



Libraries and Learning Services

University of Auckland Research Repository, ResearchSpace

Copyright Statement

The digital copy of this thesis is protected by the Copyright Act 1994 (New Zealand).

This thesis may be consulted by you, provided you comply with the provisions of the Act and the following conditions of use:

- Any use you make of these documents or images must be for research or private study purposes only, and you may not make them available to any other person.
- Authors control the copyright of their thesis. You will recognize the author's right to be identified as the author of this thesis, and due acknowledgement will be made to the author where appropriate.
- You will obtain the author's permission before publishing any material from their thesis.

General copyright and disclaimer

In addition to the above conditions, authors give their consent for the digital copy of their work to be used subject to the conditions specified on the [Library Thesis Consent Form](#) and [Deposit Licence](#).

**Online Shopping: Pearls and Pitfalls for New Zealand
Consumers – How to Increase Consumer Protection
and Build Consumer Confidence**

Patricia (Trish) Frances O’Sullivan

A thesis (by publication) submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy in Commercial Law, University of Auckland, 2017.

Abstract

Increased consumer confidence is expected to lead to increased levels of retail online shopping which will have flow-on economic benefits. Current online shopping trends demonstrate the importance of the online retail sector to New Zealand's economy. This thesis analyses the effectiveness of current consumer protection law for online consumers and recommends changes to better protect the interests of consumers who shop online. Increased consumer protection will improve consumer confidence in online shopping. The issues dealt with examine: contract formation; the use of "contract on dispatch" terms; the incorporation of terms and conditions; unfair terms regulation; and the enforcement of consumer rights in online shopping transactions. These issues relate to creating and defining the legal relationship between the online consumer and the trader and the mechanisms for obtaining consumer redress. The thesis focuses on online shopping transactions relating to the purchase of goods, rather than services.

The thesis has been completed by publication. The text of the five published articles is included as chapters 3 – 7. The thesis begins with an outline of the policy behind consumer law and an analysis of the current inconsistencies and complexities in the definition of the term "consumer". Chapter 3 includes a recommendation for a simplified definition of "consumer" which takes account of consumer policy and covers all who need consumer protection including online shoppers, whether individuals or small businesses.

In terms of contract formation, the thesis recommends an interpretation which enables the online consumer to accept the offer to sell goods, made by the trader who operates an interactive website. This analysis gives the consumer the power to accept and create contractual rights at an earlier point in the transaction than the alternate analysis which would give the trader the power to accept or reject the consumer's offer to buy. Related to this recommendation is an analysis of "contract on dispatch" terms. These terms state that the contract with the online consumer is not made until the goods are dispatched by the trader. A website review shows that these terms are commonly used by online traders in the United Kingdom. The thesis argues that "contract on

dispatch” terms are contrary to the purpose of consumer protection and that New Zealand and Australia should not require online traders to include terms which specify when the contract is made. Arguments against the validity of “contract on dispatch” terms are advanced and legislative reform, to reduce the impact of these terms on the online consumer’s contractual rights, is recommended.

An analysis of the methods used to incorporate terms and conditions includes a review of 25 New Zealand and 25 Australian retail websites. The review shows that 60% of these websites used the browse wrap method to purport to incorporate terms and conditions. The thesis argues that the browse wrap method generally does not result in valid incorporation. It is suggested that online traders are engaging in misleading and deceptive conduct by leading consumers to believe that their terms and conditions form part of the purchase contract when in fact they have not been validly incorporated. The importance of unfair terms regulation for consumers who are bound by disadvantageous terms is highlighted and it is recommended that the recent New Zealand reform in this area be amended to allow consumers to challenge unfair terms. The current regulation only allows the Commerce Commission to challenge unfair terms.

Consumers who shop online need access to justice which is cost effective and efficient. The existing methods for resolving consumer disputes in New Zealand are outlined and the effectiveness of these methods for online consumers is assessed. The thesis promotes the development of an Online Dispute Resolution (“ODR”) scheme for online consumers in New Zealand to encourage early and inexpensive settlement. It is suggested that New Zealand should model an ODR scheme on international proposals but must include access to automated negotiation tools in the ODR process and should make participation in the ODR scheme by online traders mandatory.

The thesis makes recommendations which are consistent with current consumer law policy and promotes interpretations and new regulation which advance the interests of consumers who shop online.

Acknowledgments

I wish to extend my sincere thanks to a number of people who have supported and encouraged me on the journey towards completion of this thesis.

Thank you to my supervisors Associate Professor Alexandra Sims and Dr Xiaojiang Ren. In particular, Alexandra Sims has given me the most wonderful guidance and support. I am so grateful for Alex's consistently prompt responses to my many drafts and queries and for all her detailed comments and insightful suggestions. Alex's suggestion that I undertake a review of a sample of retail websites was inspired and I believe has improved the relevance of this study greatly. I thoroughly enjoyed working with Alex and could not have asked for more from any supervisor. I am very grateful also for the support of my Head of Department, Professor Fawzi Laswad and my colleagues Mary Rossiter, Nicholas Smith and Associate Professor Lindsay Trotman.

Thank you to my dear friends, Janine Cochrane and Helen Gosman who encouraged and inspired me with the completion of their own post graduate studies. To my sisters, Ann and Catherine and my special friends, Kay McFarlane, Brigid van der Kroon and Bronwyn Roberts, thank you for encouraging me with your own dedication to the important things in your lives and for continuing to show an interest in my study over the many years. Thank you to my dear friends and colleagues, Jill Hooks, Nitha Palakshappa and Linda Pattullo who suggested at the outset that a thesis by publication would suit me – you were right, thank you!

To my parents, Dominic and Kathleen O'Sullivan, thank you for bringing me up in such a way that allowed me to believe that I could complete a study such as this.

Finally, a huge thank you to my husband Anthony Gore and our boys Joe and Frank for all your love and support – being able to share this achievement with you means a great deal.

List of Publisher Permissions

The publishers of the five articles which make up the body of this thesis have consented to reproduction of the text of the articles as chapters in this thesis in the following communications with the author:

1. Email dated 11 November 2016 from Catherine Zemann, Product Lead – Journals, LexisNexis, Legal and Professional, Asia Pacific, in relation to, T O’Sullivan “The definition of 'consumer' - will the real 'consumer' please stand up?” (2016) 24 CCLJ 23 – the text of which appears as Chapter 3 in this thesis.
2. Email dated 19 January 2016 from Roger Thornton, Senior Editor, Thomson Reuters, in relation to, T O’Sullivan “Online shopping and consumers - is conduct more important than communication in contract formation?” (2013) 19 NZBLQ 95 – the text of which appears as Chapter 4 in this thesis.
3. Email dated 15 February 2016 from Catherine Harris, Product Lead – Journals, LexisNexis, Legal and Professional, Asia Pacific, in relation to, T O’Sullivan “Online shopping and consumers - the impact of ‘contract on dispatch’ terms” (2013) 21 CCLJ 186 – the text of which appears as Chapter 5 in this thesis.
4. Email dated 25 January 2016 from Dr W. John Hopkins, Associate Professor, Law School, University of Canterbury, Editor, Canterbury Law Review in relation to, T O’Sullivan “Online shopping terms and conditions in practice: validity of incorporation and unfairness” (2014) 20 Canta LR 1 – the text of which appears as Chapter 6 in this thesis.
5. Email dated 10 February 2016 from Rebecca Stubbs, Production Editor, Oxford Journals, Oxford Press, in relation to, Trish O’Sullivan “Developing an online dispute resolution scheme for New Zealand consumers who shop online - are automated negotiation tools the key to improving access to justice?” (2015) 24(1) IJLIT 22 – the text of which appears as Chapter 7 in this thesis.

Table of Contents

Abstract	ii
Acknowledgments	iv
List of Publisher Permissions	v
Table of Contents	vii
Chapter One: Introduction	1
1.1 Summary of Research	1
1.2 Issues	2
1.3 Background	4
1.3.1 Importance of Improving Consumer Protection for Online Shoppers	4
1.3.2 Current Regulation of Online Shopping.....	6
1.3.3 Growth in Online Retail	9
1.4 Justification for Special Protection for Online Consumers – Compared With In Store Consumers	10
1.5 Contextual Framework – Outline of Policy and Consumer Definition Chapters 2 and 3.....	12
1.6 Outline of Chapters 4 to 7	13
1.6.1 Chapter Four - Online Shopping and Consumers – Is Conduct More Important Than Communication in Contract Formation?.....	13
1.6.2 Chapter Five – Online Shopping and Consumers – The Impact of “Contract on Dispatch” Terms.....	14
1.6.3 Chapter Six – Online Shopping Terms and Conditions in Practice: Validity of Incorporation and Unfairness	145
1.6.4 Chapter Seven - Developing An Online Dispute Resolution (ODR) Scheme for New Zealand Consumers Who Shop Online – Are Automated Negotiation Tools the Key to Improving Access to Justice?	16
1.7 Aims and Objectives of the Research	17
Chapter Two: Consumer Law and Policy	18
2.1 Introduction.....	18
2.2 What is Consumer Law?	18

2.3 Limits of Contract Law	24
2.4 Consumer Policy - Why Do Consumers Need Protection?.....	28
2.4.1 Inequality of Bargaining Power	30
2.4.2 Information Failure – Information Asymmetry.....	31
2.4.3 The Imperfect Market - Market Failure	32
2.4.4 Difficulties in Obtaining Consumer Redress	34
2.5 Behavioural Economics and Paternalism.....	35
2.6 Cost-Benefit Analysis	38
2.7 Consumers’ Need for Protection – Online Shopping.....	39
Chapter Three: The Definition of “Consumer” - Will the Real “Consumer” Please Stand Up.....	42
3.1 Introduction.....	42
3.2 The Rationale for Consumer Law	43
3.3 New Zealand and Australian Definitions of “Consumer”.....	49
3.3.1 New Zealand.....	49
3.3.2 Australia.....	55
3.3.3 Comparison – New Zealand and Australia	60
3.3.4 Other Statutory Definitions of “Consumer” in New Zealand	61
3.3.5 Other Statutory Definitions of “Consumer” in Australia	63
3.4 European Union / United Kingdom Definitions – Deference to Simplicity.....	64
3.5 United States – More Inconsistency.....	66
3.6 Small Business – Rationale for Inclusion Within the “Consumer” Definition	68
3.7 A New Approach.....	73
3.7.1 Option One - Individuals Acquiring for Personal Purpose	73
3.7.2 Option Two - Individuals and Small Businesses Acquiring Any Type of Goods or Services for Any Purpose.....	74
3.8 Conclusion.....	78
Chapter Four: Online Shopping and Consumers – Is Conduct More Important Than Communication in Contract Formation?.....	79

4.1 Introduction.....	79
4.2 Current Trends in Online Shopping	80
4.3 Online Shopping – A Consumer Scenario	82
4.4 Contract Formation and Website Interaction	84
4.5 The Consumer Scenario – Traditional Contract Law Analysis.....	88
4.5.1 Invitations to Treat	88
4.5.2 The Offer.....	91
4.5.3 Acceptance.....	95
4.5.4 Smythe V Thomas.....	98
4.5.5 Impact of the Trader’s Terms and Conditions On Acceptance	99
4.6 Agreement By Conduct.....	99
4.7 Conclusion.....	101
Chapter Five: Online Shopping and Consumers – The Impact of “Contract on Dispatch” Terms	103
5.1 Introduction.....	103
5.2 A Common Online Shopping Scenario - When is the Contract Made?	106
5.3 Terms Which State When the Contract is Made – Article 10 Ec Directive 2000 and Regulation 9 Ec Regulations 2002	108
5.4 Frequent Use of “Contract on Dispatch” Terms	111
5.5 The Impact of “Contract on Dispatch” Terms	113
5.6 Arguments Against the Validity of “Contract on Dispatch” Terms.....	114
5.6.1 Inherent Difficulty in Interpretation and Application	114
5.6.2 The “Substance Over Form” or Global Approach	116
5.6.3 Estoppel	119
5.6.4 Treat the Inclusion of a “Contract on Dispatch” Term as Misleading and Deceptive Conduct	120
5.6.5 Treat “Contract on Dispatch” Terms as Unfair Terms.....	121
5.7 Proposed Reform – Guarantee of Supply.....	124
5.8 Conclusion.....	126
Chapter Six: Online Shopping Terms and Conditions in Practice – Validity of Incorporation and Unfairness	127

6.1 Introduction.....	127
6.2 General Principles - Incorporation of Terms in Online Shopping Contracts	129
6.3 Click Wrap	130
6.4 Browse Wrap.....	134
6.5 Review Method	136
6.6 The Results.....	137
6.6.1 Incorporation Methods.....	137
6.6.2 Location and Description of Terms.....	137
6.6.3 Number of Words in Terms	138
6.7 Analysis of the Review Results.....	140
6.7.1 Adequacy of Notice	140
6.8 Is Leading a Consumer to Believe That They Are Bound By Terms Which Are Not Binding Misleading and Deceptive Conduct?	141
6.9 Unfair Terms Regulation.....	143
6.10 Conclusion.....	148

**Chapter Seven: Developing An Online Dispute Resolution (ODR)
Scheme for New Zealand Consumers Who Shop Online – Are
Automated Negotiation Tools the Key to Improving Access to Justice? 150**

7.1 Introduction.....	150
7.2 Current Consumer Enforcement and Dispute Resolution Processes in New Zealand	153
7.3 Automated Negotiation Tools – The Key to Success?.....	156
7.3.1 Automated Negotiation Tools.....	158
7.3.2 Assisted Negotiation	159
7.3.3 Suitability of Assisted Negotiation to Online Shopping Disputes	162
7.3.4 Development of Suitable Assisted Negotiation Tools	164
7.4 Development of ODR Schemes Internationally.....	165
7.4.1 The EU ODR Platform.....	165
7.4.2 The ADR Directive	165
7.4.3 The ODR Regulation	166
7.4.4 The UNCITRAL Proposed Rules	168

7.4.5 Comparison - EU and UNCITRAL Proposals	171
7.5 Summary of the Good and the Bad of ODR Schemes	172
7.5.1 Advantages of ODR.....	172
7.5.2 Disadvantages of ODR.....	173
7.6 Development of an ODR Scheme in New Zealand.....	174
7.6.1 How Could Negotiation Tools Work in New Zealand?	175
7.6.2 Required Regulation	177
7.6.3 Independent Third Parties	177
7.6.4 Development of an ODR Platform With Australia	178
7.7 Conclusion.....	179
Chapter Eight: Conclusion	181
8.1 “Consumer” Definition	181
8.2 Contract Formation	182
8.3 “Contract on Dispatch” Terms	183
8.4 Incorporation of Terms and Conditions and Unfair Terms.....	184
8.5 Online Dispute Resolution (ODR) for Consumers Who Shop Online.....	185
Bibliography.....	187

Chapter One

Introduction

1.1 SUMMARY OF RESEARCH

Consumer confidence when purchasing online is important. Increased consumer confidence is expected to lead to increased levels of retail online shopping which will have flow-on economic benefits. When introducing the Consumer Law Reform Bill to Parliament in 2012, the Minister of Consumer Affairs, Chris Tremain, noted, "... confident consumers, who demand high quality goods and services make good choices and seek satisfaction when their purchasing expectations are not met – an essential component of effective markets. Effective markets, in turn, drive competition, innovation and economic growth."¹ Current statistics on online shopping trends, demonstrate the importance of the online retail sector to the New Zealand economy.² This thesis analyses the effectiveness of current consumer protection law for online consumers and suggests changes to better protect the interests of consumers who shop online. The thesis deals with issues relating to: contract formation; the use of "contract on dispatch" terms; incorporation of standard terms and conditions; unfair terms regulation; and the enforcement of consumer rights in online shopping transactions. Online shopping transactions relating to the purchase of goods, rather than services, are examined.

The thesis has been completed by way of published papers. The text of each of the five publications is included as chapters in the thesis.

¹ Consumer Law Reform Bill – First Reading (9 February 2012) 677 NZPD 283 available at: <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20120209/tab/relateddocuments>.

² The BNZ Online Retail Sales Index records that the annual value of online retail spending (excluding fuel, motor vehicles, parts and marine) in New Zealand was \$3.8 billion (excl GST) in the 12 month period ending January 2017 which is equivalent to 7.4% of total annual retail sales (see: <<https://www.bnz.co.nz/business-banking/support/commentary/online-retail-sales-index>>).

1.2 ISSUES

The legal issues, faced by consumers who shop online, dealt with in the thesis are:

- *Contract formation in a common online shopping scenario* – this is an important issue as many of the consumer’s rights and obligations flow from the purchase contract. Judicial determinations around the timing of contract formation in an online shopping transaction using an interactive website have not been conclusive.³ A delay in the formation of the contract, until after payment is made, is disadvantageous for the consumer. Can the conduct of the trader and the consumer, in operating and interacting with a website, rather than the communications between them, create a valid contract? How can the exact timing of contract formation be determined? Is there a contract formation analysis which better protects the consumer?;
- *The impact of “contract on dispatch” terms* – terms which state that the contract with the online shopper is not made until the goods are dispatched are commonly used by online traders in the United Kingdom. The principle of freedom of contract means that any New Zealand trader may include “contract on dispatch” terms in their standard terms and conditions. Do “contract on dispatch” terms diminish consumer rights? Are there arguments against the validity of “contract on dispatch” terms? Should “contract on dispatch” terms be included in the “grey list” of unfair terms in New Zealand’s unfair terms regulation?;

³ See: *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594; [2004] SGHC 71; affirmed [2005] 1 SLR 502; [2005] SGCA 2 at [29] and *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768; BC200610545. See also: HG Beale (ed) *Chitty on Contracts* (32nd ed, Sweet and Maxwell, London, 2015) vol 1 at [2-008]; Judge David Harvey *internet.law.nz* (4th ed, LexisNexis, Wellington, 2015) at 562; L Davies “Contract Formation on the Internet: Shattering a Few Myths” in L Edwards and C Waelde (eds) *Law and the Internet* (Hart Publishing, Oxford, 1997) p 115; B Fitzgerald, A Fitzgerald, E Clark, G Middleton and YF Lim *Internet and E-Commerce Law – Business and Policy* (Thomson Reuters Sydney, 2011) at p 743; C Glatt “Comparative Issues in the Formation of Electronic Contracts” (1998) 6 (1) Intl J L & Info Tech 34 at 51 E Mik “The Unimportance of being “electronic” or – popular misconceptions about “Internet contracting”” (2011) 19(4) Intl J L & Info Tech 324; J Hogan-Doran “Jurisdiction in cyberspace: The when and where of on-line contracts” (2003) 77 ALJ 377; C Glatt “Comparative Issues in the Formation of Electronic Contracts” (1998) 6 (1) Intl J L & Info Tech 34; and K Tokeley “Shopping on the Net: Legal Protection for Consumers” (1997) 9 Otago Law Rev 51.

- *The incorporation of standard terms and conditions and unfair terms regulation* – assessment of the recognised methods of incorporating terms and conditions into online shopping contacts is required to determine whether these methods give adequate notice to consumers of the existence and content of terms and conditions. What methods of incorporation of terms and conditions are being used by retail websites in practice and do these methods result in valid incorporation? If terms and conditions are not validly incorporated, are traders misleading consumers into believing that their terms are valid and enforceable? As consumers have little opportunity to negotiate terms and generally do not read them,⁴ can unfair terms regulation provide consumer protection against onerous terms?;
- *The ability of consumers who shop online to seek redress in an efficient and cost effective manner* – if consumer protection regulation is to be effective, the consumer’s access to justice is a critical factor which must be addressed. The development of enforcement mechanisms and dispute resolution procedures which are cost effective and efficient for all consumers is required. This is particularly important for consumers who shop online as they generally have no face to face contact with the trader.⁵ Should New Zealand develop an online dispute resolution scheme similar to that now operating in the European Union? How can automated negotiation tools in online dispute resolution improve the online shopper’s access to justice?

Consumers who shop online face other issues, including privacy of personal information, intrusive marketing techniques using big data, fraudulent traders and choice of law and jurisdiction issues in international sales. These issues are beyond the scope of this thesis. The thesis focuses on issues which arise in creating and defining the

⁴ R Hillman and J Rachlinski “Standard Form Contracting in the Electronic Age” (2002) 77 New York University L Rev 429; R A Hillman “Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications” in Jane Winn (ed) *Consumer Protection in the Age of the Information Economy* (Ashgate Publishing Ltd, Aldershot, England, 2006) at 283; and Y Bakos, F Marotta-Wurgler and D R Trossen “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (2014) 43 Journal of Legal Studies 1.

⁵ Some online retailers do accept returns of online purchases at their bricks and mortar stores.

legal relationship between the online consumer and the trader and the mechanisms for obtaining redress when things go wrong in transactions with New Zealand businesses.

1.3 BACKGROUND

1.3.1 Importance of Improving Consumer Protection for Online Shoppers

While there is literature dealing with the legal issues arising when consumers shop online⁶ there is still more to be done with regard to possible solutions to the issues identified above i.e. contract formation; the incorporation of standard terms and conditions; the effectiveness of unfair terms regulation; the impact of “contract on dispatch” terms; and consumer redress. The Australian Productivity Commission (the Australian Government’s independent research and advisory body) released a draft report on Australian retail in July 2011. The Commission notes in relation to online retail that:

While consumers are becoming increasingly confident about online shopping, the dynamism of the market and the demands of more numerous and complex transactions will require a keener awareness by consumers than in the past. Over time, the regulators too may be required to work differently as well as devote more resources to addressing risks related to online purchases and product safety.⁷

The OECD released the *Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy* background report in November 2009.⁸ The report

⁶ A sample of legal writing relating to the New Zealand and Australian context includes: K Tokely “Shopping on the Net: Legal protection for Consumers” (1997) 9 Otago Law Review 51; K Tokeley “Towards a New Regulatory Regime for New Zealand Online Auctions” [2011] NZ Law Review 91; Kanchana Kariyawasam “Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand” (2009) 15 NZBLQ 178; L Smith “Global Online Shopping: how well protected is the Australian consumer?” (2004) 12 CCLJ 163; Judge David Harvey *internet.law.nz* (4th ed, LexisNexis, Wellington, 2015) at ch 11; and Simpson Grierson’s x-tech group *A Guide to E-Commerce Law in New Zealand* (Thomson Brookers, Wellington, 2002).

⁷ Productivity Commission “Economic Structure and Performance of the Australian Retail Industry” July 2011 Draft Report, Canberra available at: <http://pc.gov.au/projects/inquiry/retail-industry/draft> at 123.

⁸ OECD *Empowering E-consumers Strengthening Consumer Protection in the Internet Economy*

acknowledges the economic importance of e-commerce and notes:⁹

Given the significant benefits of e-commerce to the economy and to consumers, it is important for governments and stakeholders to work together to ensure that the benefits are fully realised, which includes finding ways to boost consumer confidence in online transactions.

The importance of consumer confidence in online shopping is also recognised by the European Union which has passed a number of Directives relating to e-commerce and the rights of consumers.¹⁰ These Directives acknowledge the significance of online shopping in today's society and aim to build consumer confidence. The EU Directive on the protection of consumers in distance selling contracts has, since 1997, given consumers seven days to cancel an online purchase contract for any reason and obtain a full refund.¹¹ The EU Directive on Alternative Dispute Resolution ("ADR")¹² and

Background report Washington D.C. 8-10 December 2009 available at: <http://www.oecd.org/site/0,3407,en_21571361_43348316_1_1_1_1_1,00.html>. The OECD released updated guidelines for consumer protection in e-commerce in 2016 see: OECD, *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016) available at: <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>>.

⁹ OECD *Empowering E-consumers Strengthening Consumer Protection in the Internet Economy* Background report Washington D.C. 8-10 December 2009 at p 6 available at: <http://www.oecd.org/site/0,3407,en_21571361_43348316_1_1_1_1_1,00.html>.

¹⁰ Directive [2000/31/EC](#) of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l24204>>; Directive [2013/11/EU](#) of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:0904_3> and Directive [97/7/EC](#) of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997L0007>>.

¹¹ Directive [97/7/EC](#) of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Article 6, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997L0007>>.

¹² Directive [2013/11/EU](#) of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes [2013] OJ L 165/63 available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011>>.

Regulation on Online Dispute Resolution (“ODR”)¹³ passed in 2013, establish an online dispute resolution platform for consumers who shop online across Europe.

New Zealand has no regulation which aims specifically to increase the confidence of online consumers. Australia also has no specific regulation for the protection of online consumers and takes a technology neutral stance in that consumer protection laws “apply equally to online and offline consumer transactions”.¹⁴

1.3.2 Current Regulation of Online Shopping

There is no specific legislation in New Zealand which applies solely to consumers who shop online. Instead, there are a number of general consumer protection laws including the Consumer Guarantees Act 1993 (“the CGA”) and the Fair Trading Act 1986 (“the FTA”) that apply to online shopping transactions where relevant. The principles of contract law generally apply to any purchase contract and support the consumer’s right to enforce the bargain. The level of support given to consumers by contract law principles depends on how these principles are interpreted and applied. Contract law gives the parties to a transaction which qualifies as a “contract” the ability to enforce performance of the agreement using the court system. An online shopping transaction generally amounts to a “contract” but exactly when that contract is created depends on how the contract formation rules are applied. The common use of standard terms and conditions in online shopping contracts may result in consumers being bound by unnecessary or onerous terms. The doctrine of notice and the contra proferentem rule¹⁵ of interpretation may be applied to aid consumers in determining that particular terms

¹³ Regulation EU No 524/2013 of 21 May 2013 on Online Dispute Resolution for Consumer Disputes [2013] OJ L 165/1 available at: < <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32013R0524> >.

¹⁴ Productivity Commission *Review of Australia’s Consumer Policy Framework, Final Report – Volume 2* (Canberra 2008) at p 312 available at: < www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf >. See also: Productivity Commission *Economic Structure of the Australian Retail Industry* (Canberra 2011) at p 115 -116: “The consumer protection provisions of the Competition and Consumer Act 2010 apply to online traders in the same way as they do to bricks and mortar retailers” available at: < www.pc.gov.au/inquiries/completed/retail-industry/report/retail-industry.pdf >.

¹⁵ The contra proferentem rule says that ambiguous terms should be interpreted against the party relying on them.

are not binding but this depends on how the doctrine of notice and the rules of interpretation are applied by the courts. These traditional contract law principles are discussed fully in chapters 4 – 6.

Following a process of consumer law reform initiated by the Ministry of Consumer Affairs in 2010,¹⁶ significant changes were made to the CGA and the FTA by the Consumer Guarantees Amendment Act 2013 and the Fair Trading Amendment Act 2013. This reform made some changes which benefit consumers who shop online. A guarantee of supply was added to the CGA.¹⁷ Section 5A provides that, where the supplier is responsible for delivery of goods, there is a guarantee that the goods will be delivered on or before the time agreed or if no time is agreed, within a reasonable time. This guarantee will be useful for consumers who shop online as consumers are usually required to make payment before the goods are delivered. Consumers may rely on this guarantee to recover the purchase price if goods are not delivered within the agreed time or within a reasonable time if no time is agreed. The guarantee also determines responsibility for damage to goods which occurs during transit by making the supplier liable for any damage.¹⁸ The reform also removed the purchase “by auction” exclusion from the CGA. The CGA now applies to consumers who purchase goods from suppliers operating in trade using online auction sites like “Trade Me”. In addition, a provision was added to the FTA¹⁹ which requires suppliers who operate in trade and offer goods or services for sale to consumers via the internet, to declare that they are operating in trade. This means that traders who sell goods or services using online auction sites such as “Trade Me” are now required to declare their status as a “trader”. Informing consumers that the supplier is acting in trade helps to alert consumers to the fact that the supplier is subject to the CGA. The consumer law reform also added

¹⁶ Ministry of Consumer Affairs *Consumer Law Reform A Discussion Paper* (June 2010) and Ministry of Consumer Affairs *Briefing for Commerce Committee on Consumer Law Reform Bill* (27 March 2012).

¹⁷ Consumer Guarantees Act 1993, s 5A.

¹⁸ A Sims “The guarantee of delivery of goods under the Consumer Guarantees Act 1993 and its implications for Australia” (2016) 23 CCLJ 266.

¹⁹ Fair Trading Act 1986, s 28B.

provisions to the FTA which regulate the use of unfair terms in standard form consumer contracts.²⁰ The unfair terms provisions are discussed fully in chapter 6.

The OECD approved *Guidelines for Consumer Protection in the Context of Electronic Commerce (1999)*²¹ on 9 December 1999. The OECD guidelines are reflected in the *New Zealand Model Code for Consumer Protection in Electronic Commerce* adopted by New Zealand in October 2000.²² The New Zealand Model Code includes, inter alia, guidelines on best practice in relation to: disclosure of terms and conditions;²³ mechanisms for concluding contracts;²⁴ and dispute resolution procedures.²⁵ The Model Code sets out broad guidelines on best practice for business but these guidelines have no legislative force. The OECD revised its guidelines on consumer protection in e-commerce in 2016,²⁶ however, New Zealand's Model Code has not yet been updated to take account of the updated OECD guidelines. The new OECD guidelines, which recommend stronger protection for online consumers, are discussed further in chapter 2.

The Electronic Transactions Act 2002 validates the use of the internet in commercial transactions by recognising the legal effect of electronic forms of writing, communication and signature.²⁷ It also provides rules for determining the time when electronic communications are sent and received. The Electronic Transactions Act does not include specific protections for consumers shopping using electronic means.

²⁰ Fair Trading Act 1986, s 26A and ss 46H- 46M, discussed fully in chapter [5].

²¹ Available at: <<http://www.oecd.org/sti/consumer/34023811.pdf>>.

²² Ministry of Consumer Affairs "New Zealand Model Code for Consumer Protection in Electronic Commerce" October 2000 (not currently available on new Consumer Protection website).

²³ *New Zealand Model Code for Consumer Protection in Electronic Commerce* October 2000, Clauses 20 – 27.

²⁴ *New Zealand Model Code for Consumer Protection in Electronic Commerce* October 2000, Clauses 28 – 29.

²⁵ *New Zealand Model Code for Consumer Protection in Electronic Commerce* October 2000, Clauses 36 – 40.

²⁶ OECD, *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016) available at: <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>>.

²⁷ Electronic Transactions Act 2002, ss 8 – 13A . The Electronic Transactions Act 2002 is discussed fully in: Judge David Harvey *internet.law.nz* (4th ed, LexisNexis, Wellington, 2015) at ch 11.

1.3.3 Growth in Online Retail

An outline of the recent statistics on online shopping trends demonstrates the importance of the online retail sector to the New Zealand economy. The number of consumers shopping online has increased significantly over the past decade. A Statistics New Zealand survey released in April 2013 showed that more than 50% of New Zealanders shop online.²⁸ This is an increase of 11% since 2009.²⁹ The BNZ Online Retail Sales Index records that online retail spending by New Zealanders in January 2017 was up 16% compared to January 2016.³⁰ The annual value of online retail spending (excluding fuel, motor vehicles, parts and marine) was \$3.8 billion (excl GST) in the 12 month period ending January 2017.³¹ Online shopping as a proportion of total retail sales (excluding fuel, motor vehicles, parts and marine) increased from 6.2% in January 2014 to 7.4% in January 2017.³² With the level currently at 7.4% of total annual retail shopping, there is scope for significant further growth in online shopping. These figures are not surprising given advances in technology which have increased the ease of access to the internet, including the development of wireless networks and

²⁸ Statistics New Zealand, “Household Use of Information and Communication Technology: 2012 – Media Release”(released 12 April 2013) available at: www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/HouseholdUseofICTSurvey_MR2012.aspx and Statistics New Zealand, “Household Use of Information and Communication Technology: 2012” available at: http://www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/HouseholdUseofICT_HOTP2012.aspx.

²⁹ Statistics New Zealand, “Household Use of Information and Communication Technology: 2012 – Media Release” (released 12 April 2013) available at: www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/HouseholdUseofICTSurvey_MR2012.aspx and Statistics New Zealand, “Household Use of Information and Communication Technology: 2012” available at: http://www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/HouseholdUseofICT_HOTP2012.aspx.

³⁰ The BNZ Online Retail Sales Index is available at: <https://www.bnz.co.nz/business-banking/support/commentary/online-retail-sales-index>.

³¹ The BNZ Online Retail Sales Index is available at: <https://www.bnz.co.nz/business-banking/support/commentary/online-retail-sales-index>.

³² The BNZ Online Retail Sales Index is available at: <https://www.bnz.co.nz/business-banking/support/commentary/online-retail-sales-index>. The annual value of online retail spending (excluding fuel, motor vehicles, parts and marine) increased from \$2.8 billion (excl GST) in the 12 month period ending January 2014 to \$3.8 billion (excl GST) in the 12 month period ending January 2017 (see: <https://www.bnz.co.nz/business-banking/support/commentary/online-retail-sales-index>).

mobile devices which mean that consumers can now access the internet and shop online virtually “anywhere, anytime”.

Online shopping has significant economic benefits for retailers – among other things, they: do not need to lease expensive retail space; have reduced overhead costs and their customers can shop all hours at virtually any location. These benefits can lead to reduced prices for consumers and increased product choice. The recommendations in this thesis are aimed at increasing consumer protection so that consumer confidence in online shopping is increased.

1.4 JUSTIFICATION FOR SPECIAL PROTECTION FOR ONLINE CONSUMERS – COMPARED WITH IN STORE CONSUMERS

Consumers shopping in an online environment face different issues when compared with consumers shopping in traditional “bricks and mortar” stores. The critical differences are:

First, when consumers make purchases online using interactive websites there is an absence of direct real time communication between the shopper and trader. The consumer browses the goods available, makes selections, responds to computer generated prompts and submits payment details by clicking and entering information into text boxes. The online consumer can pay for the goods selected without receiving any communication from the trader. The trader’s first direct communication with the consumer is usually via a computer generated order confirmation email which is sent to the consumer following successful submission of payment details. In a traditional store the consumer can enter into direct communication with the trader when goods are purchased at the counter and often before this point if the consumer requests particular goods or asks for advice about the characteristics of the goods.

Second, consumers who shop online are generally required to submit payment for goods without being able to see or touch the goods they are about to purchase. A shopper in a traditional store generally has an opportunity to examine, view, touch, test and even try on goods which are physically present in the store. The inability of online consumers to view the actual goods subject to the purchase raises particular issues in

relation to goods which are size, texture or colour specific. Because consumers are not able to try on clothing or shoes, for example, they must rely on the accuracy of the trader's measuring scale and colour representations in the images displayed on screen.

Third, delivery of goods in a traditional store is usually concurrent with payment.³³ Delivery of goods to the online consumer is delayed until after payment. Delivery occurs after the trader arranges delivery usually by employing a postal or courier service and the goods are delivered days or weeks later.

Fourth, when consumers shop in a traditional store they are not generally required to indicate consent to the trader's standard terms and conditions before making a purchase. Online consumers are invariably required to assent to terms and conditions or are subject to terms and conditions which are purported to be imposed on them through their interaction with the trader's website.

Fifth, in a traditional shop a trader can decline to accept the consumer's offer to purchase particular goods at the counter before the purchase price is paid. The trader in a traditional store usually ascertains whether particular goods are available for sale before accepting payment. Whereas, online shopping websites are generally set up in a way that notifies the trader that a consumer has made an order when the consumer submits payment details. It is when payment details are submitted that the website's software notifies the trader, usually by email, that an order has been placed. Traders are in a no lose position if they are able to decline or accept an order after the online consumer has submitted payment. The online consumer has to rely on the trader to issue a refund in a timely manner if the goods subject to the purchase are not available.

Sixth, consumers who make purchases from traditional stores are generally able to return to the physical address of the store to obtain remedies in respect of faulty goods. Online consumers need to rely on communication systems such as telephone, email and post to obtain remedies in respect of faulty goods unless the online shopper chooses to use the option of returning goods to a traditional store if this option is available. If goods are not returned to a traditional store, the trader's response to a

³³ Sometimes goods purchased in a traditional store are delivered after payment, for example, when goods need to be obtained from another store or ordered in. Also, the goods supplied in a traditional store may be different from the goods examined by the consumer, for example, when the consumer views a sample or demonstration model prior to purchase.

complaint from an online shopper is not subject to scrutiny from other shoppers who may be present in the store when a complaint is made. There is less opportunity to bang the counter or raise the voice to demand co-operation.³⁴

The differences between online and offline consumers outlined above, show that online consumers place a high level of trust in the trader and face different issues in relation to contract formation, the imposition of standard terms and conditions and obtaining redress when things go wrong. The need to develop additional protections for online consumers is supported by the higher level of trust shown by online consumers compared with traditional shoppers.³⁵ Sims has highlighted the difficulties faced by offline consumers attempting to enforce their rights under the Consumer Guarantees Act 1993.³⁶ The hurdles encountered for online consumers are even greater with regard to the enforcement of rights due to the absence of face to face contact with the trader. Online specific solutions should aim to increase protections for consumers and improve enforcement mechanisms which should in turn increase the confidence of consumers engaging in online shopping.

1.5 CONTEXTUAL FRAMEWORK – OUTLINE OF POLICY AND CONSUMER DEFINITION CHAPTERS 2 and 3

Chapter 2 provides a discussion of the rationale for consumer protection law including

³⁴ While online shoppers may be able to post negative feedback about a trader on social media, the immediate effect of posting negative feedback, in terms of a remedy for the consumer, is unknown.

³⁵ C Prins and L van der Wees “E-Commerce and Trust: A Variety in Challenges” in J Prins and others (eds) *Trust in Law and Electronic Commerce - The Role of Trust from a Legal, an Organisational and a Technical Point of View* (Kluwer Law International, The Hague, 2002) at 4: “Without sufficient trust between the business partners, adequate governance of the flow of materials and services will be severely hampered. This may especially apply to electronic markets and electronic commerce in general, where the only contact between the buyers and sellers may be the contact through databases and the telecommunication network” and F N Egger “Consumer Trust in E-commerce: From Psychology to Interaction Design” in J Prins and others (eds) *Trust in Law and Electronic Commerce - The Role of Trust from a Legal, an Organisational and a Technical Point of View* (Kluwer Law International, The Hague, 2002) at 11. See also: P Cortes “Online Dispute Resolution for Consumers” in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, The Netherlands, 2012).

³⁶ A Sims “Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action” (2010) 16 NZBLQ 145.

an analysis of the policy principles which underpin the development of consumer law. Chapter 2 begins with an explanation of what consumer law is and identifies the limits of contract law in terms of providing consumer protection. The discussion of the recognised rationales for consumer protection law includes an explanation of the effect of behavioural economics research and the changing nature of the modern market. Chapter 3 analyses the definition of the term “consumer” and highlights the current inconsistencies in definition which create uncertainty.³⁷ Suggestions for an improved definition which would work to benefit all worthy of consumer protection including online shoppers are promoted. The definition of “consumer” is a critical determinant of the extent and impact of any consumer protection regulation and is closely connected to the policy rationales for developing such regulation.

1.6 OUTLINE OF CHAPTERS 4 to 7

1.6.1 Chapter Four - Online Shopping and Consumers – Is Conduct More Important Than Communication in Contract Formation?³⁸

In terms of building consumer confidence it is important to be able to pin point exactly when the purchase contract is made, as the parties’ contractual rights and obligations arise at that point. If things go wrong, many consumer remedies flow from the purchase contract. Chapter 4 considers the issue of contract formation in contracts made by consumers shopping online and identifies when the contract is made in a common consumer scenario. A common consumer purchase scenario using an interactive website is described and that scenario is analysed in terms of the traditional contract law concepts of offer and acceptance.³⁹

³⁷ The text of this chapter was published in 2016: Trish O’Sullivan “The definition of ‘consumer’ - will the real ‘consumer’ please stand up” (2016) 24 CCLJ 23.

³⁸ Published in July 2013: Trish O’Sullivan “Online Shopping and Consumers – Is conduct more important than communication in contract formation?” (2013) 19 NZBLQ 95.

³⁹ The steps followed in the common “consumer scenario” include: consumer browses the goods available on trader’s website; consumer selects particular goods by clicking “add to cart” or “buy now”, for example; consumer proceeds to checkout; consumer provides personal details including delivery information or logs in if a previously registered customer; consumer may be asked to indicate agreement

Chapter 4 argues that because there is an absence of direct real time communication between the consumer and the trader when the consumer interacts with a website, the parties' conduct rather than their communications forms the contract. The chapter concludes by arguing that, in the consumer scenario which is outlined, it is the trader who makes an offer to sell by operating an interactive website and that offer is accepted by the consumer's conduct of submitting payment details. The conclusion that it is the trader who makes the offer, rather than the consumer, is supported by analogy with a purchase from a vending machine. This analysis gives the consumer the power to accept and gives contractual rights and remedies to the consumer at an earlier point in the transaction than the alternate analysis which gives the trader the power to accept or reject at a later stage.

1.6.2 Chapter Five – Online Shopping and Consumers – The Impact of “Contract on Dispatch” Terms⁴⁰

Chapter five focuses on a particular type of term which is included in some online trader's standard terms and conditions – the “contract on dispatch term”. A review of the standard terms used by some major online traders in the United Kingdom reveals the common use of a term which states that the contract is made when goods are dispatched to the consumer. These “contract on dispatch” terms comply with Regulation 9 of the United Kingdom Electronic Commerce (EC Directive) Regulations 2002 which requires traders who sell online to set out the “technical steps which must be followed to conclude a contract”. There is no prohibition in New Zealand and Australia against online traders using “contract on dispatch” terms in their terms and conditions. The chapter argues that “contract on dispatch” terms are contrary to the purpose of consumer protection in the context of online shopping, and that New Zealand and Australia should

to the trader's terms and conditions or may be subjected to a notice which refers to the existence of the trader's terms and conditions on the website; consumer confirms order by proceeding to payment; consumer submits payment details or pays using internet banking; webpage is displayed which confirms that payment has been processed; consumer receives order confirmation email and, finally, the goods are delivered.

⁴⁰ Published in 2013: Trish O'Sullivan “Online shopping and consumers — the impact of ‘contract on dispatch’ terms” (2013) 21 CCLJ 186.

not adopt a provision similar to Regulation 9. “Contract on dispatch” terms remove the ability of the consumer to bring an action based on the existence of a contract when goods are not dispatched even if the purchase price has been paid. The chapter identifies sound arguments against the validity of “contract on dispatch” terms, and also suggests that legislative reform in New Zealand and Australia should be undertaken to reduce the impact of “contract on dispatch” terms on the online shopper’s contractual rights.

1.6.3 Chapter Six - Online Shopping Terms and Conditions in Practice: Validity of Incorporation and Unfairness⁴¹

The consumer’s rights and protections can be eroded by standard terms and conditions which are commonly incorporated into the online shopping contract. For example, standard terms and conditions may require consumers to consent to the trader’s use of their personal information, may prohibit the making of negative comments about the trader on social media,⁴² or may prohibit class actions. The fact that consumers generally have no ability to negotiate terms and tend not to read them⁴³ means that the issue of “notice” of terms and conditions is often irrelevant – in terms of consumer protection. Chapter 6 reviews 25 New Zealand and 25 Australian retail websites and gives a picture of the practical reality, in respect of terms and conditions, faced by consumers who shop online. Whether terms are successfully incorporated into contracts requires a consideration of the issues of notice and assent. The common methods of incorporating terms and conditions into online shopping contracts are known as click wrap and browse wrap. The general principles of incorporation and how they apply to click wrap and browse wrap are discussed. Analysis of the review results show that 60% of websites which use browse wrap may not in fact be validly incorporating terms and

⁴¹ Published in 2014: Trish O’Sullivan “Online Shopping Terms and Conditions in Practice: Validity of Incorporation and Unfairness” (2014) 20 *Canterbury Law Review* 1–21.

⁴² These are known non-disparagement clauses.

⁴³ R Hillman and J Rachlinski “Standard Form Contracting in the Electronic Age” (2002) 77 *New York University L Rev* 429; R A Hillman “Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications” in Jane Winn (ed) *Consumer Protection in the Age of the Information Economy* (Ashgate Publishing Ltd, Aldershot, England 2006) at 283 and Y Bakos, F Marotta-Wurgler and D R Trossen “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (2014) 43 *Journal of Legal Studies* 1.

conditions. The chapter argues that online traders who have not validly incorporated terms and conditions may be engaging in misleading and deceptive conduct⁴⁴ by leading consumers to believe that their terms form part of the purchase contract. The chapter highlights the importance of unfair terms legislation for consumers who are bound by disadvantageous terms and suggests that the recent New Zealand reform in this area could be improved if it was amended to allow consumers themselves to challenge unfair terms.⁴⁵ The current unfair terms regulation in New Zealand allows the Commerce Commission only to bring action to challenge unfair terms.⁴⁶

1.6.4 Chapter Seven - Developing an Online Dispute Resolution (ODR) Scheme for New Zealand Consumers Who Shop Online – Are automated negotiation tools the key to improving access to justice?⁴⁷

The consumer's ability to obtain a remedy when things go wrong is an important issue in relation to building confidence in online shopping. This chapter considers the difficulties faced by consumers seeking to enforce their rights when they have purchased online. Consumers who shop online need access to justice which is cost effective and efficient. The existing methods for resolving consumer disputes in New Zealand are outlined and the effectiveness of these methods for online consumers is assessed. The chapter promotes the development of an Online Dispute Resolution ("ODR") scheme for online consumers in New Zealand which makes use of automated negotiation tools to encourage early and inexpensive settlement. Use of these negotiation tools is advanced as the key to a dispute resolution system that will really work for consumers who purchase goods online. The development of ODR schemes internationally, including the European Union ODR platform and the UNCITRAL proposals, are reviewed and compared. It is suggested that New Zealand should model

⁴⁴ In breach of the Fair Trading Act 1986, s 9.

⁴⁵ The New Zealand unfair terms regulation is found in the Fair Trading Act 1986, s 26A and ss 46H-46M inserted by the Fair Trading Amendment Act 2013.

⁴⁶ Fair Trading Act 1986, s 46H(1).

⁴⁷ Published in 2015: Trish O'Sullivan "Developing an Online Dispute Resolution scheme for New Zealand consumers who shop online - are automated negotiation tools the key to improving access to justice?" (2015) 24(1) International Journal of Law and Information Technology 22.

an ODR scheme on these international proposals but must include access to automated negotiation tools in the ODR process and should make participation in the ODR scheme by online traders mandatory.

1.7 AIMS AND OBJECTIVES OF THE RESEARCH

The general theme of this thesis is to identify and examine important specific legal issues faced by consumers shopping online and develop ideas for improving consumer protection and confidence in online shopping. It is expected that increased consumer confidence will lead to increased levels of retail shopping online which will have flow-on benefits for the New Zealand economy.

One chapter is devoted to each of the major issues outlined above and each of these chapters contains recommendations for change which may encourage a particular way of interpreting and applying the current law or suggest the adoption of new regulation. These recommendations are aimed at improving the protection of the interests of consumers who shop online, taking account of their special characteristics.

Chapter Two

Consumer Law and Policy

2.1 INTRODUCTION

Chapter 2 explains the theory which underpins consumer law and discusses the policy principles for developing consumer law. The question of why consumers need protection is addressed by outlining the limits of contract law as a means of protecting consumers and identifying the policy principles for developing consumer law by way of regulation outside the realms of contract, tort and criminal law. Policy principles which support the development of particular regulation to protect consumers engaging in e-commerce by shopping online are examined. The study of competition law,⁴⁸ which it is acknowledged operates in the interests of consumers, is beyond the scope of this thesis.

2.2 WHAT IS CONSUMER LAW?

Consumer law focuses on transactions between traders and consumers relating to the supply of goods and services in the market place and looks to support the interests of the consumer. Consumer law embodies a collection of rules from a variety of categories of law including contract law; competition law; tort; criminal law and perhaps more specifically, legislation designed to protect and empower consumers. Ramsay acknowledges the pluralistic nature of consumer law and comments that it seems to be a “particularly post-modern form of law”.⁴⁹ Ramsay’s statement refers to the

⁴⁸ Governed primarily by the Commerce Act 1986 in New Zealand.

⁴⁹ I Ramsay “Consumer Law and Structures of Thought: A Comment” (1993) 16 JCP 79 at 91. “Post-modern” refers broadly to the era from mid to late 20th century. See the following articles for a discussion of whether “consumer law” exists as a separate category or discipline of law: M Ferry “Theory vs. Practice in Consumer law: An Advocate’s Perspective” (1992) 14 JCP 317 and T Bourgoignie “Characteristics of Consumer Law” (1992) 14 JCP 293.

development of consumer specific regulation which may alter traditional common law rules or provide new rights and remedies for consumers.

Consumer specific regulation began to evolve from the mid-20th century. Formal moves towards developing specific consumer protection laws were advanced in the United Kingdom with the establishment of the Molony Committee⁵⁰ in 1959. The Committee described consumer protection law as:⁵¹

measures which contribute, directly or indirectly to the consumer's assurance that he will buy goods of suitable quality appropriate to his purpose; that they will give him reasonable use, and that if he has just complaint there will be a means of redress.

In the United States, the John F Kennedy government introduced a Consumer Bill of Rights to the United States Congress in 1962.⁵² The Bill established four basic consumer rights: the right to safety; the right to be informed; the right to choose and the right to be heard. These basic consumer rights are reflected in the current *United Nations Guidelines for Consumer Protection*⁵³ which promote policy development based on the following general principles:⁵⁴

⁵⁰ UK Molony Committee "Final Report of the Committee on Consumer Protection" Cmnd 1781(1962). For an assessment of the Molony Committee final report see: A L Diamond "The Molony Committee Final Report of the Committee on Consumer Protection" (1963) 26 MLR 66.

⁵¹ UK Molony Committee "Final Report of the Committee on Consumer Protection" Cmnd 1781(1962) 8.

⁵² J F Kennedy (35th President of the United States 1961-63) "Special Message to the Congress on Protecting the Consumer Interest" 15 March 1962 available at: <<http://www.presidency.ucsb.edu/ws/?pid=9108>>.

⁵³ UNCTAD *United Nations Guidelines for Consumer Protection* (United Nations, New York and Geneva 2016). The Guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999, and were revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015, available at: <<http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>>. See also: UNCTAD *Manual on Consumer Protection - advance copy* (United Nations, 2016) available at: <<http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1060>>.

⁵⁴ UNCTAD *United Nations Guidelines for Consumer Protection* (United Nations, New York and Geneva 2016) at p 7 available at: <<http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>>.

4. Member States should develop, strengthen or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Member State must set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures.

5. The legitimate needs which the guidelines are intended to meet are the following:

- (a) Access by consumers to essential goods and services;
- (b) The protection of vulnerable and disadvantaged consumers;
- (c) The protection of consumers from hazards to their health and safety;
- (d) The promotion and protection of the economic interests of consumers;
- (e) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- (f) Consumer education, including education on the environmental, social and economic consequences of consumer choice;
- (g) Availability of effective consumer dispute resolution and redress;
- (h) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
- (i) The promotion of sustainable consumption patterns;
- (j) A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce;
- (k) The protection of consumer privacy and the global free flow of information.

