

ARTICLE

## Refining the Right to Information in Vietnamese Consumer Law: Insights from Australia

Lam Uyen Lu<sup>1</sup> and Niloufer Selvadurai<sup>2</sup>

<sup>1</sup>University of Economics Ho Chi Minh City, Vietnam and <sup>2</sup>Macquarie University, Australia  
Corresponding author. E-mail: lamuyen@ueh.edu.vn

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### Abstract

In upholding a consumer's right to information, regulations prohibiting misleading or deceptive conduct perform a critical role in supporting consumer welfare and encouraging equity in business and commerce. While Vietnam enacted a *Law on Consumer Protection* in 2010, its provisions in this area are limited in ambit and application. In order to improve the effectiveness of a consumer's right to information in Vietnam, it is useful to examine the *Australia Consumer Law* which has a sophisticated regulatory framework in this area. By comparing the laws prohibiting misleading or deceptive conduct in the Vietnamese *Law on Consumer Protection* and the *Australia Consumer Law*, this article identifies certain similarities and differences between the two legal systems, thereby clarifying shortcomings that can lead to inadequacies and inefficiencies of this area of the law and providing a platform for law reform in Vietnam.

**Keywords:** Australian Consumer Law; Consumer Law; Consumer Protection; Consumer's Right to Information; Deceptive Conduct; Misleading; Vietnamese Law

The practice of unfair trade in Vietnam, especially that of misleading or deceptive conduct, has increased in recent years, substantially undermining the effectiveness of the consumers' right to information.<sup>1</sup> While protecting the interests of consumers was one of the main objectives of Vietnamese lawmakers in designing the *Law on Consumer Protection 2010* (LCP),<sup>2</sup> the content of the LCP in this area is limited to just two articles. Article 8 acknowledges the right of consumers to be informed about the goods and services they purchase while Article 10 prohibits false information or misleading conduct by businesses. Given the importance of preventing unfair trade practices, the existence of these limited articles in the LCP suggests the inadequacy of the Vietnamese LCP. However, while the LCP is limited in its ambit of operation, a variety of consumer protection provisions can be found in other statutes that predate the enactment of the LCP. These laws are closely related to the objective of protecting consumers in trade practices and include the *Advertising Law*,<sup>3</sup> *Law on Measurement*,<sup>4</sup> *Law on Quality*,<sup>5</sup> *Competition Law*,<sup>6</sup> and *Commercial Law*.<sup>7</sup> For example, Article 10 of the *Law on Quality* imposes obligations on businesses, including obligations to ensure the quality of goods and the veracity of the information provided in relation to

<sup>1</sup>To Uyen, "The Right of "God" is still Seriously Violated [Quyền của "Thượng đế" vẫn bị xâm phạm nghiêm trọng]" *Finance Times* (14 Mar 2018) <<http://thoibaotaichinhvietnam.vn/pages/nhip-cau-tieu-dung/2018-03-14/quyen-cua-thuong-de-van-bi-xam-pham-nghiem-trong-54865.aspx>> accessed 14 March 2018.

<sup>2</sup>The Vietnamese Law on Consumer Protection 2010.

<sup>3</sup>The Vietnamese Advertising Law 2012.

<sup>4</sup>The Vietnamese Law on Measurement 2011.

<sup>5</sup>The Vietnamese Law on Quality of Products and Goods 2007.

<sup>6</sup>The Vietnamese Competition Law 2015.

<sup>7</sup>The Vietnamese Commercial Law 2005.

the sale of goods. Significantly, these provisions are more extensive than the corresponding Article 12(5) of the LCP.<sup>8</sup>

It is suggested that the fragmented nature of Vietnamese consumer law presently has led to ineffective and inconsistent governance; it would be preferable to design a clear regulatory framework to protect the interests of consumers. Typically, following the civil law tradition, the legal document at the highest level, the *Civil Code*, should provide for the overall principles while applying the regulations of many subsidiary enactments such as the LCP and *Commercial Law*.<sup>9</sup> In other words, the provisions which are considered to be general principles in the *Civil Code* are automatically recognized and applied to lower enactments without the requirement of a rule granting such applicability. However, this does not automatically apply in the case of regulations of laws which are at the same subsidiary level. Since such regulations are to be applied mutually, there needs to be a reference provision that allows for such application. Currently, there is no such provision in the LCP.<sup>10</sup> Consequently, the regulation against misleading or deceptive conduct in Vietnam is dispersed and imprecise, given the lack of a link between the LCP and related laws. In this regard, the sophisticated legislative framework governing misleading and deceptive conduct provided by the *Australian Consumer Law*<sup>11</sup> (ACL) provides a useful template for law reform in Vietnam. Within this context, this article aims to analyze the merits of the present laws prohibiting misleading or deceptive conduct in Vietnam, examine the comparable regulatory framework in Australia, and consider the extent to which Australian laws can guide the reform discourse in Vietnam.

A variety of studies have articulated and critiqued the customer's right to information and developed the related theories of modern economics. Information rationales were also comprehensively discussed by Iain Ramsay.<sup>12</sup> Beales, Craswell, and Salop<sup>13</sup> stressed the importance of the information-based principle of consumer protection. Averitt and Lande discussed the relationship between antitrust and consumer protection law, developing and analysing the doctrine of consumer sovereignty.<sup>14</sup> Geraint Howells stated that increasing the information available to the consumer is undoubtedly significant,<sup>15</sup> however, he highlighted limitations of information including insufficient time, alternatives, market impediments to switching, the insight of behavioural economics, and that information is likely to benefit well-educated middle-class consumers. As a result of these studies, the informative rationale of consumer protection now has been admitted broadly worldwide; but how this right should be regulated is under-researched, especially for developing countries. In Vietnam, notable works in this category include 'Comparative Research of Consumer Protection

<sup>8</sup>Sua Le Van, 'Some Provisions of the Law on Protection of Consumer Rights - Inadequacies Need to be Improved [Mot so quy dinh cua phap luat ve bao ve quyen loi cua nguoi tieu dung - Bat cap can hoan thien]' (Ministry of Justice, 2015) <<http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=1901>> accessed 15 May 2017.

<sup>9</sup>Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) 15 *American Journal of Comparative Law* 419, 424. The author states that in the civil law system, a code 'is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves the highest level of generalisation based upon a scientific structure of classification'.

<sup>10</sup>Le (n 8). Le argues that despite Article 10 of the Law on Quality, which stipulates producer's obligations in more detail than Article 12 of the LCP, there is no reference for an application of this regulation in the LCP. This is just one of many examples of the gaps in the current legal system of consumer protection in Vietnam.

<sup>11</sup>Competition and Consumer Law Act 2010 (Cth), sch 2 ('Australian Consumer Law').

<sup>12</sup>Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Bloomsbury Publishing 2012).

<sup>13</sup>Howard Beales, Richard Craswell & Steven Salop, 'Information Remedies for Consumer Protection' (1981) 71 *The American Economic Review* 410.

<sup>14</sup>Neil W Averitt & Robert H Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 *Antitrust Law Journal* 713, 716.

<sup>15</sup>Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349.

