blockchain Revolution in Financial Services* (7 March 2016) White & Case <<http://www.whitecase.com/publications/insight/beyond-bitcoin-blockchain-revolution-financial-services>>.

37 FATF, above n 13, 7.

the increase and popularity of Bitcoin in some communities, it is essential for consumers, whether individuals or businesses, to make use of these exchanges in order to receive traditional fiat currency or invest their Bitcoin with other Bitcoin users. The use of exchanges is therefore a vital player that enables individuals or businesses to buy or invest in Bitcoin.³⁸

Furthermore, digital currencies like Bitcoin, and to some extent other digital currencies or so-called coins such as Ethereum, Neo, Litecoin and Ripple,³⁹ are used to trade for investment purposes. Therefore, platforms are created for each of these digital coins where consumers may enter the virtual and digital currency market and trade or invest their digital coins. In a similar fashion to traditional Initial Public Offerings (IPOs) where individuals or businesses invest in public listed exchanges, digital coins like Bitcoin, Ethereum and Neo run on an Initial Coin Offering (ICO) network where consumers may invest and/or trade their traditional currency for these digital coins in order to get a return on investment. However, unlike IPOs that are regulated through the Australian Securities and Investment Commission (ASIC) standards,⁴⁰ ICOs are not regulated due to their decentralised nature. The unregulated nature of ICOs, as vital players in the decentralised network, may cause concern for some consumers because of possible misleading and unconscionable conduct by these ICOs, and further conduct by exchanges. Therefore, it is essential to focus on the predicaments Bitcoin as a payment system may cause when buying, selling or investing in digital currencies without the suitable regulatory measures in place.

III THE PREDICAMENTS WITH THE USE OF BITCOIN

A *Irreversibility of Bitcoin transactions*

One of the primary concerns with the use of Bitcoin is the limited protection to consumers because of its irreversibility characteristic.⁴¹ Due to the anonymity and privacy of Bitcoin, the transactions are irreversible, which indicates that once

38 Chris Pash, 'Here's Where You Can Spend Bitcoin in Australia, And What You Can Buy', *Business Insider Australia* (online), July 2014 <<http://www.businessinsider.com.au/where-to-spend-bitcoin-in-australia-2014-7>>. Some of the businesses include Forsyth Real Estate, Hero Subs and The Little Mule. Some businesses have also offered to pay their employees in Bitcoin and accordingly get taxed as set out by the Australian Tax Office.

39 More recent digital currencies include Iota, OmiseGo and Bitcoin Cash.

40 John Price, 'Going Public' *Australian Securities and Investment Commission* (May 2015) <<http://asic.gov.au/regulatory-resources/corporate-governance/corporate-governance-articles/going-public/>>.

41 See Primavera De Filippi, 'Bitcoin: A Regulatory Nightmare to a Libertarian Dream' (2014) 3(2) *Internet Policy Review* 286.

a payment has been made into an incorrect Bitcoin wallet account, there will be no charge back as with traditional banking transactions such as credit card transactions. Moore and Christin explain that ‘irrevocability makes any Bitcoin transaction involving one or more intermediaries subject to added risk, such as if the intermediary becomes insolvent or absconds with customer deposits’.⁴² This is an important aspect to consider as many individuals and businesses use Bitcoin as a form of payment and need to be made aware of the risks and consequences relating to this issue. In this regard, the Financial System Inquiry made the following observation:

Technological innovation has the potential to improve financial system efficiency. It is a powerful force for competition, driving the development of products that better meet consumer needs and improve access. Firms can harness technologies to improve risk management and other internal processes. Although innovation has many benefits, it may also bring risks. Government must manage these risks, while enabling the benefits of innovation to flow through the system.⁴³

Therefore, consumer protection plays a vital role when dealing with Bitcoin transactions and making consumers aware of the risks, such as irreversibility, when using this type of payment system. Information regarding consumer and business protection and the use of Bitcoin as an alternative method of payment to buy and sell goods or of use for investment purposes, should be provided through agencies such as ASIC and the Australian Competition and Consumer Commission (ACCC).

One concern in relation to the use and acceptance of Bitcoin through exchanges or ICOs is whether consumers have some recourse against misleading and unconscionable behaviour by the exchanges and/or ICOs due to the lack of charge-back activities. This was one of many concerns relating to the Mt. Gox collapse in 2014–2015. Mt. Gox was one of the largest exchange platforms before its collapse and dealt with 80 per cent of the Bitcoin transactions globally.⁴⁴ However, Mt. Gox, which was operated and owned by Mark Karpeles, filed for bankruptcy in 2014 because of an alleged hacking incident within Mt. Gox.⁴⁵ This incident caused

42 Derek Dion, ‘I’ll Gladly Trade You Two Bits on Tuesday for a Byte Today: Bitcoin, Regulating Fraud in the E-Economy of Hacker-Cash’ (2013) *University of Illinois Journal of Law Technology and Policy* 165, 168. See also Matt Rosoff, ‘This Investor Thinks Bitcoin Will Change EVERYTHING-Not Just Finance’, *Business Insider Australia* (online), December 2014 <<http://www.businessinsider.com.au/how-bitcoin-could-change-everything-not-just-finance-2014-12>>.

43 Financial System Inquiry, *Regulation in a Digital Environment* (2014) <<http://fsi.gov.au/publications/interim-report/09-technology/regulation-digital-environment/>>.

44 Aaron Lindquist, ‘Funny Money: Why Bitcoin does not Warrant Increased Governmental Regulation’ (2015) 1 *Regent Journal of Global Justice and Public Policy* 79, 83.

45 Brett Wolf and Emily Flitter, Mt Gox: *The Brief Reign of Bitcoin’s Top Exchange* (28 February 2014) Reuters <<http://www.reuters.com/article/us-bitcoin-mtgox-insight-idUSBREA1R06C20140228>>.

Mt. Gox to lose approximately 750 000 Bitcoin, amounting to more than \$450 million.⁴⁶ The impact on Bitcoin users, as consumers buying and selling Bitcoin on this platform, was immense because, as mentioned, one of the disadvantages of using Bitcoin is that these transactions are irreversible and cannot be refunded. Therefore, the risks and consequences associated with using exchanges and ICOs as a means to facilitate transactions between Bitcoin and traditional currency need to be scrutinised.

After the failure of Mt. Gox, numerous other exchange platforms started making their announcement to the Bitcoin community, especially in releasing information about exchange rates. These exchanges include, but are not limited to, Bitcoin Watch, which provides information on currency exchange values on Bitcoin; Bitcoin Block Explorer, which enables the user to search transactions used for a certain address; and Bitcoin Mail, which allows users to send Bitcoin via email.⁴⁷ These exchanges, and in a similar limelight ICOs, are increasing in number and providing consumers with insufficient information on chargeback of transactions. This may raise some concern as to the nature of the information provided to consumers and the protection afforded under Australian law.

B Ebb and flow of bitcoin transactions

One distinctive feature of Bitcoin transactions is the ebb and flow of rates and valuations on a day-to-day basis. Unlike the value of an AUD \$10 note, Bitcoin do not have a set currency value assigned to them as a payment system. This means that Bitcoin exchange rates have an ebb and flow cycle.⁴⁸ This potentially becomes difficult when a consumer aims to store or invest Bitcoin, as the exchange rates fluctuate due to the volatility of the Bitcoin markets.⁴⁹ This further raises concerns for consumers and whether Bitcoin should be specifically regulated.⁵⁰ Even though Bitcoin payments are being used more because of their private and anonymous characteristics, the ebb and flow of the value attached to Bitcoin is considered a vulnerability when compared to traditional payment systems such as credit card payments.⁵¹

46 David Chuen, *Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments and Big Data* (Academic Press, 2015) 263.

47 Grinberg, above n 5, 167. See also Virtual Currency Exchange <<http://virtual-currency-exchange.com/virtual-currency-exchange/>>.

48 Jeremy Papp, 'A Medium of Exchange for an Internet Age: How to Regulate Bitcoin for the Growth of E-Commerce' (2015) 15 *Pittsburg Journal of Technology Law and Policy* 33, 38-39.

49 See Joon Wong, China's Market Dominance Poses Questions About Global Bitcoin Trading Flows (2014) Coindesk <<http://www.coindesk.com/chinese-markets-dominance-poses-questions-global-bitcoin-trading-flows/>>.

50 See also Bob Swarup, *Why Bitcoin is Fated for Boom and Bust* (2014) Coindesk <<http://www.coindesk.com/bitcoin-fated-boom-bust/>>.

51 Kaye Scholer, *An Introduction to Bitcoin and Blockchain Technology* (February 2016) <<http://www.kayescholer.com/docs/IntrotoBitcoinandBlockchainTechnology.pdf>>

Even though Bitcoin has been increasingly used by businesses and consumers as a payment method,⁵² the fact that Bitcoin is not accepted as legal tender by governments indicates that not all consumers are in a position to put their trust in these transactions, which can lead to it being a poor and unstable currency.⁵³ The main issue with acceptability of Bitcoin is that the identities of the users are not made known, which means that traditional banking institutions still remain the most preferred avenue through which transactions are done.⁵⁴ Therefore, businesses and consumers who do not have Bitcoin accounts are not obliged to accept it as payment from someone who is using it as an alternative payment method.

It is worthwhile to note, as mentioned above, that Bitcoin is also popular as an investment type scheme, despite it being used in daily activities; however, investors should be aware of the changing nature of Bitcoin's exchange rate.⁵⁵ Furthermore, the Finance Discipline Group at the University of Technology in Sydney indicated that Bitcoin is more appreciated within an investment sphere rather than a currency or 'medium of exchange'.⁵⁶ Therefore, selected Bitcoin advocates, like the Finance Discipline Group, argue that Bitcoin is not a threat because it is used as an investment rather than a means of payment. However, the volatile status of Bitcoin may influence the stability of Bitcoin as a regulated legal currency when focusing on consumer laws.

IV AUSTRALIAN CONSUMER PROTECTION WITHIN BITCOIN TRANSACTIONS

A Overview

Virtual and digital currencies (Bitcoin), as mentioned, have unique characteristics, such as being private, anonymous and decentralised, which indicates the complexities these currencies may present for regulatory purposes. Furthermore, decentralised Bitcoin currencies may present some difficulty under the ACL when buying, selling or investing Bitcoin through online exchanges or ICOs. Therefore,

52 Stanford University, Disadvantages of Bitcoin: Decentralized, Peer-to-Peer, Cryptocurrency (November 2010) <<http://cs.stanford.edu/people/eroberts/cs201/projects/2010-11/DigitalCurrencies/disadvantages/index.html>>.

53 Ibid. See also Tyler Durden, *Bitcoin Crashes, Loses Half of its Value in Two Days* (7 December 2013) Zero Hedge <<http://www.zerohedge.com/news/2013-12-07/bitcoin-crashes-loses-half-its-value-two-days>>.

54 Olujoke Akindebowo, 'The Fading Rustle, Chink and Jingle: Electronic Value and the Concept of Money' (1998) 21 *University of New South Wales Law Journal* 466, 481.

55 Catherine Martin Christopher, 'Why on Earth do People Use Bitcoin?' (2015) 2 *Business and Bankruptcy Law Journal* 1, 3-4.

56 Finance Discipline Group, Submission 7 to the Senate Economics References Committee, *Inquiry into Digital Currency*, December 2014, 12 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Digital_currency/Submissions>.

this part will focus on whether the ACL under the Competition and Consumer Act 2010 (Cth) is formulated in a way that may apply to Bitcoin transactions. This section will specifically pay attention to false and misleading information as well as unconscionable conduct by exchanges and ICOs to consumers who purchase or exchange their Bitcoin, whether for investment purposes or traditional buying or selling of Bitcoin as a 'good'.

B Australian Consumer Law (ACL)

The ACL is a subdivision of the *Competition and Consumer Act 2010* (Cth) and the key consumer protection regime across Australia.⁵⁷ The ACL was introduced in order to regulate major prohibitions such as misleading and deceptive conduct,⁵⁸ unconscionable conduct⁵⁹ as well as unfair contract regimes⁶⁰ between businesses and consumers.⁶¹ These provisions specifically deal with prohibiting established financial providers from dealing with consumers in a misleading and unconscionable way. When applying the ACL provisions to everyday transactions and investment arrangements, it can be applied positively in order to prohibit misleading and unconscionable behaviour towards consumers. Therefore, the question is whether the ACL applies to consumers who buy and sell Bitcoin as a 'good' as well as for trading or investment purposes.

As indicated earlier, Bitcoin present distinct characteristics and features as a payment system and therefore considered a digital asset controlled by the Bitcoin user through their private key. In 2014, the Australian Taxation Office (ATO) characterised Bitcoin as an asset and property but not money for tax purposes.⁶² This description of Bitcoin will apply throughout this section as a digital asset and property of the consumer. As a result of the nature of Bitcoin as a digital asset, the players within the Bitcoin system are not bound by express terms in a contract, as with traditional bank-customer contractual relationships, but rather rules and procedures agreed upon by the parties in a Bitcoin transaction.⁶³ Moreover, traditional financing

57 *Competition and Consumer Act 2010* (Cth) sch 2.

58 *Ibid* s 18.

59 *Ibid* s 21.

60 *Ibid* s 23.

61 Australian Commonwealth Government, 'The Australian Consumer Law: A Framework Overview' (July 2013) <http://consumerlaw.gov.au/files/2015/06/ACL_framework_overview.pdf>.

62 Australian Taxation Office, 'Tax Treatment of Crypto-currencies in Australia – Specifically Bitcoin' (18 December 2014) <<https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/>>.

63 Rhys Bollen, Submission 46 to the Senate Economics References Committee, *Inquiry into Digital Currency*, November 2014 <http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Digital_currency/Submission>. In addition, see Russ Marshall, 'Bitcoin: Where Two Worlds Collide' (2015) *Bond Law Review* 89.

companies (who are in the business of exchanging money) perform on the basis of a contractual relationship expressing the rights and responsibilities between the parties and are dependent upon this.⁶⁴ Specifically, legislation provides that finance companies are prohibited from displaying misleading and unconscionable behaviour towards consumers.⁶⁵ Despite this, it is arguable that the law applying to finance companies and consumers may be applicable to the conduct of exchanges or ICOs towards Bitcoin users (as consumers). This application of the law and the regulation thereof is a good example of the relationship between ASIC and the ACCC in relation to regulating behaviour of companies, in particular finance companies, towards consumers. Therefore, ASIC and the ACCC will play a fundamental role in the management of behaviour and prohibited conduct by exchanges and ICOs.

The operation of Bitcoin networks and the parties involved are valuable considerations for consumer law purposes because, even though there is no third-party issuer (bank) issuing the value between the Bitcoin user and exchanges, it is not necessary for these exchanges and/or ICOs to have 'consumer product disclosures' when buying or selling Bitcoin or any other coins associated with digital currencies.⁶⁶ Therefore, exchanges and ICOs are in a position to provide consumers with as much information, at their discretion, without detailing the risks and charges for a Bitcoin transaction or investment.⁶⁷ This discretion is what may possibly lead to misleading and unconscionable behaviour by exchanges and ICOs in their dealings with Bitcoin consumers.

When ICOs or exchanges accept and take control of a user's Bitcoin, consumer protection provisions such as misleading and deceptive behaviour as well as unconscionable conduct under the ACL play an important role within this agreement. The challenge with identifying this behaviour by exchanges and ICOs towards Bitcoin consumers is whether all Bitcoin transactions will be caught under the ACL provisions.

64 *Australian Securities and Investment Commission Act 2001* (Cth).

65 *Ibid* ss12CA, 12CB, 12DJ.

66 See specifically *Corporations Act 2001* (Cth) pt 7.6.

67 Additionally, see Lynden Griggs, 'Consumer Protection and Stored Value Facilities' (2009) 9 *Queensland University of Technology Law and Justice Journal* 198.

C Bitcoin and consumer regulation in Australia

Currently, there is no specific legislation dealing with the use of Bitcoin and its effects on consumers when buying, selling or investing Bitcoin. In 2015, the Federal Government considered the nature and impact of digital currencies on transactions in Australia and only made proposals to possible regulation in future.⁶⁸ Therefore, it is required to consider the possible effects of misleading and unconscionable conduct by exchanges and ICOs when Bitcoin consumers purchase, sell or invest with digital currencies.

As a result of the lack of legislation dealing with Bitcoin under consumer laws, it is essential to consider whether Bitcoin is considered a 'good' under the ACL, and if so, whether misleading and unconscionable behaviour by exchanges and ICOs fall within the statutory provisions of the ACL. Section 2 of the ACL defines a 'good' as:⁶⁹

- (i) ships, aircraft and other vehicles; and
- (ii) animals, including fish; and
- (iii) minerals, trees and crops, whether on, under or attached to land or not; and
- (iv) gas and electricity; and
- (v) computer software; and
- (vi) second-hand goods; and
- (vii) any component part of, or accessory to, goods.

Taking into account the items mentioned under s 2 of the ACL, it is broad enough to include Bitcoin and other digital currencies, through Blockchain software, to be considered a 'good'. Furthermore, the definition of 'consumer goods' should also be taken into account and provides that it includes 'goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption'.⁷⁰ Applying this definition to Bitcoin consumers, the types of goods should include personal, domestic and household goods when using Bitcoin as a method of payment. Therefore, most goods will fall within this definition, but consumers who use Bitcoin for trading purposes, should be alerted that trading may fall outside this definition if it is used for business purposes.

