Chapter 1

Australia's National Consumer Protection Regime

Objectives of this chapter

This chapter is intended to:

- introduce you to the Australian Consumer Law (ACL), which came into effect on 1 January 2011, how it fits into the Competition and Consumer Act 2010 (Cth) (CCA), and more recent amendments to the ACL;
- explain the origins and intended regulatory purpose of the ACL;
- investigate the reasons why governments consider it necessary to enact 'consumer protection laws';
- explore the relationship between competition policy and consumer protection policy, and consider how the CCA combines both policies in its provisions;
- explain how the ACL located in CCA Sch 2 functions as a law of the Commonwealth in CCA Pt XI, and as an 'applied law' of the States and Territories in CCA Pt XIAA;
- provide an overview of the structure of the individual Chapters, Parts, Divisions and Subdivisions of the ACL;
- operate as a 'road map' to the ACL by cross-referencing each of the Chapters, Parts, Divisions and Subdivisions of the ACL with the individual chapters of this text;
- provide resources for further reading and research.

Introduction to the ACL

1.1 On 1 January 2011, the relatively fragmented landscape of consumer protection and product liability law in Australia fundamentally changed. The Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) completed a process of reform that had been gaining momentum since the early 2000s, which culminated in the creation of a single, nationwide consumer protection and product liability regime known as the 'Australian Consumer Law'.

The ACL replaced 17 generic consumer protection laws that existed across States and Territories with a single national consumer law. It is found in CCA Sch 2 and implemented as a law of the Commonwealth in CCA Pt XI, and as an applied law of the States and Territories in CCA Pt XIAA. It is the largest reform of Australian consumer protection laws ever undertaken.

Consumer protection framework before 2011

1.2 Until 2011, consumer protection and product liability was regulated by an often confusing patchwork of Commonwealth, State and Territory legislation and regulations. At the federal level and since 1974, Pt V of the Trade Practices Act 1974 (Cth) (TPA) provided Australia's principal source of consumer protection legislation. Individual State and Territory fair trading legislation complemented and, in many places, duplicated the TPA. In addition, there were numerous conduct-specific pieces of State and Territory legislation that regulated consumer conduct not captured by the TPA. Examples included the various Door-to-Door Sales Acts and the Fair Trading Act 1999 (Vic) Pt 2B.

However, it was the Commonwealth that acted as the lead regulator for consumer protection and product liability through enforcement of the TPA. Although principally recognised for its prohibitions on anti-competitive conduct, the TPA was also the 'home' of Australia's first attempt at a national consumer protection regime. The exact relationship between the anti-competitive and consumer protection provisions of the TPA (now the CCA) was unclear at first.

Relationship between consumer protection and competition provisions of the TPA

1.3 When the TPA was introduced in 1974, the inclusion of Pt V devoted to consumer protection was new and, at first glance, seemed out of place. Senator Lionel Murphy explained his reasons for including consumer protection provisions in an Act that was principally devoted to eliminating certain anti-competitive practices. During the second reading speech of the Trade Practices Bill, Senator Murphy stated:

> The purpose of the Bill is to control restrictive trade practices and to protect consumers from unfair commercial practices … The Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices … In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor — meaning "let the buyer beware". The principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods or services is conducted on an organised basis and by trained executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.[1]

Although the TPA contained consumer protection provisions, principally in Pts IVA and V and the anti-competitive provisions in Pt IV, the two 'parts' of the TPA were largely regarded as separate regimes.

For example, Mason J in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 42 ALR 1; (1982) ATPR 40-307 concluded (at ATPR 43,786):

> The two Parts are independent and there is no direction that one Part is to be read subject to the other. Although they have to be read together as parts of the same statute, they might in other circumstances have been enacted as separate statutes with not very much difference in legal effect.

1. Second reading speech, Trade Practices Bill 1974 (Cth), Hansard, 30 July 1974, pp 540–1.

This tendency to view consumer protection policy as something separate from competition policy was reflected in the way successive Commonwealth governments reviewed and amended the TPA since it came into effect on 1 October 1974. There have been many quite significant reviews of Australia's national competition policy that have resulted in dramatic amendments to the competition provisions of the TPA.[2]

However, except for a brief review, also by the Swanson Committee, in 1976,[3] the consumer protection provisions of the TPA were not the subject of any major review or inquiry until recently.

Limitations on the application of the consumer protection provisions of the TPA

1.4 The lack of systematic analysis or review of the consumer protection provisions of the TPA was surprising given the limitations on the universal application of federal consumer protection laws caused in turn by limitations on the application of the TPA. Lacking express constitutional power to legislate for consumer protection, the TPA was principally drafted to apply to the activities of corporations engaged in trade or commerce.

The application of the consumer protection provisions of the TPA to unincorporated entities, such as sole traders or partnerships, and to State and Federal government business enterprises (GBEs) was relatively restricted. Major reforms to the TPA that were introduced by the Competition Policy Reform Act 1995 (Cth), which extended the application of TPA Pt IV to these entities, did not include amendments to the consumer protection provisions in TPA Pts IVA or V.

The consequence was an uneven application of the consumer protection provisions of the TPA. Those provisions applied to the Crown in right of the Commonwealth and to its associated Commonwealth GBEs, however, they did not apply to the Crown in right of the States and their associated GBEs. So, for example, in *Lin v State Rail Authority of New South Wales* [2003] FCA 1345, the court held that the unconscionable conduct provisions of TPA Pt IVA did not apply to the State Rail Authority of New South Wales.

To some extent, these restrictions were overcome by State and Territory Fair Trading Acts that mirrored the consumer protection provisions of the TPA, but were drafted to apply directly to unincorporated entities. In addition, there were several trading practices such as door-to-door and lay-by sales that were not directly addressed by the TPA. These practices were separately regulated by State and Territory legislation.

However, despite its constitutional limitations, the principal source of consumer protection and product liability law in Australia was the TPA. The Act prohibited a variety of specific and more general forms of conduct considered detrimental to consumers: Pt IVA prohibited forms of unconscionable conduct, Pt IVB regulated industry codes of conduct, Pt V Div 1 prohibited general misleading and deceptive conduct as well as specific forms of false conduct, Pt V Div 2 implied non-excludable terms into consumer contracts, and

2. See further, A Bruce, *Restrictive Trade Practices Law in Australia*, LexisNexis Butterworths, Sydney, 2010, at **1.15–1.21**.

3. Committee to Review the Trade Practices Act 1974 (Swanson Committee), *Report to the Minister for Business and Consumer Affairs*, Commonwealth of Australia, 1976.

Pt V Div 2A provided consumers with a statutory right of action against manufacturers of faulty goods or services. In addition, Pt VA created a product liability regime while Pt VC created a parallel criminal consumer protection regime.

What is the ACL?

1.5 In May 2008, some two years after it had formally commenced its inquiry,[4] the Productivity Commission's *Review of Australia's Consumer Policy Framework* was tabled in the Federal Parliament. That review recommended the implementation of a single, national Australian consumer law to replace the consumer protection regimes in both the TPA and the various State and Territory Fair Trading Acts.

The Council of Australian Governments (COAG) accepted the Productivity Commission's recommendations and set about creating a framework and timetable for implementing the ACL. In 2010, the Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth) and the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) (the Amendment Acts) were passed by the Federal Parliament.