Laws of Some Countries – Lessons and Proposal for Vietnam’,<sup>16</sup> ‘Experiences in Designing Legal Provisions on Product Liability of Some Asean Countries’,<sup>17</sup> ‘The Basic Principles of Product Liability Regulations in the United States and Some Other Countries’<sup>18</sup> and ‘Improvement of Consumer Protection Law in Vietnam in the Context of International Integration’.<sup>19</sup> In the light of comparative research, a fairly comprehensive analysis of the important provisions in the consumer laws of Australia, the EU, the UK, the US, Canada, and Singapore is presented in ‘Comparative Analysis of Overseas Consumer Policy Frameworks’,<sup>20</sup> and ‘Comparative Consumer Law Reform and Economic Integration’,<sup>21</sup> which undertook a comparative analysis of the general legal frameworks protecting consumers in New Zealand and the EU, occasionally uses the ACL as a comparative framework. These comparative studies, either conducted in Vietnam or in the international context, investigated and analysed the regulation of consumer law in general terms instead of focusing on specific consumers’ rights. As such, no comprehensive research has focused on the consumer’s right to information in Vietnam or undertaken a comparative study between the legal framework of this right in Vietnam and that of another country. This article aims to fill these gaps in the scholarly literature. It is hoped that the present analysis and the proposed solutions will help improve Vietnamese consumer law and form a useful template for other developing countries who are seeking to strengthen the effectiveness of their consumer protection laws.

## A comparison of Vietnam’s and Australia’s consumer law

### *Justification for the selection of Australia for comparative study*

In a report at a summary conference on consumer protection practices in Vietnam during the 2011–2015 period, Nguyen Manh Hung, Vice President and General Secretary of the Vietnam Standard and Consumers Association, and many other experts commented that despite initial achievements, consumers’ rights in Vietnam were still being challenged by a legal framework with a lot of limitations and ineffective implementation. At present, Vietnam is criticised for not having an effective regulatory mechanism to ensure that a consumer’s right to information is fully protected.<sup>22</sup> It is hence useful to examine the LCP and identify the extent to which it protects the consumer’s right to information by comparing the LCP with the ACL in order to consider how these identified shortcomings can be addressed.

<sup>16</sup>Vietnam Competition Administration, ‘Comparative Research of Consumer Protection Laws of Some Countries - Lessons and Proposal for Vietnam [So sanh Luat bao ve nguoi tieu dung mot so nuoc tren the gioi - bai hoc kinh nghiem va de xuat mot so noi dung co ban quy dinh trong du thao Luat bao ve nguoi tieu dung Vietnam]’ <[http://hoibaovenguoitieu.dung.hungyen.vn/Upload/files/vanban/full%20report\\_so%20sanh%20mot%20so%20luat%20bv%20ntd%20tren%20the%20gioi%20%20de%20xuat%20cho%20vn.pdf](http://hoibaovenguoitieu.dung.hungyen.vn/Upload/files/vanban/full%20report_so%20sanh%20mot%20so%20luat%20bv%20ntd%20tren%20the%20gioi%20%20de%20xuat%20cho%20vn.pdf)> assessed on 8 July 2021.

<sup>17</sup>Hong Tran Quang & Truong Hong Quang, ‘Experiences in Designing Legal Provisions on Product Liability of Some Asean Countries [Kinh nghiem Xay dung Phap luat ve Trach nhiem San pham cua Mot so Nuoc Asean]’ (2010) 7 Law Journal 46.

<sup>18</sup>Hanh Le Hong & Truong Hong Quang, ‘The Basic Principles of Product Liability Regulation in the United States and Some Other Countries [Cac Nguyen ly Co ban cua Che dinh Trach nhiem San pham tai Hoa Ky va Mot so Quoc gia tren The gioi]’ (2010) 2 State and Law Journal 35.

<sup>19</sup>Loan Dinh Thi My, ‘Improvement of Consumer Protection Law in Vietnam in the Context of International Integration [Hoan thien Phap luat Bao ve Quyen loi Nguoi tieu dung o Viet Nam trong Boi canh Hoi nhap Kinh te Quoc te]’ (Ministry of Commerce 2006).

<sup>20</sup>Stephen G Corones et al, ‘Comparative Analysis of Overseas Consumer Policy Frameworks’ (April 2016) <<https://eprints.qut.edu.au/95636/1/95636.pdf>> assessed on 7 July 2021.

<sup>21</sup>Luke R Nottage, Christine Riefa & Kate Tokeley, ‘Comparative Consumer Law Reform and Economic Integration’, in Justin Malbon & Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press 2013).

<sup>22</sup>Ministry of Industry and Trade, ‘Consumer protection: Need to transform towards sustainable development [Cong tac Bao ve Nguoi tieu dung: Can Phat trien Theo huong Ben vung]’ (Paper presented at the ‘Report on Consumer Protection Activities in the Period of 2011–2015’ event in Ha Noi, Vietnam) <<http://www.moit.gov.vn/tin-chi-tiet/-/chi-tiet/cong-tac-bao-ve-quyen-loi-nguoi-tieu-dung-can-phat-trien-theo-huong-ben-vung-106470-22.html>> assessed on 22 June 2021.

Australia has been chosen as a basis for comparison due to the quality of the ACL and a number of similarities between Australian and Vietnamese consumer law, which are useful in guiding Vietnamese reform discourse in consumer protection law. The ACL, and the *Trade Practices Law 1974*<sup>23</sup> (TPA) that preceded it, have been subject to an extensive law reform debates and amendments.<sup>24</sup> Therefore, it can provide Vietnam with useful experiences and reform suggestions. Specific reasons for the selection of the ACL for comparison with Vietnam are detailed below.

First, Australia is a country with a long history of legal and cultural traditions and effective governance. In 2019, the percentile rank for Australia was reported at 98.56 per cent for 'Regulatory Quality' and 93.27 per cent for 'Rule of Law'.<sup>25</sup> Thus, Australia's well-functioning legal system is a guarantee of the application of consumer protection philosophy that keeps pace with new developments of the field. Further, Australia is a country with a long tradition of legal and cultural traditions, while legal philosophy is something that Vietnam is lacking and transplanting.<sup>26</sup> The combination of a contemporary and conventional legal system is a good reference to address the aspects of a young legal foundation such as that of Vietnam.<sup>27</sup>

Second, the ACL was enacted in 2010 following the global financial crisis in or around mid-2007. Australia gained experience in adopting appropriate policies and integrating the findings of international economic, psychological, and social studies related to economic policy and consumer protection following this crisis.<sup>28</sup> A complete policy framework adopted following the global financial crisis and its aftermath and such experienced institutions is a good template for Vietnam.

Third, the geopolitical and economic context of Vietnam is arguably more comparable to Australia than to Europe or the United States. Australia is relatively geographically proximate to Vietnam and operates in the same Asia-Pacific markets.<sup>29</sup> Australia has also undergone significant national policy reforms in the mid-1990s in which the country's economic structure was changed, removing legal burdens and abolishing the government's monopoly. Two policy proposals among six advocated by the Hilmer Committee's report include the introduction of competitive neutrality and restructuring of public sector monopoly businesses to increase competition in 1993.<sup>30</sup> According to OECD's recommendation on Vietnam's competition law and policy, the principle of competitive neutrality should also be applied to all levels of government until a clear and comprehensive competitive neutrality framework is fully and effectively implemented.<sup>31</sup> These are the challenges that Vietnam, whose government's holdings and participation still dominate the market, will soon have to address.<sup>32</sup>

<sup>23</sup>Australian Trade Practices Law 1974 (Cth).

