

Consumer Protection Digests and Case Studies: A Policy Guide

(Volume I)



one vision
one identity
one community



Association of Southeast Asian Nations

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Introduction

In recent years ASEAN has made significant progress towards the establishment of an integrated ASEAN Economic Community (AEC). The AEC Blueprint outlines strengthening consumer protection as an important component under the 'Competitive Economic Region' pillar. In implementing actions towards more robust consumer protection systems, ASEAN Member States (AMS) have demonstrated their commitment to ensure that the benefits of economic integration flow to consumers as well as businesses. However, increased globalisation, cross border purchasing, changes in consumer demographics and advances in technological innovation are having significant influences on business and consumer behaviour in ASEAN countries. These developments require that more effort be made towards advancing the ASEAN consumer protection agenda.

In 2007 the ASEAN Committee on Consumer Protection (ACCP) was established to steer ASEAN's efforts in consumer protection. The ACCP's work is focused on building capacities at the regional and national levels and to provide guidance on the development of policies, laws and institutions necessary to strengthen consumer protection in the region. As AEC 2015 approaches, stronger consumer protection systems in ASEAN that enhances the region's competitiveness and supports its integration process becomes more critical.

This Policy Guide is part of a broader project entitled, *Supporting Research and Dialogue in Consumer Protection* that aims to enhance knowledge and understanding of new and emerging consumer protection concerns and to make possible better policy directions through the synthesis of experiences and lessons learned. It is an essential part of a wider institutional capacity development for consumer protection and is a multi-dimensional challenge involving a full range of stakeholders, sectors and issues. Drawing on the expertise of consumer protection experts and academics, *Consumer Protection Digests and Case Studies: A Policy Guide - Volume 1* presents 12 Policy Digests and two Case Studies that explore key consumer protection issues in the ASEAN context.

The Policy Digests cover key issues relevant to consumer protection such as consumer credit and debt, product safety regulation, online purchasing, telecommunication services, unfair sales practices, product liability,

responding to complaints about misleading information and practice with low-cost airlines, fraud in price discounting, statutory guarantees of quality in the supply of goods and services, and money transfer fraud. The Policy Digests also explore the interface between competition and consumer protection policies, as well as a specific focus on professional services markets. The Case Studies provide in-depth investigations into online consumer market and the regulation of unfair contract terms in ASEAN.

These digests and case studies are intended to assist in the development and strengthening of consumer protection systems by highlighting and sharing information on key issues on emerging concerns. It is expected that these will contribute to raising awareness and stimulating dialogue among the business community, professional associations, and appropriate academic and non-government organisations to better promote consumer protection in the ASEAN region.

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Policy Digest 1:

Consumer credit, hardship and debt collection



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This policy digest was written by Professor Justin Malbon of Sustineo Pty Ltd under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

Economic growth in the ASEAN region in the coming decades is likely to continue to be driven (in part at least) by demand for products and services by consumers within the region. The ready availability of consumer credit is likely to fuel that demand. Growth may therefore be driven by a growing middle class using credit to help finance their purchasing. The expected rapid growth of the middle class within the ASEAN region presents significant public policy, legal and regulatory challenges. This Consumer Protection Digest outlines the key problems that generally arise in the consumer credit marketplace, and outlines possible policy and regulatory responses.

2. Issues and responses

There are about 500 million middle class consumers in Asia. It is estimated that within 20 years there will be a six-fold increase of middle class consumers within the region to some 3.2 billion people. Asia's share in the global middle class could rise from just over a quarter today to two-thirds by 2030.¹ This will thus generate a thriving consumer credit market.

A robust consumer credit market is one where consumers have ready access to innovative loan products that meet their needs and desires. In such a market, lenders need reasonably stable and predictable laws and regulations to enable them to enforce loan repayments. In some cases, they may require effective systems to enable them to enforce any loan security such as a mortgage over a borrower's house or other property. If there are no stable and effective laws, it may increase the risks of operating a lending business, leading to higher costs that would be passed on to consumers as higher interest rates and charges.

Consumers will more readily and productively engage in the consumer credit marketplace if they can be somewhat confident they will be treated reasonably and fairly by lenders, particularly if they default on loan repayments. Laws and regulations that can enhance consumer confidence in the marketplace include those protecting them against harsh, unreasonable, unfair and sometimes criminal practices.

¹ Homi Kharas and Geoffrey Gertz, (2010) 'The New Global Middle Class: A Cross-Over from West to East' Chapter 2 in *China's Emerging Middle Class: Beyond Economic Transformation* (Cheng Li, editor), Washington, DC: Brookings Institution Press, p.5.

Efficient, fair and effective laws and regulatory practices essentially attempt to balance the rights and interests of the both the lenders and borrowers. The following sections explore common issues and provide possible measures to address them.

Lending practices

Lessons can be learnt from the poor lending practices in the United States that triggered the global financial crisis. Systematic poor practices involved lenders providing loans to consumers who had no reasonable prospect of being able to meet their loan repayment obligations. In many cases, mortgage brokers completed loan application forms for consumers that misleadingly or fraudulently overstated the consumer's income and assets. As a result, many defaulted on their loans. The housing market was flooded by foreclosure sales, which drove down housing prices to a level where banks were unable to recover monies for the outstanding loans. Poor regulatory oversight created the environment in which these bad lending practices were able to flourish.

The US experience illustrates the relationship between strong consumer protection measures and a nation's economic health. Bad lending practices regarding housing loans can therefore undermine economic growth.

Another circumstance where consumers can be encouraged to financially overcommit is when lenders engage in actively marketing credit cards, and unilaterally increase the borrower's credit card borrowing limits. This can lead to the borrower becoming over-indebted on their credit cards.

Possible policy and regulatory responses

Laws could be enacted requiring a lender, or a person assisting a borrower to apply for a loan, to properly assess whether the borrower will be reasonably able to meet their loan repayments. The lender might be required to collect information about the borrower's income and assets to inform them about the borrower's capacity to make repayments. Australia has recently introduced provisions in the *Consumer Credit Protection Act 2009* requiring lenders and others involved in the provision of consumer credit to take prescribed steps to ensure that a loan is not unsuitable for a borrower. Lenders are required to hold a licence and if they breach the required checking procedures they may lose it. The lender might be required to:

- provide the borrower a quote for the cost of their services
- make reasonable inquiries about the borrower's requirements and objectives for the loan and financial situation
- assess whether the loan will be unsuitable for the borrower.

If an unsuitable loan is made, penalties may be imposed, loan relief provided to the borrower and possible loss of licence for the lender.²

Interest rates and debt traps

High interest rates on loans, along with high penalty rates for late loan repayments, can cause consumers to be caught in debt traps, locking them in a state of poverty.

Fringe lenders such as loan sharks and payday lenders will usually impose prohibitive interest rates on their loans. Consumers can be caught in a debt spiral in which they are compelled to take out new high-interest loans so as to pay off earlier high-interest loans.

Possible policy and regulatory responses

Debate continues as to whether interest rate caps are an appropriate and effective means of dealing with the issue of high interest rates. Many countries continue to impose interest rate caps, even though it tends to be a rather blunt instrument. Another way of dealing with high interest rates may be to require lenders to clearly and visibly display (on their shopfronts or on their websites) the interest rates for their loans. This approach encourages price competition amongst lenders. In this way, it is hoped that competitive market pressures will lead to the lowering of interest rates.

Yet a further alternative is to encourage the establishment of local lenders, possibly with the financial support of governments, charities or religious groups, to lend to consumers at reasonable interest rates. In this way, consumers will borrow from these lenders rather than go to payday lenders or loan sharks.³

² See T Wilson 'The Responsible Lending Response' in T Wilson (ed) *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Ashgate, 2013) at 109.

³ See T Wilson, 'Supporting Social Enterprises to Support Vulnerable Consumers: The Example of Community Development Finance Institutions and Financial Exclusion' (2012) 35 *Journal of Consumer Policy* pp 197-213.

Dealing with temporary hardship

A consumer might enter into a loan arrangement and at some point face difficulty in meeting repayments because of temporary hardship. This may arise from loss of employment, dealing with a family crisis or illness. If there are no laws requiring the lender to make concessions during the period of temporary hardship, it can lead to loan termination and the borrower being required to meet penalty interest rate repayments. This can worsen the borrower's overall financial situation.

Laws allowing for suspension of repayments, or reduction in loan repayments during the period of temporary hardship, can often give the borrower a necessary financial break so that they can return to making their full loan repayments once the difficult period has passed.

Possible policy and regulatory responses

To deal with this, laws could be developed that allow the borrower to notify the lender that he or she is suffering temporary hardship and is therefore finding difficulty in making loan repayments. The notice might set out the reasons why the borrower is suffering temporary hardship. The lender might offer to either suspend repayments or reduce the amount of the repayments for a specified time. The borrower will ultimately still be required to pay the full loan amount.

If the lender does not agree to reduce or suspend repayments, the borrower should be allowed to apply to a court or tribunal to have the loan repayments suspended or reduced.⁴

Debt-collecting practices

Harsh and unfair debt-collecting processes can vary between using criminal violence to obtain loan repayments, to ongoing harassment and intimidation. Repayments of loans from criminal gangs and loan sharks will often be enforced with threats and actual use of violence.

Mainstream lenders may engage in unfair and unreasonable debt-collecting practices such as harassment by constantly phoning the borrower, including late at night and early in the morning, and attending their workplace and attempting to embarrass the borrower.

⁴ See "Responsible Lending, Unjust Terms and Hardship" in Malbon and Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney 2013) pp.241-261.

Many companies within the region are outsourcing debt collecting. A study by Global Collections Review indicates that 16% of executives in Asia-Pacific countries said it is 'highly likely' for them to outsource their collections, while 34% said it is 'likely' for them to do so.⁵ One reason, according to a senior regional manager for Asia Pacific for Atradius Collections is that 'The legal proceedings in Southeast Asia usually takes many years, need multiple hearings before a final judgement is handed down. The solicitors' fees are not cheap and upfront payment is expected.'⁶

Other unfair practices include a financial institution, such as a bank, that has a mortgage over a home foreclosing on the loan because the borrower has failed to meet a number of loan repayments. Sometimes the bank will arrange the sale of the house without adequately advertising the sale, resulting in the house being sold for well below its market value. The bank recovers the amount it is owed from the sale and sends the balance to the borrower. However, the borrower receives far less than what he or she would receive had the house been sold at the full market value.

Possible policy and regulatory responses

Steps could be taken to crack down on criminal activity relating to the enforcement of loans. The difficulty, of course, is getting overstretched and under-resourced police forces to make this a priority.

Laws and regulations could be put in place that establish the standards to which moneylenders and debt collectors must comply. The following requirements provide an example of the matters that could be included in the standards.

A debt collector should only contact you when it is necessary to do so and when the contact is made for a reasonable purpose. A reasonable purpose includes:

- *making a demand for payment*
- *making arrangements for repayment*
- *finding out why an agreed repayment plan has not been met*
- *reviewing a repayment plan after an agreed period of time*

⁵ English.news.cn 'Asian companies prefer to outsource debt collections: study' www.ft.com/intl/cms/s/0/dfe13c5a-095a-11e3-8b32-00144feabdc0.html#axzz2i1gDFEvN

⁶ English.news.cn 'Asian companies prefer to outsource debt collections: study' www.ft.com/intl/cms/s/0/dfe13c5a-095a-11e3-8b32-00144feabdc0.html#axzz2i1gDFEvN

- *inspecting or recovering mortgaged goods (if they have a right to do so).*

As a guide, if contact is necessary, it should be limited (unless you request or agree otherwise) to:

- *a maximum of three phone calls or letters per week (or 10 per month)*
- *phone contact only between the hours of 7:30am and 9:00pm on weekdays and 9:00am and 9:00pm on weekends*
- *face-to-face contact only between the hours of 9:00am and 9:00pm on weekdays and weekends*
- *no contact on national public holidays.*

Generally, visits to your home (or another agreed location) should only take place if there is no other way the debt collector can make effective contact with you, or if you ask for (or agree to) a visit. If repayment arrangements can be worked out over the phone or by letter, then face-to-face contact should not be necessary.

Conduct involving assault or threats of violence should be reported to the police.⁷

⁷ ACCC 'Dealing with Debt Collectors' www.accc.gov.au/consumers/debt-debt-collection/dealing-with-debt-collectors

Policy Digest 2:

Consumer product safety regulation – Recalls and accident information disclosure mechanisms



This policy digest was written by Professor Luke Nottage of Sustineo Pty Ltd under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

Consumer product safety is a major contemporary concern for all market economies. This digest outlines the need for some minimum public regulation¹ (Section 2), highlights best practice regulatory powers regarding product recalls (Section 3) and discusses the importance of broader accident information disclosure duties imposed on suppliers, particularly in developed countries (Section 4). These enhance accident information-sharing arrangements have been increasingly introduced among national regulators and international organisations.

2. Regulatory standards

Defective products impose various direct and indirect costs on consumers and the broader community.² Global changes in markets and technologies have combined with heightened consumer expectations regarding product safety, generating demand for regulatory reforms.³

A particular concern in developed countries worldwide (and increasingly now middle-income countries), including among ASEAN Member States, has been the influx of low-priced manufactured goods from major exporting nations. ASEAN Member States are also increasingly integrated into pan-Asian production chains, with components being sourced in the region for assembly and exporting to developed country markets through a rapidly growing network of free trade agreements.⁴ These trends heighten risks to traders and consumers if the products are later found to be unsafe. Furthermore, the rise of e-commerce has reduced entry barriers for cross-border trade, bringing smaller businesses into the market, which may be less able or inclined to focus adequately on maintaining consumer product safety.

¹ See also generally Nottage L and Kellam J, 'Product Liability and Safety Regulation' in Malbon J and Nottage L, *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) 187, especially 187-90.

² See Productivity Commission, *Review of Australia's Consumer Policy Framework: Inquiry Report* (8 May 2008) at <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>>, pp 171-2.

³ Minister of Consumer Affairs, Parliament of New Zealand, *Consumer Law Reform: Discussion Paper* (2010) at <<http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/discussion-papers/consumer-law-reform-a-discussion-paper/8.-product-safety>>.

⁴ See e.g. the ASEAN-China FTA (2010), the ASEAN Australia New Zealand FTA (2009), and negotiations continuing towards an expanded Trans-Pacific Partnership Agreement (including Brunei, Malaysia, Singapore, Vietnam as well as Australia, New Zealand and the US).

Three sets of mechanisms can provide suppliers with incentives not to put unsafe products onto the market, but the first two have major limitations, particularly for developing countries.⁵

- Market forces (suppliers' concerns about maintaining a reputation for good-quality products) can provide effective incentives for higher-probability risks, but not if the media is not well developed to publicise product failures.
- Private law (especially strict liability regimes for defective products) can incentivise suppliers, due to their concerns about having to pay compensation for harm caused by unsafe goods, but mainly only in cases where harm is extensive (death or serious injury) due to the costs involved in consumers pursuing lawsuits.⁶ Indeed, preliminary survey evidence from the Asian region suggests that the direct effects of enacting strict liability laws have not been large.⁷
- Regulation by public authorities is therefore also required in order to ensure that suppliers maintain minimum safety standards. Such regulation can be achieved through general criminal law sanctions (for example, for 'professional negligence causing death' or 'corporate manslaughter' offences), and especially through product safety regulation underpinned by administrative law and/or criminal law sanctions.

Product safety regulation was initially product- or sector-specific, targeting areas involving high-probability risks of product failure likely to result in severe consequences (such as pharmaceuticals or foodstuffs).⁸ As concern over product safety failures has grown, legislative frameworks setting minimum standards for general consumer product safety have been increasingly introduced.

⁵ See further Nottage L, 'Product Safety Regulation' in Howells G, Ramsay I and Wilhelmsson T (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, Cheltenham, 2010) 256, especially at 268.

⁶ See generally <http://www.aseanlawassociation.org/legal.html>

⁷ A similar pattern was found earlier in the EU. See Kellam J and Nottage L, 'Europeanisation of Product Liability in the Asia-Pacific Region: A Preliminary Empirical Benchmark' (2008) 31 *Journal of Consumer Policy* 217, with a longer manuscript version at <http://ssrn.com/abstract=986530>. See also Thanitcul S, 'Law and Legal Process of the Product Liability Act in Thailand' (2013) 20 (2-3) *Journal of International Cooperation Studies [Kobe University]* 27, at http://www.research.kobe-u.ac.jp/gsics-publication/jics/thanitcul_20-2&3.pdf.

⁸ See, for example, Guarino ET and Kellam J (eds), *International Food Law* (Prospect Media, St Leonards, 2000).

Such regulation typically includes powers for regulators to set product safety requirements, which must be met before the goods can be marketed. For example, the European Union (EU) adds a general safety provision to products, which mandates that goods are safe. If they are deemed unsafe, public law sanctions follow, along with any liability that may be incurred by suppliers subject to private law claims for harm from product defects. Post-marketing controls have also developed, including over intermediaries such as wholesalers or retailers (although often subjected to less strict requirements than for manufacturers and importers). These controls include powers to ban goods found to be unsafe by the authorities, to recall goods, to warn the public about likely safety risks, and even to require product accident or incident reports from suppliers.⁹

3. Voluntary and mandatory recalls

Voluntary recalls influenced by adverse publicity or private law claims

Suppliers may recall their products because they fear private law claims, potentially via two major avenues:

- The importer or insurer may, under contract law, sue the exporter if the goods have caused harm to consumers purchasing from or through the importer, resulting in the latter paying compensation to the consumers. However, in such business-to-business contracts, the exporter is often legally entitled to exclude or limit its liability towards the importer for such ‘consequential damages’ (and even for the reduced value of the defective goods themselves). Such contractual arrangements will diminish the exporter’s fear of being sued by its importer, and therefore reduce its incentive to conduct recalls promptly.
- Consumers may sue the exporter or overseas manufacturer directly, for negligence under general tort law, for not conducting a recall and thus causing or exacerbating harm to the consumers. However, there are very few examples of such claims.¹⁰ This is presumably due to problems of proof and access to justice more generally.

⁹ See also generally Howells G, *Consumer Product Safety* (Ashgate, Aldershot, 1998).

¹⁰ Kellam J, ‘Post-sale Duty to Warn and Product Recalls in Australia’ (2005) 16 *Australian Product Liability Reporter* 113

In addition, responsible suppliers nowadays increasingly voluntarily recall goods due to market effects, namely, concern about adverse publicity if harm to consumers eventuates or escalates. Indeed, marketing specialists argue that a well-conducted recall can often generate positive publicity, and are critical when recalls do not take place or are delayed.¹¹ However, even well-intentioned suppliers can find it difficult to inform the public effectively about their voluntary recalls, while others may be tempted to conduct ‘clandestine recalls’ to try to avoid any publicity or to avoid damages claims and attention from regulators.

Voluntary Recalls Influenced by Public Regulation

Over the past three decades, public regulation has often been added to national law in order to support voluntary recalls. For example, Australia developed the *Trade Practices Act 1986* (renamed in 2010 as the Australian Consumer Law (ACL), which gave regulators the power to conduct a mandatory recall.¹² Although very rarely exercised formally (as with other countries allowing for mandatory recalls), suppliers have become much more likely to conduct a ‘voluntary’ recall. Furthermore, if a voluntary recall takes place, suppliers must notify the government.¹³ In 2010, Australia’s regulator published guidelines as to what constituted a voluntary recall and how to go about conducting one effectively, and also improved an internet portal site to publicise notified recalls.¹⁴ Other major importing countries have also improved websites and guidance manuals for recalls in recent years, including the US,¹⁵ the EU¹⁶ and Japan.¹⁷

¹¹ For a recent example in Australia, see Nottage L, ‘Taking Seriously Consumer Product Safety Reporting Duties Under Australian Law’ (5 September 2013), at http://blogs.usyd.edu.au/japaneselaw/2013/08/taking_seriously_consumer_prod.html.

¹² Now found in section 122 of the ACL regime, centred on Schedule 2 of the Australian Competition and Consumer Act 2010 (Cth), available at http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/legislation.htm.

¹³ ACL section 128. New Zealand proposes to add a similar notification requirement in its Consumer Law Reform Bill, which is still before Parliament. See Nottage L, Riefa C and Tokeley K, ‘Comparative Consumer Law Reform and Economic Integration’ in Malbon J and Nottage L, *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) 52, at 63.

¹⁴ See <http://www.recalls.gov.au/>. However, there may still be some uncertainty about what constitutes a (reportable) voluntary ‘recall’: Nottage, above n 14. A clear definition in legislation is preferable.

¹⁵ See <http://www.cpsc.gov/en/>

¹⁶ See http://ec.europa.eu/consumers/safety/rapex/index_en.htm and http://www.prosafe.org/read_write/file/Corrective%20Action%20Guide%20final.pdf

¹⁷ See http://www.meti.go.jp/product_safety/recall/index.html (listing Japan’s three past mandatory recalls, followed by voluntary recalls notified since 2006) and

Around 2008, the Organisation for Economic Co-operation and Development (OECD) began investigating possible improvements in consumer product safety regimes. A general report and roundtable that year led to a more detailed report entitled *Enhancing Consumer Product Safety Information Sharing*¹⁸ and a related 10-point action plan including, as one (short-term) measure, a call to ‘pool information on recalls and emergency alerts on a single website’.¹⁹ In October 2012, the OECD officially launched its Global Portal on Product Recalls.²⁰ This makes available information provided by five OECD members (Australia, Canada, the EU, the US, and now Mexico), one non-member (Brazil) and one international non-government organisation (GS1).²¹

Although a recent development, this global database is open to states and organisations interested in providing information on product recalls and is rapidly expanding. The possible addition of data from the ASEAN Committee on Consumer Protection (ACCP) on ‘product alerts’, namely, the *Lists of Official Recalled/Banned Products and Voluntary Recalled/Banned Products in ASEAN* publicised online since November 2011,²² would enrich the OECD’s database. This inclusion would allow for more publically available data to producers, consumers and policy makers.

The OECD could also be encouraged to develop and maintain resources on the main product safety regulations concerning recalls that are in force in ASEAN as well as OECD member states. Such resources would be useful to have on the ACCP website, as well as links to any online databases or information on recalls of general consumer products that have or may be developed by individual ASEAN members states.²³

¹⁸ See <http://www.oecd.org/sti/consumer/enhancinginformationsharingonconsumerproductsafety.htm>

¹⁹ See <http://www.oecd.org/sti/consumer/45534271.pdf>.

²⁰ See <http://globalrecalls.oecd.org/>.

²¹ See http://globalrecalls.oecd.org/Content.aspx?Context=Partners_Introduction&lang=En

²² Available at <http://aseanconsumer.org/alerts/>.

²³ For example, Spring Singapore (an agency under the government’s Ministry of Trade and Industry), already provides summary information on its *Consumer Protection (Consumer Goods Safety Requirements) Regulations 2011* (at <http://www.spring.gov.sg/QualityStandards/CPS/Pages/consumer-product-safety.aspx#UjZnrnySJJ>) as well as a (non-searchable) of ‘Product Safety Alerts’ (which in fact includes recalls (at <http://www.spring.gov.sg/QualityStandards/CPS/SAT/Pages/Product-Safety-Alerts.aspx#Ujzp5LvySJJ>)). In addition, Singapore’s Health Sciences Authority lists recalls and product alert regarding drugs and other health products covered by ‘vertical’ or sector-specific regulation (via http://www.hsa.gov.sg/publish/hsaportal/en/health_products_regulation/safety_information.html).

This expansion of the ACCP's consumer product recalls portal website for ASEAN Member States, along with inclusion of its data in the OECD Global Portal, would benefit from consistent *national legislation instructing suppliers to promptly notify their national regulator when conducting voluntary recalls*. Such regulation should not be a major burden on suppliers, as the whole point of a voluntary recall is for suppliers to inform the general public about the need to return unsafe goods.

4. Additional regulation on accident information disclosure and sharing

A more recent development in consumer product safety regulation is a *requirement on suppliers to notify the regulators about serious product-related accidents or deaths*. Better flow of information flows to government through such a mechanism is essential to evidence-based 'responsive regulation' in the event of serious product failures, including more serious measures such as mandatory recalls, bans or the development of minimum safety standards.²⁴ Furthermore, if supplier reports are publically available, even without identifying specific manufacturers or products, then consumers and others can become more aware of the potential health risks associated with particular products or types of products.

In some jurisdictions, such as the EU, US and Canada, suppliers must also notify their regulators when they ought to know about serious product-related accidents or deaths, and where there is a serious risk even if no actual accident occurred. In 2010, Australia's ACL regime introduced a disclosure obligation that is narrower in these respects, and questionable also in other aspects.²⁵ For example, it also does not require disclosures of long-onset health risks or diseases (unless and until these result in deaths). Most unfortunately, the ACL adds strict confidentiality obligations on the regulator receiving accident reports from suppliers; it cannot even share identifying information with regulators from close trading partners.²⁶ This hampers Australia's capacity to contribute product hazard information to the OECD's Global Portal, which over the long term aims to collect and

²⁴See generally Nottage L, 'Responsive Regulation and Comparative Consumer Product Safety' (2011) 11/06 Sydney Law School Research Paper, <http://ssrn.com/abstract=1752627>.

²⁵ACL sections 131 and 132. See Nottage and Kellam, above n 2, updating an earlier comparative analysis by Nottage available at <http://ssrn.com/abstract=1600502>

²⁶ACL section 132A.

disclose information on serious hazards in addition to recalls. However, Australia may be able to amend the ACL if it accedes to free trade agreements or other international agreements that allow for information-sharing with counterpart regulators overseas – including those in Asia.²⁷

Major product safety regulators worldwide are already concluding memoranda of understanding to share product safety incident information. For example, the EU has long had a Rapid Alert System for Non-Food Products Posing a Serious Risk (RAPEX), for notification of measures taken by national regulators from its member states to limit supplies of dangerous goods. Pursuant to a 2006 agreement with China, information on dangerous goods reportedly sourced from China is passed on the Chinese government for investigation there (the ‘RAPEX-China’ system).²⁸

The sharing of product accident or hazard information reports (not just ‘recall’ reports) from local suppliers is thus important, as such reports can be integrated into the OECD’s portal as it expands. Yet, for effective sharing of reports, jurisdictions should consider new regulations requiring suppliers to disclose information about serious product-related accidents or deaths. They should also allow each state’s regulator to disclose reported information to foreign counterpart regulators, international organisations like ASEAN and the OECD, and to the general public (at least in general form).

ASEAN exporters are already increasingly likely to have to agree to disclose such accident information to trading partners in other countries or jurisdictions, like the EU or Canada. This is because those countries already impose duties on suppliers (including exporters), requiring them to report serious product-related accidents that they should know about, even when occurring abroad. To comply with such laws in their home country, these exporters may therefore negotiate contractual obligations on counterparties (e.g. in ASEAN Member States) to notify them if they become aware of serious product-related accidents or risks.

ASEAN suppliers and policymakers should also be aware that the US government has recently launched a website that allows consumers to directly upload information about purportedly unsafe products. Suppliers can then post comments in response and seek corrections to consumers’

²⁷Nottage L, ‘Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era’ (2011) 09/125 *Sydney Law School Research Paper* <http://ssrn.com/abstract=1509810>.

²⁸See http://ec.europa.eu/consumers/safety/rapex/index_en.htm

reports.²⁹ This Safer Products website is open to the public and searchable.³⁰ US government officials, healthcare professionals and others can also file reports.³¹ Separately, US suppliers must provide reports of accidents and serious risks to their Consumer Product Safety Commission.³² As well as considering information-sharing arrangements with this commission, the ACCP and ASEAN states can already monitor the reports from consumers and others through the new Safer Products website, to anticipate more effectively hazards that may arise with similar products within ASEAN.

²⁹ See <http://www.saferproducts.gov/>. For a preliminary analysis of this new website by the US Government Accountability Office, see <http://www.gao.gov/assets/660/652916.pdf> (March 2013).

³⁰ Searching consumer reports under “Malaysia”, for example, produces 10 “hits” – mostly about problems experienced with microwave ovens made in Malaysia: see <http://www.saferproducts.gov/Search/Result.aspx?dm=0&q=Malaysia&srt=0&t=2>.

³¹ See also “recall” reports regarding goods associated with “Malaysia”, for example, available at <http://www.saferproducts.gov/Search/Result.aspx?dm=0&q=Malaysia&srt=0&t=1>.

³² See <https://www.saferproducts.gov/CPSRMSpublic/Section15/>.

Policy Digest 3:

Consumer protection laws and regulations for online purchasing



This policy digest was written by Professor Justin Malbon of Sustineo Pty Ltd under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

The online consumer marketplace is growing at a rapid rate and offers considerable potential economic and consumer benefits. However, these benefits will be undermined if consumers are not adequately protected, which may lead to financial and other losses to individual consumers along with an overall decline in consumer confidence in the marketplace. A loss of consumer confidence could well lead to a reduction in the potential growth and economic and consumer benefits that would otherwise exist if the market were properly regulated. This digest explores the application of consumer protection laws in the online space, including existing best practice and measures for addressing common challenges.

2. Issue

The Asia-Pacific region is expected to become the largest business-to-consumer (B2C) e-commerce marketplace, with sales in the region representing 34% of total world sales. This will result in the regional marketplace being larger than the North American and the European marketplaces.¹ The Organisation for Economic Co-operation and Development (OECD) expects that growth will accelerate, with consumers increasingly adopting mobile devices such as smart phones, tablets and e-readers.²

The benefits to consumers of online purchasing include lower prices for products, a greater range of available products and an easier means for comparing products than that available in the non-online or 'real' world.³ Other benefits are the enhanced capacity to search for products and compare prices, and consider consumer reviews about products before purchase.⁴

Evidence suggests that strong consumer protection measures benefit businesses as well as consumers. Greater consumer protection can enhance consumer confidence which in turn increases consumer participation in

¹ OECD "Empowering and Protecting Consumers in the Internet Economy", *OECD Digital Economy Papers*, No. 216, OECD Publishing, 2013. <http://dx.doi.org/10.1787/5k4c6tbcvvaq2-en> at p.10.

² *Ibid.*, p.3.

³ Malbon J, 'Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study' (2013) 20 *Competition and Consumer Law Journal* 249.

⁴ See Malbon J, 'Taking Fake Online Consumer Reviews Seriously' (2013) 36 *Journal of Consumer Policy* 139-157.

the marketplace, leading to increased sales — a virtuous cycle. Strong consumer protection is best attained if:

- legislative provisions provide for the protection and advancement of consumer rights and responsibilities
- consumers have access to low-cost/no-cost systems for quick and fair resolution of their complaints
- there is privacy protection and protection from fraud.

By establishing strong regulatory frameworks for the online consumer marketplace, countries are likely to realise greater economic and business benefit than would be the case if poor and inadequate regulatory systems were in place. Matsumoto notes that:

With the [ASEAN] region's continuous increase in internet use, companies, in particular small- and medium-sized businesses, are keen to take advantage of the opportunity provided by the internet to start cross-border e-commerce because they can directly sell goods and services beyond borders without hefty investments.⁵

3. Best-practice initiatives relating to e-commerce laws

Broadly speaking, the laws that generally apply to consumer transactions in the non-digital world also apply to digital, or online, consumer transactions. In some jurisdictions, for example the US, there are few consumer protection laws specifically related to online transactions.⁶ Furthermore, there are few statutory provisions designed to protect consumers in relation to consumer contracting more generally. Consequently, ordinary contract law principles are generally applied. US courts tend to take the view that consumers have consented to standard form contract terms regardless of whether they have read them, or how unfair or harsh those terms may be. This is leading to a 'race to the bottom' by US sellers, many of whom are imposing increasingly

⁵ Tsuneo Matsumoto (ed), 'Establishment of a Secure and Safe E-Commerce Marketplace' (2010) ERIA Research Project Report No. 6, at p.1.