These general principles take account of the many rationales for the development of consumer law which have been advanced by consumer law advocates since the 1970s⁵⁵

⁵⁵ J Ziegel "The Future of Canadian Consumerism" (1973) 51 *Can Bar Rev* at 191; I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) Chapters 1 and 2; I Ramsay "Consumer Law, Regulatory Capitalism and the New Learning in Regulation" [2006] 28 *Sydney Law Review* 9; G Howells and S Weatherill *Consumer Protection Law*, (2nd ed, Ashgate, United Kingdom, 2005) at Chapter 1; I Ramsay "Consumer law and the

and provide a useful reference point for the continued support of the interests of consumers in a society which is changing rapidly due to the impact of mass production, technology advances and globalisation. Principle (j) of the UN guidelines promotes “a level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce”.⁵⁶ This principle is consistent with the OECD guidelines on consumer protection in e-commerce (revised in 2016) and contained in the *Consumer Protection in E-commerce: OECD Recommendation*⁵⁷ which states:⁵⁸

A. Transparent and Effective Protection

1. Consumers who participate in e-commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.

The UN and OECD principles require, at least, the same level of protection for consumers who shop online as that level of protection which covers traditional “bricks

Search for Empowerment” [1991] 19 Canadian Business Law Journal 397; L Griggs “Intervention or Empowerment – Choosing the Consumer Law Weapon” (2007) 15 CCLJ 111; A F Dickey and P J Ward “The Adequacy of Australian Consumer Protection Legislation - Observations and Proposals from Economic Theory” (1979) 14 Western Australian Law Review 133; M J Trebilcock “Rethinking Consumer Protection Policy” in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) at p 69; M J Trebilcock “Taking Stock: Consumerism in the 1990’s” [1991] 19 Canadian Business Law Journal 412; G K Hadfield, R Howse and M J Trebilcock “Information Based Principles for Rethinking Consumer Protection Policy” (1998) 21 Journal of Consumer Policy 131; M J Trebilcock “The Consumer Interest and the Regulatory Process” in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980) 256; Goldring, Maher, McKeough and Pearson *Consumer Protection Law* (5th ed, The Federation Press, Sydney 1998) at Chapter 1; and K Tokeley (ed), *Consumer Law in New Zealand*, (2nd ed LexisNexis, Wellington, New Zealand, 2014) at Chapter 1.

⁵⁶ Principle (j) UNCTAD *United Nations Guidelines for Consumer Protection* (United Nations, New York and Geneva 2016) at p 8 available at: <<http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>>.

⁵⁷ OECD *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016) available at: <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>>.

⁵⁸ OECD *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016) at p 10 available at: <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>>.

Note: the UNCTAD *United Nations Guidelines for Consumer Protection* specifically encourage Member States to consider OECD guidelines for *Consumer Protection in E-commerce* at para 65.

and mortar” shoppers. Further discussion of policy principles for protecting consumers who shop online is included below.

Goldring, Maher, McKeough and Pearson describe consumerism as:⁵⁹

a movement which aims to give consumers some equality of power, some redress against those forces which ply them with goods and services which they have been convinced to buy on the basis of a choice which may be informed on an artificial basis.

This description of consumerism as a movement highlights the importance of balancing power, providing redress and effectively informing consumers before they make purchasing decisions. These factors are included in Hawes’ useful summary of the five aims of modern consumer protection laws:⁶⁰

1. To promote competition;
2. To improve consumer information and to educate the public;
3. To improve the quality and safety of goods;
4. To redress inequality of bargaining power; and
5. To facilitate consumer redress.

New Zealand has enacted regulation which promotes all of these aims to some extent. Specific consumer protection regulation now covers areas such as unfair trade practices,⁶¹ unfair terms,⁶² the imposition of guarantees in the supply of goods and services,⁶³ the provision of specific rights and remedies for consumers,⁶⁴ disclosure

⁵⁹ Goldring, Maher, McKeough and Pearson *Consumer Protection Law* (5th ed, The Federation Press, Sydney 1998) at 2.

⁶⁰ C Hawes (ed) *Butterworths Introduction to Commercial Law* (4th ed, LexisNexis, Wellington 2014) at para 1.4.1.

⁶¹ Fair Trading Act 1986, Part 1.

⁶² Fair Trading Act 1986, s 26A and ss 46H- 46M.

⁶³ Consumer Guarantees Act 1993, ss 5 – 13 – goods guarantees and Consumer Guarantees Act 1993, ss 28 – 31 – service guarantees.

⁶⁴ See generally: Consumer Guarantees Act 1993, Fair Trading Act 1986.

requirements⁶⁵ and the creation of consumer related criminal offences.⁶⁶ Competition in the New Zealand market is advanced by the Commerce Act 1986. The Act is enforced by the Commerce Commission which is the regulatory body established by the Act to enforce its provisions.⁶⁷ The supply of accurate consumer information is improved by the Fair Trading Act 1986 which prohibits misleading and deceptive conduct⁶⁸ and requires particular information disclosures.⁶⁹ The quality and safety of goods and services is promoted by the Consumer Guarantees Act 1993 which creates statutory guarantees and provides statutory remedies for consumers which facilitate redress.⁷⁰ Consumer redress is supported by the Disputes Tribunal claims process which aims to provide access to justice for small claims.⁷¹ Public education about consumer rights is promoted by the Consumer Protection division of the Ministry of Business Innovation and the Environment⁷² and the Commerce Commission.⁷³ Development of further

⁶⁵ For example, the requirement to disclose “trader” status when selling goods or services online – Fair Trading Act 1986, s 28B and to comply with consumer information standards in relation to particular products or services made by regulations passed under the Fair Trading Act 1986, s 27. The Motor Vehicle Sales Act 2003, s 14 also requires motor vehicle traders to attach a “consumer information notice” to every car displayed for sale.

⁶⁶ See: offence provisions, Fair Trading Act 1986, ss 40 – 40H.

⁶⁷The Commerce Commission is New Zealand's competition enforcement and regulatory agency established in 1986 by Part 1 of the Commerce Act 1986.

⁶⁸ Fair Trading Act 1986, ss 9 – 14A .

⁶⁹ For example: Fair Trading Act 1986, s 28B requires disclosure of “trader” status when selling goods or services online; Fair Trading Act 1986, s 36C-D require disclosure of information relating to lay by sale agreements; Fair Trading Act 1986, s 36L requires disclosure of information relating to uninvited direct sales; and Fair Trading Act 1986, s 36U requires disclosure of information relating to extended warranty agreements. Additional consumer information standards in relation to particular products or services may be made by regulations passed under the Fair Trading Act 1986, s 27.

⁷⁰ Consumer Guarantees Act 1993, ss 5 – 27 provide guarantees and remedies relating to goods including guarantees that goods will be delivered, of acceptable quality, fit for particular purposes and comply with description and Consumer Guarantees Act 1993, ss 28 – 40 provide guarantees and remedies relating to services including guarantees that services will be carried out with reasonable care and skill and will be fit for particular purposes.

⁷¹ The Disputes Tribunal is established by the Disputes Tribunal Act 1988 which gives the Tribunal jurisdiction to deal with claims up to NZ\$15,000 or NZ\$20,000 if all parties agree. The Disputes Tribunal may assist the parties to negotiate an agreed settlement and if settlement is not possible may determine the dispute according to the substantial merits and justice of the case, having regard to the law but is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities (s.18 Disputes Tribunal Act 1988).

⁷² See: <https://www.consumerprotection.govt.nz/>

consumer protection law needs to be based on policy principles which have long recognised the limits of contract law.

2.3 LIMITS OF CONTRACT LAW

Before the development of consumer specific regulation, the market place was controlled by the forces of supply and demand, the phenomenon of competition and the idea of consumer choice in a free market. The contract law principle of “freedom of contract” was paramount. The principle of freedom of contract recognises the parties’ right to make any bargain choose – good or bad – and is under pinned by the Latin maxim “caveat emptor” or buyer beware. Commentators have long recognised the limits of contract law in terms of its principles providing consumer protection.⁷⁴ Harvey and Parry note in respect of the freedom of contract doctrine:⁷⁵

the twentieth century has seen increased intervention by both the judiciary and the legislature on behalf of the consumer. This is in recognition of the fact that, in many transactions, there is a significant inequality of bargaining power between the buyer and the seller. It is accordingly unrealistic to ascribe to the buyer a freedom to contract and agree detailed terms when in practice there is little choice but to accept those terms.

Contract law principles take no account of the bargaining strength of parties or of the parties’ access to information about products before the bargain is struck. Contract law

⁷³ The Commerce Commission is New Zealand's competition enforcement and regulatory agency established in 1986 by Part 1 of the Commerce Act 1986.

⁷⁴ G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 11- 35; M Trebilcock *The Limits of Freedom of Contract* (Harvard University press, 1993); A Schwartz and L Wilde “Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis” (1979) 127 University of Pennsylvania Law Review 630 available at: <http://digitalcommons.law.yale.edu/fss_papers/1117/>; and A Schwartz and R E Scott “Contract Theory and the Limits of Contract Law” (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working Papers, Paper 275.

⁷⁵ B W Harvey and D L Parry *The Law of Consumer Protection and Fair Trading* (6th ed, Butterworths, London 2000) at 87.

acts to enforce the bargain⁷⁶ and gives consumers the right to go to court to obtain performance of the purchase contract if goods or services are not provided as agreed. Contract law is always relevant to transactions concerning purchases of goods or services, as the contract is the primary source of the consumer's rights in relation to the subject matter of the contract. While the contract provides rights and the ability to obtain enforcement through the courts, the cost of enforcing the contract is often prohibitive for consumers, particularly those entering into one-off transactions for low value goods.⁷⁷ The practical reality for consumers is that there are significant barriers to contract enforcement.

Creation of the rights afforded the consumer under the contract can be impeded if the trader is able to manipulate or dictate the timing of contract formation. Consumers who shop online are particularly susceptible to attempts by traders, who use the internet as the medium for interacting, to delay the time of contract formation until after the purchase price is paid. There is limited judicial reasoning on how to apply the rules of offer and acceptance to the online shopping scenario⁷⁸ and arguments need to be developed to support the consumer's position regarding the time of contract formation. Regulation may be required to limit the trader's ability to control the timing of contract formation when selling to consumers using a retail website.

⁷⁶ G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England, 2005) at 10, "Contract law seeks to promote bargains".

⁷⁷ See: I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 42-43 and G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England, 2005) at 46 -47.

⁷⁸ See: *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594; [2004] SGHC 71; affirmed [2005] 1 SLR 502; [2005] SGCA 2 at [29] and *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768; BC200610545. See also: HG Beale (ed) *Chitty on Contracts* (32nd ed, Sweet and Maxwell, London, 2015) vol 1 at [2-008]; L Davies "Contract Formation on the Internet: Shattering a Few Myths" in L Edwards and C Waelde (eds) *Law and the Internet* (Hart Publishing, Oxford, 1997) p 115; B Fitzgerald, A Fitzgerald, E Clark, G Middleton and YF Lim, *Internet and E-Commerce Law – Business and Policy*, (Thomson Reuters Sydney, 2011) at p 743; C Glatt "Comparative Issues in the Formation of Electronic Contracts" (1998) 6 (1) *Intl J L & Info Tech* 34 at 51 E Mik "The Unimportance of being "electronic" or – popular misconceptions about "Internet contracting"" (2011) 19(4) *Intl J L & Info Tech* 324; J Hogan-Doran "Jurisdiction in cyberspace: The when and where of on-line contracts" (2003) 77 *ALJ* 377; C Glatt "Comparative Issues in the Formation of Electronic Contracts" (1998) 6 (1) *Intl J L & Info Tech* 34; and K Tokeley "Shopping on the Net: Legal Protection for Consumers" (1997) 9 *Otago Law Rev* 51.

Contract law rules relating to the incorporation of terms and conditions and the doctrine of notice have done little to protect the consumer from onerous terms. In reality, most goods offered on standard terms and conditions are offered by the trader on a “take it or leave it” basis; the consumer has no ability to negotiate and rarely reads terms even if adequate notice of terms has been given.⁷⁹ Lord Denning in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* acknowledged the consumer’s disadvantage in relation to standard terms and conditions:⁸⁰

No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words," the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

The use of standard terms and conditions by traders has become more and more common. Most traders who sell using retail websites purport to include standard terms and conditions in the purchase contract. It is quite easy to impose standard terms and conditions when using a website as a means of communication. The trader simply needs to ensure that the consumer receives adequate notice of the terms and conditions. While the doctrine of notice and the *contra proferentem*⁸¹ rule of interpretation may aid consumers who attempt to avoid onerous terms, much depends on how the judiciary apply these doctrines. Expensive litigation is required to obtain a determination on the

⁷⁹R Hillman and J Rachlinski “Standard Form Contracting in the Electronic Age” (2002) 77 New York University L Rev 429; R A Hillman “Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications” in Jane Winn (ed) *Consumer Protection in the Age of the ‘Information Economy’* (Ashgate Publishing Ltd, Aldershot, England 2006) at 283; Y Bakos, F Marotta-Wurgler and D R Trossen “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (2014) 43 Journal of Legal Studies 1; and K Tokeley (ed), *Consumer Law in New Zealand* (2nd ed LexisNexis, Wellington, New Zealand, 2014) at 6-7.

⁸⁰ Court of Appeal [1983] 1 All ER 108; [1983] QB 284 at 297.

⁸¹ This rule requires the Court to interpret ambiguous terms against the party who seeks to rely on the ambiguous term.

validity of terms which leaves the consumer with little certainty. Specific consumer focused regulation is required to improve the consumer's position beyond the rights available under pure contract law principles.

An early attempt at regulating the application of common law contract principles to sales of goods is reflected in the United Kingdom Sale of Goods Act,⁸² passed at the end of the 19th century and replicated throughout the Commonwealth.⁸³ The Sale of Goods Acts attempted to codify the common law, including the law merchant,⁸⁴ and applied to all buyers and sellers whether businesses or consumers. Consumers could benefit from the implied conditions imposed, in contracts for the sale of goods, by the Acts.⁸⁵ However, the Sale of Goods Acts illustrated a continued adherence to the principle of freedom of contract in that they allowed the contracting parties to contract out of the implied conditions imposed by the Acts.⁸⁶ Examples of modern regulation affecting the scope of the contract include: consumer guarantee law, which enhances contract terms and conditions by providing inalienable statutory guarantees or warranties in relation to quality and fitness for purpose of goods and services, and unfair terms regulation, introduced to protect consumers from the imposition of unfair terms.⁸⁷ Howells and Weatherill note that regulatory interventions like these, “largely reflect the notion that it is not the contracting *per se* which stimulates a need for legal control, but rather the presence of an imbalance between the parties which causes prejudice”.⁸⁸ These regulatory interventions work toward redressing the inequality of bargaining

⁸² Sale of Goods Act 1893 (UK).

⁸³ See for example: Sale of Goods Act 1908 (NZ), Sale of Goods Act 1896 (Queensland, AU), Sale of Goods Act 1895 (South Australia, AU), Sale of Goods Act 1895 (Western Australia, AU) and Sale of Goods Act 1923 (NSW, AU).

⁸⁴ C Hawes (ed) *Butterworths Introduction to Commercial Law* (4th ed, LexisNexis, Wellington 2014) at para 10.4.

⁸⁵ The implied conditions imposed by Sale of Goods Acts have now largely been replaced by guarantees or warranties in sales of goods to consumers – see for example: Sale of Goods Act 1908 (NZ), s. 56A.

⁸⁶ See: Sale of Goods Act 1908 (NZ), s. 56.

⁸⁷ G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 31.

⁸⁸ G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 31.

power between consumers and traders and provide avenues for redress beyond breach of contract claims.

2.4 CONSUMER POLICY - WHY DO CONSUMERS NEED PROTECTION?

The authors of *European Consumer Law* note that the consumer is a “passive market participant” who appears in the market without any profit making intentions.⁸⁹ This observation goes some way toward explaining why consumers need protection. Jacob Ziegel, an early advocate for consumer law, noted that every consumer problem exhibits one or more of the following characteristics:⁹⁰

- (i) A disparity of bargaining power between the supplier and the consumer;
- (ii) A disparity of knowledge concerning the characteristics and technical components of the goods or services being supplied; and
- (iii) A disparity of resources which may reflect in the consumer’s difficulty in obtaining redress.

These characteristics of the consumer’s position in the market illustrate that the consumer operates from a position of disadvantage and justify the development of consumer protection law. The characteristics identified by Ziegel in the early 1970s⁹¹ have developed into the following rationales for regulation to protect consumers:

- the unequal bargaining power which exists between trader and consumer;⁹²
- the asymmetry of information between traders and consumers;⁹³

⁸⁹ N Reich, H Micklitz, P Rott and K Tonner *European Consumer Law* (2nd ed, Intersentia Publishing Ltd, Cambridge, UK 2014) at 6.

⁹⁰ J S Ziegel “The Future of Canadian Consumer Law” [1973] 51 *The Canadian Bar Review* 191 at 193.

⁹¹ J S Ziegel “The Future of Canadian Consumer Law” [1973] 51 *The Canadian Bar Review* 191 at 193

⁹² J S Ziegel “The Future of Canadian Consumer Law” [1973] 51 *The Canadian Bar Review* 191 at 191; I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at Chapter 2; and G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 6.

⁹³ M J Trebilcock “Rethinking Consumer Protection Policy” in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) at p 69.

- the limited ability of an imperfect market to provide effective competition;⁹⁴
- behavioural economics research which shows that consumers will not always act rationally and in their own best interests even when fully informed and operating on a level playing field; and⁹⁵
- the consumer's access to redress is limited and is often uneconomic in comparison with the cost of the failed product.⁹⁶

Each of these is discussed below and it is suggested that all five rationales are aspects of the nature of the imbalanced power relationship between traders and consumers. Knowledge of or access to information, ready access to resources, the ability to take advantage of markets which are not fully competitive and the ability to benefit from consumer irrationality all increase the power position of the trader in relation to the consumer. Ramsay acknowledges that inequality in bargaining power is a primary rationale for consumer law and notes that policy for developing consumer law which seeks to level the power imbalance is also supported by: the failure of the market to operate perfectly; information failures; and behavioural economics theory which challenges the idea that consumers always act with complete rationality, free willpower and self-interest.⁹⁷ The rationales for consumer law overlap and are interconnected in a way that recognises the weaker position of the consumer in relation to the trader. A critical factor in developing consumer law policy is to identify exactly who may be classed as a “consumer”. This issue is dealt with fully in chapter 3.

See also: G K Hadfield, R Howse and M J Trebilcock “Information Based Principles for Rethinking Consumer Protection Policy” (1998) 21 *Journal of Consumer Policy* 131; M J Trebilcock “Consumer Protection in the Affluent Society” (1970) 16 *McGill Law Journal* 263; M J Trebilcock “The Consumer Interest and the Regulatory Process” in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980); and G Howells “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 *Journal of Law and Society* 349.

⁹⁴ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 42-43.

⁹⁵ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at Chapter 2.

⁹⁶ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 43.

⁹⁷ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at Chapter 2.

2.4.1 Inequality of Bargaining Power

Inequality in bargaining power is often advanced as the primary rationale for consumer law.⁹⁸ Ziegel commented in 1973 that: “[T]he notion of the consumer bargaining from a position of equal strength has become a fiction in any but the most attenuated sense.”⁹⁹ Howell and Weatherill challenge the ability of market forces to protect consumer interests:¹⁰⁰

It seems that inequality of economic power between consumer and supplier is the key to scepticism about the modern unregulated market as an adequate defender of the consumer interest. ... The shaping of consumer policy depends on pinning down the specific consequences of that inequality which are susceptible to legal control.

Goods and the terms on which they are offered to consumers are generally available on a take it or leave it basis. The consumer has no opportunity to negotiate and is often subject to standard form contract terms and conditions which are not read or understood. Consumers are susceptible to sophisticated marketing techniques and can be persuaded to purchase goods they do not need or want.¹⁰¹ The consumer’s limited access to and understanding of information about goods, especially complex goods, places them in a weak position in relation to the supplier. When there is an absence of competition in a market, due to the dominance of one supplier or the consumer’s inability to exercise free choice, consumers have no power to protect their interests.¹⁰² In 2000, Harvey and Parry in *The Law of Consumer Protection and Fair Trading* noted that:¹⁰³

⁹⁸ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 41.

⁹⁹ J S Ziegel “The Future of Canadian Consumer Law” [1973] 51 *The Canadian Bar Review* 191 at 191.

¹⁰⁰ G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 6.

¹⁰¹ S G Coronas *The Australian Consumer Law* (2nd ed, Thomson Reuters, 2013) at p 41.

¹⁰² G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 2-3.

¹⁰³ B W Harvey and D L Parry *The Law of Consumer Protection and Fair Trading* (6th ed, Butterworths, London, 2000) at 23.

anti-inequality of bargaining power objectives are of increasing importance and may take the form of anti-monopoly legislation, encouragement of competition, control of excessive or misleading advertising, full disclosure requirements, powers to re-open extortionate bargains, better access to the legal system for the unrepresented consumer, and consumer education programmes.

Harvey and Parry's comments illustrate that the rationale of balancing bargaining power supports a wide range of consumer law measures including the development of competition law. Inequality in the power relationship between the consumer and the trader is also evident in the common disparity in access to the resources needed to enforce rights or obtain redress.

The broader objective of empowering the consumer is connected to the rationale of balancing bargaining power.¹⁰⁴ Any regulation which increases the bargaining power of the consumer has the effect of empowering the consumer. Empowerment of the consumer concerns not just "bargaining" but also the power to obtain redress. The consumer's power to obtain redress is reduced by factors such as limited access to resources and lack of access to cost effective and efficient enforcement methods, especially in relation to low value one-off purchases.

2.4.2 Information Failure – Information Asymmetry

Trebilcock focuses on the asymmetry of information as a rationale for consumer law and notes that it justifies the development of consumer law rules which protect the consumer when information is inadequate.¹⁰⁵ As Trebilcock observes, "at almost every

¹⁰⁴ I Ramsay "Consumer law and the Search for Empowerment" [1991] 19 Canadian Business Law Journal 397 and L Griggs "Intervention or Empowerment – Choosing the Consumer Law Weapon" (2007) 15 CCLJ 111.

¹⁰⁵ M J Trebilcock "Rethinking Consumer Protection Policy" in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) at p 69. See also: G K Hadfield, R Howse and M J Trebilcock "Information Based Principles for Rethinking Consumer Protection Policy" (1998) 21 Journal of Consumer Policy 131; M J Trebilcock "Consumer Protection in the Affluent Society" (1970) 16 McGill Law Journal 263; and M J Trebilcock "The Consumer Interest and the Regulatory Process" in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980).

point in the bargaining process in the typical consumer transaction, it is impossible to devise ways of conveying to a consumer relevant information in a meaningful form”.¹⁰⁶ Howells notes that it is central to consumer policy that consumers be given the information to make informed choices.¹⁰⁷ He points out that information asymmetry justifies regulation which prohibits false or misleading information and imposes positive information requirements.¹⁰⁸ It is widely accepted that “information failures” are an important rationale for government regulation to protect consumers.¹⁰⁹ Harvey and Parry acknowledge that consumer protection legalisation which gives inalienable guarantees of fitness for purpose, quality and safety are necessary because the consumer, “cannot in reality be in possession of the requisite technical knowledge to assess the wide variety of goods in common domestic use, nor is there in reality any pre-buying opportunity to subject goods to scientific analysis”.¹¹⁰ Asymmetry of information is also indicative of the imbalanced power relationship between the trader and the consumer — knowledge or awareness of information is power.¹¹¹

2.4.3 The Imperfect Market - Market Failure

Neo classical market theory argues that competition in a free market, which is realised by consumer choice, balances business power.¹¹² Until the middle of the 20th century,

¹⁰⁶ M J Trebilcock “Consumer Protection in the Affluent Society” (1970) 16 McGill Law Journal 263 at 295.

¹⁰⁷ G Howells “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 Journal of Law and Society 349 at 352.

¹⁰⁸ G Howells “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 Journal of Law and Society 349 at 352.

¹⁰⁹ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 43.

¹¹⁰ B W Harvey and D L Parry *The Law of Consumer Protection and Fair Trading* (6th ed, Butterworths, London, 2000) at 22.

¹¹¹ Goldring, Maher, McKeogh and Pearson *Consumer Protection Law* (5th ed, The Federation Press, 1998) at 3.

¹¹² Oren Bar-Gill and R Epstein “Consumer Contracts: Behavioural Economics vs. Neoclassical Economics” NYU Law and Economics Research Paper No. 07-17 April 2007 (2008) 92 Minnesota Law Review 749 available at: SSRN: <http://ssrn.com/abstract=982527>; G Howell and S Weatherill *Consumer Protection Law* (2nd ed Ashgate, United Kingdom, 2005) at Chapter 1; K Tokeley (ed) *Consumer Law in New Zealand* (2nd ed LexisNexis, Wellington, New Zealand, 2014) at Chapter 1; M J Trebilcock “Taking

the laissez-faire principles of economics dominated. The argument is that ultimately, the law of supply and demand as well as competition between traders allow the market to operate in a way which benefits consumers who are free to choose what to purchase and with whom to deal. The laissez-faire economic argument is flawed as it assumes that the market operates in a perfectly competitive manner and that consumers always act with free choice. The limited ability of an imperfect market to provide effective competition has long been recognised.¹¹³ Ramsay notes that the central economic rationale for government intervention to protect consumers is that of ‘market failure’.¹¹⁴ A potential market failure occurs when there is a failure of one of the conditions for the optimal operation of a competitive market.¹¹⁵ Ramsay points to a number of “potential market failures” in consumer markets:¹¹⁶

Stock: Consumerism in the 1990’s” [1991] 19 *Canadian Business Law Journal* 412; and M J Trebilcock “The Consumer Interest and the Regulatory Process” in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980) at 256.

¹¹³ J S Ziegel “The Future of Canadian Consumer Law” [1973] 51 *The Canadian Bar Review* 191 at 193; I Ramsay “Framework for Regulation of the Consumer Marketplace” (1985) *Journal of Consumer Policy* 353; I Ramsay “Consumer Law and the Search for Empowerment” [1991] 19 *Canadian Business Law Journal* 397; I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 42-43; K Tokeley (ed) *Consumer Law in New Zealand* (2nd ed LexisNexis, Wellington, New Zealand, 2014) at 19-21; G Howell and S Weatherill *Consumer Protection Law* (2nd ed Ashgate, United Kingdom, 2005) at 2-8; M J Trebilcock “Taking Stock: Consumerism in the 1990’s” [1991] 19 *Canadian Business Law Journal* 412; M J Trebilcock “Consumer Protection in the Affluent Society” (1970) 16 *McGill Law Journal* 263; and M J Trebilcock “The Consumer Interest and the Regulatory Process” in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980) at 256.

¹¹⁴ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 42-43.

¹¹⁵ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 42-43. The conditions for the optimal operation of a competitive market are identified as:

- (i) There are numerous buyers and sellers in the market, such that the activities of any one economic actor will have only minimal impact on the output or price in the market;
- (ii) There is free entry into and exit from the market;
- (iii) The commodity sold in the market is homogeneous; that is, essentially the same product is sold by each seller in the particular market;
- (iv) All economic actors in the market have perfect information about the nature and value of the commodities traded;
- (v) All the costs of producing a commodity are borne by the producer and all the benefits of a commodity accrue to the consumer – that is, there are no externalities.

¹¹⁶ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed,

- (i) There may be a lack of competition (monopoly, oligopoly);
- (ii) There may be barriers to entry;
- (iii) There may be problems with product differentiation where there are qualitative differences within a product market (and thus a lack of homogeneity);
- (iv) There may be information gaps between buyer and seller, or certain market signals, e.g. seller reputation may be imperfect;
- (v) There may be third party effects which are not costed in the market price. This is the classic problem of externalities; two examples are pollution and the effect of one consumer's use of the automobile on other road users and the environment.

Trebilcock has long supported the idea that the market alone cannot protect the interests of consumers, “[t]he mechanism of the market does not seem capable of adaption so as to produce consumer transactions which are completely ‘bi-laterally voluntary and informed.’”¹¹⁷ Consumers are not in position to freely choose the best product on offer at a suitable price if they are not able to access or understand fully the information about the product so that it can be sensibly compared with others.¹¹⁸ Consumers may be subjected to sophisticated marketing techniques, may be operating in a market with few or no other suppliers of a particular product, or all suppliers may be offering a particular product on the same terms. If the consumer is not able to exercise free choice and market failure is evident, the theory that competition remedies all ills cannot operate effectively without regulatory help.

2.4.4 Difficulties in Obtaining Consumer Redress

The consumer's ability to obtain effective redress is hindered by a lack of access to cost effective and efficient enforcement methods especially in relation to low value one-off

Hart Publishing Ltd, United Kingdom, 2012) at 42-43.

¹¹⁷ M J Trebilcock “Consumer Protection in the Affluent Society” (1970) 16 McGill Law Journal 263 at 295.

¹¹⁸ G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England, 2005) at 2 and G Howells “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 Journal of Law and Society 349.

purchases. Ramsay points out that the system of individual private law litigation as a means of enforcement of consumer claims is inadequate where the harm to one is small and cost of enforcing individual claims outweighs the expected recovery.¹¹⁹ It often does not make sense economically, in terms of expenditure of time and money, for consumers to take action to enforce their rights. Consumers may also have reduced access to the resources needed to pursue a claim compared with traders. Howells and Weatherill note that, "... it is a practical truth that literally the last thing that a typical disgruntled consumer will do is to take action against a trader. Court proceedings take time and cost money, even if they are ultimately successful".¹²⁰ These factors support the development of consumer policy which aims to improve the consumer's access to justice. Quick, easy and inexpensive access to small claims courts or tribunals with the support of government funded regulatory bodies is required. Consumers in New Zealand do have access to the Disputes Tribunal¹²¹ and other industry specific tribunals,¹²² but they are generally required to spend time attending tribunal hearings, incur claim fees,¹²³ and are not entitled to regulatory body assistance.¹²⁴ More needs to be done to increase consumers' access to justice. The development of online dispute resolution services will help. The benefits of online dispute resolution as a means of redress, particularly for consumers who shop online, are discussed in chapter 7.

2.5 BEHAVIOURAL ECONOMICS AND PATERNALISM

Behavioural economics research, which recognises that even well informed consumers

¹¹⁹ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 43.

¹²⁰ G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 47.

¹²¹ The Disputes Tribunal has a maximum jurisdiction level of \$15,000 or up to \$20,000 if the parties agree to extend the Tribunal's jurisdiction – Disputes Tribunal Act 1988, s 10 and s 13 and see: <<http://www.justice.govt.nz/tribunals/disputes-tribunal/>>.

¹²² For example, the Motor Vehicle Disputes Tribunal, see: <www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal/>.

¹²³ The claim fees start at \$45 - for claims under \$2000. See: Disputes Tribunal Rules 1989, Rule 5.

¹²⁴ See further: Chapter 7 below.

will make irrational choices, supports the development of paternalistic rules designed to protect consumers from their own irrational behaviour.¹²⁵ The findings of behavioural economics research show that consumers often make bad decisions because they suffer from irrational thinking, information processing limits, over optimism and poor self-control.¹²⁶ Oren Bar-Gill notes that individuals “suffer from imperfect information and imperfect rationality and consequently might fail to make choices which maximise their preferences” and concludes that “in certain markets, consumer mistakes and sellers’ strategic responses to these mistakes are responsible for a substantial welfare loss, potentially justifying legal intervention”.¹²⁷

Behavioural economics can be used to justify ‘paternalistic’ regulation such as disclosure requirements, the imposition of “cooling off” periods and restrictions on the sale of harmful products.¹²⁸ The paternalistic approach may be “soft” in that it

¹²⁵ K Tokeley “Protecting Consumers from Themselves: A guide for policy makers” (2016) 24 CCLJ 1; T Irwin *Implications of Behavioural Economics for Regulatory Reform in New Zealand* (Sapere Research Group and New Zealand Law Foundation, December 2010) available at: <www.srgexpert.com/wp-content/uploads/2015/08/Implications-of-behavioural-economics-for-regulation_Final-2.pdf>; K Tokeley (ed) *Consumer Law in New Zealand* (2nd ed LexisNexis, Wellington New Zealand, 2014) at Chapter 1; S G Corones *The Australian Consumer Law* (2nd ed, Thomson Reuters, 2013) at pp 39-41; L Griggs “The [ir]rational consumer and why we need national legislation governing unfair contract terms” (2005) 13(1) CCLJ 116; Richard Epstein “Behavioural Economics: Human Errors and Market Correction” (2006) 73 U Chi L Rev 111; and Oren Bar-Gill and R Epstein “Consumer Contracts: Behavioural Economics vs. Neoclassical Economics” NYU Law and Economics Research Paper No. 07-17; Minnesota Law Review Vol. 92, 2007-2008 available at: <<http://ssrn.com/abstract=982527>>.

¹²⁶ OECD *Roundtable on Demand-side Economics for Consumer Policy, Summary Report* (20 April 2006, OECD) at 13 available at: <http://www.oecd-ilibrary.org/science-and-technology/report-on-a-roundtable-on-demand-side-economics-for-consumer-policy_231473533741>; C R Sunstein *Behavioural Law and Economics* (Cambridge University Press, 2000); R B Korobkin and T S Ulen “Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics” (2000) 88 Cal L Rev 1051; C Jolls, C R Sunstein and R Thaler “A Behavioral Approach to Law and Economics” (1998) 50 Stan L Rev 1471; MA Eisenberg “The Limits of Cognition and the Limits of Contract” (1995) 47 Stan L Rev 211; S P Heap “What is Behavioural Economics?” (2103) 27 Cambridge Journal of Economics 985; and T Irwin *Implications of Behavioural Economics for Regulatory Reform in New Zealand* (Sapere Research Group and New Zealand Law Foundation, December 2010) available at: <www.srgexpert.com/wp-content/uploads/2015/08/Implications-of-behavioural-economics-for-regulation_Final-2.pdf> .

¹²⁷ Oren Bar-Gill and R Epstein “Consumer Contracts: Behavioural Economics vs. Neoclassical Economics” NYU Law and Economics Research Paper No. 07-17 April 2007 at 1; (2008) 92 Minnesota Law Review 749 at 749 available at: <SSRN: <http://ssrn.com/abstract=982527>>.

¹²⁸ For example, in New Zealand, a consumer who enters into a consumer credit contract is entitled to disclosure of specific information and has a right to cancel the credit contract during a “cooling off” period which expires 5 working days after disclosure is made – see: Credit Contracts and Consumer

encourages a certain consumer response by imposing obstacles in the path to poor decisions, for example, increasing the tax payable on certain products like tobacco.¹²⁹ Alternately, the paternalistic approach may be “hard” in that it attempts to coerce consumers into changing their behaviour, for example, banning the sale of certain recreational drugs.¹³⁰

Howells acknowledges the importance of behavioural economics research in developing consumer policy, particularly in relation to information rules.¹³¹ He also points to the trader’s ability to use marketing techniques to take advantage of the consumer’s rationality failings.¹³² Ramsay notes that paternalistic interventions are often based on a distrust of a consumer’s ability to evaluate information or on a fear that individuals, even with accurate information, will act irrationally.¹³³ Behavioural economics research, which looks at how consumers act in practice when faced with purchasing choices, is now an accepted consideration when developing consumer law policy and supports some level of paternalism in making consumer law.¹³⁴

Finance Act 2003; the Product Safety Standards (Children’s Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2016 ban the sale of some flammable garments; and the Psychoactive Substances Act 2013 bans the sale of certain recreational drugs without a licence (Psychoactive Substances Act 2013, s. 27).

¹²⁹ K Tokeley “Protecting Consumers from Themselves: A guide for policy makers” (2016) 24 CCLJ 1 at 2.

¹³⁰ K Tokeley “Protecting Consumers from Themselves: A guide for policy makers” (2016) 24 CCLJ 1 at 2.

¹³¹ G Howells “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 Journal of Law and Society 349 at 358.

¹³² G Howells “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 Journal of Law and Society 349 at 361. See also: S G Coronos *The Australian Consumer Law* (2nd ed, Thomson Reuters, 2013) at pp 39-41.

¹³³ I Ramsay “Framework for Regulation of the Consumer Marketplace” (1985) 8 Journal of Consumer Policy 353 at 368.

¹³⁴ I Ramsay “Framework for Regulation of the Consumer Marketplace” (1985) 8 Journal of Consumer Policy 353 at 368, I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 56 – 67 and 81, K Tokeley “Protecting Consumers from Themselves: A guide for policy makers” (2016) 24 CCLJ 1 at 2 and G Howells “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 Journal of Law and Society 349 at 358.

2.6 COST-BENEFIT ANALYSIS

Before any consumer protection regulation is introduced, it needs to undergo a cost-benefit analysis. There is no point introducing protections for consumers if the result of the regulation is to increase costs for consumers without sufficient benefit. There is always a risk that industry compliance costs will be passed on to consumers by way of price increases or reduced consumer choice. Factors such as compliance costs, price increases and reduced consumer choice need to be balanced against the benefits to the interests of consumers and society in general, including competitors in the market. Trebilcock and Ramsay both emphasise the importance of weighing costs against benefits before proceeding with any consumer protection regulation.¹³⁵ In New Zealand, any policy proposal which requires regulation must be supported by a Regulatory Impact Statement which includes a cost-benefit analysis.¹³⁶ Tokeley notes:¹³⁷

Policy makers need to balance the benefits of regulation against the costs. However, while a cost/benefit analysis can be a significant aid to policy-making, there can be difficulties in its application. The analysis inevitably involves subjective judgements about the weight to be given to various costs and benefits. There is always a danger that the measurable costs affecting the industry will be given more weight than the

¹³⁵ M J Trebilcock “Rethinking Consumer Protection Policy” in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) at p 70; I Ramsay “Framework for Regulation of the Consumer Marketplace” (1985) *Journal of Consumer Policy* 353 at 357; and I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at 44.

¹³⁶ Treasury *Regulatory Impact Analysis Handbook* (Treasury Publication, August 2013) available at: <<http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook/>>. Para 6.1 of the *Regulatory Impact Analysis Handbook* requires the full range of positive and negative regulatory impacts, including both costs and benefits, to be identified in the Regulatory Impact Statement. For an example of a regulatory impact statement which supported the consumer law reform introduced in New Zealand in 2013 see: Ministry of Consumer Affairs *Regulatory Impact Statement Consumer law Reform: December 2010* available at: <<http://www.treasury.govt.nz/publications/informationreleases/pdfs/-mca-clrd-mar11.pdf>>.

¹³⁷ K Tokeley (ed) *Consumer Law in New Zealand*, (2nd ed LexisNexis, Wellington, New Zealand, 2014) at 31. See also: B W Harvey and D L Parry *The Law of Consumer Protection and Fair Trading* (6th ed, Butterworths, London 2000) at 23; S G Corones *The Australian Consumer Law* (2nd ed, Thomson Reuters, 2013) at 29 and G Howells and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England 2005) at 39.

intangible benefits the law may bring to the large and disparate consumer body ... Despite these difficulties, a cost/benefit analysis of regulation has the advantage of forcing policy-makers to consider all the potential ramifications of any decision to intervene.

The OECD has produced a useful toolkit which includes guidance on how to measure costs and benefits.¹³⁸ This toolkit can be used by OECD members in making this important analysis.

2.7 CONSUMERS' NEED FOR PROTECTION – ONLINE SHOPPING

Consumer protection law has become increasingly important as the means of manufacturing and supplying goods and services to consumers has changed over time.¹³⁹ Consumers, as users at the end of a production chain, are distanced from producers and generally deal with retailers who in turn may source product from wholesalers rather than manufacturers or producers. Mass production and technological advances mean consumers are exposed to ever more complex products which are available for acquisition through a widening variety of purchasing methods including a simple click on a screen for consumers who shop online. More sophisticated marketing techniques using the internet and information about particular consumers' wants and needs collected through big data processes, add pressure to consumers' buying decisions. There is a need to continue to examine and evaluate the position of the consumer as the methods of production and the means of conducting commerce change.

¹³⁸ The OECD Consumer Policy Toolkit OECD Publishing 2010) available at: <http://www.oecd.org/sti/consumer/consumer-policy-toolkit-9789264079663-en.htm>>. See also: Executive Summary at www.oecd.org/sti/consumer/45098058.pdf> and Consumer Policy in Australia: A companion to the OECD consumer policy toolkit (Australian Government 2011) available at: www.consumerlaw.gov.au/files/2015/09/Companion_to_OECD_Toolkit.pdf>.

¹³⁹ See: J S Ziegel "The Future of Canadian Consumer Law" [1973] 51 The Canadian Bar Review 191 at 191 (which notes the change from a predominantly agrarian society to an urbanised society in which the consumer is distanced from the producer); K Tokeley "Unprotected Consumers Under the Consumer Guarantees Act 1993" (1997) 3 NZBLQ 254 at 257; and Goldring, Maher, McKeough and Pearson *Consumer Protection Law* (5th ed, The Federation Press, Sydney, 1998) at 1.

The rationales discussed above: disparities in bargaining power, access to information and access to resources; the operation of an imperfect market which is not fully competitive; and obstacles to accessing redress,¹⁴⁰ apply equally to consumers who shop online. Consumers who shop online are also prone to making the same irrational choices as in store consumers.¹⁴¹ These rationales all generally support the development of consumer protection regulation which is specific to consumers who shop online. However, the differences between online consumers and consumers who shop in traditional stores,¹⁴² which are outlined in the introductory chapter, show that online consumers place a higher level of trust in traders when compared with traditional in store shoppers.¹⁴³ This level of trust and the differences between online shopping transactions and traditional in store transactions need to be acknowledged in developing policy supporting legal intervention to protect online consumers.

The OECD guidelines, *Consumer Protection in E-commerce* (revised in 2016)¹⁴⁴ and the *United Nations Guidelines for Consumer Protection*¹⁴⁵ both promote consumer

¹⁴⁰ Chapter 2 paras 5-6.

¹⁴¹ See further: Chapter 2 para 6.

¹⁴² In summary, the common characteristics of online shopping transactions which differ from in store transactions are: the absence of direct real time communication between the consumer and trader; the inability to inspect goods before purchase; the requirement to pay before delivery; the possibility that payment is made before a binding contract exists; the ease of imposition of terms and conditions; and the obstacles to obtaining redress due to the absence of face to face contact – see further: Chapter 1 para 4.

¹⁴³ C Prins and L van der Wees “E-Commerce and Trust: A Variety in Challenges” in J Prins and others (eds) *Trust in Law and Electronic Commerce - The Role of Trust from a Legal, an Organisational and a Technical Point of View* (Kluwer Law International, The Hague, 2002) at 4: “Without sufficient trust between the business partners, adequate governance of the flow of materials and services will be severely hampered. This may especially apply to electronic markets and electronic commerce in general, where the only contact between the buyers and sellers may be the contact through databases and the telecommunication network”; and F N Egger “Consumer Trust in E-commerce: From Psychology to Interaction Design” in J Prins and others (eds) *Trust in Law and Electronic Commerce - The Role of Trust from a Legal, an Organisational and a Technical Point of View* (Kluwer Law International, The Hague, 2002) at 11. See also: P Cortes “Online Dispute Resolution for Consumers” in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, The Netherlands, 2012).

¹⁴⁴ OECD, *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016) at p 10 available at: <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>>.

¹⁴⁵ UNCTAD *United Nations Guidelines for Consumer Protection* (United Nations, New York and Geneva 2016) at para 5(j) available at: <<http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>>.

protection in e-commerce that is not less than consumer protection in other forms of commerce. To provide consumer protection in e-commerce that is “not less than” consumer protection in other forms of commerce, the OECD guidelines contain principles which apply only to e-commerce transactions involving consumers. For example, the guidelines encourage member countries to adopt regulation which ensures: complete information disclosure,¹⁴⁶ trader identification,¹⁴⁷ and consumer access to ADR mechanisms including online dispute resolution systems.¹⁴⁸ These guidelines require development of policy and possibly regulation which is not technology neutral and applies specifically to consumers who transact online. New Zealand needs to update the current *New Zealand Model Code for Consumer Protection in Electronic Commerce* adopted in October 2000¹⁴⁹ to take account of the revised OECD guidelines and look towards passing specific consumer protection regulation for online consumers as recommended by the guidelines. The high level of trust shown by consumers, who shop online, due to the different characteristics of online shopping transactions,¹⁵⁰ justifies the development, in some circumstances, of greater protection for online consumers. The concluding paragraphs of chapters 3 – 7 make specific recommendations for increased consumer protection in online shopping.

¹⁴⁶ Principles 25 – 35 OECD *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016).

¹⁴⁷ Principles 28 – 30 OECD *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016).

¹⁴⁸ Principle 55 OECD *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016).

¹⁴⁹ Ministry of Consumer Affairs “New Zealand Model Code for Consumer Protection in Electronic Commerce” October 2000 (not currently available on new Consumer Protection website).

¹⁵⁰ The differences between online shopping transactions and in store transaction are discussed at para 4, page 9 above.

Chapter Three

The Definition of “Consumer” - Will the Real “Consumer” Please Stand Up*

3.1 INTRODUCTION

The word “consumer” defies precise definition but its meaning has a major impact on the extent of consumer protection law. Howells and Weatherill note that: “Defining the consumer is an endemic problem when shaping the law.”¹⁵¹ On 15 March 1962, President John F. Kennedy delivered an address to the US Congress in which he outlined his vision of consumer rights. He gave an expansive definition of the concept of the consumer in stating: “Consumers by definition, include us all, they are the largest economic group, affecting and affected by almost every public and private economic decision.”¹⁵² Notwithstanding Kennedy’s expansive definition, most consumer protection legislation around the world refers to a more limited group when defining “consumer” in relation to the supply of goods and services. The word is generally defined with reference to four different transaction characteristics: (1) the identity of the party acquiring goods or services; (2) the purpose for which goods or services are acquired; (3) the type of goods or services acquired; or (4) the value of the transaction. Some definitions focus on one or two of these characteristics while others refer to all four characteristics by including exceptions and exclusions within the definition.

* The text of this chapter was published in 2016: Trish O’Sullivan “The definition of 'consumer' - will the real 'consumer' please stand up” (2016) 24 CCLJ 23.

¹⁵¹ G Howell and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, United Kingdom, 2005) at 5. See also: David H. Vernon who speaks of choosing between a number of “imperfect options” when defining “consumer” in D H Vernon *An Outline for Post-Sale Consumer Legislation in New Zealand* (Report to the Minister of Justice, December 1987, Iowa ISBN 0-477-07230-5) at 13.

¹⁵² Available at: <<http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx>> (accessed 13 September 2016).

A variety of inconsistent statutory definitions of “consumer” apply across New Zealand and Australia. Many of these definitions contain complicated exclusions and exceptions. Inconsistency and complexity in definition is not ideal for “self-help” consumer protection statutes such as the Consumer Guarantees Act 1993 (“the CGA”) in New Zealand and the Australian Consumer Law (“the ACL”),¹⁵³ which consumers themselves should be able to use¹⁵⁴ when seeking redress in relation to supplies of goods and services, without reference to lawyers.

To critique various consumer definitions, the rationale behind the policy of consumer protection law must be considered to aid in determining what groups in society warrant legislative protection. Who needs protecting and why? Particular consideration is given to the issue of whether small businesses should be included within the definition. This chapter reviews and compares the variety of “consumer” definitions contained in legislation in New Zealand, Australia, the European Union, the United Kingdom and the United States. Before reviewing these definitions, the rationale behind the development of consumer law is discussed. Two options for reform are considered with a view to promoting a simplified and consistent approach which aids those in need of protection.

3.2 THE RATIONALE FOR CONSUMER LAW

The primary rationale behind the development of consumer law is based on a desire to balance the inequality in bargaining power between business and consumers.¹⁵⁵ In 1973, Jacob Ziegel stated that: “The notion of the consumer bargaining from a position of

¹⁵³ The Australian Consumer Law is set out in Schedule 2 of the Competition and Consumer Act 2010.

¹⁵⁴ In New Zealand the only person who has standing to enforce the Consumer Guarantees Act 1993 is the consumer – the Act may not be enforced by the Commerce Commission – unless there is a breach of section 43(4) of the Act which amounts to a breach of section 13(i) of the Fair Trading Act 1986. The Commerce Commission has authority to enforce the Fair Trading Act 1986.

¹⁵⁵ I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at ch 1 and ch 2; I Ramsay “Consumer Law, Regulatory Capitalism and the New Learning in Regulation” [2006] 28 Sydney Law Review 9; G Howell and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, United Kingdom, 2005) at ch 1; J Ziegel “The Future of Canadian Consumerism” (1973) 51 Can Bar Rev at 191; and K Tokeley (ed) *Consumer Law in New Zealand* (2nd ed LexisNexis, Wellington, New Zealand, 2014) at ch 1.

strength has become a fiction in any but the most attenuated sense.”¹⁵⁶ Ziegel pointed to the disparities in bargaining power, access to information, resources and redress in common consumer transactions.¹⁵⁷ These power, information, and resource imbalances are reflected in: the consumer’s inability to negotiate effectively due to being in the weaker position in the relationship with business; the consumer’s limited knowledge of, access to or understanding of critical information about products which reduces the ability to make informed choices;¹⁵⁸ the consumer’s generally more limited access to capital and the consumer’s inherent inability to resist pressure to acquire products which are promoted through ever more sophisticated marketing techniques. Consumer law aims to balance this inequality in bargaining power by prohibiting certain trade practices,¹⁵⁹ regulating unfair terms,¹⁶⁰ imposing obligations or guarantees in the supply of goods and services,¹⁶¹ requiring disclosure of certain information in particular supplies,¹⁶² providing rights and remedies for consumers,¹⁶³ and imposing penalties for breach.¹⁶⁴

Other rationales for consumer law include the objectives of empowering the consumer,¹⁶⁵ promoting competition in markets,¹⁶⁶ and levelling the information

¹⁵⁶ J S Ziegel “The Future of Canadian Consumerism” 51 Canadian Bar Review [1973] 191 at 191.

¹⁵⁷ J S Ziegel “The Future of Canadian Consumerism” 51 Canadian Bar Review [1973] 191 at 193.

¹⁵⁸ G Howell and S Weatherill (*Consumer Protection Law*, 2nd ed Ashgate, United Kingdom, 2005) at 2.

¹⁵⁹ Part 1 Fair Trading Act 1986 (NZ) and Part 2 and Part 3.1 of the Australian Consumer Law set out in Schedule 2 of the Competition and Consumer Law Act 2010 (Cth).

¹⁶⁰ Fair Trading Act 1986 (NZ), s 26A and ss 46H-46M and The Australian Consumer Law, ss 23 - 25 set out in Schedule 2 of the Competition and Consumer Law Act 2010 (Cth).

¹⁶¹ Consumer Guarantees Act 1993 (NZ), ss 5 – 13 – goods guarantees, Consumer Guarantees Act 1993 (NZ), ss 28 – 31 – service guarantees and the Australian Consumer Law, ss 51 – 63 set out in Schedule 2 of the Competition and Consumer Law Act 2010 (Cth).

¹⁶² For example, the requirement to disclose “trader” status when selling goods or service online - s 28B Fair Trading Act 1986 (NZ) and to comply with consumer information standards in relation to particular products or services made by regulations passed under s 27 Fair Trading Act 1986 (NZ) or made under s 134 the Australian Consumer Law set out in Schedule 2 of the Competition and Consumer Law Act 2010 (Cth).

¹⁶³ See generally: Consumer Guarantees Act 1993 (NZ), Fair Trading Act 1986 (NZ) and the Australian Consumer Law set out in Schedule 2 of the Competition and Consumer Law Act (Cth).

¹⁶⁴ See: offence provisions Fair Trading Act 1986 (NZ), ss 40 – 40H and Part 4 of the Australian Consumer Law set out in Schedule 2 of the Competition and Consumer Law Act 2010 (Cth).

¹⁶⁵ I Ramsay “Consumer law and the Search for Empowerment” [1991] 19 Canadian Business Law

asymmetry which exists between business and consumers. Trebilcock argues that an information-based approach to consumer protection policy is the appropriate framework for analysing consumer protection problems.¹⁶⁷ An information based approach focuses on the structure of the transactions (both in content and process) between consumers and traders and aims to match consumers' expectations with what they ultimately receive.¹⁶⁸ Trebilcock notes that competition policy focuses on the structure of the market and the options – price, quality and quantity – available to consumers.¹⁶⁹ He points out that information-based problems may still be prevalent in a fully competitive market and states: “The true focus of consumer protection policy, as distinct from competition policy or economic regulation is, in our view, the quality and cost of consumer information.”¹⁷⁰ He goes on to stress the importance of weighing the benefits of consumer protection against the costs of regulation including trader compliance costs which may lead to increased prices for consumers.¹⁷¹ In an earlier work, Trebilcock also acknowledges the importance of a competitive market as an antidote to anti-consumer business practices: “*As a first priority, we should preserve or re-activate vigorously*

Journal 397 and L Griggs “Intervention or Empowerment – Choosing the Consumer Law Weapon” (2007) 15 CCLJ 111.