<sup>24</sup>Productivity Commission, Review of National Competition Policy Reforms (Productivity Commission Inquiry Report No. 33, 28 February 2005) (Australia) <<https://www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf>> accessed 22 June 2021.

<sup>25</sup>World Bank, 'Worldwide Governance Indicators' <<https://info.worldbank.org/governance/wgi/Home/Reports>> accessed 22 June 2021.

<sup>26</sup>Nghia Pham Duy, 'On the Concept of Legal Culture [Gop phan tim hieu van hoa phap luat]' (2008) 24 VNU Journal of Science 1, 3.

<sup>27</sup>Horst Lucke, 'Legal History in Australia: The Development of Australian Legal/Historical Scholarship' (2010) 34 Australian Bar Review 109, 115.

<sup>28</sup>Luke Nottage, 'Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism' (2009) 9 Queensland University Technology Law and Justice Journal 111, 116. Nottage mentioned a key lesson from the economic debacle which is drawn in parallel with the US subprime housing loans debacle that triggered the global crisis, stated by the CEO of the Commonwealth Bank: 'All of us have to make sure we're lending responsibly to first-home buyers'.

<sup>29</sup>Nearly 60 per cent of Australia's trade occurs with Asia: 'People and Places of the Asia-Pacific' (Jacaranda Online) <[http://www.jaconline.com.au/essentials/downloads/JEH1\\_ch07.pdf](http://www.jaconline.com.au/essentials/downloads/JEH1_ch07.pdf)> accessed 22 June 2021.

<sup>30</sup>John Kain, Indra Kuruppu & Rowena Billing, 'Australia's National Competition Policy: Its Evolution and Operation' (Parliament of Australia, 3 Jun 2003) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/ncpebrief](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/ncpebrief)> accessed on 22 June 2021.

<sup>31</sup>OECD (2018) OECD Peer Reviews of Competition Law and Policy: Vietnam <<http://oe.cd.vtm>> accessed on 22 June 2021.

<sup>32</sup>ANT Consulting Co, 'Vietnam is Recognized by 69 Countries as a Market Economy: Opportunities to Promote Trade and Investment' (6 Feb 2018) <<http://www.antconsult.vn/news/vietnam-is-recognized-by-69-countries-as-a-market>>

### Introducing the ACL

Australian consumer protection legislation originated from the Molony Report on Consumer Protection of 1962 by the English Committee on Consumer Protection,<sup>33</sup> overcoming the limitations of remedies available under traditional common law.<sup>34</sup> This was later developed into state-level regulations on consumer protection before the TPA, comprising these regulations, was enacted at the federal level in 1974. Between 1974 and 1997 was also the period when the principle of caveat emptor was criticized for equity<sup>35</sup> and states intervened in the market, including in consumer protection matters, which resulted in the introduction of a series of new legislative provisions.<sup>36</sup> Over a long period of development, regulations on consumer protection in the TPA and the *Fair Trading Act 1999*<sup>37</sup> were officially replaced with a uniform act, the *Competition and Consumer Act 2010* (CCA). The ACL marked the end of the 30-year existence of the TPA and Australia's development into one of the top consumer protection countries.<sup>38</sup> The legal framework for consumer protection in Australia demonstrates the comprehensive objectives of the ACL, which seeks '[t]o improve consumer well-being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith'.<sup>39</sup>

Such objectives are achieved through the ACL in five chapters that provide comprehensive and specific regulations. General protections detail prohibited acts by businesses, which include the ban on misleading and deceptive conduct, unconscionable conduct in trade or commerce, and specific bans on unconscionable conduct in consumer and some business transactions.<sup>40</sup> After establishing general protections, the ACL provides for more specific protections including for specific unfair practices in trade or commerce, consumer transactions for goods or services, the safety of consumer goods and product-related services, and the making and enforcement of information standards.<sup>41</sup>

Despite the existence and wide application of the ACL across Australia, there has not been any comprehensive legal theory on consumer protection in Australia.<sup>42</sup> However, this does not prevent the application of economic theories and information such as consumer sovereignty theory, a modern theory of information and theory on consumer behaviour in developing and executing consumer protection law in this country.<sup>43</sup> Two main approaches of effective practices to attain the ACL's objectives include the economics of law, in which the cost of interventions must be taken into account for efficiency, and the application of behavioural science to consumers.<sup>44</sup> The ACL

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[economy-opportunities-to-promote-trade-and-investment.html](#)> accessed 30 June 2021. This article show that Vietnam has not been recognized by the US and EU as a market economy, as the US and the EU still believe that the Vietnamese economy has not met technical standards.

<sup>33</sup>Aubrey L Diamond, 'Reports of Committees, The Molony Committee, Final report of the Committee on Consumer Protection' (Cmnd 1781, July 1962 (HMSO, 18s)) <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1963.tb00699.x>> accessed on 22 June 2021.

<sup>34</sup>David Harland, 'Misleading or deceptive conduct: The breadth and limitations of the prohibition' (1991) 4 *Journal of Contract Law* 107–120.

<sup>35</sup>Norbert Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14 *Journal of Consumer Policy* 257, 261.

<sup>36</sup>'The Recent Fair-Trading Debate in Australia' (Australian National University) <<http://press-files.anu.edu.au/downloads/press/p98831/mobile/ch09s03.html>> accessed on 22 June 2021.

<sup>37</sup>The Victorian Fair Trading Act 1999.

<sup>38</sup>Rod Sims, 'The Bite and the Park of Consumer Law (Australia)' (2012) 50 *Law Society Journal* 74.

<sup>39</sup>Standing Committee of Officials of Consumer Affairs, 'An Australian Consumer Law: Fair Markets: Confident Consumers' Treasury' (2009).

<sup>40</sup>Competition and Consumer Act 2010 (Cth) sch 2, part 2-1, 2-2.

<sup>41</sup>Deloitte Access Economics and Australian Competition and Consumer Commission, 'The Sharing Economy and the Competition and Consumer Act' (2015) <<https://www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf>> accessed 17 May 2018.

<sup>42</sup>Louise Sylvan, 'Activating Competition: The Consumer-Competition Interface' (2004) 12 *Competition and Consumer Law Journal* 191, 192.

<sup>43</sup>Productivity Commission, 'Review of Australia's Consumer Policy Framework' (Final Report, 2008) (Australia).

<sup>44</sup>Sylvan (n 42) 192.

is developed with the objective to correct market failures in the presence of externalities and public goods, and it does not apply whole economic theory on consumer behavior<sup>45</sup> indiscriminately but on a 'case by case' basis so that the costs of that intervention do not outweigh the prospective benefit.<sup>46</sup> From this, it can be seen that the rationales for consumer protection in Australia derive from widely accepted and globally developed theories. As a result, the whole system of regulations in the ACL is scientifically structured on the basis of modern and exemplary consumer protection policy.