⁶ An attempt at providing for specific online consumer protection measures in the form of the *Uniform Computer Information Transactions Act* appears to have largely failed.

one-sided terms. These include provisions in which the consumer agrees to permit the seller to collect information from the consumer's computer and use it for wide-ranging purposes, often completely unrelated to the particular sale of goods or services.⁷

Other jurisdictions provide for higher levels of consumer protection, including with some provisions that are specific to the internet. The European Union is probably the leading jurisdiction in this regard. Directives that specifically relate to online transactions include the Directive on Electronic Commerce.⁸ It establishes harmonised rules on transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. The directive covers information services (e.g. online newspapers), online selling of products and services, advertising, professional services, entertainment services and basic intermediary services (e.g. access to the internet and transmission and hosting of information). The directive provides, among other things, for:

- obligations for the service provider to provide certain information on their website, including their name and geographical address (Article 5)
- prohibitions on certain kinds of unsolicited commercial communications (Article 7)
- the drawing up of codes of conduct for electronic commerce (Article 16)
- out-of-court dispute settlements (Article 17).

Also of interest is the proposed European Sales Law. Article 24 deals with additional duties to disclose information in electronic contracts, and Article 25 sets additional requirements for those contracts.

⁷ Radin, Margaret Jane, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012).

⁸ 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.

4. ASEAN consumer protection initiatives relating to e-commerce

The *ASEAN Economic Community Blueprint (2008)* includes an outline of measures to advance consumer and business interests regarding e-commerce. Various initiatives are being undertaken in ASEAN which are effectively designed to provide for consumer protection relating to e-commerce:

- Work is being undertaken by the ASEAN Telecommunications Regulators' Council to deal with SPAM. SPAM involves financial scams and promotion of dubious products including 'health' products. It often carries computer viruses. For a time, SPAM was regarded as a minor nuisance; it is now considered to be a major economic and social issue.
- The Chiang Rai Declaration on Consumer Protection in Telecommunications is where industry, government and consumer groups work together to propose a basic standard for consumer protection in telecommunications.⁹

Laws and regulations dealing with privacy and fraud will be explored in future policy digests.

5. Addressing challenges in emerging consumer protection

The effective regulation of the online consumer marketplace is necessarily based upon and works in tandem with the effective regulation of the real-world marketplace. That is, for the most part, the laws and regulations that apply to real-world consumer transactions also apply to online transactions. There are, however, some legal and regulatory challenges unique to the online world, including privacy, online fraud, and obtaining access to justice for cross-border transactions.

To ensure effective regulation of the online marketplace, the laws and regulations that apply to consumer transactions more generally must constitute best practice. Table 1 may serve as a starting point for the development of a systematic way to identify the fields of consumer laws

⁹ <http://a2knetwork.org/chiang-rai-declaration>.

and regulations, and the best regional practices for each field. The steps taken would involve identifying:

- the key topics that need be addressed in each ASEAN member's laws, regulations and practices for e-commerce
- the superior law regarding that field.

Table 1. Checklist of protective measures regarding consumer protection for online transactions

Issue	Measure	Best regional practice
Unconscionable and deceptive conduct	Prohibit unconscionable and deceptive conduct	[specify the provisions of the law of a particular member state]
Ensuring products are fit for purpose	Provide products that are fit for purpose and prohibit contracting out of these requirements	As above
Consumer product safety	Provide mechanisms for banning unsafe products and remedies for injury from unsafe products	As above
Unfair terms	Prohibit contracting out of unfair terms/consumer guarantees	As above
Dispute resolution	Provide low-cost or no-cost consumer access to dispute-resolution mechanisms	As above
Cooling-off period	Allow for cooling-off periods after entering into contract of sale of goods or services	As above

6. Application of best-practice laws and regulations

ASEAN resolves to establish an economic community as a single market and production base.¹⁰ A harmonised legal infrastructure is required to facilitate the establishment and operation of this community. Matsumoto notes:

Many complaints, especially in B2C e-commerce, have resulted from differences of language, laws, regulations, business practices and a lack of communication. The working group obtained the common understanding that most of those complaints can be solved by offering advice and information to consumers. To solve cross-border B2C complaints effectively, complaint-handling organizations which have deep knowledge of the legal systems in each country should form a network with each other.¹¹

There are various ways that harmonisation of the e-commerce laws and regulations can be undertaken. Possible measures might include:

- ensuring the application of identified legal and regulatory best practice in all ASEAN Member States.
- providing for the recognition in a member state of any judgement, order or declaration of a legal or administered decision-making body of another member state in relation to an e-commerce matter.

Consideration might be given to attempting new and innovative ways of attaining harmonisation, including using interim measures. One such measure might be to have each member enact an e-commerce harmonisation law. This might provide that an identified best-practice law be deemed the law of the member state (using the identification process mentioned in Part 5, above). The harmonisation law might also provide that the identified law be applied *mutatis mutandis* as if it were the law of the member state. As an example, taking the case of country A, the effect of the harmonisation law might be that the law of country B regarding unfair

¹⁰ASEAN Economic Community Blueprint (2008), p.5.

¹¹Tsuneo Matsumoto (ed), 'Establishment of a Secure and Safe E-Commerce Marketplace' (2010) ERIA Research Project Report No. 6, at p.2.

terms under consumer contracts, which is identified as best practice, is to be deemed to be the law of country A, even though the unfair terms law was not enacted in country A. This would effectively introduce a highest common denominator approach to harmonisation.

In addition, consideration could be given to enacting provisions extending the jurisdiction of a member's consumer protection laws. Although this would allow for a greater range of circumstances in which a particular member's law would apply to a cross-border consumer transaction, this would not necessarily enhance harmonisation.

Recognition of decisions of other member countries

Consideration could be given to extending the operation of recognition of foreign judgements legislation so as to recognise lower court and tribunal decisions of other ASEAN Member States regarding disputes relating to consumer protection laws and regulations.

Model Law on Electronic Commerce

Consideration could be given to becoming a party to the UNCITRAL Model Law on Electronic Commerce 1996 and to give effect to relevant provisions of the Model Law through enacting legislation, if the Member has not already done so.

The Model Law requires 'functional equivalence' between the requirements for hardcopy documents and electronic documents. Consequently, it cannot be claimed the following requirements do not comply with the law simply because they were done in electronic form. Namely a legal requirement for: information to be given in writing, a signature, the production of a document, or the retention of a document.

Policy Digest 4:

Protecting consumers of telecommunications services



one vision
one identity
one community

This policy digest was written by Associate Professor Jeannie Paterson, Melbourne Law School, of Sustineo Pty Ltd under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

Access to telecommunications services in both developed and developing economies is becoming increasingly important for consumers' meaningful participation in civic society and the commercial marketplace.¹ This digest considers the use of general and industry-specific consumer protection law in ASEAN Member States to help protect consumers' expectations of fair and reasonable treatment in contracting for telecommunications services; to choose between different providers of such services; and, through these means, to promote competition in the market for telecommunications services.² Other important steps, such as education programs, accessible and cost-effective dispute resolution mechanisms and ongoing monitoring by regulatory agencies, are also important but beyond the scope of this digest.

2. The issues

There are high levels of mobile phone penetration in most ASEAN Member States and varying, though generally increasing, levels of internet access.³ As a result, United Nations Conference on Trade and Development (UNCTAD) has predicated significant potential opportunities to develop commerce by mobile phone and computer in the ASEAN region.⁴ UNCTAD has also noted that one hurdle to these commercial developments is a lack of consumer trust in such forums.⁵

The marketing and contractual arrangements for telecommunications services can disappoint consumers' expectations of fair treatment by service providers. Advertising for telecommunications services may be misleading, for example, with some providers promoting 'low-cost' services that in fact have expensive hidden features.⁶ Telecommunications

¹ See e.g. Mark Warchauer, *Technology and Social Inclusion: Rethinking the Digital Divide* (The MIT Press, 2004).

² See also Jeannie Marie Paterson, 'Consumer Contracting in the Age of the Digital Natives' (2011) 27 *Journal of Contract Law* 152-170.

³ UNCTAD *Review of e-commerce legislation harmonisation in the Association of Southeast Asian Nations* (2013) p 3.

⁴ UNCTAD *Review of e-commerce legislation harmonisation in the Association of Southeast Asian Nations* (2013) p 3.

⁵ UNCTAD *Review of e-commerce legislation harmonisation in the Association of Southeast Asian Nations* (2013) p 4.

⁶ See e.g. (Indonesia) <http://www.thejakartapost.com/news/2008/03/10/cell-phone-ads-039misleading039.html>

contracts may contain harsh terms that give over-reaching powers to providers,⁷ such as rights to terminate the contract whenever the provider chooses,⁸ to vary any of the terms of the contract at any time⁹ or to impose high fees for early termination of a contract.¹⁰ Consumers may experience ‘bill shock’¹¹ from unexpected charges for their service, for example unrequested value-added services,¹² excess data charges,¹³ or roaming charges.¹⁴ In addition, the range of different options available to consumers in purchasing telecommunications services, and the lack of transparency in what is actually offered under different service packages, may mean that consumers find it difficult to select the service that best suits their needs.¹⁵ These factors could undermine consumer confidence and reduce their ability to distinguish effectively between different providers.

3. Consumer protection law responses

Consumer protection law can provide a response to a number of the above concerns. An effective response, consistent with best practice, will rely on a combination of general consumer law, applying to all consumer transactions, and more specialised legislation specific to the telecommunications industry. Thus, as discussed below, there is a two-pronged approach:

⁷ See Jeannie Marie Paterson, ‘Looking at the Fine Print: Standard Form Contracts for Telecommunications Services and Consumer Protection law in Australia’ (2014) *University of Western Australia Law Review* (Forthcoming).

⁸ See e.g. (Singapore) <http://news.xin.msn.com/en/singapore/article.aspx?cp-documentid=4537781>.

⁹ See e.g. (Australia) <http://www.accc.gov.au/media-release/court-declares-consumer-contract-terms-unfair>.

¹⁰ See e.g. (Philippines) <http://www.philstar.com/opinion/2013/04/14/930410/revise-telcos-unfair-pretermination-rule>.

¹¹ See e.g. (Indonesia) <http://www.thejakartapost.com/news/2011/10/04/telkonsel-lawyer-takes-small-step-consumers.html>.

¹² See e.g. (Singapore) <http://www.sammyboy.com/showthread.php?61846-how-to-take-on-singtel>; (Philippines) <http://www.complaintboard.com/sun-cellular-postpaid-l3962.html>; (Indonesia) <http://ovum.com/2011/12/09/indonesian-mobile-vas-the-road-to-recovery/>.

¹³ See e.g. (Malaysia) <http://www.digitalnewsasia.com/mobile-telco/the-hunt-for-a-smartphone-and-a-data-plan>.

¹⁴ See e.g. (Australia) <http://accan.org.au/news-items/media-releases/638-buyer-beware-global-roaming-research-reveals-confusing-array-of-charges>.

¹⁵ See further Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press).

- The general consumer protection law in force in most ASEAN Member States¹⁶ can be used to improve the treatment of consumers in their purchase of telecommunications services, particularly in precluding misleading conduct, promoting fair contract terms and encouraging transparency in the contracting process.
- Legislation specifically applying to the telecommunications industry can be used to respond to issues that cause particular concern to consumers of telecommunications products and that are not adequately addressed by more general provisions.

4. Using general consumer law to protect consumers of telecommunications services

(a) Misleading conduct

The consumer protection law of most ASEAN Member States prohibits suppliers from engaging in misleading conduct.¹⁷ These prohibitions are a central feature of an effective consumer protection regime because there is no justification for misleading consumers. Advertisements are misleading, contrary to these laws, where they contain false information about the telecommunications services being offered. They may also be misleading where they fail to give sufficient prominence to qualifications on ‘headline’ information. For example, in Australia an advertisement for a special low price for internet services was misleading because there were additional charges that would increase the overall cost to consumers but information about these charges was in very small print that consumers were unlikely to notice or read.¹⁸

As this example shows, suppliers of goods and services sometimes assume that providing qualifications in fine print is sufficient to protect

¹⁶ Discussed below.

¹⁷ See e.g. (Brunei) Consumer Protection (Fair Trading) Order 2011 s 4(a); Unfair Contract Terms Act 1999 ss 10–12; (Cambodia) Law on the Management of Quality and Safety of Services and Services 2000 article 21; (Indonesia) Law on Consumers’ Protection 1999 Article 7, 9–11; (Malaysia) Consumer Protection Act 1999 Part II; (Philippines) Consumer Act 1991 Art 50 and Chapter VI; (Singapore) Consumer Protection (Fair Trading) Act 2003 ss 4 and 6; (Thailand) Consumer Protection Act 1979 ss 4 and 22; (Viet Nam) Law on Protection of Consumers’ Rights 2010 Articles 8 and 10.

¹⁸ Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54. See also Australian Competition and Consumer Commission v Singtel Optus Pty Ltd [2010] FCA 1177

inaccurate representations to consumers from being misleading. This is not the case. Consumers are taken in by the overall impression created by such representations and often do not appreciate the effect of the fine print. Education by consumer protection agencies is usually required to help traders understand this reality.

(b) Unfair terms

The consumer protection laws of many ASEAN countries include protection for consumers against unfair contract terms. These range from general prohibitions on terms that are unfair¹⁹ to prohibitions on specific types of terms that impact harshly on consumers, such as certain types of exclusion clauses,²⁰ termination clauses and variation rights.²¹

Regulation of unfair terms protects consumers from unbalanced and onerous terms that are not reasonably necessary to protect the legitimate interests of suppliers. Such regulation is justified on the basis that consumers simply do not have the skills to read and assess all of the terms in standard form contracts and have little bargaining power to protect themselves against unfair terms.²² Certainly, telecommunications providers have a legitimate interest in ensuring that consumers comply with their contractual obligations, pay for the services and do not abuse the service. However, telecommunications providers should not be able to take advantage of their superior bargaining position to impose terms that go beyond what is necessary to protect their legitimate interests.

There are a number of types of terms that are commonly included in consumer contracts, including telecommunications contracts, which may be considered unfair and contrary to general legislative prohibitions. These include early termination charges, broad termination powers and unilateral variation clauses.²³ For example, in Australia, the Federal Court recently declared that a number of terms in a telecommunications provider's standard form consumer contract were void as unfair terms under general

¹⁹ See e.g. (Malaysia) Consumer Protection (Amendment) Act 2010 s24D; (Singapore) Consumer Protection (Fair Trading) Act 2003 Schedule 2 s 11; (Thailand) Unfair Contract Terms Act 1997.

²⁰ See e.g. (Brunei) Unfair Contract Terms Act 1999 ss 3 - 6; (Malaysia) Consumer Protection (Amendment) Act 2010 s24D.

²¹ See e.g. (Indonesia) Law on Consumers' Protection 1999 Article 18.

²² See further Jeannie Marie Paterson, *Unfair Contract Terms in Australia* (Lawbook, Sydney, 2012) Ch 1.

²³ Jeannie Marie Paterson, 'Looking at the Fine Print: Standard Form Contracts for Telecommunications Services and Consumer Protection law in Australia' (2014) *University of Western Australia Law Review* (Forthcoming).

consumer protection legislation.²⁴ This included a term that allowed the provider to terminate the contract at will and a term that allowed the provider to make changes to the contract at any time, without any limitation or protection for consumers.²⁵

(c) Transparency

Transparency refers to the need for consumer contracts to be presented in a manner that is relatively straightforward for consumers to access, read and understand. Some ASEAN Member States include transparency requirements in their general consumer protection law²⁶ or in industry-specific legislation.²⁷ These types of requirements assist all consumers in all markets. A greater level of transparency in the terms of contracts for telecommunications services can help consumers to better understand the terms on which telecommunications services are being offered. An example of the type of provision that might be more widely used is in found in Indonesia: ‘Entrepreneurs are prohibited from including a standard clause at the place or in the form which is difficult to see or cannot be read clearly, or under the statement which is difficult to understand’.²⁸ In Singapore, the Telecom Competition Code requires telecommunications providers to publish specified information relevant to consumers ‘in a manner that is readily available and easy to understand’.²⁹

²⁴ Australian Consumer Law pt 2-3.

²⁵ Australian Competition and Consumer Commission v Bytecard Pty Limited Consent order (P) VID301/2013.

²⁶ See e.g. (Indonesia) Law on Consumers’ Protection 1999 Article 18(2); (Singapore) Consumer Protection (Fair Trading) Act 2003 Schedule 2 s 20.

²⁷ (Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.2].

²⁸ (Indonesia) Law on Consumers’ Protection 1999 Article 18(2).

²⁹ (Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.2].

5. Using legislation specifically directed at telecommunications service providers to protect consumers

Most ASEAN Member States also have specific legislation applying to telecommunications services (Table 1).

Table 1. ASEAN Member States Telecommunications Legislation

Brunei	Telecommunications Order 2001
Cambodia	Cambodia Telecom Regulator, Royal Decree #NS/RKT/0312/175 (Royal Palace), 1 March 2012
Indonesia	Telecommunications Law no 36 (1999)
Lao PDR	Telecommunication Law (2001)
Malaysia	Communications and Multimedia Act 1998
Myanmar	Telecommunications Law 2013
Philippines	National Telecommunications Commission
Singapore	Code of Practice for Competition in the Provision of Telecommunications Services 2012
Thailand	Act on Organization to Assign Radio Frequency Spectrum and to Regulate the Broadcasting and Telecommunications Businesses B.E.2553 (2010), Telecommunications Business Act (2001)
Viet Nam	Law on Communications 2009

The degree to which this legislation contains initiatives for protecting consumers varies. However, the legislation offers ASEAN countries the chance to develop more targeted rules or codes of conduct that will better consumers in their dealings with telecommunications service providers, particularly through disclosure and notice requirements.³⁰

(a) Mandatory disclosure

The consumer protection laws of a number of ASEAN Member States affirm the importance of accurate information being provided to consumers

³⁰This legislation might also be used to address other consumer protection issues facing telecommunications consumers not directly related to the telecommunications service provider, for example spam messages sent by traders.

about the products they are purchasing.³¹ Despite this, much information about telecommunications services available to consumers is presented in different formats and emphasises different aspects of the service. This makes it difficult for consumers to find the information required to select the service that best suits their needs and to compare the services offered by different providers. It also leaves consumers vulnerable to ‘bill shock’, where they find themselves paying for features that they did not know about or properly understand.

Given the variety of options available in the telecommunications market, ASEAN countries might consider following what is increasingly considered to be best practice: introducing mandatory disclosure requirements for telecommunications service packages.³² These rules would require telecommunications providers to provide consumers with specified core important information relevant to their purchasing decision in a standard form, before consumers enter into a contract with the provider. A number of models already exist in the region. For example, the Malaysian Communications and Multimedia Act 1998 expressly provides for the development of a consumer code addressing ‘the provision of information to customers regarding services, rates and performance’.³³ In Singapore, the Telecom Competition Code requires suppliers to disclose features of the services being offered to consumers, including the price, terms and conditions of the service provided³⁴ and the extent to which the provider has met applicable quality standards.³⁵ In Australia, the Telecommunications Consumer Protection Code requires suppliers of telecommunications services to provide consumers with a summary of specified information in the form of a ‘Critical Information Summary’.³⁶

³¹ See e.g. (Thailand) Consumer Protection Act 1979 s 4(1); (Viet Nam) Law on Protection of Consumers’ Rights 2010 Article 8(2).

³² See Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press).

³³ (Malaysia) Communications and Multimedia Act 1998 s 190

³⁴ (Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.2] and [3.3.2].

³⁵ (Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.7].

³⁶ (Australia) Telecommunications Consumer Protection Industry Code, r 4.1.2 – 4.1.3. <http://www.acma.gov.au/Industry/Telco/Reconnecting-the-customer/TCP-code/the-tcp-code-telecommunications-consumer-protections-code-acma>

(b) Mandatory or prohibited terms

Given the importance of telecommunications services to consumers, and the complexity of many of the contracts for such services, specific regulation of the terms of consumer contracts may be necessary. For example, in Singapore, the Telecom Competition Code regulates a number of aspects of the relationship between service providers and end users. The code prohibits disproportionate early termination charges,³⁷ restricts the circumstances in which a service may be terminated or suspended³⁸ and limits the circumstances in which the price, terms or circumstances of supply may be varied.³⁹ The code also requires certain terms to be included in the contract,⁴⁰ particularly terms setting out the prices, terms and conditions on which the service will be provided⁴¹, billing arrangements⁴² and dispute resolution arrangements.⁴³

(c) Mandatory notice requirements

Even after the contract is made, ASEAN Member States might consider using mandatory disclosure and notice requirements to protect consumers from unfair surprise and ‘bill shock’. These are issues that cause many consumer complaints. Some very direct types of regulatory response already exist in some regions and could be used more widely. For example, the Telecom Competition Code (in Singapore) prohibits telecommunications suppliers from charging for unsolicited services⁴⁴ or services provided on a free trial basis without obtaining the express agreement of the consumer for the services to continue.⁴⁵ Australia has recently introduced an International Mobile Roaming standard that requires telecommunications providers to

³⁷(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012, [3.2.3]. See also the Advisory Guidelines on Contract Period and Early Termination Charges for Telecommunication Services Offered to End Users.

³⁸(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services, [3.2.4].

³⁹(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services [3.3.2].

⁴⁰(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services [3.3].

⁴¹(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services [3.3.2].

⁴²(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services [3.3.1].

⁴³(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services [3.3.4] and [3.3.5].

⁴⁴(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.8].

⁴⁵(Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.9]. See also on Indonesia’s response to consumer concern over value added services <http://ovum.com/2011/12/09/indonesian-mobile-vas-the-road-to-recovery/>

provide an SMS alert to consumers on arrival overseas, warning them that significantly high charges for using roaming services may apply.⁴⁶

(d) Service standards

Industry-specific codes may also address the important issue of service standards, for example, by specifying required service standards⁴⁷ and the rights of consumers in the event of service termination and suspension.⁴⁸

6. Policy priorities

Telecommunications services are increasingly becoming a central feature of consumers' lives across all ASEAN Member States. Yet the contracts for these services are often complicated and consumers may be disappointed. Consumer law applying generally in all ASEAN countries can prevent the worst abuses. However, states may wish to develop more specific consumer protection measures as well. In particular, existing legislation regulating telecommunication services may be used to introduce transparency and mandatory disclosure requirements to help consumers make better choices between telecommunications services. Such measures may also be usefully complemented by prohibitions on unfair and onerous terms in telecommunications contracts that impact overly harshly on consumers. Finally, some degree of uniformity between the regulatory regimes in ASEAN Member States could encourage cross border trade and competition in this significant market.

⁴⁶ (Australia) <http://www.acma.gov.au/Citizen/Consumer-info/Rights-and-safeguards/Phone-contracts-and-charges/new-tools-to-avoid-overseas-mobile-bill-shock>.

⁴⁷ (Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.1], and also [3.2.7]. Also (Australia) Telecommunications (Consumer Protection and Service Standards) Act 1999 Part 5.

⁴⁸ (Singapore) Code of Practice for Competition in the Provision of Telecommunications Services 2012 [3.2.4] and [3.3.6]

Policy Digest 5:

Protecting consumers from unfair unsolicited (door-to-door) sales practises



one vision
one identity
one community

This policy digest was written by Associate Professor Jeannie Paterson, Melbourne Law School, of Sustineo Pty Ltd under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

'Unsolicited', 'door-to-door' or 'direct' sales involve attempts by businesses to sell their products to consumers other than at the premises of the businesses, usually at consumers' homes or workplaces, without having been invited to do so by consumers. Many businesses using the unsolicited sales method are honest, ethical and provide a good-quality product to consumers. However, some businesses using this method engage in misleading, aggressive or manipulative practices. Some consumer advocates think that the risks to consumers associated with such practices outweigh any benefits and that unsolicited selling should be banned. If this more extreme response is not accepted, it is important that unsolicited sales are properly and effectively regulated to ensure that consumers are not being exploited.

This digest considers the ways consumer protection law in ASEAN Member States may be used to regulate unsolicited sales practices that have a negative impact on consumers and to improve the opportunities for free and informed choices by consumers in dealing with businesses using this sales method. The use of both general consumer protection laws and rules specifically directed at unsolicited sales are considered. Processes for educating consumers and traders about their rights and obligations and enforcement strategies are important for effective consumer protection but are not discussed in this digest. Also important is the use of non-legal approaches to promote the fairer treatment of consumers, such as by appealing to the value of a good reputation for a business and through pressure applied through name-and-shame strategies using social and commercial media. These strategies are also not discussed in this digest.

2. The issue

The unsolicited sales method is used across the ASEAN region¹ by businesses ranging from sole traders to large multinational companies. Unsolicited sales may provide an opportunity for consumers to buy unique goods and services in the convenience of their own home or workplace, often at a discounted price given the reduced overheads of the seller. The

¹ See e.g. (Thailand) <http://www.businessforhome.org/2012/11/amway-sales-exceed-12-billion/>; (Myanmar) <http://www.nextinsight.net/index.php/story-archive-mainmenu-60/916-2012/5290-best-world-intl-making-headway-into-myanmar-after-3-years>; (Philippines) <http://businessdiary.com.ph/2679/top-direct-selling-companies-in-the-philippines/>.

case for regulating unsolicited sales arises from a consistent range of complaints about the strategies employed by some businesses in pursuing unsolicited sales. For example, some businesses make misleading, even fraudulent, representations (for example, overstating the qualities of the goods or services being offered for sale).² Some businesses use unsolicited sales practices to prey upon vulnerable consumers unable to protect their own interests, such as the elderly, the ill or those suffering from various disabilities.³ Some businesses using the unsolicited sales method engage in high-pressure sales tactics, such as long sales presentations and refusing to leave the premises until the sale is made.⁴ Other businesses may use more subtle forms of manipulation,⁵ such as casting doubt in the mind of the consumer about the safety of their existing products⁶ or emphasising feelings of commitment and obligation in return for the efforts of the salesperson.⁷ Consumers may struggle to bring the sales process to an end or feel obliged to make a purchase once entry has been gained to their home.⁸ As a result, consumers may enter into contacts that they did not understand or that they later regret because the product is unsuitable or too expensive.⁹

² See e.g. (Singapore) <http://news.asiaone.com/News/Latest+News/Singapore/Story/A1Story20130718-438086.html>; (Malaysia) <http://www.bernama.com/bernama/v3/printable.php?id=210346>; (Philippines) <http://business.inquirer.net/152009/dti-forges-deals-to-protect-consumer-rights>;

³ See e.g. (Malaysia) http://www.eraconsumer.org/eraconsumer/index.php?option=com_content&view=article&id=249:watching-out-for-unfair-practices&catid=80:consumer-law&Itemid=106. Also (Australia) *Australian Competition and Consumer Commission v Keshow* [2005] FCA 558; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926.

⁴ See e.g. (United Kingdom) http://www.offt.gov.uk/shared_offt/market-studies/oft1374 (mobility aids).

⁵ See further (Australia) Paul Harrison, Marta Massi, Kathryn Chalmers and the Consumer Action Law Centre, *Shutting the Gates: An Analysis of the Psychology of In-home Sales of Educational Software* (2010) p 4.

⁶ See e.g. (Singapore) <http://www.case.org.sg/downloads/C@SEBites/C@sebitess%20Issue%2086.htm#tales>. Also (Australia) *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926.

⁷ See e.g. *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

⁸ See e.g. (Singapore) <http://news.asiaone.com/News/The+New+Paper/Story/A1Story20100201-195865.html>. Also (Australia) <http://www.accc.gov.au/media-release/full-federal-court-declares-lux-conduct-unconscionable>.

⁹ See further (Malaysia) <http://www.bernama.com/bernama/v3/printable.php?id=210346>. Also (Australia) Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* ch 23.

3. The role of consumer protection law

These negative aspects of the unsolicited sales method are inconsistent with the consumer protection objectives of fair and efficient consumer markets. Effective regulation of unsolicited sales in ASEAN Member States can draw upon general consumer protection legislation already in place in those countries, in particular to curb misleading and advantage-taking conduct. Best practice throughout Southeast Asia, Australia and the European Union¹⁰ suggests that a more targeted response might be necessary. Thus, ASEAN Member States might consider introducing industry-specific rules or codes of conduct to regulate matters such as the circumstances of sale, mandatory disclosure and cooling-off periods for unsolicited sales. A number of ASEAN Member States have already introduced legislation that deals specifically with unsolicited sales (Table 1). These examples could be used as a model by ASEAN countries that do not yet have industry-specific regulation.

Table 1. Legislation dealing with unsolicited sales

Member state	Legislation
Indonesia	Regulation No.32/M-DAG/PER/8/2008 regarding the Organization of Trade Business Activity with Direct Selling Systems (August 21, 2008) as amended by Ministry of Trade Regulation No. 47/M-DAG/PER/9/2009 (September 16, 2009)
Malaysia	Direct Sales Act and Anti-Pyramid Scheme 1993
Singapore	Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009
Thailand	Direct Sale and Marketing Act 2002

¹⁰See below and also (EU) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights; (Australia) Australian Consumer Law Pt 3-2 Div 2.

4. Using general consumer protection legislation to respond to consumer protection issues in unsolicited sales

(a) Misleading conduct

Most ASEAN countries have general consumer protection laws that prohibit misleading conduct by traders. These laws can be used to protect consumers from businesses that attempt to make unsolicited sales by misrepresenting the qualities of the product being sold or the reasons for buying it.¹¹

(b) Aggressive and unfair advantage taking

Many ASEAN Member States have general consumer protection laws that prohibit traders from engaging in aggressive practices¹² and from taking advantage of vulnerable consumers.¹³ These laws can address some of the worst abuses of the unsolicited sales model, which involve sellers targeting vulnerable consumers who are then pressured or manipulated into purchasing products unsuitable for their needs. For example, in Australia a trader selling vacuum cleaners has recently been found to have engaged in unconscionable conduct contrary to the law. The sales method involved targeting elderly consumers, promising a maintenance service for their existing vacuum cleaners and then using that service to create concerns about the safety and efficiency of the old vacuum cleaner. The consumers were then pressured into buying an expensive new vacuum cleaner.¹⁴

¹¹ See (Brunei) Consumer Protection (Fair Trading) Order 2011 s 4(a); Unfair Contract Terms Act 1999 ss 10 – 12; (Cambodia) Law on the Management of Quality and Safety of Services and Services 2000 article 21; (Indonesia) Law on Consumers' Protection 1999 Article 7, 9 – 11; (Malaysia) Consumer Protection Act 1999 Part II; (Philippines) Consumer Act 1991 Art 50 and Chapter VI; (Singapore) Consumer Protection (Fair Trading) Act 2003 ss 4(a); (Thailand) Consumer Protection Act 1979 ss 4(1) and 22; (Viet Nam) Law on Protection of Consumers' Rights 2010 Articles 8 and 10.

¹² See (Indonesia) Law on Consumers' Protection 1999 Article 15; (Viet Nam) Law on Protection of Consumers' Rights 2010 Article 10(2). Also (Thailand) Consumer Protection Act 1979 s 4(2).

¹³ See (Brunei) Consumer Protection (Fair Trading) Order 2011 s 4(c); (Malaysia) Consumer Protection (Amendment) Act 2010 s 24C; (Philippines) Consumer Act 1991 Art 53; (Singapore) Consumer Protection (Fair Trading) Act 2003 ss 4(b); (Viet Nam) Law on Protection of Consumers' Rights 2010 Article 10(3).

¹⁴ Compare (Australia) *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*.

(c) Minimum standards of quality

Many ASEAN Member States have legislation in place that provides minimum standards of quality in contracts for the sale of goods, for example through statutory guarantees or implied terms.¹⁵ These types of provisions are a central feature of any consumer protection regime. They protect consumers against being delivered substandard or shoddy goods, including through contracts made following an unsolicited sales approach.