These two Amendment Acts renamed the TPA as the 'Competition and Consumer Act 2010 (Cth)', repealed most of the consumer protection parts of the TPA identified above, and then created the actual content of the ACL as an 'applied law' regime in CCA Sch 2.

As an 'applied law' regime, CCA Pt XI creates the ACL as a law of the Commonwealth while CCA Pt XIAA creates the 'Applied ACL' as a law of the States and Territories.

However, the two Amendment Acts did not completely repeal and replace all of the consumer protection provisions of the TPA. For example, TPA Pt IVB, which provides for industry codes of conduct (discussed in **Chapter 14** of this text) remains part of the CCA and, while it does not formally belong to the ACL within CCA Pts XI or XIAA, it nevertheless remains very much an essential component of consumer protection in Australia.

Both the CCA and the ACL apply

1.6 It might be helpful to recall that the ACL refers to the text in CCA Sch 2 as applied by CCA Pts XI and XIAA. The amendments that introduced the ACL did not repeal the entire content of the former TPA, now the CCA.

Therefore, in our exploration of consumer protection law in Australia, we need to keep referring back to the 'Home Statute'; that is, the CCA. Both the CCA and the ACL form the substance of consumer protection and product liability law in Australia and we will need to refer to both in certain circumstances.

For example, assume franchisee A alleges that they have suffered loss or damage because of unconscionable conduct by their franchisor in breach of ACL s 21. Assume that another franchisee, franchisee B, alleges that they have suffered loss or damage because their franchisor has breached the Franchising Code of Conduct; for example, in not providing the required disclosure document.

4. The Productivity Commission released a 'Discussion Draft' of national competition policy reforms in October 2004. However, while that Discussion Draft did suggest a national review into consumer protection policy, its principal focus was on competition policy.

In the case of franchisee A, and in evaluating whether the franchisor has engaged in unconscionable conduct, the court may have regard to the matters in s 22, including the requirements of 'any applicable industry code' (s 22(1)(g)). The 'applicable industry code' is the Franchising Code of Conduct that imposes certain obligations on franchisors. The Franchising Code of Conduct applies because of the terms of CCA Pt IVB and *not* the ACL. However, the failure of the franchisor to comply with a provision of an applicable industry code pursuant to CCA Pt IVB is relevant to the larger allegation of unconscionable conduct in breach of ACL s 21. Therefore, if successful, franchisee A's action for damages is made pursuant to ACL s 236 and not pursuant to CCA s 82.

The reverse is true in the situation of franchisee B. The court will turn to CCA Pt IVB to investigate whether there has been a breach of s 51ACB, which states: 'A corporation must not, in trade or commerce, contravene an applicable industry code.' The failure to provide a disclosure document, required by the Franchising Code of Conduct, has been held to be a breach of Pt IVB.[5] Accordingly, franchisee B's claim for damages is made pursuant to CCA s 82 and not ACL s 236.

Why we need to examine how the ACL was created

1.7 We need to examine the technicalities of the creation and application of the ACL because these technicalities very much determine how it applies to different trading entities, which 'regulator' actually enforces the ACL, and what orders and remedies are available to that regulator: see **1.20**ff.

As we will see, there are differences in the orders and remedies available to the Commonwealth regulator, in the form of the Australian Competition and Consumer Commission (ACCC), and a State or Territory regulator, in the form of a State Fair Trading Department. For example, the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) (the Explanatory Memorandum) states:

> Part XI (Divisions 3 to 8) also applies certain additional provisions that are either relevant only at the Commonwealth level, or are not compatible with State and Territory legal systems and are not able to be included in the ACL …[6]

CCA Pt XI Divs 3–8 concern product safety, appointment of inspectors, the ability to issue infringement notices, powers of search, seizure and entry, and certain remedies. These 'additional provisions' are available only to the ACCC as Commonwealth regulator in enforcing the ACL in CCA Pt XI.

Divisions 3–8 are not then found in the Applied ACL that is found in CCA Pt XIAA — that is, the version of the ACL that is applied as a law of the States and Territories.

We will return to these differences in **Chapters 16** and **17** of this text, and consider them carefully when we explore the enforcement and remedies that are available to the ACCC and State or Territory regulators in enforcing the ACL. For now, let's take a 'bird's eye' view of the ACL and explore the reasons why it is considered necessary to regulate for consumer protection.

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5. *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 178 ALR 304; (2000) ATPR 41-790 at 41,384.
6. Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth), [17.10].

Taking a 'bird's eye' view of the ACL

1.8 During the remainder of this chapter, we will examine the specific mechanisms by which the ACL was created, why it was needed, how it fits into the CCA, and how it applies as both a law of the Commonwealth and as a law of the States and Territories in the form of the Applied ACL.

We will then take a 'bird's eye' view of the structure of the ACL in order to become familiar with its content. Set out in this first chapter are a series of tables that explain the structure of the ACL and which cross-reference that structure with the individual chapters of this text.

With this overview clearly mapped out, we will then explore the individual Chapters, Parts, Divisions and Subdivisions of the ACL in later chapters of this text, as well as other consumer protection parts of the CCA that were not repealed or replaced by the Amendment Acts (see **1.5**).

Think of this first chapter as providing an overview of the ACL and its regulatory context. As you work through the text, you can return to the tables in this first chapter to orient yourself by situating the sometimes difficult discussion of the law in later chapters within the overall framework of the CCA generally and the ACL specifically. You can also use the tables to cross-reference the substantive content of the ACL with individual chapters of this text.

Why the need for consumer protection?

1.9 However, before we start our investigation of the origin, structure and application of the ACL, we need to address a more fundamental issue — why consumer protection laws are needed in the first place.

What is it about consumers that they need protection? What do they need protection from? Why are the anti-competitive provisions of CCA Pt IV not adequate in protecting consumers? What is the relationship between competition policy and consumer protection policy?

Related to these questions is the more problematic issue of when and in what circumstances governments should intervene in the market in relation to consumer protection issues. These issues have been expressed as follows:

> There are three fundamental questions in consumer protection. Why do consumers need protection? When ought governments to intervene to protection consumers? And finally — how ought governments to intervene?[7]

While these questions can be clearly asked, they cannot be so clearly answered, and, to date, there is no overarching theory of consumer protection that answers them. In fact, one commentator lamented that:

> It is almost impossible to cover the ever growing mound of literature on consumer protection problems in different countries. It is quite impossible to survey developments in legislation and

7. I Ramsay, 'Framework for Regulation of the Consumer Marketplace' (1985) 8 *Journal of Consumer Policy* 353 at 353.

> case law, be it only for one country. Consumer protection aspects have now been introduced in so many areas of law that it is hard to find out where specific consumer concerns begin …[8]

The fundamental difficulty involves conceptualising 'consumer protection' as a discrete discipline and not as simply a subset of competition policy, or as a body of law derivative from commercial or mercantile law or that is simply interdisciplinary in nature. Griggs has, therefore, astutely observed that consumer protection 'is a subject looking for the privilege of independent existence, let alone responsibility'.[9]

Complicating the search for clarity in conceptualising consumer protection policy is the sometimes bewildering vocabulary and terminology employed by commentators in discussing consumer protection theories. You will encounter terms from fields as diverse as law, sociology, economics and behavioural studies. Concepts such as 'soft regulation', 'bounded rationality', 'neoclassical attribution', 'information asymmetries', 'biased contracting' and 'shrouded attributes' have been adapted from other disciplines and then applied to consumer protection issues in an attempt to explore this difficult policy area.