¹⁶⁶ I Ramsay “Consumer Law, Regulatory Capitalism and the New Learning in Regulation” [2006] 28 Sydney Law Review 9 at 9 and A F Dickey and P J Ward “The Adequacy of Australian Consumer Protection Legislation - Observations and Proposals form Economic Theory” (1979) 14 Western Australian Law Review 133 which notes at 136, “... all other things being equal the most effective way to improve the position of consumers within a free market enterprise is to promote competition”.

¹⁶⁷ M J Trebilcock “Rethinking Consumer Protection Policy” in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) at 69. See also: G K Hadfield, R Howse and M J Trebilcock “Information Based Principles for Rethinking Consumer Protection Policy” (1998) 21 Journal of Consumer Policy 131 and M J Trebilcock “The Consumer Interest and the Regulatory Process” in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980) 256.

¹⁶⁸ G K Hadfield, R Howse and M J Trebilcock “Information Based Principles for Rethinking Consumer Protection Policy” (1998) 21 Journal of Consumer Policy 131 at 150.

¹⁶⁹ G K Hadfield, R Howse and M J Trebilcock “Information Based Principles for Rethinking Consumer Protection Policy” (1998) 21 Journal of Consumer Policy 131.

¹⁷⁰ M J Trebilcock “Rethinking Consumer Protection Policy” in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) 68 at 69.

¹⁷¹ M J Trebilcock “Rethinking Consumer Protection Policy” in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) 68 at 70.

competitive markets whenever possible.”¹⁷² A variety of factors are relevant to the development of consumer policy and each must be given due weight.

More recently, consumer law has taken heed of behavioural economics research, which recognises that even well informed consumers will make irrational choices and has developed paternalistic rules (such as plain packaging of cigarettes) designed to protect consumers from their own irrational behaviour.¹⁷³ Irwin’s report on the implications of behavioural economics for regulatory reform in New Zealand provides a useful description of behavioural economics:¹⁷⁴

A new field of research called ‘behavioural economics’ has emerged, which studies the ways in which people deviate from rationality and simple self-interest and investigates the implications of these deviations for markets and public policy.

The Organisation for Economic Co-operation and Development (OECD) Roundtable report on the impact of demand-sided economics on consumer policy describes “behavioural economics” in these terms:¹⁷⁵

¹⁷² M J Trebilcock “Winners and Losers in the Modern Regulatory System: Must the Consumer always Lose (1975) 13(3) Osgoode Hall LJ 619 at 646.

¹⁷³ K Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington New Zealand, 2014) at Ch 1; S G Corones *The Australian Consumer Law* (2nd ed, Thomson Reuters, 2013) at 39-41; L Griggs “The [ir]rational consumer and why we need national legislation governing unfair contract terms” (2005) 13(1) CCLJ 116; Richard Epstein “Behavioural Economics: Human Errors and Market Correction” (2006) 73 U Chi L Rev 111; and Oren Bar-Gill and R Epstein “Consumer Contracts: Behavioural Economics vs. Neoclassical Economics” NYU Law and Economics Research Paper No. 07-17; (2008) 92 Minnesota Law Review 749 available at: <<http://ssrn.com/abstract=982527>>.

¹⁷⁴ T Irwin *Implications of Behavioural Economics for Regulatory Reform in New Zealand* (Sapere Research Group and New Zealand Law Foundation, December 2010) at 6 available at: <www.srgexpert.com/wp-content/uploads/2015/08/Implications-of-behavioural-economics-for-regulation_Final-2.pdf> (accessed 14 September 2016).

¹⁷⁵ OECD *Roundtable on Demand-side Economics for Consumer Policy: Summary Report* (OECD Digital Economy Papers No 116, 20 April 2006) at 13 available at <http://www.oecd-ilibrary.org/science-and-technology/report-on-a-roundtable-on-demand-side-economics-for-consumer-policy_231473533741> (accessed 14 September 2016). See also: C R Sunstein *Behavioural Law and Economics* (Cambridge University Press, 2000); R B Korobkin and T S Ulen “Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics” (2000) 88 Cal L Rev 1051; C Jolls, C R Sunstein and R Thaler “A Behavioral Approach to Law and Economics” (1998) 50 Stan L

Relying largely on psychological studies, in laboratory simulations and actual markets, behavioural economics delves into the ways in which people make decisions. These patterns of behaviour, or biases, indicate ways in which consumers make decisions that are inconsistent with their welfare.

Oren Bar-Gill notes that individuals “suffer from imperfect information and imperfect rationality and consequently might fail to make choices which maximise their preferences” and concludes that “in certain markets, consumer mistakes and sellers’ strategic responses to these mistakes are responsible for a substantial welfare loss, potentially justifying legal intervention”.¹⁷⁶ Behavioural economics can be used to justify ‘paternalistic’ regulation such as disclosure requirements, the imposition of “cooling off” periods, and restrictions on the sale of harmful products. A paternalistic reaction in terms of consumer policy promotes regulation designed to protect the irrational consumer and control marketing techniques which seek to exploit the consumer’s emotional response.¹⁷⁷

The rationale behind consumer law traditionally competes with neo classical market theory and the concepts of freedom and sanctity of contract. Neo classical market theory argues that competition in the free market, which is realised by consumer choice, balances business power, while the theory of freedom of contract recognises the rights of consumers to negotiate their own terms in any transaction.¹⁷⁸ The failure of

Rev 1471; MA Eisenberg “The Limits of Cognition and the Limits of Contract” (1995) 47 Stan L Rev 211; T Irwin *Implications of Behavioural Economics for Regulatory Reform in New Zealand* (Sapere Research Group and New Zealand Law Foundation, December 2010) available at: <www.srgexpert.com/wp-content/uploads/2015/08/Implications-of-behavioural-economics-for-regulation_Final-2.pdf> (accessed 14 September 2016).

¹⁷⁶ Oren Bar-Gill and R Epstein “Consumer Contracts: Behavioural Economics vs. Neoclassical Economics” NYU Law and Economics Research Paper No. 07-17 April 2007 at 1; (2008) 92 Minnesota Law Review 749 at 749 available at <<http://ssrn.com/abstract=982527>>.

¹⁷⁷ S G Corones *The Australian Consumer Law* (2nd ed, Thomson Reuters, 2013) at 41.

¹⁷⁸ Oren Bar-Gill and R Epstein “Consumer Contracts: Behavioural Economics vs. Neoclassical Economics” NYU Law and Economics Research Paper No. 07-17 April 2007 (2008) 92 Minnesota Law Review 749 available at: <<http://ssrn.com/abstract=982527>>; G Howell and S Weatherill *Consumer Protection Law* (2nd ed Ashgate, United Kingdom, 2005) at Ch 1; K Tokeley (ed) *Consumer Law in New Zealand* (2nd ed LexisNexis, Wellington, New Zealand, 2014) at Ch 1; M J Trebilcock “Taking Stock:

these two theories to effectively balance inequality in the bargaining relationship and protect consumers from unfair conduct or exploitation is reflected in the universal development of consumer law around the world.¹⁷⁹

The changing nature of the modern market needs to be taken into account when developing consumer law. Tokeley notes:

In the modern market place consumers are faced with many problems. No longer is the consumer face to face with the manufacturer. It is more likely that the manufacturer is a distant large corporation. In addition, many modern products are highly complex and technical so it is more difficult for consumers to judge the adequacy of a product before they make their purchase. Consumers often have significantly less knowledge and expertise about a product than the supplier and manufacturer. In the present age, consumers are in a very vulnerable position.¹⁸⁰

The problems of assessing the adequacy of a product and understanding its complexities are compounded for consumers who shop online. A recent PWC global survey of 23,000 shoppers in 25 countries showed that 54% of those surveyed buy products online weekly or monthly.¹⁸¹ The rapid increase in the volume of online shopping transactions globally highlights the importance of having regard to the particular characteristics of consumers who shop online when developing consumer law and policy. When compared to the position of traditional “bricks and mortar” shoppers, online shoppers are in a more vulnerable position with regard to business. Online shoppers are generally unable to examine goods or ask questions of the supplier before purchase and also usually make full payment before delivery. Suppliers are able to impose terms and

Consumerism in the 1990's" [1991] 19 Canadian Business Law Journal 412; and M J Trebilcock "The Consumer Interest and the Regulatory Process" in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980) 256.

¹⁷⁹I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd ed, Hart Publishing Ltd, United Kingdom, 2012) at Ch 1 and Ch 2.

¹⁸⁰K Tokeley "Unprotected Consumers Under the Consumer Guarantees Act 1993" (1997) 3 NZBLQ 254 at 257.

¹⁸¹PWC *Total Retail Survey 2016* available at <<http://www.pwc.com/gx/en/industries/retail-consumer/global-total-retail.html>> (accessed 14 September 2016).

conditions in online shopping transactions with ease and cross border sales are frequent. The online shopper's opportunity to seek redress when things go wrong is hindered by the absence of face to face contact and may be particularly difficult in cross border transactions where jurisdictional issues arise. These factors mean that the online shopper places significant trust in the supplier and this trust needs to be recognised in the development of consumer policy.

In developing consumer law, a critical question is – who is the law being designed to protect? To answer this question the rationale behind the law must be considered. If the ultimate aim is to balance the inequality of bargaining power between the consumer and business, then the definition of “consumer” must encompass that group or groups in society who are in a weak bargaining position in relation to business - those who are not on an equal footing in terms of negotiating power, access to information and enforcement of rights.

3.3 NEW ZEALAND AND AUSTRALIAN DEFINITIONS OF “CONSUMER”

3.3.1 New Zealand

In New Zealand, the primary statutes for protecting consumer rights in the acquisition of goods or services are the Consumer Guarantees Act 1993 (“the CGA”) and the Fair Trading Act 1986 (“the FTA”). The CGA provides consumer guarantees in relation to the supply of goods and services. The guarantees in respect of goods relate to quality, fitness for particular purpose, price and correspondence with descriptions and samples.¹⁸² Services must be supplied with due care and skill and must also be fit for particular purposes.¹⁸³ The provisions in the FTA which prohibit misleading and deceptive conduct and unlawful trade practices apply generally “in trade” and are not designed to protect consumers alone but all who operate in the market place.¹⁸⁴

¹⁸² Consumer Guarantees Act 1993, ss 5-13

¹⁸³ Consumer Guarantees Act 1993, ss 28-31

¹⁸⁴ For example: the Fair Trading Act 1986 may be enforced by competitors or rival traders which advances one of the primary purposes of the Act which is to promote competition.

Consumer law reform in 2014 introduced new provisions into the FTA which apply only to certain consumer transactions.¹⁸⁵ These provisions control unfair terms, extended warranty sales, the supply of unsolicited goods and services, layby sales and uninvited direct sales.¹⁸⁶ A “consumer” definition, identical to the definition in the CGA, was included in the FTA for these consumer transactions. The move to use the same definition as the CGA reflects consistency.

The definition of “consumer” used in the CGA and the FTA focuses on the type or nature of the goods or services being acquired and includes a number of exclusions and exceptions. Section 2 of the CGA provides:

“*consumer*” means a person who—

- (a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
- (b) does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of—
 - (i) resupplying them in trade; or
 - (ii) consuming them in the course of a process of production or manufacture; or
 - (iii) in the case of goods, repairing or treating in trade other goods or fixtures on land.

The CGA and the FTA only apply to supplies of goods or services made “in trade” and the CGA does not apply to supplies by charitable organisations.¹⁸⁷

A supplier may not contract out of the provisions in the CGA unless all parties are acting in trade and it is fair and reasonable to contract out.¹⁸⁸ When deciding

¹⁸⁵ Fair Trading Amendment Act 2013.

¹⁸⁶ Unfair terms in consumer contracts (Fair Trading Act 1986, s 26A and s 46H to s 46M); Supply of unsolicited goods and services (Fair Trading Act 1986, s 21A – D); Layby sales (Fair Trading Act 1986, s 36B – J); Uninvited direct sales (Fair Trading Act 1986, s 36 K – S); and Extended warranties (Fair Trading Act 1986, s 36 T – W).

¹⁸⁷ Consumer Guarantees Act 1993, s 41.

¹⁸⁸ Consumer Guarantees Act 1993, s 43 – the “fair and reasonable” requirement was added to s.43 by the

whether it is “fair and reasonable” to contract out, all the circumstances and the factors listed in section 43(2A) of the CGA must be taken into account.¹⁸⁹ Purporting to contract out in circumstances other than those permitted by section 43 of the CGA is an offence under section 13(i) of the FTA.¹⁹⁰

The FTA contains limited rights to contract out of liability for misleading or deceptive conduct,¹⁹¹ false or misleading representations,¹⁹² unsubstantiated representations¹⁹³ and false representations and other misleading conduct in relation to land,¹⁹⁴ when both parties to the contracting out agreement are operating in trade and it is fair and reasonable to contract out.¹⁹⁵ There is no right to contract out of the consumer transaction obligations added to the FTA in 2014,¹⁹⁶ even though these transactions use the same “consumer” definition as the CGA. In some circumstances a supplier can avoid its obligations under the CGA if the consumer is acting in trade but cannot avoid

Fair Trading Amendment Act 2013. Prior to this amendment a supplier could contract out whenever the consumer acquired goods or services for a business purpose.

¹⁸⁹ See: Consumer Guarantees Act 1993, s 43(2A) – “If, in any case, a court is required to decide what is fair and reasonable for the purposes of subsection (2)(d), the court must take account of all the circumstances of the agreement, including—

- (a) the subject matter of the agreement; and
- (b) the value of the goods, services, gas, or electricity (as relevant); and
- (c) the respective bargaining power of the parties, including—
 - (i) the extent to which a party was able to negotiate the terms of the agreement; and
 - (ii) whether a party was required to either accept or reject the agreement on the terms and conditions presented by another party; and
- (d) whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of the negotiations leading to the agreement or at any other relevant time”.

¹⁹⁰ Consumer Guarantees Act 1993, s 43(4).

¹⁹¹ Fair Trading Act 1986, s 9.

¹⁹² Fair Trading Act 1986, s 13.

¹⁹³ Fair Trading Act 1986, s 12A.

¹⁹⁴ Fair Trading Act 1986, s 14

¹⁹⁵ Fair Trading Act 1986, s 5D inserted, on 17 June 2014 by [section 8](#) of the Fair Trading Amendment Act 2013.

¹⁹⁶ Unfair terms in consumer contracts (Fair Trading Act 1986, s 26A and s 46H to s 46M FTA); Supply of unsolicited goods and services (Fair Trading Act 1986, s 21A – D); Layby sales (Fair Trading Act 1986, s 36B – J); Uninvited direct sales (Fair Trading Act 1986, s 36 K – S); and Extended warranties (Fair Trading Act 1986, s 36 T – W).

its obligations under the FTA consumer transaction provisions,¹⁹⁷ such as the unfair terms regulation, where the consumer is acting in trade. There is inconsistency in the application of the same consumer definition in the CGA and the FTA in that the right to contract out in consumer transactions where both parties are operating in trade is available under the CGA but absent in the relation to the FTA consumer transaction provisions.

The CGA “consumer” definition is based on the “consumer product” definition in *The Consumer Products Warranties Act 1978* (Saskatchewan) which defines a “consumer” as a person who buys “consumer products”.¹⁹⁸ The focus of the CGA definition is on the “ordinary use” of the goods or services being acquired. The definition of “consumer” in respect of goods, when considered in its entirety, sets up a three stage test:

1. What are the goods ordinarily used for?
2. Do any exceptions apply – what is the acquirer’s intended use of the goods?
3. If the acquirer of the goods is also acting in trade, has the supplier validly contracted out of the provisions of the CGA?

A definition which promotes a three stage test and requires a consideration of various exceptions is complex and difficult to apply. The production or manufacture exception only applies to the “consumption” of goods, not the transformation of goods during a process of production or manufacture. This exception is also not limited to production or manufacture “in trade”. These inconsistencies in the expression of the exclusions appear to be oversights in drafting and could be addressed with small amendments. However, the CGA has existed for over 20 years with no amendments to the consumer definition forthcoming.

What of goods which have more than one ordinary use and are commonly used for both personal and business use, such as, computers, cars, pens and telephones? The

¹⁹⁷ Ibid.

¹⁹⁸ Section 2 *The Consumer Products Warranties Act 1978* (Saskatchewan) Chapter C-30 of The Revised Statutes of Saskatchewan 1978 available at: www.qp.gov.sk.ca/m/index.cfm?action=view&p=27105 (accessed 14 September 2016). See also: Cynthia Hawes “Consumer Law Reform: The Consumer Guarantees Bill” (1992) 5 *Canterbury Law Review* 17.

statutory definition is difficult to apply to supplies of goods which are ordinarily used for both personal and business use. The New Zealand Court of Appeal was required to address this issue in *Nesbit v Porter*.¹⁹⁹ The case concerned the sale of a 1984 twin cab diesel Nissan Navara vehicle for \$11,000. The vehicle was described as a “utility” vehicle and had an open deck at the rear. To determine whether the buyers were entitled to rights under the CGA, the Court of Appeal had to decide whether the buyers were “consumers”. The evidence produced in Court showed that approximately 20% of buyers purchased the Nissan Navara for personal use, the remainder for business use. The Court of Appeal recognised that there can be more than one ordinary use of goods and held that if goods are commonly used for personal use, then personal use is an ordinary use. It is not a question of majority and in this case, as 20% of buyers purchased the Nissan Navara for personal use, personal use was an ordinary use. The court confirmed that personal use was ordinary when personal use was ‘not idiosyncratic’.²⁰⁰ The Court held that the buyers were “consumers” and were entitled to the rights and remedies in the CGA. In *Nesbit*, a level of 20% personal use was accepted as ordinary use but the Court of Appeal did not specify what minimum level of personal use is required to make it “ordinary”. In cases where the goods in question are commonly used for both personal and business use, statistical evidence of ordinary use may need to be assessed in order to determine whether the acquirer is a “consumer”. The need for a statistical assessment of use is not appropriate for a self-help statute²⁰¹ like the CGA which must be able to be used by the general public without reference to statistics.

The inconsistency in approach between the New Zealand and Australian courts in relation to the issue of “ordinary use” is illustrated in the Australian case of *Carpet Call Pty Ltd v Chan*.²⁰² Thomas J held that although the carpet in question was

¹⁹⁹ [2000] 2 NZLR 465.

²⁰⁰ [2000] 2 NZLR 465 at 473-474.

²⁰¹ The Consumer Guarantees Act 1993 is a “self-help” statute in that, there is no regulatory body charged with enforcement of the Act and the Act contains no offence provisions. See also: A Sims “Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action” (2010) 16 NZBLQ 145 at 146 and Cynthia Hawes “Consumer Law Reform: The Consumer Guarantees Bill” (1992) 5 Canterbury Law Review 17.

²⁰² (1987) ATPR (digest) 46-025.

purchased for use in a night club and was commercially rated, it was still “carpet” which is a commodity of a kind ordinarily acquired for personal, domestic or household use. In making this assessment, the judge only considered the general nature of the product, not its specific make, model or quality characteristics. He did not take account of the number of purchasers historically acquiring this type of carpet for personal use compared with those acquiring it for commercial use. This approach is quite different to the assessment made by the New Zealand Court of Appeal in *Nesbit* and demonstrates how the term “ordinary use” is open to different interpretations.²⁰³

The Australian decision of *Bunnings Group Ltd v Laminex Group Ltd*²⁰⁴ dealt with an insulation product which was suitable for both commercial and personal use, though it was marketed as suitable for industrial or commercial buildings. The Federal Court of Australia held that “‘ordinarily’ means ‘commonly’ or ‘regularly’, not ‘principally’, ‘exclusively’ or ‘predominately’”.²⁰⁵ The Court also held that determining whether goods are “ordinarily acquired for personal, domestic, or household use or consumption” is a single composite question²⁰⁶ and pointed to the relevance of inquiring into the “essential character of the goods in question”.²⁰⁷ The Court decided that the product in question was “ordinarily acquired for personal, domestic, or household use or consumption” on the basis that nothing other than the price of the product made it unsuitable for residential application.²⁰⁸ The Federal Court’s conclusion that ‘ordinarily’ means ‘commonly’ or ‘regularly’ is consistent with the approach taken by the New Zealand Court of Appeal in *Nesbit v Porter*.²⁰⁹ The fact that the Federal Court was required to undertake an in depth analysis, including an assessment of the essential

²⁰³ The inconsistency in the approaches of the courts in these two cases (*Nesbit v Porter* [2000] 2 NZLR 465 and *Carpet Call v Chan* (1987) ATPR (Digest) 46-025) is discussed fully in AYM Freilich “A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions” (2006) 33 UWALR 108.

²⁰⁴ (2006) ATPR 42-115; [2006] FCA 682.

²⁰⁵ (2006) ATPR 42-115; [2006] FCA 682 at [81] following *Clean Investments Pty Ltd v Commissioner of Taxation* (2001) 105 FCR 248; *Commissioner of Taxation v Chubb Australia Ltd* (1995) 56 FCR 557; and *Hygienic Lily Ltd v Deputy Commissioner of Taxation* (1987) 13 FCR 396.

²⁰⁶ (2006) ATPR 42-115; [2006] FCA 682 at [82].

²⁰⁷ (2006) ATPR 42-115; [2006] FCA 682 at [83].

²⁰⁸ (2006) ATPR 42-115; [2006] FCA 682 at [113] – [114].

²⁰⁹ [2000] 2 NZLR 465.

character of the goods, in order to determine the ordinary use of the goods demonstrates the complexity of this part of the definition.²¹⁰

Another criticism of the “ordinary use” requirement is that it excludes CGA cover for individuals who purchase commercial grade goods for personal use, for example, an individual who purchases an industrial sewing machine for home use. Tokeley notes that these individuals “have as much right to the protections offered under the Act as any other consumers”.²¹¹ The entitlement to protection is based on the argument that consumers who purchase commercial grade goods are still in a weak bargaining position in relation to the supplier and may be more vulnerable due to the complex nature and increased expense of many commercial grade goods.

3.3.2 Australia

The Australian definition of “consumer” is even more complex²¹² and contains a monetary presumption along with a focus, similar to the CGA, on the type of goods or services acquired and a specific inclusion relating to vehicles or trailers used on public

²¹⁰ Other Australian decisions in relation to the “consumer” definition in section 3(1) confirm that the identity of the purchaser as a business or an individual and the actual use of the goods are not relevant to the determination of whether a particular person is a consumer. In *Cinema Centre PTY Services Ltd v Eastaway Air Conditioning Pty Ltd* (1999) ASAL 55-034 it was held that a business purchaser of air-conditioning units for use in a motel complex was a “consumer” because the units were “of a kind ordinarily acquired for personal, household or domestic use.” See also: *Crawford v Mayne Nickless Ltd* (1992) ATPR (Digest) 46-091. If the \$40,000 presumption does not apply, the primary consideration is, what is the nature of the goods – are they “of a kind ordinarily acquired for personal, domestic or household use or consumption?”

²¹¹ K Tokeley “Unprotected Consumers Under the Consumer Guarantees Act 1993” (1997) 3 NZBLQ 254 at 254.

²¹² Goldring and Maher criticised the complexity of the definition in an early edition of their text, *Consumer Protection Law in Australia* (2nd ed. The Federation Press, Sydney, 1983) saying at page 23, “... it is probably the least satisfactory that could be found, and potentially highly counter-productive to the interests of consumers”. For further criticism of the definition see also: AYM Freilich “A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions” (2006) 33 UWALR 108; Steven Rares “Striking a Balance between Freedom of Contract and Consumer Rights” paper presented at the 14th International Association of Consumer Law Conference, Sydney, 2 July 2013 at 15-16 available at: <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-raises/raises-j-20130702>> (accessed 1 June 2016); A Freilich and L Griggs “Just Who is the Consumer? Policy Rationales and a Proposal for Change” in Malbon and Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney 2013); and L Griggs, A Freilich and E Webb “Challenging the Notion of a Consumer: Time for Change” (2011) 19 CCLJ 52.

roads for transporting goods. The Australian definition encompasses a wider group than the CGA due to the monetary presumption. Section 3 of the ACL defines “consumer” in relation to the acquisition of goods as follows:

Meaning of *consumer* - Acquiring goods as a consumer

- (1) A person is taken to have acquired particular goods as a *consumer* if, and only if:
 - (a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:
 - (i) \$40,000; or
 - (ii) if a greater amount is prescribed for the purposes of this paragraph - that greater amount; or
 - (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
 - (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.
- (2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:
 - (a) for the purpose of re-supply; or
 - (b) for the purpose of using them up or transforming them, in trade or commerce:
 - (i) in the course of a process of production or manufacture; or
 - (ii) in the course of repairing or treating other goods or fixtures on land.

The definition includes provisions for ascertaining the “amount paid” in various scenarios, including a mixed supply of goods and services.²¹³ There is also a presumption that a person is a consumer, if it is alleged in any proceeding that a person was a consumer in relation to particular goods or services.²¹⁴ The ACL prohibits

²¹³ Australian Consumer Law, ss 3(4)–(9).

²¹⁴ Australian Consumer Law, s 3(10).

contracting out²¹⁵ but a contract provision may limit the remedies available under the ACL if the goods supplied are ordinarily used in business, for example, damages for consequential loss can be excluded.²¹⁶

The ACL definition of consumer is also complicated by a staged test similar to the CGA and many exceptions. The \$40,000 figure which activates the presumption was previously included in the Australian Trade Practices Act 1974.²¹⁷ The \$40,000 figure is arbitrary and the method for determining the “amount paid” in order to apply the presumption is complicated. There was a move towards removing this monetary presumption in 2010 with the reform of consumer law and the introduction of the ACL.²¹⁸ However, the proposed amendment which removed the monetary presumption was deleted from the Bill just before it was passed into law.²¹⁹ The ACL was passed into law on 24 June 2010 with the monetary presumption included in the consumer definition. The Senate Economics Legislation Committee Report of 21 May 2010 approved the removal of the monetary presumption in the Bill as it was then drafted:²²⁰

On balance, the Committee believes that the bill's definition of consumer is appropriate.

²¹⁵ Australian Consumer Law, s 64.

²¹⁶ Australian Consumer Law, s 64A.

²¹⁷ Australian Trade Practices Act 1974, s 4B(1)(a) and (b).

²¹⁸ A Freilich and L Griggs “Just Who is the Consumer? Policy Rationales and a Proposal for Change” in Malbon and Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney 2013) at 42.

²¹⁹ Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) introduced into Parliament on 17 March 2010: Senate Economics Legislation Committee Report, *Trade Practices Amendment (Australian Consumer Law) Bill (no.2) 2010 Report* Parliament of Australia, Canberra 2010 available at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2008-10/tpa_consumer_law_10/report/index (accessed 14 September 2016). See also J Downes “The Australian Consumer Law – is it really an era of consumer protection?” (2011) 19 AJCCL 5 at 10.

²²⁰ Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) introduced into Parliament on 17 March 2010: Senate Economics Legislation Committee Report, *Trade Practices Amendment (Australian Consumer Law) Bill (no.2) 2010 Report* Parliament of Australia, Canberra 2010 at 29, available at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2008-10/tpa_consumer_law_10/report/index (accessed 14 September 2016).

It has long been recognised that the monetary threshold is arbitrary and contentious. It is anomalous that a business should have the same protection as an individual consumer if they buy goods for less than \$40 000 regardless of whether the goods are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. The key must be the *nature* of the good.

However, one month later when the Bill was passed into law the monetary presumption had reappeared in the Bill. It seems that the \$40,000 presumption was reinserted because the coalition government at the time wished to ensure that small businesses would be covered by the consumer definition. The Hansard report of 23 June 2010 records the following from the speech of L Hartsuyker MP:²²¹

Firstly, the coalition recommended that the definition of consumer should allow for a class of consumers that would encompass small businesses for the purpose of statutory guarantees on purchases. The previous legislation allowed for all goods purchased under \$40,000 to be considered as consumer goods, allowing small business purchases to be covered under the legislation. The coalition recommended for this threshold to be retained, and this recommendation was accepted by the minister. It was important for the coalition that small businesses continue to be protected under this legislation and I am pleased to say that this will continue to be the case.

Including the \$40,000 presumption in the consumer definition is a fairly crude way of ensuring that small businesses are covered because the effect of the \$40,000 presumption is to extend cover to all businesses (not just small businesses) transacting below the prescribed limit.

²²¹ House of Representatives Main Committee, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2), Second Reading Speech, Hansard Reports, Luke Hartsuyker MP, 23 June 2010, p 6472, available at:

http://www.aph.gov.au/Parliamentary_Business/Hansard/Search?page=12&q=Trade+Practices+Amendment+Australian+Consumer+Law+Bill+No.+2+2010&ps=10&drt=2&drv=7&drvH=7&pnu=0&pnuH=0&pi=0&chi=0&coi=0&st=1&sr=1 (accessed 14 September 2016).

The monetary presumption provides certainty for the millions of daily transactions with a value of \$40,000 or less. However, the presumption does not distinguish between acquisitions by individuals or businesses. Individuals or businesses of any size who acquire any kind of goods or services valued at \$40,000 or less are clearly “consumers” provided the acquisition is not for any of the purposes excluded by section 3(2) of the ACL.²²² Vernon argues that “it is hard to justify protecting all buyers of goods and services costing less than \$40,000” and suggests that the Australian definition provides protection for big business that is not warranted.²²³ Australian Federal Court judge, Steven Rares,²²⁴ questioned the need for large corporations to have protection under the ACL when commenting on *Qantas Airways Ltd v Aravco Ltd*,²²⁵ a case in which, the \$40,000 presumption²²⁶ entitled a large corporation to claim consumer protection in relation to the supply of a commercial service (moving a plane) for a cost of around \$5,000. Rares J said: “One wonders why such large corporations have any need for the thicket of protection given to a consumer in the Australian Consumer Law.”²²⁷ While the \$40,000 presumption provides certainty, in many cases it does not always advance the rationale of protecting those in a weak bargaining position because it extends cover to all business including big business.

²²² Resupply, use in manufacture or use in the repair treatment of other goods or fixtures.

²²³ David H Vernon *An Outline for Post-Sale Consumer Legislation in New Zealand* (Report to the Minister of Justice, December 1987, Iowa ISBN 0-477-07230-5) at 12-13.

²²⁴ Steven Rares “Striking a Balance between Freedom of Contract and Consumer Rights” paper presented at the 14th International Association of Consumer Law Conference, Sydney, 2 July 2013 at 16 – 17 available at: <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-raises/raises-j-20130702>> (accessed 1 June 2016).

²²⁵ (1996) 185 CLR 43. See also: *Crawford v Mayne Nickless Ltd* (1992) ATPR (Digest) 46-091 and *Seeley International Pty Ltd v Newtronics Pty Ltd* (2002) Aust Contract Reports 90-142.

²²⁶ Then contained in s.4B of the Trade Practices Act 1974.

²²⁷ Steven Rares “Striking a Balance between Freedom of Contract and Consumer Rights” paper presented at the 14th International Association of Consumer Law Conference, Sydney, 2 July 2013 at 17 available at: <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-raises/raises-j-20130702>> (accessed 1 June 2016).

3.3.3 Comparison – New Zealand and Australia

The definitions of “consumer” in the CGA and the ACL are similar in that both refer to the type or “ordinary use” of goods being acquired and both exclude acquisitions for the purpose of resale, production or manufacture or use in treating or repairing other goods or fixtures on land. However, the ACL includes the \$40,000 presumption and has a more limited ability to contract out.²²⁸ The tables below demonstrate, with reference to simple examples, how the definitions in the CGA and ACL operate in relation to particular purchases.

Consumer CGA	Not a Consumer CGA
Business buys: <ul style="list-style-type: none"> - a kettle for use in staff kitchen; - a small sofa for use in reception. Unless the supplier contracts out.	Individual buys: <ul style="list-style-type: none"> - an industrial sewing machine for home use; - a bus for personal use. Business buys: <ul style="list-style-type: none"> - commercial goods valued at \$40,000 or less.

Consumer ACL	Consumer ACL
Business buys: <ul style="list-style-type: none"> - a kettle for use in staff kitchen; - a small sofa for use in reception. And no exclusions apply.	Individual buys: <ul style="list-style-type: none"> - an industrial sewing machine for home use valued at AU\$40,000 or less; - a bus for personal use valued at AU\$40,000 or less. Business buys: <ul style="list-style-type: none"> - commercial goods valued at \$40,000 or less and no exclusions apply.

These tables show that the \$40,000 presumption in the ACL has a big impact on who qualifies as a consumer. A person, whether, an individual or a business, in New Zealand

²²⁸ Australian Consumer Law, s 64A - when the goods are used for business use, the remedies available may be limited by contract term. For example, damages for consequential loss could be excluded.

who buys goods which are not ordinarily acquired for personal use will never be a consumer but in Australia such persons will be consumers as long as the value of the goods is less than \$40,000 and the purchase is not for one of the excluded purposes.²²⁹ The definitions in both the CGA and the ACL cover purchases for business use as long as the goods acquired are of a kind ordinarily used for personal use and none of the exceptions apply, i.e. the goods are not acquired for the purpose of resale, use in manufacture or production or use in the treatment or repair other goods or fixtures on land.

In New Zealand the supplier may contract out of the provisions of the CGA when the acquirer is also acting in trade and it is fair and reasonable to do so.²³⁰ This means that suppliers have an opportunity to contract out of the CGA when the acquirer is also a business. There is no similar right to contract out of the consumer guarantee provisions in the ACL.²³¹ The disparity in the definitions in New Zealand and Australia is at odds with the Closer Economic Relations (CER) free trade agreement between New Zealand and Australia which was signed in 1983.²³² The inconsistencies in the definition of consumer in New Zealand and Australia create confusion for consumers who shop online from retail websites available in both countries; this is exacerbated by the fact that many retail businesses have a presence in both New Zealand and Australia. Adopting the same definition of consumer and the same contracting out provisions in both New Zealand and Australia would remove this confusion.

3.3.4 Other Statutory Definitions of “Consumer” in New Zealand

The definition of “consumer” used in both the CGA and the FTA is not used in other consumer protection statutes in New Zealand. A variety of definitions relating to the use

²²⁹ Australian Consumer Law, s 3(2) - resale, use in manufacture or production or to treat or repair other goods or fixtures on land.

²³⁰ Consumer Guarantees Act 1993, s 43.

²³¹ There is a more limited right to contract out of some of the remedies available under the ACL if the goods supplied are ordinarily used in business - under s 64A ACL.

²³² The agreement is available at: <<http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Australia/index.php>> (accessed 14 September 2016).

of the word “consumer” are used in these other statutes. These other definitions share a common theme of referring to the identity of the acquirer and the purpose of acquisition. The Credit Contracts and Consumer Finance Act 2003 (“the CCCFA”) defines a “consumer credit contract” as a credit contract where:²³³

- (a) the debtor is a natural person; and
- (b) the credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes; and ...

The CCCFA contains Credit Repossession Rules²³⁴ which apply to the repossession of “consumer goods”. “Consumer goods” are defined as, “goods that are used or acquired for use primarily for personal, domestic, or household purposes.”²³⁵ Both these definitions refer to the purpose for which the credit or goods are being acquired. Reference to the purpose of acquisition is inconsistent with the definition of “consumer” in the CGA which focuses on the ordinary use of goods or services.

The Personal Property Securities Act 1999 (“the PPSA”) regulates security over personal property and includes special rules for enforcing security over “consumer goods” and in relation to motor vehicles sold or leased to “consumers”. The PPSA defines “consumer” as “any person other than a manufacturer, wholesaler, registered motor vehicle trader, or a finance company”²³⁶ and defines “consumer goods” as “goods that are used or acquired for use primarily for personal, domestic, or household purposes”.²³⁷ While the definition of “consumer” is reasonably wide, the definition of “consumer goods” again focuses on the purpose for which the goods are acquired.

The Arbitration Act 1996 contains a provision for the benefit of consumers which provides that an arbitration agreement is enforceable against a consumer only if

²³³ Credit Contracts and Consumer Finance Act 2003 (NZ), s 11.

²³⁴ Credit Contracts and Consumer Finance Act 2003 (NZ), Part 3A

²³⁵ Credit Contracts and Consumer Finance Act 2003 (NZ), s 5.

²³⁶ Personal Property Securities Act 1999, s 57.

²³⁷ Personal Property Securities Act 1999, s 16.

the consumer, by separate written agreement, certifies that having read and understood the arbitration agreement, agrees to be bound by it.²³⁸ For the purposes of this provision a person enters into a contract as a “consumer” if that person enters into the contract otherwise than in trade and the other party to the contract is acting in trade.²³⁹ Again, this definition focuses on private or personal purposes for entering into the contact.

3.3.5 Other Statutory Definitions of “Consumer” in Australia

Within the ACL itself, different definitions of “consumer” apply to different areas of regulation. The unfair contract terms provisions apply to “consumer contracts” which are currently defined by reference to supplies to individuals wholly or predominantly for personal use.²⁴⁰ However, an amendment to this definition which extends coverage to “small businesses”, came into force in November 2016.²⁴¹ This amendment is discussed further below. The product safety rules in the ACL apply to “consumer goods” which are defined as goods that are intended for, or are of a kind likely to be used for, personal use.²⁴² The unconscionable conduct rules, in relation to consumers, apply to conduct connected with goods or services ordinarily acquired for personal use.²⁴³ More inconsistency is demonstrated here as two of these definitions focus on the purpose of acquisition, while the third focuses on ordinary use. Downes argues that the “myriad of definitions now available under the ACL results in a complex system which is likely to confuse, create uncertainty and inhibit the efficient operation of business”.²⁴⁴ It is difficult to disagree with this sentiment; the ACL includes four different definitions of consumer within the one statute.

²³⁸ Arbitration Act 1996, s 11.

²³⁹ Arbitration Act 1996, s 11(2).

²⁴⁰ Australian Consumer Law, s 23(3).

²⁴¹ s 23 of Schedule 2 Competition and Consumer Act 2010 (AU) (inserted by Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 - C2015A00147).

²⁴² Australian Consumer Law, s 2.

²⁴³ Australian Consumer Law, s 21.

²⁴⁴ J Downes “The Australian Consumer Law – is it really a new era of consumer protection?” (2011) 19 AJCCL 5 at 8.

3.4 EUROPEAN UNION / UNITED KINGDOM DEFINITIONS – DEFERENCE TO SIMPLICITY

The definitions of “consumer” in the European Directives are relatively simple and are limited to natural persons who enter into contracts for purposes not related to business. The European Union Consumer Rights Directive²⁴⁵ defines “consumer” as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”.²⁴⁶ A similar definition of “consumer” is contained in the European Union Sale of Consumer Goods Directive:²⁴⁷ “consumer” means “any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession”.²⁴⁸

The United Kingdom Consumer Rights Act 2015 was passed in order to comply with the European Union Consumer Rights Directive and contains consumer guarantees similar to those in the CGA and the ACL. The definition of “consumer” in the United Kingdom (“the UK”) statute differs slightly from the EU Directive definition in that it includes the words “wholly or mainly” and replaces “natural person” with “individual”. A “consumer” is defined as “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”.²⁴⁹ There is also a requirement that any trader claiming that an individual was not acting for purposes

²⁴⁵ European Parliament and the Council of the European Union *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights* available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0083>> (accessed 7 February 2016).

²⁴⁶ Article 2(1), European Parliament and the Council of the European Union *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights* available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0083>> (accessed 7 February 2016).

²⁴⁷ European Parliament and the Council of the European Union *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999L0044>> (accessed 7 February 2016).

²⁴⁸ Article 1 - 2(a), European Parliament and the Council of the European Union *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees* available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999L0044>> (accessed 7 February 2016).

²⁴⁹ Consumer Rights Act 2015 (UK), s 2(3).

wholly or mainly outside the individual’s trade, business, craft or profession must prove it.²⁵⁰

The table below demonstrates, with reference to the simple examples used above, how the definitions of “consumer” used in the EU and the UK operate in relation to particular purchases.

Not a Consumer EU/UK	Consumer EU/UK
Business buys: <ul style="list-style-type: none"> • a kettle for use in staff kitchen; • a small sofa for reception; • any goods or services. 	Individual buys: <ul style="list-style-type: none"> • an industrial sewing machine for home use; • a bus for personal use.

Who is covered by the EU/UK definitions, in relation to the transactions identified in the above table, is quite different from who is covered when applying the CGA and the ACL definitions (see tables above). This is primarily because the EU and UK definitions are limited to natural persons and contracts for non-business purposes. The EU and UK definitions of “consumer” are consistent with the definitions of “consumer” in statutes in New Zealand outside the CGA²⁵¹ and some of the alternate definitions of “consumer” in the ACL.²⁵² This indicates that the CGA and the ACL definitions, which focus on ordinary use, are at odds with what seems to be a more generally accepted sense of the term “consumer” in other legislation both within New Zealand and Australia and in the EU and the UK.

There is no doubt that the simplicity of the EU and UK definitions is appealing. One issue with definitions that focus on the purpose of acquisition is that suppliers need

²⁵⁰ Consumer Rights Act 2015 (UK), s 2(4).

²⁵¹ Credit Contracts and Consumer Finance Act 2003 (NZ), ss 11 and 5; Personal Property Securities Act 1999, ss 57 and 16; and Arbitration Act 1996 s 11.

²⁵² Australian Consumer Law, s 2 definition of “consumer goods” and Australian Consumer Law, ss 21 and 23(3).

to establish each purchaser's intended use of a product or service in order to determine what their obligations are as suppliers.²⁵³ Another major issue is that this definition excludes any party who is not a natural person (e.g. an entity such as partnership or company), and any person who acquires goods or services primarily for business use. This clearly excludes small business purchasers. The rationale for including small business within the "consumer" definition is discussed further below.

3.5 UNITED STATES – MORE INCONSISTENCY

In the United States one of the major federal statutes which contains consumer law is the Consumer Credit Protection Act 1968 (15 US Code 1602). The definition of "consumer" in this Act includes a party who is a natural person taking credit "primarily for personal, family, or household purposes".²⁵⁴ The Federal Trade Commission Act ("the FTC Act") also contains consumer law but does not include a definition of "consumer". The FTC Act cannot be enforced privately and is administered and enforced by the Federal Trade Commission.²⁵⁵ Each of the 50 States in the United States has enacted its own consumer protection statute which may be enforced privately. These statutes are collectively known as the Unfair and Deceptive Acts and Practices laws ("the UDAP laws").²⁵⁶ The definitions of "consumer" in these UDAP laws vary widely. For example, see the following four State definitions:

1. Alabama – in the Alabama Code – Chapter 19: Deceptive Trade Practices, "consumer" is defined as, any natural person who buys goods or services for personal, family or household use.²⁵⁷

²⁵³ AYM Freilich "A Radical Solution to problems with the Statutory Definition of Consumer: All Transactions Are Consumer Transactions" (2006) 33 UWALR 108 at 118.

²⁵⁴ Consumer Credit Protection Act 1968 (15 US Code 1602) Title 15 Ch 41 Subchapter I Pt A § 1602 (i).

²⁵⁵ See: D Pridgen "Wrecking Ball Disguised as Law Reform: ALEC'S Model on Private Enforcement of Consumer Protection Statutes" (2015) 39 NYU Review of Law & Social Change 279 which contains an excellent summary of the development of consumer law in the USA.

²⁵⁶ See: National Consumer Law Center, *Consumer Protection In The States: State-by-State Summaries of State UDAP Statutes*, 10 January 2009 available at: <<https://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf>> (accessed 15 May 2016).

²⁵⁷ Alabama Code § 8-19-3, s (2) available at:

2. Alaska – in the Alaska Unfair Trade Practices and Consumer Protection Act, “consumer” means a person who seeks or acquires goods or services by lease or purchase (note: “person” is not defined).²⁵⁸
3. California – in the Consumers Legal Remedies Act [Civil Code 1750 - 1784], “consumer” means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.²⁵⁹
4. Texas – in the Deceptive Trade Practices - Consumer Protection Act, “consumer” means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.²⁶⁰ Contracts valued at more than \$100,000 are excluded if the consumer has legal advice from an advisor not appointed by the defendant and the contract does not relate to the consumer’s residence.²⁶¹ There is a wider exemption relating to all transactions valued at \$500,000 or more.²⁶²

The “consumer” definition in Texas is widely drafted²⁶³ and covers both individuals and businesses with assets of up to \$25 million (USD) or more who acquire any type of goods or services for any purpose, unless the transaction value exceeds specified limits. In contrast, the Alabama and California statutes limit the definition to acquisitions for personal use. The variety of definitions used in just four States indicates that inconsistency in definition appears to be prevalent in the United States.

<<http://codes.lp.findlaw.com/alcode/8/19#sthash.x537sQ3o.dpuf>> (accessed 15 May 2016).

²⁵⁸ Alaska Unfair Trade Practices and Consumer Protection Act § 45.50.561, s (4) available at: <<http://codes.lp.findlaw.com/akstatutes/45/45.50./03./45.50.561.#sthash.L1JbhUHq.dpuf>> (accessed 15 May 2016).

²⁵⁹ Consumers Legal Remedies Act [Civil Code 1750 - 1784] (California), s 1761 (d).

²⁶⁰ Deceptive Trade Practices-Consumer Protection Act (Texas), s 17.45.

²⁶¹ Deceptive Trade Practices-Consumer Protection Act (Texas), s 17.49.

²⁶² Deceptive Trade Practices-Consumer Protection Act (Texas), s 17.49.

²⁶³ R Alderman “The Texas Deceptive Trade Practices Act 2005 Still Alive and Well” (2005) 8(2) Journal of Texas Consumer Law at 74 available at: < www.jtexconsumerlaw.com > (accessed June 2016).

3.6 SMALL BUSINESS – RATIONALE FOR INCLUSION WITHIN THE “CONSUMER” DEFINITION

If the theory behind consumer law is to balance the inequality in bargaining power which exists between business and consumers, then small businesses may also be deserving of protection as they are often in a weaker bargaining position when transacting with big business. Freilich and Griggs note that “... many small businesses exhibit characteristics more akin to a consumer than to an experienced commercial party. ... Commercial transactions, particularly those involving small business, should be subject to the same protections as those involving consumers”.²⁶⁴ Before the ACL was enacted, the Australian Productivity Commission recognised in its 2008 report on the consumer policy framework that: “Indeed, in their dealings with larger businesses, small businesses can face many of the same issues as individual consumers, particularly relating to unequal bargaining power and the lack of resources to effectively negotiate contracts.”²⁶⁵ Ultimately, the Productivity Commission recommended retaining the current ACL definition of “consumer”²⁶⁶ which applies to the acquisition of goods and services, noting that it provided sufficient protection for businesses, including small businesses, and commenting that “there are no clear principles that can be brought to bear in deciding the extent to which small business should be covered by generic consumer protections”.²⁶⁷

The CGA definition of “consumer” does cover small businesses to some extent. Business acquisitions of goods or services are covered, if the goods or services acquired are of a kind ordinarily used for personal use, unless one of the exclusions applies.²⁶⁸

²⁶⁴ A Freilich and L Griggs “Just Who is the Consumer? Policy Rationales and a Proposal for Change” in Malbon and Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney 2013) at 50.

²⁶⁵ Productivity Commission *Review of Australia’s Consumer Policy Framework – Inquiry Report Volume 1* (Australian Government, Canberra 2008) at 318 available at: <<http://www.pc.gov.au/inquiries/completed/consumer-policy/report>> (accessed 14 September 2016)

²⁶⁶ Then contained in s 4B Trade Practices Act 1974.

²⁶⁷ Productivity Commission *Review of Australia’s Consumer Policy Framework – Inquiry Report Volume 1* (Australian Government, Canberra 2008) at 320 available at: <<http://www.pc.gov.au/inquiries/completed/consumer-policy/report>> (accessed 14 September 2016).

²⁶⁸ The purpose of the acquisition is for resale, use in manufacture or production or use in the repair of

However, the supplier may contract out of the CGA, if it is fair and reasonable to do so and the other party to the transaction is also acting in trade.²⁶⁹ The CGA does not discriminate between small and large business. The CGA will not apply if the business intends to resupply goods in trade, consume them in a process of manufacture or use the goods to repair or treat other goods or fixtures on land.²⁷⁰ If a small business operating a corner shop buys goods from the supermarket to resell in the shop, then the business will not qualify as a “consumer” due to the resupply exclusion.

The ACL provides more protection for small businesses²⁷¹ as acquisition by any business, of any type of goods or services valued at \$40,000 or less, is covered by the definition but again, the ACL will not apply if the business intends to resupply the goods in trade, use or transform them in a process of manufacture or use the goods to repair or treat other goods or fixtures on land. There is no ability for the supplier to contract out of the ACL protection when the acquirer is also a business.²⁷²

The protection for small businesses under the CGA and the ACL is limited because of the focus on goods or services that are ordinarily acquired for personal, domestic or household use, the business purpose exclusions²⁷³ and, in New Zealand, the supplier’s ability to contract out in certain circumstances.²⁷⁴ There is only a limited right under the ACL for a supplier to contract out of some remedies if the acquisition is of

other goods or fixtures on land.

²⁶⁹ Consumer Guarantees Act 1993, s 43.

²⁷⁰ Consumer Guarantees Act 1993, s 2 “consumer” definition.

²⁷¹ When the Australian Consumer Law was passed into law on 24 June 2010 L Hartsuyker MP noted that the reason for including the \$40,000 presumption was to ensure that small businesses were covered. See: House of Representatives Main Committee, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2), Second Reading Speech, Hansard Reports, Luke Hartsuyker MP, 23 June 2010, p 6472, available at:

http://www.aph.gov.au/Parliamentary_Business/Hansard/Search?page=12&q=Trade+Practices+Amendment+Australian+Consumer+Law+Bill+No.+2+2010&ps=10&drt=2&drv=7&drvH=7&pnu=0&pnuH=0&pi=0&chi=0&coi=0&st=1&sr=1 (accessed 14 September 2016).

²⁷² There is a more limited right to contract out of some of the remedies available under the ACL if the goods supplied are ordinarily used in business - under s 64A ACL.

²⁷³ Where the purpose of the acquisition is for resale, use in manufacture or production or use in the repair of other goods or fixtures on land.

²⁷⁴ Consumer Guarantees Act 1993, s 43.

goods ordinarily used in business.²⁷⁵ Australian academics have recognised that small businesses often share the same characteristics as individuals when dealing with bigger businesses and need the protection of consumer law.²⁷⁶ A “consumer” definition which covers small businesses to the same degree as individuals when acquiring goods and services seems consistent with the rationale of balancing unequal bargaining power. One of the major issues with extending the definition of consumer to cover small businesses is the problem of defining “small business”.

Defining “small business” may be problematic but this is not an insurmountable obstacle. A “small business” definition may be based on net assets, annual turnover, number of employees, or transaction size. Australia has recently passed an amendment to the ACL unfair contract terms law to extend the unfair terms protection to small business contracts. After much consultation, the Australian legislature decided to go with a definition of “small business” which focuses on number of employees and transaction size:²⁷⁷

s 23(4) A contract is a *small business contract* if:

- (a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
- (b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and

²⁷⁵ Australian Consumer Law, s 64A.

²⁷⁶ A Freilich and E Webb “Small Business – Forgotten and in need of protection from unfairness?” (2013) 37(1) UWALR 134; A Freilich “A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions” (2006) 33 UWALR 108 at 119; L Griggs, A Freilich and E Webb “Challenging the Notion of a Consumer: Time for Change” (2011) 19 CCLJ 52; and Freilich and Griggs “Just Who is the Consumer? Policy Rationales and a Proposal for Change” in Malbon and Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) at 50. See also: Consumer Affairs Australia and New Zealand *Extending Unfair Terms Protections to Small Businesses Consultation Paper* (Treasury, Australian Government, May 2014) available at <<http://treasury.gov.au/consultationsandreviews/consultations/2014/small-business-and-unfair-contract-terms>> (accessed 14 September 2016).

²⁷⁷ See: Senate Economics Legislation Committee, *Treasury Legislation Amendment (Small Business and Unfair Terms) Bill 2015 [Provisions]* (Parliament of Australia, Canberra, September 2015) available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Small_Business_Bill_2015/Report> (accessed 14 September 2016).