In the foreword of the Australian Productivity Commission's 'Review of Australia's Consumer Policy Framework,' consumers' disadvantages in information were re-affirmed – the lack of information, behavioural biases, and information overload which result in misleading information and consequences for individuals and adverse effects on the market.<sup>47</sup> Any legal framework of consumer protection is founded on an information-based rationale, though it does not directly improve consumer information; Australia is no exception.<sup>48</sup> This framework also addresses the economics of information and state intervention in consumer protection properly by stating 'the economics of consumer protection is the economics of information,' which is proven by the terms of ACL. Therefore, the ACL can be an ideal model to assess and contrast against the protection of the consumer's rights in other countries.

### *Similarities between Vietnamese and Australian consumer protection law*

There are many similarities in the respective legislative developments on consumer protection in Australia and Vietnam. In both countries, before the enactment of a specific law, regulations for consumer protection were provided in a piecemeal fashion in the *Commercial Law*, *Civil Code*, and other statutes. Both countries adopted federal consumer protection laws in 2010, and both legal systems have followed the inevitable trend of recognising and developing consumers' rights and protection. The legal framework for consumer protection in Australia consistently demonstrates the comprehensive objectives of the ACL, 'to improve consumer well-being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith.'<sup>49</sup> To compare with the ACL, the LCP also clearly provides for state intervention in supporting consumers with weaknesses to help them balance their interests with that of the provider. In the draft LCP filed with the Vietnamese government, there was no identification of legal and economic theories used to explain and justify consumer protection policy in Vietnam. Instead, it acknowledged three points: (1) the protection of the interests of consumer and business entities; (2) the need to balance of the interests of both, and (3) the central role of the state in protecting the consumers as well as emphasizing the socialization of consumer protection. It is clear that although these acknowledgments are not comprehensive and thorough enough to become a rationale for consumer protection, they are considered the most fundamental principles in governing socio-economic relations that share the same goals with the ACL's mission.

Despite the above-mentioned similarities, there are differences between these in terms of the level of protection, comprehensive governance of consumer relations and the application of legal

<sup>45</sup>Christine Jolls, Cass R Sunstein & Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471; Hanneke A Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Intersentia 2010) 49, 164. Behavioural economics emerged as a theory that combines the study of economics with psychological theory and significantly influenced consumer policy in developed countries, provides supplementary justification for state-based interventions due to its discovery that the consumer usually owes misconception to not being rational as recognized by conventional understanding.

<sup>46</sup>Productivity Commission (n 43) 27.

<sup>47</sup>*ibid.*

<sup>48</sup>Howard Beales, Richard Craswell & Steven C Salop, 'The Efficient Regulation of Consumer Information' (1981) 24 *The Journal of Law & Economics* 491, 493.

<sup>49</sup>Standing Committee of Officials of Consumer Affairs, 'An Australian Consumer Law: Fair Markets – Confident Consumers' (Treasury of Australia, 17 February 2009).

techniques in formulating terms and designing laws between Vietnam and Australia. This gap is widening between Australia, with a long-established market economy, and Vietnam, transitioning from a centrally planned to a market economy. However, the notion that the differences in the level and effectiveness of consumer protection between these countries depend on the appearance of their economies and the development of their markets means that we should not compare them as incorrect. From a legal perspective, the differences are the result of acknowledging and applying different legal philosophies and theories of consumer protection. They are also the consequence of adopting, either correctly or incorrectly, superficial economic theories and applying either refined and subtle or poorly developed-lawmaking techniques.<sup>50</sup> From the perspective of the development of jurisprudence, differences between the mature liberal-democratic legal systems of Australia and the socialist legal system of Vietnam explains why the efficiency of law enforcement in the two countries is not at the same level. However, these differences cannot be used to eliminate the need for comparison of their laws, especially when these two laws have common objectives.

Currently, although Vietnam has launched the LCP, Vietnam's legal framework of consumer protection is neither comprehensive nor effective. The report presented by Trinh Anh Tuan, President of Vietnam Competition Administration, highlighted the shortcomings and limitations of consumer protection in Vietnam during the 2011–2015 period – with ineffective state intervention and consumer dispute settlement – and emphasized the need to improve the legal framework for Vietnam in this area.<sup>51</sup> In Vietnam, the prevalence of consumer rights violations indicates the need to analyze and reform the regulations on consumers' right to information.<sup>52</sup> In such a context, it is valuable to conduct a comprehensive doctrinal study in this article, examining relevant legislation, case law and scholarly commentary, in order to analyze the LCP and compare it with the consumer law of a country comparable in terms of the history of legal intervention. Thus, it is necessary to consider the merits of the ACL and analyze why and to what extent it provides insights for the purpose of reforming Vietnam's current consumer law.

### *Criteria for evaluating the consumer law of Vietnam and Australia*

Chambers and Wedel state that policy evaluation refers to designing and complying with a set of evaluation criteria to examine and analyze policy elements to answer the traditional question of whether they are 'good'. The three criteria for evaluating the features of a policy system include evaluation criteria specific to basic policy elements, implications for adequacy, equity, and efficiency, and the fit to the social problem of concern.<sup>53</sup> According to Chambers and Wedel, these three criteria are used to judge six basic elements without which a social policy/program cannot be implemented, including: (i) mission, goals, and objectives, (ii) forms of benefits or services delivered, (iii) entitlement (eligibility) rules, (iv) administrative or organisational structure for service delivery, (v) financing method, and (vi) interactions among the foregoing elements.<sup>54</sup> Each of the six elements consists of many subtypes that provide a quick reference for describing the main features of the policy. The second and third criteria are the same for all six policy elements, but the first

<sup>50</sup>HJM Boukema, *Good law: Towards a Rational Lawmaking Process* (Verlag Peter Lang GmbH 1982) 30–31.

<sup>51</sup>Vietnam Competition Administration, 'Meeting: Summing up Consumer Protection Activities in Vietnam in the 2011–2015 period [Hoi nghi tong ket cong tac bao ve nguoi tieu dung Vietnam giai doan 2011-2015]' (21 Jan 2016) <<http://sct.haiduong.gov.vn/Tin-moi/ket-qua-cong-tac-cai-cach-hanh-chinh-nam-2015-cua-so-cong-thuong-Ui2buTVv16.htm>> accessed 30 June 2021.

<sup>52</sup>Anh Nguyen Thi Van, 'Current Legal Framework of Consumer Protection in Vietnam [Thuc trang phap luat Vietnam ve bao ve quyen loi nguoi tieu dung]' (2010) 11 *Law Journal* 3, 8.

<sup>53</sup>Donald E Chambers & Kenneth R Wedel, *Social Policy and Social Programs: A Method for the Practical Public Policy Analyst* (4th ed, Pearson Education Inc 2005) 56.