Although it may seem a little overwhelming, it is possible to gain an understanding of the major themes involved in conceptualising consumer protection policy. A useful starting point is to consider the relationship between competition policy and consumer protection, especially since the stated purpose of the CCA is to enhance the welfare of Australians through the promotion of *both* competition and the provision of consumer protection.

Competition, efficient markets and consumer welfare

1.10 Section 2 of the CCA provides:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Implicit in s 2 is the belief that Australian consumers are in some way better off if markets are competitive; that is, if fair trading is encouraged and consumers are protected from misleading, deceptive and unconscionable conduct. The other side of this is the view that anti-competitive markets, or markets in which consumers are not protected from misleading or deceptive practices, will result in diminishing consumer welfare. Why is this?

A competitive market is considered to be an 'efficient' market in the sense that competition is the mechanism by which society's resources are efficiently allocated. The then Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481; (1976) ATPR 40-012 affirmed (at ATPR 17,245):

> Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources.

8. R Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14 *Journal of Consumer Policy* 257 at 257.
9. L Griggs, 'Intervention or Empowerment — Choosing the Consumer Law Weapon' (2007) 15 *Competition and Consumer Law Journal* 111 at 111.

When a market functions efficiently, consumers benefit from price competition amongst retailers of goods and services. This competitive benefit takes two broad forms: *inter-brand* competition, and *intra-brand* competition. In an efficient market, a consumer who wants to buy a new computer can visit different retailers and compare prices across different brands of computer (inter-brand) and compare prices across a particular brand of computer (intra-brand). All forms of anti-competitive conduct have potentially positive and negative consequences for inter- and intra-brand competition.

A market can really only properly function as a device for controlling the disposition of society's resources if it is functioning efficiently. Competitive markets display a number of characteristics that illustrate what is meant by the term 'efficiency'. We need to explore what is meant by this term and the relationship between efficiency and consumer welfare.

Consumer protection, efficiency and competitive tension

1.11 A consistent theme in the development of competition and consumer policy is the concern with efficiency. Competitive markets are efficient markets and efficient markets are said to enhance consumer welfare. In 1989, the Economic Planning Advisory Council explained:

> Competition policy is based on the view that, in general, competitive markets lead to more efficient allocation of resources than do markets in which either buyers or sellers have significant market power. Such markets also promote technical efficiency (the effectiveness with which resources within a firm are utilised) and dynamic efficiency (the speed at which firms respond to changing problems and opportunities) … When firms are unable to increase their profits through exercising market power, their pursuit of profit is channelled into finding ways to increase their efficiency and into searching for better ways to serve their customers.[10]

The idea of evaluating the effectiveness of markets through the lens of efficiency is very much a product of the neoclassical school of economic theory; the prevailing hermeneutical 'lens' through which competition policy generally and the TPA specifically is viewed.[11]

The neoclassical school makes certain assumptions about the way markets should function in order to promote efficiency and thereby to enhance consumer welfare. Neoclassical economics:

> … assumes that markets free of failures will deliver optimal outcomes for producers and consumers alike. Consumer demand is a major driving force in determining what is produced, the quantity, its price and quality.[12]

In constructing the framework of such a market, free of failures, economists generally describe perfectly competitive markets by reference to five assumptions. Those assumptions are:

1. There are many buyers and sellers.
2. These sellers produce a homogeneous product.
3. Buyers and sellers are equally informed about price.
4. There are no barriers to entry, meaning that firms can enter and exit the market.

10. Economic Planning Advisory Council, *Promoting Competition in Australia*, Council Paper No 38, Australian Government Publishing Service, Canberra, 1989.
11. Hon JJ Spigelman, 'Economic Rationalism and the Law' (2001) 24(1) *UNSW Law Journal* 200.
12. C Johnston, 'Consumer Welfare and Competition Policy' (1996) 3 *Competition and Consumer Law Journal* 1 at 3.

5. Market forces of supply and demand establish the price of the product — suppliers cannot affect the price of the product since no one firm produces more of the product than the others.[13]

Of course, no real market is perfect and deviations from this optimal competitive model occur in the form of anti-competitive conduct and information asymmetries, such as misleading and deceptive conduct. So how is the concept relevant to an effective consumer protection policy? The relevance is described in this way:

> We study the predicted outcomes of the perfectly competitive model not because those predictions conform exactly to the "real world" of our everyday economic experience, but because they provide an independent measuring rod — a benchmark model of economic performance against which economists compare the actual outcomes of real-world market situations … much of the work of the Australian Competition and Consumer Commission relies on the model of perfect competition as a benchmark against which to test potential or actual breaches of the Trade Practices Act.[14]

By understanding how perfectly competitive markets function, we can learn how certain forms of corporate behaviour cause 'market failure' that leads to deviations from the model. In such cases, the result is one of *imperfect competition* that results in a diminution of *efficiency*, which, in turn, leads to consumer detriment; that is, a diminution of consumer welfare, which would subvert the stated object of the CCA.

How do these assumptions function in reality? To begin with, it is helpful to think of competition in a market as taking place in the context of a tension that exists between firms and consumers.

On the one hand, firms want to make goods or services at as low a cost as possible to themselves; on the other hand, they also want to sell those goods or services to consumers for as high a price as they can. In this way, firms attempt to widen the margin between their costs of production and sale prices. The difference between the two represents the profit the firm derives from its goods or services.

Conversely, consumers want to choose between a wide variety of goods and services and also to be able to buy those goods or services as cheaply as possible. The indicator of this tension is price. Through their purchasing patterns, consumers signal to firms the goods or services that are preferred and the price levels they are prepared to pay for them. In this way, consumers activate competition.

Firms respond to those signals through product innovation, improved service and better allocation of resources as they compete with each other for customers.

This process is described by Williams:

> We may imagine that each participant in the economy has a pile of dollar notes. Each dollar note counts for one vote in determining how the resources of the economy ought to be allocated. If a person spends some votes purchasing brown leather sandals, that expenditure will encourage resources to flow into the production of brown leather sandals. By voting in

13. W McEachern, P Crompton, S Hopkins and M Swann, *Microeconomics: A Contemporary Introduction*, 2nd ed, Thomson/Nelson, Melbourne, 2003, pp 219–20.
14. McEachern et al, above n 13, p 219.

> the marketplace with dollar notes, the consumer has been able to influence the allocation of resources.[15]

In this sense, consumers are said to activate competition. In the 1983–1984 annual report, the then Chair of the Trade Practices Commission noted:

> Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in a position to do so. Thus I believe administration is better placed to serve the total interest of consumers if it also has responsibilities to encourage market forces and industry efficiency.[16]

Consumers activate competition because firms compete to produce the goods and services demanded by consumers. At least *in theory*, a competitive market benefits consumers by providing more choice, a more efficient allocation of resources and price competition.

Notice that markets are not ends in themselves, but economic processes that facilitate the efficient production and delivery of resources in such a way that consumers benefit. Because competitive markets are considered to enhance consumer welfare and because consumers are said to activate competition, it is the consumer that is said to be 'sovereign'.