5. Using industry-specific legislation to respond to consumer protection issues in unsolicited sales

(a) Circumstances of sale

Rules governing the circumstances in which unsolicited sales can be made help protect consumers against intrusive unsolicited sales practices. ASEAN Member States might consider introducing rules (already in place in Thailand and Malaysia) that regulate the circumstances in which sellers may visit consumers in their home or workplace. These might, for example, include rules that limit the hours in which traders are allowed to visit consumers' homes or workplaces¹⁶ and rules that impose on traders express duties to seek permission to enter consumers' premises¹⁷ and to leave on request.¹⁸ In Australia, consumer groups have run a 'do not knock' campaign that has been very popular with consumers. This campaign involved providing consumers with a sticker requesting door-to-door salespeople not to knock at their door. Due to legislation regulating the circumstances under which unsolicited sales may be made, sellers were required to respect these consumers' wishes not to be disturbed.

(b) Disclosure

Rules imposing disclosure requirements on businesses using unsolicited sales practices assist consumers in being properly informed about the

¹⁵ See e.g. (Brunei) Sale of Goods Act 1999 ss 14 - 18; (Indonesia) Law on Consumers' Protection 1999 Articles 7, 17; (Malaysia) Consumer Protection Act 1999 Parts V - VII; (Philippines) Consumer Act 1991 Chapter III; (Singapore) Consumer Protection (Fair Trading) Amendment Act 2012.

¹⁶ See e.g. (Malaysia) Direct Sales Act 1993 s 17(1). Also (Australia) Australian Consumer Laws s 73.

¹⁷ See e.g. (Thailand) Direct Sale and Marketing Act 2002 s 26.

¹⁸ See e.g. (Malaysia) Direct Sales Act 1993 s 17(2). See also (Australia) Australian Consumer Laws s 75 and the 'do not knock' campaign <http://consumeraction.org.au/get-the-do-not-knock-sticker/>.

nature of the proposed transaction and, importantly, ensure that they are able to identify and contact the person who has sold them goods or services. For example, ASEAN Member States might consider introducing duties requiring traders to inform consumers about their identity and the purpose of the salesperson's visit, as in Malaysia and Thailand,¹⁹ and about consumers' rights to terminate any contract made, as in Singapore.²⁰

(c) Form of contract

Rules governing the form and content of contracts used in the unsolicited sales process protect consumers by clarifying the agreed obligations of both parties. ASEAN countries might consider introducing rules requiring written contracts for unsolicited sales and for that contract to be signed by both parties in order to be binding, using Malaysian and Thai legislation as a starting model.²¹ ASEAN Member States might also consider requiring the written contract to include all the terms of the agreement, cooling-off and termination rights and information about the supplier, including name, business address and contact details.²² These rules might also usefully require sellers to give consumers a copy of the written contract promptly on conclusion of the transaction.²³ Both Thailand and Malaysia have legislation that may be used as a model for such regimes.

(d) Cooling-off periods

Cooling-off periods specify a period in which consumers may terminate the contract for the goods or services purchased through the unsolicited sales method without incurring any financial penalty. Cooling-off periods give consumers time to reflect on the purchase, free from pressure of the salesperson. There are some disadvantages associated with the strategy, as consumers might make opportunistic use of the right, increasing uncertainty

¹⁹ See e.g. (Malaysia) Direct Sales Act 1993 s 18(1); (Thailand) Direct Sale and Marketing Act 2002 s 26. Also (Australia) Australian Consumer Law s 74.

²⁰ See e.g. (Singapore) Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations regulation 4(6). See also (EU) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights Article 6; (Australia) Australian Consumer Law ss 76 and 78.

²¹ See e.g. (Malaysia) Direct Sales Act 1993 s 23(1); (Thailand) Direct Sale and Marketing Act 2002 s 30. Also (Australia) Australian Consumer Law s 79.

²² See e.g. (Malaysia) Direct Sales Act 1993 s 23(1) and 24; (Thailand) Direct Sale and Marketing Act 2002 ss 30 and 31. See also (EU) Council Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights Article 7. Also (Australia) Australian Consumer Law s 79.

²³ See e.g. (Malaysia) Direct Sales Act and Anti-Pyramid Scheme 1993 s 23(3); (Thailand) Direct Sale and Marketing Act 2002 s 30. Also (Australia) Australian Consumer Law s 79.

for suppliers.²⁴ However, provided the rights are clearly expressed and not excessive, this possible risk to traders should be minimal.

The ASEAN region already contains several examples of these types of provisions (see Table 2),²⁵ and cooling-off periods are also found in Australia and in the European Union.²⁶

Table 2. Cooling-off periods in ASEAN Member States

Country	Cooling-off period
Malaysia	10 working days from the day after the conclusion of the contract ²⁷
Singapore	5 days (not including Saturday, Sunday or public holidays) after the contract has been entered into ²⁸
Thailand	7 days from receipt of the goods or services ²⁹

Singapore and Thailand allow a longer cooling-off period if consumers have not been informed of their cooling-off rights at the time of contracting.³⁰

(e) Small amount sales

In some jurisdictions, industry-specific rules applying to unsolicited sales only apply to purchases over a specified amount. This type of limitation might be considered by all ASEAN countries. Formal disclosure and cooling-off rights will not be relevant to small amount sales, such as the purchase of confectionary or soft drinks. For example, in Singapore the regulations applying to unsolicited sales do not apply to purchases less than \$50.³¹

²⁴ See Iain Ramsay and Anthony Duggan, 'Front End Approaches to Access to Justice' in M Trebilcock and A Duggan and L Sossin, *Middle Income Access to Justice* (University of Toronto Press, Toronto, 2012).

²⁵ See below and also (Brunei) Consumer Protection (Fair Trading) Order 2011 s 10.

²⁶ See (EU) Council Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights Article 9 (14 days); (Australia) Australian Consumer Law s 82.

²⁷ (Malaysia) Direct Sales Act 1993 s 2;

²⁸ (Singapore) Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations reg 4.

²⁹ (Thailand) Direct Sale and Marketing Act 2002 s 33.

³⁰ See e.g. (Singapore) Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations reg 4(1) (b). Also (Malaysia) Direct Sales Act 1993 s 23; (Thailand) Direct Sale and Marketing Act 2002 s 32.

³¹ See e.g. (Singapore) Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations s 3(a).

(f) Registration

Some ASEAN Member States require registration or licensing of businesses using unsolicited or direct sales practices.³² Licensing requirements allows better monitoring by the relevant regulator of the conduct of such business; compliance with a code of conduct may be required as a condition of holding a licence.

6. In-home sales

A related sales method is 'in-home sales', often used for sales of kitchen equipment, clothing, jewellery and cleaning products. In-home sales involve sales away from the trader's principal place of business, usually at the consumer's home, but initiated by the consumer. In-home sales do not raise the same consumer protection issues as unsolicited sales because it is the consumer who has sought out the contact with the trader. Nonetheless, consumers may be vulnerable to manipulative or aggressive sales techniques. As such, the European Union extends consumer protections specific for unsolicited sales to in-home sales.³³

7. Policy priorities

Unsolicited sales methods may provide a useful service to consumers in ASEAN Member States, but these methods are also abused by some sellers, to the detriment of consumers. General consumer law in ASEAN countries will curb the worst abuses. However, member states may also wish to use the strategy that is becoming increasingly prevalent throughout the ASEAN region and the European Union. This is to develop rules that specifically regulate direct selling practices, particularly through requirements as to the permitted hours of sale and the information that must be given to consumers about the sales method, the seller and the contract. Cooling-off rights are also increasing considered an important and effective way to

Also (EU) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights Article 3(4); (Australia) Australian Consumer Law s 69

³² Regulation No.32/M-DAG/PER/8/2008 regarding the Organization of Trade Business Activity with Direct Selling Systems (August 21, 2008), as amended by Ministry of Trade Regulation No. 47/M-DAG/PER/9/2009 (September 16, 2009); (Malaysia) Direct Sales Act 1993; (Thailand) Direct Sale and Marketing Act 2002.

³³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights Article 2[8].

protect consumers against being pressured into purchases that they later regret. Uniformity between the rules of ASEAN Member States might also be a way of facilitating cross-border trade via the unsolicited sales method and a collaborative approach to enforcement.

Policy Digest 6:

Product liability: Complementing substantive law reforms to enhance incentives to supply safe consumer goods



one vision
one identity
one community

This policy digest was written by Professor Luke Nottage of Sustineo Pty Ltd under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Overview

Consumer product safety failures continue to occur in ASEAN Member States. However, many reported cases involve product sectors that are already subject to some public regulation (Section 2). For other product types, many states have enacted strict product liability (PL) statutes, to make it easier for harmed consumers to claim compensation and thus providing an additional incentive for manufacturers to supply safe goods (Section 3). Yet PL litigation and claims remain limited, as in Europe (Sections 4 and 5). The incentive effect needs to be bolstered by other measures, including improving access to justice (Section 6).

2. Persistent consumer product safety failures

ASEAN Member States continue to experience serious safety failures involving various consumer goods, as evident from the ASEAN Committee on Consumer Protection (ACCP) 'Product Alerts' as well as media coverage.¹ Voluntary recalls of motor vehicles, for example, are widely reported.² In mid-2013, Kanebo recalled around half a million skin whitening cosmetics in North and Southeast Asia.³ In 2009, Vietnamese authorities began testing baby talcum powder after German NUK brand products in Korea were found to contain asbestos.⁴

Foods and beverages are another concern, including items from Taiwan containing plasticisers.⁵ Some food companies in ASEAN are taking more seriously the potential reputational and legal risks associated with dealing with defective foodstuffs. Malaysia's Danone Dumex, for example, recalled some baby milk products in 2013 after its supplier (New Zealand's Fonterra)

¹ See lists of Official and Voluntary 'Recalled/Banned Product Notified by ASEAN Member States' (since 1 November 2011) via <http://aseanconsumer.org/alerts/>; discussed in **Digest 2**.

² See above n 1 and e.g. Tony Pugliese, 'Honda Recalls Cars in Thailand, ASEAN' (18 February 2011) http://www.just-auto.com/news/honda-recalls-cars-in-thailand-asean_id109231.aspx.

³ Jenalyn Villamarin, 'Japan's Kanebo Cosmetics Recalls Products in Asia Due to Skin Damage Complaints' (5 July 2013) <http://au.ibtimes.com/articles/486693/20130705/japan-s-kanebo-cosmetics-recalls-products-company.htm> (impacting e.g. on Thailand, Singapore, Malaysia, Indonesia, Myanmar, the Philippines and Vietnam).

⁴ Vern Weitzel 'Carcinogen Finding Prompts Test on Baby Talcum Powder' (13 April 2009) via <http://mailman.anu.edu.au/pipermail/health-vn/2009-April/000150.html>.

⁵ Lois Rain, 'Taiwan's Plasticizer Food Scandal' (13 June 2011) <http://healthfreedom.org/2011/06/13/taiwans-plasticizer-food-scandal/> (leading to restrictions imposed e.g. in the Philippines and Vietnam); 'Bubble Tea Under Threat from Toxic Fears in Taiwan' (30 May 2013) <http://blogs.wsj.com/chinarealtime/2013/05/30/bubble-tea-under-threat-from-toxic-fears-in-taiwan/>.

alerted milk powder buyers that some batches might have a bacteria causing botulism.⁶ Although further testing revealed that the products were safe, large claims have recently been filed against Fonterra for the recall costs.⁷

The ACCP's Product Alerts also report a few voluntary and/or mandatory recalls of other goods potentially used by babies or children (such as toys, strollers and bicycles) as well as some electrical goods (such as Bose home theatre equipment).

One reason for official and/or 'voluntary' attention to actual or potential safety problems in these product categories is a heightened regulatory regime and public enforcement capacity. In general, it is easier (politically) and more appropriate (economically) to mobilise the political system to enact legislation regulating product safety if there is a *high probability of harm*, especially if the consequences of a product failure are severe.⁸ Hence, most countries – including ASEAN Member States – have long had quite strict legislation regulating foods and pharmaceuticals, as well as (more recently) products such as cosmetics, motor vehicles, electrical goods, and products used by infants and children (who are at greater risk of harming themselves than adults).⁹ Such public regulation incentivises manufacturers to produce safe goods and recall promptly any (potentially) defective goods. They have further incentives from market forces if they are multinational companies trying to maintain a global reputation (such as automobile or high-end electrical goods manufacturers).

⁶ Tania Branigan, 'Fonterra Botulism Scare Leads to Import Ban in China, Vietnam and Russia' (5 August 2013) <http://www.globalnewsplatform.com/fonterra-botulism-scare-leads-to-import-ban-in-china-vietnam-and-russia/>.

⁷ 'Danone to Sue Fonterra Over Baby Formula Recall' (9 January 2014) <http://www.fz.com/content/danone-sue-fonterra-over-baby-formula-recall>.

⁸ See generally Luke Nottage, 'Responsive Regulation and Comparative Consumer Product Safety' (2011) Sydney Law School Research Paper No. 11/06, <http://ssrn.com/abstract=1752627> (with further references).

⁹ For example, the 2003 Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme includes both (i) a voluntary 'mutual recognition' arrangement facilitating registration approvals (to facilitate export of cosmetics from one member state to another), and (ii) the 'ASEAN Cosmetics Directive' which member states had to implement domestically by January 2008 (setting out approved, restricted and prohibited ingredients for safe cosmetics). See e.g. http://www.hsa.gov.sg/publish/hsaportal/en/health_products_regulation/cosmetic_products/asean_regulatory.html and e.g. (for Malaysia) <http://portal.bpfk.gov.my/index.cfm?&menuid=44>. This ASEAN regime draws on the law of the European Union (EU Cosmetics Directive 76/768/EEC, replaced on 11 July 2013 by the EU Cosmetics Regulation No 1223/2009).

However, suppliers have less incentive to provide safe goods if there is low *probability of harm*, even if the potential harm is high. Attention from the political system and media is lower, resulting in less public regulation and/or actual enforcement by regulators. Thus, the private law system must encourage suppliers to maintain minimum safety standards for general consumer goods, by making it more feasible for consumers to claim compensation for any harm suffered by defective products.¹⁰ Accordingly, countries have increasingly imposed strict liability on manufacturers and others for product ‘defects’ (see Table 1), usually defined in terms of a lack of safety that ought to be expected, in addition to or alongside traditional remedies such as the tort of negligence (requiring plaintiffs to prove negligence by the supplier).

3. The Spread of Strict Liability Statutes to ASEAN

Strict PL regimes have become well established not only in major developed countries (beginning in US state-based case law from the 1960s, spreading through the European Union (EU) pursuant to a 1985 Directive, then taking root in countries like Japan and Australia from the early 1990s), but also increasingly in developing countries (including in Asia). In particular, PL statutes inspired by the EU model have now been introduced in the Philippines (1992), Indonesia and Malaysia (1999), Cambodia (2007) and Thailand (2008):

¹⁰ Nottage, above n 8.

Table 1. Product liability statutes in ASEAN and beyond

Year of enactment (& enforcement)	Country or jurisdiction	Statute	Significant differences from European Directive
1985 (domestic law by 1988)	European Union	PL Directive ¹¹	
1992	Philippines	Consumer Act	Only for unsafe ‘consumer’ (purpose) goods, but also services; intermediate suppliers liable as well; no ‘development risks’ defence; manufacturer must prove goods were safe
	Australia	Trade Practices Act Part VA ¹²	Representative actions by regulator (Australian Competition and Consumer Commission)
1993	New Zealand	Consumer Guarantees Act	Only for certain consequential property loss (personal injury claims are covered instead by a state no-fault compensation scheme)
	China	Product Quality Act	Consumer must prove causal link between abnormal performance and harm; double damages can be awarded ¹³
1994	Taiwan	Consumer Protection Act	Triple damages can be awarded for wilful misconduct; consequential loss to non-consumer goods; manufacturers must prove goods were safe
(1995)	Japan	PL Act	Consequential loss to non-consumer goods; extended limitation period for toxic torts

1999	Indonesia	Consumer Protection Act	Including services
	Malaysia	Consumer Protection Act	Linked to manufacturer's liability for violating implied guarantee of 'acceptable quality'
2000	Korea	PL Act	Consequential loss to non-consumer goods
2007 (2011)	Cambodia	Civil Code (Art 751)	Consequential loss to non-consumer goods
2008 (2009)	Thailand	PL Act	Minister may exempt products; consumer need only prove harm from product used normally (then manufacturer must prove goods were safe); triple damages; defence if consumer knew the goods were unsafe; no (express) 'development risks' defence; extended limitation period for toxic torts ¹⁴

Interestingly, as in other Asia-Pacific countries listed above, ASEAN states have introduced strict liability statutes that mostly expand the scope of the liability of product manufacturers (and importers), compared to the 1985 European Directive. For example, in the Philippines and

¹¹Council Directive [85/374/EEC](#) of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (available and summarised at http://europa.eu/legislation_summaries/consumers/consumer_safety/l32012_en.htm).

¹²Adding to Pt V Div 2A (1986); Pt 5-3 of the 'Australian Consumer Law' (since 2010); see Luke Nottage and Jocelyn Kellam, 'Product Liability and Safety Regulation' in Justin Malbon and Luke Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (2013, Federation Press, Sydney).

¹³'Double' (or 'triple') damages refers to the possibility, provided under relevant product liability legislation, for courts to award damages to defendants in excess of the amount needed to compensate for their loss. The aim of such provisions is to punish plaintiffs or deter other manufacturers from supplying unsafe goods, as well as to provide an extra incentive to plaintiffs to bring claims for losses suffered

¹⁴'Toxic torts' are harms 'caused by substances which become harmful to the human health when they accumulate in the body, or where the symptoms which represent such damages appear after a certain latent period': PL Act (Japan) Art.5(2). For further explanations of technical terms used in this Table (and the Digest more generally), see Harland and Nottage (above n 12).

Thailand (as in China and Taiwan), the consumer does not have the *full burden of proving* that the goods were unsafe. The supplier, which typically has much better access to relevant information, must prove goods were safe, to avoid liability.

In Thailand (similar to Taiwan and China), additional ('punitive') damages may be awarded to plaintiffs. In Cambodia (as in Japan, Taiwan and Korea), plaintiffs can claim for personal injury and all forms of consequential property loss; in the European Union (EU) (and, for example, Australia) plaintiffs can only be awarded losses to property that is ordinarily and actually intended for personal or household use. In other words, other firms can sue under these PL statutes for business losses caused by defective goods.

The Philippines and Thailand also omit the 'development risks' defence, found in almost all EU member states (and, for example, Australia and Japan). This exempts manufacturers and importers from liability where scientific or technical knowledge did not permit the defect to be discovered when the goods were put into circulation. The Philippines also extends strict liability for certain consumer *services* (as does Indonesia), as well as to intermediate suppliers (as under some US case law).

In theory, such comparatively pro-plaintiff features of the enactments in most ASEAN and Asian jurisdictions should encourage their importers, and exporters from abroad, to take extra measures to ensure goods supplied into those marketplaces are not prone to cause personal injury and other harm. These firms should be incentivised to do so anyway, due to the heightened risk of damages claims from those harmed by any defective goods they supply. This is because of the lesser burden imposed on plaintiffs claiming for such losses compared to traditional regimes requiring plaintiffs to prove fault in the manufacturing or supply process.

4. The 2005–07 survey of PL Act effects in Asia

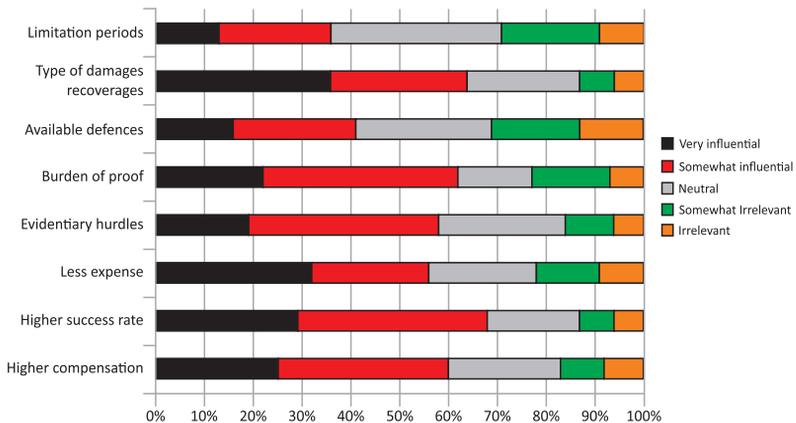
Empirically, however, there is little evidence of a strong incentive effect on suppliers due (solely) to these new strict PL laws. Over 2005-07, a large-scale mail survey of suppliers, insurers and lawyers active in Asia were asked for their impressions of the impact from the regional enactments.¹⁵

¹⁵Jocelyn Kellam and Luke Nottage, 'Europeanisation of PL in the Asia-Pacific Region: A Preliminary Empirical Benchmark' (2008) 31(2) *Journal of Consumer Policy* 217-41, with a longer version at <http://ssrn.com/abstract=986530>.

The results were consistent with similar questions posed not long before by a survey conducted for the EU into the impact of the 1985 Directive in Europe.

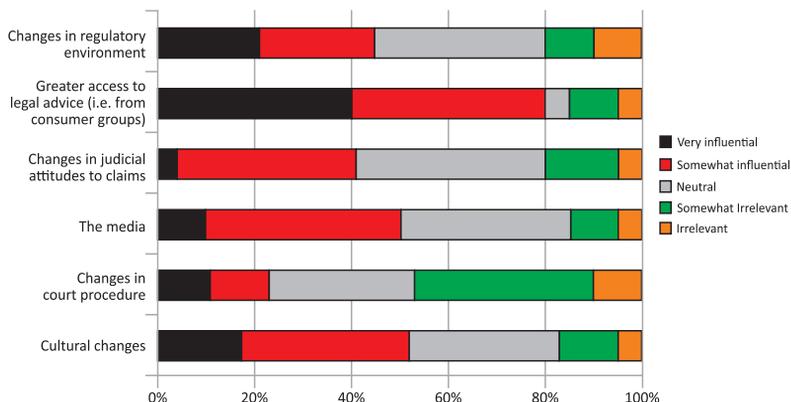
For example, respondents in Asia confirmed there were some increases in risks and claims, but not large overall increases. They also mentioned that only a few jurisdictions (such as Japan) had recorded significant, but still small, numbers of court judgments. When asked what factors encouraged claims to be brought under the new strict liability statutes (Figure 1), rather than traditional causes of action, the subset of lawyer respondents emphasised ‘less expense’ (arguably associated with a lower burden of proof for plaintiffs) and a (perceived) ‘higher success rate’.

Figure 1. Response to ‘What factors do you think influence consumers when deciding whether to bring actions under traditional causes of action or the reforms?’



Also paralleling survey results from Europe, most respondents in Asia reported more out-of-court settlements. Yet they highlighted the following factors (Figure 2) additional to the PL law reforms, especially ‘greater access to legal advice’ and broader changes in the media and general culture.

Figure 2. Response to ‘If you think there has been a general increase, how influential do you think the following factors have been in increasing the frequency of out-of-court settlements?’



5. Subsequent developments in Thailand

Similar trends are apparent in Thailand after its PL Act was enacted in 2008. Professor Sakda Thanitcul from Chulalongkorn University notes that at least three of four claims involving various beverages were promptly settled, while two others involving automobiles were also under pressure to settle. His preliminary conclusion is that implementation of ‘the Act has clearly incentivised manufacturers to negotiate and mediate with injured consumers and, as such, injured consumers have a better chance to receive more adequate and fairer compensation’.¹⁶ In turn, such heightened risk exposure should encourage Thai suppliers to undertake greater product safety activities. This will add to pressures from business partners abroad to raise the safety of Thai consumer goods.¹⁷

Nonetheless, a total of six claims reported since the new Act was implemented on 20 February 2009 is not large, even if many more claims probably remain unreported. The number seems quite low in light not only of its pro-plaintiff provisions compared to the European Directive. Thailand also enjoys various mechanisms encouraging consumer access to justice,

¹⁶ ‘Law and Legal Process of the PL Act in Thailand’ (2013) 20(2) *Journal of International Cooperation Studies* 27, at http://www.research.kobe-u.ac.jp/gsics-publication/jics/thanitcul_20-2&3.pdf, p 43.

¹⁷ Professor Thanitcul notes that concerns raised in 2000 by Australian importers of Thai vehicles and Japanese importers of processed foods were partly responsible for enactment of the new legislation.

including enactment that year of the Consumer Case Procedure Act. That provides for court officers to assist plaintiffs who claim under the PL law, waives costs of litigation, and requires the court process to conclude within three months. However, Professor Thanitcul notes that calls to establish a specialist consumer court have not yet been successful. The Office of the Consumer Protection Board also pressed for enactment of the PL law and generally plays an active role in mediating consumer disputes. The board announced that it would file suit on behalf of a consumer injured in one of the six post-2009 claims (against a Japanese car manufacturer), but ultimately did not do so, probably because the parties then reached a settlement. Private consumer organisations also facilitate approaches to the board to resolve disputes, with some even having legal departments ready to sue on behalf of consumers.¹⁸ Yet so far this has not occurred either, perhaps because of the costs involved.

6. Policy implications

This empirical evidence suggests that enacting strict PL law is a necessary but not sufficient condition for incentivising manufacturers to produce safe consumer goods. This is especially the case in areas where sector-specific public regulation and/or media attention is reduced because there tends to be a low probability of harm, even if the potential harm suffered is high. ASEAN Member States should consider introducing strict liability statutes where this has not yet occurred, and these should also be reviewed periodically. But these substantive law protections should be complemented by broader measures to improve access to justice for harmed consumers, including:

- specialist consumer courts or tribunals
- representative actions by regulators (especially for test cases)
- ‘opt-out’ class actions (especially for efficiently aggregating smaller claims), for example by accredited consumer groups (as in Taiwan)
- legal profession reform (increasing numbers and scope of practice, including advertising; facilitating networking among plaintiffs’ lawyers (as in Japan, for example); liberalisation of rules on contingency fees or third-party litigation funding (as in Australia, for example).

¹⁸ Ibid, pp 36-40.

Such multi-pronged reforms can also underpin official efforts to increase media and community awareness of potential compensation caused by product safety failures, and thereby make it more likely to improve public regulatory regimes.¹⁹

¹⁹ Such as requirements on suppliers to report serious product safety accidents involving general consumer goods: see **Digest 2**.



Policy Digest 7:

Interface between competition and consumer protection policies



This policy digest was written by Professor Caron Beaton Wells of Sustineo Pty Ltd under the project Supporting Research and Dialogue in Consumer Protection supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

Competition and consumer protection laws are critical instruments of economic policy. Each seeks to curb market participants' undesirable behaviour, aiming to improve efficiency, promote economic growth and enhance consumer welfare. However, competition and consumer protection policies approach behavioural change from different perspectives and thus sometimes come into conflict. This policy digest discusses the general relationship between competition and consumer protection policies and the benefits and challenges of coordinating the two areas. Policy digest #8 (*Interface between Competition and Consumer Protection Policies in Professional Services Markets*) applies this discussion to competition and consumer protection policies in the public utilities and professional services sectors.¹

Historically, competition and consumer protection policies have been regarded as separate, seeking to regulate different kinds of undesirable conduct. Competition policy combats the effects of market power and practices that would increase costs and reduce choice for consumers. It does so in order to achieve goals such as market efficiency, economic growth and consumer welfare.² Consumer protection policy prohibits fraud and other types of misleading or deceptive conduct that prevents consumers from making fully informed decisions, and provides information that helps consumers make intelligent and efficient choices. In many countries, consumer protection policy also includes minimum product and service standards to promote health and safety quality and the regulation of consumer contract terms. In ASEAN Member States, and many other countries around the world, it is thus common to find competition and consumer protection policies in separate legislation and enforced by separate government departments or independent enforcement authorities.

This historical separation of competition and consumer protection policies and their associated laws and institutional arrangements has masked the fact that both policies are concerned with the effective functioning of markets. There is a clear trend towards acknowledging that affinity and maximising the benefits of policy coordination. Nevertheless, there are challenges in identifying when competition and consumer protection policies

¹ The focus of these two digests is on policy. Case study #3 will focus on the question of institutional design as it relates to the enforcement of competition and consumer protection laws.

² See generally ASEAN, ASEAN Regional Guidelines on Competition Policy (2010) 3 [2.1]–[2.2].

are complementary, when they are in conflict and how best to achieve an appropriate balance when the policies pull in different directions.

Complementarity in the policies

Competition and consumer protection policies share the same overarching goal: ensuring markets function effectively and securing the associated benefits for consumer welfare and economic growth. Competition laws set minimum standards of conduct that all competitors must follow. These ground rules prohibit anti-competitive practices that reduce choice and raise prices for consumers. Consumer protection laws prohibit conduct that impairs the ability of consumers to choose effectively between the options available in the market and promote disclosure that facilitates informed consumer decision-making. Thus, competition laws ensure that consumers have adequate choices while consumer laws ensure that consumers can exercise those choices effectively.

Competition and consumer policies can be complementary in two ways. First, businesses compete not only as to price, quality and range of products and services but also as to consumer protection standards — for example, in the amount and detail of information provided to consumers about their products and services. Competition motivates sellers to provide truthful, useful information and drives them to fulfil their promises on terms of sale. Effective competition thus prompts businesses to act in ways that not only comply with consumer protection laws. In competitive markets, businesses are also incentivised to provide information that minimises switching costs and strengthens consumer loyalty by developing a reputation for quality or safety.

Secondly, consumer protection laws stimulate buying activity by giving consumers confidence that they have sufficient and accurate information to make proper purchasing decisions. The more consumers are confident in their choices, the more effective they are in activating competition through increased buying activity. More generally, the absence of consumer confidence can inhibit business and investor confidence and ultimately impede economic growth. By keeping businesses honest in the way they compete, consumer protection laws not only protect the individual consumer, but consumers generally, as well as spurring economic growth.

Conflicts between the policies

While competition policy often complements consumer protection policy, there are times when the two sit uneasily with each other. In some instances, greater competition can fail to improve consumer welfare or can even harm consumers. Greater consumer protection can reduce competition, by stifling rivalry or even facilitating anti-competitive conduct.

An example where greater competition might not improve consumer welfare relates to the deregulation or privatisation of public enterprises. There has been a worldwide trend in favour of deregulation and privatisation in recent decades, in sectors such as retail energy, financial services, telecommunications and the professions. These developments are supported by competition policy. But there is the risk that some of the new competitors may sell substandard products and consumers may lack the information needed to recognise these deficiencies and make comparisons in a market that suddenly has many sellers. In addition, more competition will not necessarily change consumer behaviour. Consumers will be accustomed to obtaining services from the incumbent and be unable to process information about alternatives. This is especially so where information (for example, in consumer contracts) is not presented in a suitably simplified form or where it relates to complex services. For these and other reasons, consumers may not switch service supplier, even if it is objectively rational for them to do so.

Increased competition can also have a disparate impact on consumers. Consumers as a whole may pay reduced prices but it may be that only well-informed consumers can benefit from this enhanced price competition. Certain sub-groups of consumers might in fact pay higher prices, even if total consumer welfare is increased by competition. Competition policy is not necessarily equipped to pay attention to these differential impacts.

In turn, consumer protection laws can hamper competition. For example, strict licensing conditions and minimum quality standards in certain service and product sectors, burdensome disclosure requirements and restrictions on advertising (for example, in the legal and medical professions and the financial services sector) can reduce information asymmetry and protect consumers from substandard services and goods. However, if set at overly strict levels, these requirements may stifle competition by increasing the costs of participating in the market, raising barriers to entry and thereby reducing the number of competitors. Furthermore, the requirement for

producers to publish price information might provide useful guidance to consumers but it can also facilitate price coordination if not collusion among suppliers, at consumers' expense. This is because publishing prices enables suppliers in a cartel to monitor each other's adherence to the cartel agreement, and punish any deviations. In other words, greater transparency on the demand side of a market may be supported by consumer protection policy. However, where it also increases greater supply-side transparency, it may also have an adverse impact on competition.

2. Benefits of coordinating competition and consumer protection policies

The benefits of coordinating competition and consumer protection policies fall into two broad categories. Firstly, coordination is likely to improve regulation in a way that achieves market efficiency, economic growth and consumer welfare. Secondly, coordination is likely to avoid unnecessary costs for government, the business community and consumers.