(c) either of the following applies:

- (i) the upfront price payable under the contract does not exceed \$300,000;
- (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

(5) In counting the persons employed by a business for the purposes of paragraph (4)(b), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.²⁷⁸

The amendment comes into effect in November 2016. The Australian definition refers to businesses which employ fewer than 20 persons and transactions values which do not exceed \$300,000 or \$1,000,000 where the transaction period exceeds one year.²⁷⁹ The amendment adopts the definition of “small business” used by the Australian Bureau of Statistics (“ABS”). The Explanatory Memorandum to the Bill notes that the figure of fewer than 20 employees “is a commonly used headcount measure and has been found

²⁷⁸ s 23 of Schedule 2 Competition and Consumer Act 2010 (Cth) (inserted by Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 - C2015A00147). The amendment provides:

s.31 At the end of section 23 of Schedule 2

Add:

(4) A contract is a *small business contract* if:

- (a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
- (b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- (c) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$300,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

(5) In counting the persons employed by a business for the purposes of paragraph (4)(b), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.

s. 32 Subsection 24(1) of Schedule 2

After “consumer contract”, insert “or small business contract.”

²⁷⁹ Australian Consumer Law, s 23(4) in Schedule 2 Competition and Consumer Act 2010 (Cth).

by the ABS to provide a good proxy of small businesses”.²⁸⁰ A Consultation Paper produced by Consumer Affairs Australia and New Zealand prior to the passing of the amendment,²⁸¹ generated over 80 submissions, most of which supported extension of the unfair terms law to small businesses.²⁸² These submissions were considered by the Senate Economics Legislation Committee which produced a report containing recommendations in September 2015.²⁸³ The Senate Committee recommended adopting the “fewer than 20 employees” measure noting:

The committee acknowledges the difficulties involved in defining a small business and that different regulatory regimes may do so differently. Nonetheless, the committee considers that the use of the ABS definition is appropriate.²⁸⁴

²⁸⁰ Explanatory Memorandum at para 3.127 available at:

<http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5497> (accessed 14 June 2016) and see also: Senate Economics Legislation Committee *Treasury Legislation Amendment (Small Business and Unfair terms) Bill 2015 [Provisions]* (Parliament of Australia, Canberra, September 2015) at 10 available at:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Small_Business_Bill_2015/Report> (accessed 14 September 2016).

²⁸¹ J Malbon and L Nottage *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) at 50. See also: Consumer Affairs Australia and New Zealand *Extending Unfair Terms Protections to Small Businesses Consultation Paper* (Treasury, Australian Government, May 2014) available at: <<http://treasury.gov.au/consultationsandreviews/consultations/2014/small-business-and-unfair-contract-terms>> (accessed 14 September 2016).

²⁸² See: Australian Government Treasury website:

<<http://treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms>> (accessed 14 September 2016).

²⁸³ Senate Economics Legislation Committee *Treasury Legislation Amendment (Small Business and Unfair Terms) Bill 2015 [Provisions]* (Parliament of Australia, Canberra, September 2015) available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Small_Business_Bill_2015/Report> (accessed 14 September 2016).

²⁸⁴ Senate Economics Legislation Committee *Treasury Legislation Amendment (Small Business and Unfair Terms) Bill 2015 [Provisions]* (Parliament of Australia, Canberra, September 2015) at para 2.33, available at:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Small_Business_Bill_2015/Report> (accessed 14 September 2016).

The Senate Committee also accepted that the proposal in the amendment Bill to include monetary transaction thresholds was appropriate, stating: “By creating a threshold, the Bill places the onus on small businesses to undertake due diligence for high-value transactions. The committee considers this the fairest approach.”²⁸⁵ Ultimately, the proposed thresholds of a contract price of \$100,000 and a price of \$250,000 for contracts with a duration of more than 12 months were increased to \$300,000 and \$1,000,000 respectively.²⁸⁶

If small businesses in Australia are covered by the unfair terms law it seems appropriate that they should also be covered by consumer protection law in the acquisition of goods and services. As much consultation was undertaken during the process of reaching the definition of “small business” for the unfair terms law in Australia, it seems that this “small business” definition would be appropriate to use in relation to a “consumer” definition for the acquisition of goods and services which extends cover to small businesses.²⁸⁷

3.7 A NEW APPROACH

3.7.1 Option One - Individuals Acquiring for Personal Purpose

Adopting the simplicity of the EU and UK definition of “consumer” is appealing. This definition provides that “consumer” means an individual acting for purposes that are wholly (or mainly) outside that individual’s trade, business, craft or profession. The

²⁸⁵ Senate Economics Legislation Committee *Treasury Legislation Amendment (Small Business and Unfair Terms) Bill 2015 [Provisions]* (Parliament of Australia, Canberra, September 2015) at para 2.70 available at:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Small_Business_Bill_2015/Report> (accessed 14 September 2016).

²⁸⁶ Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 *Schedule of the amendments made by the Senate*, Parliament of Australia, Canberra, available at:

<http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5497> (accessed 14 September 2016).

²⁸⁷ The focus of the ACL definition of “small business” bears strong similarities to the “consumer” definition in the Deceptive Trade Practices - Consumer Protection Act (Texas) which covers individuals and excludes big businesses (defined with reference to net assets and transaction value) – discussed above. The result of the exclusion of big businesses is to cover small businesses.

advantages of this definition are its simplicity and absence of exclusions. If this definition is used, there is no need to include contracting out provisions as businesses are not covered by the definition. This definition also covers individuals who acquire goods or services of a commercial nature for personal use. A definition which focuses on acquisitions for personal use is consistent with the concept of consumer used in the New Zealand CCCFA,²⁸⁸ PPSA²⁸⁹ and Arbitration Act 1996²⁹⁰ and parts of the ACL which use personal or private purpose definitions.²⁹¹

The disadvantages of a definition which focuses on acquisitions by individuals for personal use are that anyone buying for business purposes is not covered and small businesses are excluded. Applying a definition which refers to purposes that are “wholly or mainly” outside a person’s trade may also be troublesome and suppliers will often not know whether a transaction is covered by the definition as they may be unaware of the purpose of acquisition.

3.7.2 Option Two - Individuals and Small Businesses Acquiring Any Type of Goods or Services for Any Purpose

There is much to be said for a definition which focuses on those who need protection and excludes those who do not need it.²⁹² D H Vernon’s report, which was commissioned by the Minister of Justice in New Zealand before the CGA was enacted, noted that “... New Zealand should limit the protection afforded by statute to those who need it most, i.e., non-commercial buyers”.²⁹³ While Vernon acknowledged that small

²⁸⁸ Credit Contracts and Consumer Finance Act 2003 (NZ), ss 11 and 5.

²⁸⁹ Personal Property Securities Act 1999, ss 57 and 16.

²⁹⁰ Arbitration Act 1996, s 11.

²⁹¹ Australian Consumer Law, s 2 definition of “consumer goods” and Australian Consumer Law, s 21 and s 23(3).

²⁹² Steven Rares “Striking a Balance between Freedom of Contract and Consumer Rights” paper presented at the 14th International Association of Consumer Law Conference, Sydney, 2 July 2013 at 17 available at: <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-raises/raises-j-20130702>> (accessed June 2016).

²⁹³ D H Vernon *An Outline for Post-Sale Consumer Legislation in New Zealand* (Report to the Minister of Justice, December 1987, Iowa ISBN 0-477-07230-5) at 13.

businesses might be worthy candidates for protection, he recommended that New Zealand not include protection for any commercial buyers in its new law because “[d]rawing a line that distinguishes between commercial buyers who need protection and those who do not is very difficult and the socio-economic gain relatively small”.²⁹⁴ The CGA which was eventually enacted in New Zealand includes protection for any business, including small businesses, when the goods or services acquired are of a kind ordinarily used for personal domestic or household use, unless one of the exceptions applies.²⁹⁵ In more recent times there have been calls for the recognition of small businesses as consumers.²⁹⁶ The recent extension of the unfair terms law in Australia, discussed above, is testament to a change in thinking regarding the protection of small businesses. The fact that developing a suitable definition of “small business” is difficult should not defeat a worthy argument for protection.

Including individuals (natural persons) and small businesses in the “consumer” definition could be achieved by using a definition that states that “consumer” means a person who acquires goods or services in trade. “Person” could then be defined to include individuals (or natural persons) and small businesses. A definition of “small business” would also be required. This approach is consistent with the policy behind consumer protection which aims to balance the inequality in bargaining power which exists in business transactions, recognising that small businesses are often in weak bargaining position as well as individuals.

Individuals who acquire goods or services of a commercial nature are in the same bargaining position as individuals who purchase goods or services that are ordinarily acquired for personal, domestic or household use; they are possibly in a weaker position if the goods are overly technical and expensive. Removing the “ordinary use” requirement and extending cover to all kinds of goods and services includes individuals who acquire goods or services of a commercial nature. If small business is to be included within the definition then it makes sense to remove the

²⁹⁴ D H Vernon *An Outline for Post-Sale Consumer Legislation in New Zealand* (Report to the Minister of Justice, December 1987, Iowa ISBN 0-477-07230-5) at 13.

²⁹⁵ Consumer Guarantees Act 1993, s 2.

²⁹⁶ A Freilich and E Webb “Small Business – Forgotten and in need of protection from unfairness?” (2013) 37(1) UWALR 134.

“ordinary use” requirement as many acquisitions of goods or services by small businesses will be of a commercial nature. The imbalance in bargaining power between small business and big business exists no matter what type of goods or services are being acquired.²⁹⁷

A definition which focuses on who is covered, rather than who is not covered, can be expressed reasonably simply and does not require detailed exclusions or contracting out provisions. As is noted above, the main difficulty with including small businesses is developing an acceptable definition of “small business”. In the interests of maintaining consistency within the ACL and between New Zealand and Australia, the best way forward may be to adopt the “small business” definition recently adopted in Australia in relation to the unfair terms law.²⁹⁸ This definition was adopted after a thorough consultation process.

A suggested definition which focuses on the identity of the party acquiring the goods or services, not the nature of the goods or services, or the purpose of acquisition, could take the following form:

“Consumer” means a person who acquires goods or services from a supplier;

“Person” means:

- i. an individual or natural person acting in his or her personal capacity; and*
- ii. a small business as defined below.*

“Small business” means a business that employs fewer than 20 persons which acquires goods or services where either of the following applies:

²⁹⁷ A Freilich and E Webb “Small Business – Forgotten and in need of protection from unfairness?” (2013) 37(1) UWALR 134; A Freilich “A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions” (2006) 33 UWALR 108 at 119; L Griggs, A Freilich and E Webb “Challenging the Notion of a Consumer: Time for Change” (2011) 19 CCLJ 52; and Freilich and Griggs “Just Who is the Consumer? Policy Rationales and a Proposal for Change” in Malbon and Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) at 50. See also: Consumer Affairs Australia and New Zealand *Extending Unfair Terms Protections to Small Businesses Consultation Paper* (Treasury, Australian Government, May 2014), available at: <<http://treasury.gov.au/consultationsandreviews/consultations/2014/small-business-and-unfair-contract-terms>> (accessed 14 September 2016).

²⁹⁸ Australian Consumer law, s 23.

- i. *the upfront price of the goods or services does not exceed \$300,000; or*
- ii. *the supply of goods or services has a duration of more than 12 months and the upfront price payable does not exceed \$1,000,000.*

*In counting the persons employed by a business for the purposes of this definition, a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.*²⁹⁹

The advantages of this definition are that it removes the problematic “ordinary use” requirement, retains protection for small business (with transaction value limits) and does not need a list of exclusions or contracting rights. This proposed definition also covers individuals who acquire goods or services that are ordinarily acquired for commercial use.

A definition which focuses on the identity of the party acquiring the goods or services and not the nature of the goods or services, or the purpose of acquisition, advances the primary rationale behind consumer law which is to balance inequality in bargaining power. A definition which removes consumer protection for big businesses also advances this rationale by recognising that big businesses can look after themselves.

A definition of “consumer” which covers supplies of all types of goods and services, acquired for any purpose is supported by the fact that there is no “consumer” restriction in the FTA or the ACL in relation to the misleading and deceptive conduct and unlawful trade practice provisions. These FTA and ACL provisions apply to anyone acting in trade and may be enforced by anyone, consumer or business alike. There is also no “consumer” restriction in the Sale of Goods Act 1908. The pre-CGA implied conditions in the Sale of Goods Act 1908 applied to a sale to any buyer of any kind of goods purchased for any purpose. The seller, however, had an unrestricted right to contract out of the Sale of Goods Act and the Act contained limited remedies for buyers.

²⁹⁹ This “small business” definition is based on the definition recently inserted in the unfair contract terms law in Australia by s 23 of Schedule 2 Competition and Consumer Act 2010 (Cth) (inserted by Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 - C2015A00147.

Widening the definition of “consumer” to cover individuals and small businesses who acquire any kind of goods or services for any purpose is not onerous for suppliers. The obligations and remedies contained in the CGA and the ACL in relation to supplies of goods and services do no more than require suppliers to meet the consumer’s reasonable expectations.³⁰⁰ These provisions do not impose criminal sanctions. It is not overly burdensome to expect suppliers to comply with the consumer guarantees and remedy provisions when supplying any type of goods or services to individuals or small businesses for any purpose.

3.8 CONCLUSION

If simplicity were the only goal then the definition of “consumer” used in the UK and the EU would be the answer. The appeal of the UK/EU definition is undeniable in that it may be expressed in one sentence without the need to refer to exclusions or exceptions. However, a new definition must advance the rationale behind consumer law. A definition which focuses on the identity of the party acquiring the goods or services and not the nature of the goods or services, or the purpose of acquisition, advances the primary rationale behind consumer law which is to balance inequality in bargaining power. Small businesses as well as individuals are worthy of protection due to the imbalance in bargaining power between small businesses and big business. It would be appropriate to use the definition of “small business” from the ACL unfair terms law in a new consumer definition for the acquisition of goods and services. Whatever option is taken, moves need to be made towards adopting the same definition across all consumer statutes in New Zealand and Australia in order to promote consistency.

³⁰⁰ D H Vernon *An Outline for Post-Sale Consumer Legislation in New Zealand* (Report to the Minister of Justice, December 1987, Iowa ISBN 0-477-07230-5) at 8.

Chapter Four

Online Shopping and Consumers – Is Conduct More Important Than Communication in Contract Formation?*

4.1 INTRODUCTION

As the number of consumers shopping online increases,³⁰¹ the contractual implications of consumers' interactions with websites while shopping remain unclear. This chapter considers the issues of contract formation in relation to contracts made by consumers who purchase products using interactive websites.³⁰² The consumer who shops online generally browses product displayed on a website, selects a product to purchase, indicates acceptance of the trader's terms, submits payment and awaits delivery of the product purchased. This chapter focuses on contract formation through this type of website interaction - not email communications. The steps involved in a typical consumer purchase scenario are outlined and this "consumer scenario" is analysed, in terms of contract law principles, in order to determine how and when these contracts are made.

An important feature of online shopping is that there is an absence of direct communication between the trader and the consumer before the purchase is complete.

* The text of this chapter was published in July 2013: T O'Sullivan "Online Shopping and Consumers – Is conduct more important than communication in contract formation?" (2013) 19 NZBLQ 95.

³⁰¹ Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (Report no. 56, Canberra, 2011) <<http://www.pc.gov.au/projects/inquiry/retail-industry/report>>; PwC and Frost & Sullivan *Australian and New Zealand online shopping market and digital insights July 2012* <<http://www.pwc.com.au/industry/retail-consumer/publications/digital-media-research/index.htm>>; PwC and Frost & Sullivan *Digital Media Research 2011 Australian and New Zealand Online Shopping Market Insights* <<http://www.pwc.com.au/industry/retail-consumer/publications/digital-media-research/index.htm>>; Office for National Statistics, *Retail Sales in Detail November 2011* <<http://www.ons.gov.uk>>; and Office for National Statistics, *Statistical Bulletin Retail Sales - January 2012* <<http://www.ons.gov.uk>>.

³⁰² The issues discussed and the conclusions reached in this paper also apply to non-consumer transactions though determinations around "the intention of the parties" that may differ in non-consumer transactions.

While shopping online, the consumer's interaction with the trader's website entails navigating the pages of the website, browsing products, making selections of product, providing information and making choices in response to computer generated prompts which follow selections or clicks on text boxes. These computer generated responses are built into the software which creates the website.³⁰³ Given the absence of direct communication between the parties, the contract law issues which arise may be better dealt with by focusing on the conduct of the parties involved rather than attempting to identify communications and analyse them in terms of offer and acceptance. Traditional contract law principles have long recognised the phenomenon of agreement by conduct.³⁰⁴ This chapter challenges the orthodox approach, that it is the consumer who makes the offer when shopping online, which is based on the view that the display of goods on a website is akin to the display of goods in a shop. The chapter argues that in the consumer scenario which is outlined, the trader makes the offer to sell through the conduct of setting up an interactive website in a particular manner and it is the consumer who accepts the offer by submitting payment details. The consumer's conduct of tendering valid payment details evidences the conclusion of an agreement and the contract is formed when this occurs. This conclusion is supported by analogy with a purchase from a vending machine and Lord Denning's analysis of contract formation in such a purchase in *Thornton v Shoe Lane Parking*.³⁰⁵

4.2 CURRENT TRENDS IN ONLINE SHOPPING

Modern technology is advancing at a significant rate and the development of wireless networks means that websites can now be accessed from mobile phones, ipads, ipods and other such tablet devices. Consumers may also access websites using QR codes (quick response codes) which take users directly to a website through capture of the QR code image by a smartphone or similar device. This means that the consumer's ability to shop online is getting easier and consumers can virtually shop "anytime anyplace".

³⁰³ This type of interaction is sometimes called "remote information transfer" - see: Judge David Harvey *internet.law.nz* (3rd ed, LexisNexis, Wellington, 2011) at 678.

³⁰⁴ *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666.

³⁰⁵ [1971] 2 QB 163; 1 All ER 686.

Despite the increasing popularity of, and ease of access to, online shopping, consumers have not fully embraced it. Recent survey results show that annual online shopping expenditure represented 5.1% of total retail sales in New Zealand in 2011 with a predicted rise to 6% in 2012.³⁰⁶ Survey results show similar rates in Australia with annual online shopping expenditure representing 5.5% of total retail sales in 2011 with a predicted rise to 6.3% in 2012.³⁰⁷ The United Kingdom shows higher rates, with annual internet retail sales at 12.2% of total retail sales in November 2011 compared with 9.5% of total retail sales in November 2010.³⁰⁸ Given the convenience of online shopping, the price competitiveness and the variety of products available, these rates are relatively moderate and there is scope for even greater uptake.

The reluctance of many consumers to engage in online shopping may be attributed to a lack of consumer confidence. An OECD report released in December 2009 notes: “Given the significant benefits of e-commerce to the economy and to consumers, it is important for governments and stakeholders to work together to ensure that the benefits are fully realised, which includes finding ways to boost consumer confidence in online transactions.”³⁰⁹ The Australian Productivity Commission has identified the following barriers to consumer confidence: concerns about the security of online payment mechanisms; the risk of fraudulent traders failing to supply goods; the risk of supply of defective goods; the difficulty in seeking redress, and the privacy of information.³¹⁰ Most of these barriers are compounded in cross border transactions.

³⁰⁶ PwC and Frost & Sullivan *Australian and New Zealand online shopping market and digital insights July 2012* available at: <<http://www.pwc.com.au/industry/retail-consumer/publications/digital-media-research/index.htm>>.

³⁰⁷ PwC and Frost & Sullivan *Australian and New Zealand online shopping market and digital insights July 2012* available at: <<http://www.pwc.com.au/industry/retail-consumer/publications/digital-media-research/index.htm>>. The Australian Productivity Commission recorded domestic and overseas online retail at 6% of total retail spending in 2010 – see: Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*” (Report no. 56, Canberra, 2011) 73 <<http://www.pc.gov.au/projects/inquiry/retail-industry/report>>.

³⁰⁸ Office for National Statistics, *Retail Sales in Detail November 2011* < <http://www.ons.gov.uk>> (figures exclude automotive fuel).

³⁰⁹ Organisation for Economic Co-operation and Development “Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy” Background Report Washington D.C. 8 – 10 December 2009 at p 6 available at: http://www.oecd.org/site/0,3407,en_21571361_43348316_1_1_1_1_1,00.html.

³¹⁰ Productivity Commission “Economic Structure and Performance of the Australian Retail Industry” Report November 2011, Canberra available at: <http://www.pc.gov.au/projects/inquiry/retail-industry/report>.

Development of processes and solutions to deal with many of these barriers can only be improved if the rules applying to contract formation are clarified. It is the purchase contract which forms the foundation of the relationship between the consumer and the trader and that contract determines many rights and obligations including whether possible remedies for the consumer flow from breach of contract.

4.3 ONLINE SHOPPING – A CONSUMER SCENARIO

There are many methods by which products can be purchased by consumers shopping online using interactive websites. A common process follows these steps:

- The consumer browses the range of products displayed for sale on the website and selects a product by clicking on an image or description of the product. The consumer may make more particular selections relating to size, colour, model or quantity of the selected product. The website generally indicates which sizes, colours or models are available for purchase;
- The consumer indicates an intention to purchase the particular product selected by clicking on a text box which says “add to cart”, “buy now”, “purchase” or some other phrase indicating a desire to purchase the product. The selected product is then listed in the consumer’s “shopping cart”;
- When ready to purchase, the consumer proceeds to an order confirmation page by clicking on a “checkout” text box. The consumer then provides personal information and delivery details unless these details have been retained by the trader following a previous transaction or have previously been provided by a consumer who has set up an account with the trader – in which case the consumer will be asked to confirm that the retained details are correct;
- To proceed with the purchase the consumer is required to check a box indicating acceptance of the trader’s terms and conditions or click on a text box which says “I agree” to the trader’s terms and conditions. These terms and conditions may be displayed on that webpage but usually the consumer is able to view the terms and conditions by clicking on a link. The terms and conditions are then displayed on another webpage or in a pop-up box. Once acceptance of the terms

and conditions has been indicated, the transaction proceeds whether the consumer has viewed the terms and conditions or not;

- The consumer pays for the selected product by inputting credit card details or confirming that retained credit card details are correct. When the credit card details are completed or confirmed a “submit” text box is clicked and the consumer authorises payment to the trader. Assuming the credit card details are correct and there are no other problems with the credit card, the trader may take payment using the credit card details;
- A webpage will confirm that payment has been authorised and an order number may be displayed. At this point it is common for the trader to send a computer generated email to the consumer’s email address (if one has been provided) confirming that the purchase is complete;
- From the trader’s point of view, the website software generally sends an email to the trader advising that an order has been placed when the consumer’s payment is authorised; and
- The final step in the sale process is completion of delivery of the product to the consumer. Goods will be delivered to the physical address provided by the consumer. If the product is downloadable then delivery is facilitated by allowing the consumer to download the material to a device controlled by the consumer. If the product is a type of ticket the consumer may be given instructions on how to access a printable version of the ticket.

It is this scenario of website purchase by consumers that will be considered in detail in this chapter. This scenario will be referred to as “the Consumer Scenario”. In this scenario there may be no direct communication between the trader and the consumer until a computer generated email is sent to the consumer confirming that the purchase is complete. The interaction with the consumer, while connected to the website, is via automated responses generated by software built into the website. “Consumer” is used in the broadest sense and is intended to cover any non-business purchaser.

4.4 CONTRACT FORMATION AND WEBSITE INTERACTION

One of the essential elements of a completed contract is evidence of agreement through communication of offer and acceptance. Traditional contract law principles enable the exact time when the contract is made to be determined by ascertaining the point when acceptance is communicated to the offeror. Determining when the contract is made, is an important issue as it impacts on other issues such the incorporation of terms, the jurisdiction and law of the contract,³¹¹ the passing of property in relation to specific goods,³¹² and, of course, whether there is a contract at all. Ascertaining the point in time when acceptance is communicated is not always easy, due to the numerous methods by which communications can be made and the fact that there may be an absence of communication in the making of a contract by conduct. The “postal rule” provides an exception to the general rule that acceptance is communicated when it is received. Where a contract is made using the postal service, acceptance is communicated when the letter is posted.³¹³ It is generally accepted that the postal rule does not apply to email communications because they are virtually instantaneous.³¹⁴ The determination of whether the postal rule applies to email communications does not assist in determining when acceptance occurs where a contract is made using an interactive website.

³¹¹ Article 16 of European Council Regulation (EC) 44/2001 provides that consumers must be sued in the European member state in which they are domiciled but allows consumers to bring proceedings in either the state in which they are domiciled or the state in which the other party is domiciled.

³¹² Sale of Goods Act 1908 (NZ), Rule 1 s.20; Sale of Goods Act 1979 (UK), Rule 1 s.18; Sale of Goods Act 1954 (ACT), s.23(2); Sale of Goods Act 1923 (NSW), Rule 1 s.23; Sale of Goods Act (NT), Rule 1 s.23; Goods Act 1958 (VIC), Rule 1 s.23; Sale of Goods Act 1895 (SA), Rule 1 s.18; Sale of Goods Act 1896 (TAS), Rule 1 s.23; Sale of Goods Act 1895 (WA), Rule 1 s.18; and Sale of Goods Act 1896 (QL), Rule 1 s.21.

³¹³ *Adams v Lindsell* (1818) 1 B & Ald 681. Note: the postal rule does not apply to international sales of goods, in which acceptance is effective on communication to the offeror or on delivery. Articles 18(2), 21 and 24 of the United Nations Convention on Contracts for the International Sale of Goods – in force in New Zealand under the Sale of Goods (United Nations Convention) Act 1994.

³¹⁴ Eliza Mik “The Unimportance of being “electronic” or – popular misconceptions about “Internet contracting”” (2011) 19(4) Intl J L & Info Tech 324 at 330; K O’Shea and K Skeahan “Acceptances of Offers by Email: How Far Should the Postal Rule Extend?” (1997) 13 QUT Law Journal 247; Justin Hogan-Doran “Jurisdiction in cyberspace: The when and where of on-line contracts” (2003) 77 ALJ 377; C Glatt “Comparative Issues in the Formation of Electronic Contracts” (1998) 6 (1) Intl J L & Info Tech 34; Sharon Christensen “Formation of Contracts by Email – Is it Just the Same as the Post?” (2001) Queensland University of Technology Law & Justice Journal 24; and Kate Tokeley “Shopping on the Net: Legal Protection for Consumers” (1997) 9 Otago Law Rev 51. See also: *Olivaylle Pty Ltd v Flottweg GMBH & KGAA (No.4)* (2009) 255 ALR 632; [2009] FCA 522.

While there is much literature discussing the implications of using email to communicate acceptance and its implications on contract formation,³¹⁵ less has been written about the timing of contract formation when a consumer uses an interactive website to purchase products and the transaction is completed through a series of clicks on webpages and by providing information when prompted by the website.³¹⁶ Up to the point when the purchase confirmation email is sent, the consumer's interaction with the website involves reacting to computer generated prompts which are displayed in response to the consumer's navigation of the website. The communication between the parties to the contract is one sided: the consumer is in direct communication with the website but the other party to the contract, the trader, has enabled computer software built into the website, to respond on its behalf. This type of one sided transaction is akin to the making of a purchase from a vending machine³¹⁷ or buying goods in a shop where no communication passes between the seller and purchaser – for example, when electronic self-service checkout devices are used at supermarkets. The fact that there may be no actual communication with the trader until the transaction is complete means that the consequences of applying the traditional concepts of offer and acceptance to the formation of a purchase contract by a consumer using a website are far from clear.

³¹⁵ Judge David Harvey *internet.law.nz* (3rd ed, LexisNexis, Wellington, 2011) at 680; B Fitzgerald, A Fitzgerald, E Clark, G Middleton and YF Lim *Internet and E-Commerce Law – Business and Policy* (Thomson Reuters, Sydney, 2011) at 746; K O'Shea and K Skeahan "Acceptances of Offers by Email: How Far Should the Postal Rule Extend?" (1997) 13 QUT Law Journal 247; Justin Hogan-Doran "Jurisdiction in cyberspace: The when and where of on-line contracts" (2003) 77 ALJ 377; C Glatt "Comparative Issues in the Formation of Electronic Contracts" (1998) 6 (1) Intl J L & Info Tech 34; Eliza Mik "The Unimportance of being "electronic" or – popular misconceptions about "Internet contracting"" (2011) 19(4) Intl J L & Info Tech 324; and Kate Tokeley "Shopping on the Net: Legal Protection for Consumers" (1997) 9 Otago Law Rev 51.

³¹⁶ Jeannie Marie Paterson "Consumer Contracting in the Age of the Digital Natives" (2011) 27 Journal of Contract Law 152 at 157; Saul Squires "Some Contract Issues Arising from Online Business-Consumer Agreements" (2000) 5(1) Deakin Law Rev 95 at 103; Andrew Pang "Contract Formation and Mistake in Cyberspace" (2005) 21 Journal of Contract Law 197 at 199; and Sharon Christensen "Formation of Contracts by Email – Is it Just the Same as the Post?" (2001) Queensland University of Technology Law & Justice Journal 24 at 28.

³¹⁷ J Burrows, J Finn and S Todd in *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [3.4.7] where the authors suggest that "in determining whether a display of goods on a website is an offer or an invitation to treat the Courts may draw analogies with the law relating to automatic vending machines and the like".

The Singapore High Court judgment of Rajah JC in *Chwee Kin Keong v Digilandmall.com Pte Ltd*³¹⁸ provides a useful discussion of the issues involved in a consumer purchase using an online retailer's website. The six plaintiffs in the case sought to confirm the validity of their contracts to purchase 1,606 Hewlett Packard laser printers at a price of \$66 each. The price of \$66 was displayed on the seller's website by mistake. The correct price of the printers was \$3,854 each. The six plaintiffs purchased printers from the seller's website by responding to the computer generated prompts displayed on the website. The purchase orders were processed using an automated system which dispatched purchase confirmation emails to the plaintiffs. One of the plaintiffs did not receive the confirmation email because his email inbox was full. When the seller became aware of the pricing mistake, the purchasers were informed of the error and were advised that the orders would not be met. Subsequently the plaintiffs sued to enforce the contracts. Rajah JC noted:

It is not really in issue that contracts can be effectively concluded over the Internet and that programmed computers sending out automated responses can bind the sender. The events of an offer and acceptance are *ex facie* satisfied in every transaction asserted in the plaintiffs' claims.³¹⁹

He also noted that the confirmation emails sent out by the sellers "had all the characteristics of an unequivocal acceptance".³²⁰ Ultimately, the court ruled that this was a case of unilateral mistake and justice would not allow the contracts to stand. Rajah JC made some enlightening comments regarding contract formation using the internet, he noted that:³²¹

There is no real conundrum as to whether contractual principles apply to Internet contracts. Basic principles of contract law continue to prevail in contracts made on the Internet. However, not all principles will or can apply in the same manner that they

³¹⁸ [2004] 2 SLR 594; [2004] SGHC 71.

³¹⁹ *Ibid* at [134].

³²⁰ *Ibid* at [136].

³²¹ *Ibid* at [91].

apply to traditional paper-based and oral contracts. It is important not to force into a Procrustean bed principles that have to be modified or discarded when considering novel aspects of the Internet.

The decision of the High Court was upheld by the Singapore Court of Appeal which stated in relation to contract formation:³²²

It is common ground that the principles governing the formation of written or oral contracts apply also to contracts concluded through the Internet. In the present case, it is not in dispute that *prima facie* a contract was concluded each time an order placed by each of the appellants was followed by the recording of the transaction as a "successful transaction" by the automated system. The system would also send a confirmation e-mail to the person who placed the order within a few minutes of recording a "successful transaction".

The Court of Appeal seems to equate acceptance or contract formation with the webpage which noted that the transaction was successful rather than the confirmation email which the High Court described as "unequivocal acceptance". These decisions leave the question of the timing of contract formation open to debate.

The statements of the Singapore courts which refer to existing contract law principles, accord with the view of Mik who asserts that basic principles of contract law can accommodate new contracting scenarios, including internet contracting, without the need to develop new categories or principles of contract law.³²³ Pang also notes the importance of Rajah JC's general proposition that basic principles of contract law continue to prevail in contracts made on the internet.³²⁴

In terms of consumer shopping using a website, it is helpful to attempt to identify which steps in the sale process correspond with the concepts present in the

³²² [2005]1 SLR 502; [2005] SGCA 2 at [29].

³²³ Eliza Mik "The Unimportance of being "electronic" or – popular misconceptions about "Internet contracting"" (2011) 19(4) Intl J L & Info Tech 324 at 325.

³²⁴ Andrew Pang "Contract Formation and Mistake in Cyberspace" (2005) 21 Journal of Contract Law 197.

traditional contract law approach. What follows is an analysis of the Consumer Scenario, in terms of traditional contract law principles, including the phenomenon of agreement through offer and acceptance and the intention of the parties to create legal relations.

4.5 THE CONSUMER SCENARIO – TRADITIONAL CONTRACT LAW ANALYSIS

4.5.1 Invitations to Treat

An invitation to treat often precedes the making of an offer and there may be debate about whether certain actions constitute offers or invitations to treat. An invitation to treat is some form of conduct which entices or invites the making of an offer. The essential difference between an invitation to treat and an offer is that there is no intention to create legal relations shown in an invitation to treat. *Chitty on Contracts* notes that an invitation to treat is distinguishable from an offer primarily on the ground that it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms.³²⁵

The conclusion on whether certain actions are invitations to treat or offers, in any particular case, will have flow on consequences in respect of what constitutes the offer and what constitutes acceptance. The display of products for sale on a website can be considered to be an invitation to treat in much the same way as the display of goods for sale in a shop has been held to be an invitation to treat.³²⁶ *Chitty on Contracts* notes that principles similar to those which apply to displays of goods for sale in shops “would seem to apply where a supplier of goods or services indicates their availability on a website: that is, the offer would seem to come from the customer (e.g. when he

³²⁵ HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-008].

³²⁶ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795, 2 All ER 456, aff’d [1953] 1 QB 401, 1 All ER 482; *Fisher v Bell* [1961] 1 QB 394; HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-014].

clicks the appropriate “button”) and it is then open to the supplier to accept or reject that offer”.³²⁷ Davies agrees.³²⁸

It is, however generally, accepted that most Web pages or electronic mail messages that inform users of the availability of goods or services are akin to advertisements and so constitute invitations to treat. Hence the user, when he replies to such an advertisement makes an offer to the commercial entity.

The authors of *Internet and E-Commerce Law – Business and Policy* also suggest that it is the consumer who makes the offer in response to the website trader’s invitation to treat.³²⁹ They state: “The responses of website customers to the online trader’s invitation to treat will usually constitute offers, which may be accepted or rejected by the online trader.”³³⁰

In *Chwee Kin Keong*, Rajah JC does not accept that a display of product for sale on a website is always an invitation to treat. He notes that it is “open to a merchant to offer by way of an advertisement the mechanics of a unilateral or bilateral contract”.³³¹ Rajah JC suggests that in some situations the display of products on a website could be an offer. Pang comments, in relation to Rajah JC’s judgment:³³²

And while the general common law proposition to the effect that shop displays are generally invitations to treat was noted, Rajah JC refused to adopt this as a proposition of law that was writ in stone. Such an approach is to be welcomed because, even in the more traditional context of a physical shop display, the rationale for the general

³²⁷ HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-014].

³²⁸ L Davies “Contract Formation on the Internet: Shattering a Few Myths” in L Edwards and C Waelde (eds) *Law and the Internet* (Hart Publishing, Oxford, 1997) p 115. See also: C Glatt “Comparative Issues in the Formation of Electronic Contracts” (1998) 6 (1) *Intl J L & Info Tech* 34 at 51.

³²⁹ B Fitzgerald, A Fitzgerald, E Clark, G Middleton and YF Lim *Internet and E-Commerce Law – Business and Policy* (Thomson Reuters Sydney, 2011) at 743.

³³⁰ B Fitzgerald, A Fitzgerald, E Clark, G Middleton and YF Lim *Internet and E-Commerce Law – Business and Policy* (Thomson Reuters Sydney, 2011) at 743.

³³¹ [2004] 2 SLR 594; [2004] SGHC 71at [94].

³³² Andrew Pang “Contract Formation and Mistake in Cyberspace” (2005) 21 *Journal of Contract Law* 197 at 199.

proposition just mentioned is not wholly persuasive. ... it might be best to allow the courts to construe the precise language and intention of the website advertisement concerned, without tying it down to any default rule.

Tokeley agrees with this view when she states: “It might be thought that the supplier’s advertisement on the internet is always merely an invitation to treat as is the case with most displays of goods in shops. ... In some situations, however the supplier’s advertisement on the internet will manifest an intention to be bound upon the consumer's acceptance.”³³³ Christensen also argues in relation to interactive websites that “the display on the website may go beyond mere invitation to treat” because the terms of any agreement are commonly displayed on the website and the consumer agrees to those terms at the time of ordering.³³⁴ Ultimately the distinction between an invitation to treat and an offer depends on the intention of the party whose conduct is being examined and a display of goods may well amount to an offer.³³⁵

The critical characteristic of an invitation to treat is the provision of information or conduct which is designed to invite or encourage an offer from the other party. The party who makes the invitation to treat does not expect to be bound in a contract as a result of the first response from another party. *Chitty on Contracts* notes in relation to non-shop displays: “There is no perfectly general answer to the question whether such displays are offers or invitations to treat; the answer depends in each case on the intention with which the display was made.”³³⁶ An important difference between a shop display and a display of product for sale on a website in the Consumer Scenario, is that in the shop scenario the trader can decline to accept the consumer’s offer to purchase at the counter before payment is made but the website trader does not have the opportunity to decline to accept an offer from the consumer before payment is made. When making a purchase online, the consumer’s intention to purchase is usually revealed to the trader through the submission of payment details by the consumer. Most websites are set up so

³³³ Kate Tokeley “Shopping on the Net: Legal Protection for Consumers” (1997) 9 Otago Law Rev 51 at 55.

³³⁴ Sharon Christensen “Formation of Contracts by Email – Is it Just the same as the Post?” (2001) Queensland University of Technology Law & Justice Journal 24 at 28.

³³⁵ See: *Chapelton v Barry UDC* [1940] 1 All ER 356; *Keating v Horwood* (1926) 135 LT 29; *Phillips v Dalziel* [1948] 2 All ER 810; and *R v Warwickshire CC ex p Johnson* [1993] AC 583.

³³⁶ HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-016].

that the website software sends an email to the trader notifying the trader that a purchase has been made when the payment has been authorised. In these circumstances, the display of product for sale on a website in a way which enables product to be selected and payment to be submitted before the trader can decline to sell a particular product must be more than an invitation to treat.

Sound arguments can be made for and against the proposition that, generally, displays of goods on websites are invitations to treat rather than offers and each case will be decided in relation to its particular facts. Websites are often designed to create the image of a “virtual store” and consumers are encouraged to browse through product ranges using drop down category lists. The initial display of products for sale on a website in a situation like the Consumer Scenario should generally be construed as an invitation to treat. However, the trader’s conduct of setting up a website, which enables the consumer to select product at a specified price and tender payment for that product, may transform that initial invitation to treat, through simple display of product, into an offer. The setting up of a website which enables the consumer to select and pay for product to be supplied on specified terms shows the trader’s intention to be bound in a contract on indication of agreement to those terms and payment. In these circumstances the trader’s website may well be making an offer to sell rather than an invitation to treat.

4.5.2 The Offer

An offer has been described as “an expression of willingness to contract on specified terms made with the intention (actual or apparent) that it is to become binding as soon as it is accepted by the person to whom it is addressed”.³³⁷ The authors of *Law of Contract in New Zealand* state: “An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided that certain specified terms are accepted.”³³⁸ Contract law has long recognised that an offer can be made to “all the world” if the offeror shows an intention to be bound.³³⁹

³³⁷ HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-003].

³³⁸ Burrows, Finn, Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [3.2.3]

³³⁹ *Carlill v Carbolic Smoke Ball Co. Ltd* [1892] 2 QB 484 aff’d [1893] 1 QB 256. An online trader can of

It may be argued, in relation to the Consumer Scenario, that the website trader makes an offer to sell through the conduct of setting up a website which:

- (i) enables the consumer to select a particular product at a specified price;
- (ii) requires the consumer to indicate agreement to the terms and conditions on which the product will be sold; and
- (iii) enables the consumer to submit payment details.

The terms of such an offer are certain: the subject matter is identified, the price is clear and the terms and conditions of supply are specified. In the context of purchasing a ticket using an interactive website, Paterson notes that confirmation by the ticket seller that the requested tickets are available, is an offer, capable of acceptance by the consumer.³⁴⁰

The trader's conduct of operating an interactive website shows an intention to be bound to sell the product selected on the terms set out on the website when the consumer submits valid payment details. One of the arguments against this conclusion is that the trader may have insufficient stock to satisfy all acceptances to an offer made in this way. This argument has been used to justify the conclusion that shop displays are generally invitations to treat rather than offers.³⁴¹ This justification has been criticised by Treitel in *The Law of Contract* where he states in relation to shop displays:³⁴²

... if the display were regarded as an offer, the retailer might be exposed to many actions for damages if more customers purported to accept than his stock could satisfy. But such an offer could be construed as one which automatically expired when the

course limit the group of persons who are able to accept any such offer by declaring that the offer is only available to persons resident in specified countries or by restricting a person's ability to proceed with a purchase if they reside in countries which the trader does not wish to deal with.

³⁴⁰ Jeannie Marie Paterson "Consumer Contracting in the Age of the Digital Natives" (2011) 27 *Journal of Contract Law* 152 at 157.

³⁴¹ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795, 2 All ER 456, aff'd [1953] 1 QB 401, 1 All ER 482; HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-017].

³⁴² Treitel *The Law of Contract* (12th ed, Sweet and Maxwell, London, 2007) at [2-009]. See also: J Unger "Self-Service Shops and the Law of Contract" (1953) 16 *MLR* 369 and JL Montrose "The Contract in Self-service Stores" (1955) 4 *Am J Comp Law* 235.

retailer's stock was exhausted: this would probably be in keeping with the common expectation of both retailer and customer.

Glatt also suggests that it would be realistic to assume an offer with an implied term "open for acceptance while stocks last".³⁴³ Courts may be reluctant to imply such a term but the trader is free to include a specific term which states that its products are sold on an "as available" basis.

Most website software is sophisticated enough to manage stock levels and immediately remove product from availability when it has run out. This means that consumers are usually only able to select product that is available. The fact that the consumer may be able to select product that is no longer available does not prevent the creation of a contract. There is no restriction in law on the making of contracts in relation to future goods or product. If the trader is bound in a contract to sell product that is not available then the trader may comply with the contract by obtaining the product from elsewhere or the trader may breach the contract and may be required to refund the purchase price on the basis of a failure to perform the contract. If the consumer accepts an offer to sell goods by submitting valid payment details and it turns out that the goods are not available then the remedy of damages for non-delivery would be available under the relevant Sale of Goods Act.³⁴⁴ The consumer could also bring an action for recovery of the purchase price based on a failure of consideration.³⁴⁵ The onus should be on the trader to ensure that only available stock is displayed for sale.

A trader who does not operate a sophisticated website which tracks stock levels or who displays product for sale which must be sourced from other traders can avoid

³⁴³ C Glatt "Comparative Issues in the Formation of Electronic Contracts" (1998) 6(1) Intl J L & Info Tech 34 at 50.

³⁴⁴ In New Zealand see: Sale of Goods Act 1908 (NZ), s 52. See also: Sale of Goods Act 1954 (ACT), s 54; Sale of Goods Act 1923 (NSW), s 53; Sale of Goods Act (NT), s 53; Sale of Goods Act 1896 (QL), s 52; Sale of Goods Act 1895 (SA), s 50; Sale of Goods Act 1896 (TAS), s 55; Goods Act 1958 (VIC), s 57; Sale of Goods Act 1895 (WA), s 50 and Sale of Goods Act 1893 (UK), s.51 which provide a right to claim damages for non-delivery. While the Consumer Guarantees Act 1993 (NZ) and the Australian Consumer Law do not currently provide remedies for a failure to supply (or deliver) goods or services, clause 35A of the New Zealand Consumer Law Reform Bill proposes the introduction of a new guarantee that goods will be delivered within a reasonable time if the supplier is responsible for delivery and no time for delivery is agreed - by inserting section 5A into the Consumer Guarantees Act 1993.

³⁴⁵ s 55 (NZ) and s 54 (UK) confirm the common law right to recover the purchase price due to a failure of consideration.

being bound in a contract to sell product that is unavailable by ensuring that the consumer is not able to tender payment details until the trader has checked that product is available. A website can be set up so that an order is taken without payment details being submitted – in such a case the making of the order by the consumer without submitting payment details would be an offer.

Another argument against a conclusion that it is the trader who makes the offer through the conduct of operating an interactive website, is that the trader may be bound by a mistake in the information displayed about the product. For example, the incorrect price may be displayed, as happened in *Chwee Kin Keong*³⁴⁶ where printers were displayed for sale on a website at a significant under price. The Singapore courts dealt with this issue in *Chwee Kin Keong* by applying the doctrine of unilateral mistake³⁴⁷ and found that the purchase contracts were void. The judgments in *Chwee Kin Keong* confirm that issues arising due to a mistake in the displayed price of a product on a website may be resolved using the law of mistake. However, the law of mistake will not aid a trader who makes a mistake on a website where the consumer has insufficient knowledge of the existence of the trader's mistake. This limitation on the law of mistake should not preclude a determination that the trader may offer to sell product by operating an interactive website. It will be difficult for a consumer to argue that they were not aware of a mistake relating to price if the mistake is reasonably significant. If the consequences of the mistake are not significant and the consumer does not have notice of the mistake then the trader should bear any loss resulting from a contract made on the basis of such a mistake. There must be an onus on the trader who conducts business using a website to ensure that all information is accurate. The trader's terms and conditions may in any event preclude liability when information has been displayed on a website due to a mistake or error on the trader's part.

To summarise, factors which support an analysis which concludes that it is the trader who makes the offer through the conduct of operating an interactive website include:

³⁴⁶ [2004] 2 SLR 594; [2004] SGHC 71.

³⁴⁷ In New Zealand the law on unilateral mistake has been codified in the Contractual Mistakes Act 1977 which grants the court wide powers to grant relief when qualifying mistakes are established. A unilateral mistake is only actionable under the Contractual Mistakes Act 1977 if the non-mistaken party has actual knowledge of the mistake. See: *Tri-Star Customs and Forwarding Ltd v Denning* [1999]1 NZLR 33 at 37.

- (1) Sophisticated software built into most websites ensures that only available product is displayed for sale;
- (2) Significant mistakes made by the trader in the price of product displayed can be dealt with by the doctrine of unilateral mistake;
- (3) The terms and conditions on which the trader intends to be bound are specified on the website; and
- (4) The trader enables the consumer to submit payment details following indication of acceptance of the trader's terms and conditions.

While the initial display of product on a website may be an invitation to treat, the trader's overall conduct of operating an interactive website turns that initial invitation to treat into an offer. The conduct of the trader in setting up and activating the website amounts to a promise to sell the product selected by the consumer at the specified price, on the terms and conditions set out on the website when the consumer submits valid payment details. This conduct shows the trader's intention to be bound and indicates that it is the trader who makes the offer in the Consumer Scenario outlined above.

4.5.3 Acceptance

Acceptance is defined in *Chitty on Contracts* as "a final and unqualified expression of assent to the terms of an offer".³⁴⁸ *Chitty on Contracts* notes that in the case of a self-service shop, acceptance of any offer which might be made by the terms of the display would normally take place, not when the customer takes the goods off the shelf, but when the customer does some less equivocal act, such as presenting the goods for payment.³⁴⁹

The more difficult part of the analysis, in relation to the Consumer Scenario, involves determining when an offer, made through the trader's conduct of setting up an interactive website, is accepted by the consumer. In navigating the website to make a purchase, the consumer locates the desired product and selects the product by clicking on a text box which says "add to cart", "purchase" or "buy now". Selection of product

³⁴⁸ HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-027].

³⁴⁹ HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-015].

in this way would not amount to acceptance because the consumer has not indicated acceptance of the trader's terms and conditions nor submitted payment details at this point. It may be that the consumer accepts the trader's offer to sell by indicating agreement to the trader's terms and conditions of sale. However, in the Consumer Scenario, this indication of acceptance of terms is not communicated to the trader until the transaction proceeds to the point where the consumer submits valid payment details. Most consumers understand that they are not committed to making the purchase until they provide payment details. Until payment details are submitted they can simply close a website and walk away without commitment to a purchase. Paterson notes that in an online ticket purchase, using an interactive website, "consumers are committed to the transaction from the point at which they enter their payment details and confirm that they wish to proceed with the purchase".³⁵⁰ It is on providing payment details that consumers disclose an intention to create legal relations. Once credit card details are submitted it is very difficult for a consumer to reverse the transaction and the ability to re-credit the card holder depends on the practices of the bank who issued the credit card.³⁵¹ The website software generally sends an email to the trader when payment has been authorised notifying the trader that a purchase has been made. The trader may not even be aware that a consumer has placed product in a shopping cart and indicated acceptance of terms until notified by the website software that payment of the purchase price has been made.

The point in time when the consumer accepts the trader's offer to sell on specified terms is when valid payment details are provided. This is usually done by providing credit card details and clicking on a text box which says "submit". Consumers disclose an intention to be bound through their conduct of clicking "submit" which authorises payment to the trader. This argument is supported Paterson's conclusion that an online ticket seller's offer to sell tickets may be accepted by the consumer's conduct of confirming the request to purchase specific tickets.³⁵² Such confirmation is evidenced by the conduct of submitting payment details.

³⁵⁰ Jeannie Marie Paterson "Consumer Contracting in the Age of the Digital Natives" (2011) 27 *Journal of Contract Law* 152 at 157.

³⁵¹ For a useful discussion of this issue see: Helen Corner "New Zealand Consumers and Internet Purchases" (2001) 32 *VUWLR* 573.

³⁵² *Ibid* at 158.

A factor which supports a conclusion that the consumer accepts the trader's offer by submitting valid payment details is that this conduct also amounts to performance of the contract by the consumer, i.e. payment of the purchase price. *Chitty on Contracts* notes, in relation to unilateral offers, "that the offer can be accepted by full performance".³⁵³ It is difficult to comprehend a scenario where one party has enabled the other party to perform the contract but is still able to argue that acceptance has not occurred.

Once the correct payment details are provided and payment is authorised, an order confirmation message is usually displayed on the website which says something like "your payment has been processed", "accepted" or "authorised". A computer generated email is also sent directly to the consumer confirming that the purchase is complete. In *Chwee Kin Keong*, Rajah JC noted in the context of that case that this type of email confirmation "had all the characteristics of unequivocal acceptance".³⁵⁴ Unfortunately, Rajah JC did not make a decision on when acceptance occurred in the case of the sixth defendant who did not receive the confirmation email because his email inbox was full. In the absence of full arguments on the issue of when the contract was formed, Rajah JC stated: "I do not think it is appropriate for me to give any definitive views in these proceedings in relation to this very important issue."³⁵⁵ This statement illustrates the continuing uncertainty surrounding the timing of contract formation and the difficulty in pin pointing the exact time of formation due to the different scenarios that may play out. The authors of *Law of Contract Law in New Zealand* note that "... the common feature of a confirmatory email message from the vendor, generated as an automated part of the process, is not an acceptance of an offer but only a record of the transaction".³⁵⁶ If the consumer's submission of payment details amounts to acceptance then it is correct to say that the confirmation email is not acceptance but only a record of the transaction.

³⁵³ HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-078].

³⁵⁴ [2004] 2 SLR 594; [2004] SGHC 71at [136].

³⁵⁵ *Ibid* at [99].

³⁵⁶ Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [3.4.7].