It is therefore not surprising that consumer protection policy is sometimes said to involve the notion of 'consumer sovereignty'. At least in theory, 'the notion of consumer sovereignty, which is the linchpin of neoclassical economics, guarantees an important role for the consumer in (the) market economy'.[17]

Consumer sovereignty

1.12 What does this term mean and how does it relate to efficient markets and consumer welfare? Put simply:

> Consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses. It is the state of affairs in which the consumers are truly "sovereign", in the sense of having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods or services.[18]

There are several elements to this extract that help us understand the nature of consumer sovereignty and how competitive and efficient markets facilitate that sovereignty.

First, let's consider the idea that the economy acts 'primarily in response to the aggregate signals of consumer demand'. This is a reference to the signalling process described above at **1.11**. Through their purchasing patterns, consumers signal to firms the goods or services

15. P Williams, 'Why Regulate for Competition?' in M James (ed), *Regulating for Competition: Trade Practices Policy in a Changing Economy*, Centre for Independent Studies, Sydney, 1989, p 13.
16. Trade Practices Commission, *Annual Report 1983–1984*, AGPS, Canberra, p 184.
17. V Nagarajan, 'Reconceiving Regulation: Finding a Place for the Consumer' (2007) 15 *Competition and Consumer Law Journal* 93.
18. N Averitt and R Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65(3) *Antitrust Law Journal* 713 at 714.

that are preferred and the price levels they are prepared to pay for them. In this way, consumers activate competition.

Second, these consumer signals occur as part of a cause and effect process. If the consumer's purchasing patterns are the 'signals', then firms respond to those signals through product innovation, improved service and better allocation of resources as they compete with each other for customers. Consumers therefore 'cause' the economy to act in their favour by the pricing signals they send to producers of goods or services. This has the effect of producers then delivering into the market the goods or services that those consumers demand. This is what is meant by the observation above, that consumers 'activate competition'.

Third, the process is interdependent because the *quality* and *quantity* of the signals that consumers send and the goods and services produced are dependent on each other. However, firms can artificially interfere with consumers' price signalling and, in doing so, thus manipulate the market to the detriment of consumers.

On the *supply* side, firms can collude to fix prices or to prevent competitive behaviour. In this way, firms can acquire market power not through superior competitive behaviour or through increased competitive efficiency, but simply through eliminating competition. The effect of eliminating competition is to eliminate consumer choice. Less *inter-brand* and *intra-brand* competition results in consumers paying higher prices for goods or services than would prevail in a competitive market.

A good example can be found in *Australian Competition and Consumer Commission v High Adventure Pty Ltd* (2006) ATPR 42-091. Customers had been paying up to $3000 for paragliding and hang gliding equipment manufactured by Czech company Sky Paragliders (Sky), and imported and sold by High Adventure. Initially there was no other retailer of similar equipment. The lack of substitutable forms of equipment meant that customers could not 'shop around' to get a better price, thus forcing High Adventure to lower its prices to a competitive level. High Adventure was able to set the price of its equipment at its discretion.

However, Walkerjet entered the market, offering Sky's paragliding and hang gliding equipment that were substitutes for the equipment sold by High Adventure. In addition, Walkerjet sold its equipment for up to $1000 less than the prices demanded by High Adventure. The evidence indicated that customers were swapping away from High Adventure to buy equipment from Walkerjet. It's no wonder that High Adventure was upset!

Walkerjet's lower retail prices constrained the ability of High Adventure to set retail prices at its discretion. Suddenly, the market was more competitive and the consumer benefited from the *intra-brand* competition for Sky's equipment.

On the *demand* side, effective consumer choice can be diminished or even eliminated through misleading, deceptive or false conduct. For example, in *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* (1981) 37 ALR 391; (1981) ATPR 40-242, Colgate Palmolive sought an interlocutory injunction restraining Rexona from continuing an advertising campaign for its brand of toothpaste.

In granting the injunction, the court observed (at 43,195–6):

> There is evidence that Rexona's advertising campaign may erode the market share enjoyed by the smaller manufacturers of toothpastes … Rexona contended that these matters are irrelevant as the small manufacturers are neither parties to the proceedings nor consumers. In my opinion the possible detriment to the small manufacturers is a relevant consideration …

> If a corporation is engaging in misleading or deceptive advertising which assists it in gaining a substantial share of a market at the expense of small manufacturers, the interests of those manufacturers must be a relevant consideration.

Misleading or deceptive conduct can erode or even eliminate a competitor, thereby reducing the level of competition in the market by reducing consumer choice.

Fourth, consumer sovereignty is characterised by consumers 'having the power to define their own wants and the opportunity to satisfy those wants'.

The idea that consumers are rational agents who possess perfect information which thus enables ideal choices is a fundamental tenet of the neoclassical theory of markets. We noted that economists make several assumptions about a perfectly functioning market. One of those assumptions (point 3 in the list above at **1.11**) is that buyers and sellers are equally informed about price.

Neoclassical economics assumes that consumers are 'rational profit-maximisers'. Consumers are said to be 'rational' in that they possess all relevant information necessary to make a prudent and rational decision about whether to enter into the transaction in question. Consumers are said to be 'profit-maximisers' because they carefully evaluate the cost/benefit of a particular good or service in order to maximise the benefit to themselves. The idea is characterised as follows: 'A consumer fully armed with relevant information, who is articulate and rational, is a necessary assumption of the neoclassical model'.[19]

However, the reality is that markets are not perfect, consumers are often not rational nor in possession of sufficient information to make an informed evaluation of the cost/benefit of a particular transaction and, being human, they are subject to the full range of human frailties, biases and behavioural issues.

In these circumstances, the question is, how does the 'consumer sovereignty' model operate within imperfect markets composed of imperfect consumers?

Imperfect markets and imperfect consumers

1.13 Central to the idea that competitive markets enhance consumer welfare when they are efficient markets is the idea that both consumers and suppliers act rationally and have all of the information necessary to make informed demand and supply decisions.

One of the legal mechanisms giving effect to this idea is the notion of freedom of contract. Parties to a contract are assumed to have negotiated the terms of their contract to best protect and enhance their interests. With all relevant information made available to the consumer by the seller, and with the consumer exercising intelligent control over their desires, the contract eventually concluded between them is an efficient means of product distribution.

However, neither markets nor consumers are perfect. The idea that consumer contracts should be sacrosanct because of the notion of 'freedom of contract' ignores several problems associated with the formation of such contracts.

To begin with, in the 21st century, there is often a very significant difference in the bargaining power between consumers and the corporations they contract with. The rise of 'standard form' contracts and a 'take it or leave it' approach to negotiation often leaves

19. Nagarajan, above n 17.

consumers with little power to negotiate the terms of a contract to suit their individual needs and interests.