<sup>54</sup>*ibid.* Chambers and Wedel enumerate six policy elements that form the cornerstone of every policy and program: (1) mission, goals, and objectives, (2) forms of benefits or services delivered (3) entitlement (eligibility) rules (4) administrative or organizational structure for service delivery (5) financing method (6) interactions among the foregoing elements.

evaluation criteria that distinguishes between different policy elements, such as mission, goals, and objectives assesses their clarity, measurability, manipulability; administration and service delivery should be judged as to whether there is an articulate program/policy design as well as its integration, continuity, accessibility, accountability, consumer empowerment, and consumer participation in decision making.<sup>55</sup>

In assessing the consumer law of Vietnam and Australia, this article uses the three above-mentioned evaluation criteria to judge the two most familiar subtypes of specific policy elements concerning the form of benefit/service and administration and service delivery, namely, protective regulation and due process protections for clients' procedural rights.<sup>56</sup> Specifically, three of the above-mentioned evaluation criteria are used to evaluate the structures and designs of the consumer laws of Vietnam and Australia and the 'good enough' level of regulation on misleading or deceptive conduct of their laws. Evaluation criteria specific to structures and designs of these consumer laws defined as the first criterion can be analyzed to find the response for whether their structures and designation are articulate, to what extent consumer empowerment and consumer participation in decision making are ruled, as well as measure the integration, accessibility, and accountability of the laws. Accordingly, Vietnamese and Australian consumer laws are evaluated based on the clarity and consistency of the structures and designs of their laws, the adequacy and appropriateness of forms (in terms of misleading and deceptive conduct to satisfy the criteria of integration), accessibility, accountability, and consumer empowerment. The second criterion is applied to assess the adequacy, equity, and efficiency of consumer laws in Vietnam and Australia in protecting consumer's right to information against misleading or deceptive conduct. To make the evaluation, this article uses the element of due process protections for consumers' procedural rights represented by a four-step test that will be discussed in the following sections to identify what constitutes misleading or deceptive conduct. The third criterion evaluating the fit of the policy element to the social problem of concern is integrated into the standards for adequacy and efficiency of factors including the structure and designation of the laws, forms of misleading or deceptive conduct, and the four-step test as mentioned above.

### **The effectiveness of the general prohibition against misleading or deceptive conduct in the law on consumer protection and related laws**

#### *The operation of regulations prohibiting misleading or deceptive conduct in the LCP*

From the general perspective of regulatory technique construction, the present provision prohibiting misleading or deceptive conduct in the LCP is designed to assert rights and then enforce the infringement of such rights. Correspondingly, there are two principal terms in the LCP that express this structure – Article 8 of the LCP supports consumers' right to information and general prohibition, while Article 10 of the LCP regulates misleading or deceptive conduct.<sup>57</sup>

Article 8 of the LCP recognizes and affirms the rights of consumers 'being provided accurate and complete information about organisations or individuals trading goods or services; contents of transaction of goods and/or services; the source and origin of goods; being provided with invoices and vouchers and documents relating to the transactions and other necessary information about goods and/or services that consumers purchase and/or use'. Under normal circumstances, an affirmation of such a right does not make much sense. Once prohibitions against misleading information or deceptive conduct are present in consumer protection law, they imply the assertion of a right to information of consumers. However, in the context of consumer protection legislation in Vietnam, the existence

<sup>55</sup>ibid 57.

<sup>56</sup>ibid 56, 57. Chambers and Wedel enumerate types of basic policy elements of administration and service delivery including centralization, federation, case management, referral agency, indigenous worker staffing, racially oriented agencies, administrative fair hearing, due process protections for clients' procedural rights and citizen participation.

<sup>57</sup>LCP, art 10.



of Article 8 of the LCP has played a significant role. As discussed above, the statutory provisions of consumer information in Vietnam are not confined to the LCP, but are present in different statutes; together, they are essential for the enforcement of the LCP. However, there is no provision in these related laws that legally recognize consumer's right to information in general. In the absence of a legal basis for invoking and linking these provisions, Article 8 can be expected to play a meaningful alternative role. It presents not only a statutory recognition of the consumer's right to information in the LCP but also in the overall Vietnamese legal system. Although this is not a recommended solution, this provision can be an alternative basis for a regulatory system. In resolving disputes between consumers and businesses regarding informational obligations, Vietnamese courts may invoke more specific provisions in relevant laws through Article 8 of the LCP.

In comparison, Article 10 of the LCP imposes the principle for the protection of the consumer's right to information provided in Article 8. This is the only clause in the LCP regulating misleading or deceptive conduct. Article 10 directly prohibits the conduct as follows:

Attempt of organizations or individuals trading goods and/or services in deceiving or misleading consumers via advertising activities, or hide or provide information that is incomplete, false or inaccurate about one of the following details:

- a) Goods and/or services that organizations or individuals trading goods and/or services provided;
- b) Reputation, business ability, and ability to provide goods and/or services of organizations or individuals trading goods and/or services;
- c) The contents and characteristics of the transaction between consumers and organizations or individuals trading goods and/or services.

The structure of Article 10 of the LCP reflects the traditional style of regulation by Vietnamese lawmakers in which only the most apparent manifestations of these conduct are described. Specifically, Article 10.1 of the LCP comprises two descriptions. Namely, the form of misleading or deceptive conduct and the information relating to goods and services used to cause confusion or deception. Analysis of Article 10 reveals the characteristics of the regulation on the right to information in the LCP.

Significantly, there is no definition for 'misleading' or 'deceptive' conduct in Article 10 of the LCP or in any law in the Vietnamese legal system. This lack of definition makes it difficult for judges and authorized agencies to understand and enforce the regulations in this area. As a country of the civil law tradition, there is a reluctance to use precedents in Vietnam<sup>58</sup> despite precedents being recognized as a source of law in 2015.<sup>59</sup> Crucially, there have not been many cases in this area that can make significant supplement to actual practice. In this circumstance, as Article 10 of the LCP is the only clause regulating misleading or deceptive conduct in the LCP – a specified, important law in the area of consumer protection although it does not provide definitions – it could be expected to serve as a general prohibition in protecting consumer's right to information against misleading or deceptive conduct.

However, the response of this expectation is not satisfactory. Unfortunately, the prohibition regulated in Article 10 of the LCP is limited to narrow and insufficient content. In contrast, it should have been designed more technically and considerably so that this regulation can efficiently protect consumers' right to information. In Article 10 of the LCP, there are two forms of misleading or deceptive conduct: (i) misleading, deceptive advertising and (ii) concealing or providing

<sup>58</sup>Tam Le Minh, 'Building Up and Improving the Vietnamese Legal System – Issues on Theory and Practice [Xay dung va hoan thien he thong phap luat Viet Nam - Nhung van de ly luan va thuc tien]' [2003] *People's Public Security* 212, 213.

<sup>59</sup>Resolution on the Process of Selecting, Promulgating and Applying Case Law 2015.

incompletely or inaccurate information about goods or services. The latter consists of all types of information-giving relevant to selling goods and services. Apart from Article 10, the LCP has no other provisions that illumines the specific prohibition in Article 10.1 of the LCP. Instead, the remainder of the rules in Article 10.1 of the LCP define the types of information about goods or services that may cause confusion or mislead consumers. These definitions can be categorized into three broad categories – information related to products, information related to organisations and individuals dealing in goods and services, and information relevant to the performance of the transaction. Similar to the regulation on the forms of conduct in Article 10, no other provisions in the LCP provide for the specific elements involved in these three categories of information in Article 10.1 of the LCP.