Furthermore, ICOs and exchanges may exploit and take advantage of Bitcoin users by providing Bitcoin consumers with misleading and deceptive information under the ACL which is prohibited. Misleading and deceptive conduct provides

68 Parliament of Australia, The Senate, Economics References Committee Report, *Digital Currency – Game Changer or Bit Player* (August 2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Digital_currency/Report>.

69 *Competition and Consumer Act 2010* (Cth) sch 2 s 2.

70 *Ibid.*

that ‘a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive’.⁷¹ This is an important aspect to consider because Bitcoin users may be seriously influenced by the advertisements and information offered by ICOs and exchanges as a means to invest or purchase Bitcoin. Once the ICO or exchange has control of a user’s Bitcoin, their conduct may lead to misleading the Bitcoin consumer of the risks and consequences of investing or purchasing of Bitcoin that, in turn, may lead to unrealistic expectations and ultimately circumstances of financial detriment.⁷² This may result in considerable damage to the Bitcoin user because digital currencies, like Bitcoin, may be lost as in the case of the Mt. Gox debacle.⁷³

On the other hand, the ACCC warned that Bitcoin users who choose to use Bitcoin as a form of payment, whether for purchasing or investment purposes, are taking a risk and forming agreements on a ‘buyer’s risk’ basis. The ACCC stated that ‘we cannot wrap people up in cottonwool. They may be taking risks with the full knowledge that what they are doing has risk associated with it’.⁷⁴ Therefore, Bitcoin consumers should be mindful of warnings, disclosures and qualifications that provide information on the risks and consequences of using Bitcoin to purchase goods or services as well as for investment purposes. However, if there are no warnings and disclosures present on the website or advertisements of the ICO or exchange, it is possible that Bitcoin users may be misled as to the information provided when dealing with digital currencies. In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*,⁷⁵ it was stated that a business referring the consumer to another website to receive further information is not sufficient to defeat a misleading and deceptive claim.⁷⁶ This is supported by other industry-led leaders who submit that ‘online exchanges and ATMs should be required to issue warnings about the risks involved in the digital currency space, including the potential for scams and financial loss and the irreversibility of transactions’.⁷⁷

71 Ibid sch 2 s 18(1).

72 See, eg, Lawrence Trautman and Alvin Harrell, ‘Bitcoin versus Regulated Payment Systems: What Gives?’ (2017) *Cardozo Law Review* 1041.

73 See also Patrick Collins, ‘Bitcoin Investors Could Lose all their Money, FCA Warns’ *The Guardian* (online), 12 September 2017 <<https://www.theguardian.com/business/2017/sep/12/cryptocurrency-investors-bitcoin-could-lose-money-fca-warns>>; Nicholas Giurietto, Launch of Australian Digital Currency Industry Code of Conduct (24 February 2016) *CoinDesk* <<https://www.coindesk.com/press-releases/launch-australian-digital-currency-industry-code-conduct/>>.

74 Senate Report, above n 68, 42.

75 [2011] FCA 1254.

76 Ibid [108].

77 Senate Report, above n 68, 42.

In order to fulfil requirements under the ACL, in relation to misleading and deceptive behaviour, ASIC provides some guidance to businesses in reducing misleading conduct towards consumers.⁷⁸ These guidelines apply similarly to ICOs and exchanges entering into agreements with Bitcoin consumers. They include:

- (i) consistency of use of certain terms relating to Bitcoin transactions;
- (ii) clarity of warnings and disclosures on websites and advertisements;
- (iii) realistic figures of fees and/or costs associated with Bitcoin transactions; and
- (iv) transparency of terms, conditions and risks.⁷⁹

These guidelines form an important part in the control of ICOs and exchanges, especially in circumstances where a statement was made that the Bitcoin consumer will not receive a refund under any circumstances.⁸⁰

In a similar light, it is possible that ICOs and exchanges are prohibited under the ACL to act unconscionably towards Bitcoin consumers when receiving Bitcoin as a payment for goods or services as well as keeping Bitcoin as an investment for that particular user. Under the ACL, unconscionable conduct refers to where ‘a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time’.⁸¹ This is an important consideration within Bitcoin transactions as ICOs and exchanges may cause an imbalance in the relationship when Bitcoin is used as a method of payment. In order to invest, trade or buy in Bitcoin or other digital currencies, ICOs and exchanges do provide ‘white papers’ or ‘terms of service’ when purchasing, selling or investing in these digital currencies.⁸²

In order to consider whether unconscionable conduct has taken place between a business and consumer based on the information provided in the ‘white paper’ or ‘terms of service’, the court may take the following factors into account under the ACL:

78 Australian Securities Investment Commission, ‘Advertising Financial Products and Services (including credit): Good Practice Guidance’ (November 2012) <<http://download.asic.gov.au/media/4496584/rg234-published-27-september-2017.pdf>>.

79 Ibid 7-8.

80 Similar circumstances were found in the case of *TPC v Radio World Pty Ltd* (1989) ASC 55-929.

81 Competition and Consumer Act 2010 (Cth) sch 2 s 21.

82 See Laura Shin, *Bitcoin White Paper By Consumers’ Research Explores Blockchain Opportunities And Obstacles* (22 January 2016) Forbes <<https://www.forbes.com/sites/laurashin/2016/01/22/bitcoin-white-paper-by-consumers-research-explores-blockchain-opportunities-and-obstacles/#3e2f6b9f68d8>>; Benjamin Vitaris, *Joint Report by Stellar and Luxembourg Fintech Platform: Approach ICOs with Caution* (20 September 2017) Bitcoin Magazine <<https://bitcoinmagazine.com/articles/joint-report-stellar-and-luxembourg-fintech-platform-approach-icos-caution/>>.

- (i) the bargaining strengths of the parties;⁸³
- (ii) consumer complying with conditions not necessary for the transaction;⁸⁴
- (iii) whether the consumer was made aware of the terms in the contract;⁸⁵ and
- (iv) whether undue influence was exerted upon the consumer to enter into a transaction.⁸⁶

Therefore, the unconscionability provisions under the ACL may assist a Bitcoin consumer in identifying whether advantage was taken by the ICO or exchange in providing agreements that set out unfair terms and conditions.⁸⁷

However, it is possible for the ICO or exchange to argue that a particular term or condition was implied within the ‘white paper’ or ‘terms of service’ as a result of the type of agreement between the parties. In order to claim that implied terms did exist, *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*⁸⁸ found that for a term to be implied it must:

- (i) be reasonable and equitable;
- (ii) give business efficacy to the contract;
- (iii) be obvious that ‘it goes without saying’;
- (iv) be clearly expressed; and
- (v) not contradict any express terms in the contract.⁸⁹

These requirements apply rigidly when the document represents all of the terms within an agreement.⁹⁰ These elements may similarly apply to agreements between ICO, exchanges and Bitcoin consumers.

Taking into account the factors under s 21 of the ACL as well as other relevant considerations by the court and applying it to a Bitcoin transaction scenario, it may be hard for the court to consider the bargaining strengths of the parties because there is no or limited information between the ICO or exchange and the Bitcoin user because of its online nature. Also, as mentioned above, the making available of information through ‘white papers’, ‘terms of service’ or ‘consumer product disclosers’ is subject to the ICO or exchange.

As a result of the distinct characteristics of Bitcoin and its volatile status as a payment method, regulation thereof is unclear. The unregulated nature of digital currencies makes it difficult for Bitcoin consumers to be protected under specific

83 Ibid s 21(2)(a).

84 Ibid s 21(2)(b).

85 Ibid s 21(2)(c). See also Euripides Rizos, ‘The Consumer’s Right of Withdrawal in case of Payment with Bitcoins’ (2016) 1 *Oslo Law Review* 1.

86 Ibid s 21(2)(d).

87 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

88 (1977) 180 CLR 266.

89 Ibid 283.

90 See, eg, *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

legislation, including the *Sale of Goods Act 1895* (WA) and other financial system legislation.⁹¹ However, the Competition and Consumer Act may be available to Bitcoin consumers when claiming misleading and unconscionable conduct by ICOs and exchanges.⁹² The applicable provisions for misleading and unconscionable conduct is broad enough to include protection to Bitcoin consumers; however, this may be limited where Bitcoin is used for purposes other than those made provision for under the ACL. This article argues that with applicable amendments to the ACL, users of Bitcoin can be provided protection when entering into Bitcoin transactions with ICOs and exchanges. This will ensure development of Bitcoin as an alternative method of payment in this digital age and the benefits it provides to consumers and businesses while protected under the ACL.⁹³

V CONCLUSION

Virtual and digital currencies such as Bitcoin have gained popularity and are viewed as a 'revolutionary payment system' for consumers and businesses.⁹⁴ However, as discussed in this paper, and agreeing with Grimmelmann, the development of technology, and in particular Bitcoin, has given rise to legal challenges of such a payment system in relation to protection for consumers and businesses using Bitcoin for buying, selling, or investment purposes.⁹⁵ Bitcoin has developed into an alternative method of payment that has shown many benefits as a payment system for consumers, but it is also challenging because of its unregulated status, as legal tender. Furthermore, the fact that Bitcoin consumers elect to use Bitcoin as a means to buy or sell goods or services, or simply to invest, should not preclude parties in a Bitcoin agreement from using appropriate measures to deal with conduct under the terms and conditions set out by this agreement.

This paper further examined the legal status of misleading and deceptive conduct as well as unconscionable conduct by ICOs and exchanges towards Bitcoin consumers. Although there is no specific legislation dealing with this type of behaviour towards Bitcoin consumers when using Bitcoin as a method of payment

91 This may include protection to consumers under the ePayments Code and Financial Ombudsman Services.

92 *Competition and Consumer Act 2010* (Cth) sch 2.

93 See Louise Parsons, 'Bitcoin: Consumer Protection and Regulatory Challenges' (2016) 27(3) *Journal of Banking and Finance Law and Practice* 184.

94 Stephan Small, 'Bitcoin: The Napster of Currency' (2015) 37 *Houston Journal of International Law* 581, 640.

95 James Grimmelmann, 'Anarchy, Status Updates, and Utopia' (2014) 35(1) *Pace Law Review* 135, 135.

or investment, the ACL makes provision for Bitcoin consumers to bring a claim under ss 18 and 21 of the ACL. Therefore, even though there is no existing authority for the operation of misleading and unconscionable conduct within Bitcoin transactions, it does not preclude these types of agreements from falling within the ambit of the ACL.

ICOs and exchanges who deal with Bitcoin users need to be aware of their conduct when entering into an agreement with the user as they may be subject to the provisions under the ACL. Therefore, ICOs and exchanges are advised to follow the guidelines set out by ASIC when disclosing important information to Bitcoin consumers on the use of Bitcoin within the transaction. In conclusion, the use of Bitcoin as a digital asset in transactions for buying, selling and investing should be clearly publicised by governmental agencies like the ACCC, ASIC and ATO through guiding principles on their websites and other resources such as training and education on the use of digital currencies as a payment method and the risks it involves. Specific legislation in consumer protection is not necessary; however, the adaptable nature of Bitcoin makes it possible that the *Competition and Consumer Act 2010* (Cth)⁹⁶ be amended to include Bitcoin transactions as a consumer transaction in order to narrow the scope of misleading and unconscionable conduct by ICOs and exchanges.

96 *Competition and Consumer Act 2010* (Cth) sch 2.

HOW RECENT CHANGES TO CONSUMER LAWS HAVE MISSED THE MARK IN EVOLUTIONARY TRENDS: THE MODERN UTILITY OF EVOLUTIONARY LEGAL THEORY

Tracy Albin*

ABSTRACT

Consumer Law — Evolutionary Legal Theory — Harmonisation of Laws — Competition Policy — Unfair Contract Terms

The recent change to the Competition and Consumer Law Act 2010 (Cth) ('the Act') which saw the extension of unfair contract term protections to small businesses has generated a proliferation of discussion, not only amongst consumer law academics and legal practitioners, but also those working in, or with, small businesses in various industries. One of the less mainstream lines of discussion concerns the potential for an increase in regulatory 'red tape' as a result of the changes, thereby increasing costs to small businesses and arguably decreasing their ability to participate competitively in their respective markets. In this context, this paper argues that the extension is out of line with the objective of competition laws; to maintain a healthy level of competition within trade systems.

This paper seeks to explore the way in which the application of an evolutionary legal perspective before the implementation of legislative changes may assist law makers in developing or reforming laws in a way that is consistent with other legislative frameworks in that area. Given the lack of research into the application of evolutionary legal theory to the development of laws in a contemporary context, this paper will provide a novel perspective on the issue, especially by applying the theory to a legislative change enacted in the last 12 months.

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Part I of the paper will briefly analyse evolutionary theory as it applies to the law whilst part II will provide an overview of the legislative changes in question and a brief discussion of the arguments surrounding 'red tape'. Part III will then apply evolutionary legal theory to the changes to section 23 and 24 of the Act, highlighting the potential for those sections to contradict the legislative intent of competition policy in Australia. Part IV of the paper will conclude by advocating for the use of evolutionary legal theory in the reform consultation process across all areas, so as to ensure the continued harmonisation of laws into the future.

I INTRODUCTION

A Evolutionary Legal Theory

Evolutionary legal theory is the belief that law 'evolves' through time by building upon previous legal norms and implementing reform in order to bring laws in line with the political, social and economic reflections of the time.¹ The theory is derived predominantly from the social theory of Charles Darwin. Developed in the second half of the nineteenth century, the theory finds its roots in the idea that the law is a living concept and is not restricted by historical approaches.² There is not much in the way of literature on evolutionary legal theory, and most scholars provide slightly altered understandings of the concept from those that came before them. However, E Donald Elliot's paper of 1985 provides one of the most comprehensive discussions available.³ Elliot describes evolutionary legal theory with reference to four main groups; the social, the doctrinal, the economical and the sociobiological approaches.⁴ In the interests of comprehension, these approaches will be summarised briefly.

1 Social Approach

The social approach predominantly developed from the German historical school of jurisprudence in the nineteenth century.⁵ This approach believes that the development of law does not depend on the ideas and actions of the executive government, but rather grows and evolves from the 'spirit of the people'.⁶ Some theorists in this area, such as Savigny, also advocate against the codification of laws, which are believed to stifle their development and therefore an easily malleable system of common law is to be preferred.⁷ This is also reflected by the theoretical

1 E Donald Elliot, 'The evolutionary tradition in jurisprudence' (1985) 85 *Columbia Law Review* 38, 38.

2 Ibid 39.

3 See generally Elliot, above n 2.

4 Elliot, above n 2, 40.

5 Ibid.

6 Ibid 43.

7 Ibid 42-3.

prophecies of Maine, who believed that ‘the most primitive jurisprudential stage ... is a legal system based on the judgments of kings’.⁸ Although this approach pre-dates Darwinism and therefore lacks a scientific basis, the social theory of legal evolution very much facilitated future theorists’ ideas that law and culture evolve together.⁹

2 Doctrinal Approach

Perhaps one of the most well-known evolutionary theorists, a supporter of what Elliot describes as the ‘doctrinal approach’, is Oliver Wendell Holmes Jr (‘Holmes’). Holmes’ belief that laws are designed, and indeed are required to reflect the social, political and economic systems of their context is one of the biggest canons of evolutionary legal theory today:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹⁰

Holmes’ theory supported the idea that the function of legal doctrines evolves with the times and as such, it is the judges who in fact make the law.¹¹ Emphasis was placed on the ability of judges to use independent thought when interpreting laws, and to employ a policy perspective in order to instil an interpretation worthy of the social context in which it appeared. In this regard, Holmes has stated: ‘the more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest’.¹² Holmes also believed that the law never stops growing, and indeed will do so until the end of time.¹³

3 Economic Approach

Theorists of an economic approach to evolutionary legal theory, such as Rubin¹⁴ and Priest¹⁵, are not concerned with identifying patterns of legal change but rather focus on understanding the circumstances that cause legal doctrines to change.¹⁶ One of

8 Ibid 44; Henry Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (John Murray London Publishers, 1st ed, 1861) 3–4.

9 Elliot, above n 2, 43.

10 Oliver Wendell Holmes Jr, *The common law* (Macmillan Publishers London, 1st ed, 1882) 5.

11 Elliot, above n 2, 51.

12 Oliver Wendell Holmes Jr, ‘The Gas-Stoker’s Strike’ 7 *American Law Review* 582, 583–4.

13 Holmes, above n 11, 32.

14 Paul Rubin. See generally Elliot, above n 2, 64–6.

15 George L. Priest. See generally Elliot, above n 2, 66–9.

16 Elliot, above n 2, 62.

the main circumstances considered by economic evolutionary theorists is the desire of society to decrease unnecessary costs associated with society's compliance with laws.¹⁷ In answering the questions left by theorists such as Holmes, economic evolutionary legal theorists hypothesise that it is the laws that reduce social costs, which are the 'fittest' or 'strongest' and are more likely to survive.¹⁸

Following on from Holmes, these theorists also suggest that evolution of the law is the result of the joint effort of both litigants and judges; for judges to have an influence on the development of law, litigants must first decide to question the operation of the law before a court.¹⁹ Rubin believed that in those cases where litigants have a substantial enough interest in the development of the law the subject of their dispute, they will pursue their action until an efficient outcome is reached, which will then exist for the benefit of any future litigants.²⁰ This theory adapts many elements of the earlier approaches with regard to the effect of social policy on the evolution of law, and rests on the belief that the most economically sound option will survive.