As Barr-Gill notes:

> Consumer contracts are characterised by an asymmetry between the two parties; the seller of a good or the provider of a service on the one hand and the consumer on the other. One party is usually a highly sophisticated corporation, the other … an individual prone to the behavioural flaws that make us human. Absent legal intervention, the sophisticated seller will often exploit the consumer's behavioural biases. The contract itself, commonly designed by the seller, will be shaped around the consumers' systematic deviations from perfect rationality.[20]

The 'consumer's behavioural biases' that Barr-Gill refers to are the 'flaws that make us human' and preclude consumers from necessarily making efficient and wise choices in their consumption. Lack of self-control and preferential biases make it easier for consumers to be exploited by corporations. It is here that other schools of economics, such as behavioural economics, make significant contributions.[21]

Likewise, consumers are often not well informed about the goods and services they wish to purchase. Many consumers do not take the time or exercise the control necessary to educate themselves about the true financial implications of the contract they wish to conclude. This situation is worsened if the suppliers of the goods or services have engaged in false, misleading or deceptive conduct.

Consumers that do not take the time, or take limited amounts of time, to acquire the information necessary to make an optimal and rational decision about acquiring goods or services are then said to be 'boundedly rational'.[22] Inadequate information gathering often leads to confusion and exploitation.[23]

The result is that information asymmetries and poor consumer behaviour distort the competitive function of the market and thus diminish the welfare of consumers as a result. Vickers notes:

> Competition cannot work effectively unless customers are reasonably well informed about the choices before them. Uninformed choice is not effective choice, and without that there will not be effective competition. Informed choice has two elements — knowing what alternatives there are, and knowing about the characteristics of alternative offerings. In particular what matters is the ability of customers to judge the prospective value for money, for them, of the alternatives on offer.[24]

Significant differences in bargaining power which undermine the consumer's ability to protect their interests, the lack of information available to consumers, and the consumer's inherent and very human biases and flaws mean that markets can therefore never function with the sort of theoretical efficiency necessary to deliver consumer welfare.

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20. O Barr-Gill, 'Seduced by Plastic' (2004) 98 *Northwestern University Law Review* 1373.
21. J Gans, 'Protecting Consumers by Protection Competition: Does Behavioural Economics Support this Conclusion?' (2005) 13 *Competition and Consumer Law Journal* 1.
22. R Korobkin, 'Bounded Rationality, Standard Form Contracts and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203.
23. See the examples in Griggs, above n 9.
24. J Vickers, *Economics for Consumer Policy*, British Academy Keynes Lecture, 29 October 2003, p 5.

Implications for consumer protection policy

1.14 It should not be surprising that governments have responded to imperfect markets characterised by information asymmetries and consumer 'bounded rationality' by legislating for their opposite. Laws relating to information disclosure, prohibitions on unconscionable conduct, misleading or deceptive conduct, and product liability represent attempts to mitigate the extent to which consumers are disadvantaged in the market.

While the theory of consumer sovereignty has the virtue of empowerment, it rests on flawed assumptions. The extent to which the dynamics of real-life markets diverge from the assumptions imputed to markets by neoclassical economics and how best to empower consumers is truly an interdisciplinary task.

We have covered a lot of ground in exploring the regulatory and philosophical foundations of consumer protection policies. Before moving on, it might be convenient to draw together the threads of this discussion:

1. There is no generally agreed-on 'theory of consumer protection'.
2. Consumer protection has traditionally been thought of in terms of an outgrowth of commercial, mercantile and contract law.
3. Over time, consumer protection has tended to be 'subsumed' within the growing field of competition policy; with its emphasis on the efficient functioning of the supply and demand side of markets.
4. This is evident within the Australian context because CCA s 2 specifically makes the connection between competitive markets, consumer protection and consumer welfare.
5. Neoclassical economics currently supplies the dominant paradigm in interpreting efficient markets, with competition policy and consumer welfare being 'intrinsically linked' in neoclassical economic theory.
6. Neoclassical economics makes several assumptions about the characteristics of both the market and consumers within the market. Consumers are said to be rational decision-makers in possession of the information needed to make informed and rational choices about whether to acquire goods or services.
7. Within the context of competition policy, 'consumer sovereignty' is the ideal, where consumers activate competition through their pricing signals and suppliers respond to those signals in their production policies. Thus, the consumer is 'sovereign' in the sense that the market responds to their wishes and preferences.
8. However, neither the real-life behaviour of markets or consumers corresponds to the assumptions imputed to them by neoclassical economics. Interdisciplinary studies in behavioural economics and other sociological disciplines indicate that consumers are 'boundedly rational', often not possessing sufficient information nor discipline to make rational decisions.
9. Likewise, corporations in the market may limit or distort the amount of information available to consumers through misleading or deceptive conduct or 'shrouding' the information, where it is not sufficiently obvious to a consumer.
10. These 'market failures' detract from the 'consumer sovereignty' model because they interfere with the ability of consumers to engage in the signalling mechanism that is supposed to encourage suppliers to respond to consumer preferences.

11. Accordingly, these market failures, whether in the form of anti-competitive behaviour (from the supply side) or in the form of misleading, deceptive or unconscionable conduct (from the demand side) have traditionally been the subject of consumer protection laws.
12. Governments have therefore intervened in the functioning of the market in order to redress imbalances in bargaining power (unconscionable conduct), unwillingness to negotiate (unfair contracts terms), the 'shrouding' of information (compulsory disclosure laws), the inability to exercise behavioural restraint (cooling-off periods), latent product defects (product liability laws), and the provision of inaccurate or incorrect information (misleading or deceptive conduct).

Exactly how the ACL addresses these examples of 'market failure' is what we will now consider.

Origins of the ACL

1.15 How and why did the ACL originate and what were the processes by which the ACL was implemented?

Productivity Commission inquiry

1.16 Throughout the 2000s, different Federal Government inquiries explored the limitations inherent to a consumer protection and product liability regime that was effectively fragmented across different jurisdictions.

In December 2006, the Productivity Commission began an inquiry into the framework of Australia's consumer protection policy and was tasked with examining ways in which the current consumer protection regime could be improved. During its inquiry, the Productivity Commission considered the coordination of consumer protection laws and enforcement, the removal of duplication and of inconsistencies across different jurisdictions.

On 8 May 2008, the Productivity Commission's final report *Review of Australia's Consumer Policy Framework*[25] (PC Report) was tabled in the Federal Parliament. The PC Report made a number of far-reaching recommendations for the future regulation of consumer protection law in Australia. In summary, it made the following five recommendations:

1. A national consumer law should be implemented across all jurisdictions and be based on the consumer protection provisions of the TPA.
2. A new national consumer law should include provisions addressing unfair contract terms.
3. Specific parts of the new national consumer law should be principally enforced by the ACCC but that the balance should be enforced jointly by the ACCC and respective State and Territory Fair Trading Departments.
4. The ACCC should receive new enforcement powers and new remedies.
5. States and Territories should have the option to refer their enforcement powers to the Commonwealth Government in order to centralise enforcement of the new consumer law by the ACCC.

25. Productivity Commission, *Review of Australia's Consumer Policy Framework*, Report No 45, Canberra, 2008.

The PC Report also estimated that a national consumer law, based on its recommendations, 'could provide a net gain to the community of between $1.5 billion and $4.5 billion a year' constituted by both reduced direct detriment to consumers and increased productivity and innovation.[26]

Implementing the Productivity Commission's recommendations

1.17 In October 2008, COAG agreed:

> … to a new consumer policy framework comprising a single national consumer law based on the Trade Practices Act 1974, drawing on the recommendation of the Productivity Commission and best practice in State and Territory consumer laws, including a provision regulating unfair contract terms.[27]

But just how was this new consumer policy framework comprising a single national consumer law to be practically implemented? Moving from an agreement to implement an ACL to the mechanics of actually doing so in the context of Australia's federal system necessitated a series of intergovernmental agreements between the Commonwealth, State and Territory governments.