Interestingly, Article 10.1 of the LCP is a broad general provision that reveals one of the unusual characteristics of the Vietnamese legal system since Vietnamese socialist legal thinking has always been fragmented.<sup>60</sup> Interpreting this provision is difficult, as there is no specific prohibition that is supplementary to Article 10.1 of the LCP. This characteristic reduces the provision's role as a general protection of the consumer's right to information. Since Article 10.1 is a unique provision in the LCP regulating misleading or deceptive conduct, the pros and cons of this provision can be the basis for assessing the effectiveness of LCP regulations. The lack of specific protections in the LCP presents a severe defect in the statute, likely resulting in the ineffective enforcement of protection of consumers' right to information in Vietnam. Therefore, this is a significant shortcoming of the LCP that needs to be addressed and requires revision as soon as possible.

It seems that in the view of Vietnamese lawmakers, the LCP naturally belongs to the system of statutes having interrelated legal relationships, such as *the Commercial Law*,<sup>61</sup> *Competition Law*,<sup>62</sup> and *Advertising Law*.<sup>63</sup> Therefore, courts and other mechanisms automatically apply the relevant provisions in these other statutes when resolving disputes relating to consumer information, specifically for misleading or deceptive conduct. Consequently, consideration of the protection of consumer's right to information in this area is likely to be subject to the analysis of pertinent provisions of these laws. Interestingly, in laws that do not directly protect consumers – such as those designed with the objective of safeguarding free competition in the market (*Competition Law*) or the state management of advertising activities (*Advertising Law*) – the right to consumer information is regulated in more detail. This is a necessary complement by which the mission of protecting consumers in Vietnam could be achieved, but it shows an embarrassing lack of coordination in the application of the philosophy of legal construction in Vietnam. It is also an illustration of the frequent lack of an explicit theory of law that leads to ambiguity and misunderstanding about the level of the dwelling of the content of issues, by which it is impossible to identify the purpose and the mission of each statute.

Yet, as Vietnam has already established the LCP, it is only possible to use the provisions of the LCP and other laws to decide in dispute resolution if – and only if – such an application is stipulated in the LCP.<sup>64</sup> In such a situation where a regulation already exists, the general principle of 'lex specialis derog legi generalis' ('lex specialis') will be applied where the LCP plays the role of general law while the relevant statutes are specialized laws.<sup>65</sup> A reference in the statutory provision will form the

<sup>60</sup>John Gillespie & Pip Nicholson, 'The Diversity and Dynamism of Legal Change in Socialist China and Vietnam', in John Gillespie & Pip Nicholson (eds), *Asian Socialism and Legal Change: The dynamics of Vietnamese and Chinese Reform* (ANU Press 2005) 1, 7.

<sup>61</sup>The Vietnamese Commercial Law 2005

<sup>62</sup>The Vietnamese Competition Law 2018

<sup>63</sup>The Vietnamese Advertising Law 2012.

<sup>64</sup>Article 156.3 of The Vietnamese Law on Promulgation of Legal Normative Documents 2015 stipulates that 'if various legal normative documents promulgated by the same agency contain different regulations on the same issue, the one that is promulgated later shall apply'. In accordance with this regulation, it is impossible for courts and governmental bodies to apply different regulatory provisions of many different laws that regulate the same issues relating to consumer protection.

<sup>65</sup>Gerard Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 11 *German Law Journal* 966, 986–987. Conway describes this traditional rule as follows: 'It is important to note that the application of lex

legal basis for judges and other authorized agencies to apply them when making a decision. Thus, this article's analysis in Section II.B will go in the direction of selecting and analyzing the provisions in specific laws with detailed rules that specify the prohibitions in Article 10 of the LCP.

There are two forms of conduct related to the informational obligation described above, hiding or providing misleading or deceptive information and constituting misleading or deceptive advertising. Categorising into such groups is not entirely appropriate, for example conducting a promotion as well as advertising should be included in the same group of marketing practices, but it is grouped with other types of providing information while advertising is regulated separately. However, the analysis below is implemented in such a way that it adheres to categories introduced in the LCP as the basis for its examination of the provisions of the laws which add and improve the enforcement effect of the LCP. From such an analysis, the consumer's right to information regulations in Vietnam can be assessed.

### *The ambit of the general prohibition against misleading or deceptive conduct in other laws that suppress the LCP*

Apart from the general provisions mentioned in the LCP, the conduct of providing misleading information causing consumers confusion about goods and services is regarded an obligation dealing with the sale of goods and services in the Vietnamese *Law on Measurement*,<sup>66</sup> the *Law on the Quality of Goods and Services*,<sup>67</sup> and *Commercial Law*.<sup>68</sup> Also, the *Commercial Law* regulates commercial practices relating to traders' obligation to provide information such as the display, introduction, and promotion of goods. These provisions almost assert the same content that prohibits the conduct of revealing of false information in a similar manner. The Vietnamese *Law on Measurement* requires producers and traders to provide truthful information on quantities of pre-packaged goods and notify customers and consumers of conditions needed for transporting, storing, preserving, and using these goods. The Vietnamese *Law on Quality of Goods and Services* sets the rules of a business' obligations to provide information relating to selling goods and services. Accordingly, Article 8 of the Vietnamese *Law on Quality of Goods and Services* lists the prohibitions against providing untruthful information, committing fraudulent acts related to products' and goods' quality or origin and concealing information on the products' and goods' capability of causing danger to humans, animals, plants, assets, or the environment. Meanwhile, Article 16 of the Vietnamese *Law on Quality of Goods and Services* establishes sellers' obligations relating to information including the supply of truthful information on product and quality of goods, the goods' warranty, the goods' capability of causing danger, and the preventive measures taken upon receiving warnings from producers or importers.

Evaluating the role of these provisions on informational obligations as supplementary aspects of the LCP, these laws are not as complementary as they should be. In general, the provisions on obligations to provide information on the sale of goods and services in the two laws above require businesses to perform acts associated with the mandatory disclosure of information. The drawback of listing these types of information in these laws enumerates just some information type, the content of which is still incomplete. If all the specific information required for disclosure to customers by these two laws are compiled, a well-defined set of information can emerge. Nevertheless, these obligations are with respect to information related to goods and services; they do not concern the manufacturer, supplier, or commercial transaction between transacting parties. Therefore, reading Article 10 of the LCP with other laws show that they are not as complementary as they should or appear to be.

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specialis excludes *lex generalis*, otherwise *lex specialis* might be the first stage of the reasoning but would be eclipsed or superseded by (an interpretation based on) *lex generalis*'.

<sup>66</sup>The Vietnamese Law on Measurement 2011.

<sup>67</sup>The Vietnamese Law on Quality of Goods and Services 2007.

<sup>68</sup>The Vietnamese Commercial Law 2005.