4 Sociobiological Approaches

Sociobiological evolutionary legal theories differ from traditional evolutionary legal theories in that they focus on the law as a product of evolution itself – which feeds into the evolution of behaviours – rather than just focusing on the evolution of laws from their present state.²¹ Theorists in this area propose that laws adjust to surrounding conditions by way of three steps; variation, selection and transmission.²² The first step involves a consideration of where the law has come from (that is, the historical context of the law) and how it has come to be in its present state. The second step considers the possible variations of the law available based on surrounding societal, political and economic factors; this is where Darwin's theory of evolution is applied and the most fitting solution is adopted. The third step is simply the retention of this information, and the process used to make the selection of the fittest, for future use.

This process is thought to produce the best outcome when creating new, or altering existing, laws. By approaching law reform in this way, theorists suggest that it will result in more efficient law making and a higher level of retention. Additionally, by retaining the information related to this decision, it may be used by future legislatures and other bodies to enact necessary change in the same way, thereby ensuring efficiency. This final approach, the three-step system, will be the

17 Ibid 63.

18 Ibid.

19 Ibid 64–5.

20 Paul Rubin, 'Why is the common law efficient?' (1977) 6(1) *Journal of Legal Studies* 51, 53.

21 Elliot, above n 2, 72.

22 A G Keller, 'Law in Evolution' (1919) 28 *Yale Law Journal* 769, 773.

approach taken in this paper to analyse the application of evolutionary legal theory to the changes to section 23 and 24 of the Act.

II THE LEGISLATIVE CHANGES

On 12 November 2016, the changes to section 23 and 24 of the Act came into force.²³ These changes were a result of considerable criticism regarding the use of standard-form contracts in various industries.²⁴ It was often argued that these types of contracts were used by big corporations when contracting with smaller entities, who often lacked the resources to seek legal or expert advice as to the terms. The imbalance of power between the contracting parties was such that small businesses were often falling foul of critical and unfair contract terms. It might be relevant to quote from the second reading speech too, which, in the right circumstances, operated harshly against them. Following substantial submissions by key stakeholders to the Australian Competition and Consumer Commission ('ACCC'), the legislative changes were drafted and introduced, thereby extending the protection against unfair contract terms to small businesses operating in those situations prescribed by the Act.

These new provisions apply to small businesses with up to 20 employees, including casual employees who are employed on a regular and systematic basis, and to contracts below \$300,000 (for a 12-month contract) or below \$1 million (for those exceeding 12 months).²⁵ The contracts must also be for the supply of goods or services or the sale or grant of an interest in land.²⁶ However, following the introduction of these changes, there has been great debate as to the Act's potential to increase costs for small businesses and hence the practical vitality of the changes.

For example, the business law section of the Law Council of Australia, during the public consultations, stated:

The Committee considers that there is no basis for extending UCT regulation to agreements already regulated under the Prescribed Codes. Additionally, however, the Committee is concerned that the extension of UCT regulation to such agreements will create uncertainty and increased costs for the affected industries.²⁷

23 By virtue of the *Treasury Legislative Amendment (Small business and unfair contract terms) Bill 2015* (Cth).

24 Consumer Affairs Australia and New Zealand, *Extending Unfair Contract Term Protections to Small Businesses*, Consultation Paper (16 September 2014) 1-6.

25 *Competition and Consumer Act 2010* (Cth), Sch II, s 23(4).

26 *Ibid.*

27 Law Council of Australia, Submission to the Department of Treasury Consumer Affairs Australia and New Zealand, *Unfair Contract Terms and Small Business Consultation Paper* (16 September 2014) 13 [6.4].

The Business Council of Australia also stated:

Extending these protections to small business can increase small business costs because of the additional resources required to negotiate individual commercial contracts ... resulting in higher costs and prices for all ... The BCA's preference is that once the problem is better defined it be addressed in accordance with Option 2 i.e. consideration of light touch or non-regulatory options. The RIS lists these as 'industry-led initiatives to curtail the use of UCTs, improve small business awareness and information campaigns, information disclosure requirements and the development of guidance material for businesses'.²⁸

These statements embody the suggestion outlined in the beginning of this paper; that the changes to section 23 and 24 of the Act may increase regulatory red tape and associated costs to small businesses, thereby decreasing their ability to maintain a competitive edge in their respective markets. Additionally, it is the opinion of the author that these changes, although relatively untested at this stage, may give rise to direct conflict between the purposes of consumer law and competition policy. This conflict arises between the proposed ability of s 23 and 24 to decrease the ability of small businesses to effectively compete in the marketplace and the purpose of competition principles to promote and facilitate healthy competition amongst all sizes of entities. This may result in the need for future reform due to the inefficiency of the current framework. In this light, it is argued that the application of evolutionary legal theory during the consultation stage may assist in the development of laws that are in harmonisation with each other and have an increased chance of 'survival' when applied practically. This will be discussed below.

III HOW CAN EVOLUTIONARY LEGAL THEORY ASSIST CONSUMER LAW?

A Unfair Contract Terms, Small Businesses and Competition Principles

The 2015 *Harper Review* provides a clear overview of the purpose of competition policy:

Our competition law must ensure that market participants, big and small, can compete in a way that allows the most efficient and responsive players to thrive. These principles are particularly important where market participants differ in their capacity or financial means to engage with the legal or regulatory process.²⁹

This is a seminal demonstration of the underlying purpose of competition law in Australia; to promote healthy market competition and ensure the success of those businesses that are offering the best products and prices to consumers. Therefore, by promoting market competition, competition principles are indirectly promoting

²⁸ Ibid 7.

²⁹ Competition Policy Review Panel, *Competition Policy Review ('Harper Review')* Final Report (2015) 27.

the welfare of consumers; this is supported by the fact that the two areas of law are provided for in the same Act. Therefore, it is inherent that the development of one area of law necessitates a consideration of its effect on the other. In this respect, when considering how evolutionary legal theory could assist the development of such closely related laws as these, Tuebner has pointed out, '[t]he main criteria for selection are whether the innovation fits in with the existing normative structures'.³⁰

Further, Zamboni has commented that evolutionary legal theory should provide various stakeholders – lawyers, judges and the like – with normative patterns to follow when determining the way in which laws should develop, and provide explanations as to why the particular option being put forward is the best choice.³¹ In light of these observations, the following sections of this paper will implement the three-step system of evolutionary legal theory, as it is derived from the sociobiological approach. In doing so, they will explore how the recent changes to unfair contract term provisions have 'missed the mark' in evolutionary trends of Australian competition principles. It will also demonstrate how applying such a theory, when assessing the suitability of laws, may be beneficial to law makers, avoiding the need to go back to the drawing board.

B Step One: The Theory of Variation

In scientific terms, the theory of variation 'refers to a genetic event that causes the individuals or groups of a certain type or species to possess different characteristics from one another'.³² In terms of legal development, variation refers to the effects of changing social, economic and political climates on the development and operation of the law. It also refers to the demand that these changing conditions generate for new or refreshed laws through law reform procedures. This step, as mentioned in part I, includes the necessary examination of the way in which the law has historically developed; an analysis of how it has come to be the way it is based on the conditions of a previous time.

In applying this step to the development of s 23 and 24 of the Act, the body responsible for leading the law reform initiative – in this case the ACCC – would undertake an analysis of the rationale behind the unfair contract term protections in the ACL. By way of cohesion, regulation of unfair contract terms was brought about

30 Gunther Tuebner, *Law as an Autopoietic system* (Oxford Blackwell Publishers, 1st ed, 1993) 59.

31 See generally Mauro Zamboni, 'From Evolutionary Theory and Law to Legal Evolutionary Theory' (2008) 9(4) *German Law Journal* 540.

32 Harun Yahya, *The meaning of variations* (2005) Darwinism Refuted <http://www.darwinismrefuted.com/origin_of_species_01.html>.

based on recommendations of the Productivity Commission in a report released in April 2008 ('the Report').³³ Driven by consumer protection rationales, the Report noted the limitations of the existing unconscionability provision in the generic consumer law, which prohibited the abuse of unfair terms only in constrained circumstances.³⁴ The Report also highlighted that the existing provisions were very costly and slow to use, and lacked clarity about their application in the consumer space.³⁵

The driving force behind the introduction of a new provision covering unfair contract terms was the increased use of standard-form contracts.³⁶ The Report noted that while standard-form contracts lower costs for businesses which are in turn passed on to consumers by way of lower prices, their complexity and the ability of businesses to insert unfair terms when such contracts were offered on a take-it-or-leave-it basis created substantial operational issues.³⁷ The Commission also noted ethical and economic rationales for introducing a national law on unfair contract terms.³⁸ Firstly, the extension of the existing ethical policy to cover substantive terms that are manifestly unfair would further the objectives of consumer law principles.³⁹ Secondly, by protecting consumers from unfair contract terms, loss resulting from those terms is reduced, removing the need for consumers to rely on the good faith of those businesses.⁴⁰

Therefore, the first-step analysis of s 23 and 24 reveals that the underlying driver behind those provisions was the increase in the ability of businesses to exploit the inequality of bargaining power between them and consumers, which had an explicitly negative impact on the welfare of consumers and an indirect impact on the ethical operation of markets. This background is important when considering the rationale behind extending those provisions to small businesses. Given the values that were at play in the introduction of the provisions in 2010, it is easy to see where the recent developments have stemmed from. Not only is consumer law concerned with the inequality of bargaining power between consumers and businesses, but also with the inequality between larger and smaller businesses themselves. The review conducted by the ACCC highlights the potential for this inequality to have an impact on the stability of markets and the furtherance of

33 Productivity Commission, Australian Government, *Review of Australia's Consumer Policy Framework*, Report No 45 (2008) 149–171.

34 Ibid 139.

35 Ibid.

36 Ibid 1, 6, 83.

37 Ibid 149.

38 Ibid 151.

39 Ibid.

40 Ibid.

consumer law principles. An interesting point to note is that, in bringing about these legislative changes, small businesses are being characterised as the ‘consumer’ in the prescribed situation; the larger business therefore being the supplier.

This analysis effectively demonstrates how the law has come to be the way it is following the changes in November 2016 but more importantly, the values and attitudes that led to the discussion giving rise to the possibility of change in the first place. This is a seminal consideration when trying to understand what the objective of the legislative change is in order to put forward appropriate alternatives in step two, discussed below.

C Step Two: The Theory of Selection

This step involves an evaluative comparison of all options put forward when engaging in law reform, choosing the most appropriate option based on, inter alia; the objectives sought to be achieved, the fit of the option to those objectives, the implications of each selection, and most importantly, the way in which the selection made will interact with existing legal frameworks. It is the latter criterion which the author believes is the most important consideration, and one in which the ACCC failed to adequately take into account when proposing the changes to s 23 and 24 of the Act.

Although the approach taken in this paper is a sociobiological one, this part of the analysis draws on aspects of the other approaches described in pt I. For example, in describing the way in which the changes to the Act result in increased costs for small businesses, and by advocating for more ‘light-handed’ and ‘non-regulatory’ approaches to be taken in order to reduce or eliminate these costs, an economic approach to evolutionary legal theory is implemented.

1 The Options of Reform Proposed by Consumer Affairs

In the Decision Regulation Impact Statement (‘Impact Statement’) issued by Consumer Affairs Australia and New Zealand (‘Consumer Affairs’), four alternatives for addressing the issue of unfair terms in standard-form contracts were put forward. These included;

- (1) Imposing the status quo and taking no action;
- (2) light-touch or non-regulatory approaches;
- (3) legislative amendment to extend unfair contract term protections to small businesses; or
- (4) new legislation to require contracts with small businesses to be negotiated on request.⁴¹

41 Consumer Affairs, above n 25, 13–34.

The second and fourth options were expected by Consumer Affairs to not 'adequately and systematically address the identified problem'.⁴² Hence, the third option was preferred.⁴³

2 The cost of the third option: conflict with competition principles

During the consultation process, 'there was [a] suggestion that an extension of the consumer protections to small businesses, particularly where it is not straightforward to determine whether a business is covered, could introduce significant uncertainty and compliance costs in business dealings'.⁴⁴

Consumer Affairs went on to comment that:

This argument suggests that the inability to include unfair terms in standard form contracts might limit the degree to which a business can assign certain risks to the other party in return for a lower contract price, and that any compliance cost associated with the intervention could be passed onto small businesses through a higher contract price. Another possibility is that suppliers may respond by limiting their supply (or acquisition) of particular goods or services to small businesses, or moving to negotiated contracts for some transactions.⁴⁵

The specific costs expected to be incurred by small businesses as identified in the Impact Statement fell into three specific categories; (1) familiarisation costs, (2) costs to ensure compliance and (3) costs associated with a change in business process.⁴⁶ The total estimated amount for these costs, as indexed by the Business Cost Calculator from the Office of Best Practice Regulation, was \$50 million in the first year alone.⁴⁷

These costs can be seen as wholly out of line with the intent of competition principles. By introducing increased compliance and complexity costs, the legislative changes have effectively stifled the ability of some small businesses to compete in Australian markets. In some cases, this will be directly attributable to the fact that as a result of these compliance costs, they have fewer financial resources available for the purposes of increasing their market share and maintaining a competitive position against other larger and more financially equipped firms. In addition to this, the Impact Statement highlighted the possibility that, particularly in financial industries, larger suppliers may limit their supply of goods or services to smaller firms due to their inability to assign certain risks to those businesses in return for a lower contract price.⁴⁸ This is directly in conflict with the position taken by competition laws.

42 Ibid xii.

43 Ibid.

44 Ibid 28–9.

45 Ibid 70.

46 Ibid 29–30.

47 Ibid 31.

48 Ibid 29.

3 Applying Evolutionary Legal Theory

It is the position of the author, which was supported by a high percentage of the submissions to Consumer Affairs, that other non-legislative interventions could and should have been considered before the over-regulation of standard-form contracts was imposed. Option 2, as noted above, received generous support from some stakeholders including the Business Council of Australia.⁴⁹ By allowing market participants to undertake an active role in reform processes, raising awareness of the issues and educating market participants on how to reduce the impact of those issues on their businesses, the concerns surrounding increased compliance costs and the conflict between consumer laws and competition laws that this paper argues now exists, could have been avoided.

In adopting the approach of an economic evolutionary theorist, the conclusion of the author is supported. For example, Landes and Posner – although their work has been criticised for misinterpreting economic values and utility maximisation⁵⁰ – support the view that the selection made by law makers (in their perspective, this role is best suited to judges interpreting laws in relation to the values and attitudes of the time) should be the one that results in maximum benefit for society with the lowest possible impact on the economy (cost).⁵¹ By opting for non-regulatory options at first instance, the increased costs associated with the currently implemented legislative changes could potentially have been avoided, if the alternative options were successful.

It is the ultimate opinion of the author that the consultation and evaluation process could have benefited from the application of an evolutionary prospective to determine how the proposed legislative changes would affect the operation of competition laws, given the two work so closely together. Perhaps if an evolutionary perspective was considered, the ‘light-touch’ and ‘non-regulatory’ option would have been preferred, at least in the beginning to evaluate its efficiency and utility, before proceeding to such a ‘heavy handed’ approach.

D Step Three: The Theory of Retention or Transmission

The Impact Statement accurately and systematically details the submissions received, the data collected on the issues, and the positives and negatives of the proposed remedies. There are also various resources available on the ACCC website, including the detailed submissions received by stakeholders, the explanatory memorandum to the legislative amendments, statements of parliament (for

49 Ibid 17–20.

50 See generally J M Balkin, ‘Too good to be true: The positive economic theory of law’ (Working Paper No 290, Yale Law School Faculty Scholarship, 1 January 1987).

51 William Landes and Richard Posner, *The economic structure of tort law* (Harvard University Press, 1st ed, 1987).

example, the explanatory memorandum and second reading speech) and other key information. It is the view of this author that the theory of retention or transmission is adequately satisfied.

IV CONCLUSION

Recent legislative changes to s 23 and 24 of the Act have wholly ‘missed the mark’ in evolutionary trends of both consumer and competition law principles. Although the changes are being hailed as a saviour for small businesses, there is an argument to be made that the changes are in direct conflict, at least in some instances, with the object of competition law. For example, increased compliance costs associated with accommodating these new changes, estimated to be \$50 million in the first year, have a significant potential to adversely affect businesses’ ability to participate competitively in their respective markets. Smaller businesses are likely to either struggle financially to comply with these changes, or avoid them altogether, by continuing to negotiate from unequal bargaining positions. This is out of line with the position taken by competition principles; to promote healthy market competition and allow for both small and large businesses to flourish, which in turn promotes the purpose of consumer laws – to provide more choice and higher quality goods to consumers.

It is the position of the author that, had the responsible law reform bodies involved in the small business standard-form contract review implemented an evolutionary perspective when evaluating the suitability of all options put forward, particularly the ‘light-touch’ options, the potential for conflict between competition and consumer principles would have been revealed. In order to ensure the harmonisation of laws, the government and other law reform bodies should routinely consider evolutionary perspectives as key tools in aiding effective and enduring law reform.

Case Notes

ACCC v WOOLWORTHS: UNCONSCIONABILITY UNDER THE AUSTRALIAN CONSUMER LAW

Claudia Carr*

I INTRODUCTION

In 2014, Woolworths Supermarkets ('Woolworths') sought financial support from underperforming suppliers to make up a projected shortfall in sales and profits targets under a scheme known as 'Mind the Gap' ('Scheme'). In *Australian Competition and Consumer Commission v Woolworths Limited*¹ (*ACCC v Woolworths*), the Australian Competition and Consumer Commission ('ACCC') argued that Woolworths' conduct in designing and implementing the scheme was unconscionable under s 21(1) of the Australian Consumer Law ('ACL').² That section provides that a person must not, in trade or commerce and in connection with the supply or acquisition of goods or services, engage in conduct that is unconscionable in all the circumstances.³ In December 2016, Yates J held that Woolworths' conduct was not unconscionable under s 21(1). This case note sets out the facts of *ACCC v Woolworths* and discusses the key features of Yates J's judgment.