4.5.4 *Smythe v Thomas*

The issue of online contract formation was discussed by the Supreme Court of New South Wales in *Smythe v Thomas*³⁵⁷ in relation to an online auction website. The Supreme Court declined to apply the traditional rule in contracts made by auction, which deems a bid to be an offer which is able to be accepted by the auctioneer on behalf of the seller.³⁵⁸ The Court found that the actions of the online bidder in *Smythe v Thomas* amounted to acceptance. The case concerned the listing for sale of a Wirraway aircraft on the eBay auction website. The Court decided that the seller had made an “offer” by listing the aircraft for sale with a reserve price. In coming to the conclusion that a binding contract for the sale of an aircraft had been formed Rein JA stated:³⁵⁹

In my view, the seller, by listing the Wirraway on eBay's site with an effective disclosed reserve of \$150,000 offered to sell the Wirraway to that bidder who:

- (a) bid within the specified time period;
- (b) made a bid of at least \$150,000;
- (c) was the highest bidder of those who made bids in accordance with (a) and (b); and
- (d) did not qualify or seek to impose a qualification on his bid to which the seller had not previously indicated his willingness to consent.

The judge clearly identified the seller as being the offeror, in which case it was the buyer who accepted the offer by being the highest bidder at the specified time. Although Rein JA did not identify what conduct amounted to acceptance specifically, there was no “communication” involved in this transaction which signified acceptance. It must have been the buyer’s conduct of bidding and becoming the highest bidder at the specified time which amounted to acceptance. At the point of acceptance there was no communication, but a running down of the clock. *Smythe v Thomas*³⁶⁰ adds weight to

³⁵⁷ [2007] NSWSC 844, (2007) 71 NSWLR 537.

³⁵⁸ *Payne v Cave* (1789) 2 TR 148.

³⁵⁹ *Ibid* at [39].

³⁶⁰ [2007] NSWSC 844, (2007) 71 NSWLR 537.

the argument that acceptance when purchasing using interactive websites may be identified by conduct rather than communication.

4.5.5 Impact of the Trader’s Terms and Conditions on Acceptance

The trader’s terms and conditions posted on the website may specify the point in time when the contract is made.³⁶¹ If these terms and conditions have been successfully incorporated into the contract then they will have a bearing on when the contract was made – if at all. The authors of *Law of Contract in New Zealand* note that: “Normally such conditions specify the point at which the supplier or agent considers the contract has been formed and the purchaser has of course accepted that this will be the position.”³⁶² Whether such terms and conditions are incorporated will depend on whether the consumer received adequate notice and the specific nature of the terms and conditions. It is beyond the scope of this chapter to discuss these issues further.

4.6 AGREEMENT BY CONDUCT

It has long been accepted that the “agreement” of the parties may be evidenced by the conduct of the parties.³⁶³ The authors of *Law of Contract in New Zealand* refer to the global or objective approach to contract formation when it is difficult or impossible to analyse the transaction in terms of offer or acceptance.³⁶⁴ The authors note that:³⁶⁵

³⁶¹ Article 10 of the EU Directive on Electronic Commerce adopted in 2000 (Directive 2000/31/EC) requires the provider of a service, which enables a contract to be made using electronic communication, to provide information about the technical steps which must be followed to conclude a contract. This directive has been implemented in the United Kingdom by the Electronic Commerce (EC Directive) Regulations 2002.

³⁶² Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [3.4.7].

³⁶³ Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [3.3.1]; and HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet and Maxwell, London, 2008) vol 1 at [2-005] and [2-030].

³⁶⁴ Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [3.2.1].

³⁶⁵ Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [3.3.1].

Conduct alone may objectively establish acceptance, as where a consumer pays, by cash or electronically, for goods or services from an automated vending device or the dispatch of goods in response to an offer to purchase them, or the opening of packaging and use of the packaged goods by a consumer who had been expressly notified that such conduct will constitute acceptance.

Agreement by conduct was recognised in *Brogden v Metropolitan Railway Co*³⁶⁶ where the vendor supplied coal and the buyer accepted and paid for the coal for a number of years without ever formally agreeing to draft terms. The House of Lords held that once the buyer began to accept deliveries of coal, there was a contract based on the draft terms. It was the conduct of ordering and supplying the coal which evidenced the parties' agreement. Pointing to conduct which evidences agreement in a consumer purchase using a website is a more satisfactory way of determining when the contract is made, as opposed to focusing on communications of offer and acceptance. The practical reality is that purchase contracts using interactive websites may be completed without direct communication between humans. Fortunately, the law has already developed to accept that contracts can be inferred from conduct.

Lord Denning's decision in *Thornton v Shoe Lane Parking*³⁶⁷ provides helpful guidance on what conduct constitutes offer and acceptance in a contract inferred from conduct. The case involved the purchase of a parking ticket using an automated vending machine. With regard to the offer and acceptance analysis of a contract made using a vending machine Lord Denning stated:³⁶⁸

The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of

³⁶⁶ (1877) 2 App Cas 666.

³⁶⁷ [1971] 2 QB 163; 1 All ER 686.

³⁶⁸ [1971] 2 QB 163 at 169; 1 All ER 686 at 689.

the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot.

Lord Denning identified the conduct which amounted to the offer as, the proprietor of the machine holding it out as “ready to receive the money”. The vending machine proprietor’s conduct of holding the machine out as ready to receive the money is analogous to a website trader’s conduct of providing an information box which enables the consumer to insert payment details and click “submit”. Lord Denning identified the conduct which amounted to acceptance as the customer putting “his money into the slot”. This conduct of acceptance can be equated with a consumer clicking on “submit” following input of payment details in the information box provided by the trader.

Mik makes the point that “how people use technology matters more than technology itself”.³⁶⁹ A consumer who purchases goods from a website should not be required to understand how the internet works or the intricacies of web browsers and software protocols in order to be confident that a contract to purchase has been completed. It is the action of following the steps on the website, clicking the appropriate text boxes and providing the required payment information that forms the contract.

4.7 CONCLUSION

It is clear that the traditional principles of contract law can adapt to govern the making of consumer purchase contracts using interactive websites. The key to this adaptation will be a shift towards focusing on the conduct which creates the agreement rather than focusing on the communication between the consumer and the trader. It is difficult to point to communications of offer and acceptance when the consumer interacts with a website in the manner outlined in the Consumer Scenario. The critical action which evidences an intention to create legal relations by the trader is the conduct of activating a website which enables the consumer to select product and submit payment details after indicating agreement to the trader’s terms and conditions. A sensible analysis

³⁶⁹ Eliza Mik “The Unimportance of being “electronic” or – popular misconceptions about “Internet contracting”” (2011) 19(4) Intl J L & Info Tech 324 at 329.

identifies the consumer's conduct of submitting payment details as the acceptance of that offer by the consumer. It is at this point that the consumer intends to be bound in a contract and expects the trader to fulfil its side of the bargain. These conclusions are supported by analogy with the vending machine purchase.

Chapter Five

Online Shopping and Consumers – The Impact of “Contract on Dispatch” Terms*

5.1 INTRODUCTION

When is a binding contract concluded in an online purchase? Consumers who shop online may not be concerned with that question while shopping and making purchases. However, the question will become important when things go wrong with the purchase and the consumer then needs to rely on the existence of a contract to provide a remedy. Consumers expect, and reasonably so, that the online trader is under a binding obligation to supply product after payment has been made and that legal remedies are available to recover the purchase price if delivery is not forthcoming. It is essential for consumer confidence in online shopping³⁷⁰ that consumers' expectations be met. Yet surprisingly, a review of the standard terms and conditions used by some major online United Kingdom traders³⁷¹ shows that it is common to use terms that provide that no contract is made until the trader dispatches the goods. An example of this type of term is found on Amazon's United Kingdom website which states in its standard terms and conditions:

We only accept your offer, and conclude the contract of sale for a product ordered by you, when we dispatch the product to you and send e-mail confirmation to you that

* The text of this chapter was published in 2013: Trish O'Sullivan "Online shopping and consumers — the impact of 'contract on dispatch' terms" (2013) 21 CCLJ 186.

³⁷⁰ The Frost and Sullivan survey, "*Australian and New Zealand Online Shopping Market 2013*" released in July 2013 reports that online shopping sales account for 7% of total retail sales in both Australia and New Zealand in 2013. These figures indicate that there is still scope for much growth in online shopping sales. Frost and Sullivan, 2013, Sydney, Australia, available (for purchase) at <www.frost.com>.

³⁷¹ <www.amazon.co.uk>; <www.sainsburys.co.uk>; <www.argos.co.uk>; <www.appliancesonline.co.uk>; <www.marksandspencer.com>; <www.tesco.com>; <www.johnlewis.com>; and <www.next.co.uk>.

we've dispatched the product to you.³⁷²

United Kingdom traders appear to be including this type of “contract on dispatch” term in an effort to comply with Regulation 9 of the United Kingdom Electronic Commerce (EC Directive) Regulations 2002 (“the EC Regulations”), which requires traders to provide information setting out the “technical steps to follow to conclude the contract” prior to a consumer placing an order. Regulation 9 adopts Article 10 of the European Union Electronic Commerce Directive 2000 (“the EC Directive”).³⁷³ While Regulation 9 requires online traders in the United Kingdom to include terms which specify the steps required to conclude a contract with a consumer online, any online trader, including those in New Zealand and Australia, is free to include terms specifying when the online contract is made and may use a “contract on dispatch” term. A review of 25 New Zealand and 25 Australian online shopping websites reveals that 5 out of the 25 New Zealand websites reviewed and 3 out of the 25 Australian websites reviewed use “contract on (or after) dispatch” terms.³⁷⁴ “Contract on dispatch” terms are having some

³⁷² See: Condition 1 in the “Conditions of Sale” at:

<http://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=1040616> (accessed 5 April 2013).

³⁷³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

³⁷⁴ A review of a random sample of 25 New Zealand (<www.mischifshoes.co.nz>; <www.rebelsprt.co.nz>; <www.noelleeming.co.nz>; <www.harveynorman.co.nz>; <www.ezibuy.co.nz>*; <www.countdown.co.nz>; <www.kathmandu.co.nz>; <www.store.apple.com>; <www.thewarehouse.co.nz>; <www.briscoes.co.nz>; <www.mightyape.co.nz>*; <www.hallensteins.co.nz>; <www.thegoodguys.co.nz>; <www.wiseguys.co.nz>*; <www.thehomestoreonline.co.nz>; <www.babystuff.co.nz>; <www.pharmacydirect.co.nz>; <www.nzsoccershop.co.nz>; <www.lvmartin.co.nz>; <www.elive.co.nz>*; <www.smithandcaugheys.co.nz>; <www.whitcoulls.co.nz>; <www.bfc.co.nz>; <www.barkersonline.co.nz>* and <www.ordermax.co.nz> - last viewed 24 October 2013) and 25 Australian (<www.colesonline.com.au>; <www.myer.com.au>; <www.florsheim.com.au>; <www.kogan.com.au>; <www.styletread.com.au>; <www.target.com.au>; <www.booktopia.com.au>; <www.bigw.com.au>; <www.dicksmith.com.au>; <www.officeworks.com.au>; <www.theiconic.com.au>; <www.ebgames.com.au>; <www.countryroad.com.au>; <www.witchery.com.au>; <www.wittner.com.au>; <www.jbhifionline.com.au>*; <www.appliancesonline.com.au>; <www.jeanswest.com.au>; <www.davidjones.com.au>; <www.ripcurl.com.au>; <www.mightyape.com.au>*; <www.ezibuy.com.au>*; <www.goodguys.com.au>; <www.snowys.com.au> and <www.rebelsport.com.au> - last viewed 24 October 2013) online shopping websites reveals that 5* out of the 25 New Zealand websites use a “contract on (or after) dispatch” term while 3* of the 25 Australian websites reviewed use a “contract on (or after) dispatch” term.

impact on New Zealand and Australian consumers using local websites and “contract on dispatch” terms used by United Kingdom websites impact on New Zealand and Australian consumers who shop using those off shore websites.

This chapter considers the impact of “contract on dispatch” terms if they are treated as valid. These terms will have serious consequences for consumers who pay for goods which are never dispatched. “Contract on dispatch” terms effectively give complete discretion regarding performance to the trader in situations where the consumer may already have completed full performance by making payment. If there is no contract, the consumer will not have a right to recover the purchase price based on the existence of a contract. Consumers will need to rely on some other cause of action or regulation to recover their payment. This chapter argues that “contract on dispatch” terms should not be treated as valid because they ignore traditional contract formation principles which focus on ascertaining, on an objective basis, when agreement is reached. “Contract on dispatch” terms are also problematic and difficult to apply because they are self-defeating in nature. How can a “contract on dispatch” term be part of a contract which the term itself states does not exist if there has been no dispatch? Consideration is also given to the issues of whether “contract on dispatch” terms are misleading and deceptive and whether they are covered by the unfair terms regulation in Australia and as proposed in New Zealand. The chapter explains how the proposed addition of a “guarantee of supply” to the New Zealand Consumer Guarantees Act 1993 will reduce the impact of “contract on dispatch” terms and suggests further legislative reform which would grant consumers a simple right to recover the purchase price in the event that goods are not dispatched within a set time limit.³⁷⁵

The background to the EC Directive will be discussed with a view to determining what purpose Article 10 was designed to achieve. Whether that purpose has been achieved through practical compliance with Regulation 9 in the United Kingdom will be considered. The chapter argues that the adoption of a provision similar to Article 10 in New Zealand and Australia will not benefit consumers because it may encourage traders to adopt the common United Kingdom practice of including “contract on

³⁷⁵ Similar to Article 7 of European Directive 97/7/EC which provides that, unless otherwise agreed, goods must be delivered within 30 days of the order being placed by the consumer. Article 7 has been adopted as regulation 19 of the Consumer Protection (Distance Selling) Regulations 2000 (UK).

dispatch” terms. To put the discussion into a practical context a common consumer online shopping scenario is outlined and the chapter proceeds on the basis that the “contract on dispatch” term has been validly incorporated.

5.2 A COMMON ONLINE SHOPPING SCENARIO - WHEN IS THE CONTRACT MADE?

The question of when the contract is made is an important consideration for consumers who may need to rely on the existence of a contract to recover the purchase price or enforce the trader’s obligations. Pin pointing the time when a contract is made is also important when dealing with issues relating to the incorporation of terms; the application of the rules in the Sale of Goods Acts regarding the passing of property in specific goods;³⁷⁶ determining the source of income for taxation purposes;³⁷⁷ and determining the jurisdiction and the governing law of the contract. This chapter focuses on how delaying the formation of a contract until goods are dispatched affects a consumer’s contractual rights.

In a common online shopping scenario, the consumer browses product displayed for sale on a website, selects particular product to purchase, proceeds to “the checkout”, provides personal and delivery information, indicates agreement to the trader’s standard terms and submits payment details. Following successful submission of payment details, an order confirmation webpage is usually displayed by the trader and an order confirmation email is sent to the consumer. The consumer then awaits delivery of the product. In this scenario the consumer is required to indicate agreement to the trader’s terms, usually by clicking “I agree” or checking a box indicating acceptance of the trader’s terms. This method of incorporation of terms has become known as the “click wrap” method. The “browse wrap” method of incorporation describes the situation where the trader’s terms are posted on the website and those terms state that they govern

³⁷⁶ Sale of Goods Act 1908 (NZ), Rule 1 s 20; Sale of Goods Act 1954 (ACT), s 23(2); Sale of Goods Act 1923 (NSW), Rule 1 s 23; Sale of Goods Act (NT), Rule 1 s 23; Sale of Goods Act 1896 (QL), Rule 1 s 21; Goods Act 1958 (VIC), Rule 1 s 23; Sale of Goods Act 1895 (SA), Rule 1 s 18; Sale of Goods Act 1896 (TAS), Rule 1 s 23 and Sale of Goods Act 1895 (WA), Rule 1 s 18.

³⁷⁷ Income Tax Act 2007 (NZ), s YD4(3) and see: *NZ Income Tax Law and Practice* (revised edition), CCH online version [900-055].

any contract made using the website but the consumer is not required to indicate agreement to the terms. For either of these methods of incorporation of terms to be valid, the terms must be incorporated before the contract is made.

When a consumer shops online there are a number of acts which could determine the time when the contract is made. In terms of a traditional offer and acceptance analysis, a variety of actions could qualify as acceptance. These include: the consumer's act of clicking "I agree" or checking a box to indicate assent to terms; the consumer's submission of payment details; the display of the trader's order confirmation webpage; the sending of an order confirmation email by the trader, or an act which the trader's terms specify equates to acceptance. In an earlier chapter,³⁷⁸ it is argued that in an online shopping "click wrap" scenario, when the trader's terms do not specify when the contract is made, the contract may be made when the consumer accepts the trader's offer to sell, usually by submitting payment details.³⁷⁹ This view is supported by Blount who suggests that: "A display on a fully interactive website, such as an on-line store conducting a business, may well be an offer."³⁸⁰ Blount contends that the offer may be accepted by the purchaser when the last virtual 'OK' button is clicked following the approval of terms and the provision of credit card details.³⁸¹ In the "click wrap" scenario the consumer is required to indicate agreement to the trader's terms before payment is submitted, in which case assent to terms occurs before the contract is made if the submission of payment signifies the making of the contract.

³⁷⁸ T O'Sullivan "Online Shopping and Consumers – Is conduct more important than communication in contract formation?" (2013) 19 NZBLQ 95 - the text of this article is included in Chapter 4 above.

³⁷⁹ Opinions on this point differ and some commentators take the view that the display of product on a website is an invitation to treat which the consumer may respond to, by making an offer to purchase which the trader can then accept. See: L Davies "Contract Formation on the Internet: Shattering a Few Myths" in L Edwards and C Waelde (eds) *Law and the Internet* (Hart Publishing, Oxford, 1997) at 115; A Murray "Articles 9-11, ECD Contracting Electronically in the Shadow of the E-Commerce Directive" in L Edwards (ed) *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, Oxford, 2005) at 73-74; C Glatt "Comparative Issues in the Formation of Electronic Contracts" (1998) 6 (1) *Intl J L & Info Tech* 34 at 51; and B Fitzgerald, A Fitzgerald, E Clark, G Middleton and YF Lim *Internet and E-Commerce Law – Business and Policy* (Thomson Reuters Sydney, 2011) at 743. The Singapore High Court and Court of Appeal declined to make a definitive ruling on this point in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594; [2004] SGHC 71 aff'd [2005] 1 SLR 502; [2005] SGCA 2.

³⁸⁰ S Blount *Electronic Contracts Principles from the Common Law* (LexisNexis Butterworths, Australia, 2009) at 42.

³⁸¹ S Blount *Electronic Contracts Principles from the Common Law* (LexisNexis Butterworths, Australia, 2009) at 42.

If a court were to determine that the contract is made at some at some other time, for example when the trader displays an order confirmation webpage or sends an email confirming the details of the order, these actions also occur after the consumer is required to indicate acceptance of terms in the “click wrap” scenario. As long as the contract is made after the indication of assent to terms, there will be no issue with incorporation of terms due to timing. In *eBay International AG v Creative Festival Entertainment Pty Ltd*³⁸² the Federal Court of Australia declined to pin point the exact time when the contract to purchase entertainment tickets online was made but stated that “... the transaction was completed online at the time of the webpage transactions”³⁸³ and held that this was after the purchaser indicated assent to the terms posted on the website.³⁸⁴ The discussion in this chapter will proceed on the basis that the “contract on dispatch” term is included in standard terms which have been validly incorporated using the “click wrap” method.

5.3 TERMS WHICH STATE WHEN THE CONTRACT IS MADE – ARTICLE 10 EC DIRECTIVE 2000 AND REGULATION 9 EC REGULATIONS 2002

The principle of freedom of contract allows online traders to include terms in their standard terms which state when a contract is made. European traders’ freedom to decide whether to include a term regarding contract formation is regulated by Article 10 of the EC Directive. Article 10 requires the provider of a service which enables a contract to be made with a consumer, using electronic communication, to provide information about the technical steps which must be followed to conclude a contract. Article 10 of this Directive has been adopted by the United Kingdom in Regulation 9 of the Electronic Commerce (EC Directive) Regulations 2002. Regulation 9 provides:

³⁸² (2006) 170 FCR 450; [2006] FCA 1768; BC200610545.

³⁸³ (2006) 170 FCR 450; [2006] FCA 1768; BC200610545 at [52].

³⁸⁴ (2006) 170 FCR 450; [2006] FCA 1768; BC200610545 at [27].

Information to be provided where contracts are concluded by electronic means

9. (1) Unless parties who are not consumers have agreed otherwise, where a contract is to be concluded by electronic means a service provider shall, prior to an order being placed by the recipient of the service, provide to that recipient in a clear, comprehensible and unambiguous manner the information set out in (a) to (d) below -

- (a) the different technical steps to follow to conclude the contract;

The Commission of the European Communities' purpose in adopting Article 10 was to increase consumer protection in online shopping and provide transparency.³⁸⁵ Obviously, the Commission envisaged some sort of warning or advice to consumers that if they proceed with the next step in the transaction they will be bound by a contract and will be liable for the purchase price. A statement such as, 'if you proceed with clicking this "submit" or "OK" button you will be committed to a contract to purchase' would inform the consumer of the consequences of taking that step and thereby achieve the purposes of enhanced consumer protection and transparency. The Directive's purpose of consumer protection and transparency; however, is not achieved if compliance with the Directive and with subsequent United Kingdom Regulation has resulted in the frequent use of "contract on dispatch" terms which tend to favour the interests of the trader. "Contract on dispatch" terms delay the imposition of any contractual obligation on the trader until the product is dispatched and provide no obvious consumer protection or transparency especially when the term is buried in a long list of standard terms.

The adoption of Article 10 by the European Union must be considered in the context of the draft Directive³⁸⁶ which also included a draft Article 11, among other things, which sought to determine when an online contract with a consumer is concluded. The original draft of Article 11 provided that a contract is concluded when the consumer receives from the trader an acknowledgement of receipt of the consumer's

³⁸⁵ Commission of the European Communities, "Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market" (Brussels, November 1998) at 26 <http://www.edis.sk/ekes/ecommm_legalen.pdf> (accessed 20 September 2013).

³⁸⁶ Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (1999/C 30/04) submitted by the Commission on 23 December 1998 at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51998PC0586:EN:HTML>> (accessed 20 September 2013).

acceptance and the consumer has confirmed receipt of the acknowledgement of receipt.³⁸⁷ It has been pointed out that the draft Article 11 was overly complex and would have been difficult to apply in practice.³⁸⁸ It was commendable but overly ambitious of the Commission of the European Communities to attempt to devise one rule that would fit all electronic contracting scenarios and it is not surprising that the draft Article 11 was never adopted. However, while the “contract conclusion” part of Article 11 was scrapped, Article 10 was left unchanged. The combined effect of scrapping the “contract conclusion” part of Article 11 and adopting Article 10 is that the Directive imposes no restrictions on the ability of traders to specify the time of contract formation. Murray notes that in drafting the Directive, the Commission had an opportunity to harmonize the rules of contract formation with regard to electronic contracts: “... there is no doubt the opportunity to harmonise those actions which lead to conclusion of a contract is a powerful one. A major barrier to consumer confidence in e-commerce is simply consumers often don't know when they have entered into a

³⁸⁷ Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (1999/C 30/04) submitted by the Commission on 23 December 1998 available at:

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51998PC0586:EN:HTML>>. Draft Article 11 provided:

Moment at which the contract is concluded

1. Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, in cases where a recipient, in accepting a service provider's offer, is required to give his consent through technological means, such as clicking on an icon, the following principles apply:

(a) the contract is concluded when the recipient of the service:

- has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance, and

- has confirmed receipt of the acknowledgement of receipt;

(b) acknowledgement of receipt is deemed to be received and conformation is deemed to have given when the parties to whom they are addressed are able to access them;

(c) acknowledgement of receipt by the service provider and confirmation of the service recipient shall be sent as quickly as possible.

See also: A Murray “Articles 9-11, ECD Contracting Electronically in the Shadow of the E-Commerce Directive” in L Edwards (ed) *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, Oxford, 2005) at 75.

³⁸⁸ A Murray “Articles 9-11, ECD Contracting Electronically in the Shadow of the E-Commerce Directive” in L Edwards (ed) *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, Oxford, 2005) at 76 and see also: N Reich “Consumerism and citizenship in the information society – the case of electronic contracting” (2000) 7 CCLJ 185 at 198-9.

legally binding contract with the supplier”.³⁸⁹ The objective of harmonisation was not achieved because the draft Article 11 was never adopted and was replaced with some technical rules relating to the placing and receiving of orders online. The final version of Article 11 imposes no restrictions on the trader’s ability to stipulate when the contract is concluded and Article 10 merely requires the trader to disclose to the consumer information about when that moment is. There is little consumer protection in Article 10 and the object of transparency can be nullified by the trader’s ability to comply with Article 10 by burying the relevant information in the trader’s standard terms and enabling the consumer to consent to those terms without viewing or reading the terms. Regulation 9 of the United Kingdom EC Regulations adopts Article 10 in its entirety.

5.4 FREQUENT USE OF “CONTRACT ON DISPATCH” TERMS

A review of the terms used by some major United Kingdom online traders, to meet Regulation 9, reveals the frequent use of a term which states that the contract is not made until the goods are dispatched by the trader.³⁹⁰ The term used by the John Lewis

³⁸⁹ A Murray “Articles 9-11, ECD Contracting Electronically in the Shadow of the E-Commerce Directive” in L Edwards (ed) *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, Oxford, 2005) at 73.

³⁹⁰ The following websites use “contract on dispatch” terms which can be viewed by clicking on the “terms and conditions” link at the bottom of each homepage (accessed 5 April 2013):

<www.sainsburys.co.uk> “Placing an order and order acceptance - 6.1 The Order Acknowledgement email and order number are not an order confirmation or order acceptance from us. Acceptance of your order and the completion of the contract between you and us will take place on despatch to you of the products ordered unless we have notified you that we do not accept your order or you have cancelled it.”

<www.argos.co.uk> “Order process -

2.1 Please see the Home delivery information and How to use this website section for information on how to place an order. All orders that you place on this website will be subject to acceptance in accordance with these terms and conditions.

2.2 The 'confirmation' stage sets out the final details of your order. Following this, we will send to you an order acknowledgement email detailing the products you have ordered. Please note that this email is not an order confirmation or order acceptance from Argos.

2.3 Acceptance of your order and the completion of the contract between you and us will take place on despatch to you of the products ordered unless we have notified you that we do not accept your order or you have cancelled it (please refer to Returns and refunds).”

<www.appliancesonline.co.uk> “Legal contract - A legal contract is formed between us when we put the appliance(s) you have ordered on a van to deliver it to you. Legally until then we can decline to supply the goods to you but we don’t understand why we would want to do that. We are in the business of trying to

website includes the phrase: “The technical steps required to create the contract between you and us are ...”³⁹¹ This phrase reflects the words of Regulation 9 and indicates an intention by the trader to comply with Regulation 9. “Contract on dispatch” terms also commonly state that the trader's order confirmation webpage and order confirmation e-mail are not acceptance. For example, Amazon’s United Kingdom website includes a term which states:³⁹²

sell you things!”

<www.marksandspencer.com> “**Acceptance of your order** - Please note that completion of the online checkout process does not constitute our acceptance of your order. Our acceptance of your order will take place only when we dispatch the product(s) or commencement of the services that you ordered from us.”

<www.tesco.com> “Books Warehouse Product Terms and Conditions: Acceptance - There will be no contract of any kind between you and us unless and until we actually dispatch the goods to you. At any point up until then, we may decline to supply the goods to you without giving any reason. At the moment that the goods are dispatched (and not before), a contract will be made between you and us, and you will be charged for the goods.”

<www.johnlewis.com> “Contract creation and electronic contracting - The technical steps required to create the contract between you and us are as follows:

- You place the order for your products on the Website by pressing the confirm order button at the end of the checkout process. You will be guided through the process of placing an order by a series of simple instructions on the Website.
- We will send to you an order acknowledgement email detailing the products you have ordered. This is not an order confirmation or order acceptance from johnlewis.com.
- As your product is shipped from our warehouse we will send you a despatch confirmation email.
- Order acceptance and the completion of the contract between you and us will take place on the despatch to you of the Products ordered unless we have notified you that we do not accept your order, or you have cancelled it in accordance with the instructions in **Change or cancel an order.**”

<www.next.co.uk> “Orders and Contract Information - Your order is accepted and a contract is formed between Next and you when we despatch the goods you have ordered and not before. A contract is not formed at the point in time that payment has been taken from you by Next, nor at the point in time that you receive an email from Next acknowledging receipt of your order.”

Compare: These “contract on dispatch” terms can be compared with the contract formation terms on the following United Kingdom websites:

<www.bookdepository.co.uk> “Once payment has been received The Book Depository will confirm that your order has been received by sending an email to you at the email address you provide. The order confirmation email will include your name, the order number and the total price. The Book Depository acceptance of your order brings into existence a legally binding contract between us on these terms.”

<www.asos.com> “Our Contract - When you place an order, you will receive an acknowledgement e-mail confirming receipt of your order. This email will only be an acknowledgement and will not constitute acceptance of your order. A contract between us for the purchase of the goods will not be formed until your payment has been approved by us and we have debited your credit or debit card.”

³⁹¹ <www.johnlewis.com>

³⁹² <http://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=1040616>

“Conditions of sale”.

1 OUR CONTRACT

Your order is an offer to Amazon to buy the product(s) in your order. When you place an order to purchase a product from Amazon, we will send you an e-mail confirming receipt of your order and containing the details of your order (the "Order Confirmation E-mail"). The Order Confirmation E-mail is acknowledgement that we have received your order, and does not confirm acceptance of your offer to buy the product(s) ordered. We only accept your offer, and conclude the contract of sale for a product ordered by you, when we dispatch the product to you and send e-mail confirmation to you that we've dispatched the product to you (the "Dispatch Confirmation E-mail").

The fact that the terms and conditions on Amazon's American website do not include this "contract on dispatch" term nor any term regarding the time of contract formation indicates that the term is included in the United Kingdom website terms and conditions in an effort to comply with Regulation 9. The American website's conditions of use include a term which states that products are made available through the website on an "as available" basis.³⁹³ This term is quite different from a term which denies the existence of a contract if goods are not dispatched.

5.5 THE IMPACT OF "CONTRACT ON DISPATCH" TERMS

A term that states that the contract is made on dispatch, if treated as valid, has significant consequences for consumers. It gives complete discretion to the trader regarding performance of the contract even if the consumer has already completed performance by submitting payment. It ignores the traditional rules for determining when a contract has been made which are based on the principle of determining when "agreement" was reached on an objective basis, usually by adopting an offer and acceptance analysis. If goods are not dispatched and there is held to be no contract, the consumer cannot: bring an action based on breach of contract for recovery of the

³⁹³ <www.amazon.com> Conditions of Use –

"The amazon services and all information, content, materials, products (including software) and other services included on or otherwise made available to you through the amazon services are provided by amazon on an "as is" and "as available" basis, unless otherwise specified in writing."

purchase price; make a claim for damages that may flow from the breach; or apply for an order for specific performance of the contract.

In addition, if a “contract on dispatch” term is upheld with the result that there is no contract, then a consumer would also be excluded from bringing an action for damages for non-delivery or breach of the delivery rules based on the provisions of the Sale of Goods Act 1908 (NZ)³⁹⁴ and the Australian states’ Acts,³⁹⁵ because these Acts only apply to “contracts”.³⁹⁶ To recover the purchase price, if it has been paid but there is no valid contract, a consumer would need to bring an action based on some other cause of action such as misleading or deceptive conduct under the Fair Trading Act 1986 (NZ) or the Australian Consumer Law, the tort of deceit, estoppel or restitution. Bringing an action based on one of these causes of action can be complex and may require the consumer to obtain detailed legal advice.

5.6 ARGUMENTS AGAINST THE VALIDITY OF “CONTRACT ON DISPATCH” TERMS

5.6.1 Inherent Difficulty in Interpretation and Application

“Contract on dispatch” terms are paradoxical and hence self-defeating. If a trader argues, on the basis of such a term, that there is no contract, then the term itself does not exist because there is no contract into which it can be incorporated. The trader’s argument can only be valid if there is a contract in the first place and the term is part of the contract and is hence binding on both parties. The trader is saying, at once, that there

³⁹⁴ Sale of Goods Act 1908 (NZ) - Damages for non-delivery s 52 and Delivery rules s 31.

³⁹⁵ Sale of Goods Act 1954 (ACT) - Damages for non-delivery s 54 and Delivery rules s 33; Sale of Goods Act 1923 (NSW) - Damages for non-delivery s 53 and Delivery rules s 32; Sale of Goods Act (NT) - Damages for non-delivery s 53 and Delivery rules s 32; Sale of Goods Act 1896 (QL) - Damages for non-delivery s 52 and Delivery rules s 31; Sale of Goods Act 1895 (SA) - Damages for non-delivery s 50 and Delivery rules s 29; Sale of Goods Act 1896 (TAS) - Damages for non-delivery s 55 and Delivery rules s 34; Goods Act 1958 (VIC) - Damages for non-delivery s 57 and Delivery rules s 36 ; Sale of Goods Act 1895 (WA) - Damages for non-delivery s 50 and Delivery rules s 29.

³⁹⁶ A contract for the sale of goods is defined in: Sale of Goods Act 1908 (NZ), s 3; Sale of Goods Act 1954 (ACT), s 6; Sale of Goods Act 1923 (NSW), s 6; Sale of Goods Act (NT), s 6; Sale of Goods Act 1896 (QL), s 4; Sale of Goods Act 1895 (SA), s 1; Sale of Goods Act 1896 (TAS), s 6; Goods Act 1958 (VIC), s 6; and Sale of Goods Act 1895 (WA), s 1.

is a contract and there is no contract, which shows the paradoxical and self-defeating nature of such a term.

There can be two alternate approaches to the problem. First, these terms will be inherently difficult to interpret and apply. The court may ignore a term which is term meaningless or “unworkable” if the confusion the term creates relates to a matter that is of minor significance.³⁹⁷ It may be difficult to argue that the issue of whether a contract exists or not is of “minor significance” in which case the court may conclude that the term makes the contract void for uncertainty.³⁹⁸ Finding that the contract is void for uncertainty would not be conducive to consumer protection which is the purpose of the relevant Directive and Regulations.

Alternately, Lord Denning’s judgment in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp Ltd*³⁹⁹ suggests that the court has power to ignore irreconcilable terms. Lord Denning stated, in the context of a case concerning a “battle of forms”:⁴⁰⁰

If differences are irreconcilable - so that they are mutually contradictory - then the conflicting terms may have to be scrapped and replaced by a reasonable implication.

In the case of a “contract on dispatch” term used in the online shopping scenario, the “contract on dispatch” term conflicts with the conduct of the parties if that conduct shows that they have reached an agreement notwithstanding the existence of the term. If goods have been selected and appear to be available and the consumer has performed his or her side of the bargain by submitting payment after indicating agreement to the trader’s terms, then conduct has occurred which clearly indicates that the parties have reached agreement. It can be argued on the basis of Lord Denning’s judgment that the difference between the conduct of the parties which indicates agreement, is irreconcilable with the term in the contract which denies the existence of a contract until

³⁹⁷ *Walsh v Matamau Co-operative Dairy Co Ltd* [1918] NZLR 850; [1918] GLR 730; *Williams v Wairarapa Automobile Association Mutual Insurance Company* [1943] NZLR 322; [1943] GLR 191; *Place v Rees & Co* (1894) 13 NZLR 610; *Nicolene Ltd v Simmonds* [1953] 1 QB 543; [1953] 1 All ER 822 (CA).

³⁹⁸ *G Scammell and Nephew Ltd v Ouston* [1941] AC 251; [1941] 1 All ER 14.

³⁹⁹ [1979] 1 All ER 965; 1 WLR 401.

⁴⁰⁰ *Ibid* at All ER 969; WLR 405.

the goods are dispatched. A reasonable implication in these circumstances would be that the conduct of the parties determines when the contract is made, not the “contract on dispatch” term. This approach is conducive to the consumer protection purpose referred to above.

5.6.2 The “Substance Over Form” or Global Approach

A substance over form approach to determining whether a contract exists focuses on ascertaining objectively the intention of the parties rather than strictly applying the technical rules of offer and acceptance. This is the so called global approach taken by courts in scenarios where it is difficult to establish any clear offer and/or acceptance. Cooke J referred to this approach in *Meates v Attorney-General*:⁴⁰¹

The acid test in a case like the present is whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain.

The test is objective and aimed at finding the intention of the parties from an analysis of what has been said and done. This approach is also reflected in the words of Hardie Boys J who stated in *Broadcasting Corporation of New Zealand v Daniels*:⁴⁰² “Agreement comes from a meeting of the minds and the Court is entitled to look at the whole context to see whether that has occurred.” The Federal Court of Australia has recognised the existence of a contract through inference or implication when offer and acceptance are not explicit. In *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*⁴⁰³ Allsop J stated that “the essential question in such cases is whether the parties’ conduct, including what was said and not said and including the evident commercial aims and expectations of the parties, reveals an understanding or agreement ...”.⁴⁰⁴

⁴⁰¹ [1983] NZLR 308 (CA) at 377.

⁴⁰² (1988) 2 NZBLC 103,535 at 103,541.

⁴⁰³ [2001] FCA 1833.

⁴⁰⁴ [2001] FCA 1833 at [369]. See also: *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR [97,326] at 11,117-118; *Vroon BV v Fosters Brewing Group* [1994] VicRp

The House of Lords, however, does not view the global approach to determining whether a contract exists favourably. In *Gibson v Manchester City Council*,⁴⁰⁵ the House of Lords expressed disagreement with Lord Denning's leaning towards a global approach and overturned the Court of Appeal decision. In the Court of Appeal,⁴⁰⁶ Lord Denning suggested that if no identifiable acceptance can be found, the court may decline to analyse the contract in terms of offer and acceptance and should look at the correspondence as a whole and at the conduct of the parties to see whether the parties have come to an agreement on everything that is material.⁴⁰⁷ In holding that the Manchester City Council had entered into a contract to sell a Council house, Lord Denning ignored a statement in the Council's correspondence which stated that a particular letter was not an offer. He found that the conduct of the parties along with all the correspondence indicated that agreement had been reached. On appeal, the House of Lords held that the statement in the correspondence which stated that the Council's letter was not to be regarded as an offer prevented the creation of a contract.⁴⁰⁸ Lord Denning did not treat an express statement in correspondence between the parties as conclusive on whether a contract was made. His decision reflects a substance over form approach in determining whether a contract exists.

A useful example of a substance over form approach was taken in the Australian case of *Oceanic Sun Line Special Shipping Company Inc v Fay*⁴⁰⁹ where the operator of a cruise ship tried to argue that a negligence claim by a passenger who had been injured

53; [1994] 2 VR 32 at 81-3; *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 at 555; *Pobjie Agencies v Vinidex Tubemakers* [2000] NSWCA 105 at [22-24] and *Brambles Holdings Limited v Bathurst City Council* [2001] NSWCA 61 at [74- 80]. Compare: *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] VicRp 55; [1994] 2 VR 106 at 178 where Tadgell J exhibited some caution about the finding of a contract merely on the basis of a manifestation of mutual assent.

⁴⁰⁵ [1979] 1 All ER 972, 1 WLR 294.

⁴⁰⁶ *Gibson v Manchester City Council* [1978] 2 All ER 583 at 586, 1 WLR 520 at 523.

⁴⁰⁷ *Gibson v Manchester City Council* [1978] 2 All ER 583 at 586, 1 WLR 520 at 523. See also: Lord Denning's statement in *Port Sudan Cotton Co v Chettiar* [1977] 2 Lloyd's Rep 5 at 10, "In considering this question I do not much like the analysis in the textbooks of enquiring whether there was an offer and acceptance or a counter-offer and so forth. I prefer to examine the whole of the documents in the case and to decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards."

⁴⁰⁸ [1979] 1 All ER 972 at 976, 1 WLR 294 at 298.

⁴⁰⁹ (1988) 165 CLR 197; 79 ALR 9; [1988] HCA 32.

while on board the cruise ship, should be dealt with in Athens due to a term in the passage ticket which stated that any action against the carrier must be brought only before the courts in Athens, Greece. The passenger purchased the cruise passage through a travel agent in Sydney and on payment of the fare was given an “exchange order” which was exchanged for the passage ticket in Greece. The jurisdiction term was set out in the passage ticket conditions. The High Court of Australia held that the contract of carriage was made in Sydney when payment of the balance of the fare was made and the exchange order was issued by the travel agent.⁴¹⁰ The terms in the passage ticket handed over in Greece were not incorporated into that contract due to the fact that the contract had been made before the passenger left Australia. Wilson and Toohey JJ stated in their judgment:⁴¹¹

If a contract of carriage was not concluded before the respondent left Australia then it must follow that, notwithstanding that the entire passage money had been paid and that a particular cabin on a particular vessel had been allocated to him for a specified cruise and that although nothing remained for him to do except to present himself in Athens with the exchange order, the appellant came under no obligation to carry him until he did so. Such a construction of the circumstances flies in the face of common sense and cannot be accepted.

The court’s conclusion that a contract must have been made in Sydney before the passenger departed for Greece reflects the understanding of a reasonable person who would believe on the basis of these facts that a contract was formed in Sydney. It can also be said that in an online shopping context, an objective consideration of the actions of a consumer who selects and pays for product online following indication of assent to the trader’s terms, and of a trader who represents that particular product is available and accepts submission of payment, show the parties’ intention to contract. The intention to enter into an agreement is evident from the actions of the parties using the website and the creation of that agreement should not be nullified by a term specifying that a contract will come into existence at a different time.

⁴¹⁰ Ibid at (1998) 165 CLR 197, at 205.

⁴¹¹ Ibid at (1998) 165 CLR 197, at 205.

5.6.3 Estoppel

To defeat a “contract on dispatch” term a consumer could turn to the equitable principles of estoppel. It would be open to a consumer to argue that the actions of the trader in operating a website which enables the consumer to select particular goods and submit payment for those goods following indication of agreement to the trader’s terms means that the trader is estopped from denying the existence of a contract. The basic elements of equitable or promissory estoppel are representation, reliance and detriment.⁴¹² These elements are explained succinctly in the following description of equitable estoppel: “If party A induces a belief or expectation in party B, and party B relies on it to his or her detriment, the courts may grant party B a remedy to avert the unconscionable effects of A’s resiling from his or her word.”⁴¹³ Equitable estoppel is often raised to aid the enforcement of promises which do not have contractual force usually due to an absence of consideration.⁴¹⁴ The law of estoppel is in a state of development and the original limitations on the doctrine, which allowed estoppel arguments to be raised only where there was an existing contractual relationship and as a defence to claims, have been relaxed.⁴¹⁵

The New Zealand High Court decision in *Mortensen v New Zealand Harness Racing Conference*⁴¹⁶ provides an interesting illustration of equitable estoppel being used to enforce an obligation where payments had been accepted by the defendant. Thorp J found that the trustees of a racehorse stakes board had encouraged a belief in the owners of 59 racehorses that their horses had been validly entered in a racing series by accepting staggered registration payments. The racehorse owners had relied on that encouragement to their detriment by continuing to expend considerable money and effort in preparing the horses for the racing series. The trust board was estopped from contending that the horses were ineligible to race by pointing to the fact that the first of

⁴¹² *Gillies v Keogh* [1989] 2 NZLR 327 at 347.

⁴¹³ C Hawes(ed) *Butterworths Introduction to Commercial Law* (3rd ed LexisNexis, Wellington 2010) at [2.5.4].

⁴¹⁴ See for example: *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256.

⁴¹⁵ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Burberry Mortgage Finance and Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356; *Harris v Harris* (1989) 1 NZ ConvC 190,406 and *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80.

⁴¹⁶ Unreported, HC Auckland CP 1812A/90, 11 December 1990.

the staggered payments had been paid late. The result of the case was that the trust board was under an obligation to allow the horses to participate in the racing series.

These principles can be applied to a common online shopping scenario where a trader seeks to rely on a “contract on dispatch” term to deny the existence of a contract. The trader, by operating a website which enables the consumer to select particular goods which appear to be available and submit payment for those goods after indicating agreement to the trader’s terms, represents to or encourages a belief in the consumer that the trader is under an obligation to supply those goods. The consumer’s reliance is shown by the submission of payment and also by the termination of the search for the particular product the consumer believes has been purchased. Detriment is evident in the fact that the consumer has paid for product which the trader has not dispatched and claims it has no obligation to deliver due to the “contract on dispatch” term. Therefore, the trader should be estopped from relying on the “contract on dispatch” term to deny the existence of a contract in the event of a failure to dispatch.

5.6.4 Treat the Inclusion of a “Contract on Dispatch” Term as Misleading and Deceptive Conduct

Section 9 of the Fair Trading Act 1986 (“the FTA”) (NZ) and section 18 of the Australian Consumer Law (“the ACL”) both prohibit conduct in trade which is misleading or deceptive or is likely to mislead or deceive. It could be argued that leading a consumer to believe that he or she has made a contract while including a term in the standard terms which denies the existence of a contract until dispatch is misleading or deceptive. It is the trader’s conduct of representing that particular goods are available on terms which the consumer has assented to and accepting payment for those goods, which leads a consumer to believe that a contract exists or at least that the trader is under an obligation to supply. This representation is misleading or deceptive in circumstances where the trader’s standard terms deny the existence of a contract until goods are dispatched. The consumer is misled into believing that the trader is under an obligation to supply the goods which the consumer has paid for, but the term in the

standard terms provides that the trader is under no obligation to provide the goods because a contract does not come into existence until dispatch.

In most cases the “contract on dispatch” term is buried in the standard terms with no particular attention being drawn to it. New Zealand and Australian courts have held that statements which correct misleading first impressions in fine print must be prominently displayed and easy to understand.⁴¹⁷ A “contract on dispatch” term which is included in an array of standard terms is unlikely to overcome the consumer’s impression that the trader is under an obligation to supply after the purchase is made using the website.

A consumer may seek award of damages for breach of section 9 of the FTA (NZ) and section 18 of the ACL.⁴¹⁸ Applications may also be made to the court for orders varying the terms of any contract, declaring that a term of a contract is void and directing the refund of money.⁴¹⁹ These remedies would be useful for a consumer who is seeking to obtain a refund of purchase monies paid in circumstances where the trader claims that there is no contract in reliance on a “contract on dispatch” term.

5.6.5 Treat “Contract on Dispatch” Terms as Unfair Terms

The ACL provides that unfair terms in standard form consumer contracts are void.⁴²⁰ The New Zealand Consumer Law Reform Bill (“the CLR Bill (NZ)”) proposes similar unfair terms regulation which prohibits the inclusion or enforcement of unfair terms in standard form consumer contracts.⁴²¹ “Contract on dispatch” terms could be treated as unfair terms in standard form consumer contracts under sections 24 and 25 of the ACL and as proposed by the CLR Bill (NZ).⁴²² Under the ACL, the Australian Competition

⁴¹⁷ *ACCC v Signature Security Group Pty Ltd* [2003] FCA 3 at [27]; *Commerce Commission v Air New Zealand* [2006] DCR 90 at [61].

⁴¹⁸ FTA (NZ), s 43 and ACL, s.236.

⁴¹⁹ FTA (NZ), s 43 and ACL, s.243.

⁴²⁰ ACL, s 23.

⁴²¹ Clause 11A of the Consumer Law Reform Bill (NZ) proposes the insertion of section 26A into the Fair Trading Act (NZ).

⁴²² Clauses 11A and 26A of the Consumer Law Reform Bill (NZ) propose the insertion of section 26A and sections 46H – 46M into the Fair Trading Act (NZ).

and Consumer Commission (“the ACCC”), the Australian Securities and Investment Commission (“the ASIC”), and any individual can apply to a court for a declaration that a term of a consumer contract is unfair. The proposed New Zealand reform is restricted in that it stipulates that only the Commerce Commission may apply to a court for a declaration that a term is unfair but any person may ask the Commerce Commission to make an application for a declaration.⁴²³ Section 24 of the ACL provides that a term in a consumer contract is unfair if:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- (b) it is not reasonably necessary to protect the legitimate interests of the party who would be disadvantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to apply or be relied on.

The CLR Bill (NZ) proposes the introduction of section 46L into the FTA (NZ) which is identical to section 24 of the ACL.⁴²⁴ In determining whether a term is unfair, section 24(2) of the ACL and proposed section 46L(2) of the FTA (NZ) require the court to take account of the extent to which the term is transparent⁴²⁵ and the contract as a whole. “Significant imbalance” has been held to cover a scenario where the parties’ rights and obligations under the contract are tilted in the trader’s favour.⁴²⁶ Patterson suggests that a term which attempts to re-align the consumer’s common law rights causes a significant imbalance in the parties’ rights and obligations.⁴²⁷ A “contract on dispatch” term does cause a significant imbalance in the consumer’s rights because the

⁴²³ The proposed s 46H to be inserted into the FTA by clause 26A of the Consumer Law Reform Bill allows only the Commerce Commission to apply to the court for a declaration that a term in a standard form consumer contract is unfair.

⁴²⁴ To be inserted in the FTA by clause 26A of the Consumer Law Reform Bill.

⁴²⁵ “Transparent” is defined in s 24(3) of the ACL as, ‘expressed in reasonably plain language; legible; presented clearly; and readily available to any party affected by the term.’ See also: J Patterson “The Australian Unfair Contract Terms law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts” [2009] MULR 934.

⁴²⁶ *Director of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 AC 481 and see: J Downes “The Australian Consumer Law – is it really a new era of consumer protection?” (2011) 19 AJCCL 5 at 15.

⁴²⁷ J Patterson “The Australian Unfair Contract Terms law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts” [2009] MULR 934 at 944.

ability to rely on the existence of a contract according to common law can be denied by the trader. The term also gives the trader the ability to avoid any obligation to perform in circumstances where the consumer has already made payment. All the power to determine whether a contract exists lies with the trader and the consumer's common law right to sue for breach of contract is restricted.

A "contract on dispatch" term is not reasonably necessary to protect the trader's legitimate interests. If a trader wants to protect its position in the event that it is unable to supply product that has been purchased or it makes a mistake regarding the price of a product, it can include a term which gives a right to cancel the contract if product is unavailable or the price is misstated. Denying the existence of a contract is not necessary. Some traders may include "contract on dispatch" terms to ensure that all contracts are made in the country in which the trader resides for jurisdiction, source of law or taxation purposes. The trader can include terms which specify the jurisdiction and law of the contract without needing to rely on a "contract on dispatch" term. A determination around where income is sourced for taxation purposes is not determined solely on where a contract is made. Matters relating to performance of the contract are also taken into account.⁴²⁸ The trader can determine the place where the contract is made by including a term other than a "contract on dispatch" term; for example, a term which states that the contract is made when the trader's order confirmation page is displayed on the website. Any possible benefits to a trader's tax assessment are outweighed by the possible detriment to consumers caused by "contract on dispatch" terms.

The detriment to the consumer caused by a "contract on dispatch" term is that legal remedies, based on the existence of a contract, are not available if the product is not dispatched. More particularly if the consumer has paid the purchase price but the product is not delivered, the consumer cannot rely on the contract to recover the price, claim damages for non-delivery, or seek specific performance. This type of detriment can be classified as the loss of a legal right which would be covered by the words "or otherwise" in section 24(c) of the ACL and proposed section 46L of the FTA (NZ).

⁴²⁸ Income Tax Act 2007 (NZ), s YD4(3) and see: *NZ Income Tax Law and Practice* (revised edition), CCH online version at [900-055].

Examples of the kinds of terms which may be unfair are set out in section 25 of the ACL and proposed section 46M of the FTA (NZ). The list of examples in the ACL was originally drafted as a “black list” of prohibited terms but has been passed into law as a “grey list” of examples of terms which may be unfair.⁴²⁹ The examples in the list which are relevant to an argument that “contract on dispatch” terms are unfair are:

- (a) a term that permits, or has the effect of permitting, one party (but not the other party) to avoid or limit performance of the contract; and
- (b) a term that permits, or has the effect of permitting, one party (but not the other party) to terminate the contract.