Two such agreements are particularly important: the 2008 National Partnership Agreement to Deliver a Seamless National Economy, and the July 2009 Intergovernmental Agreement for the Australian Consumer Law.

National Partnership Agreement to Deliver a Seamless National Economy

1.18 The ACL was to be implemented pursuant to a larger intergovernmental agreement by which COAG members committed to a reform agenda intended to create a 'seamless economy'. What does this mean?

In 2008, the Commonwealth, State and Territory governments signed the National Partnership Agreement to Deliver a Seamless National Economy (the National Partnership Agreement). This agreement is intended to: facilitate COAG's desire to implement more consistent regulation across all jurisdictions in Australia; reduce compliance costs and thereby to enhance Australia's economic growth; and improve workforce participation and overall labour mobility.

Attached to the National Partnership Agreement is an 'Implementation Plan' that establishes a framework by which the initiatives of COAG are to be implemented by the Commonwealth and member State and Territory governments. Pursuant to that Implementation Plan, the Commonwealth, State and Territory governments agreed to both implement the ACL and a timetable for its implementation.

Intergovernmental Agreement for the ACL

1.19 In July 2009, the Commonwealth, State and Territory governments signed the Intergovernmental Agreement for the Australian Consumer Law committing to the introduction of the ACL by 31 December 2010 for commencement across all jurisdictions by 1 January 2011.

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26. Productivity Commission, above n 25, pp 55–6.
27. The Treasury, *An Australian Consumer Law: Fair Markets — Confident Consumers*, Commonwealth of Australia, Canberra, 17 February 2009, p 6.

From agreement to legislation — implementing the ACL

Trade Practices Amendment (Australian Consumer Law) Acts 2010 (Cth)

1.20 The ACL was intended to be introduced in two parts. First, the Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth) amended the TPA to include the unfair contracts terms regime and provide the ACCC with additional powers of enforcement as well as additional remedies and orders. The ACCC's additional powers became effective in March 2010 while the unfair contracts terms regime became effective on 1 July 2010.

This first Act did not actually introduce the bulk of the ACL. That was the task of the second component of the reforms. The Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) completed the introduction of the ACL that became effective on 1 January 2011.

It is this second Amendment Act that actually created the ACL by renaming the TPA as the 'Competition and Consumer Act 2010 (Cth)' and creating the ACL as an 'application law': see *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855 at [7]. We will need to carefully explore the process by which the ACL was created and how it is applied consistently across Federal, State and Territory jurisdictions.

Competition and Consumer Act 2010 (Cth)

1.21 The second Amendment Act repealed the consumer protection Parts of the TPA (Pts IVA, V, VC), but retained the general prohibitions contained in them. For example, the former TPA s 52 prohibited a corporation, in trade or commerce, from engaging in conduct that was misleading or deceptive or likely to mislead or deceive. This general prohibition on misleading or deceptive conduct is retained in ACL s 18 in CCA Sch 2, and applied as a law of the Commonwealth by CCA Pt XI and as a law of the States and Territories by CCA Pt XIAA.

However, before we can 'drill down' into the very specific Chapters, Parts, Divisions and Subdivisions of the ACL, we need to stand back a little to see the bigger picture. What exactly *is* the ACL and how does it fit into the CCA?

What exactly is the ACL?

1.22 As previously stated at 1.5, the actual substance and text of the ACL is found in CCA Sch 2. However, the ACL differs slightly in its application in Pt XI as a law of the Commonwealth and in Pt XIAA as an 'application law' of the States and Territories. The subtle differences in the ACL found in these two Parts relate principally to the powers granted to 'the regulator' in the form of the ACCC. We will consider these differences later in this text.

ACL as an 'application law'

1.23 Part of the difficulty associated with creating a national consumer protection regime involves implementing consistent legislation across the Commonwealth and all the States and Territories. What law is to apply? And what is the mechanism by which that law is then nationally applied?

The solution agreed on by COAG is to create the ACL as an 'application law'. The Explanatory Memorandum explains the need for an application law regime:

> An application law scheme is necessary as the Australian Parliament does not have power to legislate generally with respect to fair trading and consumer protection matters. It has the power to legislate in respect of "foreign corporations and trading or financial corporations formed within the limits of the Commonwealth", within the meaning of section 51(xx) of the Australian Constitution and in respect of "trade and commerce … among the States; [sic] within the meaning of section 51(i) of the Australian Constitution.[28]

This solution involves designating the Commonwealth as the lead regulator, enacting the ACL as a law of the Commonwealth, and then each of the States and Territories picking up and 'applying' the ACL as a law of the State or Territory.

The basic substance of the ACL set out in CCA Sch 2 is then applied as a law of the Commonwealth by CCA Pt XI, and then picked up as an 'applied law' of the States and Territories by CCA Pt XIAA. The version of the ACL operating in the States and Territories, as it is applied by CCA Pt XIAA (s 140), is called the 'Applied ACL' and most often found in the State and Territory Fair Trading Acts — see generally, *Director of Consumer Affairs Victoria v Dimmeys Stores Pty Ltd* (2013) ATPR 42-443.

The exact mechanics of the application of the ACL will be explained in **Chapter 2** of this text.

The substance of the ACL as applied by CCA Pt XI as a law of the Commonwealth and as applied by CCA Pt XIAA as a law of the States and Territories differs slightly. There are some enforcement powers that are granted to the ACCC as the Commonwealth regulator under Pt XI that are not granted to the State or Territory regulators. We will consider these differences in **Chapters 16** and **17** of this text.

Overview of the ACL

1.24 In its essential form, the ACL as it appears in CCA Sch 2 and then applied as a law of the Commonwealth by CCA Pt XI, or applied as a law of the States or Territories by CCA Pt XIAA, is composed of five Chapters that are further divided into Parts, Divisions and Subdivisions:

- ACL Ch 1 is an introductory chapter providing for definitions and interpretative provisions to be applied in interpreting the ACL.
- ACL Ch 2 contains general protections for consumers, including prohibitions on misleading or deceptive conduct and unconscionable conduct as well as the unfair contracts terms regime.
- ACL Ch 3 contains specific protections for consumers by prohibiting specific forms of conduct, such as unsafe goods or services, and specific forms of unfair practices, such as pyramid selling, bait advertising and harassment and coercion. This Chapter also contains the consumer guarantee, product safety and product liability regimes.

28. Explanatory Memorandum, above n 6, [17.6].

- ACL Ch 4 creates a criminal consumer protection regime in respect of some of the prohibitions in Ch 3.
- ACL Ch 5 concerns enforcement and remedies. It provides the ACCC with a suite of enforcement powers, including civil pecuniary penalties, substantiation notices, and 'search and seizure' information gathering powers.

Set out below is a more detailed overview of each Chapter of the ACL. This text will provide you with an overview of the Parts, Divisions and Subdivisions of each Chapter as well as directions to where you can find a more detailed discussion of each of these elements in this text.