Improved regulation

Coordinating competition and consumer protection perspectives is likely to lead to improved overall policy in three ways.

Policymakers and regulators can make more informed decisions by taking into account both perspectives. Competition policy focuses on the supply side of the market, whereas consumer protection policy focuses on the demand side. For markets to work effectively, attention has to be paid to both sides and in a coordinated way — sellers need to be competitive and consumers need to be able to exercise their buying power. Competition and consumer perspectives therefore bring different insights to the policy discussion and combining them provides policymakers and regulators with a whole-of-market approach. The need for, and likely effect of, government interventions in a market cannot reliably be predicted without close attention to both demand-side and supply-side factors.

Sensitivity to the competition effects of consumer protection policies can highlight potential adverse impacts of such policies (and vice versa). Without a continual reminder of the way in which competition works and its benefits, a consumer protection program may impose controls and restrictions that ultimately stifle the very competition that increases consumer choice.

Comparative advertising controls provide a good example of this. Some regard comparative advertising as unfair or unethical and hence take the view that it should be regulated from a consumer protection perspective. However, such advertising can be a crucial tool for enabling new sellers to enter a market and for existing sellers to introduce new products. It can therefore benefit competition. Systematic and explicit interaction and coordination between competition policymakers and consumer protection policymakers and enforcers can help to minimise the problems caused by compartmentalised policy-making and enforcement.

Competition perspectives can make consumer protection policies more effective and vice versa. The example of privatisation highlights how consumer protection perspectives shed light on a competition policy dilemma. It has been found that opening sectors to competition does not always lead to consumers switching from the incumbent supplier, contrary to the expectations of competition policy. Taking into consideration consumer protection perspectives and their focus on actual consumer behaviour can provide an explanation for this switching failure: consumers may lack the information required to choose between new competitors and for that reason choose to stay with the incumbent. This suggests is that to make privatisation effective, consumer protection policies aimed at educating consumers are needed, to aid the transition to competitive markets.

Incidental benefits

Policy coordination is also likely to result in two other benefits.

First, given the general consensus that competition and consumer protection policies are connected and complementary, developing them independently risks incurring costs down the track. Any adjustment to one policy area, once it is discovered that it has a negative impact on the other area, will result in increased compliance costs for business and may erode business and investor confidence.

Second, policy coordination promotes mutually reinforcing capacity building. Competition policymakers and enforcement authorities must focus primarily on supply-side forces whereas consumer protection policymakers and enforcers must focus primarily on demand-side dynamics. However, each benefits from sharing the market knowledge and enforcement experience of the other. Consumer complaints, for example,

can be a useful source of information about market failure and about the way in which businesses are behaving, when they are attempting to lock in consumers and prevent switching or disabling consumer search through complex pricing structures.

Furthermore, there is considerable potential for improving enforcement effectiveness and efficiency if authorities are able to learn from each other's approaches. Competition and consumer protection authorities often use different enforcement tools and techniques. The experience of consumer authorities in recovering revenues obtained through fraud, for example, can help competition authorities develop measures to prevent price fixers from retaining their ill-gotten gains.

3. Challenges of coordinating competition and consumer protection policies

ASEAN Member States face three main challenges in integrating competition and consumer protection policies.

The first challenge is institutional design. Some regulators have dual responsibility for competition and consumer protection laws (e.g. the Australian Competition and Consumer Commission and the UK Competition and Markets Authority) whereas other countries have separate regulators (e.g. the United States' Department of Justice and Federal Trade Commission). Among many ASEAN Member States, the preferred choice is to have a separate regulator for each area (Vietnam being an exception), although the regulators are in some instances housed under the umbrella of the same ultimate department. No single model is right for every jurisdiction. Among other things, existing traditions, practices, legislative and funding arrangements must be taken into account. The important lesson is that whatever the institutional arrangements, those responsible for consumer protection and competition policies interact in a close and timely fashion, on an ongoing basis.

The second challenge is that many ASEAN Member States are more familiar with either competition policy or consumer protection policy because they have had one or the other in place for longer. Where a country has had more experience in one field, there is a risk that existing policies and practices fail to take whole-of-market considerations into account. Regulatory 'look-

back' will take time and cause existing businesses to incur compliance costs if any policies are changed as a result. Nevertheless, this review process will ensure that competition and consumer protection policies and enforcement develop and are implemented coherently in the future.

The final challenge is that competition policy has been influenced by economic theories that assume consumers demonstrate rational behaviour. By contrast, consumer protection policy is currently benefiting from behavioural economics theory challenging that assumption. This theory demonstrates that people do not always act rationally but are instead influenced by inherent biases (e.g. loss aversion, over-optimism and choice overload). Consumer protection policy can be understood as counteracting business behaviour that takes advantage of such biases. It is valuable for authorities to understand these different theories of consumer behaviour and recognise the contributions that they each make to both competition and consumer protection policies.

Policy Digest 8:

Interface between competition and consumer protection policies in professional services markets



This policy digest was written by Professor Caron Beaton Wells of Sustineo Pty Ltd under the project Supporting Research and Dialogue in Consumer Protection supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

The professions are an important sector of most market economies. A generally accepted definition of a ‘profession’ is a ‘disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of learning derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interests of others.’¹ This definition encompasses a wide range of professionals including lawyers, accountants, medical practitioners, pharmacists, engineers, architects and real estate agents.

Professionals generally comprise a significant proportion of the services economy; access to affordably priced and high-quality professional services is crucial for both individual consumers and businesses, large and small. The economic significance of the professions, and in particular the importance of professional mobility for national and regional competitiveness, is reflected in the ASEAN Economic Community (AEC) Blueprint which provides that ‘[i]n facilitating the free flow of services by 2015, ASEAN is also working towards recognition of professional qualifications with a view to facilitate their movement within the region’.²

Policy digest #7 (*Interface between Competition And Consumer Protection Policies*) explained the general relationship between competition and consumer protection policies and outlined the benefits and challenges associated with coordinating these policies. The current digest examines the competition–consumer policy interface in the context of the professions. It identifies the key issues and responses to those issues that are likely to ensure that professional services markets are regulated in a way that protects consumers while remaining competitive. This topic has been examined by numerous international and national agencies – the policy analyses and responses that have been developed are generally consistent and may provide a useful body of learning and experience for ASEAN Member States.³

¹ Constitution of Australian Council of Professions Inc, cl. 1.

² This is consistent with Article V of the ASEAN Framework Agreement on Services 1997 which provides that ASEAN Member States may recognise the education or experience obtained, requirements met, and license or certification granted in other ASEAN Member States, for the purpose of licensing or certification of service suppliers.

³ See, e.g., ACCC, *Professions and the Competition and Consumer Act, 2010*; *Competition Bureau (Canada)*,

Part 2 of the digest identifies the general objectives and forms of regulation that apply to the professions. Parts 3 and 4 examine two different categories of regulation — structural and behavioural — and address how it is possible to regulate in a way that is responsive to both competition and consumer protection concerns in respect of each.

2. Regulating the professions

Most countries regulate the professions. Regulation may be imposed directly, through legislation, and/or may be delegated to professional associations and bodies, enabling the profession to self-regulate through its own set of rules and codes of conduct. Regulation takes both structural and behavioural forms. Structural regulation governs matters such as entry to and mobility within the profession and the scope of services that professionals provide. Behavioural regulation covers matters relating to the conduct of professional activity, including pricing and advertising and form of business structure.

The primary rationale for regulating professional services is that consumers are generally not able to properly assess the quality of the professional services that they buy. This is because of the complex nature of these services and the fact that they may be purchased infrequently. The result is considerable asymmetry of information between service providers and their customers/clients. To protect consumers from potential exploitation, it is seen as necessary to place some restrictions on the supply of professional services. At the same time, not all customers are individual consumers or small businesses. Large companies are more sophisticated or are frequent purchasers of professional services and therefore are generally less in need of protection.

Another justification for regulation of this sector is to prevent or minimise negative externalities, that is, the negative effects on third parties or society in general that result when consumers purchase low-quality services. In a legal system where parties are poorly represented, for example, litigation may be unnecessarily protracted and the quality of judicial decision-making is likely to suffer. There is therefore a general public benefit in ensuring that consumers have access to high-quality legal representation.

Self-regulated professions: Balancing competition and regulation, 2007; OFT (UK), Competition in Professions, 2000; European Commission, Professional Services – Scope for More reform (2005); OECD, Competition in Professional Services, 2000.

At the same time, it is recognised that competition in professional services markets is vital to ensuring that all consumers have access to a broad range of services at competitive prices and that professionals are sufficiently incentivised to deliver high-quality services that meet consumer demand. Competition authorities often raise concerns about regulation that restricts competition to a greater extent than is appropriate or necessary – increasing prices, restricting choice and reducing quality and innovation in the provision of professional services.

In addition, while recognising their value in promoting and enforcing high standards of ethical behaviour, competition authorities are wary of the activities of professional associations. Depending on their nature, such activities may have the potential to unduly restrict entry, limit pricing freedom and facilitate anti-competitive coordination among association members.

In response to these concerns, competition authorities advocate for the general application of competition laws to the professions, take action to enforce those laws when breached by professional associations and individual professionals, and work with governments and professional associations to ensure that regulatory frameworks and codes strike the right balance between the policy objectives of competition and consumer protection.

3. Structural regulation – entry, mobility and scope of services

Structural regulation relates to measures that typically:

- limit the number of professionals able to enter the profession (such as educational/qualification or work experience criteria and quotas on the number of new entrants)
- limit professionals from offering their services in places other than where they are licensed (such as different entry requirements between jurisdictions and limits on the ability of professionals to move between jurisdictions)
- restrict members of related professions from offering similar services (such as exclusive rights to offer certain services or use particular titles, and restrictions on consumers' access to complementary services).

Entry restrictions are justified as necessary to protect consumers by preserving the quality of services offered by professionals. Mobility restrictions may also be linked to quality concerns, where it is perceived, for example, that ‘foreign’ legal or medical practitioners are less likely to understand the local laws or practices of a jurisdiction than ‘domestic’ practitioners.⁴ Similarly, the case for regulating the scope of professional service firms is often based on the need to enhance quality by preserving exclusivity, while also providing consumers with quality ‘signals’ so as to offset asymmetric information.

However, structural regulation can also have anti-competitive effects, by reducing the supply of professional services, increasing prices above competitive levels (by creating barriers to entry) and reducing incentives for professionals to become efficient, including through innovation in the services that they offer. Restrictions on mobility may also limit the ability of professionals to respond promptly to changes in demand and this may lead to a misallocation of service providers. As noted above, ASEAN is committed to facilitating mobility within the region.

When weighing up the consumer protection benefits of structural restrictions against their potential anti-competitive effects, it is important to test arguments about service quality carefully. Some entry restrictions – quotas for example – may have little impact on quality. Moreover, there may be other less anti-competitive measures that have quality-enhancing effects. Professional accreditation schemes that are voluntary, for example, may signal quality to consumers without reducing supply or consumer choice, given that consumers can still choose to purchase services from professionals who have not chosen to become accredited. Mutual recognition agreements (MRAs) between jurisdictions can facilitate mobility, without undermining quality standards. At a regional level, the AEC Blueprint recognises this by calling for member states to complete MRAs relating to professional services.⁵ However, while a large number of MRAs have been signed, there remain considerable challenges to MRA implementation, including regulatory barriers, lack of budgetary support

⁴ Restrictions on foreign lawyers and doctors may be linked also to other policy objectives. Such restrictions are common in ASEAN Member States (although some member states, such as Singapore, for example), have recently taken steps to open up and deregulate these markets in the interests of increased international competitiveness.

⁵ AEC Blueprint 2008. cl 21. This reflects the earlier decision of the Bali Concord II adopted at the Ninth ASEAN Summit held in 2003 calling for completion of MRAs for qualifications in major professional services by 2008 to facilitate free movement of professional/skilled labour/talents in ASEAN.

and weak coordination between regulators and professional bodies.⁶ Similarly, regulation affecting integration of the practices of complementary service providers may allow for such integration while at the same time protect consumers by requiring one category of provider to work under the supervision of another in an integrated practice.

4. Behavioural regulation – advertising, pricing and business structure

Behavioural regulation relates to measures that typically:

- impose restrictions on advertising by members of the profession (such as restrictions on comparative advertising, canvassing or soliciting custom and offering inducements or discounts)
- recommend or mandate fees for professional services (such as recommendations or rules that relate to minimum or maximum fees or limits on certain types of payments, such as contingency fees)
- impose restrictions on business structure (such as restrictions on ownership, multidisciplinary practices and firm location or size).

Arguments in favour of advertising and pricing restrictions are generally based on asymmetric information and the resultant weakness in the bargaining position held by consumers, as well as the particular vulnerability of consumers to false and misleading advertising in professional services markets. Advertising restrictions on lawyers, in particular, are common in ASEAN Member States and appear to be based primarily on ethical concerns. Fee schedules recommended by professional associations are seen as providing consumers with information about reasonable fees as well as guiding existing and new members of the profession on fee-setting in relation to complex services, thereby reducing the transaction costs associated with fee negotiations.⁷

However, advertising is crucial in facilitating competition by informing consumers about their choices, reducing search costs, easing entry by new

⁶ See e.g., R Aldaba, 'ASEAN Economic Community 2015: Labor Mobility and Mutual Recognition Arrangements on Professional Services', Discussion Paper Series No. 2013-4, Philippine Institute for Development Studies, January 2013; C Manning and A Sidorenko, *The Regulation of Professional Migration in ASEAN: Insights from the Health and IT Sectors* (2007) 30(7) *The World Economy* 1084.

⁷ A fee schedule is a list of fees charged for particular types of services.

service providers and strengthening incentives for existing firms to innovate and grow. Freedom in pricing is also essential to competition, innovation and consumer welfare. Price restrictions that fix fees or set a minimum price significantly inhibit competition between service providers and thus deny consumers the benefit of a competitive market. Moreover, recommended fee schedules can facilitate collusion by helping professionals coordinate the prices that they charge. Maximum fee levels can also be detrimental in that they may cause high-quality professionals to exit the market, with the consequence that overall choice and service quality is decreased.

Restrictions on business structure, location and size are generally justified on the grounds of ensuring high-quality service and independence by professionals, and reducing the risks of conflict of interest. Yet it is also the case that they have the anti-competitive effect of reducing the returns of engaging in the profession (by limiting the attainment of economies of scale and the availability of capital to expanding firms), inhibiting firms from developing innovative services and limiting the locations at which consumers can access services, thereby increasing consumer search and transaction costs.

Behavioural restrictions should be assessed to ensure that they are genuinely in the interests of consumers and inhibit competition to the least extent possible. Competition and/or consumer laws will generally already prohibit false or misleading advertising. Thus, in most instances, no additional restrictions will be necessary to protect consumers. In the case of price restrictions, it is important that professional associations provide fee recommendations for 'information' only, ensure that members understand they are able to independently set fees and not impose disciplinary measures for supposed breaches of pricing 'policies'. Moreover, it is important to recognise that many of the consumer protection benefits of price restrictions may be achieved through non-regulatory methods (for example, through the publication of survey data on average prices) enabling consumers to assess the reasonableness of professional fees and reduce search costs, while also providing new entrants with guidance and reducing transaction costs. In Singapore, for example, the Ministry of Health has published hospital bill sizes and health outcomes to drive competition in the healthcare sector and enable patients to make more informed choices.

5. Conclusion

In general terms, regulation of the professions to meet both competition and consumer policy objectives is a matter of applying principles that are relevant to all areas of regulation. Such principles require that regulation be targeted, consistent, transparent and proportionate.

Regulation should be targeted to those markets where information asymmetry problems are most acute, such as markets involving individual consumers, households and small businesses, and where the possible harm is serious and potentially irreversible, such as in some medical markets.

Regulation involving professional association rules, such as entry requirements, should be clear and transparent so that justifications can be tested. Furthermore, transparency allows for anti-competitive effects (such as the promotion of collusion on prices) to be identified by competition authorities. Regulation should also be consistent; for example, allowing professionals to be mobile within and across jurisdictions facilitates competition and promotes consumer choice.

Finally, regulation should be proportionate to the ends sought to be achieved. Thus, in the case of pricing and advertising restrictions it is important to weigh up the costs and benefits to ensure that such restrictions provide adequate protection for consumers while at the same time do not unduly distort or prevent competition. To this end, it is important that regulatory objectives be carefully defined, that the effectiveness of regulatory restrictions in achieving these objectives be periodically reviewed and tested against verifiable outcomes, and that alternative non-regulatory approaches be considered.

Policy Digest 9:

Low-cost airlines: responding to consumer complaints about misleading and unfair practices



This policy digest was written by Associate Professor Jeannie Paterson of Sustineo Pty Ltd under the project Supporting Research and Dialogue in Consumer Protection supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

With tourism in and between ASEAN Member States becoming increasingly popular, the airline industry is also growing. There are many airlines offering services in the ASEAN region, and many of these are ‘low-cost’ airlines, or at least offer some low-cost services.¹ Low-cost airlines make an important contribution to the travel industry in all jurisdictions. They provide opportunities for travel to a greater range of destinations and to a wider range of consumers than would otherwise be available, and also promote healthy competition in the travel market.

There are frequent consumer complaints about airline service, including low-cost airlines. Low-cost airlines offer consumers a restricted or ‘no frills’ service. The discount fares offered often have restrictions on cancelling or changing a booking and limited catering options. Discount fare passengers may be the last to be accommodated when the airlines needs to make changes due to cancelled or over-booked flights.² However, even low-cost airline tickets come with some important consumer rights. Consumers are entitled to expect all airlines to meet basic service standards and not to mislead them or burden them with harsh hidden terms.

It would be possible for ASEAN Member States to consider specific regulations governing airline service standards, in particular, responsibilities for unplanned service disruptions such as flight delays and cancellations.³ However, this digest considers the ways in which existing consumer protection law in ASEAN countries may be used to protect consumers from unfair treatment by airlines and also the need for education about those laws and the nature of airline travel, low-cost or otherwise. Consumers need to understand the limitations on their travel experience inherent in the low-cost travel option, the risks associated with any form of airline travel, the nature of the contractual undertaking being assumed by the airline, and the merits of travel insurance. At the same time, low-cost airlines should not assume that by purchasing to a low-cost flight, consumers have abandoned their rights to fair treatment.

¹ See <http://travelproject.com.au/south-east-asian-budget-airlines/>; *Consumer Protection in Air Transport – Singapore Experience*, Paper presented at the World Wide Air Transport Conference, 2013 available at http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp79_en.pdf.

² See e.g. (Australia) <http://www.choice.com.au/reviews-and-tests/travel/general-travel/airline-travel/your-rights-in-flight.aspx#ixzz2yBWUVM6V>

³ See e.g. R Tang, *Airline Passenger Rights: The Federal Role in Aviation Consumer Protection* Congressional Research Service (2013) available at <https://www.fas.org/spp/crs/misc/R43078.pdf>.

2. The issues

Consumer complaints about unfair treatment by airlines occur across the ASEAN region and also through the European Union, Australia and America. Some complaints arise because consumers may not understand the more limited options (in terms of service and flexibility) that come with such a ticket, and for this reason may be disappointed with the service provided. Other complaints arise because the airlines have failed to meet basic customer service standards. The airlines in question may have included harsh or one-sided terms in their contracts, unreasonably failed to keep consumers informed about changes to their travels arrangements, failed to respond adequately to complaints or may not have been fully transparent in their terms and conditions.

There are at least four common categories of complaint:

- Misleading airline pricing — Some low-cost airlines advertise very low-cost fares but consumers then find that fare is not the complete price and that they are required to pay other fees, charges and taxes.⁴
- Lack of transparency in airline terms and conditions — Airline terms can be hard to find and/or difficult to understand.⁵
- Harsh or onerous terms — Unexpected terms impact harshly on consumers, including overly broad exclusion clauses or restrictions on transfers or changes.⁶
- Customer service — Some airlines fail to keep consumers informed about changes or variations to their travel arrangements and some make it difficult for consumers to obtain information and/or refunds when something goes wrong with their travel arrangements.

Consumer protection legislation, already in place many ASEAN Member States, could respond to many of the concerns raised, particularly complaints about misleading conduct and one-sided and unfair contract terms. The ways in which consumer law can address these issues are discussed below.

⁴ See e.g. (Malaysia) <http://www.eturbonews.com/3971/zero-fares-offer-permissible-misleading>.

⁵ See e.g. BEUC — The European Consumer Organisation, *Unfair Terms in Transport Contracts* (2013).

⁶ See e.g. BEUC — The European Consumer Organisation, *Unfair Terms in Transport Contracts* (2013). Also (Singapore) <http://www.case.org.sg/downloads/central/280813%20CASE%20Survey%20on%20Budget%20Airlines%E2%80%99%20Refund%20Policy%20for%20Duplicate%20or%20Double%20Booking.pdf>.

3. General consumer protection legislation

Misleading conduct

Most ASEAN Member States have general consumer protection laws that prohibit misleading conduct by traders.⁷ These laws can be used to respond to those airlines that quote a ticket price that does not include all costs that will actually be charged to the consumer, such as credit card fees, taxes and surcharges.⁸ The headline price misleads consumers as to the actual cost of the ticket; consumers may only discover the real cost at the time they are concluding the transaction and potentially are already emotionally committed to specific travel arrangements.

Transparency

A related issue is the transparency of contract terms. In some cases, airline contract terms may be difficult to access or expressed in a way that is unclear or confusing.⁹ A higher level of transparency in the terms of standard-form airlines contracts would help consumers better understand the terms under which they will travel. An example of the type of provision that might be more widely used by ASEAN Member States to prompt greater transparency is found in Indonesia, where 'Entrepreneurs are prohibited from including a standard clause at the place or in the form which is difficult to see or cannot be read clearly, or under the statement which is difficult to understand'.¹⁰

Unfair contract terms

The consumer protection laws of many ASEAN countries include protection for consumers against unfair contract terms. The form of these protections varies. Some ASEAN Member States have general prohibitions on terms

⁷ See (Brunei) Consumer Protection (Fair Trading) Order 2011 s 4(a); Unfair Contract Terms Act 1999 ss 10 – 12; (Cambodia) Law on the Management of Quality and Safety of Services and Services 2000 article 21; (Indonesia) Law on Consumers' Protection 1999 Article 7, 9 – 11; (Malaysia) Consumer Protection Act 1999 Part II; (Philippines) Consumer Act 1991 Art 50 and Chapter VI; (Singapore) Consumer Protection (Fair Trading) Act 2003 ss 4(a); (Thailand) Consumer Protection Act 1979 ss 4(1) and 22; (Viet Nam) Law on Protection of Consumers' Rights 2010 Articles 8 and 10.

⁸ (Malaysia) <http://www.eturbonews.com/3971/zero-fares-offer-permissible-misleading>. See also <http://www.theguardian.com/business/2014/feb/17/ryanair-easyjet-fined-travel-insurance>.

⁹ BEUC — The European Consumer Organisation, *Unfair Terms in Transport Contracts* (2013)

¹⁰ (Indonesia) Law on Consumers' Protection 1999 Article 18(2).

that are unfair.¹¹ Others have prohibitions on specific types of terms that impact harshly on consumers, such as certain types of exclusion clauses,¹² termination clauses and variation rights.¹³ Legislative prohibitions on unfair contract terms are an important safeguard for consumers who are entering into standard-form contracts with which they may have little experience or expertise, as will be the case for many consumers entering into contracts for air travel.

Airline contracts of carriage are standard-form contracts and when purchased by consumers (i.e. not for business purposes) may be subject to review under this legislation for unfair terms. Airlines cannot control all aspects of the flight experience affecting consumers but they should ensure that consumers are not burdened by onerous terms that go beyond what is reasonably necessary to protect the interests of the airline. Regulators and courts in the European Union have found a number of common clauses in airline ticket contracts to be unfair terms under the *Directive on Unfair Terms in Consumer Contracts*.¹⁴ Terms considered unfair include those:

- denying a passenger carriage on a return flight if the passenger does not board the outward bound flight ('no-show' policies)¹⁵
- denying passengers a right to refund in the case of a force majeure event preventing the flight from taking place¹⁶
- providing the airline will not refund taxes and other charges that did not become due if a consumer did not take his or her flight
- allowing the airline to increase prices after booking, without the consent of the consumer¹⁷
- allowing the airline to change contract terms, after the ticket has been purchased¹⁸

¹¹ See e.g. (Malaysia) Consumer Protection (Amendment) Act 2010 s24D; (Singapore) Consumer Protection (Fair Trading) Act 2003 Schedule 2 s 11; (Thailand) Unfair Contract Terms Act 1997.

¹² See e.g. (Brunei) Unfair Contract Terms Act 1999 ss 3 - 6; (Malaysia) Consumer Protection (Amendment) Act 2010 s24D.

¹³ See e.g. (Indonesia) Law on Consumers' Protection 1999 Article 18.

¹⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ No L 95 p 29.

¹⁵ Dr Michael Schillig, *Study on the Unfair Terms Directive Across Europe* (2013) pp 128, 131; BEUC — The European Consumer Organisation, *Unfair Terms in Transport Contracts* (2013).

¹⁶ BEUC — The European Consumer Organisation, *Unfair Terms in Transport Contracts* (2013).

¹⁷ BEUC — The European Consumer Organisation, *Unfair Terms in Transport Contracts* (2013).

¹⁸ BEUC — The European Consumer Organisation, *Unfair Terms in Transport Contracts* (2013); <http://>

- preventing the consumer from relying on representations made by the airline or its agents at the point of sale.¹⁹

Consumer complaint handling

As already noted, many of the matters that disappoint consumers in airline travel are beyond the direct control of airlines, such as flight delays and changes due to bad weather. In dealing with travel disruptions of these kinds, airlines still need to treat consumers fairly. Importantly, much consumer anxiety and concern about travel disruption can be reduced simply through the airline taking steps to communicate promptly and clearly with consumers. Consumer protection law does not cover issues of communication. Nonetheless, airlines should have an incentive to meet reasonable standards of customer service in order to maintain customer goodwill. In some cases, airlines may delay or fail to have efficient procedures for meeting their own obligations to consumers, particularly for refunds and compensation. This is an area where regulators might become involved, to ensure that airlines acknowledge to their own responsibilities and to allow consumers to exercise their rights without undue complication.

4. Education and enforcement

Adequate consumer protection law capable of addressing consumer concerns about their dealings with airlines is only one part of the process of improving consumer confidence and choice in this industry. Another important element will be to develop strategies for assisting both consumers and airlines alike in better understanding their rights and obligations under law, as well as the array of choices open to consumers in this market.²⁰

Consumers need to understand the importance of carefully investigating what is offered to them under the various fare options of any particular airline and, in the event that the travel experience does not go smoothly, both the extent and the limit of their rights under consumer protection

conflictoflaws.net/2013/unfair-terms-in-low-cost-airline-contracts-a-spanish-court-takes-a-bold-step/comment-page-1/.

¹⁹ Australian Competition and Consumer Commission, *Unfair Contract Terms: Industry Review Outcomes* (2013).

²⁰ *Consumer Protection in Air Transport – Singapore Experience*, Paper presented at the World Wide Air Transport Conference, 2013 p 3, available at http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp79_en.pdf.

law. Consumers should be encouraged to take time to read the terms on which different ticket options are offered. They may also benefit from a better understanding of the role of travel insurance in protecting them for unforeseen contingencies that may disrupt their flights. A good example of this type of focused educational effort is found in Singapore, where the Civil Aviation Authority of Singapore has worked with the Consumers Association of Singapore to educate consumers²¹ on the 'key aspects of air travel, including what to look out for when purchasing air tickets and the avenues of recourse in the event of airline service lapses'.²²

Airlines also need to understand their fundamental obligations under consumer law and consider the best ways of dealing with disappointed consumers. Many airlines are aware of these issues but some may also require ongoing consultations with, and even enforcement action by, regulators and consumer advocates to prompt a better approach for consumers.

5. Policy priorities

The airline travel industry is growing in the ASEAN region and consumer concerns about the service should be taken seriously. However, it would be prudent for ASEAN Member States to assess the efficacy of existing consumer protection legislation, in the light of consumer and airline consultation and education, before moving to industry-specific legislation which may result in increased costs to airlines.

²¹*Air Travel Tips*, Consumers Association of Singapore.

²²*Consumer Protection in Air Transport – Singapore Experience*, Paper presented at the World Wide Air Transport Conference, 2013 p 3, available at http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp79_en.pdf.

Policy Digest 10: Fraud in price discounting



This policy digest was written by Professor Justin Malbon of Sustineo Pty Ltd under the project Supporting Research and Dialogue in Consumer Protection supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

Introduction

Traders often use strategies to entice consumers to buy their products. Some strategies are lawful in most jurisdictions, while others are not. Engaging in misleading and deceptive conduct is often unlawful and may be harmful to consumers and competitors who play by the rules.

An increasingly common, but lawful, strategy involves advertising sales at discount prices. Under the strategy, the seller sells a line of products at a high price knowing that very few consumers will buy it at that price. After a time the seller reduces the price, lawfully claiming the product is now sold at a discount. After a further time the seller may further discount the price. Consumers usually buy the product believing the seller was compelled to offer a discount to move stock. In reality, the 'discount' price is the one the trader assumed all along would be the one that most consumers would be prepared to accept, and so is not really a discount in the sense popularly understood (Kapner 2013).

Another related practice involves lifting the price before an expected holiday shopping period for a short time, and then dropping the price during the holiday period. The trader will (often lawfully) claim the goods are being sold at a discount price.

Predatory pricing is another form of price discounting that may be unlawful in some jurisdictions, usually involving a large trader attempting to destroy a smaller trader. The large trader sells competing products at an unsustainably low price, resulting in the smaller trader losing customers and going out of business. Once this occurs, the large trader readjusts the prices upwards and continues trading. This practice can undermine fair competition. The practice is generally not considered to be fraudulent, misleading or deceptive to consumers, so will not be considered in this digest.

In many countries, however, it is unlawful for traders to use bait, or bait-and-switch, strategies. This digest will focus on these strategies. They involve the trader fraudulently offering products at a price discount under certain conditions.

Bait and bait-and-switch conduct

Bait advertising involves a trader advertising a product at a low (i.e. discount) price. When the consumer proceeds to purchase the advertised product they discover either that it is not available at the advertised low price, or it is not available at all. The seller then encourages the consumer to either pay a higher price for the advertised product, or to switch to buying a substitute (higher-priced) product — this is a bait-and-switch strategy. Because the consumer has sustained a sunk cost by turning up at the seller's store, or spending search time locating the product on the seller's website, the consumer may believe they can recover some of that loss by purchasing the product on offer, even if it is at a higher price than they had expected. The US Federal Trade Commission defines bait advertising as:

...an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch customers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser.¹

Some US states treat bait advertising as a crime that are usually only subject to minor penalties (Ayres and Klass 2004, p. 517).

An Australian court case illustrates this point. A car dealership advertised the sale of a particular model of a Ford motor vehicle at \$6600 for a limited period. It was revealed to a potential customer that only one vehicle was available at the advertised price, and it had been sold. The customer was offered the same type of vehicle at a much higher price. The judge found the seller had not intended to supply a reasonable quantity of the advertised models at the advertised price, and had therefore breached the law.²

As a further illustration of bait advertising, a reader of the Singapore *Straits Times* complained in a Forum Letter to the newspaper that he responded to a travel agent's advertisement for a tour package which was offered at a steeply discounted price. When he called the agent he was told that the promotional fare had been sold; yet the advertisements offering the heavily

¹ 16 C.F.R. § 238.0 (2003). Cited by I Ayres and G Klass (2004) 'Promissory Fraud Without Breach' (2004) *Wisconsin Law Review* 507 at 517.

² *Reardon v Morley Ford Pty Ltd* (1980) 33 ALR 417.

discounted prices continued for some weeks afterwards. The reader appeared to be unaware this was unlawful.³

Bait advertising differs from ‘upselling’ which involves attempting to convince the consumer to buy a different or more expensive product than the one advertised, without misleading the consumer. Upselling is generally considered to be lawful.