II FACTS

Around September 2014, it became apparent that Woolworths was unlikely to meet its sales and profits targets for December 2014. To 'close the gap' between targeted and actual sales and profits, Woolworths implemented the Scheme. It

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1 [2016] FCA 1472.

2 *Competition and Consumer Act 2010* (Cth) sch 2.

3 Note that s 21(4) of the ACL provides that s 21(1) is capable of applying to a system of conduct or pattern of behaviour regardless of whether an individual is identified as having been disadvantaged as a result.

involved approaching certain suppliers to make ‘asks’ for support to help make up sales and profits targets. To determine which suppliers to approach, Woolworths prepared ‘Opportunity Reports’ that analysed the performance of suppliers from July to October 2014 using four lenses: whether gross profit margins had declined; whether the supplier was behind on any target in a Joint Business Plan; whether the supplier’s co-op and promotional spend had declined; and whether Woolworths had achieved specified growth in its gross profit margin on selling the suppliers’ product.

Agreements reached with suppliers as to payments under the scheme were recorded in internal management records and payments were made by an adjustment of accounts. The scheme was intended to raise \$15 million. It ultimately raised approximately \$18.1 million.

The ACCC alleged that Woolworths engaged in unconscionable conduct under s 21 of the Australian Consumer Law. [MK1][CC2] The ACCC’s case was based on the proposition that in the course of Scheme negotiations with suppliers, Woolworths enjoyed a substantially stronger bargaining position, and took advantage of that.⁴ The ACCC argued that Woolworths had no legal or contractual entitlement to the payments it sought under the Scheme, and was aware of, or indifferent to, that fact. It was alleged that Woolworths intentionally pressured suppliers to make payments by threatening that if payments were not made, it would jeopardise the suppliers’ relationship with Woolworths and their ability to reach consumers through Woolworths in future.⁵

A key feature of the ACCC’s case is that it did not allege several individual instances of unconscionable conduct that occurred each time Woolworths approached a supplier. Rather, the proceedings were brought on the basis that one instance of unconscionability occurred in the systemic implementation of the entire scheme⁶ pursuant s 21(4), which provides that s 21(1) can apply to a system of conduct or a pattern of behaviour.

In its defence, Woolworths argued that the ACCC’s case misunderstood or oversimplified the nature of commercial relationships between suppliers and retailers.⁷ It argued that making ‘asks’ of suppliers under the Scheme was ordinary – suppliers had previously, in relation to the promotion and sale of their products, provided

4 *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 1472, [124].

5 *Ibid.*

6 *Ibid* [126].

7 *Ibid* [32].

financial support to Woolworths. Woolworths contended that the Scheme was a legitimate pursuance of lawful profit. Woolworths also took issue with the fact that the ACCC did not call any suppliers approached by Woolworths under the Scheme to give evidence; the case relied solely on documentary evidence.

III JUDGMENT

Yates J held that Woolworths did not engage in unconscionable conduct in all the circumstances and thus did not contravene s 21.⁸ The ACCC announced that it would not appeal the judgment.⁹

The following section discusses the key features of the judgment.

A The Meaning of ‘Unconscionable’ in s 21

‘Unconscionable’ is not defined in the ACL. With reference to case law, Yates J defined it as ‘conduct against conscience by reference to the norms of society that are in question’.¹⁰ His Honour identified the relevant norms as being those ‘apposite to commercial relationships’, specifically those in the supermarket industry.¹¹

Unconscionable conduct is not simply ‘unfair’ or ‘unjust’¹² – Yates J accepted Spigelman CJ’s description of unconscionability as involving ‘a high level of moral obloquy’ or ‘highly unethical’ circumstances.¹³ The ACCC’s efforts to undermine Spigelman CJ’s description were explicitly rejected.¹⁴ Therefore, something more than unfairness is required to warrant the courts’ intervention in arm’s length commercial transactions.

Woolworths implemented the Scheme to adjust a projected gap between targeted profit and sales and predicted profit and sales produced by the retailer’s relationships with its suppliers. Attempting to do so by asking suppliers to make payments based on factual performance data could not, alone, be unconscionable.¹⁵ Yates J said the

⁸ Ibid [264]–[265].

⁹ Australian Competition and Consumer Commission, *ACCC won’t appeal Woolworths unconscionable conduct decision* (16 December 2016) Australian Competition and Consumer Commission <<https://www.accc.gov.au/media-release/accc-won%E2%80%99t-appeal-woolworths-unconscionable-conduct-decision>>.

¹⁰ *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 1472, [129] citing *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447, [41].

¹¹ Ibid [129].

¹² This is in line with the current well-accepted authorities; see, eg, *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* (2003) 200 ALR 491, [185] (Selway J).

¹³ *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 1472, [131] citing *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, [121] (Spigelman CJ).

¹⁴ Ibid [132].

¹⁵ Ibid [205].

fact that conduct is engaged in for profit is not a hallmark of unconscionability.¹⁶ This is clearly appropriate in the context of trade and commerce; otherwise, the ACL would be an untenable intrusion on companies' ability to maximise profit.

'Unconscionability' is not to be determined according to the personal intuition of a judge; rather, Yates J said that the characterisation of conduct is performed through fact-finding to identify relevant norms.¹⁷ This statement underpins the entire judgment. Justice Yates spends most of his discussion identifying the conduct of Woolworths, identifying the previous behaviour and interactions of Woolworths with its suppliers to formulate the 'norms' of the industry, and then comparing the former against the latter to see if the norms were contradicted by the Scheme.

B Woolworths' Normal Commercial Dealings

The finding that Woolworths did not behave unconscionably was largely dependent on findings of fact as to Woolworths' previous interactions with suppliers. Much of Woolworths' success stemmed from its ability to show that asking for financial support from suppliers was part of its ordinary course of business. Yates J also accepted that the Opportunity Reports were fact-based and the metrics used in their preparation were not unusual, meaning they were used prior to the scheme for the purpose of reviewing suppliers' performance and seeking financial support from suppliers.¹⁸

The ACCC did not suggest that seeking such support from suppliers was unconscionable on its own outside of the formalised Scheme.¹⁹ Thus, in the view of Yates J, the mere formalisation and co-ordination of something Woolworths already did in the ordinary course of business was not unconscionable.²⁰ The size and administration of the scheme did not affect the nature of Woolworths' interactions with suppliers.²¹ From a suppliers' perspective, the experience would have been the same as any ordinary negotiation with Woolworths.²² Further, the prevailing norms that were identified in the judgment led to Yates J's conclusion that there was nothing unusual in seeking financial support from suppliers to improve profitability of a previous trading period.²³

16 Ibid [201].

17 Ibid [144].

18 Ibid [192]–[194], [210].

19 Ibid [200].

20 Ibid [198].

21 Ibid [200].

22 Ibid [199].

23 Ibid [196].

Because of the importance given to prevailing norms, *ACCC v Woolworths* was a particularly fact-heavy case. It should not be taken as an authority for the principle that seeking financial support from suppliers generally will not be unconscionable; indeed, *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*²⁴ (*ACCC v Coles*) is evidence that such conduct can be unconscionable in different circumstances.²⁵

The weight Yates J placed on prevailing norms, not just of the supermarket industry generally, but of the relationship between Woolworths and its suppliers, arguably results in a restrictive interpretation of unconscionability. At the very least, it means that what is unconscionable under the ACL will be shaped by the context of the relevant industry in any given circumstance. This interpretation is potentially unable to serve the objectives of the ACL where prevailing norms in a particular industry are already problematic, perhaps due to years of market dominance by a small number of badly-behaved players or widespread unconscionable conduct that has not been challenged. It is yet to be seen whether the High Court will take a different approach to Yates J.

C Distinguishing ACCC v Woolworths from ACCC v Coles

In *ACCC v Coles*, the ACCC alleged that Coles Supermarkets Australia Pty Ltd ('Coles') contravened s 21 of the ACL. It was held that Coles' specific conduct in asking for payments from suppliers was unconscionable in all the circumstances. Coles made demands for payments from suppliers, outside of the terms of arrangement negotiated, for products already supplied, to make up for profit gaps, waste, markdowns and short or late deliveries.

Yates J distinguished *ACCC v Woolworths* from *ACCC v Coles*. His Honour did so firstly on the basis that in *ACCC v Coles*, the contraventions that occurred were based on specific dealings with individual suppliers; in contrast, the allegations in *ACCC v Woolworths* were with respect to a single contravention regarding an entire class of suppliers approached under the Scheme. The allegations against Woolworths were more broadly based and brought with reference to s 21(4); no arguments were made as to specific instances of unconscionability in approaching an individual supplier. In *ACCC v Coles*, Coles admitted that its conduct, with respect to specific individual suppliers, was unconscionable and that it had no reasonable basis to claim the disputed payments. In contrast, Woolworths' denied that its conduct under the Scheme was unconscionable.

²⁴ [2014] FCA 1405.

²⁵ This is discussed further below in Part C.

As a result of these distinguishing features, Yates J held that any reliance the ACCC placed on *ACCC v Coles* was misplaced.²⁶ This is peculiar, considering that Woolworths' conduct within the Scheme was not at all dissimilar to that of Coles. The key material difference lies in the fact that it was Woolworths' Scheme in issue. Yates J's decision shrouds s 21(4) in ambiguity. Although the ACCC's allegations were as to the entire scheme, throughout the judgment Yates J does consider Woolworths' conduct in actually engaging with suppliers. This gives rise to the question of how the ACCC is supposed to prove a system of conduct or a pattern of behaviour – was proving unconscionable conduct in engaging with the suppliers a necessary stepping stone to proving that the entire Scheme is unconscionable? If that is the case, then had Woolworths' conduct been the same as Coles', the scheme would have been unconscionable. In the circumstances, it seems difficult to prove that a system of conduct is unconscionable without considering conduct with respect to individual suppliers. Clarification is needed as to the proper application of s 21(4) and how proceedings should be brought pursuant to that section.

Perhaps the imputed distinction between *ACCC v Coles* and *ACCC v Woolworths* by the ACCC in the manner in which they brought their case is unnecessary; a system of conduct might not be unconscionable but specific instances might be. If the ACCC argued that both the scheme and specific instances of conduct were unconscionable, it might have had more success in relying on *ACCC v Coles* – at least, it would have warranted a more in-depth comparison by Yates J.

However, the ACCC's reliance on documentary evidence alone would possibly still have prevented a decision in favour of the ACCC. The ACCC's failure to call evidence from a supplier was an issue throughout the case; it resulted in an incomplete picture of the circumstances. This indicates it will always be difficult to prove unconscionability, in the context of a commercial relationship, without leading evidence from one of the parties to the relevant transaction.

D Woolworths was not in a Superior Bargaining Position and Did Not Take Advantage of Any Such Position

The ACCC pointed to Woolworths market share, being approximately 38% at the relevant time, as evidence of Woolworths' superior bargaining power. It was alleged that Woolworths only felt it *could* make a profit off the scheme because it enjoyed such power. Yates J agreed with Woolworths that this was a circular argument; the ACCC argued that Woolworths' conduct was unconscionable because of an inequality of bargaining power, and that there was an inequality of bargaining power because of Woolworths' conduct.²⁷

²⁶ Ibid [244].

²⁷ Ibid [248].

Yates J considered that a large market share alone did not necessarily mean that Woolworths was particularly significant to any given supplier.²⁸ Again, much of the judgment turned on its own facts; here, the issue being that the ACCC led no evidence as to how Woolworths' market dominance effected negotiations with specific suppliers under the Scheme. A number of the suppliers approached were substantial entities and had relationships with other retailers, including Woolworths' main competitors such as Coles and IGA.²⁹ None of the evidence indicated that Woolworths enjoyed a substantial advantage in bargaining power. Evidence also provided that suppliers, where appropriate, would approach Woolworths in the same way and ask for financial support for products.³⁰ Therefore, requesting financial support was not one-sided and only available to Woolworths, which did not support the proposition that an inequality in bargaining power existed.³¹

Although Yates J did not consider that Woolworths had superior bargaining power to suppliers, in any case, unequal bargaining power alone is insufficient to give rise to unconscionability.³²

E Woolworths Did Not Pressure Suppliers Into Making Payments

Yates J held that Woolworth's 'asks' for payments were not demands. They were not urgent or insistent.³³ Although Woolworths attempted to implement timeframes for payments, Yates J determined that it would have been clear to suppliers that they were unenforceable.³⁴

Negotiations between Woolworths and its suppliers were evidently forthright, but this was considered consistent with negotiations of a commercial nature.³⁵ In this respect, Yates J's decision clearly has regard to the nature of commercial relationships; he also provided that gentility was not required in negotiations.³⁶ Companies may take comfort in the knowledge that *ACCC v Woolworths* indicates that frank negotiations will not risk contravention of s 21(1), nor will impoliteness or a lack of civility amount to unconscionability.

None of the documentary evidence led by the ACCC showed that Woolworths made threats to suppliers to force compliance. Woolworths' negotiations 'script'

28 Ibid [249]–[250].

29 Ibid [250].

30 Ibid [259].

31 Ibid [260].

32 See, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 459 (Gibbs CJ).

33 Ibid [211].

34 Ibid.

35 Ibid [212].

36 Ibid.

contained statements to be made to suppliers to the effect that Woolworths' ability to continue to provide support was 'predicated on [gross profit margin or trade spend] moving in the right direction'.³⁷ As no suppliers were called to give evidence, there was no proof that they felt threatened by Woolworths' conduct. Yates J held that it was not unconscionable or threatening for Woolworths to plainly state its commercial expectations, in its own best interests, to suppliers.³⁸ This is good news for companies; it indicates that statements as to commercial expectations and positions will not be taken as 'threats', nor will references of 'escalation' to a manager.³⁹

Thus, Yates J held that it could not be inferred that suppliers believed that if they did not make the payment requested of them under the Scheme, it would jeopardise their relationship with Woolworths or access to Woolworths' customers.⁴⁰ Indeed, the evidence showed that some suppliers had refused to make payments.⁴¹ There was no evidence that the scheme targeted vulnerable suppliers.⁴²

F Woolworths Sought Payments on a Legitimate Basis

Yates J rejected the ACCC's proposition that Woolworths knew, based on the 'lenses' it used, that it had no legitimate basis to seek payment.⁴³ The suppliers approached had collectively reduced their expenditure on product promotion through Woolworths by \$46 million compared to the same period in the previous year. This indicated how changes in trading might affect profitability; ultimately, the ACCC could not prove that the suppliers did not contribute to Woolworths' profit shortfall.⁴⁴ Yates J said that it was simplistic to assume that the retailer has complete control over the gross margins it makes because of its retail prices.⁴⁵

Woolworths' employees reviewed the Opportunity Reports and exercised discretion in approaching suppliers; they did not need instruction to do so, because the relevant managers and buyers were best-placed to understand their suppliers' performance.⁴⁶ As a result, the sums asked for were not arbitrary.

37 Ibid [213].

38 Ibid.

39 Ibid [224]–[225].

40 Ibid [242].

41 Ibid [230]–[232].

42 Ibid [243].

43 Ibid [239].

44 Ibid [203].

45 Ibid [235].

46 Ibid [240].

Yates J held that there was no evidence that Woolworths claimed it had a contractual or legal right to the payments it sought under the Scheme. The suppliers were sophisticated entities, who no doubt understood this and did not mistakenly believe that Woolworth's had a contractual or legal right to payment. The fact that there was no contractual basis for the payments did not prohibit Woolworths from seeking them.⁴⁷ Further, a party to a trading relationship cannot be expected to 'foreshadow' asks or request consent to engage in negotiations.⁴⁸ Throughout, the judgment is clearly sensitive to the needs of commercial industries.

G Some Suppliers Did Receive a Benefit from Negotiations

Part of the ACCC's case was that suppliers received no benefit from making payments to Woolworths under the Scheme. However, the evidence showed that in several instances, the suppliers were offered benefits, or negotiated benefits, in return for the payments that they made.⁴⁹ Therefore, the Scheme was not purely for the benefit of Woolworths at the detriment of suppliers.

IV IMPLICATIONS FOR OTHER LEGISLATION

Section 21 of the ACL is similar to s 12BC of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*). In deciding *ACCC v Woolworths*, Yates J referred to cases considering s 12BC for guidance on s 21.⁵⁰ Litigants should be aware that the courts' approach to unconscionability under the ACL and the *ASIC Act* will likely be similar in future; therefore, jurisprudence on both relevant sections should be considered.

V CONCLUSION

ACCC v Woolworths turned, in large part, on its own facts; it should not be taken as a broad authority for the legitimacy of requests for financial support made by retailers to suppliers. It indicates that it will sometimes be legitimate for retailers to seek payments from suppliers outside of a contract, although some legitimate basis is required, and retailers should be wary of straying too far from their ordinary course of business. The case also provides some insights as to the operation of

47 Ibid [208].

48 Ibid [207].

49 Ibid [204].

50 Notably, his Honour had reference to *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 90 ALJR 835.

unconscionability in the context of the ACL. A seminal feature of the case is the importance that Yates J placed on the prevailing norms of the relevant industry. Seemingly, what may constitute unconscionability, in any given context, is shaped by the nature of the industry in which the alleged unconscionable conduct takes place. Ultimately, Yates J's decision raises the bar for establishing unconscionability under the ACL above the level of mere unfairness or injustice, and far higher than that argued for by the ACCC.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V RECKITT BENCKISER (AUSTRALIA) PTY LTD [2016] FCAFC 181

Nicki Jacobs*

I INTRODUCTION

The civil penalty handed down in this case is the highest corporate penalty ever for misleading conduct under the Australian Consumer Law ('ACL'). Misleading conduct does enormous detriment to the consumers involved, the company's competitors and to the economy generally. The \$6 million-dollar penalty sends a loud, and necessary, message to corporations that this behaviour will not be tolerated. The judgment has also provided clarity on section 18, misleading or deceptive conduct, section 33, misleading conduct as to the nature etc. of goods and subsection 224(2), pecuniary penalties of the ACL.