A “contract on dispatch” term falls within both these examples of unfair terms because the trader is given the ability to avoid performance of the contract and is able to effectively terminate the contract by failing to supply.

One difficulty with applying the unfair terms provisions to “contract on dispatch” terms, is that the unfair terms provisions apply to “contracts”. Before the provisions can be applied, the court would need to satisfy itself that a contract exists notwithstanding the existence of the “contract on dispatch” term. A conclusion that the unfair terms provisions apply is justifiable on the basis the “contract on dispatch” term does declare that there is a contract if goods are dispatched. However, the question of whether “contract on dispatch” terms are covered by the unfair terms regulation in Australia and as proposed in New Zealand, could be put beyond doubt if “contract on dispatch” terms were included in the grey list of examples of unfair terms.

5.7 PROPOSED REFORM – GUARANTEE OF SUPPLY

The introduction of regulation that requires traders, including online traders to supply goods within a reasonable time may also help to solve the problems associated with “contract on dispatch” terms. A requirement to supply within a reasonable time would benefit consumers as they could bring claims for recovery of price based on breach of such a requirement if goods are not supplied, without the need to point to a contract.

⁴²⁹ J Downes “The Australian Consumer Law – is it really a new era of consumer protection?” (2011) 19 AJCCL 5 at 17.

The Consumer Guarantees Act 1993 (“the CGA”) (NZ) applies to “consumers” who are defined as including persons who “acquire goods” of a kind ordinarily acquired for personal, domestic or household use or consumption.⁴³⁰ The CGA (NZ) does not specify that there must be a contract to acquire those goods. The CGA (NZ) and the ACL do not currently contain guarantees of supply, however, clause 35A of the CLR Bill (NZ) proposes the introduction of a new guarantee that goods will be delivered within a reasonable time if the supplier is responsible for delivery and no time for delivery is agreed.⁴³¹ This provision is to be welcomed because it will enable consumers to recover a purchase price based on breach of a guarantee, which generally cannot be contracted out of,⁴³² regardless of whether there is a contract or regardless of what that contract says. Adoption of a similar “guarantee of supply” provision into the ACL is to be encouraged.

Additional reform which would benefit consumers shopping online would be the introduction of a simple requirement on the trader to refund the purchase price within a set time if the goods cannot be supplied. Such a requirement could state if a trader is unable to supply goods within a certain period after receiving payment from the consumer, then the trader must refund the consumer’s payment within 14 days of receipt of that payment unless the consumer agrees otherwise. A similar provision is included in the United Kingdom Consumer Protection (Distance Selling) Regulations 2000.⁴³³

⁴³⁰ Consumer Guarantees Act 1993 (NZ), s 2.

⁴³¹ Clause 35A of the Consumer Law Reform Bill states:

The following section is inserted after section 5:

5A Guarantee as to delivery

- (1) Where the supplier is responsible for delivering, or for arranging the delivery of, goods to a consumer there is a guarantee that the goods will be received by the consumer either –
 - (a) at a time, or within a period, agreed between the supplier and the consumer; or
 - (b) if no delivery time has been agreed, within a reasonable time.
- (2) Part 2 (as modified by this section) gives the consumer a right of redress against the supplier where the delivery of the goods fails to comply with the guarantee under this section.
- (3) Where a consumer has a right of redress, the consumer may, -
 - (a) if, and only if, the failure is of a substantial character, reject the goods under section 18 (3); and
 - (b) in all cases, obtain damages under section 18 (4) (other than damages relating to the remedies set out in section 18 (2)), whether or not the consumer also rejects the goods.

⁴³² Section 43 of the Consumer Guarantees Act 1993 prohibits contracting out of the provisions of the Act unless the consumer is acquiring goods or services for business purposes.

⁴³³ Regulation 19 of the Consumer Protection (Distance Selling) Regulations 2000 (UK) which adopts

5.8 CONCLUSION

The purpose of Article 10 of the EC Directive, as adopted by the United Kingdom in Regulation 9 of the EC Regulations, is to enhance consumer protection for online shoppers. Yet a review of the online standard terms shows that traders frequently achieve compliance with Regulation 9 by including “contract on dispatch” terms in their standard terms. These terms favour the interests of the trader and give the trader complete discretion regarding performance. They are not conducive to consumer protection and they conflict with traditional contract formation principles.

Therefore, New Zealand and Australia should not adopt a rule similar to Article 10. It is preferable to rely on traditional principles to ascertain when an agreement is reached rather than adopt a rule that would enable and possibly even encourage traders to impose provisions designed solely for their benefit by delaying the creation of a contractual obligation until they have completed performance.

Currently, even without a rule similar to Article 10, any trader in New Zealand and Australia is free to use a term which specifies when a contract with the consumer is concluded and may use “contract on dispatch” terms. While there are arguments available to consumers to defeat the validity of such terms, the rights and legitimate expectations of consumers would be better protected if “contract on dispatch” terms were included in the grey list of examples of unfair terms in the unfair terms regulation. The proposed guarantee of supply which is to be included in the New Zealand CGA will allow consumers to avoid the application of any “contract on dispatch” term when seeking to recover payments made in circumstances where the product purchased is not dispatched within a reasonable time. It is recommended that a similar guarantee be added to the ACL. Consideration should also be given to the adoption of a provision which requires a refund of the consumer’s payment within a specified time if the goods cannot be supplied unless other agreement is reached.

Article 7 of European Directive 97/7/EC provides that, unless otherwise agreed, goods must be delivered within 30 days of the order being placed by the consumer.

Chapter Six

Online Shopping Terms and Conditions in Practice – Validity of Incorporation and Unfairness*

6.1 INTRODUCTION

How are terms and conditions (“terms”) being incorporated into online shopping contracts in practice? This chapter reports on the findings of a review of 25 New Zealand and 25 Australian online shopping websites. The review aims to give a picture of the practical reality, in respect of terms, faced by consumers who shop online. Consumers who shop online may be at a disadvantage in respect of terms when compared with consumers who shop in traditional “bricks and mortar” shops. Consumers who purchase goods in traditional shops are not generally asked to assent to terms before making purchases of goods nor are they exposed to lists of terms which are stated to apply to purchases due to the consumer’s presence in the shop. Yet, online consumers who await delivery of goods following payment are routinely faced with the online trader’s efforts to include terms in the shopping contract. Terms which may disadvantage consumers shopping online include: terms which purport to exclude liability for product failure or limit damages claims; proscribe dispute resolution processes; specify the jurisdiction and law of the contract; authorise the trader to pass the consumer’s personal information to third parties; restrict the consumer’s ability to make disparaging comments about traders or their products,⁴³⁴ and prohibit the bringing of class actions. In New Zealand many of these types of term will be inoperative, in

* The text of this chapter was published in 2014: Trish O’Sullivan “Online Shopping Terms and Conditions in Practice: Validity of Incorporation and Unfairness” (2014) 20 Canterbury Law Review 1–21.

⁴³⁴ For a United States example of this type of “non-disparagement” term see: *Palmer v Kleargear* (unreported default judgment United States District Court for the District of Utah case No. 1:13-cv-00175-DB, 30 April 2014) discussed in N Davis “The Yelper and the Negative Review: the Developing Battle Over Nondisparagement Clauses” (2014) GPSOLO eReport 3(10) available at: http://www.americanbar.org/publications/gpsolo_ereport/2014/may_2014/yelper_negative_review_developing_battle_nondisparagement_clauses.html.

respect of consumers, due to section 43 of the Consumer Guarantees Act 1993 (“the CGA”) which prohibits terms which attempt to avoid the rights and remedies available under that Act unless the consumer is purchasing goods for business purposes.⁴³⁵ A similar restriction applies in Australia which prevents contracting out of the consumer guarantee provisions in the Australian Consumer Law (“the ACL”).⁴³⁶ However, it is important to determine the circumstances in which consumers may be bound by other disadvantageous terms, which are not rendered inoperative by consumer protection laws.

Whether terms are successfully incorporated into a contract requires a consideration of the issues of notice and assent. The common methods of incorporating terms into online shopping contracts are known as click wrap and browse wrap. The click wrap method has generally been accepted as the more successful method of incorporation. The “click” by the consumer has been interpreted as a form of assent to terms or is treated as an effective way of drawing the consumer’s attention to terms which works as a form of notice. Whether terms are validly incorporated using the browse wrap method turns solely on the question of the adequacy of notice prior to contract formation. The review of websites discussed in this chapter identifies whether the method of incorporation used by each website is click wrap or browse wrap and notes the extent of any efforts to give notice.

The chapter begins with a discussion of the general principles applying to the incorporation of terms in online shopping contracts followed by an explanation of the method used to conduct the review. The review results are then presented. Somewhat surprisingly, the results of the review show that 60% of the 50 websites reviewed use the browse wrap method to incorporate terms.⁴³⁷ The number of words in the terms used by the websites reviewed ranges from 303 to 10,005 words. The chapter goes on to comment on the effectiveness of incorporation in practice and points out that most consumers are unlikely to read terms, especially when the number of words is

⁴³⁵ Consumer Guarantees Act 1993, s 43(4) provides that any attempt to include such an exclusion may be misleading and deceptive conduct in breach of section 13(i) of the Fair Trading Act 1986.

⁴³⁶ Australian Consumer Law, s 64 set out in Volume 3, Schedule 2 of the Competition and Consumer Law Act 2010 provides that terms which purport to exclude the Guarantee provisions in Part 3 – 2 Division 1 of the ACL are void.

⁴³⁷ The writer had expected that the click wrap method of incorporation would be the more common method used by online traders.

excessive. The chapter argues that some online traders may be engaging in misleading and deceptive conduct by stating that their terms are binding when in fact their terms have not been validly incorporated into the contract. Finally, the chapter highlights the importance of unfair terms legislation which can alleviate the impact of terms which are validly incorporated but prove to be unfair.

6.2 GENERAL PRINCIPLES - INCORPORATION OF TERMS IN ONLINE SHOPPING CONTRACTS

The general principles applying to the incorporation of terms into contracts are well settled. Terms must be incorporated before the contract is made.⁴³⁸ If a party has signed an agreement containing terms, those terms are binding on that party even if they have not been read.⁴³⁹ If terms are not signed they may be incorporated by reasonably sufficient notice before the contract is made.⁴⁴⁰ If terms are unexpected or particularly onerous, a higher degree of notice is required.⁴⁴¹ This particular rule is known as “the red hand rule” as explained by Lord Denning in *Spurling Ltd v Bradshaw*⁴⁴² where he stated, in deciding that an exclusion clause formed part of a contract:⁴⁴³

[T]he more unreasonable a clause is, the greater the notice which must be given of it.

⁴³⁸ *Parker v South Eastern Railway* (1877) 2 CPD 416; *Harvey v Ascot Dry Cleaning Co Ltd* [1953] NZLR 549; *Spurling Ltd v Bradshaw* [1956] 2 All ER 121; [1956] 1 WLR 461; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; 1 All ER 686; *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125; 8 ALR 131; 50 ALJR 348; *Oceanic Sun Line Special Company Inc v Fay* (1988) 165 CLR 197; 79 ALR 9; [1988] HCA 32.

⁴³⁹ *L'Estrange v Graucob* [1943] 2 KB 394 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463.

⁴⁴⁰ *Parker v South Eastern Railway* (1877) 2 CPD 416; *Harvey v Ascot Dry Cleaning Co Ltd* [1953] NZLR 549; *Spurling Ltd v Bradshaw* [1956] 2 All ER 121; [1956] 1 WLR 461; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; 1 All ER 686; *Interfoto Picture Library Limited v Stiletto Visual Programmes Ltd* [1989] 1 All ER 348; [1989] QB 433; *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125; 8 ALR 131; 50 ALJR 348; *Oceanic Sun Line Special Company Inc v Fay* (1988) 165 CLR 197; 79 ALR 9; [1988] HCA 32.

⁴⁴¹ *Spurling Ltd v Bradshaw* [1956] 2 All ER 121; [1956] 1 WLR 461; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; 1 All ER 686.

⁴⁴² [1956] 2 All ER 121; [1956] 1 WLR 461.

⁴⁴³ [1956] 2 All ER 121 at 125; [1956] 1 WLR 461 at 470.

Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.

In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,⁴⁴⁴ the High Court of Australia confirmed the established principle from *L'Estrange v Graucob*⁴⁴⁵ that if the contract is signed then the question of notice, including the degree of notice, is not relevant unless some vitiating element such as misrepresentation, duress or mistake is present.⁴⁴⁶

These general principles apply equally to the incorporation of terms in online shopping contracts. The two common methods of incorporating terms in online shopping contracts have become known as click wrap and browse wrap but the central issues which determine whether incorporation is successful remain those of notice and assent.

6.3 CLICK WRAP

The click wrap method of incorporating terms requires the consumer to check a box or click on a phrase such as “I agree” to indicate acceptance of the trader’s terms before proceeding with the transaction. The terms may be viewed by clicking on a link, usually posted near the check box or “I agree” button, which will display the terms on another webpage or in a pop-up box. As long as the consumer has indicated acceptance of the terms, the consumer is permitted to proceed with the transaction whether the terms have been viewed or not. If the consumer does not indicate acceptance of the terms, the consumer cannot proceed with the transaction and is reminded of the need to indicate acceptance.

It is generally accepted that the click wrap method is a valid means of incorporation of terms.⁴⁴⁷ In *eBay International AG v Creative Festival Entertainment*

⁴⁴⁴ (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463.

⁴⁴⁵ [1943] 2 KB 394.

⁴⁴⁶ (2004) 219 CLR 165 at 181; 211 ALR 342; [2004] HCA 52; BC200407463 at [54] per Gleeson CJ, Gummow, Hayne, Callahan and Heydon JJ.

⁴⁴⁷ *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768 (“the Big Day Out case”); *Feldman v Google Inc* 513 F Supp 2d 229 (2007); *US v Drew* 259 FRD

Pty Ltd,⁴⁴⁸ the Federal Court of Australia held that terms printed on the back of tickets to the “Big Day Out” music festival were not binding because they differed from the terms displayed on the website which had been assented to by customers when tickets were purchased. The Court held that the ticket seller had engaged in misleading and deceptive conduct by printing non-binding terms on the back of the tickets.⁴⁴⁹ The Court, in reaching its conclusion, agreed with eBay’s assertion that customers were bound by the terms displayed on the website through their conduct of clicking an assent text box and by clicking “OK”. Customers indicated assent to the terms by clicking a text box which stated “I have read and agreed to the following terms and conditions”. Customers also clicked “OK” in response to message which stated “Please agree to the terms and conditions before you proceed.” The case is an example of the Federal Court of Australia accepting that the click wrap method is a valid means of incorporating terms. The case confirms that terms displayed on a website and assented to by “clicking” may bind the purchaser.

A more recent decision of the England and Wales High Court (Commercial Division), *Spreadex Ltd v Cochrane*,⁴⁵⁰ warns that the click wrap method does not always result in a valid incorporation of terms. The defendant used a website to set up an account to trade in the movement of prices in various commodities. The plaintiff, the website operator, was a spread betting bookmaker. The defendant’s user account was set up with a password and private account number. The defendant indicated acceptance of the website operator’s terms by clicking on various buttons. One of the terms stated that the user was deemed to have authorised all trading under the user’s account number. Several trades were made on the account by a child without the defendant’s authority and resulted in a loss of over £60,000 accumulating in the defendant’s account. The bookmaker sued to recover the funds and argued that the defendant was liable because of the term which deemed that all trades on the account were authorised by the account

449 (CD Cal 2009); *Ryanair Ltd v Billigfluege.de GMBH* [2010]IEHC 47 and *Ryanair v On the Beach Ltd* [2013] IEHC 124. See also: J M Paterson “Consumer Contracting in the Age of the Digital Natives” (2011) 27 *Journal of Contract Law* 152 and D Clapperton and S Coronos “Unfair terms in “clickwrap” and other electronic contracts” (2007) 35 *ABLR* 152.

⁴⁴⁸ (2006) 170 FCR 450; [2006] FCA 1768; BC200610545.

⁴⁴⁹ (2006) 170 FCR 450; [2006] FCA 1768; BC200610545 at [81] Rares J held that the ticket seller breached s 52 of the Australian Trade Practices Act 1974 which was the relevant legislation in force at the time.

⁴⁵⁰ [2012] EWHC 1290 (Comm).

holder. The High Court found that there was no binding contract due to an absence of consideration and determined that the term in question was “unfair” under the relevant legislation.⁴⁵¹ The court also held that, in any event, the “deemed authority” term had not been validly incorporated. The terms posted on the website included four documents including the Customer Agreement which contained the “deemed authority” term. The Customer Agreement was 49 pages long and contained 49 closely printed and complex paragraphs. The Court stated that “[t]his was an entirely inadequate way to seek to make the customer liable for any potential trades which he did not authorise, and is a further factor rendering the [relevant clause] an unfair term”.⁴⁵² The approach of the court is entirely sensible and serves as a reminder that every case will be decided on its own facts. The issue of adequacy of notice will not be ignored by the courts just because a consumer has clicked a consent button.

There are two approaches to determining that terms can be incorporated into contracts through clicking. First, indicating acceptance by clicking “I agree” or checking a box has been treated as akin to signing. Second, clicking has been treated as evidence that the consumer has adequate notice of terms before the contract is made.⁴⁵³ There are major differences between these approaches. Clapperton and Corones note that there are arguments as to whether assent to terms by clicking “I agree” results in incorporation by signature or notice.⁴⁵⁴

If treated as incorporation by signature, the user would be bound by the terms whether the terms were read or not. If treated as incorporation by notice, the vendor must have taken reasonable steps to bring the terms to the attention of the consumer at or before the time the contract was formed.

⁴⁵¹ The Unfair Terms in Consumer Contracts Regulations 1999 (UK).

⁴⁵² [2012] EWHC 1290 (Comm) at [21].

⁴⁵³ *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768 (“the Big Day Out case”) and *Feldman v Google Inc* 513 F Supp 2d 229 (2007) *US v Drew* 259 FRD 449 (CD Cal 2009).

⁴⁵⁴ D Clapperton and S Corones “Unfair terms in “clickwrap” and other electronic contracts” (2007) 35 ABLR 152 at 157.

Paterson favours the incorporation by signature analysis but notes that the issue is whether the consumer had notice that the consequence, of indicating consent, is that the terms will be binding on the consumer:⁴⁵⁵

Typically, click-wrap contracts may be treated as signed contracts. The consumer's act of clicking 'I accept' will usually constitute a clear and unequivocal signal of consent to the standardised terms proposed by the supplier. In such cases the supplier's terms will be incorporated into the contract regardless of whether the consumer has read or understood those terms. ... For a click-wrap contract to be treated as a signed contract, it must always be shown that consumers were provided with a clear statement of the consequences of the act of clicking (ie, 'By clicking I consent to the attached terms and conditions').

Determining the rationale for finding that clicking a check box or "I agree" button incorporates terms is important – if the click is treated as a signature then the adequacy of notice is not important. If adequate notice is not required the consumer's opportunity to become informed of the content of the terms is reduced and there is no requirement to provide a higher degree of notice for any unexpected or particularly onerous terms.⁴⁵⁶ Treating a click as a type of signature is not a helpful approach. Focusing on the issue of notice is preferable and allows a true application of the traditional principles on incorporation of terms.⁴⁵⁷ The effect of requiring the consumer to click to indicate assent will often amount to sufficient notice of terms because generally the link to the terms is posted next to the check box or "I agree" button and includes a clear statement that the consumer is clicking to indicate acceptance of terms. If there is no link to view the terms near the check box or "I agree" button, how can the click amount to assent? In the traditional paper contract situation the signature is placed on the document which records the terms. This is quite different from a consumer who clicks to indicate assent

⁴⁵⁵ J M Paterson "Consumer Contracting in the Age of the Digital Natives" (2011) 27 Journal of Contract Law 152 at 163.

⁴⁵⁶ *L'Estrange v Graucob* [1943] 2 KB 394 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463 and see: E Macdonald "Incorporation of Standard Terms in Website Contracting – Clicking 'I Agree'" (2011) 27 Journal of Contract Law 1 at 12.

⁴⁵⁷ See: *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm).

to terms if the link to view those terms is not posted anywhere near the check box or “I agree” button. The issue which determines whether terms are incorporated using the click wrap method must then be the question of sufficiency of notice. Has the trader taken sufficient steps to bring the content of the terms to the consumer’s attention before they indicate their assent to those terms? The action of clicking can be treated as evidence which confirms one of the steps taken by the trader in informing the consumer about the existence and content of the terms. Other evidence which assists in determining the sufficiency of the notice will be the facts concerning the location of the link to the terms in relation to the assent button, the description of the terms, the number of words included in the terms, the size of the type font used and the clarity of expression in the terms. The review discussed in this chapter considers the location of the link to terms on the website, the phrase used to describe the terms and the number of words in each set of terms.

6.4 BROWSE WRAP

Browse wrap describes the method of incorporation in which the trader’s terms are posted somewhere on the website and can be viewed by clicking on a link to those terms. The link to the terms is usually posted at the bottom of the home page or at the bottom of every page of the website. Sometimes the link to the terms appears in the left or right margin of the webpages. The consumer is able to view the terms by clicking on the link which refers to the terms. The terms usually commence with a statement that the terms are binding on anyone using the website and that the terms apply to any contract made using the website. The consumer is not required to click “I agree” or check a box to indicate assent or agreement to the terms before completing the transaction. The consumer may not view the terms and may indeed not even be aware that they exist before completing a purchase transaction.

Courts have generally been reluctant to treat terms, purported to be incorporated using the browse wrap method, as valid. In *Specht v Netscape Communications Corp*,⁴⁵⁸

⁴⁵⁸ 150 F. Supp. 2d 585 (S.D.N.Y. 2001) affirmed *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002).

a United States court refused to enforce terms alleged to have been incorporated through the browse wrap method. The terms contained in a licence agreement sought to bind persons who downloaded free software from a website. The website user downloaded the software by clicking on a “download” text box. Text following the “download” text box requested that the website user view and agree to the download software licence agreement before downloading and using the software. The licence agreement could be viewed by clicking on a link to another webpage. Website users were not required to view the licence agreement or indicate their consent to the agreement’s terms before downloading the software.

The online computer retailer Dell was involved in a number of cases involving online purchases in the United States between 2004 and 2006. In 2004, in *Defontes v Dell Computer Corp*,⁴⁵⁹ the Superior Court of Rhode Island held that the arbitration clause in Dell’s terms and conditions did not bind the plaintiff, reasoning that the browse wrap method “was not sufficient to put plaintiffs on notice of the terms and conditions of the sale of the computer”.⁴⁶⁰ In the following year, the Illinois Court of Appeal held in *Hubbert v Dell Corp*⁴⁶¹ that terms which were available through a blue hyperlink at the bottom of five webpages viewed by the customer, were binding due to statements on three of the webpages that: “All sales are subject to Dell’s terms and conditions of sale.”⁴⁶² The Court held that these statements were enough to put a reasonable person on notice of the terms and make them binding on customers. In both *Defontes* and *Hubbert*, the purchaser was not required to click on any box to indicate assent to the terms. More recently the Supreme Court of British Columbia stated in *Century 21 Canada Limited Partnership v Rogers Communications*:⁴⁶³ “A properly enforceable browse wrap agreement will give the user opportunity to read it before deeming the consumer’s use of the website as acceptance of Terms of Use.”

In summary, the browse wrap method of incorporation has not been particularly successful. It may succeed if the notice stating that any contract made while using the website is governed by the trader’s terms is prominently displayed prior to the making

⁴⁵⁹ 2004 R.I. Super. LEXIS 32.

⁴⁶⁰ *Defontes v Dell Computers Corp* 2004 R.I. Super. LEXIS 32 at [17].

⁴⁶¹ 835 N.E.2d 113 (Ill. App. Ct. 2005).

⁴⁶² *Hubbert v Dell Corp* 835 N.E.2d 113 (Ill. App. Ct. 2005) at p.122.

⁴⁶³ *Century 21 Canada Limited Partnership v Rogers Communications Inc* 2011 BCSC 1196 at [108].

of the contract.⁴⁶⁴ This becomes an issue of adequacy of notice and the traditional ticket cases will aid in reaching a conclusion in any given case. Patterson confirms: “Browse-wrap contracts have been treated as unsigned contracts incorporating terms through notice.”⁴⁶⁵ The posting of a link to the trader’s terms at the bottom of a webpage, without any other notice to the consumer advising of the existence of the terms, is unlikely to amount to sufficient notice. The success of the browse wrap method of incorporation depends on the adequacy of notice and in each case the court will need to consider the location of the link to terms, whether the existence of the terms is drawn to the consumer’s attention at other places on the website and at what stage of the transaction process.

6.5 REVIEW METHOD

In order to collect the information recorded in the review,⁴⁶⁶ the writer posed as an online shopper and “shopped” up to the point where payment details were required. A random product was selected for purchase using the online “shopping cart”. An account with the online trader was generally created in order to reach the payment submission details webpage. The method of incorporation of terms used by each online trader was recorded as click wrap or browse wrap and on two occasions, as a hybrid (described below) between the two methods. The location of the link to view the terms and the phrase used to describe the terms was noted. The number of words in each set of terms was also recorded. The 25 New Zealand and 25 Australian websites were chosen randomly and included a mix of large and small retailers. Google and Wikipedia searches of “popular retail websites” were conducted to identify suitable websites. The New Zealand websites required a New Zealand delivery address and Australian

⁴⁶⁴ *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002); *Defontes v Dell Computers Corp* 2004 R.I. Super. LEXIS 32; *Hubbert v Dell Corp* 835 N.E.2d 113 (Ill. App. Ct. 2005); *Register.com Inc v Verio Inc* 356F 3d 393 (2nd Cir, 2004) and *Southwest Airlines Co v Boardfirst LLC* (2007) US Dist LEXIS 96230.

⁴⁶⁵ J Paterson “Consumer Contracting in the Age of the Digital Natives” (2011) 27 *Journal of Contract Law* 152 at 163.

⁴⁶⁶ The review information was collected between 1 August 2013 and 30 November 2013.

websites required an Australian delivery address. The review covered a range of websites selling a variety of different products including:

- (1) Clothing and shoes;
- (2) Appliances, electronics and computers;
- (3) Games and DVDs;
- (4) Books;
- (5) Groceries;
- (6) Sports and outdoor equipment;
- (7) Household goods;
- (8) Baby gear;
- (9) Office supplies; and
- (10) Pharmaceuticals.

6.6 THE RESULTS

6.6.1 Incorporation Methods

The results indicate that the majority of websites used the browse wrap method to purport to incorporate their terms. Of the New Zealand websites reviewed, 52% used the browse wrap method of incorporation and 40% used the click wrap method. The remaining 8% used a method of incorporation which has been described as “hybrid”. The hybrid method purports to use the click wrap method of incorporation but the check box has already been checked when the webpage which refers to terms is displayed. The review of Australian websites showed that 68% used the browse wrap method and 32% used the click wrap method. The combined results of the 50 websites show that 60% used browse wrap, 36% click wrap and 4% the hybrid method.

6.6.2 Location and Description of Terms

An overwhelming majority of the websites which used browse wrap simply posted a link to the terms at the bottom of each webpage without any other reference to terms

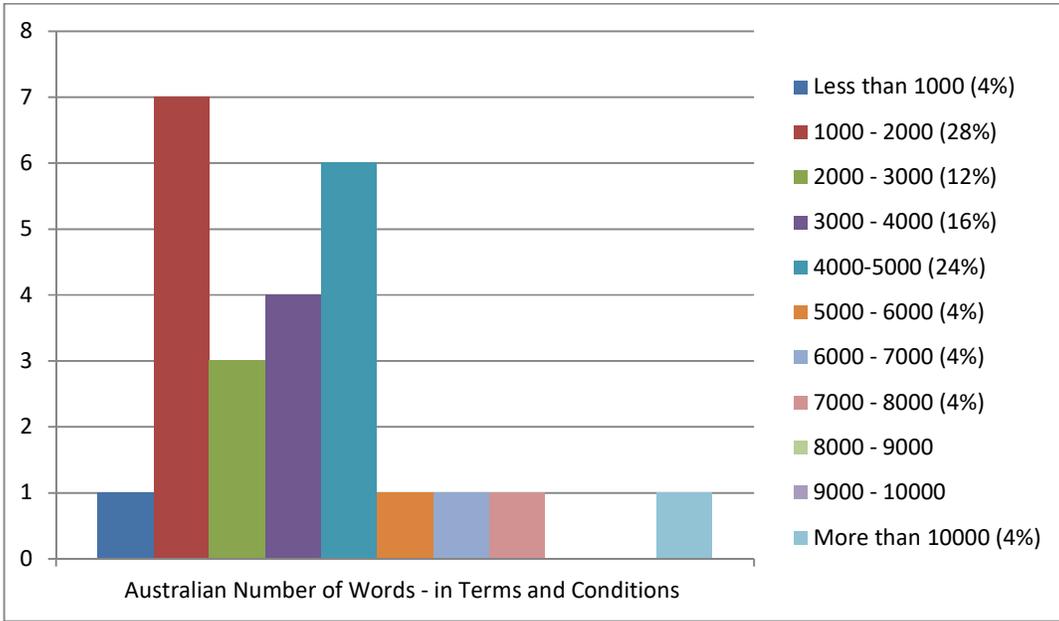
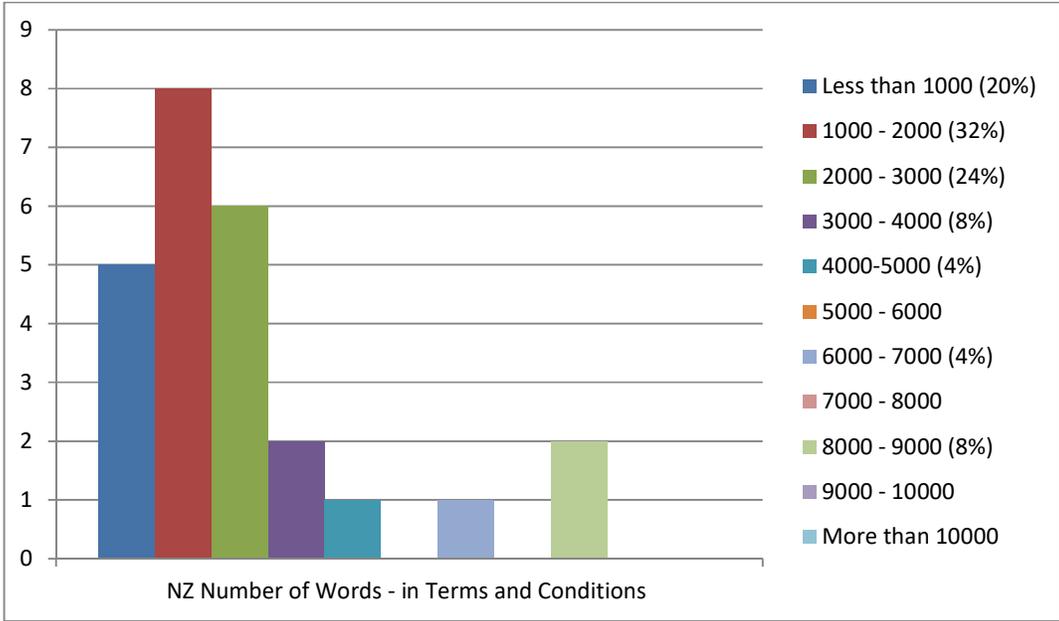
during the transaction process. Twelve of 13 New Zealand websites which used browse wrap posted the link to terms at the bottom of each webpage, while one posted the link at the top of the page under a heading “About Us”. All 17 Australian websites which used browse wrap posted the link to terms at the bottom of each webpage. Each set of terms contained a term which stated that by using the website the user was bound by the terms or that any contract made by the website user would include the terms.

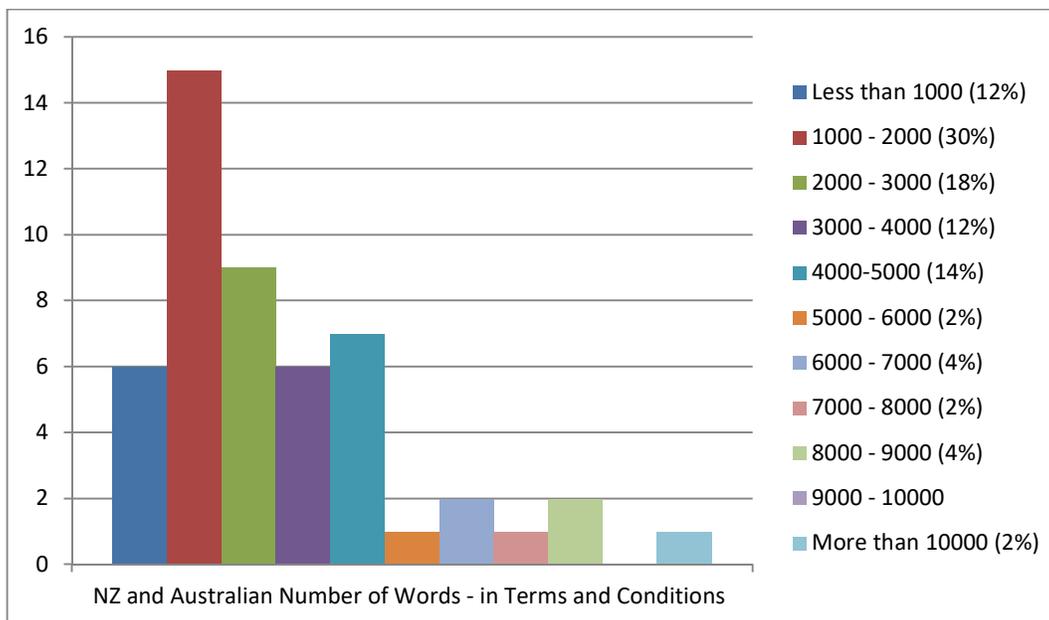
Nine out of 12 New Zealand websites which used click wrap or the hybrid method posted the link to terms near the check box. The other 3 websites posted the link to terms at the bottom of the page on which the check box or “I agree” button appeared. All 8 Australian websites which used click wrap posted the link to the terms near the check box or “I agree” button.

The links to the terms described terms using a somewhat confusing variety of phrases including “conditions of use”, “terms and conditions”, “TERMS + COND”, “Legal”, “Sales and refunds”, “Terms of Service”, “Site Terms and Conditions of Purchase”, “Terms and conditions of trade”, “customer agreement”, “Shipping and returns”, “terms of business”, “Terms of Use” and “Delivery and returns”.

6.6.3 Number of Words in Terms

The number of words used by the 25 New Zealand websites in each set of terms ranged from 303 to 8443 words. The number of words in the terms used by the Australian websites ranged from 334 to 10,005 words. These results are reflected in the charts below:





6.7 ANALYSIS OF THE REVIEW RESULTS

6.7.1 Adequacy of Notice

It is unlikely that using browse wrap with no reference to the existence of terms other than the posting of a link at the bottom of each webpage is sufficient notice of those terms. More must be done to draw the consumer's attention to the existence and content of the terms. The number of online traders using a basic browse wrap method revealed by the review shows that many terms in online shopping contracts may not be binding on consumers. While this may seem like good news for consumers it may not be helpful if consumers are not aware that the terms are not binding.

6.7.2 Number of Words in the Terms

The review shows that 88% of the terms used by the New Zealand and Australian websites contained over 1000 words. When the number of words becomes excessive is debatable, but terms which contain over 1000 words require a considerable amount of a

consumer's time and attention to read and absorb. Terms which extend to 10,000 must be viewed as excessive. Studies by Hillman and Rachlinski⁴⁶⁷ have confirmed the widely held view that the vast majority of consumers are unlikely to read terms even if they are aware of their existence. The likelihood of reading must drop even further if the terms are excessively long and complex. The length of terms must have an impact on the adequacy of notice. If terms which disadvantage consumers are buried in lengthy documents, without any particular highlighting, then consumers will have strong arguments for avoiding those terms on the grounds of inadequate notice. The approach of the England and Wales High Court (Commercial Division) in *Spreadex Ltd v Cochrane*,⁴⁶⁸ discussed above, is to be welcomed in this regard.

6.8 IS LEADING A CONSUMER TO BELIEVE THAT THEY ARE BOUND BY TERMS WHICH ARE NOT BINDING MISLEADING AND DECEPTIVE CONDUCT?

Online traders who purport to incorporate terms using the browse wrap method rely on the statement in the terms which declares that the terms are binding on website users and that the terms are included in any contract made using the website. If in fact the terms are not validly incorporated, due to insufficiency of notice for example, then the trader has misled the consumer into believing that the terms are binding. Consumers may believe that the terms define their contractual rights when in fact the terms are not binding at all. It can be argued that the trader's conduct of making a statement declaring terms to be binding in circumstances where the terms have not in fact been validly

⁴⁶⁷ R A Hillman and J J Rachlinski "Standard Form Contracting in the Electronic Age" (2002) 77 New York University Law Rev 429; R A Hillman "Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications" in Jane Winn (ed) *Consumer Protection in the Age of the 'Information Economy'* (Ashgate Publishing Ltd, Aldershot, England 2006) at 283 and Y Bakos, F Marotta-Wurgler and D R Trossen "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts" (2014) 43 Journal of Legal Studies 1. See also: "April Fool's day prank by United Kingdom online retailer Games Station" as reported by The Telegraph 17 April 2010 at: <<http://blogs.telegraph.co.uk>>.

⁴⁶⁸ *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) at [21] where the court held that a term included in a 49 page closely printed and complex document which was one of four documents posted online was not binding even though the customer agreed to the terms by clicking various consent buttons.

incorporated is misleading and deceptive. Section 9 of the New Zealand Fair Trading Act 1986 (“the FTA”) and section 18 of the Australian Consumer Law (“the ACL”) both prohibit conduct in trade which is misleading or deceptive or likely to mislead or deceive. Section 13(i) of the FTA and section 29(1)(m) of the ACL also both provide that no person shall in trade, in connection with the supply of goods, make a false or misleading representation concerning the “effect of any condition”. Breach of section 13 (i) and section 29(1)(m) are criminal offences punishable by significant fines.⁴⁶⁹

In *eBay International AG v Creative Festival Entertainment Pty Ltd*,⁴⁷⁰ Rares J held that the ticket seller engaged in conduct which was misleading or deceptive and/or likely to mislead or deceive by representing that certain terms on the back of the paper ticket were binding when those terms were not included in the purchase contract which was completed online. The conduct of the ticket seller in printing terms on the back of a ticket which differed from the terms posted on the seller’s website at the time of sale was misleading and deceptive. Only the terms posted on the website were binding. The purchaser had no notice of the terms on the back of the ticket until after the purchase contract was complete. A similar argument could apply to declarations by online traders that certain terms are binding when in fact they are not binding at all. For example, if a term posted on a website states that the consumer has one week from delivery to lodge a complaint about the quality of a product, but that term has not been validly incorporated, the consumer is misled into believing that a complaint time limit applies when in fact it does not. The Commerce Commission in New Zealand and the corresponding regulatory bodies in Australia should be encouraged to investigate possible FTA and ACL breaches in scenarios where terms have not been validly incorporated but traders claim that the terms are binding.

⁴⁶⁹ FTA, s 40 maximum fine \$60,000 for individuals (to be increased to \$200,000 on 17 June 2014 by s 27 of the Fair Trading Amendment Act 2013) and \$200,000 for body corporates (to be increased to \$600,000 on 17 June 2014 by s 27 of the Fair Trading Amendment Act 2013) and ACL, s 151 maximum fine \$220,000 for individuals and \$1,100,000 for body corporates.

⁴⁷⁰ (2006) 170 FCR 450; [2006] FCA 1768; BC200610545.

6.9 UNFAIR TERMS REGULATION

Potentially a number of the terms that traders are using in their contracts, if those terms have been validly incorporated, may be unfair terms. While the Disputes Tribunal in New Zealand has long been able to set aside “harsh or unconscionable” terms,⁴⁷¹ general regulation of “unfair terms” in New Zealand has only recently been introduced.⁴⁷² The Fair Trading Amendment Act 2013 introduces unfair terms provisions into the FTA which take effect on 18 March 2015.⁴⁷³ The New Zealand provisions are similar to the Australian Consumer Law (“the ACL”).⁴⁷⁴ The ACL provides that unfair terms in standard form consumer contracts are void.⁴⁷⁵ The New Zealand provisions state that terms which are declared unfair by the Court cannot be used in a standard form contract and cannot be applied, enforced or relied on.⁴⁷⁶ Under the ACL, various Australian regulators and any individual can apply to the Court for a declaration that a term of a consumer contract is unfair. The New Zealand reform is restricted in that it stipulates that only the Commerce Commission may apply to the Court for a declaration that a term is unfair.⁴⁷⁷ However, any person, including a consumer, may ask the Commerce Commission to make an application for such a declaration in relation to a contract in which that person is a party.⁴⁷⁸

⁴⁷¹ Disputes Tribunals Act 1988, s 19.

⁴⁷² See: A Sims “Unfair Contract Terms: A New Dawn in Australia and New Zealand?” (2014) 39 Mon LR 739 and K Tokeley “New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal” (2013) 37(1) UWAL Rev 107.

⁴⁷³ s 26A and ss 46H-46M of the New Zealand Fair Trading Act 1986 to be inserted by the Fair Trading Amendment Act 2013 and see: <<http://www.consumeraffairs.govt.nz/legislation-policy/changes-to-consumer-laws/what-businesses-need-to-know/changes-18-June-2014/summary>> (accessed May 2014).

⁴⁷⁴ ss 23-25 of the Australian Consumer Law is set out in Volume 3, Schedule 2 of the Competition and Consumer Law Act 2010. Regulation of unfair terms in consumer contracts was introduced in the United Kingdom in 1995 in order to implement EU Unfair Consumer Contract Terms Directive. The current Unfair Terms in Consumer Contracts Regulations 1999 (UK) provide that unfair terms are not binding on consumers.

⁴⁷⁵ ACL, s 23 (1).

⁴⁷⁶ FTA (NZ), s 26A.

⁴⁷⁷ Section 46H(1). The Ministry of Consumer Affairs originally proposed that consumers be entitled to challenge unfair contract terms in the Disputes Tribunal but this proposal is not included in the final regulation – see: Ministry of Consumer Affairs “Consumer Law Reform Additional Paper – September 2010 Unfair Contract Terms” at 15 available at: <<http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/policy-reports-and-papers>> (accessed May 2014).

⁴⁷⁸ FTA (NZ), s 46H(2).

A New Zealand court may determine that a contract in which the terms have not been negotiated between the parties is a “standard form contract”.⁴⁷⁹ In making this determination, the court must take account of factors such as bargaining power, who drafted the contract, and the extent to which the parties had an opportunity to negotiate the terms.⁴⁸⁰ Most online shopping contracts with consumers, which include the trader’s standard terms and conditions, will meet the definition of “standard form” consumer contract because the consumer generally has no opportunity to negotiate the terms.⁴⁸¹ Goods are generally offered for sale on a “take it or leave it” basis. Section 46L of the FTA and section 24 of the ACL provide that a term in a standard form consumer contract is unfair if:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- (b) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

Section 46K of the FTA and section 26 of the ACL provide that the unfair terms provisions do not apply to terms relating to the subject matter of the contracts or the upfront price. In determining whether a term is unfair, section 46L(2) of the FTA and section 24(2) of the ACL require the Court to take account of the extent to which the term is transparent and the contract as a whole.⁴⁸² “Significant imbalance” has been held

⁴⁷⁹ FTA (NZ), s 46J(1) .

⁴⁸⁰ FTA (NZ), s 46J(2).

⁴⁸¹ See: section 46J(1) FTA (NZ) which allows the court to determine that a contract is a standard form contract if the terms have not been subject to effective negotiation between the parties. Factors which the court must take into account in making this determination are listed in s 46J(2) of the FTA (NZ) and see s 27 of the ACL.

⁴⁸² In *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754 the following term, “This agreement shall be governed by and interpreted and enforced in accordance with the laws applicable in the Australian Capital Territory. This agreement shall be deemed to have been entered into in the Australian Capital Territory”, was found to be unfair as it artificially required all contracts to have been made in a specific jurisdiction contrary to reality. The term also had the effect of limiting or deterring consumers outside that jurisdiction from enforcing their contracts. In *Spreadex Ltd v Cochrane*

to cover a scenario where the parties' rights and obligations under the contract are tilted in the trader's favour.⁴⁸³ Terms in online shopping contracts which disadvantage consumers may well result in a tilting of rights in the trader's favour which will meet the "significant imbalance" requirement. If such terms are not reasonably necessary to protect the trader's legitimate interests and cause detriment to the consumer then the court may determine that they are unfair.

The unfair terms legislation in New Zealand and Australia includes a "grey list" of types of terms which are examples of unfair terms.⁴⁸⁴ Section 46M of the FTA provides that the following kinds of terms may be unfair contract terms:⁴⁸⁵

- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract:
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract:
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract:
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract:
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract:
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price (as defined in section 46K(2)) payable under the contract without the right of another party to terminate the contract:

[2012] EWHC 1290 (Comm) a United Kingdom court found that a term which stated that "the account holder authorised all transactions on his account" was "unfair" under the United Kingdom Unfair Terms in Consumer Contracts Regulations 1999.

⁴⁸³ *Director of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 AC 481 and see: J Downes "The Australian Consumer Law – is it really a new era of consumer protection?" (2011) 19 AJCCL 5 at 15.

⁴⁸⁴ FTA (NZ), s 46M and ACL s 25.

⁴⁸⁵ A similar "grey list" of terms is set out in s 25 of the ACL.

- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract:
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether a contract has been breached or to interpret its meaning:
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents:
- (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent:
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party:
- (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract:
- (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

Many terms which disadvantage consumers included in standard form contracts by online traders will be covered by the examples of unfair terms included in the “grey list” but other terms will fall outside those examples. For example, a non-disparagement term which prohibits a consumer from making any negative comments about the online trader or its products is not covered by the examples in the grey list.⁴⁸⁶ A term which states that there is no contract until the goods are dispatched by the trader also falls outside the “grey list” but may be an unfair term in circumstances where the consumer pays the full price prior to dispatch.⁴⁸⁷ In addition, terms which attempt to exclude consumer rights under the Consumer Guarantees Act 1993 in New Zealand or the

⁴⁸⁶ A non-disparagement term was at the centre of *Palmer v Kleargear* (unreported default judgment United States District Court for the District of Utah case No. 1:13-cv-00175-DB, 30 April 2014) discussed in N Davis “The Yelper and the Negative Review: the Developing Battle Over Nondisparagement Clauses” (2014) GPSOLO eReport 3(10) available at: http://www.americanbar.org/publications/gpsolo_ereport/2014/may_2014/yelper_negative_review_developing_battle_nondisparagement_clauses.html.

⁴⁸⁷ For a full discussion of this type of term see: T O’Sullivan “Online Shopping and Consumers – the impact of ‘contract on dispatch’ terms” (2013) 21 CCLJ 186 - the text of this article is included in Chapter 5 above.

consumer guarantee provisions in Part 3 – 2 Division 1 of the ACL, will not be effective due to the prohibitions on contracting out of that legislation.⁴⁸⁸

The Australian unfair terms legislation was applied by the New South Wales Consumer, Trader and Tenancy Tribunal in an online context in *Malam v Graysonline, Rumbles Removals and Storage*.⁴⁸⁹ A consumer purchased a glass top table using the Graysonline auction site. When the table was collected for delivery it was packaged in a box and was not inspected. When unpacked on delivery, the glass top was broken and the legs were damaged. Graysonline refused to accept liability for the damage and sought to rely on terms in its user agreement which the consumer had accepted by clicking “yes”. The terms stated that “all sales were made on an ‘as is, where is’ basis” and that Graysonline accepted no responsibility for damage during transit unless it was responsible for delivery. Graysonline also sought to rely on a notice which was displayed on the website, after the purchase was complete, which stated that “items must be inspected before removal from Graysonline as refunds or exchanges are not given under any circumstances”. The Tribunal found that the table was broken before it left Graysonline’s warehouse. The Tribunal concluded that the user agreement was a standard form consumer contract but the terms in the notice displayed on the website following the purchase were not binding as the contract had already been concluded when the notice was displayed. The Tribunal found that term in the user agreement which prevented the consumer from returning the goods was not “transparent” because it was included in a 13 page agreement which was structured in a confusing way and contained inconsistent clauses. The Tribunal found that the term was “unfair” because it was not necessary to protect the interests of Graysonline and declared that the term was void.

Consumers shopping online who are bound by terms which meet the legislative definition of “unfair” may challenge those terms in Australia. In New Zealand, consumers must request that the Commerce Commission make an application to the court for a declaration that terms are “unfair”.⁴⁹⁰ If the court declares that a term is

⁴⁸⁸ Consumer Guarantees Act 1993 (NZ), s 43 and ACL, s 64.

⁴⁸⁹ [2012] NSWCTTT 197.

⁴⁹⁰ FTA (NZ), s 46H.

unfair, it cannot be used, applied, enforced or relied on.⁴⁹¹ In Australia, an unfair term is treated as void.⁴⁹² Continued use of a term which has been declared unfair is a breach of section 26A of the FTA which is an offence subject to the penalties provided in section 40 of the Act. The unfair terms legislation is an important remedy for online consumers who in reality are unlikely to read terms and even if they do, have little opportunity to negotiate different terms. The effectiveness of the unfair terms regulation for New Zealand consumers would be greatly improved if the limitation which allows only the Commerce Commission to apply for declarations that terms are unfair were removed. Consumers could then bring their own applications for declarations and perhaps more importantly, consumers could challenge a trader's reliance on a particular term, on the grounds that the term is unfair.

6.10 CONCLUSION

The review shows that a significant majority of the websites reviewed in New Zealand and Australia use a basic browse wrap method which may not in fact result in validly incorporated terms. While this sounds like positive news for consumers, it does not help if consumers are not aware that the terms are not binding. Online traders may actually be engaging in misleading and deceptive conduct by leading consumers to believe that they are bound by terms which have not been validly incorporated. The review highlights the excessive number of words included in many sets of terms. The length of the documents which contain the terms can have a negative effect on the adequacy of notice. The location of the link to terms and the phrase used to describe terms can also have an impact on the adequacy of notice. These factors – the length of terms, the location of the link to terms and the description of terms – can all be referred to by consumers in arguing that they have not been sufficiently notified of terms. Consumers who are bound by terms which qualify as “unfair” can resort to unfair terms legislation to challenge those terms, in Australia directly and in New Zealand⁴⁹³ by requesting the Commerce Commission to take action. The effectiveness of the New Zealand unfair

⁴⁹¹ FTA (NZ), s 26A(1).

⁴⁹² ACL, s 23(1)(a).

⁴⁹³ From 18 March 2015.

terms legislation would be improved if it were amended to allow consumers to also apply to the court for orders pursuant to the legislation.

Chapter Seven

Developing an Online Dispute Resolution (ODR) Scheme for New Zealand Consumers Who Shop Online – Are Automated Negotiation Tools the Key to Improving Access to Justice?*

7.1 INTRODUCTION

Access to justice is an important issue for all consumers but is particularly critical for consumers who shop for goods online. Online shoppers are often in a vulnerable position because they generally make full payment before delivery of the goods they purchase. Consumers who shop online do not have face to face contact with the trader and generally cannot return to a physical store, with the goods, to seek redress. They usually rely on email or telephone communication to resolve issues. Often the small value of items purchased means that the consumer is not able to spend much time or energy on seeking redress because this is not justified economically. The online consumer's ability to obtain a remedy when things go wrong is therefore an important issue in relation to building confidence in online shopping.

New Zealand adopted the Model Code for Consumer Protection in Electronic Commerce in October 2000. The Model Code is based on the OECD Guidelines (1999)⁴⁹⁴ and requires businesses to set up internal complaint handling procedures to deal with consumer complaints relating to electronic commerce.⁴⁹⁵ The guidelines in the

* The text of this chapter was published in 2015: Trish O'Sullivan "Developing an Online Dispute Resolution scheme for New Zealand consumers who shop online - are automated negotiation tools the key to improving access to justice?" (2015) 24(1) International Journal of Law and Information Technology 22.