Policy rationale

It might seem that bait advertising is only harmful if a consumer actually purchases the higher-priced product. However, it is considered harmful regardless of a sale, because the seller seeks to deceive the consumer into entering the seller’s premises or making a purchase on its website (Tushnet 2011, p. 1355). The practice is generally considered to be an oppressive or deceptive marketing technique to persuade consumers to buy something they did not really want (Grabosky et al 2001, pp. 105–129).

Recital 6 of the European Union Directive on Unfair Commercial Practices states that unfair advertising such as bait advertising ‘directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors’ (Directive 2005/29/EC). The recital distinguishes between illegitimate enticement and the legitimate enticement of consumers to encourage them to purchase products. It states that:

...this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers’ perceptions of products and influence their behaviour without impairing the consumer’s ability to make an informed decision.

³ Yiu Wing Lit ‘Protect Consumers from Misleading Sales Tactics’ *The Straits Times* 12 August 2013 <http://www.straitstimes.com/premium/forum-letters/story/protect-consumers-misleading-sales-tactics-20130812>

ASEAN laws applying to bait advertising

A number of ASEAN members prohibit bait advertising.

- Brunei Darussalam's Consumer Protection (Fair Trading) Order 2011 prohibits unfair practices regarding consumer transactions, including making a false claim. Clause 5 in the second schedule of the Order specifically refers to bait advertising as a false claim.
- Cambodia's Management of Quality and Safety of Products and Services 2000 (Article 4) states that manufacturers and service providers must provide accurate information of the composition or configuration of their products, goods, or services to prevent confusion by consumers or damage to competition.
- Indonesia's Law Number 8 Year 1999 concerning Consumer Protection (Article 12) prohibits bait advertising. Entrepreneurs are prohibited from offering, promoting or advertising the goods and/or services on special process or rates within a certain period of time and in certain number, if the entrepreneurs do not intend to implement during that designated period of time or according to the amount or numbers to be offered, promoted or advertised.
- Malaysia's Consumer Protection Act 1999 (Section 13) prohibits advertising for supply, at a specified price, goods or services the seller does not intend to offer for supply or does not have reasonable grounds for believing can be supplied at that price for a reasonable period and in reasonable quantities. This includes having regard to the nature of the market in which the person carries on business and the nature of the advertisement. A defence applies if the seller offered to supply the goods or services at a later reasonable time.
- Philippines' Consumer Act 1992 (Article 48 of Chapter 1 of Title III) declares that the policy of the legislation is to promote and encourage fair, honest and equitable relations amongst parties in consumer transactions and protect the consumer against deceptive, unfair and unconscionable sales acts or practices. Article 50 prohibits deceptive sales acts or practices.
- Singapore's Consumer Protection (Fair Trading) Act 2003 prohibits unfair practices. This may include making a false claim (Section 4). The second schedule specifies a number of unfair practices including bait advertising (Paragraph 5).

- Thailand's Consumer Protection Act 1979 (Section 4) provides that consumers have rights to receive correct and sufficient information and descriptions about the quality of goods or services. Section 22 provides that an advertisement may not contain a statement that is unfair to consumers or which may cause an adverse effect to society as a whole. A statement that is false or exaggerated or will cause misunderstanding in the essential elements concerning the goods or services may be a breach of the Act.
- Vietnam 's Law on Consumer Protection (Article 10 Prohibited acts): The business individuals, organizations are prohibited from conducting fraudulent or misleading acts to the consumers by way of providing inaccurate, misleading, inexact information or hiding information about one of the followings: a) The goods, services which are provided by such business individuals, organizations.

Non-ASEAN laws

Set out below are laws in some non-ASEAN jurisdictions dealing with bait advertising.

Hong Kong

Hong Kong has toughened its attitude towards unfair marketing practices. It introduced the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 which prohibits bait advertising (Section 13G; see also Chu and Man 2013). Section 21A attempts to deal with cross-jurisdictional issues arising from online bait advertising. The Ordinance applies to sales where the trader has its usual place of business in Hong Kong, regardless of the location of the consumer.

Europe

Annex I of the 2005 European Union Directive on Unfair Commercial Practices sets out a range of commercial practices that are deemed to be unfair, including bait advertising (Paragraph 5) and bait-and-switch advertising (Paragraph 6; see also Heim 2006 at p. 526). Annex I sets out commercial practices that are considered to be unfair in all circumstances. Recital 5 states that misleading commercial practices include:

making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).

Germany introduced an Act against Unfair Competition in 2004,⁴ which complies with the Directive and replaced a nearly century-old Act. Under the Act, bait advertising is deemed to be an unfair practice in all circumstances. Section 5(5)(2) provides that, as a rule, stocking an amount of goods at the advertised discounted price for an anticipated two days' worth of sales will be considered reasonable, unless the trader provides evidence that justifies a lower level of stocking. Civil remedies are exclusively set out in the Act and include injunction, retraction, damages, and 'skimming off profits' (Heim 2006).

Australia

Section 35 of the Australian Consumer Law prohibits bait advertising. The section differs from legislation in most jurisdictions in that it sets both positive and negative obligations. After prohibiting bait advertising in much the same way as is done in many jurisdictions, the section proceeds to place a positive obligation on a seller who advertises goods or services to offer the goods or services at the advertised price for a period and in quantities that are reasonable.

Application of the law

The effective enforcement of the bait advertising laws may in many instances require greater awareness on the part of consumers and traders. Consumers may not be aware that bait advertising is unlawful, nor may they be aware of how to detect it. Consumer reporting of suspected bait advertising may prove to be an effective way of clamping down on the practice. In some cases traders may not be aware of their obligations not to mislead and deceive consumers. The agency responsible for enforcement may well assist traders by providing guidelines about complying with the law and providing website information about compliance.

⁴ Gesetz gegen unlauteren Wettbewerb, UWG [2004]BGBl. I 1414.

The Hong Kong Ordinance confers concurrent jurisdiction on the customs and excise department and the Communications Authority, so as to have the capacity to deal with online bait advertising (Chu and Man 2013, p. 63).

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Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market

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Policy Digest 11:

Statutory guarantees of quality in the supply of goods and services to consumers



This policy digest was written by Associate Professor Jeannie Marie Paterson of Sustineo Pty Ltd under the project Supporting Research and Dialogue in Consumer Protection supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

This digest considers best practice among ASEAN Member States (AMS) in consumer protection laws that require goods and services to meet minimum standards of quality. This digest considers the ‘baseline’ standards that apply to all supplies of goods and services to consumers. It is of course possible for there to be additional forms of protection provided to consumers in certain markets. Policy Digest 13 will deal with warranties provided by retailers and manufacturers. Regulators, and trade and professional bodies, may impose also higher requirements on members in terms of the quality of the goods and services that they provide, for example in the pursuit of safety or to promote industry best practice. These developments in specific industries are not considered in this digest.

Statutory guarantees of minimum quality are a central feature of any consumer protection regime. They protect consumers against substandard or shoddy goods and services and ensure that consumers have rights of redress when goods do not meet their reasonable expectations. Thus, for example, statutory provisions guaranteeing minimum standards of quality would provide a remedy for a consumer who buys shoes that fall apart after being worn only a few times or a kettle or toaster that stops working after only a month.

This digest suggests that effective consumer protection provides consumers and traders with clear standards that goods and services are expected to meet, as well as accessible rights of redress for goods and services that do not meet those minimum standards. It is also important for the law to limit the ability of retailers and manufacturers unfairly to contract out of these obligations or to avoid their responsibilities in any other way.

2. Why use legislation to impose minimum quality standards in consumer transactions?

Consumers expect that the goods and services they buy will be of a reasonable quality and fit for their purpose. Consumers are disappointed if these expectations are not fulfilled (e.g. goods breaking easily or quickly, goods or services not working as represented by the trader or services not being performed to a good standard). This risk of disappointed consumer expectations may be addressed in a number of different ways:

- Consumers might be encouraged to seek out good information about different products and traders so as to select those with the best reputation for quality.¹
- Regulatory agencies and consumer advocates could provide information about the types of issues consumers should consider when purchasing particular goods or services and their own reviews of the relative quality of commonly purchased products provided by different retailers.²
- Consumer protection law might be used to impose minimum standards of quality in the supply of goods and services to consumers.

A number of AMS have legislation that ensures consumers have a statutory right to goods and services that meet basic quality standards. Indonesia does this through general principles: the Law Number 8 Year 1999 on Consumer Protection (Article 7) obliges entrepreneurs to ‘guarantee the goods and/or services produced and/or traded based on the prevailing quality standard provisions of the goods and/or services’.³ Other member states have legislative provisions that provide specific guarantees of quality applying to the sale of goods and services to consumers (Table 1). Similar guarantees are also found in the consumer protection regimes in the European Union⁴ and in Australia.⁵

Table 1. Legislation regarding guarantees of quality applying to sales of goods and services

Member state	Legislation
Brunei	Sale of Goods Act 1999 ss 14 – 18
Malaysia	Consumer Protection Act 1999 Parts V – IX

¹ See e.g. the shopping tips provided by CASE in Singapore, available at http://www.case.org.sg/consumer_guides.aspx.

² See e.g. (Malaysia) Federation of Malaysian Consumers Associations, at <http://www.fomca.org.my/v3/>; (Singapore), the ‘Consumer’ Magazine published by CASE available at <http://www.case.org.sg/publications.aspx>. Also, in Australia, the work of Choice; <http://www.choice.com.au>.

³ See also (Thailand) Consumer Protection Act 1979 Article 4.

⁴ Directive [99/44/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 and Directive [2011/83/EC](#) of the European Parliament and of the Council on Consumer Rights.

⁵ Competition and Consumer Act 2010 (Cth), Schedule 2 The Australian Consumer Law part 3-2.

Singapore	Sale of Goods Act 1979; Consumer Protection Act 2009, as amended by the Consumer Protection (Fair Trading) Amendment Act 2012, ss 12A – 12E
Philippines	Consumer Act 1992 Chapter III

These protections usually take the form of terms implied by statute into the contract for the supply of the goods, although in Australia they are independent statutory rights. Similar statutory rights may be provided to consumers against manufacturers.⁶

How is the legal imposition of quality standards justified?⁷ Consumers typically have less knowledge of, and experience with, the goods and services that they purchase than manufacturers and suppliers. This ‘information asymmetry’ between consumers and traders means that consumers may not be good at selecting the products that will best suit their needs or at bargaining for the best contractual terms to protect their interests. Statutory guarantees of quality give consumers a right of redress in the event that the goods or services they have purchased prove to be faulty or defective. In this sense, consumer guarantees of quality can be seen as giving effect to the reasonable expectations of consumers that the goods and services they buy will be of reasonable quality.

3. Guarantees of quality in the supply of goods and services

Goods

Statutory guarantees of quality in the sale of goods to consumer commonly include guarantees that:

- the consumer will receive good title to the goods⁸
- the goods will be of acceptable/satisfactory quality⁹

⁶ (Malaysia) Consumer Protection Act 1999 Part VII.

⁷ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, p 607, [25.45]; G Hadfield, R Howse and M J Trebilcock MJ, ‘Information-Based Principles for Rethinking Consumer Protection Policy’ (1998) 21 *Journal of Consumer Policy* 131 at 141; G Howells and S Weatherill, *Consumer Protection Law* (Ashgate, 2nd ed, 2005), p 146.

⁸ (Brunei) Sale of Goods Act 1999 s 14; (Malaysia) Consumer Protection Act 1999 s 31; (Singapore) Sale of Goods Act 1979 s 12.

⁹ (Brunei) Sale of Goods Act 1999 s 16(2); (Malaysia) Consumer Protection Act 1999 s 32; (Singapore) Sale

- the goods will be fit for their disclosed purpose,¹⁰ and
- in the case of a sale of goods by description, the goods will match their description.¹¹

The guarantees of acceptable quality and fitness for a disclosed purpose are the guarantees that are perhaps most commonly relied upon by consumers.

Acceptable or satisfactory quality

The guarantee of acceptable or satisfactory quality ensures that goods meet the expectations of a reasonable consumer, taking into account all of the circumstances including the price and marketing accompanying the goods.¹²

Typically, goods do not need to be perfect to meet the standard of acceptable or satisfactory quality. In *Banks v Carpet Xtra (2006) Ltd*¹³ the plaintiffs failed to convince the District Court in Tauranga (New Zealand) that the heavy-duty carpet they bought for their home, with the specific request that it not track and be suitable for grandchildren, was of unacceptable quality because it showed track marks and stains. Justice Rollo stated that:¹⁴

These concepts of acceptable quality and being reasonably fit for any particular purpose are not qualities of perfection; rather they fall within a continuum to be determined by the goods themselves, in the circumstances of the case.

of Goods Act 1979 s 14.

¹⁰(Brunei) Sale of Goods Act 1999 s 16(3); (Malaysia) Consumer Protection Act 1999 s 33; (Singapore) Sale of Goods Act 1979 s 15.

¹¹(Brunei) Sale of Goods Act 1999 s 15; (Malaysia) Consumer Protection Act 1999 s 34; (Singapore) Sale of Goods Act 1979 s 13.

¹²(Brunei) Sale of Goods Act 1999 s 16(6); (Malaysia) Consumer Protection Act 1999 s 32(2); (Singapore) Sale of Goods Act 1979 s 14(2A) and (2B).

¹³*Muriel Banks and Donald Banks v Carpet Xtra Ltd* (2006) (District Court, Tauranga, 28 November 2008 CIV-2007-070-001452).

¹⁴*Muriel Banks and Donald Banks v Carpet Xtra Ltd* (2006) (District Court, Tauranga, 28 November 2008 CIV-2007-070-001452), [51].

It can sometimes be difficult for consumers to show that a defect that arises more than a couple of weeks after purchase was attributable to a defect in the goods existing at the time of sale. The 'lemon law' in Singapore assists consumers through a presumption that goods were defective at the time of sale or delivery, for defects that are detected within six months,¹⁵ unless such a presumption is incompatible with the nature of the goods or the seller could prove otherwise.¹⁶ The Consumers Association of Singapore gives the following example:

A consumer purchased a three-year-old car with 30,000 mileage for \$70,000. The car was described by the seller as being in 'very good condition' and no related faults were highlighted to the consumer. If after three months the car starts stalling or is unable to start, it is unlikely to have been of satisfactory quality when purchased, and the seller will need to provide recourse to the consumer, unless he can prove otherwise.¹⁷

In most regimes, goods will not fail to be of acceptable quality with regard to defects:

- that were specifically drawn to the consumer's attention¹⁸
- where the consumer examined the goods, that ought to have been revealed on that examination¹⁹
- that were caused by unreasonable use.²⁰

The Canadian case of *Gallant v Larry Woods Used Cars Ltd*²¹ illustrates the limits on the scope of a trader's liability placed where a consumer is found to have used the goods in an 'abnormal' manner. In this case the consumer bought an eight-year-old vehicle. After three weeks the vehicle required major repair. During the three weeks the consumer had driven 3000 miles.

¹⁵ Consumer Protection Act 2009, as amended by the Consumer Protection (Fair Trading) Amendment Act 2012 s 12B(3).

¹⁶ Consumer Protection Act 2009, as amended by the Consumer Protection (Fair Trading) Amendment Act 2012 s 12B(4).

¹⁷ CASE, Lemon Law and Motor Vehicles.

¹⁸ (Brunei) Sale of Goods Act 1999 s 16(2); (Malaysia) Consumer Protection Act 1999 s 32(3); (Singapore) Sale of Goods Act 1979 s 14 (2C).

¹⁹ (Singapore) Sale of Goods Act 1979 s 14 (2C).

²⁰ (Malaysia) Consumer Protection Act 1999 s 32(5); (Singapore) Sale of Goods Act 1979

²¹ (1982) 38 NBR (2d) 262.

The court held that the guarantee as to acceptable quality had not been breached because the failure was caused by the consumer's overuse of the vehicle.

Fitness for purpose

The guarantee of fitness for purpose ensures that the goods are fit for their ordinary purpose and also any particular purposes requested by the consumer and supplied for that purpose by the retailer.²²

The statutory guarantee of fitness for purpose will usually not apply where the circumstances show that the consumer did not rely or it was unreasonable to rely on the skill or judgment of the retailer.²³ For example, suppose that a consumer seeks to purchase a laptop computer with long-term battery life. It may not be reasonable to rely on the skill of the supplier if the consumer is told by the salesperson, 'I don't know which one would be best but this model is popular'.

Services

Statutory guarantees of quality applying to services commonly include guarantees that:

- services will be rendered with due care and skill²⁴
- services, and any product resulting from the services, will be fit for a purpose that the consumer made known to the supplier²⁵
- services will be supplied within a reasonable time.²⁶

The guarantee that services supplied to a consumer 'will be rendered with due care and skill' is similar to the common-law duty of care in tort and contract law. The standard requires the trader to take care in delivering the services but does not require the trader to ensure that the consumer will

²²(Brunei) Sale of Goods Act 1999 s 16(3); (Malaysia) Consumer Protection Act 1999 s 33(1); (Singapore) Sale of Goods Act 1979 s 14(3).

²³(Brunei) Sale of Goods Act 1999 s 16(3); (Malaysia) Consumer Protection Act 1999 s 33(2); (Singapore) Sale of Goods Act 1979 s 14(3).

²⁴(Malaysia) Consumer Protection Act 1999 s 53; (Philippines) Consumer Act 1991 Chapter III Article 69(a).

²⁵(Malaysia) Consumer Protection Act 1999 s 54; (Philippines) Consumer Act 1991 Chapter III Article 69(b).

²⁶(Malaysia) Consumer Protection Act 1999 s 55.

obtain his or her desired result.²⁷ Unlike the guarantee that goods must be of acceptable quality, this guarantee requires the consumer to prove fault. Typically, this will require the consumer to point to acceptable standards in the trade with which the service provider failed to comply.

The guarantee of fitness for purpose will not apply in a case where the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.²⁸

Remedies

Where the statutory guarantees of quality are implied as terms into the contract for the supply of goods or services to consumers, then the remedy for failure to comply with the guarantees will be in contract, for damages for breach of contract. Some consumer protection legislation replaces these contractual remedies with a regime of statutory remedies. These statutory remedies provide a better level of protection for consumers by clearly setting out the rights of consumers against suppliers and manufacturers that fail to ensure their goods and service comply with the guarantees.

The remedies provided by statute may allow the consumer to request the supplier to remedy the failure through refund, a replacement or the repair of non-conforming goods.²⁹ Where these responses are not available or appropriate, the consumer may have a right to terminate the contract and recover the price of the goods³⁰ and/or seek damages for foreseeable losses.³¹

²⁷ Jeannie Marie Paterson and Kate Tokeley, 'Consumer Guarantees' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) pp 97 – 128.

²⁸ (Malaysia) Consumer Protection Act 1999 s 54(2).

²⁹ (Malaysia) Consumer Protection Act 1999 ss 41(1)(a) and 60(1)(a); (Singapore) Consumer Protection Act 2009, as amended by the Consumer Protection (Fair Trading) Amendment Act 2012 ss 12B(2) and 12C.

³⁰ (Malaysia) Consumer Protection Act 1999 ss 41(1)(b) and 60(1)(b); (Singapore) Consumer Protection Act 2009, as amended by the Consumer Protection (Fair Trading) Amendment Act 2012 s 12B(2) and 12D.

³¹ (Malaysia) Consumer Protection Act 1999 ss 41(2) and 60(2). See also (Singapore) Consumer Protection Act 2009, as amended by the Consumer Protection (Fair Trading) Amendment Act 2012 s 12F(6); (Philippines) Consumer Act 1991 Chapter III Article 68(f)(2).

Actions for damages against manufacturers of goods

In some AMS, consumers also have a right to claim damages against manufacturers for failures of goods to comply with certain guarantees of quality under the legislation.³² This is a useful right for consumers, which ensures consumers have recourse for substandard goods even in cases where the retailer is no longer in business.

4. Making the guarantees of quality mandatory and non-excludable

Legislation providing a regime of statutory guarantees of quality should also ensure that the guarantees are mandatory and that traders cannot exclude the guarantees by contract. As already discussed, consumers may have little bargaining power in purchasing goods and services, due to lack of information and experience. If suppliers can contract out of their rights under statute they are likely to do so and consumers will be left with little recourse for substandard goods or services. Prohibiting contracting out ensures consumers actually get the protection of the statutory guarantees of quality. The consumer protection legislation of some ASEAN countries does contain express provisions that prohibit contracting out of these guarantees of quality.³³

5. Information requirements

If consumers are to be able to exercise their rights to goods and service that met the minimum statutory guarantees of quality then they must be aware of these rights. This calls for education by regulators and advocates about consumers' rights. Some consumer rights organisations in AMS are actively engaged in this education process. Singapore's 'lemon laws'³⁴ have been accompanied by an extensive consumer education program by the Consumers Association of Singapore.

³² (Malaysia) Consumer Protection Act 1999 Part VII.

³³ See e.g. (Brunei) Unfair Contract Terms Act 1999 s 8; (Malaysia) Consumer Protection Act 1999 s 6; (Singapore) Consumer Protection Act 2009 s 13 and Unfair Contract Terms Act 1996 s 6. See also (Thailand) Unfair Contract Terms Act 1997 s 4; (Indonesia) Law on Consumers' Protection 1999 Article 18.

³⁴ Consumer Protection (Fair Trading) Amendment Act 2012, ss 12A – 12E.

To enforce their rights under law, consumers must also be able to raise their concerns with the trader. To this end, it is useful for consumer protection laws to impose certain disclosure obligations on traders, such as informing all consumers of their place of business and contact details. These kinds of obligations are found in the European Union Consumer Rights Directive.³⁵ For example, under this Directive for sales, other than distance sales, a trader must provide information to consumers setting out matters such as the characteristics of the goods, the cost of the goods, delivery arrangements, the contact details of the supplier and the supplier's complaint handling policy.³⁶

6. Policy priorities

Requiring traders to meet mandatory minimum standards of quality in the supply of goods and services to consumers is a central feature of any consumer protection regime. AMS might usefully look to the legislative schemes in place in countries such as Malaysia and Singapore for a model, consistent with best practice in the region and Europe, to meet reasonable consumer expectations in this field. In particular, AMS might look to uniform rules governing minimum standards of quality in the supply of goods and services and ensuring that these standards cannot be excluded in consumer contracts.

³⁵ Directive 2011/83/EC of the European Parliament and of the Council on Consumer Rights.

³⁶ Directive 2011/83/EC of the European Parliament and of the Council on Consumer Rights, Article 5.



Policy Digest 12: Money transfer fraud



This policy digest was written by Professor Justin Malbon of Sustineo Pty Ltd under the project Supporting Research and Dialogue in Consumer Protection supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

A rapid transformation in the consumer money transfers marketplace is taking place within the ASEAN region, reflecting global developments. Technological change is fuelling the expansion of services that enable money transfers both within an ASEAN member country and across international borders. Money transfers can be made using a computer connected to the internet or a mobile phone; consumers can use phone applications ('apps') or text messages to deposit, withdraw or transfer money. The processes and services for consumers to transfer money electronically will be referred to as 'mobile money'.

Mobile money services are enabling consumers to access to financial services. Many of these consumers would otherwise be excluded from access, particularly in developing countries because mainstream lenders find it unprofitable to provide financial services, or perceive that lending to these people is too financially risky. However, mobile money does open new avenues for money transfer fraud. The challenge is to create a regulatory environment that facilitates innovation and access to services while protecting consumers from fraud and other forms of abuse.

Forms of fraud in money transfers that do not involve mobile money services, such as phishing schemes, are discussed briefly below. These present difficulties in policing, and are often best dealt with through consumer education programs.

2. Transformation of the consumer money transfers market

Cheap and easy access to mobile phone networks and handsets is enabling wider access to mobile money services. Providers can accommodate a large customer base and operate across borders — it was estimated that 364 million people relied on mobile money services worldwide in 2012. It has also been estimated that mobile money transactions will grow at a rate of about 60% annually. Growth rates are higher in developing economies (where growth rates are at nearly 20% per annum) compared with single digit growth in developed economies (Capgemini 2013, pp.5 and 6).

A mobile money provider may be a bank. However, increasingly non-bank players are entering the consumer payments marketplace, including Google, PayPal, Amazon and Square. Many of these businesses have contracts with financial institutions to enable the payment systems to access the consumers account (Robinson 2014, p. 555).

Established financial institutions in developed countries tend to be reluctant to strongly engage with mobile money. This is because of the complexity of revenue-sharing agreements with telecommunications firms and concerns mobile money will cannibalise existing electronic payment services. Telecommunications companies, however, often stand to benefit from mobile money because of the increased use of their services.

Mobile money provides an enormous opportunity for providing low-cost access to financial services to those on low incomes. It enables purchasing products, paying bills and transferring money to relatives or friends. It also enables workers in one country to pay (that is, to remit) money back to relatives in the worker's home country. Mobile money services can offer better, safer and more reliable services than those usually available to low-income consumers (Collins et al 2009).

Operation of money market consumer services

An early example of the adoption of mobile money in a developing country is Kenya's M-PESA system. It provides services for more than 13 million consumers and is made available through mobile phones and a network of more than 16,000 agents. Money can be transferred using text messages together with a network of retail agents that operate as cash-in and cash-out points (Maurer 2012, p. 589). The M-PESA service has apparently been relatively immune from corruption or misuse. An audit ordered by the Kenyan government in 2008 found the service was safe and in line with the country's objectives for financial inclusion (Buku 2013, p. 396).

There are more than 29 mobile money services in the Asian region, with more to follow. In the Philippines, for instance, GCash provides a similar service to M-PESA and has more than two million users (Maurer 2012, p. 589). Indonesia has a large number of providers including mSaku, T-Cash, Dompetku and XL Tunai (Breen 2013).

The penetration of mobile money services has almost trebled over the past three years. Globally, 4.6% of people were using mobile money services in 2013. This includes 1.6% of people in East Asia and the Pacific, and 3.4% of people in South Asia (GSMA, 2013).

	World	East Asia & Pacific	Europe & Central Asia	Latin America & Caribbean	Middle East & North Africa	South Asia	Sub-Saharan Africa
June 2011	1,542	1,067	63	319	924	578	12,024
June 2012	2,315	1,387	75	878	2,729	1,445	15,832
June 2013	4,361	1,657	416	2,165	15,165	3,485	24,652

Source: GSMA, Mobile Financial Services for the Unbanked: State of the Industry 2013

Statistics are yet to be collected on the perception of mobile money services amongst consumers in Asia. The largest reliable survey was conducted by M-PESA in Kenya. Of M-PESA users surveyed, 90% said that M-PESA is a faster way of transferring money than other services, 96% rated M-PESA as cheaper and more convenient, and 98% said that M-PESA is safer. This demonstrates significant consumer satisfaction with mobile banking services like M-PESA (ASEAN-EU Business Summit, 2013).

Mobile phone apps are often more advanced in developing countries than those provided by most international banks throughout the world. One example is an app called ‘Sinar Sip’ offered by Bank Sinar in Bali, with banking facilities for consumers who would otherwise not have access to mainstream banking services. Bank Andara provides micro-financing services and offers ‘Andara Link’ in association with Visa to enable thousands of micro-finance branches across Indonesia to provide mobile money services (Breen 2013).

Remittances

A substantial amount of money is transferred to developing countries through remittances, in which a person transfers money to relatives or friends in their home country. Remittances are essential for economic growth in many developing countries. International remittances provide about \$325 billion in capital each year and account for about 57% of total private foreign investment in developing countries. The money tends to go directly to the intended recipients, without bureaucratic intervention. Banking transfer systems that are often used for remittances involve an average fee of 9.3% of the amount being sent. Mobile money offers a way to greatly reduce the infrastructure costs of traditional banking systems, and may offer a way of greatly reducing remittance fees (Richard, 2012).

3. Risks associated with money transfer

There are a number of risks for consumers in relation to mobile money transfers.

Misuse of personal data and identity fraud

A consumer's personal data may be accessible by a number of parties including the financial institution, mobile phone provider and any agents. This access increases risks of abuse and identity fraud as mobile money typically reduces the need for face-to-face engagement (Financial Action Task Force 2013, para. 44. See also de Koker 2013, p. 169)

SIM swapping fraud

Consumers can be defrauded by swapping SIM (subscriber identification module) cards. This involves the fraudster requesting a SIM swap at the mobile phone provider's shop. The swapped SIM card is used to intercept and divert the randomly generated security passwords linked to the consumer's bank account. The fraudster then operates the consumer's account and diverts funds without the consumer receiving account activity alerts from the bank (de Koker 2013, p. 190).

Roaming fraud

A consumer who enables global roaming on their phone may be subjected to roaming fraud. Here the fraudster identifies a way of intercepting communications to facilitate money transfer fraud. This creates additional regulatory issues because of difficulties in identifying the jurisdiction in which the fraud is occurring.

Internet scams

Other forms of fraud relating to money transfers include scams in which the victim receives an email from a person (the perpetrator) claiming to need the victim's assistance in transferring money from the perpetrator's country. This is sometimes referred to as the Nigerian scam as it has been persistently used by perpetrators in that country. It can be quite difficult for regulators to prevent this form of fraudulent activity and relies on the consumer being able to detect the scam to avoid being defrauded. Consumer awareness programs may help with this problem.

The *Jakarta Post* recently reported on the prevalence of a phishing scam in which some Indonesians are duped into believing they have won a prize. The victim is notified of their apparent prize and is asked to provide their bank details to the scammer. The scammer uses this information to transfer money from the victim's bank account. In some cases the perpetrator will create a fake website to give their claims greater credibility (Sipahutar 2014). Again, these scams are difficult to police. Consumer education programs may play some role in reducing the chances of a consumer falling prey to the scam.

4. Regulatory challenges and options

The new mobile money environment is raising a range of complex issues. The technology is rapidly changing, money transfers often cross borders and mobile money providers generally include both banking and non-banking institutions.

Mobile money can, however, provide considerable advantages, particularly in developing countries where financial services can be made available to those who previously had no access to the services. It also offers a way of reducing the costs and fees for remittances.

Proposed Regulatory Aims

Regulation should therefore aim to facilitate the growth and innovation of mobile money services while ensuring its integrity. Aims could include:

- setting common minimum standards for a variety of providers offering similar services
- encouraging the emergence of a competitive market
- increasing consumer convenience
- improving payments security and transparency
- strengthening fraud prevention
- stimulating innovation (Capgemini 2013, p. 21).

The regulatory aims should also ensure consistent monitoring by financial and consumer protection agencies of mobile money activities (Dias et al, 2010, p. 2). Increased standardisation would also help increase market acceptance (Capgemini 2013, p. 24).

Proposed Policies and Strategies

A number of policies and strategies can be adopted to combat money transfer fraud. These include:

ASEAN Co-ordination

Given the complexity of the issues and the ease and frequency of cross-border transactions, it makes sense for policies, standards, co-operative regulatory processes and model legislation to be developed and coordinated at an ASEAN level.

This process should involve the participation of members' national central banks, government banking and finance agencies, telecommunications agencies, agencies responsible for monitoring and prosecuting criminal activities such as the financing of terrorism and fraud, competition agencies and consumer protection agencies (Dias et al 2010, p. 8).

Link Strategies with Strategies Dealing with Money Laundering and Terrorist Financing

The regulation of mobile money should also be tied with efforts to combat money laundering, terrorist financing and other related threats to the integrity of the international financial system.

The Financial Action Task Force is an inter-governmental body established in 1989 by the ministers of its 36 member nations to deal with these issues. Its objectives are to set standards and promote effective implementation of legal, regulatory and operational measures to combat money laundering and terrorist financing.¹

Singapore is the only ASEAN member that is also a member of the task force. It has recently published *Guidance for a Risk-Based Approach to Prepaid Cards, Mobile Payments and Internet-Based Payment Services* (Financial Action Task Force 2013). It is recommended other ASEAN members join the task force.

Deal with Roaming Fraud

The Groupe Speciale Mobile Association, which represents the interests of mobile operators worldwide, recommends that near real-time roaming data exchange technology be implemented to reduce roaming fraud (Merritt 2011, p. 154).