The appellant is the Australian Competition and Consumer Commission ('ACCC') and the respondent is Reckitt Benckiser (Australia) Pty Ltd ('Reckitt Benckiser'). The legal issue is whether the Federal Court of Australia (comprised of a single judge) failed to impose an appropriate penalty on Reckitt Benckiser for the civil penalty contraventions under s 33 of the ACL. The case was decided by Justices Jagot, Yates and Bromwich in the Federal Court of Australia and the joint judgment was handed down on 16 December 2016.

II FACTS

This case was first heard on 9 December 2015 at the liability hearing. On 11 December 2015, the primary judge made orders including declarations of contravention. On April 2016, a contested penalty hearing took place. On 29 April 2016, the primary judge ordered Reckitt Benckiser to pay a pecuniary penalty of \$1.7 million for the

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contraventions of s 33 of the ACL. The ACCC advanced eight grounds of appeal in the Full Court of the Federal Court of Australia.

The proceedings concerned the conduct of Reckitt Benckiser involving representations on product packaging and two webpages about four ostensibly different Nurofen pain medications said to ‘target’ four different types of pain, ‘back pain’, ‘migraine pain’, ‘period pain’, and ‘tension headache’. In fact, the only difference between the four products was the packaging and marketing. They all provided the same dose, 200 mg, of the active ingredient, ibuprofen, delivered in the same way. The four products were sold at double the price of standard Nurofen which also provided the same dose of 200 mg of ibuprofen. No product was any more or less effective than the others in treating any of the symptoms shown on the packaging. Between 2010 and 2015 numerous sources pointed out the lack of accuracy in Reckitt Benckiser’s marketing strategy yet the products continued to be sold without alteration. There were 5.9 million sales of the four products over five years, generating revenue of about \$45 million for Reckitt Benckiser.

III HOLDING

The appeal was allowed. The Full Court accepted most of the submissions made by the ACCC on appeal and found the primary judge’s approach to consumer loss to involve material error. This finding gave rise to the need for the Full Court to determine for itself the appropriate penalty to be imposed for the contravening conduct. The initial pecuniary penalty of \$1.7 million was set aside and Reckitt Benckiser was ordered to pay the Commonwealth a pecuniary penalty of \$6 million. The Full Court found the prior penalty to be manifestly inadequate given the need for deterrence and the substantial consumer loss suffered. In their joint judgment Jagot, Yates and Bromwich JJ, stated that ‘the objective of any penalty ... must be to ensure that Reckitt Benckiser and other “would-be wrongdoers” think twice and decide not to act against the strong public interest’.¹

IV JUDGMENT

In their joint judgment, Jagot, Yates and Bromwich JJ first considered the nature and scope of appeals to the Full Court applying the cases: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*²; *Wong v R*³; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*⁴; *Cabal v United Mexican States*⁵; *Costa v Public*

¹ *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC181, [150].

² [2015] HCA 46.

³ [2001] HCA 64.

⁴ [2001] FCA 1833.

⁵ [2001] FCA 427.

*Trustee (NSW)*⁶. The Court stated that appeals to the Full Court are by way of rehearing, which requires the Court to decide for itself as to both facts and law and to give effect to its own judgment. They made note that this does not remove the requirement for error to be established before intervening.⁷ It was also stated that error may be specific or determinative,⁸ and alternatively, error may be inferred from a result that could not have been arrived at without an operative error.⁹ In cases of specific error, the Court detailed that the error must have caused or materially affected the outcome. The first seven grounds of appeal in this case are within the category of asserted specific error.¹⁰ The eighth ground is within the category of inferred error.¹¹

In respect to grounds one and two, the Court rejected Reckitt Benckiser's proposition that it had derived no financial benefit from the contravening conduct.¹² The Court also ruled that the primary judge's approach to consumer loss was in error and the error was material to the outcome.¹³ The Court disagreed with the primary judge's acceptance that an attempt to assess consumer loss would either be impossible or so speculative as to be useless.¹⁴ Instead, they stated that there was ample evidence to infer a direct causal relationship for the sale of the products in question and accordingly 'the loss was in the order of 50% of the total revenue from the sale of the impugned products, being \$45 million'.¹⁵

In respect to ground three, the Court noted that the primary judge mistakenly identified a packaging proposal which was rejected by the ACCC as the new packaging.¹⁶ The Court ruled that the primary judge's mistake as to the correct packaging was material to his decision that the consumer might have been willing to pay substantially more for the products in question for reasons other than the contravening conduct.¹⁷ Due to the material error by the primary judge the Court was required to determine for itself the appropriate penalty for the contravening conduct.¹⁸

6 [2008] NSWCA 223.

7 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC181, [45].

8 *Ibid* [51].

9 *Ibid* [52].

10 *Ibid* [54].

11 *Ibid* [55].

12 *Ibid* [63].

13 *Ibid* [70].

14 *Ibid* [62].

15 *Ibid* [98].

16 *Ibid* [99].

17 *Ibid* [106].

18 *Ibid* [110].

In respect to ground four, the Court ruled that the primary judge erred by giving undue weight to the consideration that the type of harm caused to consumers was not physical and only monetary.¹⁹ The Court agreed with ACCC's submission that the primary judge wrongly overlooked the risk of loss of consumer choice²⁰ and therefore the primary judge's conclusion involved error of reaching a conclusion not open in the circumstances, resulting in the Full Court hing to determine for itself the appropriate penalty imposed.²¹

In respect to ground five, the Court gave positive treatment to *E R v Olbrich*²² and *R v Storey*²³, ruling that the primary judge erred in his judgment that the contravening conduct should be regarded as innocent because the ACCC did not plead any state of mind in relation to the conduct,²⁴ stating that at the very least Reckitt Benckiser did 'court the risk' of the contraventions.²⁵

In respect to ground six, the Court accepted the ACCC's submission that the primary judge erred in finding that the contravening conduct involved only two courses of conduct and instead found that there were six courses of conduct.²⁶

In respect to ground seven, the primary judge found Reckitt Benckiser had provided 'commendable and significant cooperation' however, the Full Court found there was only a small degree of cooperation so it should not carry any substantial weight.²⁷

In respect to ground eight, the Court found that there was a substantial need for both general and specific deterrence in this case and that any penalty in this case must be to ensure any possible wrongdoers are discouraged from acting against the public interest. However, the Court did note that this need does not give license to impose an unfair penalty.²⁸ The Court then discussed the factors that must be taken into consideration when determining an appropriate civil penalty, which

19 Ibid [111].

20 Ibid [114].

21 Ibid [115].

22 [1999] HCA 54.

23 [1998] 1 VR 359.

24 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC181, [117].

25 Ibid [136].

26 Ibid [139] – [140].

27 Ibid [146] – [147].

28 Ibid [152].

included giving regard to the maximum penalty, considering the loss to consumers, considering the attitude of the contravener, consequences of the conduct, how long the conduct took place, the need for general deterrence, market share, and several other factors.²⁹

V CONCLUSION

The \$6 million civil penalty which was handed down is the highest penalty ever for misleading conduct under the ACL. The decision promotes the public interest in compliance and certainly sends a warning that larger penalties may be awarded in future cases where consumers are being misled. The judgment has also provided clarity on the determination of civil penalties, which will be beneficial within multiple areas of law, not just consumer law.

²⁹ Ibid [154] – [163].

**POZZEBON (TRUSTEE) V AUSTRALIAN
GAMING AND ENTERTAINMENT LTD,
IN THE MATTER OF AUSTRALIAN
GAMING AND ENTERTAINMENT LTD
(IN LIQ) [2014] FCA 1034**

Nicki Jacobs*

I INTRODUCTION

This is a significant case as at the time of the judgment there was very little case law regarding the interpretation of the *Personal Property Securities Act* ('PPSA'). The decision substantiates that attachment, enforceability, and one of the means of perfection, are all necessary prerequisites to perfect a security interest. It also confirms that not properly perfecting a security interest in the case of insolvency, will result in the personal property being vested in the insolvent estate.

The respondent is Australian Gaming and Entertainment Ltd ('AGEL') and the applicants are Mr and Mrs Pozzebon (together, 'the Pozzebons'). The question in dispute is whether the security interest in question had been perfected only by registration within the meaning of section 21(1) (b) of the *Personal Property Securities Act 2009* (Cth). The legal issue involved the interpretation of s 21 of the PPSA and s 588FL of the *Corporations Act 2001* (Cth). The case was decided by Justice Collier in the Federal Court of Australia and the judgment was handed down on 24 September 2014.

II FACTS

On or around 24 December 2013 Mr and Mrs Pozzebon, who were the joint trustees of the Pozzebon Family Superannuation Fund, and Perth company Australian

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Gaming and Entertainment Ltd entered into a transaction where the Pozzebons agreed to lend, and AGEL agreed to borrow, a total of \$250,000 ('the Loan'). A security agreement was executed by both parties and dated 24 December 2013. It was agreed by both parties that a valid security agreement existed in favour of the Pozzebons. As stated in the security agreement AGEL agreed, among other things, to mortgage personal property and land, and other property, to the Pozzebons. It was not in dispute that the security interest had attached to the relevant collateral and was enforceable for the purposes of s 21(1)(b) of the PPSA.

Almost 5 months later, on or around 19 May 2014, the Pozzebons registered their security interest on the Personal Property Securities Register ('PPSR'). On or around 26 May 2014 AGEL was placed into voluntary liquidation.

III HOLDING

It was held, by Collier J, that the only means by which the Pozzebons' security interest was perfected was by registration. Other means of perfection, including temporary perfection, were not available to the Pozzebons. The Court found that although the security interest had attached and was enforceable it had not been registered within 20 business days thereof as required by s 588FL(2)(a) of the *Corporations Act*. Therefore, the security interest was neither valid nor enforceable against AGEL.¹ It was also found that attachment and enforceability are mandatory requirements for perfection of a security interest under s 21(1)(b) of the *PPSA*.²

IV JUDGMENT

This case concluded on 24 September 2014 with the application being dismissed. Collier J made clear that the position adopted by the applicant misconceived and wrongly interpreted both s 21(1) of the PPSA and s 588FL(2) of the *Corporations Act*.³ Section 21(1) of the PPSA outlines the way in which a security interest is perfected. Section s 588FL(2) of the *Corporations Act* provides the ways in which a security interest may vest in a company.

Collier J first examined the provisions of the *Corporations Act* noting that 26 May 2014 was the 'critical time' within the meaning of s 55FL(7) which meant that the security interest was registered within the 6 months before the beginning

1 *Pozzebon (Trustee) v Australian Gaming and Entertainment Ltd (in liq)* [2014] FCA 1034, [52].

2 *Ibid* [37].

3 *Ibid* [36].

of the administration and the ‘critical time’ as outlined by s 588FL(2)(b)(i).⁴ She also noted that the appointment of the administrator was an event outlined by s 588FL(1)(a)(ii).⁵ Due to the timing of the registration, the security interest vested in the company, making the applicant an unsecured creditor, unless it could be proven that the security interest was not perfected only by registration.⁶

Collier J then discussed the applicants’ submission that their security interest was not perfected only by registration, but by attachment, enforceability and effective registration, on the basis that attachment and enforceability are not always necessary for perfection.⁷ Her Honour was quick to state that this was a clearly misconceived interpretation of s 21(1) of the PPSA and that unless perfection is of a temporary nature, attachment and enforceability are mandatory prerequisites.⁸

Collier J then discussed the circumstances and provisions in the PPSA which allow for temporary perfection,⁹ including s 22(2)-(4), s 33, s 34, s 35, s36, s 38, s39, and s 40. However, Collier J stated that those provisions reflect very limited circumstances of a limited duration which show no suggestion of being applicable in the present case.¹⁰ Therefore, the Pozzebons’ attempt to save their security interest was unsuccessful.

Collier J also strongly endorsed the following statement by Austin RP and Black AJ in Annotations to the *Corporations Act* at 83, 615:

Section 588FL(4) applies if a security interest is perfected at the relevant time by registration, and not to the perfection of the security interest by possession, control or temporary perfection which are unaffected by the section by reason of s 588FL(2)(a)(ii).¹¹

V CONCLUSION

This case confirms that attachment, enforceability, and one of the means of perfection, as outlined in s 21(2) of the PPSA, are necessary prerequisites to perfect a security interest. It also highlights that not registering a security interest on the PPSR within 20 business days of the formation of a security agreement over corporate property leaves the lender at extreme risk.

4 Ibid [32].

5 Ibid.

6 Ibid [34].

7 Ibid [35].

8 Ibid [36].

9 Ibid [42].

10 Ibid [43].

11 Ibid [44].

This decision is an important reminder to secured parties to register their security interest as soon as possible when entering into a security agreement to avoid the dreadful situation the Pozzebons found themselves in. It is also an alert to liquidators to be aware of secured parties who have not met the requirements of the PPSA and *Corporations Act*, like the Pozzebons, as those parties' security interests will have most likely vested in the company.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V CHRISCO HAMPERS AUSTRALIA LTD: DETERMINING UNFAIR CONTRACT TERMS

Monisha Kannan*

I INTRODUCTION

The case of *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd*,¹ presents as a succinct guide on how “unfair” contract provisions within the meaning of s 24 of the Australian Consumer Law (“ACL”) will henceforth be applied to consumer and business contracts.

II BACKGROUND

Chrisco Hampers Australia Ltd (‘Chrisco’) conducted a business that supplied customers with Christmas hampers.² The goods supplied by Chrisco included food, beverages and domestic and household products, which were packaged into hampers for customers across Australia.³

Chrisco offered the Hampers through its catalogue, website and as hard copies sent by post which included by direct request by its customers.⁴ The hampers were paid for in instalments over a period of up to a year.⁵ It was common ground between

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1 [2015] FCA 1204.

2 *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* [2015] FCA 1204, [2].

3 *Ibid* [12]-[13].

4 *Ibid* [14].

5 *Ibid* [2].

the parties that the contracts between Chrisco and its customers were ‘consumer contracts’ and ‘standard form contracts’ within the meaning of s 23(3) and s 27 of the ACL, respectively.⁶ The Australian Competition and Consumer Commission (‘ACCC’) alleged three contraventions of the ACL, which gave rise to the following issues.

III ISSUES

A *HeadStart Term*

Chrisco’s contracts contained a term called a HeadStart term. This term allowed Chrisco to continue to withdraw funds from a customer’s bank account even after full payment of the Hamper was made.⁷ The excess money withdrawn was to be used for any future order. However, the customer did not obtain a discount.⁸ The term was to apply unless or until the customer opted out of it. If the customer did not place a future order, but requested a refund of the money, the money would be refunded without interest.⁹

The first issue pertained to whether the HeadStart term was an unfair term within the meaning of s 24 of the ACL. Section 24(1) requires the three elements in (a) to (c) to be satisfied in order for a contract term to be considered unfair.¹⁰ As such, Justice Edelman, methodically considered each element.

1 *Section 24(1)(a) of the ACL*

Section 24(1)(a) provides that a term of a consumer contract is unfair if it causes a significant imbalance in the parties’ rights and obligations arising under the contract.

Chrisco argued that there was no imbalance, nor substantial imbalance, because the removal of the money from the customers’ accounts without interest and without any discount on a prospective order conferred a benefit to the customer.¹¹ This benefit was argued to be that the customer was given the ability to pay for prospective orders by smaller instalments over a longer period of time.¹²

6 Ibid [26].

7 Ibid [3].

8 Ibid.

9 Ibid.

10 Ibid [38].

11 *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* [2015] FCA 1204, [4].

12 Ibid.

In a hypothetical example, Chrisco described part of its customer demographic as ‘unsophisticated’.¹³ The example illustrated that an unsophisticated customer who could not budget to pay the instalments, obtained a benefit as a result of the HeadStart term because, in essence, it acted as ‘a savings plan’ which came at a small cost to the consumer.¹⁴

However, Edelman J found that this benefit was not substantial.¹⁵ The HeadStart term gave Chrisco a right to withdraw money from the customers’ account, with no obligation to pay interest or to provide a discount to a customer who subsequently chose to place an order,¹⁶ and without any substantial corresponding right for the customer.¹⁷

(a) ‘Evaluative Assessment’

In accordance with s 24(2), which is to be taken into account when determining whether a consumer contract is unfair, Edelman J undertook an evaluative exercise which involved consideration of the contract as a whole and the transparency of the HeadStart term.