⁴⁹⁴ <<http://www.oecd.org/sti/consumer/34023811.pdf>> (accessed 1 August 2015).

⁴⁹⁵ Clause 36 of the Model Code requires businesses to establish fair and effective internal procedures to address and respond to consumer complaints within a reasonable time, in a reasonable manner, free of charge to the consumer and without prejudicing the rights of the consumer to seek legal redress. Clause 38 requires businesses to provide consumers, who are unsatisfied with the resolution provided by any internal complaint handling mechanism, with information regarding any external dispute resolution body to which the business subscribes or any relevant government body. Clause 39 requires businesses to

code provide a useful reference point for online traders but these guidelines have no legislative force.

The development of an Online Dispute Resolution (“ODR”) scheme, with legislative force, for resolving online shopping disputes seems appropriate given the fact that: the shopping transactions are completed online; the cost of single transactions is generally low; the online consumer places a high level of trust in the online retailer by making payment before delivery or sighting of the product; and the online consumer generally cannot return to a physical store to demand a remedy when problems arise. This chapter recommends developing an ODR scheme for online shopping disputes first. The scheme could later be extended to cover any small value consumer disputes.

When shopping online, consumers frequently encounter problems such as: non-delivery of goods; supply of faulty goods; or failure of goods to comply with their website description. The extent of the occurrence of problems arising is difficult to gauge accurately because often consumers will not complain or the problem may be dealt with appropriately by the online trader. A European Commission Press release in 2013 reported that: “In 2010, one in five consumers in the EU encountered problems when buying goods or services [online] in the Single Market, ... Only a small fraction of consumers sought and secured effective redress.”⁴⁹⁶ Over a two year period from 2010 to 2011, the European Consumer Centres’ Network, ECC-Net, which operates across 29 European countries received approximately 31,000 complaints from consumers per year and 55% of those complaints concerned online purchases.⁴⁹⁷ Delivery issues and the

provide clear and easily accessible information to consumers on any independent customer dispute resolution mechanism to which the business subscribes that is capable of dealing with consumer complaints. Clause 42 requires any business based in New Zealand that enters into a contract with a consumer whom the business reasonably believes is resident in New Zealand (e.g. because of address details supplied by the consumer) to specify that the governing law of that contract is the law of New Zealand and that disputes arising under the contract shall be determined by courts or tribunals in New Zealand.

⁴⁹⁶ European Commission Press release MEMO Brussels, 12/3/13 *A step forward for EU consumers: Questions & answers on Alternative Dispute Resolution and Online Dispute Resolution* available at: <http://europa.eu/rapid/press-release_MEMO-13-193_en.htm> (accessed 1 August 2015).

⁴⁹⁷ European Consumer Centres’ Network (Centres in 29 countries) *The European Online Marketplace Consumer Complaints 2010-2011* September 2012 at p 13 available at: <http://ec.europa.eu/consumers/ecc/news_en.htm> and <ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf> (accessed 1 August 2015).

supply of defective products were the main areas for complaint.⁴⁹⁸ New Zealand consumers will likely be experiencing problems at similar rates. The European Union (“the EU”) is pushing ahead with the development of an ODR platform to assist consumers in resolving disputes with online traders.⁴⁹⁹ It is time to seriously consider adopting a similar ODR scheme in New Zealand.

This chapter outlines the existing methods for enforcing consumer rights and the dispute resolution processes available in New Zealand for consumers who shop online. An explanation of how automated negotiation tools work is provided and the benefits of using such tools are discussed. Automated negotiation tools have the capacity to greatly reduce the cost and speed of obtaining a remedy by encouraging early settlement and resolution. Cost and efficiency are both critical factors in resolving low value disputes and the key to the success of any ODR scheme is to ensure that these automated tools are incorporated into the scheme.⁵⁰⁰ The success of these automated tools as used by organisations like “eBay” and “PayPal” when dealing with disputes arising from online transactions are highlighted.

The chapter reviews the development of ODR schemes by the EU and the United Nations Commission on International Trade Law (“UNCITRAL”). These ODR schemes propose establishing ODR platforms which are entry point websites where complaints are lodged and independent third parties are appointed to assist in working towards the resolution of disputes, making final determinations if necessary. The ODR platform proposed by UNCITRAL includes a negotiation stage which may make use of automated negotiation tools. The benefits of establishing an ODR platform, similar to those proposed by the EU and UNCITRAL, which incorporates automated negotiation tools are discussed with a view to promoting a similar scheme in New Zealand, and possibly with Australia.

⁴⁹⁸ European Consumer Centres’ Network (Centres in 29 countries), *The European Online Marketplace Consumer Complaints 2010-2011* September 2012 at p 15 available at: <http://ec.europa.eu/consumers/ecc/news_en.htm> and <ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf> (accessed 1 August 2015).

⁴⁹⁹ The EU Directive on ADR (2013/11/EU) and Regulation on ODR (EU No 524/2013) came into force 8 July 2013. EU member countries are obliged to implement the Directive within two years by passing national laws by July 2015 - the ODR Platform is to become operational six months later in January 2016.

⁵⁰⁰ J Hörnle “Encouraging Online Alternative Dispute Resolution in the EU and Beyond” (2013) 38 *European Law Review* 187.

The term “ODR”,⁵⁰¹ as used in this chapter, covers any use of the internet or technology to aid in the non-judicial resolution of disputes. This may include communication by email or via a website, the lodging of complaints online, the use of automated negotiation tools, and online negotiation, mediation or adjudication which may or may not make use of audio visual technology.

7.2 CURRENT CONSUMER ENFORCEMENT AND DISPUTE RESOLUTION PROCESSES IN NEW ZEALAND

The Disputes Tribunal is the most appropriate forum for resolving disputes relating to online shopping issues in New Zealand. The Tribunal has a maximum jurisdiction level of \$15,000 or up to \$20,000 if the parties agree to extend the Tribunal’s jurisdiction.⁵⁰² Most online shopping transactions relate to purchases of products valued at considerably less than these jurisdiction limits. In the 12 month period ending 31 March 2014, the Tribunal dealt with 15,511 disputes and the average cost for dealing with each dispute was \$600-650 per claim.⁵⁰³ A small selection of “decisions of interest” for the years 2009 to 2014 are posted on the Disputes Tribunal website.⁵⁰⁴ A review of these decisions does not disclose any decisions which relate specifically to online shopping purchases from retail websites. However, these published “decisions of interest” only represent a small proportion of the total number of disputes dealt with by the Tribunal.⁵⁰⁵ It seems likely that online shoppers who want to pursue claims against online traders would use the Disputes Tribunal. A claim may be lodged online via the

⁵⁰¹ For a general description of the term “ODR” see the introductory chapter of M S A Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice - A Treatise on Technology and Dispute Resolution* (Eleven International Publishing, The Hague, The Netherlands, 2012) at p 3 “... the term ‘ODR’ is not subject to universal agreement over its meaning and scope. ODR is described by some as technology-assisted dispute resolution, by others as technology-facilitated dispute resolution, and by still others as technology based -based resolution schemes”.

⁵⁰² Disputes Tribunal Act 1988, s 10 and s 13.

⁵⁰³ Letter dated 29 April 2015 from the Ministry of Justice in response to an official information request from the author.

⁵⁰⁴ < <http://www.justice.govt.nz/tribunals/disputes-tribunal/decisions-of-note> > (accessed 16 June 2015).

⁵⁰⁵ The author contacted the Disputes Tribunal in November 2014 to ascertain whether the Tribunal has statistics which record the numbers of different types of disputes dealt with by the Tribunal but was advised that such statistics are not available.

Tribunal website at costs ranging from \$45 to \$180 depending on the level of the amount claimed.⁵⁰⁶ A hearing date is appointed, the other party is notified of the hearing date and the claimant then appears in person to present the claim to the Tribunal referee. Legal representation in the Tribunal is not permitted. While the claim may be lodged online, the claimant still needs to attend a hearing and may need to take time off work or arrange child care to do so. Tribunal decisions may be appealed to the District Court, but only on narrow grounds. Appeal is only possible on the grounds that the referee conducted the proceedings (or a tribunal investigator carried out an inquiry) in a way that was unfair and prejudiced the result of the proceedings, at a cost of \$200.⁵⁰⁷ Tribunal decisions and agreed terms of settlement are deemed to be orders of the District Court and may be enforced using District Court procedures.⁵⁰⁸

Consumers may also seek to resolve online shopping disputes by commencing actions in the District Court for any claim up to \$200,000⁵⁰⁹ but will generally need legal representation and need to pay a fee of \$200⁵¹⁰ to commence the proceeding. Claimants in the District Court are subject to cost orders if they are not successful. Consumers are unlikely to bring claims in the District Court in relation to low value goods purchased online due to the expense of litigation.

In New Zealand, in theory consumers have a number of different avenues in which to seek redress outside the Disputes Tribunal and the District Court, however, the reality is somewhat different. For example, while New Zealand has a plethora of industry specific dispute resolution schemes,⁵¹¹ there is no particular scheme dedicated

⁵⁰⁶ Disputes Tribunal Rules 1989, Rule 5 proscribes the following fees: \$45 for claims under \$2,000; \$90 for claims \$2,000 or more but less than \$5,000; and \$180 for claims which are \$5,000 or more.

⁵⁰⁷ Disputes Tribunal Act 1988, s 50.

⁵⁰⁸ Disputes Tribunal Act 1988, ss 45 – 47.

⁵⁰⁹ District Courts Act 1947, s 29.

⁵¹⁰ District Courts Fees Regulations 2009 - as at 1 July 2014.

⁵¹¹ See: A Sims 'Industry-Specific Regulation' in K Tokeley (ed) *Consumer Law in New Zealand* (LexisNexis, Wellington, 2014) at 241. For example: The Electricity & Gas Complaints Commissioner see: <www.egcomplaints.co.nz>; Telecommunications Dispute Resolution see: <www.tdr.org.nz>; Privacy Commissioner see: <www.privacy.org.nz>; Accident Compensation complaints see: <<http://www.acc.co.nz/making-a-claim/what-if-i-have-problems-with-a-claim/ECI0046>>; Motor Vehicle Disputes Tribunal see: <www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal>; Health and Disability Commissioner see: <www.hdc.org.nz>; Retirement Commissioner see: <www.cflri.org.nz>; Insurance and Savings Ombudsman see: <www.iombudsman.org.nz>; Financial Services Complaints Ltd see: <www.fscl.org.nz>; Financial Dispute Resolution see: <www.fdr.org.nz>; The Banking Ombudsman see: <www.bankomb.org.nz>; Real Estate Agents Authority see: <www.reaa.govt.nz>; Tenancy Tribunal

to retail disputes. The majority of these schemes relate to service industries and essentially provide industry funded, self-regulating complaints procedures for customers. Participants in a particular industry may join a relevant scheme for resolution of their customers' complaints. Schemes can generally impose membership sanctions on participants who fail to comply with scheme decisions. These schemes do not follow uniform procedures and consumer awareness of their existence is limited.⁵¹² None of these schemes provide avenues for resolution of disputes relating to online shopping transactions.

Another potential option, for a group of consumers who are affected by the same issue with a particular product or supplier, is to bring a class action. Class actions are generally driven by lawyers acting on a "success fee" basis which is not a common practice in New Zealand. Sims and Tokeley point out that the ability to bring class actions is limited by the requirements of the High Court Rules.⁵¹³ Rule 4.24 requires all persons with the same interest to consent to the proceeding and provides that the class action may only proceed on the direction of the court.⁵¹⁴ In practice, class actions are rarely, if ever, used by New Zealand consumers, which contrasts with other jurisdictions such as the United States.⁵¹⁵ Another route for obtaining resolution of consumer disputes is to contact television shows like "Fair Go" and "Target" in New Zealand or "The Checkout" in Australia which promote the protection of consumer rights. These

see: <www.dbh.govt.nz/tenancy-tribunal> and <www.justice.govt.nz/tribunals/tenancy-tribunal>; Plumbers, Gasfitters and Drainlayers' Board see: <www.pgdb.co.nz/complaints.html>; Electrical Workers Registration Board see: <ewrb.govt.nz>; Building Practitioners Board see: <www.lbp.govt.nz>; Weathertight Homes Tribunal see: <www.justice.govt.nz/tribunals/whf>; New Zealand Institute of Chartered Accountants see: <www.nzica.com>; Accountants and Tax Agents Institute of New Zealand see: <www.atainz.co.nz>; and New Zealand Law Society see: <www.lawsociety.org.nz/for-the-community/lawyers-complaints-service> (all accessed 16 June 2015).

⁵¹² A Sims "Industry-Specific Regulation" in K Tokeley (ed) *Consumer Law in New Zealand* (LexisNexis, Wellington, 2014) 241 at 284.

⁵¹³ A Sims "Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action" (2010) 16 NZBLQ 145 at 168 and K Tokeley 'Class Actions for New Zealand Consumers' in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen (eds) *The Yearbook of Consumer Law 2008* (Ashgate, Aldershot, England, 2007) 297 at 306-313.

⁵¹⁴ See: A Sims "Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action" (2010) 16 NZBLQ 145 at 168 and K Tokeley "Class Actions for New Zealand Consumers" in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen (eds) *The Yearbook of Consumer Law 2008* (Ashgate, Aldershot, England, 2007) 297 at 306-313.

⁵¹⁵ See: Class Action Fairness Act 2005 (US) and *AT&T Mobility v. Concepcion* (2011) 563 U.S. 321 a United States Supreme Court majority decision which upheld the validity of class action waiver clauses.

shows do good work and often a threat of contacting a television show may encourage the trader or supplier to act responsibly and provide an appropriate remedy. However, shows like these can only deal with a small number of disputes and many consumers cannot spare the time required to resolve a dispute in this manner or are not interested in appearing on television.

Government agencies such as Consumer Affairs⁵¹⁶ and the Commerce Commission⁵¹⁷ can also assist consumers in resolving some disputes but they have limited jurisdiction⁵¹⁸ and are subject to funding constraints. Various self-help options are available to consumers such as, using credit card charge back facilities or posting bad feedback in relation to particular traders.

Overall, access to justice for New Zealand consumers needs improvement, particularly in relation to small value disputes.⁵¹⁹ Developing a suitable ODR system for consumers who shop online will go a long way toward improving the ability of online consumers to enforce their rights and obtain suitable remedies. If an ODR scheme for online shoppers proved to be a successful method for accessing justice then the ODR scheme could, at a later date, be extended to cover any small value consumer disputes.

7.3 AUTOMATED NEGOTIATION TOOLS – THE KEY TO SUCCESS?

The key to creating an ODR scheme which is effective, efficient and inexpensive is to encourage early settlement through the use of automated negotiation tools before a dispute is referred to an independent third party. Hörnle notes that: “An ADR/ODR system is only financially viable if the great majority of cases settle early through negotiation with little third party intervention.”⁵²⁰ The cost of resolving disputes is

⁵¹⁶ <www.consumeraffairs.govt.nz> (accessed 1 August 2015).

⁵¹⁷ <www.comcom.govt.nz> (accessed 1 August 2015).

⁵¹⁸ For example: the Commerce Commission can only assist with Fair Trading Act 1986 disputes – not Consumer Guarantees Act 1993 disputes.

⁵¹⁹ See generally, A Sims “Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action” (2010) 16 NZBLQ 145.

⁵²⁰ J Hörnle “Encouraging Online Alternative Dispute Resolution in the EU and Beyond” (2013) 38 European Law Review 187 at 197.

obviously reduced significantly if the parties can reach settlement themselves without involving outside professionals.

The cost of using third parties to resolve disputes is difficult to pin point as it varies widely but generally the cost relates to the time required to perform the task and the expertise of the third party. While rates for non-judicial adjudicators are not widely published, the following examples provide an idea of the costs involved if third parties are used to resolve disputes. Fees for private mediation services in New Zealand commence at around \$300 per hour and \$2,000 per day plus disbursements which may include room and equipment hire.⁵²¹ In Spain, the cost of appointing third party arbitrators to resolve consumer disputes using the Consumer Arbitration Scheme in 2011 averaged more than €400 per dispute.⁵²² The New Zealand Disputes Tribunal provides a reasonably inexpensive service for claimants who pay claim fees commencing at \$45 but the actual cost to the Tribunal in dealing with disputes through the appointment of a referee (in the 12 month period ending 31 March 2014) was \$600 to \$650 per dispute.⁵²³ While private mediators may offer more economic services if dealing with a high volume of low value and uncomplicated disputes, it is difficult to see how the appointment of third parties to resolve online shopping disputes can ever be justified economically given that many disputes will relate to items valued at less than \$500. In 2010, Colin Rule, who established the eBay Resolution Centre in 2007,⁵²⁴ noted that the average value of online disputes dealt with by eBay was less than \$100 USD and quite often less than \$20 USD.⁵²⁵ Rule also confirms that the use of

⁵²¹ The New Zealand Dispute Resolution Centre discloses mediator fees commencing at \$2,500 per day and \$300 per hour - see: The New Zealand Dispute Resolution Centre website available at: <<http://www.nzdrc.co.nz/MEDIATION/FEES+-+EXPENSES+-+MEDIATION.html>> (accessed 16 June 2015). Mediate.co.nz discloses fees commencing at \$1,250 per half day of up to 4 hours and \$1,950 per day - see: <<http://www.mediate.co.nz/cost>> (accessed 16 June 2015).

⁵²² C Hodges, I Benöhr, N Creutzfeldt-Banda “Consumer-to-Business Dispute resolution: The Power of CADR” (2012) 13 ERA Forum 199 at 206 and 216 and P Cortes “A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward” (2015) 35(1) Legal Studies 114 at 129.

⁵²³ Letter dated 29 April 2015 from the Ministry of Justice in response to an official information request from the author.

⁵²⁴ C Rule “Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace” (2008) AC Resolution Mag 8 at 9. Colin Rule went on to found Modria.com with Chittu Nagarajan in 2011. Modria creates private customer dispute resolution processes for businesses using ODR automation – see: <www.modria.com> (accessed 30 October 2015).

⁵²⁵ C Rule “Leveraging the Wisdom of Crowds: The eBay Community Court and the future of Online

technology is critical when dealing with high volume low value disputes: “In line with this concept [the use of technology], we designed a software program to assist the parties in resolving their disputes, and to involve human neutrals only on an exceptional basis.”⁵²⁶ Consumers who purchase low value items must be able to resolve disputes at a cost which is significantly less than the value of the item subject to the dispute.

7.3.1 Automated Negotiation Tools

The use of automated negotiation tools in the ODR process has been described by some commentators as enabling technology to act as “the fourth party”.⁵²⁷ There are two common types of automated negotiation or settlement tools: blind bidding and computer assisted negotiation.⁵²⁸ Blind bidding is suitable for monetary disputes where liability is not in dispute. The parties submit a maximum number of secret bids and when the bids fall within a predetermined range the computer technology settles the dispute at the midpoint between the bids making use of algorithms.⁵²⁹

Assisted negotiation is a process where technology or computer software acts like a mediator using information management systems to aid and shape communication positively. Schultz describes computer assisted negotiation as a process where the

Dispute Resolution” (2010) AC Resolution Mag 4 at 4.

⁵²⁶ C Rule “Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace” (2008) AC Resolution Mag 8 at 10.

⁵²⁷ E Katsh “Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace” (2006) *Lex Electronica* 10 available at: <<http://www.lex-electronica.org/articles/v10-3/katsh.htm>> (accessed 30 October 2015); E Katsh “Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code” [2004] 49 *New York Law School Law Review* 271; E Katsh and L Wing “Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future” (2006) 38 *University of Toledo Law Review* 19 at 31; and A Gaitenby “The Fourth Party Rises: Evolving Environments of Online Dispute Resolution” (2006) 38 *University of Toledo Law Review* 372.

⁵²⁸ T Schultz ‘The Roles of Dispute Settlement and ODR’ in K Ingen-Hosz (ed) *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer 2011) 135 available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811890> (accessed 1 August 2015) and P Cortes “A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward” (2015) 35(1) *Legal Studies* 114 at 128.

⁵²⁹ Used by Cybersttle.com (1998 - 2013) and see: T Schultz ‘The roles of Dispute Settlement and ODR’ in Ingen-Hosz *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer 2011) 137 available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811890> (accessed 1 August 2015).

parties negotiate directly via a variety of web forms, chats and other web-based communication tools that are not limited to the exchange of monetary bids.⁵³⁰

7.3.2 Assisted Negotiation

The automated negotiation tool which would be most useful in resolving online shopping disputes is “assisted negotiation”, the purpose of which is to encourage early settlement by promoting communication between the parties which is positive, constructive and works towards suggesting resolution options which are acceptable to the parties. The parties to an online shopping dispute could be encouraged to agree to remedies such as: a refund of the purchase price; timely delivery of goods; or the supply of replacement goods through an online dialogue which is structured in a way that promotes resolution. The “blind bidding” form of automated negotiation only works in circumstances where liability is not in dispute and the parties need to agree a monetary amount. The resolution of online shopping disputes generally requires an array of settlement options to be presented – not just agreement to a monetary figure.

Professor Ethan Katsh was involved in the pilot ODR scheme which led to the creation of “SquareTrade”⁵³¹ which resolved over two million eBay disputes from 1999 to 2007.⁵³² Katsh explains that “SquareTrade” used technology (which he calls the “fourth party”) to act like a virtual mediator using information management to aid communication in assisted negotiation by implementing the following steps:⁵³³

⁵³⁰ T Schultz “The roles of Dispute Settlement and ODR” in K Ingen-Housz (ed) *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer 2011) 137 available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811890> (accessed 1 August 2015).

⁵³¹ E Katsh “Bringing online Dispute Resolution to Virtual Worlds: Creating Processes through Code” *New York Law School Law Review* 49 [2004] 271 at 278 and C Rule “Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace” (2008) *AC Resolution Mag* 9.

⁵³² E Katsh “Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace” (2006) 10(3) *Lex Electronica* 1 at 5 available at: <<http://www.lex-electronica.org/articles/v10-3/katsh.htm>> (accessed 30 October 2015).

⁵³³ E Katsh “Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes through Code” [2004] 49 *New York Law School Law Review* 271 at 278; P Motion “Article 17 ECD: Encouragement of Alternative Dispute Resolution On-line Dispute Resolution: A View from Scotland” in L Edwards (ed) *The New Legal Framework for E-Commerce in Europe* (Hart, 2005) 137 at 144.

- The claimant completes a standardised complaint form which recognises particular types of disputes and requires the complainant to select suitable solutions;
- The respondent is contacted and given the opportunity to complete a response form, also selecting acceptable solutions;
- If both parties agree on the same solution the dispute is resolved; and
- If there is no early resolution, further negotiation is facilitated by the software which shapes communications between the parties into a constructive and polite negotiation. This helps to isolate issues and suggests solutions e.g. by removing inflammatory language and restating suggestions positively.

Rabinovich-Einy describes how the technology used by SquareTrade intervened in negotiations between the parties and, by allowing the parties to formulate and reformulate the problem and the solution, performed some of what would be associated with a mediator's role, moving the parties from a problem mode to a solution stance.⁵³⁴

eBay established its own resolution center in 2007 which took over the work of SquareTrade. As eBay purchased and then, in 2015, later sold PayPal,⁵³⁵ various mutations of the resolution center evolved with the latest PayPal version being the most current mutation.⁵³⁶ Automated negotiation including assisted negotiation techniques have proven to be very successful when used by organisations such as eBay, PayPal, Net Neutrals⁵³⁷ and the Internet Corporation for Assigned Names and Numbers (ICANN) which deals with domain name disputes under the Uniform Domain-Name Dispute-Resolution Policy (UDRP).⁵³⁸ The benefits of using automated negotiation tools have been promoted by Cortes and Lodder who state:⁵³⁹

⁵³⁴ O Rabinovich-Einy "Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation" (2006) 11 Harvard Negotiation Law Review 253 at 258.

⁵³⁵ See: <<http://fortune.com/2015/07/20/paypal-ebay-split-valuation/>> (accessed 30 October 2015).

⁵³⁶ <<https://www.paypal.com/au/cgi-bin/webscr?cmd=xpt/cps/general/PPDisputeResolution-outside>> (accessed 30 October 2015).

⁵³⁷ Net Neutrals is an online dispute resolution program based in Wisconsin, USA, aimed at resolving disputes relating to feedback posted on eBay. See: <<https://netneutrals.com/>> (accessed 30 October 2015).

⁵³⁸ The success of ODR in relation to UDRP is discussed by P Cortes in "Online Dispute Resolution for Consumers" in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and*

Research has shown that an effective redress mechanism for low-value consumer disputes will need to rely on effective automated negotiation tools. This is because early settlement without the intervention of neutral third parties will be the most (if not the only) cost-efficient way to resolve low-value consumer disputes.

By 2012, the Dispute Resolution Centers operated by eBay and PayPal were resolving over 60 million disputes annually in numerous different languages.⁵⁴⁰ In 2011, the eBay Resolution Center was nominated for a Dutch Innovation Justice Award.⁵⁴¹ Schultz comments on the success of the eBay model and notes the “extraordinary success of certain online dispute resolution mechanisms, combined with the development of rather significant autonomous regulatory systems based on such mechanisms ...”.⁵⁴² It should be noted that the success of ODR as used by eBay and PayPal must, however, be due partly to the ability of these organisations to impose sanctions on their members. For example, eBay and PayPal can freeze member accounts or cancel memberships if minimum performance standards are not met or resolution agreements are not followed through.⁵⁴³ That is not to say that the ODR systems developed by these organisations

Practice (Eleven International Publishing, The Hague, The Netherlands, 2012) 152-155.

⁵³⁹ P Cortes and A R Lodder “Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress (24 March 2014)” (2014) 1 Maastricht Journal of European and Comparative Law 21 available at: <<http://ssrn.com/abstract=2414098>> (accessed 1 August 2015).

⁵⁴⁰ L Del Duca, C Rule and Z LoebI “Facilitating Expansion of Cross-Border E-Commerce – Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)” (2012) 1 Penn State Journal of Law & International Affairs 59 at 63 available at: <<http://elibrary.law.psu.edu/jlia/vol1/iss1/4/>> (accessed 30 October 2015).

⁵⁴¹ C Rule “eBay Resolution Centre Up for Dutch Innovation Justice Awards” June 2011 available at: <www.mediate.com/articles/vote.cfm> (accessed 1 August 2015).

⁵⁴² T Schultz “The roles of Dispute Settlement and ODR” in K Ingen-Hosz (ed), *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer 2011) 135 at 139 available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811890> (accessed 1 August 2015) and L Del Duca, C Rule and Z LoebI *Facilitating Expansion of Cross-Border E-Commerce – Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)* (2012) 1 Penn State Journal of Law and International Affairs 59 available at: <<http://elibrary.law.psu.edu/jlia/vol1/iss1/4/>> (accessed 30 October 2015).

⁵⁴³ See: eBay’s Seller Performance Standards available at: <<http://pages.ebay.com/help/policies/seller-non-performance.html>> (accessed 16 June 2015) which note “**What happens if you don't meet the standards?** If you don't meet the minimum performance standards, we may put limits on your selling activity or lower your search placement until your performance improves. We may also restrict you from

have not provided extremely useful reference points for the development of ODR in other areas.

7.3.3 Suitability of Assisted Negotiation to Online Shopping Disputes

Cortes notes that: “Assisted negotiation and online mediation (e.g. SquareTrade, eBay and PayPal) have been successful in niche markets by targeting large numbers of similar disputes with highly automated ODR models that recognise patterns from comparable disputes matching them with proposed solutions. ... The success of automated processes for consumer disputes depends on the nature of the dispute, the accuracy of the information provided, and the capability of the software or the fourth party in assessing the dispute.”⁵⁴⁴ Assisted negotiation is well suited to the nature of online shopping disputes because:

- The problems encountered by online consumers recur frequently, for example: non-delivery; supply of faulty goods; and the failure of goods to comply with website descriptions;
- A reasonably small array of suitable remedies such as timely delivery, price and shipping cost refunds, repair or replacement of goods will satisfy the majority of consumer complaints;
- Traders are generally keen to resolve matters quickly in order to avoid incurring additional time and expense in dealing with independent third parties;
- Traders generally wish to avoid negative feedback from consumers as this effects trust levels from other potential customers; and

selling items on eBay if your performance falls significantly below the minimum requirements.” The eBay User Agreement available at: <<http://pages.ebay.com/help/policies/user-agreement.html>> (accessed 16 June 2015) also states: “If you (as seller), choose to reimburse a buyer, or are required to reimburse a buyer or eBay under the eBay Money Back Guarantee, you authorize eBay to instruct PayPal to remove the reimbursement amount (in same or other currency) from your PayPal account, place the amount on the (sic) your invoice and/or charge your payment method on file.”

⁵⁴⁴ P Cortes “Online Dispute Resolution for Consumers” in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, The Netherlands, 2012) at 156–157; see also: P Cortes “Developing Online Dispute Resolution for Consumers in the EU: A proposal for the Regulation of Accredited Providers” (2011) 19 Intl J L Info Tech 1-28.

- Disputes between buyer and seller successfully dealt with by the eBay and PayPal Resolution Centers are very similar to the problems that arise in online shopping disputes. The eBay model which enables disgruntled customers to post negative feedback encourages trader participation in dispute resolution and the fact that a failure to settle is followed by expeditious adjudication results in speedy resolution.

Hörnle and Cortes et al. point out that automated negotiation is more likely to be successful if it is applied to simple fact based disputes with limited grounds for claims and limited resolution options.⁵⁴⁵ The founder of eBay's Dispute Resolution Center, Colin Rule, notes that eBay limits the types of claims that may be made to "item not received", "item not as described" and "unpaid item", and then pinpoints particular problems within those types of claim by using forms which ask particular questions of claimants and respondents.⁵⁴⁶ Limiting the types of claim that can be made is critical to the success of assisted negotiation because the acceptable resolution options are then also limited. The ability to limit the types of claim which can be made in online shopping disputes is quite feasible. As mentioned above the same types of claim recur frequently. This means that automated standard forms can be developed which require the online shopper to select the type of dispute concerned and then select from an array of solutions which may effectively resolve that type of dispute.

Hörnle also notes that agreement to early settlement is more likely if the parties know what their rights are and are faced with the prospect of additional expense and delay if a third party needs to be appointed to resolve the dispute.⁵⁴⁷ Hörnle states: "... early settlement only takes place if (1) there is a binding adjudication as the ultimate dispute resolution and (2) if the parties know what the likely outcome would be, if their case went to adjudication."⁵⁴⁸ The possibility of an independent third party being

⁵⁴⁵ J Hörnle "Encouraging Online Alternative Dispute Resolution in the EU and Beyond" (2013) 38 *European Law Review* 187 at 194 and P Cortes and F Esteban de la Rosa "Building a Global Redress System for Low-value Cross-Border Disputes" (2013) 62 (2) *ICLQ* 407 at 413.

⁵⁴⁶ C Rule "Resolving Disputes in the World's Largest Marketplace" (2008) *AC Resolution Mag* 8 at 10.

⁵⁴⁷ J Hörnle "Encouraging Online Alternative Dispute Resolution in the EU and Beyond" (2013) 38 *European Law Review* 187 at 197 and see: P Cortes and F Esteban de la Rosa "Building a Global Redress System for Low-value Cross-Border Disputes" (2013) 62(2) *ICLQ* 407 at 413.

⁵⁴⁸ J Hörnle "Encouraging Online Alternative Dispute Resolution in the EU and Beyond" (2013) 38 *European Law Review* 187, 197.

appointed to resolve unsettled disputes actually encourages settlement. Any ODR scheme developed in New Zealand will need to provide for appointment of third parties when necessary. These third parties must be able to impose binding decisions if agreed settlement cannot be reached. The administrators of an ODR scheme must also be able to provide the parties with basic advice on consumer law so that the parties know what their rights are.

7.3.4 Development of Suitable Assisted Negotiation Tools

In order to develop suitable automated negotiation tools for online shopping disputes, lawyers, consumers, traders, academics, regulators and other interested parties should be encouraged to work together with software developers to develop tools capable of encouraging early settlement. In online shopping disputes, as noted above, the suitable resolution options for consumers are generally quite limited – these may include refunding the purchase price and delivery charges, repairing or replacing faulty goods or delivering goods within specified time periods. The relevant experts need to work together with software developers and code writers to develop online complaint and response forms which extract information from the parties to a dispute which enable issues to be isolated and appropriate settlement options to be selected. Assisted negotiation tools can shape the information received to encourage positive and constructive communication between the parties. The aim of assisted negotiation tools should be to promote settlement of disputes without reference to third parties using a process where both the consumer and the trader feel that their voice is heard in the online negotiation process. Ultimately, if settlement is not reached, disputes will need to be referred to third parties for resolution⁵⁴⁹ and binding decision if necessary. If the proportion of referrals of disputes to third parties is very low then the assisted negotiation techniques are working successfully.

⁵⁴⁹ J Suquet-Capdevila explains how a third party acting as a mediator can operate effectively online – see: J Suquet-Capdevila “Exploring Online Consumer Mediation in Catalonia: Principles and Technological Uses” (2012) 20 Intl J L Info Tech 124.

7.4 DEVELOPMENT OF ODR SCHEMES INTERNATIONALLY

7.4.1 The EU ODR Platform

The European Union has made major advances in its development of an ODR platform which will provide an entry point for European online consumers to commence dispute resolution processes and progress claims online. The EU Directive on Consumer Alternative Dispute Resolution (“the ADR Directive”)⁵⁵⁰ and the Regulation on ODR for Consumer Disputes (“the ODR Regulation”)⁵⁵¹ came into force on 8 July 2013. EU member countries are required to implement the Directive within two years by passing national laws by July 2015 and the ODR Platform is to become operational six months later, in January 2016.⁵⁵² The ADR Directive and the ODR Regulation are connected in that the ODR platform to be created under the Regulation will provide consumers with access to national ADR entities established to comply with the conditions laid down in the ADR Directive.

7.4.2 The ADR Directive

The ADR Directive requires each EU Member State to establish a framework which makes ADR procedures available to consumers for resolving contractual disputes relating to sales or services⁵⁵³ in their own countries. Member States must ensure that these disputes can be submitted to an ADR entity which operates a website that provides information and enables a consumer to submit a complaint online.⁵⁵⁴ The ADR entities tasked with offering resolution services must meet quality criteria which

⁵⁵⁰ Directive 2013/11/EU of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes [2013] OJ L 165/63.

⁵⁵¹ Regulation EU No 524/2013 of 21 May 2013 on Online Dispute Resolution for Consumer Disputes [2013] OJ L 165/1.

⁵⁵² See generally: S Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press, 2015) 90-101 and N Reich, H-W Micklitz, P Rott and K Tonner, *European Consumer Law* (2nd ed Intersentia, 2014) 363-374.

⁵⁵³ Article 2.

⁵⁵⁴ Article 5.

guarantee effective, fair, independent and transparent operation.⁵⁵⁵ Online traders in each Member State must be required to inform consumers about the existence of the ADR entities. Online traders must also provide website details for the ADR entities on their websites and in their general terms and conditions.⁵⁵⁶ Traders are to be required to inform consumers about the ADR entities when a dispute cannot be settled between the consumer and the trader directly.⁵⁵⁷ The Directive also requires Member States to ensure co-operation between ADR entities in cross border disputes.⁵⁵⁸ In order to meet the requirements of the Directive, the UK government issued a consultation document, via the Department for Business, Innovation and Skills, in March 2014 and published its response to the consultation in November 2014.⁵⁵⁹ The UK has met the July 2015 deadline (so far as is reasonable) for implementing the Directive by passing regulations⁵⁶⁰ which place dispute resolution information requirements on businesses selling to consumers online, establish competent authorities to certify ADR entities and set the standards that ADR entity applicants must meet in order to achieve certification.

7.4.3 The ODR Regulation

EU Regulation 524/2013 on ODR for consumer disputes requires the EU Commission to develop and operate an ODR Platform.⁵⁶¹ The ODR platform is to be a single point of entry for consumers and traders seeking out-of-court resolution of online contractual disputes.⁵⁶² The platform is to be an interactive website where consumers can lodge complaints free of charge and then be linked to suitable ADR providers in their home countries who will assist with resolving disputes.⁵⁶³ The platform will notify traders

⁵⁵⁵ Articles 6, 7, 8 and 9.

⁵⁵⁶ Article 13.

⁵⁵⁷ Article 13(3).

⁵⁵⁸ Article 16.

⁵⁵⁹ <<https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers>> (accessed 30 October 2015).

⁵⁶⁰ The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (UK) and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (UK).

⁵⁶¹ Article 5.

⁵⁶² Articles 2 and 5(2).

⁵⁶³ Article 5(4), Article 8.

about complaints lodged against them and then submit the complaint to the ADR entity the parties agree to use.⁵⁶⁴ The platform must establish a feedback system which will allow the parties to express their views on the effectiveness of the ODR platform and on the ADR entity which has handled their dispute.

The Regulation enables consumers to submit disputes to ADR online, via the ODR platform. The aim is to provide a user-friendly, interactive website, available in all EU languages free of charge. Online traders are required to provide an electronic link to the ODR Platform on their websites.⁵⁶⁵ The ODR platform will notify traders when a complaint is lodged against them. The consumer and the trader will then agree on an ADR entity to use to help resolve their dispute.⁵⁶⁶ When they agree, the chosen ADR entity will receive the details of the dispute via the ODR platform. The ADR entity is required to settle the dispute within 90 days.⁵⁶⁷ ODR contact points must be established in each Member State and will provide support to claimants and report to the Commission every two years.⁵⁶⁸ The ODR contact points must provide general information on consumer rights and redress and facilitate communication between the parties and the ADR entities.⁵⁶⁹

In summary, the ODR platform procedure established by the Regulation follows these steps: complaint lodgement by the consumer; trader notification; selection of an ADR entity by agreement and then submission of the complaint to the ADR entity for resolution within 90 days. There is no opportunity to negotiate a settlement via the platform before submission to the ADR entity and it is not mandatory for the trader to participate in the ODR process. If the trader declines to agree to the appointment of an ADR entity, then the claim proceeds no further.⁵⁷⁰

⁵⁶⁴ Article 9.

⁵⁶⁵ Article 14.

⁵⁶⁶ Where the parties fail to agree, within 30 calendar days after submission of the complaint form, on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint shall not be processed further. The complainant party must be informed of the possibility of contacting an ODR advisor for general information on other means of redress. See: Article 9(8).

⁵⁶⁷ Article 10(a).

⁵⁶⁸ Article 7.

⁵⁶⁹ Article 7.

⁵⁷⁰ Article 9(8).

7.4.4 The UNCITRAL Proposed Rules

The [United Nations Commission on International Trade Law](#) (“UNCITRAL”) works towards formulating modern, fair and harmonised rules for international commercial transactions. In 2010, UNCITRAL’s Working Group III (Online Dispute Resolution)⁵⁷¹ was established to develop a global framework for ODR. The most recent Working Group III meeting was held in New York in February 2015. The mission of the Working Group is to develop an ODR system for resolving disputes relating to cross-border, low value, high-volume e-commerce transactions including both B2C (business to consumer) and B2B (business to business) transactions. Working Group III has produced draft procedural rules which propose a three stage process – negotiation between the parties; negotiated settlement facilitated by a “Neutral”; and final determination. In 2014, Working Group III proposed two different tracks for the “final determination” stage, depending on whether the buyer’s nation state treats arbitration clauses as binding. The draft Track I set of rules is to apply when arbitration clauses are treated as binding. Under Track I, a “Neutral” is appointed to facilitate settlement and if no settlement is reached the dispute is referred to binding arbitration for final determination. The draft Track II set of rules is to apply when arbitration clauses are not treated as binding by the buyer’s nation state. Track II also appoints a “Neutral” to facilitate settlement but if no settlement is reached the “Neutral” makes a non-binding final recommendation. The draft rules for Track I and Track II apply only if the parties to the dispute agree to be bound by the UNCITRAL ODR rules in the contract which is subject to dispute.⁵⁷²

At the 31st meeting in February 2015, Working Group III failed to reach a consensus and there is now some doubt as to whether the Working Group will reach final agreement on the draft rules. It is likely that UNCITRAL will make a decision on the future of Working Group III when it considers the report of the 31st meeting. At the meeting in February 2015, Working Group III proceeded to discuss draft procedural

⁵⁷¹ Working Group III (New York, 9-13 February 2015) Report available at: http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html and <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V15/014/29/PDF/V1501429.pdf?OpenElement> (accessed 1 August 2015).

⁵⁷² Draft Article 1 Track I (A/CN.9/WG.III/WP.133) and Draft Article 1 Track II (A/CN.9/WG.III/WP.130).

rules known as the “third proposal”⁵⁷³ but the draft contains many alternative formulations for various rules and does not reflect a cohesive document. However, the “third proposal” (and the Track I and Track II) draft rules do promote the following staged procedure:

1. Complaint Lodgement – via the ODR Platform website which is a system for processing communications monitored by the ODR administrator (Article 4).
2. Negotiation Stage – negotiations between the parties via the ODR Platform in order to attempt to reach settlement themselves (Article 5).
3. Facilitated Settlement Stage – if the dispute not settled within 10 days (unless an extension is agreed) of commencement of the Negotiation Stage, the ODR Administrator appoints a “Neutral” independent 3rd party (Article 9). The Neutral communicates with the parties to attempt to reach a settlement (Articles 5 and 6).
4. Final Determination – Recommendation by the Neutral or referral to binding arbitration, if the dispute is not settled within 10 days of commencement of the Facilitated Settlement Stage. The Neutral evaluates the dispute and makes a recommendation within 15 days or the arbitration takes its course. The Neutral’s recommendation is not binding unless agreed (Articles 6 and 7).
5. Settlement – if settlement is reached the terms of the settlement are recorded on the ODR Platform and the proceeding terminates (Article 8).

The latest Working Party III report also emphasised that any recommendation by the Neutral “would or could be implemented by a private enforcement mechanism, such as a charge-back or a trust mark”.⁵⁷⁴

The draft UNCITRAL rules as they currently stand in the third proposal and

⁵⁷³ Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.133) available at: http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html (accessed 1 August 2015).

⁵⁷⁴ Working Group III (New York, 9-13 February 2015) Report available at: http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html and <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V15/014/29/PDF/V1501429.pdf?OpenElement> (accessed 1 August 2015) at para 25.

Tracks I and II are problematic. The online trader is required to include a different dispute resolution clause in cross border online contracts depending on whether the buyer's home nation treats arbitration clauses as binding.⁵⁷⁵ This requires the online trader to establish the location of each buyer and whether each buyer's home country treats arbitration clauses as binding or non-binding, which introduces a complication which may result in uncertainty if the wrong dispute resolution clause is inserted in the contract. The success of these rules in relation to cross border disputes also requires the development of a narrow set of globally shared legal principles⁵⁷⁶ – the development of which will be far from easy. The requirement that the parties agree to be bound by the ODR process promoted by the draft procedural rules, in the contract subject to the dispute, may well also reduce the impact and effectiveness of the proposed ODR procedure.

On the positive side, the procedure promoted by Working Group III is relatively straight forward and includes a negotiation stage before a neutral third party is appointed which would allow the parties to reach agreement themselves – possibly making use of automated negotiation tools. Cortes makes this point when he suggests that the EU ODR platform should also include a negotiation stage before the appointment of a third party ADR entity: "... as envisaged by UNCITRAL, direct negotiation, particularly when followed by effective adjudication, is the most important dispute resolution method that parties can use in settling their disputes".⁵⁷⁷ He

⁵⁷⁵ See: R A. Brand "The Unfriendly Intrusion of Consumer Legislation into Freedom to Contract for Effective ODR" in M Piers, H Storme and J Verhellen (eds) *Liber Amicorum Johan Erauw* (Intersentia, 2014) 374-375 and University of Pittsburgh School of Law, Legal Studies Research Paper Series Working Paper No. 2014-42 at 374-375 available at: <<http://ssrn/abstract=2520035>> (accessed 1 August 2015).

⁵⁷⁶ Working Group III 25th Session (New York, 21-25 May 2012) "Online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework - Note by the Secretariat" A/CN.9/WG.III/WP.113 paras 10-14 available at: <http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html> and <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V12/515/37/PDF/V1251537.pdf?OpenElement>> (accessed 1 August 2015) and P Cortes "A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward" (2015) 35(1) Legal Studies 114 at 122 where the author notes: "UNCITRAL is devising guidelines for the efficient resolution of low-value cross-border disputes without reliance on national or regional laws; instead, it is envisaged that the rules will rely on a narrow list of globally shared substantive legal principles, such as those developed by credit card chargeback mechanisms."

⁵⁷⁷ P Cortes "A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward" (2015) 35(1) Legal Studies 114 at 141.

comments further that “setting up an ODR platform that acts only as a referral website will be a missed opportunity to enhance consumer redress in the EU”.⁵⁷⁸

7.4.5 Comparison - EU and UNCITRAL Proposals

The ODR platform being developed by the EU establishes an entry point for consumer claims relating to online contracts and then provides for the referral of claims to national ADR providers for resolution. Only business to consumer (B2C) transactions are covered and the appointed ADR provider can determine the time frames for progressing claims. It is not mandatory for the trader to participate in the ODR process because the trader can decline to agree to the appointment of an ADR entity. Working Group III, established by UNCITRAL, also proposes an ODR platform for lodging of claims, but has undertaken a more ambitious task of developing set procedural rules with rigid timeframes for dealing with business to consumer and business to business (B2C and B2B) low-value cross-border disputes relating to e-commerce transactions. The “Neutral” will be appointed by the ODR administrator rather than be appointed by the parties themselves as envisaged by the EU proposal. The draft UNCITRAL rules are limited in that the rules will only apply when the parties have agreed to be bound by them in the contract which is subject to dispute. Progress with the UNCITRAL proposals also requires the development of a standard set of global substantive rules on legal issues which will not be easy to complete given the range of approaches taken to various issues across the globe.

The EU and UNCTRAL have both suggested similar procedural stages but the UNCITRAL proposals include a negotiation stage, where automated negotiations tools can be used, before referral to the neutral third party. Cortes and Hörnle both criticise the EU ODR platform because does not include a negotiation stage, where the parties could make use of automated negotiation tools. Hörnle notes that the EU ODR platform “should provide a set of negotiation tools, enabling parties to engage in negotiation

⁵⁷⁸ P Cortes “A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward” (2015) 35(1) *Legal Studies* 114 at 141. See also: P Cortes, “Improving the EU’s proposals for Extra-judicial Consumer Redress” (2012) 23(2) *Computers and the Law* 27-28 and J Hörnle “Encouraging Online Alternative Dispute Resolution in the EU and Beyond” (2013) 38 *European Law Review* 187 at 201.

without the intervention of a third party”.⁵⁷⁹ The EU seems to have missed an opportunity to greatly enhance the ODR scheme by failing to include an opportunity for direct negotiation between the parties which makes use of assisted negotiated tools. The likely effectiveness of the EU Platform is also severely hindered by the failure to make trader participation in the ODR process mandatory. The EU system could have provided that if the parties do not agree to the appointment of an ADR entity within a certain timeframe, then the ODR administrator has authority to appoint an ADR entity to resolve the dispute.

7.5 SUMMARY OF THE GOOD AND THE BAD OF ODR SCHEMES

7.5.1 Advantages of ODR

There is a real opportunity to develop cost effective, efficient and easy to access dispute resolution procedures by making use of the internet. The ability to work towards resolving disputes at any time and in any place, without the need for a hearing requiring the physical presence of the parties is made possible by connecting through the internet. As discussed above, the internet also enables the use of automated negotiation tools which can encourage settlement at an early stage with little or no involvement of third parties. Some commentators have criticised the use of automated tools in ODR suggesting that these tools result in a lack of due process and consequently second rate justice.⁵⁸⁰ These criticisms must be balanced against the real need for more efficient and cost effective processes for consumers.

⁵⁷⁹ J Hörnle “Encouraging Online Alternative Dispute Resolution in the EU and Beyond” (2013) 38 *European Law Review* 187 at 201.

⁵⁸⁰ These authors have questioned whether mechanisms which encourage settlement achieve justice: Owen Fiss “Against Settlement” (1984) 93 *Yale Law Journal* 1073 and H Eidenmueller and M Engel “Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe” 7 July 2013 (SSRN ID 2290654) (forthcoming) *Ohio State Journal on Dispute Resolution* available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290654> (accessed 1 August 2015). Cf A H Raymond and S J Shackelford “Technology, Ethics, and Access to Justice: Should an Algorithm be Deciding Your Case?” (2014) 35 *Mich. J. Int’l L* 485.

7.5.2 Disadvantages of ODR

Use of the internet in resolving disputes can introduce technical problems related to the quality of the internet service but these problems can be addressed practically and internet services are improving all the time. Using ODR raises more serious questions about a third party's ability to assess the credibility of participants, develop trust and deal with the emotions of participants to a dispute.⁵⁸¹ For example, the claimant may need a "day in court" to feel sufficiently heard. Doris notes that one of the key difficulties with ODR is "whether ODR schemes can in practice adequately deal with human emotion".⁵⁸² Other practical problems relate to the enforceability of outcomes and how to deal with appeals and arbitration clauses. Designing an ODR scheme which adequately deals with valid arbitration clauses in contracts is problematic but not insurmountable.⁵⁸³ Arbitration clauses will have less impact on any ODR scheme developed for online consumers in New Zealand because the New Zealand Arbitration Act 1996 provides that arbitration clauses in contracts with consumers are not valid unless there is a separate consent agreement relating to arbitration.⁵⁸⁴ It is not common for online retail websites in New Zealand to include separate arbitration clause consents in their standard terms and conditions.

Cortes points to the following four constraints to ODR for consumers: securing the allocation of public funding for ODR services; the need to ensure due process for consumers which requires the development of uniform procedural standards which address impartiality, fairness and supervision of ODR service providers; the reluctance

⁵⁸¹ See: N Ebner and J Thompson "@ Face Value? Nonverbal Communication & Trust Development in Online Video-Based Mediation" (2014) *International Journal of Online Dispute Resolution* (forthcoming) available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395857> (accessed 16 June 2015) and E Katsh "Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Though Code" [2004] 49 *New York Law School Law Review* 271 at 282.

⁵⁸² M Doris "Developing Consumer ODR in the European Union – a model to imitate?" (2012) *Australian Product Liability Reporter* 280 at 283. This issue is also highlighted by Ebner and Thompson in their discussion of online video based e-mediation in N Ebner and J Thompson "@ Face Value? Nonverbal Communication & Trust Development in Online Video-Based Mediation" (2014) *International Journal of Online Dispute Resolution* (forthcoming) available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395857> (accessed 16 June 2015).

⁵⁸³ The draft UNCITRAL Rules Track I and II propose different procedures depending on whether the contract concerned contains a valid and enforceable arbitration clause.

⁵⁸⁴ Section 11 of the New Zealand Arbitration Act 1996 provides that arbitration clauses in contracts with consumers need a separate consent agreement.

of parties to participate in ODR processes, and finally a lack of awareness of the existence of ODR as a resolution process.⁵⁸⁵ These constraints all relate to issues which can be dealt with through government policy development, regulation and education.

7.6 DEVELOPMENT OF AN ODR SCHEME IN NEW ZEALAND

It is inevitable that ODR will soon become an important consumer enforcement and dispute resolution mechanism.⁵⁸⁶ New Zealand needs to take steps towards developing a suitable ODR scheme for consumers. The development of an ODR scheme for resolving disputes relating to online shopping transactions would be a good starting point. Such a scheme could then, in the future, be extended to any low value consumer disputes whether they relate to transactions involving goods or services.⁵⁸⁷ Initially, developing an ODR scheme for online shoppers is appropriate given that online shopping transactions are completed online, the cost of single transactions is generally low, online shoppers place a high level of trust in the online retailer by making payment before delivery and they cannot generally return to a physical shop to obtain a remedy when problems arise.