Regulate Mobile Money Transfers

The UNCITRAL Model Law on International Credit Transfer provides for ways to regulate mobile money transfers to reduce error and fraud.²

In summary, money transfer fraud as it impacts on consumers relates to a wide range of activities. These activities evolve and mutate as fraudsters develop novel and imaginative ways of defrauding consumers. Their practices also change with the rapidly changing technology. Some of the activities relate to money laundering and other criminal activities. Regulatory strategies therefore need to be flexible and coordinated with other agencies dealing with financial and criminal activities.

¹ www.fatf-gafi.org

² http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1992Model_credit_transfers.html See also Castellani 2013, p. 272.

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Case Studies



one vision
one identity
one community

Case Study 1:

The Online Consumer Marketplace



This Case Study was written by Professor Justin Malbon of Sustineo Pty Ltd under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

Executive summary

This case study reports on the discussions engaged in and insights gained by Professor Malbon from a field trip to Kuala Lumpur, Singapore and Jakarta in February 2014.¹ This report outlines some of the views expressed by participants during the meetings, discusses the issues raised and offers some proposed responses to those issues.

The report focussed on a number of key issues, including:

- clarifying the objectives for consumer protection for online transactions within ASEAN
- taking a whole-of-government approach to dealing with online consumer transactions
- gaining enhanced information sharing and regulatory cooperation within ASEAN
- adopting measures to enable low-cost and efficient redress regarding complaints
- recognising judgements and tribunal orders within ASEAN
- developing a model law for cross-border online transactions.

A key theme from the discussions was the necessity for a greater level of policy, strategy and implementation coordination and information sharing both within each ASEAN member government and between ASEAN members. A related issue is the tendency for governments, both within each of the case study countries (Indonesia, Malaysia and Singapore) as well as between ASEAN nations more generally, to see the issues of consumer protection and the advancement of e-commerce as raising separate – and even oppositional – concerns. However, as was made clear by a representative from e-commerce businesses in Indonesia, consumer trust and confidence in online shopping is critical to the success of e-commerce within ASEAN, and in particular to the success of the business-to-consumer marketplace. Business has a vested interest, therefore, in providing good

¹ The field trip involved discussions at meetings with participants from government departments engaged in consumer protection, trade and telecommunications. The meetings also involved participants from consumer organisations, a consumer complaints tribunal and a representative of an e-commerce business association. A list of participant agencies and organisations appears in Attachment 1).

consumer protection, as it seeks to build consumer trust and engagement in e-commerce more generally.

Consequently, it makes sense to develop policies, laws and strategies in a way that engages government agencies responsible for e-commerce, consumer protection, law enforcement and the regulation and oversight of internet communications. It also makes sense to actively engage consumer and business groups in the process.

1. Introduction

1.1 Context

The case study can be seen in the context of a range of ASEAN developments aimed at strengthening e-commerce. A key report is the 2013 United Nations Conference on Trade and Development Review of E-Commerce Legislation Harmonisation in ASEAN (the UNCTAD Report).² In addition, a number of studies have explored options for the regulation of e-commerce within ASEAN. These include the Roadmap for Integration of e-ASEAN Sector (2004)³, the ASEAN Internal Document: AADCP E-Commerce Project – Harmonization of E-Commerce Legal Infrastructure in ASEAN, Implementation Progress Checklist (2007), the ASEAN Secretariat Roadmap for Integration of e-ASEAN Sector,⁴ and the ASEAN Working Group on E-Commerce and ICT Trade Facilitation study entitled ASEAN e-Commerce Database.⁵ The latter report found there is an untapped potential for e-commerce within ASEAN. It, however, identified significant barriers to its take-up, including:

... the lack of consumer trust, the [consumers'] inability to judge the quality of the product during on-line shopping, payment fraud, privacy, identity theft, and access to complaints systems.

The report concluded that a key challenge for many ASEAN countries is to increase internet penetration to levels that will make e-commerce a viable venue for business.

A theme in many of these reports is that business-to-consumer (or even consumer-to-consumer) e-commerce will continue to be constrained, and its social and economic potential will be unrealised, unless an environment of trustworthiness can be established. Trustworthiness can, in part, be attained by establishing a harmonised framework for cross-border

² <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=623>

³ <http://www.asean.org/news/item/asean-framework-agreement-for-the-integration-of-priority-sectors-vientiane-29th-november-2004-2>

⁴ 29 November 2004, <http://www.aseansec.org/16689.htm>

⁵ ASEAN e-Commerce Database, 2009: <http://www.asean.org/resources/item/asean-e-commerce-database-project-2>.

complaints and dispute resolution, which in turn can encourage better customer service and improved online sales.⁶

In terms of the advancement of laws and regulations for consumer protection, the UNCTAD Report noted that:

Progress to date on appropriate consumer protection legislation for online transactions in the [ASEAN] region is mixed. Six out of ten countries have legislation in place. Two countries have partial laws in place (Brunei Darussalam and Indonesia). One country has draft laws (the Lao People's Democratic Republic) and another has yet to commence work in this area (Cambodia).⁷

It is apparent that there is not, nor should there be, a distinct silo for laws and regulations dealing with 'bricks and mortar' consumer transactions, and another silo for online consumer transactions. Laws and regulations for online transactions potentially cover a range of topics, including requirements for warranties that goods be fit for purpose, the products be safe, the transaction not lead to identity theft and fraud, and disputes with sellers can be quickly and cheaply settled, at least with regard to transactions within ASEAN.

Some of these topics are common to both bricks and mortar and online transactions, including those dealing with warranties for fitness for purpose of consumer products, and consumer product safety. Other issues more clearly fall within the ambit of online transactions, including identity theft and computer fraud. Together, these topics canvas a wide range of issues that cannot be reasonably dealt with in this case study. In any event, they are being dealt with in other studies under this project.

Unlike the world of bricks and mortar consumer transactions, the internet readily facilitates cross-border transactions. In Australia, for instance, about 45% of consumer transactions involve purchases from overseas sellers. It is likely that a large proportion of online consumer transactions in any one ASEAN nation will be (or will become) transactions with the sellers outside that nation. Consequently, issues regarding cross-border transactions are

⁶ UNCTAD Report at p.x.

⁷ UNCTAD Report at p.x.

significant. Consumers and sellers are likely to obtain substantial benefit if cross-border transactions within the ASEAN region are relatively seamless. That is, where the laws and regulations applying to transactions within the region are harmonious, and where online disputes can be settled with relative ease and at low cost.

Previous studies have highlighted the necessity for enhanced harmonisation of e-commerce laws and regulations within ASEAN. According to UNCTAD:

The process of harmonization started more than 10 years ago in support of ASEAN regional economic integration objectives through various initiatives aiming at promoting economic growth, with information and communication technologies (ICT) as a key enabler for the ASEAN's social and economic integration: the e-ASEAN initiative (1999), the e-ASEAN Framework (2000), the ASEAN Economic Community (AEC) Blueprint (2007). The latest initiative is the ASEAN ICT Masterplan 2015.⁸

1.2 Case study countries

The interviews were undertaken in Kuala Lumpur, Singapore and Jakarta. These three locations were chosen as they are in relatively close geographical proximity; budget and time constraints limited available options for the study. In addition, the three countries (Malaysia, Singapore and Indonesia) apply different systems for the adoption and application of their laws. For instance, Malaysia and Singapore are common law-based countries, while Indonesia is a civil law-based country.

Indonesia adopts a process by which omnibus laws are developed, which is also the case with the Lao People's Democratic Republic and Vietnam. Other member nations tend to enact more specific laws. The three countries being studied therefore provide a good representation of the legislative approaches adopted throughout the region. The three countries also vary significantly in population and geographical size, with Singapore being a relatively small geographical country and Indonesia being a large country both in geography and population.

⁸ UNCTAD Report at p.6.

1.3 Existing laws, systems and practices

Most ASEAN countries, including the three case study countries, have e-commerce and consumer protection laws in place, illustrated by the following table from the UNCTAD Report:⁹

Table 1. Status of e-commerce law harmonization in ASEAN as of March 2013

Member Country	Electronic Transactions	Privacy	Cybercrime	Consumer Protection	Consumer Regulation	Domain Names
Brunei Darussalam	Enacted	None	Enacted	Partial	Enacted	Enacted
Cambodia	Draft	None	Draft	None	Draft	Enacted
Indonesia	Enacted	Partial	Enacted	Partial	Enacted	Enacted
LDR	Enacted	None	None	Draft	Enacted	Partial
Malaysia	Enacted	Enacted	Enacted	Enacted	Enacted	Enacted
Myanmar	Enacted	None	Enacted	Enacted	Enacted	Enacted
Philippines	Enacted	Enacted	Enacted	Enacted	None	Enacted
Singapore	Enacted	Enacted	Enacted	Enacted	Enacted	Enacted
Thailand	Enacted	Partial	Enacted	Enacted	Partial	Partial
Viet Nam	Enacted	Partial	Enacted	Enacted	Enacted	Enacted

The UNCTAD Report notes that there has been no significant regional work undertaken on e-commerce law harmonisation since 2009. However, there are various committees and working groups that have continued to monitor developments in the field, and member countries have made significant progress in updating their laws. UNCTAD recommended that further work be done regarding the harmonisation project in e-commerce.¹⁰

Measures that warrant specific comment at this stage include those dealing with privacy and cybercrime.

Privacy

ASEAN countries that provide protection require a person's consent before their personal data can be used. There is an implied constitutional right to privacy in Thailand. In Indonesia, the use of any information through

⁹ <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=623>, at p.xi.

¹⁰ UNCTAD Report at p.6.

electronic media involving personal data must be made with the consent of the person concerned. Electronic systems must protect any personal data that they hold. Malaysia, Philippines and Singapore have the most comprehensive regimes in place to protect the privacy of consumers. Brunei, Cambodia, Laos and Myanmar have no regime for protecting consumer privacy.

Cybercrime

All ASEAN countries, with the exception of Cambodia and Laos, have a regime in place to counter cybercrime. Cybercrime involves the unauthorised access or modification of information in a computer without authorisation, and includes the spreading of viruses. Most regimes are very comprehensive, with the exception of Vietnam, which covers only a limited range of activities. Myanmar prohibits additional forms of cybercrimes, such as the importation or possession of a computer or the setting up of a network or access to a network without government approval.

Building consumer awareness

The issue of building awareness of consumer's rights and obligations when engaging in online transactions was mentioned numerous times by the interviewees. Building consumer awareness will become an increasingly significant issue as a greater proportion of the ASEAN population engage with online commerce. This will expose many users to online scams and other misleading and deceptive practices.

It is therefore important that consumer awareness programmes be developed. Other measures for building consumer trust and confidence include the use of trust marks.

Trust marks

Malaysia

Malaysia introduced a trustmark system in 2010, known as Malaysia Trustmark®. The system is managed by Cybersecurity Malaysia, an agency within the Ministry of Science, Technology and Innovation.¹¹

¹¹ <http://mytrustmark.cybersecurity.my/>

The trustmark validates the legality of an organisation involved in e-commerce, by certifying that the organisation is a trustworthy e-commerce operator. This helps consumers identify whether a trader can be trusted and whether they can confidently proceed with a transaction. The aim of the trustmark system is to strengthen consumer confidence and reduce fraud.

Malaysia is a founding member of the World Trustmark Alliance (WTA), which evolved from the Asia Trustmark Alliance. A number of ASEAN nations are members of the alliance including Singapore, Vietnam, Thailand and the Philippines. The alliance uses a code of conduct as a benchmark to assess whether a business can be awarded a trustmark.

Singapore

A trustmark system is operated by the Consumers Association of Singapore (CaseTrust), which was introduced in 1991.¹² Accredited businesses include online e-commerce businesses, spa and wellness retailers, travel agencies, motor vehicle retailers, employment agencies and renovation and interior design retailers. There are 400–500 accredited businesses, each of which must pay \$5,000 for a 3–4 year membership.

After receiving an application, the Consumers Association of Singapore (CASE) will undertake a desktop check of the applicant business, undertake mystery shopping and analyse consumer complaints about the business and check police records regarding the business.

An accredited online company must use a secure payment mechanism and ensure that client data is kept confidential. It must also seek to resolve any disputes in a timely and fair manner, and offer to have the dispute mediated. Accredited members must also offer a five-day cooling-off period for consumers purchasing goods.

The downside of the trustmark system is that it may unduly raise the expectations of consumers about the quality of the goods and services being purchased, and about having any disputes resolved in their favour. Some consumers form an inaccurate and unrealistic view about their rights and entitlements.

¹² <http://www.casetrust.org.sg/>

CASE is of the view that the CaseTrustmark probably does not have a sufficiently high profile within Singapore. Consequently, CASE is considering an advertising campaign to raise the profile of the trustmark.

1.4 Issues covered in this report

Issues concerning the ASEAN online consumer marketplace include consumer protection, privacy, data protection, cybercrime, access to justice for resolving disputes, cross-border cooperation for enforcement, and building consumer awareness. Many of these issues cannot be meaningfully canvassed in this report; a number are dealt with under other reports and studies for this project.¹³

This report will focus on a number of the key issues, including:

- clarifying the objectives for consumer protection for online transactions within ASEAN (Section 2)
- taking a whole-of-government approach to dealing with online consumer transactions (Section 3)
- gaining enhanced information sharing and regulatory cooperation within ASEAN (Section 4)
- adopting measures to enable low-cost and efficient redress regarding complaints (Section 5)
- recognising judgements and tribunal orders within ASEAN (Section 6)
- developing a model law for cross-border online transactions (Section 6).

Other related issues, such as consumer awareness, building consumer trust and trust marks, are also briefly canvassed.

¹³ASEAN-Australia Development Cooperation Program (AADCP) Phase II: Supporting Research and Dialogue in Consumer Protection Project.

2. Principles and objectives of online consumer protection

Overview

A number of case study participants expressed the need for establishing clear objectives for regulating and promoting the online consumer marketplace so as to guide directions for future reform. Objectives have been established by a range of agencies and organisations that apply to varying e-commerce related contexts. These have been developed by ASEAN, the Asia-Pacific Economic Cooperation (APEC), the Organisation for Economic Co-operation and Development (OECD), UNCTAD and other agencies. These can guide the development of re-defined ASEAN principles and objectives.

Case study responses

Consumers International proposed that when developing any consumer protection mechanisms the key questions to be asked are if the mechanisms will:

- be effective in practice. That is, would consumers realistically be able to use and benefit from the mechanisms?
- operate efficiently in the real world.

Consumers International suggested consideration be given to the *UNCTAD Guidelines for Consumer Protection* for assistance when developing principles. The guidelines are presently being reviewed by UNCTAD, with a revised version likely to be made available during 2014.

Developing a set of principles and objectives involves, in part, understanding the nature of the issues confronting consumers. Malaysian officials identified the key areas of concern as privacy, dispute resolution and transactions' security. The main consumer complaints they identified include:

- not receiving the goods ordered
- receiving defective goods
- not being able to locate the seller after purchase.

A persistent problem experienced in Malaysia and other jurisdictions arises from 'fly by night' operators. They deliberately scam consumers by creating a site, or use an online platform such as Facebook, to apparently offer goods at well below normal prices. When contacted by a consumer, he or she is asked to provide a deposit. The promised goods are never delivered, and the operator vanishes. Considerable government resources often are spent attempting to locate the perpetrator.

At the same time, it needs to be recognised that consumers also behave badly. In some instances, they will falsely claim that they did not receive the goods or that they were received in the damaged state, then subsequently retain the goods without paying for them.

Discussion

A starting point for developing principles and guidelines is to clearly identify the problems to be dealt with. ASEAN has noted that the region has enormous potential for greater e-commerce. However, it identified significant barriers to its take-up, including:

- lack of consumer trust
- an inability to judge the quality of the product during online shopping
- payment fraud
- privacy
- identity theft
- lack of ready and affordable access to complaints systems.¹⁴

Another useful source for developing e-commerce principles is the *APEC Blueprint for Action on Electronic Commerce*. The APEC ministers who approved the blueprint did so after:

- recognising the enormous potential of electronic commerce to expand business opportunities, reduce costs, increase of efficiency, improve the quality of life, and facilitate the greater participation of small business in global commerce
- taking into account the different stages of development of member

¹⁴ UNCTAD Report at pp.3 and 4.

economies, and the regulatory, social, economic and cultural frameworks in the region

- taking into account that enhancing capability in electronic commerce among APEC economies, including through economic and technical cooperation, is needed to enable all APEC economies to reap the benefits of electronic commerce.¹⁵

Based on these assumptions, the ministers agreed that the role of governments is to promote and facilitate the development and uptake of electronic commerce by:

- providing a favourable environment, including legal and regulatory aspects, that is predictable, transparent and consistent
- providing an environment that promotes trust and confidence among electronic commerce participants
- promoting the efficient functioning of electronic commerce internationally by aiming, wherever possible, to develop domestic frameworks that are compatible with evolving international norms and practices
- becoming a leading-edge user in order to catalyse and encourage greater use of electronic means ...¹⁶

Yet another source of principles is the *United Nations Guidelines for Consumer Protection* (as expanded in 1999), which provide in part as follows:

...General principles

...2. Governments should develop or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each government should 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.

¹⁵ www.apec.org/Meeting-Papers/Leaders-Declarations/1998/1998_aelm/apec_blueprint_for.aspx

¹⁶ www.apec.org/Meeting-Papers/Leaders-Declarations/1998/1998_aelm/apec_blueprint_for.aspx

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

- (a) The protection of consumers from hazards to their health and safety;*
- (b) The promotion and protection of the economic interests of consumers;*
- (c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- (d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
- (e) Availability of effective consumer redress;
- (f) 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;
- (g) The promotion of sustainable consumption patterns.*

Notably, the European Union (EU) in its European Consumer Agenda¹⁷ places consumers at the centre point in attaining an effective and successful European single market. It recently released a policy document that develops a ‘systematic approach to integrating consumer interests into all relevant policies and puts a special emphasis on tackling problems faced by today’s consumers in the food chain, energy, transport, digital and financial services sectors’.¹⁸

Proposals

In developing a clear set of principles and strategies, it is suggested that they be developed with the involvement of key consumer and industry representatives. Business stands to benefit from enhanced consumer trust and confidence in the purchasing of goods and services online. It could also be encouraged to develop a voluntary set of principles and strategies to enhance consumer confidence and engagement.

¹⁷European Commission, *A European Consumer Agenda – Boosting Confidence and Growth* (COM(2012) 225, Brussels) available at http://ec.europa.eu/consumers/strategy/docs/consumer_agenda_2012_en.pdf p 1. For EU documentation online, see especially <http://eur-lex.europa.eu/en/index.htm> and http://ec.europa.eu/consumers/index_en.htm

¹⁸ http://ec.europa.eu/consumers/safety/rapex/index_en.htm at p.1.

3. A whole-of-government approach

Overview

A number of participants identified issues regarding insufficient coordination of information, strategies and implementation within their own government agencies. The issue is particularly acute for online consumer protection, as it potentially engages a range of agencies including those responsible for telecommunications, consumer protection, police enforcement, business and economic advancement, international trade and the central bank. It was said that the relevant agencies tend to adopt a somewhat siloed approach to their areas of responsibility, which takes focus away from coordinating policies and approaches for dealing with issues such as online consumer protection.

Case study responses

It was said that ASEAN member countries tend to structure their government departments so that a distinction is made between advancing domestic trade and international trade, with international trade gaining priority. In many cases, this leads to effective efforts made to comply with international standards for product safety and consumer protection for exported goods but the same degree of compliance and protection is not provided for domestic consumers. This suggests that governments have the capacity to provide full protection for domestic consumers, but do not place the same priority on doing so as they do for exported goods.

Discussion and proposals

Coordination among government agencies is an issue confronting most, if not all, governments throughout the world. One way of dealing with this issue is to identify it as a priority and to adopt a whole-of-government approach to dealing with it. A particular department within government could be given lead agency responsibility for developing whole-of-government policies and strategies to deal with online commerce, including consumer protection. Other relevant agencies would need to be actively engaged in the process of developing the policies and strategies.

A working party could be formed, to identify existing policies, strategies and approaches and make preliminary assessments of their success and

their shortcomings. The working party could then propose policies and strategies informed by best practice within ASEAN and other jurisdictions. A discussion paper could be circulated among key stakeholders for their input before a final paper is drafted. This process could involve coordinating responses between a number of agencies including those responsible for consumer protection, telecommunications, law enforcement, consumer complaints agencies, and business and consumer organisations.

This same broad approach could be taken at the ASEAN level, with a particular agency within a member nation responsible for providing leadership and administrative support to develop ASEAN-wide policies and strategies.

4. Information sharing and regulatory cooperation within ASEAN

Overview

A number of reports, including the UNCTAD Report, emphasise the need for information sharing, capacity building and regulatory cooperation. There is some level of information sharing through the ASEAN website; this could be further developed. There is also a degree of regulatory cooperation, for instance for issues relating to food.

Case study responses

Concerns expressed by participants about the inadequacy of information sharing and knowledge within government were also expressed regarding relations between ASEAN governments.

It was noted that there is regulatory cooperation in some areas, such as with food safety. Some information is available on the ASEAN website; however, it was noted that information sharing needs to be more extensive than presently exists on that site.

Closer integration between the work of ASEAN and APEC was suggested. Comments by case study participants regarding enhanced information sharing and cooperation included:

- there needs to be better coordination among consumer protection agencies within ASEAN
- there needs to be better regulatory cooperation in relation to criminal and other investigations
- an ASEAN ministerial council responsible for consumer affairs might be a good idea
- there should be a clearinghouse for ideas, approaches and strategies regarding consumer issues
- there should be better linkages with APEC working groups regarding e-commerce
- the relevant ASEAN regulators in each country should be a member of the International Consumer Protection and Enforcement Network¹⁹
- consideration should be given to actively involving ministers and government officials responsible for consumer affairs in the ASEAN Economic Officials Meeting, at least in so far as it involves enhancing e-commerce.

Discussion

The need for regulatory cooperation and information sharing will become more pressing as the number of consumers purchasing online increases. This increase may be rapid. It is in the mutual interest of business and consumers for the internet to be seen as offering a safe and trustworthy means for purchasing goods and services. It appears from the responses of participants that there is an assumption within national governments and across governments within ASEAN that consumer protection is a separate and distinct issue to enhancing e-commerce. As mentioned, this is not so. Enhanced consumer protection is crucial in building consumer trust, which in turn increases consumer engagement and participation with online commerce. If this is accepted, it follows that government agencies responsible for consumer protection should be active participants in the development of e-commerce policies and strategies. This active participation should take place at both the ASEAN and APEC levels.

¹⁹ <https://icpen.org/>

Enhanced regulatory cooperation has been proposed previously. At its second meeting in August 2009, the ASEAN Committee on Consumer Protection (ACCP) discussed the terms of reference and work programmes for all three ACCP working groups. The work programmes form the basis of the ACCP's overall work plan to 2010–2011. The initiatives included the:

- (a) development of a notification and information exchange mechanism
- (b) notification and information exchange mechanism on unsafe products in ASEAN Member States
- (c) development of a cross-border consumer redress website
- (d) development and implementation of a capacity-building roadmap.

There have been some positive developments in attaining these objectives. Information sharing, particularly for unsafe products, has seen some gains. A website has been developed that provides some sharing of information in relation to ASEAN consumer protection measures.

The Second Consultative Meeting of the Working Group on Cross-Border Consumer Redress Development of Complaint and Redress Mechanism Models in ASEAN (in Jakarta, Indonesia, October 2013) recently proposed:

- agreement between members of proposed South East Asian Consumer Council on cross-border redress
- ASEAN agreement on cross-border consumer dispute resolution
- formation of the ASEAN Consumer Redress Network (Model: European Consumer Centres Network (ECC Net))
- the working group to be absorbed in the ACCCP as one of its working groups and the next meeting to take place during the first ACCCP meeting in Kuala Lumpur.²⁰

Recommendations were also made for:

- MOUs between governments to strengthen consumer protection, including cross-border dispute resolution (e.g. Malaysia–Singapore)
- MOUs between consumer organisations for cross-border complaints handling (e.g. CASE).

²⁰ aseanconsumer.org/misc/downloads/misc-crossborder2.pdf

Proposals

Regulators in ASEAN countries may consider becoming members of the International Consumer Protection and Enforcement Network. In working on this project, the consultants have obtained an extensive, and increasing, amount of information about legislation and other data that may be of use to the ASEAN website. ASEAN might consider having regard to the implementation of the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders*.

5. Low-cost and efficient redress

Overview

Each of the case law countries provides consumer redress mechanisms for low cost. To date, there have been relatively few consumer complaints about online transactions, but this may well change in the future with greater uptake of consumer online purchasing. The redress mechanisms in the case study countries are as follows.

Case study responses

Malaysia

The Tribunal for Consumer Claims Malaysia was established in 1999, soon after the enactment of the Consumer Protection Act 1999. The tribunal has 40 active branches throughout the country, along with 32 additional hoc bodies. It has jurisdiction for claims up to RM 25,000, with a RM 5 complaint fee.

The tribunal was established to provide alternative ways for consumers to claim for losses suffered from purchased goods and services and an alternative forum for consumers to file claims in a simple, inexpensive and speedy manner.

The Malaysian Government has a 'no wrong door policy'. Government agencies that deal with the public, such as the Tribunal for Consumer Claims, must avoid turning away members of the public that approach the tribunal on the basis that they have gone to the wrong agency. Rather, the tribunal must help the person as best they are reasonably able. This

involves assisting complainants in making their complaint applications. The tribunal will therefore always deal with a matter in one way or another.

If there are more than five cases involving the same company or individual, the tribunal will contact the police. The conduct may constitute a breach of the Data Protection Act. Often consumers lodge complaints with police. If they consider it appropriate, the police will refer a matter to the tribunal.

The tribunal provides an online query system. If the complainant provides his or her phone number, the tribunal will contact the complainant. The tribunal will provide an email response within three days. The tribunal has a consumer complaints division and an enforcement division.

Singapore

In Singapore, consumer claims can be dealt with by the State Court, the successor to the previously named Small Claims Tribunals. They were established in 1985 to provide a quick and inexpensive forum to resolve small claims between consumers and suppliers. The State Courts have jurisdiction to hear claims not exceeding \$10,000, or up to \$20,000 if the parties agree in writing.

A consumer complainant may seek assistance from CASE, which is partly funded by the government. Usually, CASE will seek to resolve the matter by negotiating with the seller. If that fails, mediation will be attempted, and if that fails the matter is taken before the State Court. Counselling and legal advice is provided to the consumer free of charge. CASE's policy is to help consumers help themselves. It offers a four-step process for assisting to resolve disputes.

- Step 1: CASE provides the consumer with an Assisted Case-Write letter which the consumer takes to the business. The letter will usually state that the consumer has certain rights and so on. The cost to the consumer for the letter is \$10. The consumer is encouraged to negotiate the matter with the business.
- Step 2: If the consumer wishes to take the matter further, CASE will correspond with and phone the business on behalf of the consumer to attempt to reach a negotiated settlement. This costs the consumer \$35.

- Step 3: CASE attempts mediation with the business in question.
- Step 4: The consumer takes the matter to the State Court.

There were 21,000 complaints during 2013.

Indonesia

Consumers can seek resolution of their disputes through the Consumer Dispute Settlement Body (BPSK). The BPSK is established under the Law on Consumer Protection (Law No. 8/1999). The agencies are established at district level to assist with out-of-court settlement through mediation. The BPSK provides mediation, conciliation and arbitration services and supervises compliance of settlement agreements. It can receive complaints and issue subpoenas. The BPSK also serves a regulatory function in ensuring compliance with orders. Out of 500 districts in Indonesia, there are 120 BPSK district-based agencies, half of which are active. The agency's goal is that all businesses meet the objective of providing consumer protection.

Consumers can seek assistance in having their disputes resolved from the Indonesian Consumers Association (YLKI) or the National Consumer Protection Agency (BPKN). The BPKN has not seen many complaints that directly relate to online transactions.

Discussion

At present, the number of consumer complaints is relatively low. The Tribunal for Consumer Claims Malaysia stated that during 2012 there were 184 complaints about online transactions out of 7,872 complaints that year. During 2013, there were 153 complaints about online transactions out of 7,739. CASE also reported a relatively low number of complaints about online transactions. The Indonesian BPSK received one complaint that was specifically characterised as being about online transactions, but had received more than 500 complaints from overseas buyers.

As a typical example of a complaint from an overseas consumer, a Malaysian consumer complained about a hotel's service in Bali. The matter was settled between the parties using the agency of the BPSK. The most common complaints are about the payment of money to a trader who has vanished and not provided the goods or services ordered.

Malaysia is unique in that it is a criminal offence under Section 117 of the Consumer Protection Act for a party to fail to comply with an order of the Tribunal for Consumer Claims. Consequently, if a trader fails to repay a consumer under a tribunal order, the trader may face a criminal penalty. This is a strict liability offence with a fine of up to RM 5000. Payment of the penalty does not remove the trader's liability to pay to the consumer the amount ordered by the tribunal. In practice, the fine is rarely, if ever, imposed. On receipt of a notice to pay the fine, a trader will often either pay the amount due to the consumer or seek to reopen the matter to have it reheard. The tribunal will normally accede to the request.

The EU has introduced a Mediation Directive that applies to cross-border civil disputes and promotes alternative dispute resolution.²¹ The EU is also committed to putting in place an online platform for resolving cross-border disputes by 2014.²² The United Nations Commission on International Trade Law is also working towards developing processes for online dispute resolution.

Proposals

ASEAN may seek to build on existing dispute resolution processes having regard to these developments of the EU and the United Nations.

6. Judgements and tribunal orders and a model law for cross-border online transactions

Overview

A number of participants drew attention to problems with the capacity to enforce a judgement debt or tribunal order against a seller in another ASEAN country. Although there may be a law that recognises foreign judgements, these will often not apply to the judgements of a small claims court or consumer disputes tribunal. There was some discussion about extending the operation of recognition of foreign judgements law; however, some participants felt that it would be unfair to enforce the judgement of

²¹ Consumer Protection PE487.749 European Parliament legislative resolution of 12 March 2013 on the proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

²² http://ec.europa.eu/consumers/redress_cons/docs/com_2013_401_en.pdf

an overseas country if that country did not provide the same legal rights to consumers as existed in their country. This suggests that there ought to be moves to gain greater harmonisation of consumer protection laws within ASEAN. The proposal made in this section is that a model law be developed for cross-border online transactions within ASEAN. The law could apply to both business-to-business and business-to-consumer contracts, and could also include provisions regarding the recognition of tribunal and court decisions for cross-border enforcement purposes.

Case study responses

Case study participants identified a number of issues regarding the difficulties of cross-border consumer transactions:

- It is difficult (or impossible) to enforce an order of a consumer complaints tribunal or small claims court in another ASEAN country.
- There is lack of harmonisation of ASEAN laws regarding privacy principles, data protection and other related issues pertaining to consumer trust and confidence.
- There is no effective system for enforcing criminal and other penalties across borders within ASEAN.

Discussion and proposals

The legal, practical and financial difficulties that exist in relation to cross-border transactions can retard the growth of e-commerce within ASEAN. The EU acknowledged, for instance, that online transactions within the EU are being hampered by the fact that a business transacting with a consumer outside its jurisdiction:

- must identify the provisions of another country's applicable law
- incurs additional costs from the translation, legal advice and adaptation of contracts to different national laws.

According to the EU, these barriers are factors that dissuade many firms from entering into cross-border trade and others from expanding into more member states. This is particularly true for small- and medium-sized enterprises, for which the costs of entering multiple foreign markets can be prohibitively high in relation to their turnover. The impact of businesses not

selling across borders means that consumers are often faced with fewer choices at higher prices in their domestic market, or are even refused access to products from other member states.