Section 24(3) provides that a term is transparent if it is expressed in reasonably plain language, legible, presented clearly, and readily available to any party affected by the term.¹⁸ Edelman J found that the HeadStart term as a whole did not lack transparency. However, His Honour noted that there were two crucial matters that weakened this conclusion.¹⁹

(i) Language of HeadStart Term Not Clear

The HeadStart term did not clearly identify the amounts that would be debited by Chrisco nor the means by which those amounts would be calculated or determined.²⁰ It merely stated that the customer’s account will ‘continue accordingly’.²¹

Further, Chrisco’s website and catalogue terms provided that ‘[Chrisco] would write to [the customer] to confirm [the] HeadStart plan payments prior to commencing direct debits’.²² However, Edelman J held that it was not plain to the customer whether Chrisco would write to confirm whether they intended to proceed with the HeadStart term, or whether Chrisco would write to confirm the amount of the payment that it would withdraw.²³

13 Ibid [62].

14 Ibid [58].

15 Ibid [53]—[56], [69].

16 Ibid [69].

17 Ibid [53].

18 Ibid [75].

19 Ibid [79].

20 Ibid [81].

21 Ibid.

22 Ibid [86].

23 Ibid.

It was also held, as pleaded by the ACCC, that the means by which the customer could cancel the HeadStart plan and obtain a refund was not clear.²⁴

(ii) Potential for HeadStart Term To Be Clearer

Edelman J stated that the HeadStart term could have been presented in a manner which was 'far more legible, much more clearer and more readily available'.²⁵ The way in which the HeadStart term appeared, including the font size, especially in comparison to other surrounding words, had the effect of not being adequately visible to the customer.²⁶ Additionally, there were also difficulties with respect to the opt-out provisions in Chrisco's catalogue that were unclear.²⁷

(b) HeadStart Term Deemed to Cause 'Significant Imbalance'

For the reasons stated above, His Honour found that the HeadStart term, in respect to the contract as a whole and the transparency of the term, caused significant imbalances in the parties' rights and obligations which arose out of the contract. Therefore, the requirement in s 24(2) was satisfied.²⁸

2 Section 24(1)(b) of the ACL

Section 24(1)(b) relates to a contract term not being reasonably necessary to protect the legitimate interests of the party who would be advantaged by it.²⁹ Chrisco did not contend in its submissions that the HeadStart term was reasonably necessary to protect its legitimate interests, and so it was presumed that it was not reasonably necessary in accordance with the rebuttable presumption in s 24(4) of the ACL, which must be read with 24(1)(b).³⁰ Therefore, the requirement in s 24(1)(b) was satisfied.

3 Sections 24(1)(c) of the ACL

Section 24(1)(c) provides that a consumer contract would be unfair, subject to the satisfaction of subsections (a) and (b), if it would cause detriment, financial or otherwise, to a party were it to be applied or relied upon. Edelman J considered whether the HeadStart term caused a significant imbalance in the parties' rights and obligations arising out of the contract,³¹ concluding that it would impose a significant financial detriment upon the customer without any corresponding benefit, and that the transparency issues strengthened this conclusion.³²

24 Ibid [88].

25 Ibid [89].

26 Ibid [89] - [90].

27 Ibid [91].

28 Ibid [96].

29 Ibid [98].

30 Ibid.

31 Ibid [99].

32 Ibid [100].

B Cancellation Charges

Chrisco charged its customers a ‘cancellation charge’ which, during one period of time, had the potential of amounting to 50% of the total cost of the order.³³ The example provided illustrated that if only one Hamper had been ordered the cost of the cancellation could have been more than \$2,000.³⁴

In respect of the cancellation charges, the central issue was the construction of s 97(3) of the ACL. Section 97(3) provides that a supplier of goods who is a party to a lay-by agreement must ensure that, if the agreement provides that a termination charge is payable, the amount of the charge should be not more than the supplier’s reasonable costs in relation to the agreement.

The ACCC submitted that s 97(3) could be contravened in two ways. The first would be if a supplier of goods did not have a system to ascertain reasonable costs in relation to the agreement.³⁵ The second would be if the cancellations charges exceeded the supplier’s reasonable costs in relation to the agreement.³⁶ Chrisco submitted that s 97(3) could only be contravened the second way.³⁷

Edelman J observed that it was difficult to identify the precise reasons as to why the ACCC had claimed that Chrisco had contravened s 97(3).³⁸ His Honour did not accept the ACCC’s construction of s 97(3), that Chrisco had failed to ensure it had a proper system in place for estimating reasonable costs in relation to the agreement, even if the application of that criterion meant that Chrisco would never have actually imposed a termination charge which exceeded its reasonable costs.³⁹ This construction was held to be inconsistent with the words of s 97(3) as the section can only be contravened after a supplier’s termination charge exceeds its reasonable costs in relation to the agreement.⁴⁰

It was further held that even if the Court accepted the ACCC’s construction, there would still be no contravention by Chrisco of s 97(3).⁴¹

C Lay-by Agreement Representation

There was a statement on Chrisco’s website and order confirmation form that read ‘your order cannot be cancelled once it is fully paid for’.⁴²

33 Ibid [5].

34 Ibid.

35 Ibid [107].

36 Ibid.

37 Ibid.

38 Ibid [109].

39 Ibid [110].

40 Ibid [110].

41 Ibid [127].

42 Ibid [146].

The ACCC pleaded that Chrisco had contravened s 29(1)(m) of the ACL by making false or misleading representations concerning the exclusion of rights concerning goods and services. Those representations were that a customer could not cancel his or her lay-by agreement after making final payment.⁴³ However, s 97(1) of the ACL provides that consumers have the right to terminate a lay-by agreement at any time before delivery of the goods.⁴⁴ Therefore, the issue was whether or not Chrisco's customer contracts were lay-by agreements in accordance with the definition provided for in s 96 of the ACL.⁴⁵

Chrisco argued that s 96(3) concerned agreements for the supply of a particular good upon condition of full payment.⁴⁶ They submitted that s 96(3) was therefore not concerned with agreements that provided for the possibility of the supply of alternative goods if full payment is not made, or with agreements that permitted a consumer to receive some alternative good even if those were not the goods that the consumer ordered.⁴⁷ However, Edelman J found no reason to interpret s 96(3) so narrowly and Chrisco was found liable.⁴⁸

III OVERALL DECISION AND CONCLUSION

Chrisco was held liable in respect of the first and third issues which fell mostly on the imbalance in the parties' rights and obligations.

This case is one of the few cases that has considered the unfair contract provisions of the ACL in detail. Edelman J's analysis of the HeadStart term illustrates the several factors that a court is likely to take into account when assessing whether or not a contract term is unfair.

This case demonstrates that the terms and conditions in standard form contracts must be evaluated in light of section 24 of the ACL. This includes the need for transparent, comprehensive and plain language terms that are not isolated from other key terms and conditions. Further, a key aspect of this case illustrates that automatic deductions from consumer accounts of potential future purchases are likely to be considered an unfair term, even with an opt-out provision.

In regards to the overall decision, ACCC Commissioner, Sarah Court, stated:⁴⁹

[T]he Court's findings send a strong message to traders that they must comply with all of their obligations under the Australian Consumer Law, including the unfair contract terms laws that are in place to protect consumers from unfair terms in standard form consumer contracts.

43 Ibid [144]—[145].

44 Ibid.

45 Ibid [147].

46 Ibid [150].

47 Ibid.

48 Ibid [8], [151].

49 Australian Competition and Consumer Commission, 'Federal Court finds Chrisco's lay-by agreements contained unfair contract term' (11 November 2015) <<https://www.accc.gov.au/media-release/federal-court-finds-chricos-lay-by-agreements-contained-unfair-contract-term>>.

MISLEADING AND DECEPTIVE CONDUCT UNDER THE ACL (WA): COMMISSIONER FOR CONSUMER PROTECTION V UNLEASH SOLAR

Monisha Kannan*

I INTRODUCTION

The *Commissioner for Consumer Protection v Unleash Solar Pty Ltd* (in liq) (No 2)¹ is a Western Australian case involving an application for default judgment made by the Commissioner for Consumer Protection ('the Commissioner'). Unleash Solar was the first respondent and Mr Dionysis Perdikoyiannis, who at the time of these proceedings was sole director of Unleash Solar, was the second respondent. The matter was determined in the Federal Court of Australia ('FCA').

The legal issue concerned several allegations by the Commissioner that Unleash Solar and Mr Perdikoyiannis had contravened the *Australian Consumer Law* (Cth) ('ACL')² and *Australian Consumer Law* (WA) ('ACL (WA)')³, collectively referred to as the ACL hereafter.

Although default judgment was granted, Mckerracher J was required to make a determination on the Commissioner's allegations of the respondents' conduct to determine what the appropriate relief would be.

II FACTS

The primary business of Unleash Solar was to supply and install solar photovoltaic systems ('System'), in trade or commerce, to consumers in Western Australia.⁴ The

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1 [2016] FCA 1177.

2 Contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

3 Contained in the *Fair Trading Act 2010* (WA).

4 Ibid [4].

Commissioner alleged that the respondents had contravened the ACL in relation to conduct concerning, first the Residential Net Feed-in Tariff scheme ('FiT Scheme'); second, the non-supply of purchased Systems; and third, the non-supply of a gift or free item in relation to a purchased System.

A FiT Scheme

From 1 August 2010 to 1 August 2011, the Western Australian government operated the FiT Scheme, under which owners of a renewable energy system, including the Systems installed and supplied by Unleash Solar, were able to obtain payments in exchange for energy exported by an owner to the electricity grid.⁵ However, in May 2011, the government announced a reduction in the rate applicable for energy exported to the grid, affirming that the FiT Scheme would close once the Systems reached a certain energy capacity.⁶

In September 2011, the respondents sent a letter to at least four customers containing several representations about the FiT Scheme ('the Letter').⁷

1 Commissioner's Allegations (Letter Representations)

The Commissioner alleged that the ordinary reader would have taken the representations in the Letter to mean as follows:

1. If a consumer had installed a System after 30 September 2011 then they would receive 1 to 1 payments for the electricity it produced (1 to 1 Payments Representation);
2. A consumer who installed a System, under the FiT Scheme, would only be eligible for payments at the FiT rate ('FiT Rate') if that consumer's total system generation during a billing cycle exceeded their total household consumption during that billing cycle (Excess Generation Representation);
3. If a consumer used 1000kW of power and the consumer's system produced 900kW of power, the consumer would only pay for 100kW of power plus the service fee (Example Representation); and
4. The closure of the FiT scheme would not affect consumers whose electricity bills did not exceed \$175 or \$200 for each two month billing cycle and who installed a 1.5kW or 2kW System, even if they installed that System after 30 September 2011 (No Excess Representation).⁸

However, the court determined that these representations were false for the following reasons:

⁵ Ibid [22]—[23].

⁶ Ibid.

⁷ Ibid [24].

⁸ Ibid [8], [25].

1. A consumer who had a System installed after 30 September 2011 would not receive 1 to 1 payments for electricity produced by the consumer's System. Instead, a consumer who installed a System prior to 30 September 2011 would export energy to the electricity grid and be eligible for payments at the FiT rate whenever the electricity generated by the System exceeded the energy demand of the consumer's house at that particular time;
2. Conversely, a consumer who installed a System would purchase energy from the electricity grid at the applicable residential tariff ('Residential Tariff') whenever the electricity generated by the System was less than the energy demand of the consumer's house at that particular time;
3. The FiT Rate and the Residential Tariff were, at all material times, different and a consumer who installed a System after 30 September 2011 would not be eligible for payments at the FiT Rate for energy they exported to the electricity grid;
4. If a consumer used 1,000kW of power and the consumer's system produced 900kW of power, the consumer would not necessarily only pay for 100kW of power plus the service fee. The amount the consumer would pay would depend upon different variables, including the FiT Rate and the Residential Tariff, the amount of energy exported to and the amount of energy purchased from the electricity grid.
5. The closure of the FiT Scheme would affect all consumers of Systems whose Systems were installed after 30 September 2011 because those consumers would be likely to export energy to the electricity grid at some times of the day and would no longer be eligible for the Fit Rate for those exports.⁹

2 Findings

As a result of the Letter, the first respondent was found to have first, engaged in conduct that was misleading or deceptive, or alternatively, likely to mislead or deceive; in contravention of s 18(1) of the ACL and s 18(1) of the ACL (WA);¹⁰ second, engaged in conduct in which false or misleading representations were made about the benefits of a good or service, in contravention of s 29(1)(g) ACL and s 29(1)(g) ACL (WA);¹¹ and third, engaged in conduct in which false or misleading representations were made about the effect of a consumers right, in contravention of s 29(1)(m) of the ACL and s 29(1)(m) of the ACL (WA).¹²

⁹ Ibid [8], [26].

¹⁰ Ibid [37].

¹¹ Ibid [88]—[89].

¹² *Commissioner for Consumer Protection v Unleash Solar Pty Ltd* (in liq) (No 2) [2016] FCA 1177, [90] citing *Australian Competition and Consumer Commission v Avitalb Pty Ltd* [2014] FCA 222 and *Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd* [2013] FCA 1315.

B Non-Supply of Systems

1 Commissioner's Allegations

Between November 2010 and April 2011, Unleash Solar entered into contracts for the supply of Systems and accepted deposits from nineteen consumers.¹³ However, only thirteen consumers were supplied with their Systems.¹⁴

2 Findings

Unleash Solar failed to supply Systems to the remaining six customers. In these six cases that the Commissioner pursued, Unleash Solar did not supply the System in contravention of s 36(4) of the ACL and s 36(4) of the ACL (WA), which provides that a person, in trade or commerce, who accepts payments for goods or services must supply all the goods or services within the period specified or within a reasonable time.¹⁵

C Non-Supply of Gift or Free Item

1 Commissioner's Allegations

In connection with the above Systems, Unleash Solar offered a free gift, namely, a five or ten year supply of a solar panel cleaner, called a 'Powerboost'. Eleven of the nineteen consumers did not receive their free Powerboost.¹⁶

Mckerracher J stated that the consumers who were not supplied the Powerboost may have suffered a potential loss in that they may have been required to obtain a similar item (solar panel cleaner) at their own expense.¹⁷ Unleash Solar advertised the Powerboost to be valued at \$500.¹⁸

2 Findings

Consequently, the respondents had contravened s 32(2) of the ACL and s 32(2) of the ACL (WA) which provides that a person who offers any gift or other free item in connection with the supply of goods or services must, within the period specified or within a reasonable time, supply the gift or other free item in accordance with the offer.¹⁹

13 *Commissioner for Consumer Protection v Unleash Solar Pty Ltd* (in liq) (No 2) [2016] FCA 1177, [38].

14 *Ibid.*

15 *Ibid* [38]—[41].

16 *Ibid.*

17 *Ibid* [42].

18 *Ibid* [74], [105].

19 *Ibid* [104].

III RELIEF

Pursuant to the aforementioned contraventions of the ACL and the ACL (WA), excluding s18, which is not the subject of civil pecuniary penalties,²⁰ Mckerracher J undertook a detailed analysis of what the appropriate relief should be in this instance.

1 Declarations

Following a discussion of the relevant principles of declaratory relief, Mckerracher J found that the declarations proposed by the Commissioner were appropriate for recording the Court's disapproval of the conduct.²¹ The declarations proposed included specifics about the conduct alleged which the Court found contained an appropriate level of detail.²²

2 Injunctions

The Commissioner sought an injunction against Mr Perdikoyiannis, even though he was not in Australia at the time of these proceedings.²³ This was to prevent the possibility of Mr Perdikoyiannis returning to Australia and operating or carrying on a similar business. Consequently, Mckerracher J ordered that Mr Perdikoyiannis be restrained, both in an individual capacity and as an employee, for a period of 3 years from the date of the order, from managing or being otherwise concerned in the carrying on of a business that promoted or supplied photovoltaic solar panel systems in Australia.²⁴

3 Pecuniary Penalties

The Commissioner also sought pecuniary penalties for the contraventions of ss 29, 32, and 36 under the ACL (WA) as the 'regulator' of it.²⁵

(a) Determining the Appropriate Penalties

In determining the appropriate penalty and in accordance with s 224(2) of the ACL (WA),²⁶ Mckerracher J was required to have regard to, inter alia, the nature and extent of the conduct; loss or damage of the conduct; circumstances of the conduct; size of the business; deliberateness of the conduct; the roles of the individuals within the business; culture of compliance; cooperation; and similar conduct in the past.²⁷

²⁰ Ibid [63].

²¹ Ibid [55].

²² Ibid.

²³ Ibid [56].

²⁴ Ibid [58]—[59].

²⁵ Ibid [12]—[14], [60].

²⁶ See, eg, *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076, [52], [152].

²⁷ *Commissioner for Consumer Protection v Unleash Solar Pty Ltd* (in liq) (No 2) [2016] FCA 1177, [68].

(i) Nature and Extent of the Conduct

Mckerracher J found that Unleash Solar and Mr Perdikoyiannis were aware of the FiT Scheme and the terms upon which it was being closed.²⁸ The closure had the impact of negatively affecting the Unleash Solar business because it reduced a customer's incentive to purchase a System.²⁹

Unleash Solar's failure to supply the Systems that were purchased, constituted a 'complete failure' of its contractual obligations.³⁰ Unleash Solar accepted \$7,420 from the six consumers who did not received the Systems that they purchased.³¹

(ii) Loss or Damage of the Conduct

Although there was no evidence that the FiT Scheme Representations actually misled any person to enter into a contract to purchase a System or adhere to a contract already entered into, Mckerracher J held that the potential for the representations to have that effect was clear.³²

Of the six customers, three received a refund, one did not and it is not clear, with respect to the remaining two, what eventuated.³³ Nevertheless, Mckerracher J found that even where consumers did ultimately receive an outcome, the possibility of other resulting losses was apparent, such as a loss of the opportunity to participate in the FiT Scheme.³⁴

(iii) Circumstances of the Conduct

Due to the nature of the industry that Unleash Solar was operating in, namely, the energy sector, rights that existed pursuant to programs and incentives were designed to encourage energy efficiency.³⁵ Mckerracher J held that the conduct by the respondents was a deliberate attempt to take advantage of such government incentives and of customers' desire to be more environmentally friendly.³⁶

(iv) Size of the Business

The Commissioner submitted that Unleash Solar was a reasonably sized business, though its precise size was not apparent.³⁷ However, a large number of orders were recorded in a short space of time.