Because the legislative framework of the ACL is more 'structured' than the consumer protection provisions of the TPA, it is easy to get confused. For example, you may be trying to find out whether there has been a 'major failure' for the purposes of an action against a supplier of goods, and suddenly find yourself lost among Subdiv A of Div 1 of Pt 5-4 within Ch 5 of the ACL within CCA Pt XIAA!

If you do find yourself a little lost in the complexity of the later discussions, you can always return to this chapter to re-orient yourself by locating the discussion in its overall context within both the ACL and the CCA.

Navigating the structure of the ACL

1.25 One way to conceptualise the structure of the ACL is to identify the *nature* of the conduct it is intending to protect consumers from and, if that conduct is in breach of the ACL, then to go on to consider the *consequences* flowing on from that breach.

This is a logical approach to the ACL that establishes a clear conceptual 'pathway' from conduct to breach to consequence. The consequences for a breach of the ACL then depend very much on the person or regulator addressing that breach. The ACCC may institute proceedings seeking the imposition of criminal fines or a civil pecuniary penalty, or one of the many other orders provided for in ACL Chs 4 and 5.

A private consumer who has suffered loss or damage as a result of conduct in breach of a provision of either ACL Ch 2 or 3 may seek a variety of remedies, including injunctive relief or damages provided for in ACL Ch 5.

The tables set out below illustrate this approach to navigating the structure of the ACL.

General protections — ACL Ch 2

1.26 There are some general forms of conduct harmful to consumers that can take many different forms. For example, there are an almost infinite number of ways in which a person or corporation could engage in misleading or deceptive conduct.

It would be impossible for the ACL to identify, define and then prohibit each and every form of behaviour that misleading or deceptive conduct might take. Likewise, it would be impossible to identify, define and then prohibit every form of behaviour that falls within the larger definition of 'unconscionable conduct'.

For this reason, ACL Ch 2 adopts a broader approach by providing protections against 'general forms of conduct' however that conduct might manifest in particular

circumstances. The location of these protections in Ch 2 and where they are discussed in this text are provided in **Table 1.1** below.

Table 1.1: General protections in ACL Ch 2

ACL Ch 2 — General protections		
Part	**Prohibited conduct**	**Book chapters**
2-1	Misleading or deceptive conduct	Chapters 3 and 4
2-2	Unconscionable conduct	Chapters 5 and 6
2-3	Unfair contract terms	Chapter 7

Specific protections — ACL Ch 3

1.27 However, there are also certain practices, scams and forms of behaviour detrimental to consumers that are well known and seem to recur with depressing frequency. These very specific forms of harmful conduct include false conduct about certain goods or services, pyramid selling schemes, the sending of unsolicited goods or services, and harassment and coercion.

It is possible to legislate for very specific guarantees to be provided to consumers of any kind of good or service that is ordinarily used for personal, domestic or household use or consumption. It doesn't matter whether the items being purchased are as diverse as a fridge or a pair of hiking shoes. Provided the person acquired the goods as a consumer, very specific forms of guarantees are provided for by the ACL. This is the approach adopted by ACL Ch 3, which provides 'specific protections' and is set out (including where these protections are discussed in this text) in **Table 1.2** below.

Table 1.2: Specific protections in ACL Ch 3

ACL Ch 3 — Specific protections				
Part	**Division**	**Subdivision**	**Relevant conduct**	**Book chapter**
3-1			**Unfair practices**	
3-1	**1**		False or misleading representations etc	Chapter 8
3-1	**2**		Unsolicited supplies	Chapter 9
3-1	**3**		Pyramid schemes	
3-1	**4**		Pricing	
3-1	**5**		Other unfair practices (referral selling, harassment and coercion)	
3-2			**Consumer transactions**	
3-2	**1**		Consumer guarantees	
3-2	**1**	**A**	Guarantees relating to the supply of goods	Chapter 10

ACL Ch 3 — Specific protections				
Part	**Division**	**Subdivision**	**Relevant conduct**	**Book chapter**
3-2	**1**	**B**	Guarantees relating to the supply of services	Chapter 10
3-2	**1**	**C**	Guarantees not to be excluded etc by contract	Chapter 10
3-2	**2**		**Unsolicited consumer agreements**	Chapter 11
3-2	**2**	**A**	Introduction	
3-2	**2**	**B**	Negotiating unsolicited consumer agreements	
3-2	**2**	**C**	Requirements for unsolicited consumer agreements etc	
3-2	**2**	**D**	Terminating unsolicited consumer agreements	
3-3			**Safety of consumer goods and product related services**	Chapter 13
3-3	**1**		Safety standards	
3-3	**2**		Bans on consumer goods and product related services	
3-3	**2**	**A**	Interim bans	
3-3	**2**	**B**	Permanent bans	
3-3	**2**	**C**	Compliance with interim bans and permanent bans	
3-3	**3**		Recall of consumer goods	
3-3	**3**	**A**	Compulsory recall of consumer goods	
3-3	**3**	**B**	Voluntary recall of consumer goods	
3-3	**4**		Safety warning notices	
3-3	**5**		Consumer goods, or product related services, associated with death or serious injury	
3-4			**Information standards**	
3-5			**Liability of manufacturers for goods with safety defects**	Chapter 12
3-5	**1**		Actions against manufacturers for goods with safety defects	
3-5	**2**		Defective goods action	

Consequences for breach of the ACL — ACL Chs 4 and 5

1.28 If there is a breach of a provision of ACL Chs 2 and 3 set out in **Tables 1.1** and **1.2** above, almost immediately there are three possible consequences:

1. The ACCC or State or Territory regulator may institute criminal proceedings in relation to an offence under the ACL.
2. The ACCC or State or Territory regulator may seek a variety of civil orders or remedies.
3. An affected consumer may seek a range of private orders or remedies.

ACL Chs 4 and 5 set out the various criminal offences, public and private enforcement and remedies available to different parties.

Criminal offences — Ch 4

1.29 **Table 1.3** below explains the structure of ACL Ch 4, which provides for criminal offences in relation to certain forms of conduct in breach of the ACL, and where these offences are discussed in this text.

Table 1.3: Offences in ACL Ch 4 for breach of the ACL

ACL Ch 4 — Offences				
Part	**Division**	**Subdivision**	**Offensive conduct**	**Book chapter**
4-1			**Offences relating to unfair practices**	Chapter 16
4-1	**1**		False or misleading representations etc	
4-1	**2**		Unsolicited supplies	
4-1	**3**		Pyramid schemes	
4-1	**4**		Pricing	
4-1	**5**		Other unfair practices (referral selling, harassment and coercion)	
4-2			Offences relating to consumer transactions	
4-2	**1**		Consumer guarantees	
4-2	**2**		Unsolicited consumer agreements	
4-2	**2**	**A**	Negotiating unsolicited consumer agreements	
4-2	**2**	**B**	Requirements for unsolicited consumer agreements	
4-2	**2**	**C**	Terminating unsolicited consumer agreements	
4-3			**Offences relating to safety of consumer goods and product related services**	
4-3	**1**		Safety standards	

ACL Ch 4 — Offences				
Part	**Division**	**Subdivision**	**Offensive conduct**	**Book chapter**
4-3	**2**		Bans on consumer goods	⇩
4-3	**3**		Recall of consumer goods	
4-3	**4**		Consumer goods associated with death or serious injury	
4-4			**Offences relating to information standards**	
4-5			**Offences relating to substantiation notices**	
4-6			**Defences**	
4-7			**Miscellaneous (time limits etc)**	

Enforcement powers and remedies — Ch 5

1.30 ACL Ch 5 provides an extensive suite of remedies and enforcement powers available to the ACCC and State and Territory regulators. Chapter 5 also provides for extensive remedies to consumers who have suffered loss or damage caused by conduct in breach of ACL Chs 2 or 3. The Ch 5 remedies and enforcement powers and where they are discussed in this text are listed in **Table 1.4** below.