To remedy this, the European Commission has proposed a Common European Sales Law (CESL).²³ Parties to a cross-border transaction within the EU will be able to voluntarily elect in their sales contract to have the CESL apply as the law of the contract. This will stand as an alternative to having the domestic law apply to the contract. This will reduce costs, simplify the legal environment, enable on-flow of lower prices and bring about greater protection and certainty for consumers.²⁴

It might be claimed that a CESL approach would not work within ASEAN because of the differences in the legal regimes within ASEAN, and the differences in economic development. However, just as there are some common law countries within ASEAN (including Malaysia and Singapore) and civil law countries such as Indonesia, there are also common law and civil law countries within the EU. In addition, a model law dealing with the international sale of goods has been in place since the 1980s and has been adopted in civil law and common law countries throughout the world. The United Nations Commission on International Trade Law Convention on the International Sale of Goods, which applies to the international sale of goods between commercial businesses, has been adopted by more than 80 countries and has been proven to be quite effective. It deals with issues such as contract formation, the point in time when the risk of loss or damage to the product passes from seller to buyer, and the consequences of a breach of contract.

The Uniform Commercial Code (UCC) is an example of a US model law addressing most aspects of commercial law. The first edition of the UCC was published in 1952, ten years after drafting first began. The UCC was and continues to be drafted jointly by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. This approach is inherently voluntary. As such, member states may simply choose not to implement the model law in any form. In the US, the UCC has been adopted in some form in each of its 50 states. However, even if member states do choose to implement the model law, as it is only a

²³ http://ec.europa.eu/justice/contract/cesl/index_en.htm

²⁴ http://ec.europa.eu/justice/contract/cesl/index_en.htm

model, there is a high propensity for divergence between member states as to the provisions of their relevant laws. For example, while UCC § 2-302 on unconscionable contracts or clauses has been adopted in a majority of the US states, Louisiana did not adopt it in any form.

ASEAN may wish to adopt a similar approach of developing a law for cross-border transactions within ASEAN, including business-to-business and business-to-consumer contracts. Some provisions of the law could be voluntarily adopted by the parties into their contract. There could also be mandatory provisions dealing with some basic consumer rights such as sellers providing cooling-off periods, clear information about their identity and reasonably clear information about their products. The law might also provide for the recognition of the orders made by a consumer complaints tribunal, small claims court or other similar bodies. Such provisions could, more or less, follow the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).²⁵ This may enable easy cross-border enforcement of judgements, orders and awards within ASEAN.

A number of initiatives outside ASEAN, particularly in the EU, enable low-cost and relatively quick means of resolving cross-border consumer disputes. In 2009, the EU introduced the European Small Claims Procedure. If the other party to a cross-border dispute admits to the claim, an applicant can seek a European Payment Order as the basis for enforcing the claim. Obtaining a payment order involves filling in a form and lodging it with an appropriate court. If the claim is denied, the applicant can seek payment using the European Small Claims Procedure, if the claim is for less than €2,000. This involves obtaining an order in a small claims court in an EU country (except Denmark), and if successful in obtaining an order, lodging it with the relevant court in the overseas country for enforcement.²⁶ Presently, the system has not yet proven to be as successful as hoped, due in part to a lack of knowledge of the procedure by judicial authorities. Issues also arise with translating the orders into the language of the court in the enforcing jurisdiction.

²⁵ www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

²⁶ www.courts.ie/Courts.ie/library3.nsf/pagecurrent/BE71CDF8FCA10C8C80257559005F5C59?opendocument Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007. Regulation (EC) No 1896/2006 creating a European Order for payment procedure, OJ L 399, 30.12.2006.

ATTACHMENTS

1. Methodology and timetable of meetings with participant agencies and organisations

The case study meetings involved semi-structured interviews. The running sheet for the interviews appears in Attachment 2. Participants were provided a copy of the interview running sheet a week or so in advance of each meeting. Generally, however, the conversations were free-flowing, and the running sheet was not closely followed. This gave participants the opportunity to direct the course of the conversation and provide relevant insights. The participants were also assured that the discussions would be treated confidentially, in that participants would not be directly quoted without their permission.

The semi-structured interview approach was adopted because it allows for initial exploration of issues as well as explorative flexibility. It enables the researcher ‘to see reality from a client’s point of view’²⁷ and collect data with an open willingness to learn from the participants and to explore new questions that are likely to emerge from the study.²⁸ This enables the generation of ideas and thoughts linked to the objects and concepts under analysis.²⁹ It also enables taking a holistic perspective on an issue and gaining a contextual understanding of the research issues. The aim of semi-structured interviews is ‘to avoid predetermined outcomes, that is to say, using a less obtrusive means for attaining data’.³⁰ The aim in this case study, therefore, was to gain a sense of the broad concerns, interests, and desires of interviewees and to gain a general sense of the strategies they consider appropriate for dealing with the harmonisation issue.

²⁷ RA Krueger, *Focus Groups: A Practical Guide for Applied Research* Edition, 2nd ed. (Sage Publications, 1994) p.9.

²⁸ S Lederer, ‘History’, in Sugarman & Sulmasy (Eds.), *Methods in Medical Ethics* 2nd ed. (Georgetown University Press, Washington, DC, 2010) p. 158.

²⁹ P Brito, ‘Teen Conceptualization of Digital Technologies’ (2011) 14 *New Media and Society* 14, 513–532 at 520.

³⁰ M Patton *Qualitative Evaluation and Research Methods* 2nd ed (Sage Londohn 1990) at p.132.

City	Departments or organisations	Date
Kuala Lumpur	Ministry of Domestic Trade, Co-Operatives and Consumerism Service Industry Division Enforcement Division Domestic Trade Division Cybersecurity (Agency) under the Ministry of Science, Technology and Innovation (MOSTI)	24 February
	Consumers International	
	Malaysian Consumer Complaints Tribunal	25 February
Singapore	Ministry of Trade and Industry	26 February
	Consumers Association of Singapore (CASE)	
Jakarta	Directorate of Consumer Empowerment Directorate of Domestic Business Directorate of Domestic Trade Development and Enterprise Registration (MoT), R & D Agency for Domestic Trade (MoT) Directorate E-Business, Ministry of Communication and information	27 February
	Indonesian Consumers Association (YLKI) National Consumer Protection Agency (BPKN) Consumer Dispute Settlement Agency (BPSK) DKI Jakarta Indonesia E-commerce Association (idEA) R & D Agency for Domestic Trade (MoT)	

2. Interview running sheet

1. Introduction

Introduce the research topic, the purpose of the research and the research process.

2. The interviewee's knowledge and experience

Please tell me something about your roles and experiences, particularly in so far as they may have provided you impressions, knowledge and insights into consumer protection, particularly regarding online contracting.

3. Issues regarding consumer protection regarding online contracting

Taking your general impressions, do you believe that consumers have reasonable/very good/inadequate protection regarding purchasing goods or services online?

- Are there any examples, or anything you have heard about, experienced, read etc, regarding good or bad experiences that consumers have had?

4. What is working well?

Given your knowledge and experiences regarding the laws and regulations impacting on consumer protection for online purchasing, what do you believe is working well, and why do you think that?

- Any examples if possible.

5. What requires improvement?

Regarding the laws and regulations impacting on consumer protection for online purchasing, what do you believe could be improved, and why do you think that?

- Any examples if possible.
- Ideally, how would you change things if you could?

6. Harmonisation

ASEAN is seeking greater harmonisation of laws within the region. What I'd like to discuss now are various hypothetical or possible models for harmonisation and your reaction to them, and any insights, impressions or other perspectives you may be able to offer.

Invite responses to the following claim:

Harmonisation of consumer protection laws for online contracting may be particularly pertinent because of the ease at which a consumer in one ASEAN nation can purchase goods and services from a supplier in another ASEAN nation. Harmonisation may reduce transaction costs, make dispute resolution cheaper and easier, and provide greater certainty and therefore greater consumer confidence and participation in the online marketplace. It may also help make ASEAN online retailers more competitive internationally.

Given what I have said, what are your impressions and perspectives?

7. Harmonisation models

Assuming for the moment that we accept that it is worthwhile pursuing harmonisation regarding consumer protection, at least for online purchasing, I would like to propose a number of harmonisation models and seek your response, if any.

[Briefly describe each of these models to the participant.]

The various models could include:

- the European Union directives model
- the US commercial code model
- the UNCITRAL model law approach
- the council of ASEAN ministers responsible for consumer affairs approach.

Other additional or alternative approaches could be based on bilateral and multilateral agreements. Are you aware of any agreements that are in place at the moment that are relevant to consumer protection regarding online contracting? If so, what are they? If not, what sort of agreements should there be, and what should be the terms of those agreements?

Another more specific model could involve the recognition, for the purposes of enforcement, of any dispute findings of an ASEAN nation in another ASEAN nation. What are your insights regarding this approach?

8. Regional cooperation models

The International Consumer Protection and Enforcement Network (ICPEN) is an informal network of governmental organisations involved in enforcement of fair trade practices and other consumer protection activities. As far as I am aware, no ASEAN country is a member of ICPEN.

- Do you know why this is the case?
- Do you believe it is worthwhile for ASEAN countries to be members? If so, why/why not?
- Are you aware of any formal or informal regulatory cooperation within ASEAN regarding issues concerning online consumer contracting?
- How could these networks be introduced or improved?

9. Summing up and thanks

Are there any other comments you would like to make about what we have discussed, and about anything you would like to mention that has not been discussed?

Briefly summarise my understanding of what has been covered.

Thanks for participating.

Case Study 2:

Regulating unfair contract terms in ASEAN Member States



one vision
one identity
one community

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Summary

Increasingly, it is recognised that consumers dealing in the market face two overlapping issues affecting their choice of goods and services: unfairness in the process through which the contract was made (procedural unfairness) and unfairness in the substance of the contract terms in standard form contracts for those goods and services (substantive unfairness). Most ASEAN member states have general legislation that addresses the problems of procedural unfairness, in the form of prohibitions of misleading conduct and unfair advantage-taking conduct. Only some ASEAN member states have regulation that addresses substantively unfair contract terms. This case study considers the approaches taken to address these issues in three ASEAN countries: Malaysia, Myanmar and Singapore. The findings will help ASEAN Member States reflect on the need for general provisions protecting consumers from both substantive unfairness as well as the form that a regime regulating unfair contract terms might take.

The study recommends that:

- ASEAN Member States consider further research on the prevalence and effect of unfair terms in standard form contracts on consumers in the ASEAN region.
- Countries such as Myanmar that do not currently specifically regulate unfair contract terms consider introducing such a regime.
- Countries such as Singapore and Malaysia review the impact of their regimes dealing with the unfair exclusion and limitation clauses and also unfair terms generally, and share that information with other member states.
- ASEAN Member States consider coordinated education strategies aimed at both consumer and traders about the unfair terms in standard form contracts.
- Government departments responsible for consumer protection in the ASEAN region involve trade organisations and consumer advocates in developing strategies for promoting fair contract terms, possibly through standardised contracts or model terms.

1. Introduction

The United Nations Principles for Consumer Protection refer to the right of consumer choice, which is an important factor in promoting consumer confidence. However, what facilitates consumer choice is a complex question. Clearly, consumers should not be misled or deceived. Nor should they be subject to physical pressure or abuse in entering into a contract. Consumer choice is undermined by manipulative marketing strategies that prey on consumer anxieties and vulnerabilities. Consumer choice may also be limited by fine-print consumer terms that undermine the rights of consumers and make their contract less beneficial than expected.

The range of issues facing consumers in the marketplace are commonly divided into two categories relating to unfairness in the process through which the contract was made (procedural unfairness) and unfairness in the substance of the terms (substantive unfairness).¹

Two examples from the *Straits Times* illustrate these problems.

Example 1: Unfair contract process

The *Straits Times* (April 17) article 'Vietnamese tourist kneels and begs for refund of iPhone 6 at Sim Lim Square' reported the case of a Vietnamese tourist who had a very bad experience in trying to buy an iPhone 6. The tourist paid \$950 for the phone at Mobile Air, but was then asked to pay an additional \$1,500 as warranty fees. The tourist had been asked to sign an agreement, but 'did not scrutinise it as his English was not fluent, and he thought Singapore was a safe place to shop'. He had been asked if he wanted a warranty but assumed the one-year warranty was complimentary. The tourist was not told he would have to pay for this warranty.

This is an example of an unfair contract process (procedural unfairness). The details of the transaction were not provided in the article. However, such practices may involve misleading omissions, in not disclosing the full price of the product and also unfair advantage taking, in that the shop took advantage of the inexperience and language difficulties of the consumers.

¹ On the distinction between procedural and substantive unfairness, see *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 620 (McHugh JA).

Example 2: Unfair contract terms

The *Straits Times* (April 17) article ‘Mobile Users on Contract get 4G Shock from Telco’, reported a problem of telecommunications providers changing contract pricing after selling mobile phone packages to consumers.

The details of the contracts in this case were not provided in the article. However, some telco contracts give providers the right to change terms after the contract is made, which means those providers can increase prices after consumers have signed up to the contract, which can give consumers a pricing ‘shock’. This is an example of a (substantively) unfair term that is balanced against the interests of consumers.

Problems of procedural and substantive fairness faced by consumers in market transactions may be addressed in legislation through specific targeted rules directed at particular types of transaction (for example, credit contracts or mobile phone contracts) and also through broad standard-based prohibitions that apply to all consumer transactions. In the European Union and Australia, there are standard-based prohibitions on unconscionable or unfair commercial practices and on unfair contract terms. These types of provisions are also found in the consumer laws of many ASEAN Member States.

This case study considers the general provisions that address the unfair treatment of consumers in three ASEAN member states: Myanmar, Malaysia and Singapore. These countries have been chosen because they illustrate different approaches to the issues. Myanmar has only recently enacted its consumer law, while the regimes in Singapore and Malaysia are more established. All three countries have general prohibitions on procedural unfairness, such as misrepresentation and undue coercion or harassment. The consumer protection law in Myanmar emphasises precluding unsafe products and misleading or deceptive practices. Singapore regulates unfair exclusion clauses while Malaysia has a regime that extends to regulating general substantive unfairness.

The aim of the study is to assist ASEAN Member States in reflecting on the need for general provisions protecting consumers from unfair contract terms in standard form contracts, and the form that such a regime might take.

Many countries committed to consumer protection are grappling with the question of how to promote genuine consumer choice while still preserving incentives for consumers to take responsibility for their own well-being, and without impeding the operation of the free market. Where the line is drawn will be informed by the expectations and values of the communities in question. However, there is increasing recognition of the value of cross-border trade and of the common issues facing consumers in the region. Therefore, ASEAN Member States might find it useful to share ideas about the expectations of fair treatment of consumers, legislative measures for promoting both procedural and substantive fairness, and strategies for ensuring that the standards of fair dealing expected in the market place are internalised and applied by traders and consumers alike. This type of reflection may provide new insights into the regulatory strategies that would better promote consumer confidence in the region.

Procedural and substantive fairness

Consumer protection law has traditionally addressed procedural unfairness, ensuring consumers have accurate information about the goods and services they are considering purchasing and ensuring they are not misled or pressured into transactions. These are important concerns. Consumers cannot genuinely exercise choice about the products and services they will purchase (which drives an efficient market) if their ability to make decisions has been compromised by misinformation, exploitative advantage taking or undue coercion or harassment by the trader. The view is sometimes taken that as long as parties have not been misled or coerced then there is little need for consumer protection regulating the substance of contract terms because those reflect the choices of the parties concerned.² However, this approach does not fully acknowledge the bargaining constraints on consumers entering into standard form contracts.

Standard form contracts can benefit contracting parties by reducing the costs associated with negotiating and drafting contracts on a case-by-case basis.³ Consumers should carefully read the terms of contracts before they agree to them. However, there are real concerns that standard form

² See, e.g., Anthony T Kronman, 'Paternalism and the Law of Contracts' (1983) 92 *Yale Law Journal* 763, 763–4.

³ Michael J Trebilcock, 'Rethinking Consumer Protection Policy' in Charles E F Rickett and Thomas G W Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) 68, 93.

contacts may not always promote the interests of even careful consumers. By definition, there is little opportunity for consumers to negotiate the terms of standard form contracts. There may be little opportunity for consumers to read and assess the terms contained in standard form contracts. Such contracts are typically presented by traders to consumers on a ‘take it or leave it basis’.⁴ The terms of a standard form contract may not be available to consumers at the time the contract is made.⁵ Even if available, consumers may not read the terms of the standard form contracts presented to them because they do not have the time or the skills to do so.⁶ Even if consumers do read the terms of standard form contracts, these may be expressed in obscure or legalistic language that makes it difficult for consumers to understand legal issues contained in those terms. Moreover, studies in behavioural economics, which draw on psychology and economics, suggest that there are cognitive limitations on the ability of consumers to use information in the highly rational manner presumed by neo-classical economic theory.⁷

Consumers entering into standard form contracts are not only unlikely to read the terms of those contracts. Behavioural economics shows that consumers ‘will often process imperfectly even the information they do acquire.’⁸ In making decisions, consumers are poor at processing large amounts of information and consequentially tend to focus on a few key factors.⁹ In the process of contracting, consumers will typically focus on a few key ‘salient’¹⁰ or visible

⁴ *George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297 (Lord Denning MR); *Schroeder Music Publishing v Macaulay* [1974] 3 All ER 616, 624 (Lord Diplock).

⁵ See, eg, *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 204 (Wilson and Toohey JJ).

⁶ *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1, 25 (Kirby P). See also *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] AC 361, 406 (Lord Reid).

⁷ See generally, Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211; Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203; Robert A Hillman and Jeffrey J Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ (2002) 77 *New York University Law Review* 429.

⁸ Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211, 214.

⁹ Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203, 1226–9.

¹⁰ Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203 1262.

terms,¹¹ such as price, quantity or warranties,¹² and pay little attention to the remainder of the contract. This inability to focus on more than a few key factors is exaggerated if there are other distractions accompanying the decision-making process, for example, prominent advertising.¹³ Studies in behavioural economics have also found that individuals are poor at assessing the risks associated with a particular contract term. Thus, individuals ‘judg[e] risk to be high when the type of harm is familiar or easily imagined and low when it is not.’¹⁴

The implications of these findings in considering the fairness of the terms in standard form consumer contracts are significant. Many incidental terms are found towards the end of the contracts and may be expressed in technical legal language. These factors make it more likely that consumers will not be aware of the existence of such terms or their impact. Even if such terms are displayed in a prominent position and expressed in clear language, they may not influence consumers’ decisions to enter into the contract. Consumers may instead focus on issues of price and quantity and are unlikely to base their decisions on an assessment of the potential impact of the other terms of the standard form contract presented to them. Even to the extent that consumers do consider the impact of incidental terms, their assessment of the risks imposed by these terms may be inaccurate. Due to inexperience, consumers may dismiss as remote the risk allocated to them under these terms.

Overreaching or onerous contract terms may be particularly problematic where consumers are purchasing ‘credence’ goods, such as complex items such as electric goods or white goods. Consumers cannot easily

¹¹ Todd D Rakoff, ‘Contracts of Adhesion: An Essay in Reconstruction’ (1983) 96 *Harvard Law Review* 1173, 1251.

¹² Robert A Hillman and Jeffrey J Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ (2002) 77 *New York University Law Review* 429, 452. See also Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2nd ed, Hart Publishing 2007), 162; Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211, 241.

¹³ See Eldar Shafir, ‘A Behavioural Perspective on Consumer Protection’ (2008) 15 *Competition and Consumer Law Journal* 302, 309–10; Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2nd ed, Hart Publishing 2007), 74, 75.

¹⁴ Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203, 1233. See also Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211, 213, 218–19; Jon D Hanson and Douglas A Kysar, ‘Taking Behavioralism Seriously: The Problem of Market Manipulation’ (1999) 74 *New York University Law Review* 630, 662–4.

verify the quality or reliability of such goods. Consumers may expect these goods to operate for a period of time that is commensurate with their price and yet find that their rights to repair or replacement of defective goods are restricted by terms exempting the manufacturer or retailer from liability. In ongoing contracts for the supply of services, there may be unilateral variation clauses or broad termination clauses can impact harshly on consumers. Exclusive jurisdiction clauses may limit consumers' ability to enforce their rights in cross-border transactions.

Examples of unfair terms

Some examples of the types of unfair terms that are commonly found in consumer contracts are listed below.

Exclusion and limitation clauses

Exclusion or limitation clauses aim to reduce or exclude a party's liability for conduct that would otherwise be in breach of contract or constitute a tort, such as negligence. Exclusion clauses may represent a fair allocation of risk between parties. In standard form consumer contracts they may also represent an attempt to shift responsibility for risks well within the control of the trader to consumers, to the extent that the trader will not be liable for goods that are not of acceptable quality or where there is a failure to use due care and skill. For example:

The company shall remove furniture, carpeting and valuables if so specifically requested by the customer but shall not be responsible for damage caused carrying out such work nor be responsible for their reinstatement or the cost thereof.¹⁵

Refunds: Refunds, other than rectification of an error made by the Operator, will only be given at the discretion of the Operator.¹⁶

¹⁵ Exclusion clause considered unfair by the Office of Fair Trading (UK), Unfair Contract Terms Guidance: Annexes (2008) 14.

¹⁶ Exclusion clause found to be unfair under Part 2B of the FTA in Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd [2008] VCAT 2092 (Unreported, Harbison VP, 24 October 2004) [155].

Entire agreement clauses

Standard form contracts commonly contain boilerplate provisions saying that the written contract contains the entire agreement of the parties.

For example:

ENTIRE AGREEMENT: The Membership Agreement together with the Membership Terms and Conditions Schedule, the Privacy Statement and the Direct Debit Service Agreement constitutes the entire agreement, understanding and arrangement (express or implied) between the Customer and the Operator relating to the subject matter of this Contract and supersedes and cancels any previous agreement, understanding and arrangement relating thereto whether written or oral.¹⁷

The Customer should ensure that any representation or promise made before or at the time of signature to the contract not included in the printed form of the contract is added in writing to the face of the contract and signed by the Customer and the Company or its agent. In this way there will be no doubt as to the terms of the representation or promise. Any such statement not in written form must be agreed by the surveyor in writing.¹⁸

Entire agreement clauses attempt to prevent material extrinsic to the formal written contract document, such as oral representations, pamphlets or other advertising, from being incorporated into the contract between the parties by stating that the written contract forms the ‘entire’ agreement of the parties.¹⁹ Other types of terms that attempt to achieve the same result include terms stating that agents or employees of the trader do not have authority to make statements binding on the parties or to make changes to the written contract or that any changes to the written contract must be in writing signed by a particular officer of the trader.²⁰

¹⁷ Entire agreement clause held to be unfair under FTA (Vic) pt 2B in *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092.

¹⁸ Entire agreement clause held to be unfair under the UTCCR in *Office of Fair Trading v M B Designs (Scotland) Ltd* [2005] CSOH 85.

¹⁹ On entire agreement clauses see generally N.C Seddon and M.P Ellinghuas, *Cheshire and Fifoot’s Law of Contract* (9th ed, Butterworths, 2008) pp 403-404; J.W Carter, E Peden and G.J Tolhurst, *Contract Law in Australia* (5th ed, Butterworths, 2007) pp 646-647.

²⁰ Office of Fair Trading (UK), *Unfair Contract Terms Guidance* (2008) [14.1.2].

Regulators and courts in England and Australia have regularly suggested that such clauses are unfair.²¹ It is unfair for traders to attempt to avoid liability for statements that were made to induce consumers to enter into the contract in the first place. Entire agreement clauses may also reduce the incentive for traders to ensure that the representations made by their employees and agents are accurate.

Unilateral variation clauses

Standard form contracts in a number of industries make use of broad or unfettered unilateral variation clauses in the provision of services. These clauses purport to allow the trader to change aspects of the service at any time.

*All prices are subject to alteration without notice and the price applicable shall be that ruling the date of dispatch ... the buyer is responsible for all carriage charges on orders. Carriage charges are subject to change without notice.*²²

*[The provider of mobile phone services] reserves the right to change prices or services at any time without prior notice to customers or the public Price changes will not be retroactive for existing prepaid customers. It is the User's responsibility to check this online.*²³

A trader who has contracted to provide services on particular terms should not be able to change those terms on a whim. If traders require discretion to change the terms of the contract then the circumstances in which those

²¹ Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (2008) 61; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2011) p 22; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 13. Entire agreement clauses were found to be unfair under the UTCCR in *Office of Fair Trading v MB Designs (Scotland) Ltd* [2005] SLT 691, [45] and under the former Pt 2B of the FTA (Vic) in *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [163].

²² Term considered unfair by the Office of Fair Trading (UK), *Unfair Contract Terms Guidance: Annexes* (2008) 87.

²³ *Netspeed General Terms and Conditions 1.7*, declared unfair by the Federal Court of Australia under the Australian Consumer Law in *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013). See also *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, [50].

changes can be made should be defined. There should also be limits on the extent to which changes can be made that have a negative impact on consumers. Traders should not be able to vary the essential features of contracts they have committed themselves to perform at least without consent of the consumer or giving consumers the right to exit the contract if the changes have a negative effect on them. See also example 2 in the introduction above.

Over reaching termination powers

Consumers who have contracted for the provision of a service rely on that service being provided for the period of the contract without disruption. Yet some standard form contracts for the supply of ongoing services give traders overreaching termination powers. For example:

*[the provider] reserves the right to terminate any account at any time with or without cause or reason...*²⁴

This type of term goes beyond what is needed to protect the provider's interests and gives no protection to the interests of consumers.

Even where a provider's right to terminate the contract is restricted to specified events, the termination right should be a proportionate response to those events. In *Director of Consumer Affairs Victoria v AAPT Ltd*²⁵ the contract provided a right for the trader immediately to terminate the contract where the consumer had breached the contract in an inconsequential manner, or changed its address or contact details without notifying the trader. President Morris found that these terms were unfair within the meaning of what was then Pt 2B of the *Fair Trading Act 1999* (Vic). The terms were 'broadly drawn, and ... one sided in their operation'.²⁶

Exclusive jurisdiction

Some standard form contracts contain provisions requiring that, in event of dispute, consumers must sue the trader in a particular jurisdiction. This

²⁴ Netspeed General Terms and Conditions 6.5, declared to be an unfair term in *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

²⁵ [2006] VCAT 1493.

²⁶ [2006] VCAT 1493, [53].

is an important issue in respect to cross-border and online transactions where the provider of goods and services will often attempt to restrict the jurisdiction in which consumers are permitted to sue. Terms requiring consumers to sue in a particular jurisdiction have been judged unfair in the European Union and in Australia.²⁷ It will usually be the consumer who will suffer the cost and inconvenience of suing in another jurisdiction.²⁸ In *Oceano Grupo Editorial SA v Rocio Murciano Quintero*, the European Court of Justice found that a clause conferring exclusive jurisdiction on the trader's principal place of business was unfair.²⁹ The court held that:³⁰

A term of this kind, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or trader has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence...

By contrast, the term enables the seller or trader to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or trader to arrange to enter an appearance and makes it less onerous for him to do so.

²⁷ *Oceano Grupo Editorial SA v Rocio Murciano Quintero* [2000] ECR I-4941; *Standard Bank London Ltd v Apostolakis (No 2)* [2002] CLC 939; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [210].

²⁸ Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 21.

²⁹ [2000] ECR I. See also *Standard Bank London Ltd v Apostolakis (No 2)* [2002] CLC 939; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754.

³⁰ [2000] ECR I, [22] – [23].

The different regimes

Overview

Many jurisdictions have general consumer protection legislation that prohibits various forms of procedural unfairness. The European Union Directive on Unfair Commercial Practices³¹ contains a general prohibition on unfair commercial practices.³² This general prohibition is accompanied by prohibitions on unfair practices that involve a misleading action,³³ a misleading omission³⁴ or are aggressive.³⁵ These provisions are backed up by a 'blacklist' of practices deemed unfair under any circumstance.³⁶ Similar types of conduct are also caught by the Australian Consumer Law, which includes prohibitions on misleading or deceptive conduct,³⁷ undue harassment and coercion,³⁸ and unconscionable conduct.³⁹

These categories of misconduct are also the target of general consumer protection laws in most ASEAN Member States. Most states have laws that prohibit misleading conduct by traders. Many also have general consumer protection laws that prohibit traders from engaging in aggressive practices and from unfair practices that take advantage of vulnerable consumers, seen in example 1 in the introduction above.

³¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149, p. 22 ('Unfair Commercial Practices Directive').

³² Unfair Commercial Practices Directive Article 5(1).

³³ Unfair Commercial Practices Directive Article 6; Consumer Protection from Unfair Trading Regulations 2008 (UK) SI 2008/1277, Regulation 5. Compare Australian Consumer Law Section 18.

³⁴ Unfair Commercial Practices Directive Article 7; Consumer Protection from Unfair Trading Regulations 2008 (UK) SI 2008/1277, Regulation 6.

³⁵ Unfair Commercial Practices Directive Article 8; Consumer Protection from Unfair Trading Regulations 2008 (UK) SI 2008/1277, Regulation 7. Compare Australian Consumer Law Section 50.

³⁶ Unfair Commercial Practices Directive Annex I.

³⁷ Australian Consumer Law Section 18.

³⁸ Australian Consumer Law Section 50.

³⁹ See, e.g., *Australian Consumer Law* Sections 20–22.

General prohibitions on misleading conduct

Brunei	Consumer Protection (Fair Trading) Order 2011 s 4(a)
Cambodia	Law on the Management of Quality and Safety of Services and Services 2000 article 21
Indonesia	Law on Consumers' Protection 1999 article 7, 9 – 11
Malaysia	Consumer Protection (Amendment) Act 2010 Part II
Myanmar	Consumer Protection Law 2014 s 13
Philippines	Consumer Act of the Philippines Title III Chapter 1 Art. 50-51 and Chapter VI
Singapore	Consumer Protection (Fair Trading) Act 2003 s 4(a)
Thailand	Consumer Protection Act 1979 ss 4(1) and 22
Viet Nam	Law on Protection of Consumers' Rights 2010 Articles 8 and 10

General prohibitions on aggressive practices

Indonesia	Law on Consumers' Protection 1999 Art 15
Myanmar	Consumer Protection Law 2014 s 13
Singapore	Consumer Protection (Fair Trading) Act 2003 schedule 2 s 12
Thailand	Consumer Protection Act 1979 s 4(2)
Viet Nam	Law on Protection of Consumers' Rights 2010 Articles 10(2) and (3)

General prohibitions on unfair advantage taking

Brunei	Consumer Protection (Fair Trading) Order 2011 s 4(c)
Malaysia	Consumer Protection (Amendment) Act 2010 s 24C
Philippines	Consumer Act of the Philippines Title III Chapter 1 Art. 52
Singapore	Consumer Protection (Fair Trading) Act 2003 s 4(c)
Viet Nam	Law on Protection of Consumers' Rights 2010 Article 10(3)

Recognition of the risks to consumers arising from the widespread use of standard form contracts in consumer transactions has led to increasingly robust regulation in a number of jurisdictions addressed at ensuring substantive fairness in the terms of those contracts.⁴⁰ In the European Union, concerns with substantive fairness are expressed primarily through the Directive on Unfair Terms in Consumer Contracts,⁴¹ which renders void unfair terms in consumer contracts.⁴² As explained in *Director General of Fair Trading v First National Bank* by Lord Steyn:⁴³

The purpose of the Directive is twofold, viz the promotion of fair standard contract forms to improve the functioning of the European market place and the protection of consumers throughout the European Community. The Directive is aimed at contracts of adhesion, viz ‘take it or leave it’ contracts. It treats consumers as presumptively weaker parties and therefore fit for protection from abuses by the stronger contracting parties.

In the United Kingdom the *Unfair Terms in Consumer Contracts Regulations*⁴⁴ overlap with the *Unfair Contract Terms Act 1977* (UK), which deals with terms that exclude or restrict liability,⁴⁵ and the Law Reform Commissions have recommended the two pieces of legislation be replaced with a single Act.⁴⁶ In Australia, the Australian Consumer Law contains a general regime regulating unfair contract terms in standard form consumer contracts and also restrictions on traders contracting out of liability for goods and services that do not meet basic standards of quality, as specified in that legislation.⁴⁷

⁴⁰ See further Jeannie Marie Paterson, ‘The Australian Unfair Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts’ (2009) 33 Melbourne University Review 934.