28 Ibid [72].

29 Ibid.

30 Ibid [73].

31 Ibid.

32 Ibid [75].

33 Ibid [76].

34 Ibid.

35 Ibid [78]—[79].

36 Ibid [79], [82].

37 Ibid [81].

(v) Deliberateness of the Conduct

The Letter was determined to be a deliberate act of misleading consumers as a result of the negative consequences that the closure of the FiT Scheme would have upon Unleash Solar.³⁸ However, in respect of the non-supply of Systems, it was noted that even if Unleash Solar did not deliberately fail to supply the Systems, it conducted its business in a way which would objectively result in such failures.³⁹

(vi) The Roles of the Individuals within the Business

As sole director of Unleash Solar, the Court considered that Mr Perdikoyiannis's conduct was in direct relation to his intimate involvement in its management and direction.⁴⁰ His involvement was considered material.⁴¹

(vii) Culture of Compliance

Mckerracher J stated that it was not possible to make an assessment on any existence of Unleash Solar's culture of compliance, because of the surrounding circumstances of the matter, including that Unleash Solar was no longer in operation at the time that this matter was deliberated.⁴²

(viii) Cooperation

Mr Perdikoyiannis and Unleash Solar were said to have co-operated with the Commissioner in respect of some aspects of their conduct pursuant to an enforceable undertaking.⁴³

(ix) Similar Conduct in the Past

Neither Mr Perdikoyiannis nor Unleash Solar were found to have contravened the ACL in the past.⁴⁴

(b) Orders for Pecuniary Penalties

Mckerracher J, taking the above factors into consideration, coupled with the multiple contraventions of the ACL, and the strong need for deterrence of such conduct, ordered Unleash Solar to pay \$390,000 and for Mr Perdikoyiannis to pay \$145,000.

38 Ibid [82].

39 Ibid [83].

40 Ibid [2], [5], [59], [84].

41 Ibid [59].

42 Ibid [85].

43 Ibid [86].

44 Ibid [87].

IV CONCLUSION

This case highlights the need for businesses to fulfill their obligations. The serious ramifications in terms of the penalties placed on the respondents, illustrates the Courts strict application of the ACL and its absolute protection of consumers. In this instance, it was clear that the respondents engaged in quite deliberative conduct for the purposes of obtaining financial gain at the expense of the consumers. The substantial court penalties demonstrated the seriousness of the conduct and the consequences that will ensue if businesses engage in misleading and deceptive practices.

Specifically, the Australian government, both at a State and Federal level, offers a range of incentives, programs and rebates for the purposes of encouraging energy efficiency. Therefore, any conduct in relation to these incentives, which may be viewed as exploitative and unethical, must carefully be considered by the courts, given the consumers' apparent desire to be environmentally friendly in participating in the incentives and in a time of great environmental concern.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V COLES SUPERMARKETS AUSTRALIA PTY LTD [2014] FCA 1405

Sowmya Kolli*

I INTRODUCTION

This case illustrates that unconscionable conduct is a broad and complicated area of law, meaning courts consider a range of factors when determining what it constitutes.¹ The outcome of this case has also clarified that unconscionable conduct should be regarded in a ‘business-to-business’ context. In her judgment, Gordon J was particularly critical and described the conduct of Coles Supermarket (‘Coles’) as ‘serious, deliberate, and repeated’ breaches of the Australian Consumer Law which was ‘contrary to conscience’. This critical approach to unconscionable conduct could be said to have vindicated the Australian Competition and Consumer Commission’s (‘ACCC’) efforts to regulate Australian Consumer Law in the interest of the public. The ACCC’s Chairman Rod Sims stated that ‘the outcome of this case sends a clear signal to larger businesses generally to undertake appropriate business conduct in commercial dealings with smaller suppliers’.²

In this case the respondent is Coles and the applicant is the ACCC. The legal issue concerns the enforcement and remedies as stated in section 87(b) of the

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1 Jon Meadmore, Melanie Williamson, Harriette Watson, ‘Unconscionable Conduct – A comparison of Coles and Woolworths’ Decisions’ (Colin Biggers & Paisley Lawyers Insight Article Release, 22 December 2014) <<https://www.cbp.com.au/insights/2017/february/unconscionable-conduct-a-comparison-of-coles-and>>.

2 Australian Competition and Consumer Commission, ‘The Court Finds Coles Engaged in Unconscionable Conduct and Orders Coles Pay \$10 Million in Penalties’ (Media Release, MR 320/14, 22 December 2014).

Competition and Consumer Act 2010 (Cth)³ in the case of admitted unconscionable conduct and other contraventions of the Australian Consumer Law.⁴ In particular, the issue concerns unconscionable conduct in business transactions pertaining to threats of commercial consequences if demands were not met, as well as demanding payments and refusing to pay or repay money.⁵ The matters of unconscionable conduct have been put forward through two separate proceedings by the ACCC. The first pertains to the Active Retail Collaboration rebate ('ARC Rebate') proceedings and the second concerns the Claims proceedings, both of which were held by the courts to constitute unconscionable conduct by Coles.⁶

II FACTS

A *The ARC proceedings*

Around April 2011, Coles had discovered that by identifying opportunities of cost saving recoveries experienced by the supplier, which it considered was because of its supply chain, it could increase its earnings before interest and tax (EBIT) and therefore increase its profit margins. The Tier 3 ARC Plan, as developed by Coles, was a strategy for Coles to close what it described as a 'profit gap'⁷ by targeting its Tier 3 Suppliers which by its definition, were smaller than Coles and for whom Coles represented a 'very significant part' of the supplier's business.⁸

In the situation where a supplier's products increased in line with the suppliers' sales growth, Coles identified that it could expect its profits to increase with respect to this increase in suppliers' sales growth.⁹ Coles' justification for this 'profit gap' was that its profits on suppliers' products was growing behind the suppliers' sales to Coles. This 'profit gap' was to account for the difference between the two.¹⁰ Coles knew that the 'profit gaps' in respect to any particular product may have been caused by its own acts and omissions and by matters that were largely or entirely outside the control of its suppliers. Despite this, during this relevant period, Coles encouraged and/or required its Categories Managers ('CM') and Business Categories Managers ('BCM') to seek payments to achieve these profit gaps.

3 *Competition and Consumer Act 2010* (Cth) s 87(b).

4 *Competition and Consumer Act 2010* (Cth) sch 2 ("Australian Consumer Law").

5 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, 2 [1].

6 *Ibid* 1 [5].

7 *Ibid* 31 [94].

8 *Ibid*.

9 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, 42 [142].

10 *Ibid*.

During this relevant period, Coles recorded what it deemed to be the cost to it of products that were supplied to Coles from its suppliers which were regarded as lost, damaged, or unfit while in Coles' retail stores as 'waste'. In addition to this, Coles also recorded what it considered to be the cost of Coles' employees or agents reducing the supplier's products as 'markdowns'.¹¹ Although Coles was aware that these 'waste' and 'markdowns' in respect to any particular product could have been due to its own acts/omissions rather than any conduct of its suppliers, it continued to encourage its CMs and BCMs to seek payments from the respective suppliers concerned.¹²

In addition to seeking payments for profit gaps and wastes, during the relevant period, Coles also decided to impose penalties or fines, in the form of monetary penalties, on some suppliers. This was in relation to seeking payments for 'late or short deliveries' despite the fact that they included deliveries that did not lead to any loss to Coles.

This case was followed by the ACCC's long-running investigation into supplier complaints in the supermarket sector. The ACCC urged suppliers to come forward to the ACCC in confidence to report their concerns about dealings with the major supermarket chains.¹³

III JUDGMENT

ARC PROCEEDINGS

In relation to the findings of unconscionable conduct with the ARC proceedings, Gordon J considered several factors such as the delivery of the ARC instructions, the relationship of the circumstances to the specific instances of unconscionable conduct, and the nature of the conduct itself.

The ARC instructions showcased Coles' intentions of the unconscionable conduct as it focused a great deal on encouraging CMs and BCMs to place importance of the ARC Plan to Coles' profits.¹⁴ The instructions also conveyed that the CMs were not to negotiate this rebate,¹⁵ and they conveyed that there was a sense of urgency about having each supplier agree to new trading terms incorporating the ARC rebate within a number of days.¹⁶ Furthermore, the ARC instructions also did

11 Ibid [144].

12 Ibid [145].

13 Paul Ninoul and Tadeusz Skoczny, *Procedural Fairness in Competition Proceedings* (Edward Elgar Publishing, 2015) 23.

14 *Australian Competition and Consumer Commission v Coles Supermarket Australia Pty Ltd* [2014] FCA 1405, 32 [95].

15 Ibid.

16 Ibid.

not provide the CMs and BCMs with sufficient information about how Coles had determined the values to the ARC rebate, and as a result, the CMs and BCMs were unable to provide adequate explanations of the ARC rebate to the supplier to whom they delivered these instructions.¹⁷

In reference to the relationship of the background circumstances to the specific instances of unconscionable conduct, Gordon J was clear in saying that Coles' actions were "deliberate, orchestrated, and relentless".¹⁸ To add to this, Gordon J also stated that Coles' conduct in relation to the suppliers had some recurring themes and actions. It also adopted certain tactics in relation to particular suppliers,¹⁹ which in this case, are relevant factors to the determination of the appropriate penalty.

The five suppliers ('Claims Suppliers'), the subject of the admitted contraventions from whom Coles sought payments of the ARC rebate all:

- (a) were significantly smaller than Coles (all had annual revenue of less than a fraction of 0.1% to that of Coles' annual revenue)
- (b) were highly dependent on their ongoing sales to Coles to sustain their business
- (c) would have experienced significant adversity to their business if Coles had substantially decreased, or even ceased their trading with them
- (d) were subject to inadequate and incorrect information by Coles regarding the value of the ARC rebate
- (e) could not understand, or did not agree with the values that Coles had provided to the ARC rebate
- (f) were pressured to comply with the terms of the ARC rebate
- (g) felt that they had no choice but to agree and comply with the ARC rebate as they feared that this would impact their dealings with Coles
- (h) commenced paying and continued to pay Coles according to the terms of the ARC rebate even though they did not agree to the terms of the rebate.²⁰

Therefore, in relation to these suppliers, it was held that Coles was motivated by profit in agreeing to the ARC rebate, did not convey to the suppliers that it was optimal for them to agree to the ARC rebate, did not provide the suppliers with adequate information, or provided them with incorrect information, about the ARC rebate. Furthermore, Coles even threatened commercial consequences as leverage to obtain the agreement of the suppliers, all of which were sufficient to constitute unconscionable conduct on behalf of Coles.²¹

17 Ibid.

18 Ibid 56 [201].

19 Ibid 43 [149].

20 Ibid 32 [98].

21 Ibid 57 [204].

IV THE CLAIMS PROCEEDINGS

As a result of the trading arrangements negotiated between Coles and the Claims Suppliers, Coles acquired grocery products for retail sale from the Claims Suppliers. The Claims proceeding refers to the unconscionable conduct committed by Coles when seeking payments from the Claims Suppliers outside of their relevant trading arrangements.²² The payments that Coles sought from their suppliers was for the purpose of the so called ‘profit gaps’, ‘waste’, and ‘markdowns’, and ‘short or late deliveries’ and were deducted by Coles from monetary payments that were supposed to be paid to that supplier for products that it had already supplied to Coles.²³ In determining unconscionable conduct, several factors were considered which included:

- (a) Coles’ market share and power
- (b) Coles’ trading arrangements
- (c) Coles’ business practices which included the profit gaps, waste markdowns, and short or late deliveries.

Coles’ market share and power during the Claims relevant period were considered the same as mentioned when dealing with the ARC rebate proceedings. The Claims Suppliers had, during the claims relevant period, a total annual revenue of less than 0.5% of Coles’ total annual revenue.²⁴ As with the ARC proceedings, most of the conditions relating to the acquisition of grocery products by Coles from a supplier, including the choice of whether Coles would continue to acquire from the respective supplier were all determined by Coles.²⁵

In relation to Coles’ business practices during the Claims relevant period, Coles continued to encourage its CMs and BCMs to meet profit targets which included the practices of seeking profit gaps, waste and markdowns and the penalties for short or late deliveries.²⁶ BCMs and CMs were also awarded prizes for meeting their profit targets.²⁷

Coles admitted that during the Claims relevant period, it engaged in conduct which was, in all the circumstances, unconscionable in contravention of section 22 of the Australian Consumer Law,²⁸ in relation to each Claims Supplier. The court proceeded to consider the admitted contraventions and weighed them against relevant factors to determine the penalties and remedies for the parties involved.

²² Ibid 41[138].

²³ Ibid.

²⁴ Ibid [139].

²⁵ Ibid [140].

²⁶ Ibid [141].

²⁷ Ibid.

²⁸ *Competition and Consumer Act 2010* (Cth) sch 2 (‘Australian Consumer Law’).

In determining the penalties and remedies available, the factors considered were the culture of compliance and corrective measure²⁹ implemented by Coles, the cooperation received from Coles,³⁰ and the maximum penalties along with the one transaction principle with reference to the penalties. The court applied the maximum for each supplier that Coles committed the contraventions against, which resulted in up to \$10 million in damages paid by Coles in total.³¹

V ANALYSIS

As ‘unconscionable conduct’ is not defined in the Australian Consumer Law, its application has significantly evolved from its origins in the principle of equity recognised by the common law which only offers protection to those who were at a ‘special disadvantage’. The introduction and development of the Trades Practices Act (‘TPA’)³² gave way to the extension of the protection to include business dealings.³³

The introduction of the Australian Consumer Law brought on provisions of unconscionable conduct that extended the range of remedies available and provided a list of factors for the courts to consider.³⁴ The extension of those protections to business dealings that were developed in the TPA was essential to the determination of this case, and has proven that unconscionable conduct may also occur in the business-to-business context.

In March 2015, the Competition Policy Review released a report examining the protections that small businesses have under the ACL’s unconscionable conduct terms.³⁵ The review panel concluded that it believed that the provisions were working as intended to meet their policy goals. The panel also viewed that the law should undergo active and ongoing review, and any deficiencies, as they become apparent, should be rectified. In consideration of this view, the panel acknowledged the issues that were raised in relation to unconscionable conduct. The following issues were raised by the panel:

29 *Australian Competition and Consumer Commission v Coles Supermarket Australia Pty Ltd* [2014] FCA 1405, 60 [220].

30 *Ibid.*

31 *Ibid* 61 [226].

32 *Trade Practices Act 1974* (Cth).

33 Consumer Affairs Australia and New Zealand, Commonwealth of Australia, *Australian Consumer Law Review* (2015) 13.

34 *Competition and Consumer Act 2010* (Cth) sch 2 (‘*Australian Consumer Law*’).

35 Consumer Affairs Australia and New Zealand, Commonwealth of Australia, *Australian Consumer Law Review* (2015) 13.

- a) whether the provisions should provide guidance to the courts to facilitate a more consistent interpretation of ‘unconscionable’, for example, providing further clarity regarding the ‘norms of society’
- b) whether it should be extended to protect all businesses, including publicly listed companies
- c) whether it should be extended to prohibit specific forms of unfair commercial practice.

The recent Australian Consumer Law Review conducted in 2017 responded to these issues and acknowledged that there was a case for unconscionable conduct to extend to protect all businesses,³⁶ including publicly listed companies, which was reflected in its proposal to extend the Australian Consumer Law’s unconscionable protections to publicly listed companies.³⁷

In regard to the broad interpretation of the unconscionable conduct provisions, the panel was confident that the flexibility of the terms has been effective in cases of unconscionable conduct and would allow courts to determine unconscionable conduct on a case-by-case basis in accordance with the changing norms of society.

In relation to the development of unconscionable conduct, this case shows that where a party engages in other unfair tactics or conduct such as communicating misleading messages, or engaging in undue pressure, or making unreasonable commercial threats, the conduct in question may be more likely to constitute a contravention in the provisions of unconscionable conduct pursuant to the CCA.

VI CONCLUSIONS

The recent Australian Consumer Law Review conducted in 2017 further showcases that the broad principle-based approach to the unconscionable conduct provisions is achieving the intended policy measures and will likely remain this way. The case at hand provides for a great example where the court’s broad principle-based approach and the flexibility of the provisions have allowed for development in this area of law on a case-by-case basis according to the norms of society. As a result, this approach has further clarified the provisions of unconscionable conduct which has set a marked precedent for future similar cases.

36 Consumer Affairs Australia and New Zealand, Commonwealth of Australia, *Australian Consumer Law Review* (2017) 48.

37 Ibid.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v APPLE PTY LTD [2017] FCA 416

Sita Samtani*

I INTRODUCTION

In this case, the Australian Competition and Consumer Commission commenced proceedings in the Federal Court of Australia against the two respondents – Apple Inc. (a United States of America corporation) and its subsidiary company, Apple Pty Ltd (Apple Australia).¹ The ACCC alleged that the respondents made false, misleading, or deceptive representations in relation to consumers' rights which are rights to a repair, replacement or refund as well as compensation for damages and loss. The legal issue in this case was whether the ACCC should be granted leave to serve documents on Apple Inc. being located in a foreign jurisdiction. Moshinsky J presiding over the case examined whether the requirements for service out of jurisdiction were satisfied. This paper will firstly discuss the facts relating to the conduct of Apple as a whole and the relevant consumer law provisions. Thereafter, there will be a discussion of the issue of service on Apple Inc.