Rather than reinvent the wheel, New Zealand can take advantage of the significant work done by the EU and UNCITRAL in developing ODR platforms. The schemes promoted by both the EU and UNCITRAL require the establishment of an ODR platform website which operates as an entry point for complaints and provides information to both consumers and traders. Any ODR platform developed in New Zealand should incorporate a two stage process which includes an opportunity for negotiation between the parties before referral of the dispute to an independent third party, as suggested by the UNCITRAL proposal. If the parties are unable to resolve the dispute themselves, using assisted negotiation, the second stage would require the

⁵⁸⁵ P Cortes “Online Dispute Resolution for Consumers” in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, The Netherlands, 2012) 144.

⁵⁸⁶ The inevitable development of ODR in New Zealand is noted by Nathan Speir “Mediating in the Future Online Dispute Resolution” *Law Talk* (New Zealand Law Society, 10 October 2014) 30 at 31.

⁵⁸⁷ Ultimately, consumers who purchase goods from physical shops should have access to the same dispute resolution processes that are available to consumers who purchase the same goods online.

dispute to be referred to an independent third party who would work to resolve the dispute using ADR techniques, preferably online, and make a final determination if consensual settlement is not achieved.

7.6.1 How could negotiation tools work in New Zealand?

Once the ODR platform is established, a process, similar to the UNCITRAL proposal, could follow these steps:

1. Claim - The consumer lodges a complaint against an online trader via the ODR platform by completing a computer generated form which requires identification of the type of dispute and selection of acceptable remedies for the consumer.
2. Response - The ODR platform administrator notifies the online trader of the complaint and seeks a response through completion of a computer generated form which responds to the claim and also indicates remedies acceptable to the trader.
3. Negotiation Stage - The negotiation stage is enhanced by automated negotiation tools which identify areas of consensus and areas of conflict. The automated tools then assist in generating a dialogue between the parties which seeks to move them towards agreed settlement, shaping communication in a positive light, removing inflammatory language, isolating issues and identifying suitable solutions.
4. Decision - If there is no agreed resolution after a period of, perhaps, 10 days then either party may submit the dispute to an independent third party for resolution. If the independent third party is not able to encourage settlement over of period of say another 10 days then the third party may impose a binding decision.
5. Enforcement - Decisions could be enforced through the District Court in the same way that Disputes Tribunal decisions are currently enforceable.⁵⁸⁸ Compliance with decisions by online traders could be encouraged through the

⁵⁸⁸ Disputes Tribunal Act 1988, ss 45-47.

use of a compliance rating system which displays a compliance rating on the traders' websites.

The cost of developing and administering the ODR platform, initially for online shoppers, would need to be funded by the government and could be overseen by the Ministry of Justice. The Ministry of Justice is tasked with developing and delivering an effective justice system that is accessible and cost-effective for New Zealanders.⁵⁸⁹ The expense of creating an ODR platform can be justified on the grounds that the purpose of the ODR scheme is to improve consumer access to justice and make it more cost effective. Once the ODR platform is up and running, online traders could be required to pay an annual fee to support the platform and consumers could be required to pay a small fee (perhaps \$5 -\$10)⁵⁹⁰ to lodge a complaint online. If a dispute is not settled at the negotiation stage, the online trader could be required to pay a fee which would contribute to the cost of appointing a third party to resolve the dispute.⁵⁹¹

An ODR scheme developed in New Zealand would be available for New Zealand consumers dealing with online retailers operating in New Zealand. A simple way to identify whether an online business operates in New Zealand is to ascertain whether the business charges goods and services tax (GST) on sales as required by New Zealand law.⁵⁹² Difficult jurisdiction questions arise in relation to businesses based outside New Zealand who sell online to consumers in New Zealand. It is unlikely that such businesses could be forced to participate in an ODR scheme established under New Zealand law. It is beyond the scope of this chapter to consider jurisdiction issues further.

⁵⁸⁹ See: Ministry of Justice website "Policy Development – justice system improvements" available at: <<http://www.justice.govt.nz/policy/justice-system-improvements>> (accessed 1 August 2015).

⁵⁹⁰ The cost of lodging a complaint with the Disputes Tribunal is currently upwards of \$45 depending on the level of the claim – the fee for a consumer using the ODR platform should be less than this.

⁵⁹¹ Other funding possibilities could be considered, such as the system used by Youstice, an online dispute resolution service offered to businesses which uses a smart app to assist with resolving customer complaints online see: <<http://www.youstice.com/en/>> (accessed 30 October 2015). The service offers customers free use of the negotiation tool and then requires payment of a nominal fee if the dispute is escalated to an independent third party for decision. This fee is then refunded to the winner.

⁵⁹² Of course, a website may fraudulently purport to collect GST, thus misleading the consumer into believing the online business is a New Zealand business and that the consumer is able to use the ODR scheme. One way to assist consumers in identifying New Zealand online businesses, would be for the Commerce Commission or another suitable regulatory body to retain a list of all businesses who qualify as New Zealand online businesses.

7.6.2 Required Regulation

Similar to the requirements of the EU ODR platform, online traders would need to be required by regulation to provide information to consumers about the ODR platform and provide a link to the ODR platform website on their trading websites. If such an ODR platform is to be successful in New Zealand, regulation must make it mandatory for online traders to participate in the ODR procedure. Mandatory participation by traders will greatly increase access to justice for consumers as it will ensure that the ODR process is available for all consumers shopping online. A major flaw with the EU proposal is that traders can avoid the ODR process by refusing to agree on the appointment of a third party ADR provider. Regulation could provide that if the parties are unable to agree on the appointment of a third party within a set time frame, then the ODR administrator can appoint a third party to resolve the dispute.⁵⁹³ On a practical point, regulation should also require all online traders to post a contact email address on their websites. Some online traders only enable contact via web contact forms and do not disclose an email address. When a consumer lodges a complaint via the ODR platform they will need to provide a contact email address for the trader so that the ODR platform can give the trader notice of the complaint and request a response.

7.6.3 Independent Third Parties

The existing Arbitrator and Mediator Institutes (AMINZ and IAMA) in New Zealand could be used to identify suitable persons interested in being appointed as independent third parties under the ODR scheme. These third parties would be charged with the task of aiding the parties to reach settlement using ADR techniques and making final determinations if settlement is not achieved. The Institutes could be invited to establish systems for vetting or registering persons suitably qualified to act as independent third parties in relation to online shopping disputes lodged via the ODR platform. Regulation

⁵⁹³ Appointment of a “neutral” by the ODR administrator is envisaged by the UNCITRAL proposals – see: Article 9 Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.133).

would also be required to ensure that third parties appointed under the ODR scheme are suitably vetted and qualified.

7.6.4 Development of ODR Platform with Australia

Some Australian commentators have promoted the establishment of an ODR scheme for Australian consumers.⁵⁹⁴ Martin Doris has suggested the development of an ODR scheme similar to that being developed by the EU in Australia.⁵⁹⁵ Sourdin and Liyanage note that a more “strategic framework approach” would support the development of ODR in Australia further.⁵⁹⁶ There are good reasons, including cost savings, for developing one ODR platform that could service both New Zealand and Australian consumers:

- Consumer protection laws in New Zealand and Australia are very similar. The consumer guarantees in relation to goods in the Consumer Guarantees Act 1993 (NZ)⁵⁹⁷ and the Australian Consumer Law (AU)⁵⁹⁸ are almost the same, although the definition of “consumer” is different.⁵⁹⁹ The prohibitions on misleading and deceptive conduct in trade are also very similar in the Fair Trading Act 1986 (NZ)⁶⁰⁰ and the Australian Consumer Law (AU)⁶⁰¹;
- The development of one ODR platform would advance the purpose of the Closer Economic Relations (CER) free trade agreement between New Zealand and

⁵⁹⁴ M Doris “Developing Consumer ODR in the European Union – a model to imitate?” (2012) Australian Product Liability Reporter 280 and L Griggs “e-Commerce” in J Malbon and L Nottage (eds) *Consumer Law and Policy in Australia and NZ* (Federation Press, 2013) 405.

⁵⁹⁵ M Doris “Developing Consumer ODR in the European Union – a model to imitate?” (2012) Australian Product Liability Reporter 280.

⁵⁹⁶ T Sourdin and C Liyanage “The Promise and Reality of Online Dispute Resolution in Australia” in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, The Netherlands, 2012) at 497.

⁵⁹⁷ Consumer Guarantees Act 1993 (NZ), ss 5–13.

⁵⁹⁸ The Australian Consumer Law, ss 54–59.

⁵⁹⁹ The New Zealand “consumer” definition is based on the ordinary use of the goods or services acquired (s 2 Consumer Guarantees Act 1993 (NZ)) while the Australian definition is based on the maximum price (currently \$40,000) of the goods or services acquired (s 3 Australian Consumer Law).

⁶⁰⁰ Fair Trading Act 1986 (NZ), ss 9–13.

⁶⁰¹ The Australian Consumer Law, ss 18, 29 and 33.

Australia⁶⁰² which was signed in 1983 and remains valid; and

- Many online retailers have a presence in both New Zealand and Australia⁶⁰³ and many New Zealanders buy from Australian retail websites and vice versa.

The establishment of one ODR scheme for both New Zealand and Australia would require much cooperation but investigations should be undertaken at Government level to ascertain the feasibility of establishing one ODR scheme for both countries.

7.7 CONCLUSION

A working group should be established by the appropriate government department to look at how an ODR scheme for consumers who shop online can be established in New Zealand. New Zealand could work with the Productivity Commission in Australia and look toward developing a dual scheme which operates in New Zealand and Australia. A successful ODR scheme can be modelled on the work done by the EU and UNICITRAL. The key to the development of a cost effective, efficient and successful ODR scheme for online consumers, will be the incorporation of automated negotiation tools into the ODR process to help facilitate early settlement. ODR scheme developers will need to work with software developers to create automated negotiation tools which work effectively for both consumers and traders. Guidance can be taken from the systems already established by organisations such as eBay and the latest PayPal version. Government funding will be required to establish an ODR platform but once the Platform is established, online traders could be charged an annual fee to support the ongoing operation of the platform and consumers could be charged a small fee to lodge complaints. If a dispute needs to be referred to a third party for resolution, the trader could be charged a fee to contribute to the cost of this appointment. Government regulation will be required to impose fee levels, make trader participation mandatory and ensure that online traders notify consumers of the existence of the ODR platform on their websites and when disputes arise. Regulation will also be required to ensure that

⁶⁰² The agreement is available at: < <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Australia/index.php> > (accessed 1 August 2015).

⁶⁰³ For example: Country Road; Ezibuy; Max; Rebel Sports; JB Hi Fi; Harvey Norman; Mighty Ape and Style Tread.

the independent third parties who are appointed to progress the resolution of disputes are suitably vetted and qualified. The Mediator and Arbitrator institutes already existing in New Zealand and Australia could be utilised to advance registration or vetting systems. If an ODR scheme is established and proves to operate successfully for consumers who shop online, then the ODR scheme could, in the future, be extended to cover any low value disputes. This would be a major advance in the ongoing challenge to increase consumers' access to justice.

Chapter Eight

Conclusion

8.1 “CONSUMER” DEFINITION

The definition of “consumer” is a critical determinant of the extent and impact of consumer protection law. There is much inconsistency and complexity in the current definitions of “consumer” across New Zealand and Australia. A simplified definition of “consumer” which focuses on the identity of the party acquiring goods or services and not the nature of the goods or services, nor the purpose of acquisition, advances the primary rationale behind consumer law which is to balance inequality in bargaining power. The factors which demonstrate that consumers are in a weak bargaining position when dealing with traders are: the consumer’s inability to negotiate terms and conditions; the consumer’s limited knowledge of, access to or understanding of information about particular products; the consumer’s generally more limited access to the resources required to obtain redress, and the consumer’s inherent inability to resist pressure to acquire products which are promoted through sophisticated marketing techniques. When compared to consumers who shop in traditional stores, consumers who shop online are in a more vulnerable position with regard to traders because online shoppers are generally unable to examine goods or ask questions of the trader before purchase and usually make full payment of the purchase price before delivery. Online traders are able to impose terms and conditions in online shopping transactions with ease and the online shopper’s opportunity to seek redress when things go wrong is hindered by the absence of face to face contact. These factors point to an even greater imbalance in bargaining power when consumers shop online. An imbalance in bargaining power is also common when small businesses deal with big business. The definition of consumer should include small businesses well as individuals. A definition of “consumer” which focuses on the identity of the party acquiring goods or services and includes small businesses will benefit both online and offline consumers and should

be adopted in New Zealand. Adopting the same definition across all consumer statutes in New Zealand and Australia will promote consistency across both countries.

8.2 CONTRACT FORMATION

It is important to be able to pin point exactly when the online purchase contract is made because the parties' contractual rights and obligations arise at that point. Traditional contract law principles can adapt to govern the formation of consumer purchase contracts made using interactive websites but judicial determinations around the exact point when acceptance occurs remain unclear. The key to applying traditional contract law principles to online shopping transactions will be a shift towards focusing on the conduct which creates the agreement rather than focusing on the communications between the consumer and the trader. It is difficult to point to clear communications of offer and acceptance when there is an absence of direct real time communication between consumers and traders transacting using interactive websites. The analysis of the common consumer purchase scenario using an interactive website shows that the critical action which evidences an intention to create legal relations by the trader, and amounts to an offer, is the conduct of operating a website which enables the consumer to select a particular product, consent to terms and conditions and submit payment details. The consumer's conduct of submitting payment details signifies acceptance of that offer. It is at this point that the consumer shows an intention to be bound in a contract and expects the trader to fulfil its side of the bargain. The conclusion that it is the trader who makes the offer, rather than the consumer, is supported by analogy with a purchase from a vending machine and the judgment of Lord Denning in *Thornton v Shoe Lane Parking*.⁶⁰⁴ This analysis supports the consumer law policy of balancing bargaining power by giving the online consumer the power to complete the contract by signalling acceptance rather than allowing the trader, who chooses to transact online, to dictate when the contract is created. Allowing the trader to dictate when the contract is formed can have the consequence of preventing the consumer's contractual rights from arising in circumstances where the consumer has already paid for goods in full.

⁶⁰⁴ [1971] 2 QB 163; 1 All ER 686.

8.3 “CONTRACT ON DISPATCH” TERMS

The purpose of Article 10 of the European Union Electronic Commerce Directive 2000, as adopted by the United Kingdom in Regulation 9 of the Electronic Commerce (EC Directive) Regulations 2002, is to enhance consumer protection for online shoppers. Regulation 9 requires traders who sell to consumers online to “set out the steps which must be followed to conclude a contract”. A review of United Kingdom websites shows that traders frequently achieve compliance with Regulation 9 by including “contract on dispatch” terms in their standard terms and conditions. “Contract on dispatch” terms state that the contract is made when the trader dispatches the goods to the consumer. These terms are not conducive to consumer protection because they allow the trader to dictate that the contract is not created until the trader dispatches the goods even though the consumer may already have paid the purchase price and received an order confirmation email from the trader. These “contract on dispatch” terms favour the interests of the trader by giving the trader the power to delay creation of the consumer’s contractual rights. Although the consumer may have paid in full, there is no claim for recovery of the purchase price, based on breach of contract, until the goods are dispatched. If the goods are not dispatched the term asserts that there is no contract; however, this is a self-defeating argument because there can be no term if there is no contract.

While there are arguments against the validity of these “contract on dispatch” terms (the self-defeating nature of the terms; the substance over form approach to interpretation; estoppel; misleading and deceptive representation; the guarantee of supply and the assertion that they are unfair terms), New Zealand should not adopt a rule similar to the United Kingdom’s Regulation 9, which requires online traders to include a term which states when the contract is made. The interests of New Zealand consumers who shop online would be advanced by adding “contract on dispatch” terms to the “grey list” of examples of unfair terms in New Zealand’s unfair terms regulation. Regulation which requires traders to refund the consumer’s payment, if goods are not supplied within a specified time, would also benefit online consumers and recognises their vulnerability in paying before delivery.

8.4 INCORPORATION OF TERMS AND CONDITIONS AND UNFAIR TERMS

Whether terms and conditions are successfully incorporated into a contract requires a consideration of the issues of notice and assent. The common methods of incorporating terms into online shopping contracts are known as click wrap and browse wrap. The click wrap method requires the consumer to check a box or click on a phrase such as “I agree” to indicate acceptance of the trader’s terms and conditions before completing the transaction. The “click” by the consumer has generally been interpreted as a form of assent to terms or is treated as an effective way of drawing the consumer’s attention to terms which works as a form of notice. Browse wrap describes the method of incorporation in which the trader’s terms and conditions are posted somewhere on the trader’s website and can be viewed by clicking on a link to those terms. However, sometimes the link may not be obvious to the consumer; for example, in one website reviewed, the link was posted at the top of the page under a heading “About Us” and on other websites the terms and conditions were described using confusing phrases such as: “legal”; “customer agreement”; “shipping and returns”; and “terms of business”.⁶⁰⁵ The terms and conditions usually commence with a statement that the terms are binding on anyone using the website and are part of any contract made using the website. Whether terms are validly incorporated using the browse wrap method turns solely on the question of the adequacy of notice prior to contract formation.

The review of retail websites discussed in chapter 6 shows that a significant majority of the websites reviewed in New Zealand and Australia use a basic browse wrap method of incorporation of terms and conditions. It is argued that this browse wrap method in many instances does not in fact result in validly incorporated terms and conditions. Online traders may actually be engaging in misleading and deceptive conduct by leading consumers to believe that they are bound by terms which have not been validly incorporated. Factors such as: the length of the terms; the location of the link to terms; and the description of terms, all impact on whether the online consumer has sufficient notice of terms. In some instances traders who use the click wrap method

⁶⁰⁵ See: para 6.4 above.

of incorporation may also fail to validly incorporate terms and conditions, for example, when an onerous term is buried in a very lengthy set of terms and conditions without any particular attention being drawn to the onerous term. This interpretation is to be commended for taking a realistic approach to the issue of notice by recognising that online consumers are unlikely to become aware of terms hidden in long documents. A stringent approach to the doctrine of notice operates to the benefit consumers who shop online.

Consumers who are bound by onerous terms which meet the definition of “unfair terms” can in theory use unfair terms regulation to challenge those terms in New Zealand and Australia. Unfortunately, New Zealand consumers, unlike their Australian cousins, cannot rely on the regulation directly but must ask the Commerce Commission to take action in respect of unfair terms. New Zealand unfair terms regulation should be amended to allow consumers, as well as the Commerce Commission, to apply to the court for orders declaring that particular terms are unfair and thus unenforceable. Amending the unfair terms law to allow New Zealand consumers to apply to the court or the Disputes Tribunal for unfair terms declarations would advance the consumer law policy principle of redressing inequality of bargaining power.

8.5 ONLINE DISPUTE RESOLUTION (ODR) FOR CONSUMERS WHO SHOP ONLINE

A working group should be established by the Ministry of Business Innovation and Employment to look at how an ODR scheme for consumers who shop online can be established in New Zealand. New Zealand could work with the Productivity Commission in Australia and look toward developing a dual scheme which operates in New Zealand and Australia. A successful ODR scheme can be modelled on the work done by the EU and UNICITRAL. The key, for online consumers, to the development of a cost effective, efficient and successful ODR scheme will be the incorporation of automated negotiation tools into the ODR process to help facilitate early settlement.

Assisted negotiation is well suited to the nature of online shopping disputes because the problems encountered by online consumers recur frequently and the suitable resolution options are limited. The numerous disputes successfully dealt with using automated negotiation by the eBay and PayPal Resolution Centers are very similar to the problems that arise in online shopping disputes. It has been shown that automated negotiation is more likely to be successful if it is applied to simple fact based disputes with limited grounds for claims and limited resolution options. Also, traders who are keen to resolve matters quickly and want to avoid negative feedback from consumers will participate positively in automated negotiation.

Government funding will be required to establish an ODR platform but once the platform is established, online traders could be charged an annual fee to support the ongoing operation of the platform and consumers could be charged a small fee to lodge complaints. Regulation will be required to impose fee levels, make trader participation mandatory and ensure that online traders notify consumers of the existence of the ODR platform on their websites and when disputes arise. Regulation will also be required to ensure that the independent third parties, who are appointed to resolve the rare disputes which cannot be solved through the automated ODR process, are suitably vetted and qualified.

If an ODR scheme is established and proves to operate successfully for consumers who shop online, then the ODR scheme could be extended to cover any low value consumer disputes. An ODR scheme for consumers who shop online would advance the consumer law policy of facilitating consumer redress and would address the ongoing challenge to increase consumers' access to justice.

Bibliography

Statutes and Regulations

Alabama Code § 8-19-3 (US)

Alaska Unfair Trade Practices and Consumer Protection Act § 45.50.561 (US)

Arbitration Act 1996

Australian Consumer Law in Schedule 2 of the Competition and Consumer Act 2010 (Cth)

Commerce Act 1986

Competition and Consumer Act 2010 (Cth)

Consumer Credit Protection Act 1968 (15 US Code 1602)

Consumer Guarantees Act 1993

Consumer Guarantees Amendment Act 2013

Consumer Protection (Distance Selling) Regulations 2000 (UK)

Consumer Rights Act 2015 (UK)

Consumers Legal Remedies Act [Civil Code 1750 - 1784] (California, US)

Contractual Mistakes Act 1977

Credit Contracts and Consumer Finance Act 2003

Deceptive Trade Practices-Consumer Protection Act (Texas, US)

Disputes Tribunal Act 1988

District Courts Act 1947

Electronic Transactions Act 2002

Fair Trading Act 1986

Fair Trading Amendment Act 2013

Income Tax Act 2007

Motor Vehicle Sales Act 2003

Personal Property Securities Act 1999

Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2016

Psychoactive Substances Act 2013

Sale of Goods (United Nations Convention) Act 1994

Sale of Goods Act (NT)

Sale of Goods Act 1893 (UK)

Sale of Goods Act 1895 (SA)

Sale of Goods Act 1895 (WA)

Sale of Goods Act 1896 (QL)

Sale of Goods Act 1896 (TAS)

Sale of Goods Act 1908

Sale of Goods Act 1923 (NSW)

Sale of Goods Act 1954 (ACT)

Sale of Goods Act 1958 (VIC)

Trade Practices Act 1974 (Cth)

Unfair Terms in Consumer Contracts Regulations 1999 (UK)

United Kingdom Electronic Commerce (EC Directive) Regulations 2002

EU Directives and Regulations

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.

Regulation EU No 524/2013 of 21 May 2013 on Online Dispute Resolution for Consumer Disputes [2013] OJ L 165/1.

Cases

ACCC v Signature Security Group Pty Ltd [2003] FCA 3

Adams v Lindsell (1818) 1 B & Ald 681

AT&T Mobility v. Concepcion (2011) 563 U.S. 321

Brambles Holdings Limited v Bathurst City Council [2001] NSWCA 61

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833

Broadcasting Corporation of New Zealand v Daniels (1988) 2 NZBLC 103,535 at 103,541

Brogden v Metropolitan Railway Co (1877) 2 App Cas 666

Bunnings Group Ltd v Laminex Group Ltd (1987) ATPR (digest) 46-025

Burbery Mortgage Finance and Savings Ltd v Hindsbank Holdings Ltd [1989] 1 NZLR 356

Butler Machine Tool Co Ltd v Ex-Cell-O Corp Ltd [1979] 1 All ER 965; 1 WLR 401

Carlill v Carbolic Smoke Ball Co. Ltd [1892] 2 QB 484 aff'd [1893] 1 QB 256

Carpet Call v Chan (1987) ATPR (Digest) 46-025

Century 21 Canada Limited Partnership v Rogers Communications Inc 2011 BCSC 1196

Chapelton v Barry UDC [1940] 1 All ER 356

Chwee Kin Keong v Digilandmall.com Pte Ltd [2004] 2 SLR 594; [2004] SGHC 71; aff'd [2005] 1 SLR 502; [2005] SGCA 2

Cinema Centre PTY Services Ltd v Eastaway Air Conditioning Pty Ltd (1999) ASAL 55-034

Clean Investments Pty Ltd v Commissioner of Taxation (2001) 105 FCR 248

Commerce Commission v Air New Zealand [2006] DCR 90

Commissioner of Taxation v Chubb Australia Ltd (1995) 56 FCR 557

Crawford v Mayne Nickless Ltd (1992) ATPR (Digest) 46-091.

Defontes v Dell Computer Corp 2004 R.I. Super. LEXIS 32

Director of Consumer Affairs Victoria v Backloads.com Pty Ltd [2009] VCAT 754

Director of Fair Trading v First National Bank Plc [2001] UKHL 52; [2002] 1 AC 481

eBay International AG v Creative Festival Entertainment Pty Ltd (2006) 170 FCR 450; [2006] FCA 1768; BC200610545

Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523

Feldman v Google Inc 513 F Supp 2d 229 (2007)

Fisher v Bell [1961] 1 QB 394

G Scammell and Nephew Ltd v Ouston [1941] AC 251; [1941] 1 All ER 14

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 1 All ER 108; [1983] QB 284

Gibson v Manchester City Council [1978] 2 All ER 583, 1 WLR 520

Gibson v Manchester City Council [1979] 1 All ER 972, 1 WLR 294

Gillies v Keogh [1989] 2 NZLR 327

Gold Star Insurance Co Ltd v Gaunt [1998] 3 NZLR 80

Harris v Harris (1989) 1 NZ ConvC 190,406

Harvey v Ascot Dry Cleaning Co Ltd [1953] NZLR 549

Hubbert v Dell Corp 835 N.E.2d 113 (Ill. App. Ct. 2005)

Hygienic Lily Ltd v Deputy Commissioner of Taxation (1987) 13 FCR 396.

Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR [97,326] at 11,117-118

Interfoto Picture Library Limited v Stiletto Visual Programmes Ltd [1989] 1 All ER 348; [1989] QB 433

Keating v Horwood (1926) 135 LT 29

L'Estrange v Graucob [1943] 2 KB 394

MacRobertson Miller Airline Services v Commissioner of State Taxation (WA) (1975) 133 CLR 125; 8 ALR 131; 50 ALJR 348

Malam v Graysonline, Rumbles Removals and Storage [2012] NSWCTTT 197

Meates v Attorney-General [1983] NZLR 308 (CA) at 377

Mortensen v New Zealand Harness Racing Conference Unreported, HC Auckland CP 1812A/90, 11 December 1990

Nesbit v Porter [2000] 2 NZLR 465

Nicolene Ltd v Simmonds [1953] 1 QB 543; [1953] 1 All ER 822 (CA)

Oceanic Sun Line Special Company Inc v Fay (1988) 165 CLR 197; 79 ALR 9; [1988] HCA 32

Olivaylle Pty Ltd v Flottweg GMBH & KGAA (No.4) (2009) 255 ALR 632; [2009] FCA 522

Palmer v Kleargear (unreported default judgment United States District Court for the District of Utah case No. 1:13-cv-00175-DB, 30 April 2014)

Parker v South Eastern Railway (1877) 2 CPD 416

Payne v Cave (1789) 2 TR 148

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1952] 2 QB 795, 2 All ER 456, aff'd [1953] 1 QB 401, 1 All ER 482

Phillips v Dalziel [1948] 2 All ER 810

Place v Rees & Co (1894) 13 NZLR 610

Pobjie Agencies v Vinidex Tubemakers [2000] NSWCA 105

Port Sudan Cotton Co v Chettiar [1977] 2 Lloyd's Rep 5

Qantas Airways Ltd v Aravco Ltd (1996) 185 CLR 43

R v Warwickshire CC ex p Johnson [1993] AC 583

Register.com Inc v Verio Inc 356F 3d 393 (2nd Cir, 2004)

Ryanair Ltd v Billigfluege.de GMBH [2010] IEHC 47

Ryanair v On the Beach Ltd [2013] IEHC 124

Seeley International Pty Ltd v Newtronics Pty Ltd (2002) Aust Contract Reports 90-142

Smythe v Thomas[2007] NSWSC 844, (2007) 71 NSWLR 537

Southwest Airlines Co v Boardfirst LLC (2007) US Dist LEXIS 96230

Specht v Netscape Communications Corp 150 F. Supp. 2d 585 (S.D.N.Y. 2001) aff'd

Specht v Netscape Communications Corp 306 F 3d 17 (2nd Cir 2002)

Spreadex Ltd v Cochrane [2012] EWHC 1290 (Comm)

Spurling Ltd v Bradshaw [1956] 2 All ER 121; [1956] 1 WLR 461

Thornton v Shoe Lane Parking [1971] 2 QB 163; 1 All ER 686

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463

Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd [1994] VicRp 55; [1994] 2 VR 106

Tri-Star Customs and Forwarding Ltd v Denning [1999]1 NZLR 33

US v Drew 259 FRD 449 (CD Cal 2009)

Vroon BV v Fosters Brewing Group [1994] VicRp 53; [1994] 2 VR 32

Walsh v Matamau Co-operative Dairy Co Ltd [1918] NZLR 850; [1918] GLR 730

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

Williams v Wairarapa Automobile Association Mutual Insurance Company [1943] NZLR 322; [1943] GLR 191

Texts

Beale, HG (ed) *Chitty on Contracts* (32nd ed, Sweet and Maxwell, London, 2015).

Blount, S *Electronic Contracts Principles from the Common Law* (LexisNexis Butterworths, Australia, 2009).

Burrows, J., J Finn and S Todd in *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012).

Corones, S G *The Australian Consumer Law* (2nd ed, Thomson Reuters, 2013).

Fitzgerald, B., A Fitzgerald, E Clark, G Middleton, and YF Lim *Internet and E-Commerce Law – Business and Policy* (Thomson Reuters, Sydney, 2011).

Goldring, J., LW Maher, J McKeogh and G Pearson *Consumer Protection Law* (5th ed, The Federation Press, Sydney, 1998).

Harvey, B W., and D L Parry *The Law of Consumer Protection and Fair Trading* (6th ed, Butterworths, London, 2000).

Harvey, Judge David *internet.law.nz* (4th ed, LexisNexis, Wellington, 2015).

Hawes, C (ed) *Butterworths Introduction to Commercial Law* (4th ed, LexisNexis, Wellington 2014).

Howells, G., and S Weatherill *Consumer Protection Law* (2nd ed, Ashgate, Aldershot, England, 2005).

Malbon, J., and L Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney, 2013).

Ramsay, I *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, (3rd ed, Hart Publishing Ltd, United Kingdom, 2012).

Reich, N., H Micklitz, P Rott and K Tonner *European Consumer Law* (2nd ed, Intersentia Publishing Ltd, Cambridge, United Kingdom, 2014).

Simpson Grierson's x-tech group *A Guide to E-Commerce law in New Zealand* (Thomson Brookers, Wellington, 2002).

Sunstein, C R *Behavioural Law and Economics* (Cambridge University Press, 2000).

Tokeley, K (ed), *Consumer Law in New Zealand* (2nd ed LexisNexis, Wellington, New Zealand, 2014).

Trebilcock, M J *The Limits of Freedom of Contract* (Harvard University Press, 1993).

Treitel, HG *The Law of Contract* (12th ed, Sweet and Maxwell, London, 2007).

Wahab, M S A., E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice - A Treatise on Technology and Dispute Resolution* (Eleven International Publishing, The Hague, The Netherlands, 2012).

Wrbka, S *European Consumer Access to Justice Revisited* (Cambridge University Press 2015).

Chapters

Brand, R A “The Unfriendly Intrusion of Consumer Legislation into Freedom to Contract for Effective ODR” in M Piers, H Storme and J Verhellen (eds) *Liber Amicorum Johan Erauw* (Intersentia, 2014) 374.

Cortes, P “Online Dispute Resolution for Consumers” in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, The Netherlands, 2012) 139.

Davies, L “Contract Formation on the Internet: Shattering a Few Myths” in L Edwards and C Waelde (eds) *Law and the Internet* (Hart Publishing, Oxford, 1997) 97.

Egger, F N “Consumer Trust in E-commerce: From Psychology to Interaction Design” in J Prins and others (eds) *Trust in Law and Electronic Commerce - The Role of Trust from a Legal, an Organisational and a Technical Point of View* (Kluwer Law International, The Hague, 2002) 11.

Freilich, A and L Griggs “Just Who is the Consumer? Policy Rationales and a Proposal for Change” in J Malbon and L Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney 2013) 39.

Griggs, L “e-Commerce” in J Malbon and L Nottage (eds) *Consumer Law and Policy in Australia and NZ* (Federation Press, Sydney, 2013) 385.

Hillman, R A “Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications” in Jane Winn (ed) *Consumer Protection in the Age of the ‘Information Economy’* (Ashgate Publishing Ltd, Aldershot, England 2006) 283.

Motion, P “Article 17 ECD: Encouragement of Alternative Dispute Resolution On-line Dispute Resolution: A View from Scotland” in L Edwards (ed) *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, Oxford, 2005) 137.

Murray, A “Articles 9-11, ECD Contracting Electronically in the Shadow of the E-Commerce Directive” in L Edwards (ed) *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, Oxford, 2005) 67.

Prins, C., and L van der Wees “E-Commerce and Trust: A Variety in Challenges” in J Prins and others (eds) *Trust in Law and Electronic Commerce - The Role of Trust from a Legal, an Organisational and a Technical Point of View* (Kluwer Law International, The Hague, 2002) 4.

Schultz, T “The roles of Dispute Settlement and ODR” in A Ingen-Housz (ed), *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer Law International, The Hague, 2011) 135 available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811890>

Sims, A ‘Industry-Specific Regulation’ in K Tokeley (ed) *Consumer Law in New Zealand* (LexisNexis, Wellington, 2014) 241.

Sourdin, T., and C Liyanage “The Promise and Reality of Online Dispute Resolution in Australia” in MSA Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, The Netherlands, 2012) 471.

Tokeley, K “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen (eds) *The Yearbook of Consumer Law 2008* (Ashgate, Aldershot, England, 2007) 297.

Trebilcock, M J “Rethinking Consumer Protection Policy” in C E F Rickett and T G W Telfer (eds) *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) 68.

Trebilcock, M J “The Consumer Interest and the Regulatory Process” in A J Duggan and L W Darvall (eds) *Consumer Protection Law and Theory* (The Law Book Company, Sydney, 1980) 256.

Journal Articles

Alderman, R “The Texas Deceptive Trade Practices Act 2005 Still Alive and Well” (2008) 8(2) *Journal of Texas Consumer Law* 74, available at: <www.jtexconsumerlaw.com>.

Bakos, Y., F Marotta-Wurgler and D R Trossen “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (2014) 43 J. Legal Stud 1.

Bar-Gill, Oren., and R Epstein “Consumer Contracts: Behavioural Economics vs. Neoclassical Economics” NYU Law and Economics Research Paper No. 07-17 April 2007; (2008) 92 Minn L Rev 749, available at SSRN: <<http://ssrn.com/abstract=982527>>.

Bourgoignie T, “Characteristics of Consumer Law” (1992) 14 JCP 293.

Brand, R A “The Unfriendly Intrusion of Consumer Legislation into Freedom to Contract for Effective ODR” Legal Studies Research Paper Series Working Paper No. 2014-42, available at: <<http://ssrn/abstract=2520035>>.

Christensen, S “Formation of Contracts by Email – Is it Just the Same as the Post?” (2001) Queensland University of Technology Law & Justice Journal 24.

Clapperton, D., and S Corones “Unfair terms in “clickwrap” and other electronic contracts” (2007) 35 ABLR 152.

Corner, H “New Zealand Consumers and Internet Purchases” (2001) 32 VUWLR 573.

Cortes, P “A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward” (2015) 35(1) Legal Stud 114.

Cortes, P “Developing Online Dispute Resolution for Consumers in the EU: A proposal for the Regulation of Accredited Providers” (2011) 19 Intl J L Info Tech 1.

Cortes, P “Improving the EU’s proposals for Extra-judicial Consumer Redress” (2012) 23(2) Computers and Law 26.

Cortes, P., and A R Lodder “Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress” (2014) 21(1) Maastricht Journal of European and Comparative Law 14, available at: <<http://ssrn.com/abstract=2414098>>.

Cortes, P., and F Esteban de la Rosa “Building a Global Redress System for Low-value Cross-Border Disputes” (2013) 62 (2) ICLQ 407.

Davis, N “The Yelper and the Negative Review: the Developing Battle Over Nondisparagement Clauses” (2014) GPSOLO eReport 3(10), available at: <http://www.americanbar.org/publications/gpsolo_ereport/2014/may_2014/yelper_negative_review_developing_battle_nondisparagement_clauses.html>.

Del Duca, L., C Rule and Z Loebel “Facilitating Expansion of Cross-Border E-Commerce – Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)” (2012) 1 Penn State Journal of Law & International Affairs 59, available at: <<http://elibrary.law.psu.edu/jlia/vol1/iss1/4/>> .

Diamond, A L “The Molony Committee Final Report of the Committee on Consumer Protection” (1963) 26 MLR 66.

Dickey A F, and P J Ward “The Adequacy of Australian Consumer Protection Legislation - Observations and Proposals from Economic Theory” (1979) 14 UWALR 133.

Doris, M “Developing Consumer ODR in the European Union – a model to imitate?” (2012) Australian Product Liability Reporter 280.

Downes, J “The Australian Consumer Law – is it really a new era of consumer protection?” (2011) 19 AJCCL 5.

Ebner, N., and J Thompson “@ Face Value? Nonverbal Communication & Trust Development in Online Video-Based Mediation” (2014) International Journal of Online Dispute Resolution, available at:

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395857> and

<http://www.elevenjournals.com/tijdschrift/ijodr/2014/2.,_2014>

Eidenmueller, H., and M Engel “Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe” 7 July 2013 (SSRN ID 2290654) available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290654>.

Eisenberg, MA “The Limits of Cognition and the Limits of Contract” (1995) 47 Stan L Rev 211.

Epstein, R “Behavioural Economics: Human Errors and Market Correction” (2006) 73 U Chi L Rev 111.

Ferry, M “Theory vs. Practice in Consumer law: An Advocates Perspective” (1992) 14 JCP 317.

Fiss, Owen “Against Settlement” (1984) 93 Yale LJ 1073.

Freilich, A “A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions” (2006) 33 UWALR 108.

Freilich, A and E Webb “Small Business – Forgotten and in need of protection from unfairness?” (2013) 37(1) UWALR 134.

Gaitenby, A “The Fourth Party Rises: Evolving Environments of Online Dispute Resolution” (2006) 38 University of Toledo Law Review 372.

Glatt, C “Comparative Issues in the Formation of Electronic Contracts” (1998) 6 (1) Intl J L & Info Tech 34.

Griggs, L., A Freilich and E Webb “Challenging the Notion of a Consumer: Time for Change” (2011) 19 CCLJ 52.

Griggs, L “Intervention or Empowerment – Choosing the Consumer Law Weapon” (2007) 15 CCLJ 111.

Griggs, L “The [ir]rational consumer and why we need national legislation governing unfair contract terms” (2005) 13(1) CCLJ 116.

Hadfield, G K., R Howse and M J Trebilcock “Information Based Principles for Rethinking Consumer Protection Policy” (1998) 21 JCP 131.

Hawes, C “Consumer Law Reform: The Consumer Guarantees Bill” (1992) 5 Canta LR 17.

Heap, S P “What is Behavioural Economics?” (2103) 27 Cambridge Journal of Economics 985.

Hillman, R A., and J J Rachlinski “Standard Form Contracting in the Electronic Age” (2002) 77 New York University L Rev 429.

Hodges, C., I Benöhr and N Creutzfeldt-Banda “Consumer-to-Business Dispute resolution: The Power of CADR” (2012) 13 ERA Forum 199.

Hogan-Doran J, “Jurisdiction in cyberspace: The when and where of on-line contracts” (2003) 77 ALJ 377.

Hörnle, J “Encouraging Online Alternative Dispute Resolution in the EU and Beyond” (2013) 38 Euro L Rev 187.

Howells, G “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 Journal of Law and Society 349.

Jolls C., C R Sunstein and R Thaler “A Behavioral Approach to Law and Economics” (1998) 50 Stan L Rev 1471.

Kariyawasam, Kanchana “Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand” (2009) 15 NZBLQ 178.

Katsh, E "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace" (2006) Lex Electronica 10, available at: <<http://www.lex-electronica.org/articles/v10-3/katsh.htm>>.

Katsh, E “Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Though Code” [2004] 49 New York Law School Law Review 271.

Katsh, E., and L Wing “Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future” (2006) 38 University of Toledo Law Review 19.

Korobkin, R B., and T S Ulen “Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics” (2000) 88 Cal L Rev 1051.

Macdonald, E “Incorporation of Standard Terms in Website Contracting – Clicking ‘I Agree’” (2011) 27 JCL 1.

Mik, E “The Unimportance of being “electronic” or – popular misconceptions about “Internet contracting”” (2011) 19(4) Intl J L & Info Tech 324.

Montrose, JL “The Contract in Self-service Stores” (1955) 4 Am J Comp Law 235.

O’Shea, K., and K Skeahan “Acceptances of Offers by Email: How Far Should the Postal Rule Extend?” (1997) 13 QUT Law Journal 247.

Pang, A “Contract Formation and Mistake in Cyberspace” (2005) 21 JCL 197.

Patterson, J “Consumer Contracting in the Age of the Digital Natives” (2011) 27 JCL 152.

Patterson, J “The Australian Unfair Contract Terms law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts” [2009] MULR 934.

Pridgen, D “Wrecking Ball Disguised as Law Reform: ALEC’S Model on Private Enforcement of Consumer Protection Statutes” (2015) 39 NYU Review of Law & Social Change 279.

Rabinovich-Einy, O “Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation” (2006) 11 Harvard Negotiation Law Review 253.

Ramsay, I “Consumer Law and Structures of Thought: A Comment” (1993) 16 JCP 79.

Ramsay, I “Consumer Law and the Search for Empowerment” [1991] 19 Canadian Business Law Journal 397.

Ramsay, I “Consumer Law, Regulatory Capitalism and the New Learning in Regulation” [2006] 28 Sydney L Rev 9.

Ramsay, I “Framework for Regulation of the Consumer Marketplace” (1985) JCP 353.

Rares, S “Striking a Balance between Freedom of Contract and Consumer Rights” paper presented at the 14th International Association of Consumer Law Conference, Sydney, 2 July 2013 at 17, available at: <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-rares/rares-j-20130702>> .

Raymond, A H and S J Shackelford “Technology, Ethics, and Access to Justice: Should an Algorithm be Deciding Your Case?” (2014) 35 Mich. J. Int’l L 485.

Reich, N “Consumerism and citizenship in the information society – the case of electronic contracting” (2000) 7 CCLJ 185.

Rule, C “eBay Resolution Centre Up for Dutch Innovation Justice Awards” June 2011, available at: <www.mediate.com/articles/vote.cfm>.

Rule, C “Leveraging the Wisdom of Crowds: The eBay Community Court and the future of Online Dispute Resolution” (2010) AC Resolution Mag 4.

Rule, C “Resolving Disputes in the World’s Largest Marketplace” (2008) AC Resolution Mag 8.

Schwartz, A., and L Wilde “Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis” (1979) 127 University of Pennsylvania L Rev 630 available at: < http://digitalcommons.law.yale.edu/fss_papers/1117/ >.

Schwartz, A., and R E Scott “Contract Theory and the Limits of Contract Law” (2003) John M. Olin Center for Studies in Law, Economics and Public Policy Working Papers, Paper 275.

Sims, A “Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action” (2010) 16 NZBLQ 145.

Sims, A “The guarantee of delivery of goods under the Consumer Guarantees Act 1993 and its implications for Australia” (2016) 23 CCLJ 266.

Sims, A “Unfair Contract Terms: A New Dawn in Australia and New Zealand?” (2014) 39 Monash L Rev 739.

Smith, L “Global Online Shopping: how well protected is the Australian consumer?” (2004) 12 CCLJ 163.

Speir, N “Mediating in the Future Online Dispute Resolution” Law Talk, (New Zealand Law Society, 10 October 2014) 30.

Squires, S “Some Contract Issues Arising from Online Business-Consumer Agreements” (2000) 5(1) Deakin L Rev 95.

Suquet-Capdevila, J “Exploring Online Consumer Mediation in Catalonia: Principles and Technological Uses” (2012) 20 Intl J L Info Tech 124.

Tokeley, K “New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal” (2013) 37(1) UWALR 107.

Tokeley, K “Protecting Consumers from Themselves: A guide for policy makers” (2016) 24 CCLJ 1.

Tokeley, K “Shopping on the Net: Legal Protection for Consumers” (1997) 9 Otago L Rev 51.

Tokeley, K “Towards a New Regulatory Regime for New Zealand Online Auctions” [2011] NZ Law Review 91.

Tokeley, K “Unprotected Consumers Under the Consumer Guarantees Act 1993” (1997) 3 NZBLQ 254.

Trebilcock, M J “Consumer Protection in the Affluent Society” (1970) 16 McGill Law Journal 263.

Trebilcock, M J “Taking Stock: Consumerism in the 1990’s” [1991] 19 Canadian Business Law Journal 412.

Trebilcock, M J “Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?” 13 Osgoode Hall Law Journal 619.

Unger, J “Self-Service Shops and the Law of Contract” (1953) 16 MLR 369.

Vernon, David H *An Outline for Post-Sale Consumer Legislation in New Zealand* (Report to the Minister of Justice, December 1987, Iowa ISBN 0-477-07230-5)

Ziegel, J S “The Future of Canadian Consumer Law” [1973] 51 The Canadian Bar Review 191.

Government Publications and Materials

Consumer Affairs Australia and New Zealand *Extending Unfair Terms Protections to Small Businesses Consultation Paper* (Treasury, Australian Government, May 2014), available at: <<http://treasury.gov.au/consultationsandreviews/consultations/2014/small-business-and-unfair-contract-terms>>.

House of Representatives Main Committee, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2), Second Reading Speech, Hansard Reports, Luke Hartsuyker MP, 23 June 2010, p 6472, available at: <http://www.aph.gov.au/Parliamentary_Business/Hansard/Search?page=12&q=Trade+Practices+Amendment+Australian+Consumer+Law+Bill+No.+2+2010&ps=10&drt=2&drv=7&drvH=7&pnu=0&pnuH=0&pi=0&chi=0&coi=0&st=1&sr=1>.

Ministry of Consumer Affairs *Consumer Law Reform A Discussion Paper* (June 2010) and Ministry of Consumer Affairs *Briefing for Commerce Committee on Consumer Law Reform Bill* (27 March 2012).

Ministry of Consumer Affairs *Consumer Law Reform Additional Paper – September 2010 Unfair Contract Terms* available at: <<http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/policy-reports-and-papers>>.

Ministry of Consumer Affairs *Regulatory Impact Statement Consumer law Reform: December 2010* available at: <<http://www.treasury.govt.nz/publications/informationreleases//pdfs/-mca-clrd-mar11.pdf>>.

Productivity Commission *Economic Structure of the Australian Retail Industry* (Canberra 2011) available at: <www.pc.gov.au/inquiries/completed/retail-industry/report/retail-industry.pdf>.

Productivity Commission *Review of Australia's Consumer Policy Framework – Inquiry Report Volume 1* (Australian Government, Canberra 2008), available at: <<http://www.pc.gov.au/inquiries/completed/consumer-policy/report>>.

Productivity Commission *Review of Australia's Consumer Policy Framework, Final Report – Volume 2* (Australian Government, Canberra 2008) available at: <www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>.

Senate Economics Legislation Committee Report, *Trade Practices Amendment (Australian Consumer Law) Bill (no.2) 2010 Report* Parliament of Australia, Canberra 2010 available at:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2008-10/tpa_consumer_law_10/report/index>.

Senate Economics Legislation Committee *Treasury Legislation Amendment (Small Business and Unfair terms) Bill 2015 [Provisions]* (Parliament of Australia, Canberra, September 2015) at 10, available at:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Small_Business_Bill_2015/Report>.

Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 *Schedule of the amendments made by the Senate*, (Parliament of Australia, Canberra, 2015) available at:

<http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5497>.

Treasury *Regulatory Impact Analysis Handbook* (Treasury Publication, August 2013) available at: <<http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook/>>.

UK Molony Committee “Final Report of the Committee on Consumer Protection” Cmnd 1781(1962).

Other Secondary Materials

European Commission Press release MEMO Brussels, 12/3/13 *A step forward for EU consumers: Questions & answers on Alternative Dispute Resolution and Online Dispute Resolution* available at: <http://europa.eu/rapid/press-release_MEMO-13-193_en.htm>.

European Consumer Centres' Network (Centres in 29 countries), *The European Online Marketplace Consumer Complaints 2010-2011* September 2012 available at: <http://ec.europa.eu/consumers/ecc/news_en.htm> .

Frost and Sullivan survey *Australian and New Zealand Online Shopping Market 2013* (Frost and Sullivan, 2013, Sydney, Australia) available (for purchase) at: <www.frost.com>.

Irwin, T *Implications of Behavioural Economics for Regulatory Reform in New Zealand* (Sapere Research Group and New Zealand Law Foundation, December 2010), available at: <www.srgexpert.com/wp-content/uploads/2015/08/Implications-of-behavioural-economics-for-regulation_Final-2.pdf>.

Kennedy, J F (35th President of the United States 1961-63) "Special Message to the Congress on Protecting the Consumer Interest" 15 March 1962 available at: <<http://www.presidency.ucsb.edu/ws/?pid=9108>> .

OECD Consumer Policy Toolkit OECD Publishing 2010) available at: <<http://www.oecd.org/sti/consumer/consumer-policy-toolkit-9789264079663-en.htm>> .

OECD *Empowering E-consumers Strengthening Consumer Protection in the Internet Economy* Background report Washington D.C. 8-10 December 2009 available at: <http://www.oecd.org/site/0,3407,en_21571361_43348316_1_1_1_1_1,00.html> .

OECD *Roundtable on Demand-side Economics for Consumer Policy: Summary Report* (OECD Digital Economy Papers No 116, 20 April 2006) at 13, available at <http://www.oecd-ilibrary.org/science-and-technology/report-on-a-roundtable-on-demand-side-economics-for-consumer-policy_231473533741>.

OECD, *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, Paris, 2016) available at: <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>>.

OECD, *Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy* Background Report Washington D.C. 8 – 10 December 2009 at p 6, available at: <http://www.oecd.org/site/0,3407,en_21571361_43348316_1_1_1_1_1,00.html>.

Office for National Statistics, *Retail Sales in Detail November 2011*
<<http://www.ons.gov.uk>>.

Office for National Statistics, *Statistical Bulletin Retail Sales - January 2012*
<<http://www.ons.gov.uk>>.

PwC and Frost & Sullivan, *Australian and New Zealand online shopping market and digital insights July 2012* <<http://www.pwc.com.au/industry/retail-consumer/publications/digital-media-research/index.htm>>.

PwC and Frost & Sullivan, *Digital Media Research 2011 Australian and New Zealand Online Shopping Market Insights* <<http://www.pwc.com.au/industry/retail-consumer/publications/digital-media-research/index.htm>>.

PWC, *Total Retail Survey 2016*, available at:
<<http://www.pwc.com/gx/en/industries/retail-consumer/global-total-retail.html>>.

Statistics New Zealand, “Household Use of Information and Communication Technology: 2012 – Media Release” (released 12 April 2013) available at:
<www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/HouseholduseofICTSurvey_MR2012.aspx>.

Statistics New Zealand, “Household Use of Information and Communication Technology: 2012” available at:
<http://www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/HouseholdUseofICT_HOTP2012.aspx>

The BNZ Online Retail Sales Index available at: < <https://www.bnz.co.nz/business-banking/support/commentary/online-retail-sales-index> >.

UNCITRAL Working Group III (New York, 9-13 February 2015) Report available at:
<http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html>.

UNCITRAL Working Group III 25th Session (New York, 21-25 May 2012) “Online dispute resolution for cross-border electronic commerce transactions: further issues for

consideration in the conception of a global ODR framework - Note by the Secretariat”
A/CN.9/WG.III/WP.113 paras 10-14 available at:

<http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html>.

UNCTAD *Manual on Consumer Protection - advance copy* (United Nations, 2016)
available at: <<http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1060>>.

UNCTAD *United Nations Guidelines for Consumer Protection* (United Nations, New York and Geneva 2016) available at:

<<http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>>.