⁴¹ Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (OJ April 21, 1993, L95/29).

⁴² 93/13/EEC Recital 4.

⁴³ [2002] 1 AC 481, [31].

⁴⁴ Unfair Terms in Consumer Contracts Regulations 1999 (UK). See generally Susan Bright, ‘Winning the Battle against Unfair Contract Terms’ (2000) 20 Legal Studies 331, 332–3; Hugh Collins, ‘Good Faith in European Contract Law’ (1994) 14 Oxford Journal of Legal Studies 229; Elizabeth Macdonald, ‘The Emperor’s Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations’ (1999) 58 Cambridge Law Journal 413

⁴⁵ See generally Elizabeth Macdonald, *Exemption Clauses and Unfair Terms* (Tottel Publishing, 2006).

⁴⁶ United Kingdom Law Commission and Scottish Law Commission, *Unfair Terms in Contracts*, Law Commission Report No 292, Scottish Law Commission Report No 199 (2005).

⁴⁷ See, e.g., Australian Consumer Law s 64.

The consumer protection laws of some ASEAN countries also include protection for consumers against unfair contract terms. The form of these protections varies. The consumer protection legislation of some member states have general prohibitions on procedural unfairness, that may in some cases deal with the problem of the unfair term discussed in example 2 above.

Controls on exclusion clauses

Brunei	Unfair Contract Terms Act 1999
Singapore	Unfair Contract Terms Act 1996
Indonesia	Law on Consumers' Protection 1999 Article 18

General prohibitions on unfair contract terms

Malaysia	Consumer Protection (Amendment) Act 2010 s 24D
Singapore	Consumer Protection (Fair Trading) Act 2003 Schedule 2 s 11
Thailand	Unfair Contract Terms Act 1997
Vietnam	Law on Protection of Consumers' Rights 2010 Article 16 (list of prohibited terms)

A better understanding of the different models for regulating substantive unfairness can be obtained by considering the regimes in three jurisdictions: Myanmar, Singapore and Malaysia.

Myanmar: no prohibitions on unfair contract terms

Myanmar's legal regime is influenced by its colonial past, the rule by authoritarian government from 1962 to 2010 and its recent move to democracy.⁴⁸ Thus, the legal system of Myanmar contains a combination of the customary law, codified English common law, such as the Contract Act of 1872, and recent Myanmar legislation, including the Consumer Protection Law 2014.

⁴⁸ <http://www.nyulawglobal.org/globalex/Myanmar.htm>. See also M Crouch, 'Rediscovering 'Law' in Myanmar: A Review of Scholarship on the Legal System of Myanmar, (2014) Pacific Rim Law and Policy Journal Association 543; M Crouch and T Lindsay, Law Society and Transition in Myanmar (2014) .

The Myanmar Consumer Protection Law⁴⁹ was passed in response to concerns about unsafe ingredients in food and beverages on sale in Myanmar.⁵⁰ It covers a range of matters including the rights and duties of consumers and entrepreneurs, prohibitions for entrepreneurs and provisions relating to the settlement of consumer disputes and sanctions for violations of the Act. The Consumer Protection Law also establishes a committee for consumer protection.

The Myanmar Consumer Protection Law shows a general commitment procedural fairness. In particular the law shows a strong commitment to promoting transparency in transactions and avoiding misleading or deceptive conduct by traders. Chapter II states that an objective of the Law is protecting consumers by the distribution of ‘correct transparent information’.⁵¹ Under the Law Consumers have a right to correct information⁵² and entrepreneurs have a duty to give ‘clear and proper’ information on goods or services.⁵³ The law also contains a number of more targeted prohibitions on specified types of misleading conduct,⁵⁴ such as misleading consumers about the price or quality of their goods⁵⁵ or selling substituted goods.⁵⁶

The Myanmar Consumer Protection Law includes also objectives of ensuring the rights of consumers (freely) to choose the goods and services that they purchase, which suggests that consumers should not be coerced into consumer contracts.⁵⁷ This is also apparent in the obligations of entrepreneurs:

*The Entrepreneurs shall not offer for sale or advertise the goods or services by using any mode which causes annoyance to the physical or mental [health (sic)] of the consumer.*⁵⁸

⁴⁹ The Pyidaungsa Hluttaw No 10, 2014, The 14th Waxing of Taboung, 1375 ME, 14 March 2014.

⁵⁰ *The Irrawaddy* (17 March, 2014).

⁵¹ (Myanmar) Consumer Protection Law 2014 s 3©.

⁵² (Myanmar) Consumer Protection Law 2014 s 6(a)(iii).

⁵³ (Myanmar) Consumer Protection Law 2014 s 7(b)(ii).

⁵⁴ (Myanmar) Consumer Protection Law 2014 ss 9, 10, 14.

⁵⁵ (Myanmar) Consumer Protection Law 2014 s 9(a) and also 14(a).

⁵⁶ (Myanmar) Consumer Protection Law 2014 s 13.

⁵⁷ (Myanmar) Consumer Protection Law 2014 s 3©. See also the Contracts Code for protection against undue influence.

⁵⁸ (Myanmar) Consumer Protection Law 2014 s 13.

This provision might merely catch offensive advertising but might also extend to force and aggressive conduct. It is unclear whether it would catch the advantage-taking conduct discussed in example 1 above.

The Myanmar Consumer Protection Law does not contain a provisions dealing directly with specific unfair terms such as exclusion clauses or with unfair terms generally. However, it does contain provisions that might be used to tackle unfair exclusion and limitation clauses. The law provides that consumer have a right to ‘obtain ‘the promised value, terms and conditions and warranty’ of the goods and services that they choose.’⁵⁹ It also provides that entrepreneurs have a duty to guarantee that the goods or services traded or produced are ‘based on stipulated standard and quality’.⁶⁰ These rights and obligations cannot be realised if traders can contract out of the basic obligation to provide goods of acceptable quality and use due care and skill in the provision of services.

Singapore

The beginning of Singapore’s modern legal system might be traced back to 6 February 1819, when Sir Stamford Raffles signed a treaty placing Singapore under his jurisdiction as Lieutenant-Governor of Bencoolen.⁶¹ The grant of the Second Charter of Justice on 20 March 1827 established the Court of Judicature (which had jurisdiction over the Straits Settlement which Singapore was a part of) and also implicitly imported the existing English law into Singapore.⁶² However post-1826, developments in English common law only had application to the extent that it was accepted as part of Singapore’s law by a Singapore court;⁶³ Singapore common law developed independently subject to its own social circumstances and society’s needs. After its independence in 1965, this state of affairs was further clarified in 1993 by the Singapore Parliament in the Application of the English Law Act (Cap 7A). English common law that had been part of

⁵⁹ (Myanmar) Consumer Protection Law 2014 s 6(a)(ii).

⁶⁰ (Myanmar) Consumer Protection Law 2014 s 7(b)(iv).

⁶¹ G W Bartholomew, ‘The Singapore Legal System’, in Riaz Hassan (ed), *Singapore: Society in Transition* (Oxford University Press, 1976) 84; L A Mills, ‘British Malaya 1824-1867’, (1970) 33(3) *Journal of the Malayan Branch of the Royal Asiatic Society*, 66. Both cited by Kevin Y L Tan, ‘Singapore A Statis Legal Laboratory’ in E. Ann Black and Gary F. Bell (eds.), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge University Press, 2011), 331.

⁶² Tan, above n 1, 337; *Chua Chaon Neoh v Spottiswoode* (1868) 1 Kyshe 216.

⁶³ See Walter Woon, ‘The Applicability of English Law in Singapore’, in Kevin Y L Tan (ed), *The Singapore Legal System* (Singapore University Press, 1999) 230.

Singapore law before 2 November 1993 continued to be part of Singapore law and the common law continued to be in force in Singapore.⁶⁴

The central pieces of consumer protection legislation in Singapore are the Sale of Goods Act (SGA),⁶⁵ Unfair Contract Terms Act (UCTA),⁶⁶ and Consumer Protection (Fair Trading) Act (CPFTA).⁶⁷ The SGA and the UCTA are substantial re-enactments of the English Sale of Goods Act 1979 and Unfair Contract Terms Act 1977, respectively. The CPFTA was passed on 11 November 2003 and came into effect 1 March 2004 (Act 27 of 2003) after many years of lobbying and several rounds of public consultation.⁶⁸ The CPFTA was strongly influenced by the Saskatchewan (Canada) Consumer Protection Act and the Alberta (Canada) Fair Trading Act.⁶⁹ In providing a consumer protection regime government's preference is to balance the regulatory action and consumer responsibility; therefore, Singapore's consumer protection regime maintains a strong degree of self-reliance on consumers in discerning and protecting their own rights.⁷⁰ The legislature's primary intention was to encourage 'greater consumer responsibility and pro-activity' by empowering consumers to 'seek civil remedies against errant traders without having to rely on or wait for the government to take action'.⁷¹

⁶⁴ *Application of the English Law Act* (Singapore, cap 7A, 1994 rev ed) s 3.

⁶⁵ (Singapore, cap 393, 1999 rev ed) ('SGA')

⁶⁶ (Singapore, cap 396, 1994 rev ed) ('UCTA')

⁶⁷ (Singapore, cap 52A, 2009 rev ed) ('CPFTA')

⁶⁸ See, *MTI Consultation Paper* (Consultation Paper No 1, Singapore Ministry of Trade and Industry, November 2002); *MTI Consultation Paper* (Consultation Paper No 2, Singapore Ministry of Trade and Industry, July 2003); Explanatory Notes, Consumer Protection (Fair Trading) Bill 2002; Explanatory Notes, Consumer Protection (Fair Trading) Bill 2003.

⁶⁹ *Consumer Protection Act*, SS 1996, c C-30.1, and *Fair Trading Act*, RSA 2000, c. F-2. See also Ravi Chandran, 'Consumer Protection (Fair Trading) Act' (2004) *Singapore Journal of Legal Studies* 192, 193; Wee Ling Loo and Erin Goh, 'Award of Damages under the Singapore Consumer Protection (Fair Trading) Act' (2007) 9 *Asian Law* 66, 66.

⁷⁰ Ministry of Trade and Industry, Republic of Singapore, 'Singapore: Public Consultation on the Consumer Protection (Fair Trading) Act' (2008) 34(1) *Commonwealth Law Bulletin* 149, 149. See also Ministry of Trade and Industry, Republic of Singapore, *Consumer Protection (Fair Trading) Bill 2nd Consultation Paper* (July 2003), 1.

⁷¹ See, for e.g., Singapore, *Parliamentary Debates, Official Report* (10 November 2003) vol 76 at col 3352 (Mr Raymond Lim Siang Keat); Singapore, *Parliamentary Debates, Official Report* (11 November 2003) vol 76 at col 3444 (Mr Raymond Lim Siang Keat). See, also, discussion in Loo and Goh, above n 16, 81: cheating (*Penal Code* (Singapore, cap 224, 1985 rev ed) s 415); false labelling (*Sale of Food Act* (Singapore, cap 283, 2002 rev ed) ss 17 and 20); false trade descriptions (*Consumer Protection (Trade Descriptions and Safety Requirements) Act* (cap 53, 1985, rev ed) s 4).

The CPFTA is directed at unfair practices, and primarily covers unfair terms in the process of making a contract. The CPFTA provides consumers with the right to sue for an ‘unfair practice’.⁷² Section 4 of the CPFTA defines four main categories of (procedurally) unfair practices:

- (1) deceptive or misleading representations (due to acts or omissions),⁷³
- (2) undue pressure or influence,⁷⁴
- (3) unfair advantage taking of consumer unable to protect their own interests,⁷⁵ and
- (4) miscellaneous specified unfair practices based on identified areas of concerns.⁷⁶

These provisions would be capable of addressing the procedural unfairness in the sale of a mobile phone discussed above in example 1; the conduct may have involved misleading representations or omissions and also unfair advantage taking of the inexperience and language difficulties of the consumer.

Singapore law also exercises control over exclusion clauses.⁷⁷ The controls over exclusion clauses vary according to the type of clause in question.

Section 6 of the UCTA restricts the seller’s ability to exclude or restrict liability arising under the implied terms in the SGA. Terms implied by Section 12 (seller’s implied undertakings as to title) cannot be excluded at all, while conditions implied under Sections 13–15 (seller’s implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose) cannot be excluded or restricted against persons dealing as consumers and are subject to a requirement of reasonableness for non-consumers.⁷⁸

⁷² CPTA s 6(1).

⁷³ (Singapore) Consumer Protection (Fair Trading) Act 2003 s 4(a).

⁷⁴ (Singapore) Consumer Protection (Fair Trading) Act 2003 schedule 2 s 12.

⁷⁵ (Singapore) Consumer Protection (Fair Trading) Act 2003 s 4(c).

⁷⁶ Singapore Ministry of Trade and Industry, Explanatory Notes on Proposed Consumer Protection (Fair Trading) Bill in Second Phase Consultation (July 2003) 6 [25].

⁷⁷ See also in substantially the same form (Brunei) Unfair Contract Terms Act 1997.

⁷⁸ (Singapore) Unfair Contract Terms Act 1996 s 6.

More broadly, the UCTA regulates exemption clauses by either invalidating them or limiting their scope by reference to a requirement of reasonableness. The UCTA prevents parties from excluding or restricting liability in negligence for personal injury or death.⁷⁹ Terms excluding or restricting liability for negligence arising in loss or damage other than death or personal injury,⁸⁰ and those that attempt to exclude or restrict contractual liability⁸¹ are subject to a requirement of reasonableness.

Singapore does not have a formal regime dealing with general unfair contract terms generally. However, the specific unfair practices listed in the schedule to the CPFTA, includes:

*Taking advantage of a consumer by including in an agreement terms of conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable.*⁸²

This provision might be capable of addressing the more offensive examples of unfair terms. It is not at all clear whether it could address the examples of unfair terms discussed in part 1 and also part 2 above.

Malaysia

Malaysia inherited English law, especially with respect to contract law. Reception of English law was statutorily confirmed by the Civil Law Enactment of 1937. Sections 3 of the Civil Law Act 1956 (Revised 1972) provide for the reception of general English common law and statutes where there is no existing Malaysian statute. Section 5 of the Civil Law Act 1956 modifies Section 3 by providing that in relation to commercial matters, unless otherwise provided in Malaysian statute, the law imported is the law as would be administered in England as on 7 April 1956 (for the states in Peninsular Malaysia, excluding Malacca and Penang), and at the corresponding period of the relevant case (for Malacca, Penang, Sabah and Sarawak).

Due to Sections 3 and 5 of the Civil Law Act 1956, consumer protection laws enacted in England since Malaysia's independence in 1957 (e.g.

⁷⁹ (Singapore) Unfair Contract Terms Act 1996 s 2(1)

⁸⁰ (Singapore) Unfair Contract Terms Act 1996 s 2(2).

⁸¹ (Singapore) Unfair Contract Terms Act 1996 s 3(2).

⁸² Consumer Protection (Fair Trading) Act 2003 Schedule 2 s 11.

the Fair Trading Act 1973, the Consumer Protection Act 1987) are not incorporated into Malaysian law, except in the case of Sabah and Sarawak. The Sale of Goods Act 1957 (modeled on the Indian Sale of Goods Act 1930, which in turn was based on the older Sale of Goods Act 1893 (UK)) only applies to the states of Peninsular Malaysia, excluding Sarawak and Sabah.⁸³ It applies to contracts for the sale of all types of goods, including second-hand, and does not distinguish between commercial and private sales, or wholesale and retail.⁸⁴ So even though the Sale of Goods Act 1893 (UK) has been superseded by the Sale of Goods Act 1979 (UK), the latter has not been adopted in Peninsular Malaysia, unlike Singapore. In contrast, Section 5(2) of the Civil Law Act 1956 provides that commercial matters arising in Sabah and Sarawak are governed by the law ‘as would be administered in England in the like case at the corresponding period’, so arguably, the Sale of Goods Act 1979 (UK) would apply in those two states.⁸⁵ The general line of case law by the High Court of Sarawak and Sabah supports this interpretation.⁸⁶

The central piece of consumer protection legislation in Malaysia is the Consumer Protection Act 1999 (CPA 1999).⁸⁷ It was introduced after the Federation of Malaysian Consumers Associations intensely lobbied for a consumer protection-specific legislation that was intended to provide a comprehensive regime under the direct supervision of the Ministry of Domestic Trade and Consumer Affairs.⁸⁸ The object of the proposed

⁸³ *Sale of Goods Act 1957* (Malaysia), s 1(2).

⁸⁴ *Sale of Goods Act 1957* (Malaysia), s 2 (definition of ‘goods’). See also Izawati Wook, ‘Consumer Protection in E-Commerce: the Current Legal Framework in Malaysia’ [2013] 1(6) *Legal Network Series(A)* 1, 10.

⁸⁵ Razman, M.R.B. and B.A.S. Syahirah, 2001. *Malaysian Legal System: A Basic Guide*. McGraw Hill, Kuala Lumpur, Malaysia; Razman et al., ‘Consumer Protection Food and Environmental Safety Based on Statutory Implied Terms in Malaysian Sale of Goods Law: Focusing on Urban Sustainability,’ (2010) 4(3) *International Business Management* 134, 135.

⁸⁶ *Heng Leong Motor Trading Co. v Osman bin Abdullah* (1994) 2 MLJ 456; *Arab-Malaysian Credit Berhad v Hock Thai Finance Corporation Berhad* [1995] 1 LNS 13 (High Court Sabah and Sarawak); *Low Hock Jee v Mayban Finance Berhad* [1996] 2 CLJ 479 (High Court Sabah and Sarawak); *Arab-Malaysian Credit Bhd v Saujana Kinabalu Sdn Bhd* [2011] 10 CLJ 10 (High Court Sabah and Sarawak); *ECM Coachbuilders Sdn Bhd v Intrabuana Tour & Travel Sdn Bhd* [2013] 2 CLJ 414 (High Court Sabah & Sarawak). See however, *Aqua Logistics Pte Ltd v Sasacom Sdn Bhd* [2008] 8 CLJ 405 (High Court Sabah and Sarawak) where the judge applied the Sale of Goods Act 1957 (Malaysia), without referencing 5(2) of the Civil Law Act 1956 (Malaysia).

⁸⁷ See also the Direct Selling Act 1993 (Malaysia).

⁸⁸ Indrani Thuraisingham, ‘The Malaysian Consumer Protection Act needs further amendment’ <<http://www.asialaw.com/Article/1970809/How-Asia-is-protecting-its-growing-consumer-market.html?Print=true&Single=true>>

legislation was to consolidate and fill in the gaps between disparate ‘indirect protections’ scattered across existing statutes.⁸⁹

Parts V, VI and VIII of the original Consumer Protection Act 1999 was based on Pts I, II and III of the Consumer Guarantees Act 1993 (NZ), which was in turn taken in part from the *Trade Practices Act 1967* (Cth), the Supply of Goods and Services Act 1982 (UK) and the Consumer Products Warranties Act 1977 (Saskatchewan).⁹⁰ In 2007 the Federation of Malaysian Consumers Associations reviewed the operation of the Consumer Protection Act 1999 and recommended the introduction of provisions dealing with unfair contract terms. The Consumer Protection (Amendment) Act 2010 which introduced Part IIIA dealing with categories of procedural and substantive unfairness. Part IIIA was guided by the Indian Law Commission Report on Unfair (Procedural & Substantive) Terms in Contract (2006). The Indian Commission concluded that this separation of procedural and substantive unfairness was necessary to ensure greater effectiveness by enabling the law ‘to be able to stretch its hands to rectify such substantive unfairness’.⁹¹

Malaysia is unique in that it is the only jurisdiction where unfairness is elaborated by two separate regimes: procedural unfairness (24C) and substantive unfairness (24D).⁹² Unfair advantage taking is dealt with through a prohibition on procedural unfairness in s 24C. The CPA provides that:

*A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and supplier.*⁹³

⁸⁹ Halimah Ahmad (1999) A holistic approach to consumer protection. Proceeding of the 4th National Seminar of MACFEA. 19 August. Selangor.

⁹⁰ Amin 2013 xciii

⁹¹ The Law Commission of India (2006) 199th Report on Unfair (Procedural & Substantive) Terms in Contract, 136

⁹² See further N Amin and A I Killiyyah, ‘Protecting Consumers against Unfair Contract Terms in Malaysia: The Consumer Protection (Amendment) Act 2010’ [2013] 1Malayan Law Journal Articles 89.

⁹³ (Malaysia) Consumer Protection Act 1999 s 24C(1).

The CPA also sets out a list of matters that may be taken into account in making this assessment, including:

- (a) the knowledge and understanding of the consumer in relation to the meaning of the terms of the contract or their effect;
- (b) the bargaining strength of the parties to the contract;
- (c) reasonable standards of fair dealing;
- (d) whether or not, prior to or at the time of entering into the contract, the terms of the contract were subject to negotiation or were part of a standard form contract;
- (e) whether or not it was reasonably practicable for the consumer to negotiate for the alteration of the contract or a term of the contract or to reject the contract or a term of the contract;
- (f) whether expressions contained in the contract are in fine print or are difficult to read or understand;
- (g) whether or not, even if the consumer had the competency to enter into the contract based on his or her capacity and soundness of mind, the consumer—
 - (i) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered; or
 - (ii) suffered serious disadvantages in relation to other parties because the consumer was unable to appreciate adequately the contract or a term of the contract or its implications by reason of age, sickness, or physical, mental, educational or linguistic disability, or emotional distress or ignorance of business affairs
- (h) whether or not independent legal or other expert advice was obtained by the consumer who entered into the contract;
- (i) the extent, if any, to which the provisions of the contract or a term of the contract or its legal or practical effect was accurately explained by any person to the consumer who entered into the contract;
- (j) the conduct of the parties who entered into the contract in relation to similar contracts or courses of dealing between them; and

(k) whether the consumer relied on the skill, care or advice of the supplier or a person connected with the supplier in entering into the contract'.⁹⁴

This provision would be a way of responding to the treatment of the consumer in example 1 above.

The CPA also contains both general and specific prohibitions on misleading conduct.⁹⁵ The Act provides that:

'no person shall engage in conduct that—

(a) in relation to goods, is misleading or deceptive, or is likely to mislead or deceive, the public as to the nature, manufacturing process, characteristics, suitability for a purpose, availability or quantity, of the goods; or

(b) in relation to services, is misleading or deceptive, or is likely to mislead or deceive, the public as to the nature, characteristics, suitability for a purpose, availability or quantity, of the services.⁹⁶

This general prohibition is complemented by specific prohibitions on misleading conduct, for example, statements that:

(a) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model;

(b) the goods have had a particular history or particular previous use;

(c) the services are of a particular kind, standard, quality or quantity;

(d) the services are supplied by any particular person or by any person of a particular trade, qualification or skill'.⁹⁷

Some of these considerations direct attention to the form of the contract and also the efforts of the trader to ensure consumers understand the effect of the terms. In this way, the provisions look at efforts to address potential problems of substantive unfairness.

⁹⁴ (Malaysia) Consumer Protection Act 1999 s 24C(2)

⁹⁵ (Malaysia) Consumer Protection Act 1999 Part II.

⁹⁶ (Malaysia) Consumer Protection Act 1999 s 9.

⁹⁷ (Malaysia) Consumer Protection Act 1999 s 10.

The core provision dealing directly with substantive unfairness, in the form of unfair terms, is Section 24D(1). The CPA provides that:

‘A contract or a term of a contract is substantively unfair if the contract or the term of the contract—

- (a) is in itself harsh;
- (b) is oppressive;
- (c) is unconscionable;
- (d) excludes or restricts liability for negligence; or
- (e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification.’⁹⁸

The CPA sets out a list of matters that may be taken into account in making this assessment, including:

- ‘(a) whether or not the contract or a term of the contract imposes conditions—
 - (i) which are unreasonably difficult to comply with; or
 - (ii) which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract;
- (b) whether the contract is oral or wholly or partly in writing;
- (c) whether the contract is in standard form;
- (d) whether the contract or a term of the contract is contrary to reasonable standards of fair dealing;
- (e) whether the contract or a term of the contract has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;
- (f) whether the benefits to be received by the consumer who entered into the contract are manifestly disproportionate or inappropriate, to his or her circumstances;
- (g) whether the consumer who entered into the contract was in a fiduciary relationship with the supplier; and

⁹⁸ (Malaysia) Consumer Protection Act 1999 s 24D(1).

- (h) whether the contract or a term of the contract—
- (i) requires manifestly excessive security for the performance of contractual obligations;
 - (ii) imposes penalties which are disproportionate to the consequences of a breach of contract;
 - (iii) denies or penalizes the early repayment of debts;
 - (iv) entitles the supplier to terminate the contract unilaterally without good reason or without paying reasonable compensation; or
 - (v) entitles the supplier to modify the terms of the contract unilaterally.⁹⁹

These factors combine considerations relevant to deciding whether a term is unfair in substance and also indications of the types of terms that are at risk of being unfair. The provisions seem very capable of addressing the problems of unfair terms set out in example 2 above, and also in part 2.

Comparing different strategies

Malaysia, Singapore and Myanmar have comprehensive legislative regimes to address the problem of misleading conduct by traders, which include specific and general prohibitions on such conduct. All three regimes can also address coercive or aggressive conduct and, in the case of Malaysia and Singapore, less overt forms of unfair advantage taking. There is greater divergence between these regimes in terms of the coverage of substantive fairness concerns. Singapore has a comprehensive regime regulating exclusion clauses in consumer contracts. Malaysia has a comprehensive regime directed at unfair contract terms in consumer contracts generally.

The prohibition of misleading and deceptive conduct and the promotion of product safety may be thought to require higher priority than unfair terms, and this may be an influence on the Myanmar legislation. However, the regulation of substantive unfairness and, in particular, unfair contract terms are issues all ASEAN Member States need to consider. Certainly, the types of term that may have the greatest impact on consumers are overreaching exclusion clauses. The Singapore example shows a comprehensive regime directed at this issue. Nonetheless, particularly in

⁹⁹ (Malaysia) Consumer Protection Act 1999 s 24D(2)

the area of services, a range of other types of terms may impact harshly on consumers, disappointing their expectations and reduce confidence.

It is difficult to assess the impact of the regimes in Singapore and in Malaysia in dealing with exclusion clauses and unfair terms. There are few reported cases, which of itself is not surprising. There has not been any comprehensive industry inquiry or report by the relevant government agencies in either Singapore or Malaysia.¹⁰⁰ In the United Kingdom, most unfair terms under the *Unfair Terms in Consumer Contracts Regulations* are dealt with through negotiations between the Office of Fair Trading and the relevant trader, rather than through litigation.¹⁰¹ Susan Bright found that during 2000–2005 more than 5000 terms were changed or abandoned following investigation by the Office of Fair Trading.¹⁰² Bright reports that the terms most commonly considered unfair by the Office of Fair Trading were:¹⁰³

‘those excusing or limiting liability for shortcomings in the quality of goods or services, those imposing financial penalties, and failure to use plain and intelligible language. Also referred to frequently are unfair price variation clauses, cancellation clauses, and clauses disclaiming liability for employee statements.’

The Australian Competition and Consumer Commission recently reviewed the standard form contracts used in a range of industries, including telecommunications services, providers of solar panels, fitness centres, hire car companies, airlines and travel agents.¹⁰⁴ The report identified a number of potentially unfair terms in commonly used contracts:

- Contract terms that allow the business to change the contract without consent from the consumer.

¹⁰⁰ See also M Rajadurai and D E Barclay, ‘Unfair Terms in Malaysia: The Gap in the Consumer Protection (Amendment) Act 2010’ [2014] 1 *Legal Network Series* (A) xx.

¹⁰¹ Susan Bright, ‘Unfairness and the Consumer Contract Regulations’ in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (Oxford University Press, 2007) 173, 176. See also Susan Bright, ‘Winning the Battle against Unfair Contract Terms’ (2000) 20 *Legal Studies* 331.

¹⁰² Susan Bright, ‘Unfairness and the Consumer Contract Regulations’ in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (Oxford University Press, 2007) 173, 176.

¹⁰³ Susan Bright, ‘Unfairness and the Consumer Contract Regulations’ in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (Oxford University Press, 2007) 173, 176.

¹⁰⁴ Australian Competition and Consumer Commission, *Unfair Contract terms: Industry Report* (2013).

- Terms that unfairly restrict the consumer’s right to terminate the contract.
- Terms that suspend or terminate the services being provided to the consumer under the contract.
- Terms that make the consumer liable for things that would ordinarily be outside of their control.
- Terms that prevent the consumer from relying on representations made by the business or its agents.
- Terms seeking to limit consumer guarantee rights.

Importantly, in its industry review the Australian Competition and Consumer Commission found that:

in the majority of industries reviewed, most businesses took advantage of the opportunity to align their standard form contracts with the new national unfair contract terms provisions of the ACL. Problematic terms were identified and either amended or deleted in each of the eight categories listed above.¹⁰⁵

Thus, in countries where there already are regimes directly regulating unfair contract terms, it would be useful for government agencies to monitor and promote the regime. This might be done through scrutiny of the terms in particular industries, consultations with stakeholders about measures to make standard form more fair, and publication of the findings of these inquiries and negotiations. It is in this way that other stakeholders will have the incentive and assistance to improve the substantive fairness of the consumer contracts with which they deal.

¹⁰⁵ Australian Competition and Consumer Commission, *Unfair Contract Terms: Industry Report* (2013) 1

Policy priorities

Consumer protection policy in many countries has shifted focus from procedural fairness, such as prohibiting misleading conduct and aggressive or unfair advantage taking by traders, to substantive fairness, including the use of exclusion clauses and other one-sided terms in consumer transactions. This development is based on the view that regulation of unfair contract terms plays an important role in creating a fairer, more balanced market.¹⁰⁶ The regulation of unfair terms will protect traders with fair terms from suffering a competitive disadvantage or being driven from the market altogether.¹⁰⁷ Consumers should benefit from the existence of a safety net against unfair terms, leaving them freer to concentrate on the issues of price and quality.¹⁰⁸

In light of these insights, there are steps that ASEAN Member States might take to address the problems presented for consumers by unfair contract terms. These include considering further research on the prevalence and effect of unfair term on consumers and the experience of Malaysia (and Thailand and the Philippines) in developing a regime to regulate unfair contract terms. Countries with a legislative regime that regulates exclusion clauses, such as Singapore, and also Brunei and Indonesia, or unfair contract terms, such as Malaysia, and also Thailand and Vietnam, might review the impact of those regimes and consider the possibility of an industry-by-industry review of standard form contract terms affecting consumers.

Of course, any consumer protection regime requires effective enforcement strategies by regulators and effective education of both consumers and traders as to their rights and responsibilities. Traders can be taught how to draft clauses that reflect a fairer balance of risk. Consumers can be encouraged to read their contracts, understand what to expect in various commonly used contracts and how to seek redress when terms are unfair. In Malaysia, Singapore and Myanmar, government officials have all expressed a commitment to education strategies as a means of better

¹⁰⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008) vol II, 422.

¹⁰⁷ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008) vol II, 422.

¹⁰⁸ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349, 364.

protecting consumers.¹⁰⁹ Government officials might develop education programs for better informing stakeholders about the parameters of fair terms. Other innovative strategies might also be developed through work with trade associations and consumer advocates, leading to standardised contracts in some areas or model terms.¹¹⁰ These experiences and ideas for innovation might also usefully be shared among ASEAN Member States.

¹⁰⁹ Interviews with the author conducted in 2014.

¹¹⁰ See H Collins, 'Harmonisation of European Contract Law: Citizenship, Diversity and Effectiveness' (2004-2005) 7 *Cambridge Year Book in European Legal Studies* 81, 96. Also J E Malbon, J.E., 'Online cross-border consumer transactions: a proposal for developing fair standard form contract terms, (2013) 37 *University of Western Australia Law Review*, 20-44.



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