Table 1.4: Enforcement and remedies in ACL Ch 5

ACL Ch 5 — Enforcement and remedies				
Part	**Division**	**Subdivision**	**Enforcement and remedies**	**Book chapter**
5-1			**Enforcement**	Chapter 17
5-1	**1**		Undertakings	⇩
5-1	**2**		Substantiation notices	
5-1	**3**		Public warning notices	
5-2			**Remedies**	
5-2	**1**		Pecuniary penalties	
5-2	**2**		Injunctions	
5-2	**3**		Damages	Chapter 18
5-2	**4**		Compensation orders etc for injured persons and orders for non-party consumers	Chapter 17
5-2	**4**	**A**	Compensation orders etc for injured persons	⇩
5-2	**4**	**B**	Orders for non-party consumers	
5-2	**4**	**C**	Miscellaneous (power of court)	
5-2	**5**		**Other remedies**	

ACL Ch 5 — Enforcement and remedies *(cont'd)*				
Part	**Division**	**Subdivision**	**Enforcement and remedies**	**Book chapter**
5-2	**6**		Defences	Chapter 16
5-3			**Country of origin representations**	Chapter 18
5-4			**Remedies relating to guarantees**	
5-4	**1**		Action against suppliers	
5-4	**1**	**A**	Action against suppliers of goods	
5-4	**1**	**B**	Action against suppliers of services	
5-4	**2**		Action for damages against manufacturers of goods	
5-4	**3**		Miscellaneous (non-exclusion)	
5-5			**Liability of suppliers and credit providers**	
5-5	**1**		Linked credit contracts	
5-5	**2**		Non-linked credit contracts	

Ongoing review and recent amendments

1.31 Like most statutory regulatory regimes, the ACL is the subject of frequent governmental review and legislative amendment. In 2015, Consumer Affairs Australia and New Zealand (CAANZ) undertook a systematic review of the ACL that resulted in a number of important amendments. The Treasury Laws Amendment (Australian Consumer Law Review) Act 2018 (Cth) extended the protection in ACL s 21 against statutory unconscionable conduct to corporations and significantly strengthened the powers of the ACCC to gather evidence of potential contraventions of the ACL. In addition, the Treasury Laws Amendment (2018 Measures No 3) Act 2018 (Cth) significantly increased the penalties for a contravention of the ACL by bringing them in line with penalties for anti-competitive conduct under CCA Pt IV. These amendments will be considered throughout this text.

Summary

1.32 What are the important elements to remember about the introduction of the Australian Consumer Law (ACL)?

1. Until 2011, consumer protection in Australia rested on a network of both Commonwealth, State and Territory laws and regulations.
2. Although it has always been recognised that consumers should be protected against exploitation by suppliers, there is no overarching theory of consumer protection. Consumer protection policy as largely grown from contract law and mercantile law, or seen as a sub-set of competition policy.

3. As participants in the market, consumers are said to 'activate competition' by price signalling: the messages consumers send to producers about the goods and services they want.
4. At least in theory, the neoclassical assumption of efficient markets depends on the consumer being well informed and rational in the purchasing decisions they make, and thus in the signals they send to producers.
5. However, the assumptions on which neoclassical economics rests are rarely found in actual markets. Market failure can occur on the supply side as producers engage in anti-competitive practices, and on the demand side with consumers not making well informed or rational choices, whether because of information asymmetries or other forms of behaviour.
6. Governments have therefore tended to intervene in the market to address anti-competitive conduct (Competition and Consumer Act 2010 (Cth) (CCA) Pt IV) and to mitigate the effects of information asymmetries (misleading or deceptive conduct) or other forms of manipulative behaviour (unconscionable conduct).
7. Up until 2011 (when the CCA took effect), the principal source of consumer protection at the Commonwealth level was the Trade Practices Act 1974 (Cth) (TPA), which addressed many of the consumer issues mentioned above through prohibitions on misleading or deceptive conduct, unconscionable conduct, product safety and information disclosure regulations.
8. However, because of constitutional limitations in its application, the TPA did not operate as a comprehensive source of consumer protection. The TPA was therefore augmented by State and Territory Fair Trading Acts as well as various 'conduct specific' legislation, such as Door-to-Door Sales Acts.
9. Despite the recognised importance of consumer protection laws, successive reviews of the TPA focused largely on the supply side; that is, focused on the substance and enforcement of the anti-competitive provisions in TPA Pt IV.
10. Concerns with duplication and inefficiency prompted the Federal Government to undertake a wholesale review of Australia's consumer protection regime. In 2008, the Productivity Commission's *Review of Australia's Consumer Policy Framework* recommended the implementation of a single, national Australian consumer law to replace the consumer protection regimes in both the TPA and the various State and Territory Fair Trading Acts.
11. The Council of Australian Governments accepted the Productivity Commission's recommendations and set about creating a framework and timetable for implementing the ACL.
12. In 2010, the Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth) and the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) (the Amendment Acts) were passed by the Federal Parliament.
13. These two Amendment Acts renamed the TPA as the 'Competition and Consumer Act 2010 (Cth)', repealed most of the 'consumer protection' Parts of the TPA identified above, and then created the actual content of the ACL as CCA Sch 2.
14. The ACL in CCA Sch 2 functions as an 'applied law' regime. It is applied as a law of the Commonwealth by CCA Pt XI, and as a law of the States and Territories by CCA Pt XIAA. Further, the ACL is incorporated into State and Territory legislation.

15. However, the two Amendment Acts did not completely repeal and replace all of the consumer protection provisions of the TPA. For example, Pt IVB providing for 'Industry Codes' of conduct remains part of the CCA and, while it does not formally belong to the ACL within CCA Pts XI or XIAA, it nevertheless remains very much an essential component of consumer protection in Australia.
16. The ACL in CCA Sch 2 is composed of five Chapters that are further divided into Parts, Divisions and Subdivisions.
17. ACL Chs 2 and 3 provide both general and specific prohibitions, including misleading or deceptive conduct, unconscionable conduct, the unfair contract terms regime and the consumer guarantees regime.
18. ACL Chs 4 and 5 then provide for remedies and enforcement. It is in the enforcement powers granted to the ACCC that the two versions (Commonwealth, and State and Territories) of the ACL found in CCA Pts XI and XIAA respectively differ, with the ACCC being granted wider enforcement powers than State or Territory regulators.
19. Amendments following the 2015 Consumer Affairs Australia and New Zealand review of the ACL have enhanced the protections afforded by the ACL, strengthened the ability of the ACCC to investigate alleged contraventions of the ACL and significantly increased the penalties for contraventions of the ACL.

Further reading

Australian consumer law generally

Consumer Affairs Australia and New Zealand, *Australian Consumer Law Final Report,* Commonwealth of Australia, 2017.

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