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¹ *Australian Competition and Consumer Commission v Apple Pty Ltd* [2017] FCA 416 [1].

II FACTS RELATING TO CONDUCT OF APPLE AND THE RELEVANT CONSUMER LAW

In the ACCC's concise statement, it was alleged that the respondents engaged in conduct that was misleading or deceptive, or conduct that was likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law ('ACL'), being Schedule 2 to the *Competition and Consumer Act 2010* (Cth).²

The ACCC also alleged that, in conjunction with the supply of goods, the respondents made false or misleading representations as to the existence, exclusion or effect of guarantees, rights and remedies, in contravention of s 29(1)(m) of the ACL.³

Some key points of the concise statement will be discussed. First of all, the ACCC alleged that Apple Inc. manufactures and supplies Australian Apple devices with software known as 'iOS'.⁴ Apple Australia provides after-sales support for products and iOS software in its Australian Apple stores.⁵

The ACCC commenced an investigation following reports relating to an 'Error 53', which is an error that disabled some consumers' devices after downloading an iOS software update. Many consumers who experienced 'Error 53' had previously had their Apple device repaired by a third party (predominantly, replacing a cracked screen). Between 2015 and 2016, Apple Australia represented to a portion of their consumers that if a component of their iPhone or iPad had previously been repaired, serviced or replaced by someone other than Apple Australia or an Apple-Authorised Service Provider, no Apple entity (including Apple Australia and Apple Inc.) was required to, or would, provide a remedy for the Error 53 software fault at no cost.⁶

Also during this period, Apple Inc. published a webpage. The relevant text, which appeared on a page headed 'If you see error 53 or can't update or restore your iPhone or iPad', was as follows:

If the screen on your iPhone or iPad was replaced at an Apple Service Centre, Apple Store, or Apple Authorized Service Provider, contact Apple Support. If the screen or any other part on your iPhone or iPad was replaced somewhere else, contact Apple Support about pricing information for out-of-warranty repairs.

Essentially, Apple Inc. represented to Australian consumers with the Error 53 fault that if they had previously had their device repaired by a third party, Apple were

2 [2017] FCA 416 [7].

3 Ibid.

4 Ibid [5].

5 Ibid.

6 Ibid [6].

not required to remedy the fault. The investigation revealed that Apple appeared to have routinely refused to look at or service consumers' defective devices if a consumer had previously had the device repaired by a third party repairer, even where that repair was unrelated to the fault. The ACCC alleges that due to these representations, a breach of section 29(1)(m) occurred which relates to false or misleading representations relating to goods or services. Specifically, subsection (m) relates to the attempt to exclude the consumer guarantees and remedies under Part 3-2 of the ACL, including the guarantees in sections 54 and 55, which required that they be goods of acceptable quality and be reasonably fit for the purposes for which Apple Inc. represented they were reasonably fit.⁷

Furthermore, in around June 2016, officers of the ACCC telephoned the 13 retail stores operated by Apple Australia to make an inquiry about a defective iPhone.⁸ In each call, the ACCC caller told the Apple Australia representatives responding to the call that:

- (a) The screen of the iPhone had been replaced by someone other than Apple Australia or an Apple-Authorised Service Provider; and
- (b) A fault had later developed with the speaker component of the iPhone.⁹

During these calls, Apple Australia represented to the ACCC caller that no Apple entity (including Apple Australia and Apple Inc.) was required to remedy the defective speaker at no cost under the ACL if the screen of the iPhone had been replaced by someone other than Apple Australia or an Apple-Authorised Service Provider.¹⁰ Henceforth, the ACCC also alleges that the respondents engaged in conduct that was misleading or deceptive (or likely to mislead or deceive) in contravention of s 18 of the ACL.

The ACCC had two main arguments as to why they should be granted leave to serve documents to Apple US. The first aspect concerns an alleged false or misleading representation by Apple US on the Apple website, due to the fact that it did not refer to rights and remedies under the ACL.¹¹ The second aspect concerns the alleged behaviour of Apple US being liable for certain conduct of Apple Australia on the basis that Apple Australia engaged in the relevant conduct both on its own behalf and on behalf of Apple US.¹²

The ACL provides for a number of consumer guarantees relating to the quality, suitability for purpose and other characteristics of goods and services. Suppliers

7 Ibid [8].

8 Ibid [6].

9 Ibid.

10 Ibid.

11 Ibid [18].

12 Ibid [20].

must guarantee that products will be of acceptable quality and also guarantee that they will be reasonably fit for any disclosed or represented purpose. If the product is not of acceptable quality or fit for purpose, consumers are entitled to remedies such as a refund, repair or replacement.

The ACCC alleges that Apple US and Apple Australia represented to consumers that they were not entitled to a free remedy if their Apple device had previously been repaired by a third party. Nonetheless, having a part of an Apple device serviced, repaired or replaced by someone other than Apple cannot, on its own, extinguish the consumer's right to a remedy for non-compliance with the consumer guarantees.¹³

III APPLICATION FOR SERVICE ON APPLE US

For the ACCC to serve an application on Apple Inc. in the United States of America, the Federal Court Rules 2011 relevantly set out the process.¹⁴

Rule 10.43(4)(c) refers to the party having a prima facie case for all or any of the relief claimed in the proceeding. This requirement has been described as 'not particularly onerous'.¹⁵ In *April International Market Services*,¹⁶ Bennett J stated that:

Establishing a prima facie case for the relief claimed for the purposes of O 8 r 3(2) of the FCR should not call for a substantial inquiry. A prima facie case is made out where, upon a broad examination rather than an intense scrutiny of the material before the court, inferences are shown to be open which, if translated into findings of fact, would support the relief claimed.

Henceforth, the applicant need only to show a broad prima facie case in which inferences point to relief claimed.¹⁷

Justice Moshinsky applied the relevant rules to the facts of the case in determining whether the requirements for service out of jurisdiction are satisfied. Firstly, the application is required to be served with an affidavit through a private service agent on Apple US. The affidavits state that the proposed method of service is permitted by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at The Hague on 15 November 1965 (the

13 Australian Competition and Consumer Commission, *ACCC takes action against Apple over alleged misleading consumer guarantee representations* (6 April 2017) ACCC <https://www.accc.gov.au/media-release/accc-takes-action-against-apple-over-alleged-misleading-consumer-guarantee-representations>.

14 [2017] FCA 416, [10].

15 *Australian Competition and Consumer Commission v Yellow Page Marketing BV* [2010] FCA 1218 [25].

16 *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd* (No 6) (2010) 270 ALR 504 [8].

17 [2010] FCA 1218, [25].

Hague Convention) (to which Australia and the USA are parties) and conforms to the California Code of Civil Procedure.¹⁸

His Honour then discussed that the other requirements are satisfied including whether the Federal Court of Australia has jurisdiction¹⁹ and most importantly, whether the ACCC has a prima facie case against Apple US. Moshinsky J articulates his reasons for deciding why the ACCC has a prima facie case against Apple US in paragraphs 18-20. In relation to the website representation, His Honour states that:

It appears from the affidavit material that Apple US is responsible for operating and publishing content on the relevant website page for Apple Australia. In these circumstances, I am satisfied that the ACCC has a prima facie case against Apple US in relation to the statement on the website page.

In relation to the iOS software error representations, His Honour states that:

... It appears ... that Apple US is the licensor and supplier of the iOS8 and iOS9 software to consumers in Australia. This may support an inference that, in responding to customers seeking support in relation to the software update, Apple Australia was acting on behalf of Apple US as well as on its own behalf.

His Honour then goes on to say that both allegations are closely linked. Henceforth, it is desirable that the claims continue together in one proceeding. Thereafter, Justice Moshinsky granted leave to the ACCC to serve the court documents to Apple US in the United States of America in accordance with the Hague Convention and the California Code of Civil Procedure.²⁰

IV CONCLUSION

This will be an interesting case to follow as it is set on an international scale. The issue of cross-jurisdictional service can be complex. Moreover, the fact that Apple Australia was acting as an agent for and on behalf of Apple US may cause difficulties. Apple Australia is one branch of the large multinational conglomerate Apple Inc. with 498 stores in 22 countries worldwide. This case illustrates how multinational corporations with numerous offices around the globe can still be subject to foreign consumer laws.

18 [2017] FCA 416, [16].

19 Ibid [17].

20 Ibid [22].

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V JETSTAR AIRWAYS PTY LIMITED (NO 2) [2017] FCA 205

Sita Samtani*

I INTRODUCTION

In this case, the respondent was Jetstar Airways Pty Ltd ('Jetstar') and the applicant was the Australian Competition and Consumer Commission ('ACCC'). On 7 March 2017, Justice Foster of the Federal Court of Australia delivered his judgment relating to the penalties and remedies for the respondent's contraventions of ss 18, ss 29(1)(i) and ss 29(1)(m) of the Australian Consumer Law ('ACL'). It was held that on two occasions, in 2013 and again in 2014, Jetstar breached the ACL by engaging in misleading and deceptive conduct and making false or misleading representations about the price of certain advertised airfares.

II BACKGROUND

Justice Foster delivered a judgment in November 2015,¹ in which His Honour found Jetstar had contravened ss 18, ss 29(1)(i) and ss 29(1)(m) of the Australian Consumer Law (ACL) in two instances. The first instance was by making false representations on its website on 14 May 2013 concerning the price it would charge per person for two flights, where those representations did not disclose the existence of an \$8.50 booking and service fee per person per flight which applied to all bookings other than those paid for by using certain payment methods, and secondly, by making false representations on its mobile site from 21 March 2014 (mobile site conduct) concerning the price it would charge for a flight in circumstances where those representations did not disclose the existence of the same booking and service fee.²

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1 *Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263.

2 [2017] FCA 205, [1].

Jetstar's above mentioned conduct is referred to as 'drip-pricing'. According to the ACCC, drip pricing is where a headline price is advertised at the beginning of an online purchasing process and additional fees are then incrementally disclosed.³ This can result in a person paying a higher price than advertised or spending more than is realised. In regards to the misleading conduct of the airline ACCC Chairman, Mr Rod Sims, stated:

... the findings that some of their conduct was misleading are significant ... it is encouraging that a number of businesses in the travel, accommodation and ticketing industries have adjusted their online pricing practices to improve disclosure of fees and charges since the ACCC began its work on drip pricing. This also has a positive effect on competition, allowing consumers to easily compare and choose the best price.⁴

Ensuring a level playing field for competitors and safeguarding the interests of consumers is at the core of the ACCC's purpose. The main aims of the ACCC are to enforce the Competition and Consumer Act 2010 and promote competition and fair trading for the benefit of all Australians.

III FACTS

This case concerns Justice Foster's findings in relation to the penalties for Jetstar's contraventions. The ACCC alleged that Jetstar contravened the ACL on two occasions and sought a pecuniary penalty of \$300,000 for the website conduct and an additional penalty of \$250,000 for the mobile site conduct.⁵ The ACCC submitted that the two contraventions in question did not comprise a single course of conduct.⁶ Rather, those contraventions involved the same deception being practised on different occasions and across two separate media. The contraventions occurred almost twelve months apart.⁷

Conversely, Jetstar argued that the website conduct and the mobile site conduct were 'the same conduct' within the meaning of s 224(4)(b) of the ACL, or alternatively, that the conduct should be penalised as a single course of conduct.⁸ Jetstar contended that the appropriate penalty for all of the contravening conduct was \$100,000 in total.⁹ Jetstar submitted that the two pieces of conduct were so

3 ACCC, *Drip Pricing*, <https://www.accc.gov.au/consumers/online-shopping/drip-pricing>

4 ACCC, *Court finds that Jetstar and Virgin Australia engaged in misleading 'drip pricing' practices* (17 November 2015) <https://www.accc.gov.au/consumers/online-shopping/drip-pricing>

5 [2017] FCA 205, [8].

6 [2017] FCA 205, [19].

7 *Ibid.*

8 *Ibid* [13].

9 *Ibid* [9].

closely related that, as a matter of discretion, the maximum penalty for a single contravention should be treated as a guide, though not a limit, to the penalty to be imposed for both contraventions.¹⁰ Jetstar argued that the course of conduct principle is based upon an underlying concern to avoid double punishment where there is an inter-relationship between the legal and factual elements of two or more offences.¹¹

Section 224 of the ACL gives the Federal Court power to impose a pecuniary penalty upon a person who contravenes s 29(1) of the ACL.¹² The maximum penalty for each act or omission to which s 224 applies is \$1.1 million in the case of a body corporate such as Jetstar. A contravention of s 18 of the ACL does not render the contravener liable to a pecuniary penalty, however, a contravention of s 29(1) of the ACL does render the contravener liable to the imposition of a pecuniary penalty.¹³

Section 224(2) provides:

In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including:

- (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.¹⁴

Jetstar argued that the website conduct and the mobile site conduct was ‘the same conduct’ within the meaning of s 224(4)(b) of the ACL.¹⁵ Section 224(4) provides:

- (4) If conduct constitutes a contravention of 2 or more provisions referred to in subsection (1)(a):
 - (a) a proceeding may be instituted under this Schedule against a person in relation to the contravention of any one or more of the provisions; but
 - (b) a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

Jetstar’s submissions as to why the two occurrences comprised the same conduct were, that the wrongdoing was the same in both contraventions; the failure to disclose the existence and quantum of the booking and service fee until a consumer arrived at the payment page, and secondly, that there was no material difference

¹⁰ *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44 [120].

¹¹ *Ibid.*

¹² *Ibid* [3].

¹³ *Ibid* [2].

¹⁴ *Ibid* [12].

¹⁵ *Ibid* [13].

between the circumstances of the website conduct and the mobile site conduct.¹⁶ Jetstar supported these arguments by reference to multiple cases.¹⁷

The ACCC rebutted these submissions by arguing that the two pieces of conduct took place almost twelve months apart and on different media platforms. The ACCC argued that the purpose of sub-s 224(4) is to prevent separate and thus cumulative penalties being ordered for contraventions of two or more provisions of the ACL in respect of the same conduct.¹⁸ Thus, the subsection would operate so to prevent the Court from imposing two pecuniary penalties in respect of Jetstar's website conduct in the present case, one under s 29(1)(i) and another under s 29(1)(m).¹⁹

IV REASONING

Foster J found in favour of the ACCC's interpretation of the penalty. His Honour agreed that the two occurrences were discrete events and were not the same conduct for the purposes of s 224(4)(b) of the ACL.²⁰ Even though the misrepresentation on the website and on the mobile start are substantially similar, the contraventions were separate because they occurred at different times and on different media platforms.²¹

In relation to the respondent's penalty, Jetstar submitted that the conduct in the present case was not serious²² as that the conduct was unlikely to have a misleading effect on consumers and no consumers would have ultimately have been misled if they proceeded to purchase a fare because they would be able to see the booking fee.²³ The ACCC submitted that the fact no consumer would have been misled by the time that payment was made has no logical connection to the Court's assessment of the seriousness of the contravention.²⁴ Moreover, the website and mobile site are used by consumers for the purpose of booking Jetstar flights. High numbers of bookings are made through these media avenues each year. Foster J noted that Jetstar has a high revenue and that the gross amount from booking fees was very sizeable for the 2012-2013 year.²⁵ His Honour ultimately disagreed with Jetstar on

16 Ibid [14].

17 See *Australian Competition and Consumer Commission v AirAsia Berhad Company* [2012] FCA 1413; *Australian Competition & Consumer Commission v Marksun Australia Pty Ltd* [2011] FCA 695; [2011] ATPR 42-363; *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* (No 2) [2016] FCA 144.

18 [2017] FCA 205 [16].

19 Ibid.

20 Ibid [17].

21 Ibid [22].

22 Ibid [25].

23 Ibid.

24 Ibid [28].

25 Ibid [29].

the matter of the seriousness of the conduct, however, he agreed that the conduct is not on the most serious end of the spectrum.²⁶

It was observed by Allsop CJ in *ACCC v Coles* that:

the financial resources of a firm, “do not alone justify a higher penalty than might otherwise be imposed ... [however], they are clearly relevant to considering the size of the penalty required to achieve specific deterrence and can be weighed against the need to impose a sum which will be recognised by the public as significant and proportionate to the seriousness of the contravention for the purposes of achieving general deterrence.”²⁷

These observations are relevant to the present case, particularly general deterrence. The reasonableness of Jetstar’s stance in relation to the alleged contraventions does not provide a basis for discounting the penalty that might otherwise be imposed. Additionally, the co-operation of Jetstar with the ACCC in 2013/2014, as well as the fact that Jetstar had not previously been found by a Court to have contravened the ACL, are moderately mitigating factors.²⁸ Justice Foster put emphasis on general deterrence to try to ensure that similar behaviour by traders would not occur in the future and to protect the consumer by making sure they are dealt with openly, fairly and frankly.²⁹

V CONCLUSION

Considering all the facts, Foster J imposed a civil pecuniary penalty of \$295,000 in respect of the website conduct and an additional civil pecuniary penalty of \$250,000 in respect of the mobile site conduct.³⁰ The penalty is reflective of the mitigating factors considered by the Court. There was also a need for the penalty to reflect the Court’s long-standing approach to general deterrence.³¹

26 Ibid [30].

27 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330.

28 [2017] FCA 205 [51]-[52].

29 Ibid [58].

30 Ibid [59].

31 Ibid [60].