Additionally, one of the essential forms of prohibition against misleading or deceptive conduct is silence as a non-action. However, this kind of conduct is only mentioned in a single provision within the *Law on Quality of Goods and Services*, which prohibits the concealment of information about the possibility of goods causing danger. Unfortunately, the provision is incomplete, potentially ignoring its silence about other types of information that must be disclosed to the consumer. This is a significant shortcoming of the LCP that requires reform.

Separately, consumer protection is one of the principles of commercial activity articulated in Article 9 of the *Commercial Law*. With respect to the protection of the customer's right to information, the provisions on businesses' informational obligations provide for three forms of conduct – display and introduction, promotion, and advertising of goods and services. Accordingly, the *Commercial Law* stipulates that businesses are prohibited from displaying and introducing samples of goods that do not reflect the quality, price, utility, design, type, packaging, warranty period, and quality indicators. It also provides that businesses must display as well as introduce goods for comparison with other businesses.<sup>69</sup>

In connection with Article 8 of the LCP, Article 123 of the *Commercial Law* may be invoked as providing the forms of conduct mentioned in the LCP's provision concerning misleading or deceptive information about goods or services. In relation to obligations to provide information for promotion, Article 96 of the *Commercial Law* requires traders to 'strictly follow the announced promotion program and commitments with customers', to publicly inform customers about the prices of goods and services for sale promotion, related expenses for the delivery of goods and services for sale promotion, conditions of participation in the promotion, and the use of benefits received from promotional activities. If the promotion is in the form of donation, the trader must give notice of the price of the goods or services donated; if the promotion is by way of a discount, traders must declare the deduction in comparison to the regular price before the promotion period begins.<sup>70</sup> The specific benefits that customers receive through other promotional forms and the costs incurred by customers must also be disclosed.<sup>71</sup>

The above prohibitions against misleading or deceptive conduct by the *Commercial Law* are stipulated more specifically than that of the LCP. As a result, they can be applied by Vietnamese courts and other authorized agencies to be read with the provisions of the LCP in dispute resolution involving consumers' right to information. However, the supplementary regulations in the *Commercial Law*, *Law on Measurement*, and *Law on Quality of Goods and Services* are still not different from the techniques used to describe the prohibition in the LCP. In the laws discussed in the preceding paragraphs above, there are no regulations that determine the nature of the conduct constituting misleading or deceptive information that can be used to conclude whether the same conduct is in violation of the prohibition. The advantage of these regulations is that they clarify the group of prohibited behaviours in the LCP by specifically detailing the smaller types of conduct in within this group. However, these regulations do not prescribe a process to identify the breach of the consumer's right to information based on the factors that constitute the conduct. Consequently, their addition to the regulation on the consumer's information right in the LCP is unlikely to be a sufficient or comprehensive supplement. However, this is not required as the priority for laws such as the *Commercial Law* is to ensure the proper performance of trade and commerce in the market, rather than to protect the rights of consumers.

Thus, the general prohibitions in the LCP and other related laws that supplement it show inadequacies and shortcomings. All of them lack definitions that clarify the signs of misleading or deceptive conduct. They are especially lacking in description and factors to identify misleading and deceptive information. Also, the operation of specific behaviours governed by these laws

<sup>69</sup>The Vietnamese Commercial Law 2005, art 123.

<sup>70</sup>The Vietnamese Commercial Law 2005, art 97.

<sup>71</sup>*ibid.*

appears to be somewhat vague. Save for the portion in relation to misleading advertising, Article 10.1 of the LCP merely states the prohibition of two forms of conduct concealing information relating to products or providing misleading or deceptive information. These remain unclear since many questions regarding their nature have not been clarified or have answers provided, including whether they include half-truths. The next section examines similar questions explored thus far in the context of the legal regime in Australia.

## The nature and ambit of the prohibition against misleading or deceptive conduct in the Australia consumer law

### *The Operation of ACL provisions prohibiting misleading or deceptive conduct*

Consumer protection against misleading or deceptive conduct is stipulated in the ACL on two levels: general protection, and specific protection. The general protection against misleading or deceptive conduct in the ACL, as will be discussed in the following sections, has met the requirements for regulation. The ACL is designed to provide general standards or norms constituting unacceptable conduct to guide the commercial practices of businesses. As a result, regulatory provisions containing definitions of the nature, and structure of misleading conduct are provided for. In reality, business activities and practices are always subject to rigid rules in the statutory provisions. Thus, the general description of the most common features in the section on misleading or deceptive conduct makes it possible to cover and predict many of the potential forms of conduct that lawmakers may not acknowledge at the time of designing the statutory provisions. Provisions on general protection, therefore, requires broad, abstract legislative thinking, a comprehensive descriptive structure, and the most accurate words that can determine the nature of the prohibition. With respect to the section on specific protections in the ACL, the provisions concerning the types of conduct shows an attempt to capture most if not all types of potential breaches in this area. Simultaneously, as discussed in the following sections, each kind of conduct is adequately noted in the specific protections and contributes to clarifying the diversity of prohibitions, and efficiently contributing to the protection of the consumer's right to information for the ACL.

Additionally, a developed body of case law relating to disputes concerning misleading or deceptive conduct in Australia has contributed significantly to the determination of clear and detailed standards of prohibition. This actual practice is beneficial for the protection of consumers' right to information for two main reasons. First, Australia belongs to the common law system, where precedents<sup>72</sup> are a source of interpreting laws. Precedents are valuable as 'guidelines [that guide the courts] on the path to their decisions'<sup>73</sup> since they have been applied to real cases. Second, the regulations against misleading or deceptive conduct in the ACL are reproduced from those of the TPA without a difference in its essence.<sup>74</sup> Thus, some longstanding cases remain applicable to the present with the effect of the ACL.

### *General protection against misleading or deceptive conduct in the ACL*

Unlike the statutory structure in the LCP which asserts the rights of consumers and then stipulates the specific prohibition, the regulation against misleading or deceptive conduct in the ACL follows a structure that starts with the general prohibition and then provides a particular prohibition of each form of conduct. Section 18 (1) of the ACL sets out the general prohibition: 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or

<sup>72</sup>John Lockhart, 'The Doctrine of Precedent—Today and Tomorrow' (1987) 3 Australian Bar Review 1, 1. Lockhart explains that 'the doctrine of binding precedent in its strictest form (*stare decisis* according to orthodox theory) means that lower courts are bound to follow the decisions of courts above them in the hierarchy and that superior appellate courts are bound by their own previous decisions'.

<sup>73</sup>Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (4th edn, LexisNexis Butterworths 2014) 95.

<sup>74</sup>Stephen G Corones, *The Australian Consumer Law* (Thomson Reuters Lawbook Co 2011) 95.

deceive'. This clause appears to have three elements which should be clarified or explained in cases as a basis for the application of the regulations: (a) determine what forms of 'engage in conduct' are; (b) define how is considered as 'in trade and commerce'; and (c) describe what 'misleading or deceptive conduct' means. The analysis of each element in the general prohibition clause as discussed below shows its significant effect in performing the task as an overall provision of the legal framework of prohibition in the ACL.

