

FURTHER CHALLENGES FOR AUSTRALIAN CONSUMER LAW

ALGUNS DESAFIOS PARA A LEI AUSTRALIANA DE PROTEÇÃO DO CONSUMIDOR

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ABSTRACT: In 2016 Treasury, Commonwealth Government of Australia will review the ACL (Australian Consumer Law) which forms part of the *Competition and Consumer Act 2010* (Cth) and publish an Issues Paper in March 2016. The review will be influenced by a behavioural economics perspective and also involve a Survey of Consumers to judge the effectiveness of the national consumer policy framework. This paper follows the public discussions among consumer advocates, regulators and academics about the subject. This paper will examine benefits and detriments in protecting consumers of goods, services, financial services and credit through separate regulators and legislation.

KEYWORDS: Australian Consumer Law – Revision of the national consumer policy – Separate regulators and legislation for financial services – General unfair business practices rule – Sharing economy.

RESUMO: Em 2016, o Departamento do Tesouro da Austrália vai rever a ACL (Direito do Consumidor da Austrália), que faz parte da *Competition and Consumer Act 2010* (Cth) e publicar um documento um relatório em março de 2016. A revisão será influenciada por uma perspectiva de economia comportamental e envolvem também uma pesquisa de consumidores para avaliar a eficácia do quadro da política do consumidor nacional. Este trabalho segue as discussões públicas entre os defensores dos consumidores, reguladores e acadêmicos sobre o assunto. Assim, o trabalho irá analisar os benefícios e malefícios para proteger os consumidores de bens, serviços, serviços financeiros e crédito através de regulamentos e legislações.

PALAVRAS-CHAVES: Lei Australiana de Proteção do Consumidor – Revisão da política nacional de proteção do consumidor – Legislação e Agências separadas para serviços financeiros – Cláusula geral contra práticas comerciais abusivas – Economia do compartilhamento.

SUMÁRIO: 1. Introduction – 2. Prospective Review: 2.1 The review of the ACL – 3. Regulatory Philosophy and Architecture: 3.1 The Australian architecture of consumer law; 3.2 The Re-

under the ACL and the NCCPA; the extension of the prohibition on unfair contractual terms to insurance contracts; whether unfair terms prohibitions should apply more widely than standard form contracts.¹¹⁸

6. CONCLUSION

Robust consumer protection can enhance an efficient and competitive market economy and drive productivity. The review of the ACL is an opportunity to reflect on legislation and current regulatory challenges. Regulatory architects have built two market citadels. In reality, some activities fall between each. More importantly this has led to overlapping statutory constructs which even senior judges find challenging. A review of the ACL should identify all gaps and inconsistencies between the Competition and Consumer Act and the ASIC Act. Many of the items identified have a competition dimension. There should be greater focus on eliminating definitional problems. Both the ACCC and ASIC put substantial resources into education and persuasion. It is clear that some economic actors do not wish to comply with the law. It may be time to put less emphasis on responsive regulation and even more on enforcement. While consumer choice must be maintained, it is too easy to manipulate cognitive biases, particularly in rapidly changing digital and international environments.

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- A proteção dos consumidores em um mundo globalizado: *studium generale* sobre o consumidor como *homo novus*, de Claudia Lima Marques – RDC 85/25-62 (DTR\2013\484), e
- Risco e o consumidor na reforma do sistema financeiro australiano, de Gail Pearson – RDC 68/147-194, *Doutrinas Essenciais de Direito do Consumidor* 1/1165-1218 (DTR\2008\834).

118. There is a wide interpretation of standard form contract. In *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204 (Federal Court of Australia) a contract which had an opt out term and under which consumers could select items from a catalogue was a standard form contract.