*'Engage in conduct'*. Determination of what constitutes 'engage in conduct' in section 18 of the ACL is the direct objective of the prohibition, indicating what forms of conduct are considered 'misleading or deceptive'. At the most general level, the forms of conduct explained in section 2(2) of the CCA consist of two forms of conduct: 'doing or refusing to do any act'. The CCA also specifies that 'refusing to do any act' means that the two forms in sub-section 2(2)(c) of the CCA include 'refraining (otherwise inadvertently) from doing that act or making it known that the act will not be done'. These regulations, in conjunction with section 18 of the ACL, are quite adequate and fulfill their role as catch-all provisions in the classification of misleading or deceptive conduct without neglecting any type of conduct that could be available in actual situations.

Additionally, some other forms of conduct are provided by judges through their comments and explanations accompanying case law. Judicial interpretation responds to questions raised by the facts of disputes, such as whether misleading or deceptive conduct refers to 'representation'. If the concept of misleading or deceptive conduct is understood in the context of the relationship between a seller and consumer, 'representation' will be identified as a type of conduct. For the first time, the Australian High Court in *Butcher v Lachlan Elder Realty Pty Ltd*<sup>75</sup> noted that the term 'conduct' in section 52 of the TPA included 'representations'. It may comprise many pre-contractual and post-contractual misrepresentations including advertising, franchising, property sales, and rent.<sup>76</sup> This is also evident in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* in which the judges held that 'misleading or deceptive conduct under section 52 of the TPA generally, though not always, consists of representations.'<sup>77</sup>

However, without constraining misleading or deceptive conduct to representation, judges and legal scholars have extended their consideration of conducts to specific types of 'refusal to perform' conduct such as silence, omission, non-disclosure, opinions, statements as to future matters, statements of law, and the authorized use of character images.<sup>78</sup> Corones divides misleading or deceptive conduct into the two categories of conduct, namely silence and intermediary involving the relaying of information (the conduct in the form of performing a particular action), while Lockhart divides conduct into the two categories of acts and omissions.<sup>79</sup> As expressed in *Commonwealth Bank of Ireland Act v Mehta*,<sup>80</sup> silence may be considered a violation of a duty of disclosure since it may be characterized as misleading or deceptive. In particular, Corones specifies two broad categories including 'silence in isolation' and 'half-truth'. Accordingly, 'silence in isolation' is construed as the deliberate decision to withhold information,<sup>81</sup> and 'half-truth' is defined as a statement that is intended to deceive by being only partly true, or the information 'is true on its face, it misrepresents the true state of affairs because of what it is unsaid'.<sup>82</sup> 'Half-truth' is divided into two sub-

<sup>75</sup>Dan Svantesson, 'Some Observations on the Regulation of Misleading or Deceptive Conduct' (2007) 13 *The National Legal Eagle* 6, 18.

<sup>76</sup>Corones (n 74) 99.

<sup>77</sup>*Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477, 504.

<sup>78</sup>Lockhart (n 73) 52.

<sup>79</sup>Lockhart (n 73) 95.

<sup>80</sup>*Commonwealth Bank of Ireland Act v Mehta* (1991) ATPR para 41-103.

<sup>81</sup>*Rhone-Poulenc Agrochimie SA* (n 77) 490.

<sup>82</sup>Corones (n 74) 100. Corones analyzes the case *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31.

categories – the first is providing incomplete information, and the second is failing to disclose subsequent changes, which render that information no longer accurate.<sup>83</sup> These regulations and judicial pronouncements protect consumers' interests against a variety of potential breaches of the right to information.

*'In trade and commerce'*. The breadth of 'in trade and commerce' has been the subject of extensive judicial and academic scrutiny. It helps to determine more specific characteristics of conduct that can be prohibited by the ACL. The term 'in trade and commerce', as clarified and analyzed in *Concrete Constructions (NSW) Pty Ltd v Nelson*, refers to 'conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character'.<sup>84</sup> The concept of trade and commerce also extends to statements made by persons who themselves are not engaged in trade or commerce, but their presentation is made 'in such context and in such circumstances as to render them as a commercial character'.<sup>85</sup> Australian courts distinguish between 'in trade and commerce' and 'in connection with trade and commerce'<sup>86</sup> by indicating the distinction of understanding these terms in practical situations. Accordingly, as analyzed in *Concrete Constructions (NSW) Pty Ltd v Nelson*, 'in trade and commerce' should be construed preferably from the narrow view, referring to the central conception of trade and commerce and not to the 'immense field of activities' in which corporations 'may engage in the course of, or for the purpose of carrying on some overall trading or commercial business'.<sup>87</sup>

Despite such conceptual discourse, practical situations continue to pose questions that require judgments to provide explanations for each case. These situations include the individual sale of real or personal property, statements made in the employment context, statements made in public debate, and statements made by those who are not directly engaged in trade or commerce but are made with the intention to influence the trade and commerce of other businesses.<sup>88</sup> Australian courts do not always choose to adopt the same interpretation and application to deal with these cases. The diversity of judges' interpretations shows the variety of the different interpretative approaches available for the ACL.

For conduct in the context of individual sales, Australian judges have determined that an individual sale is not defined as a form of 'trade and commerce' because of two reasons discussed in *Orbien v Smolobogov* and *Argy v Blunts*: Individual sale is 'not something done by the appellants in the course of carrying on a business',<sup>89</sup> and 'it lacked trading or commercial character as a transaction'<sup>90</sup> even though it uses 'facilities commonly employed in commercial transactions', or it uses agents to advertise, to make auction or negotiate a private treaty. This assertion is consistent across these two judgments.<sup>91</sup>

However, for the statements made in the employment context, judges have provided a different set of explanations. In *Concrete Constructions*, the Court held that internal communication by one employee to another in the course of their ordinary activities are not characterized as being 'in trade or commerce', whereas in *Patrick v Steel Mains Pty Ltd*, *Finucane v New South Wales Egg Corporation*, and *Walker v Salomon Smith Barney Securities Pty Ltd*, judges agreed that the employment of staff for the purpose of carrying out its trading and commercial activities should be

<sup>83</sup>Corones (n 74) 101.

<sup>84</sup>*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

<sup>85</sup>Corones (n 74) 57. Corones analyzes the cases *Taylor v Crossman (No 2)* [2012] FCAFC 11; 199 FCR 363; *Astra Resources Plc v Full Expose Pty Ltd* [2012] FCA 1061 paras 28–31; *Weir v Screen* [2013] ACTSC 188 paras 86–90.

<sup>86</sup>Alexander Bruce, *Consumer Protection Law in Australia* (1st edn, LexisNexis 2011).

<sup>87</sup>*Concrete Constructions (NSW) Pty Ltd v Nelson* (n 84).

<sup>88</sup>Bruce (n 86) 61.

<sup>89</sup>*O'Brien v. Smolonogov* (1982) 43 ATPR 847.

<sup>90</sup>*Argy v Blunts* [1990] 94 ALR 719, ATPR 51 para 274.

<sup>91</sup>Bruce (n 86) 63. Bruce analyzes the case *O'Brien v. Smolonogov* (1982) 43 ATPR 847 and *Argy v Blunts* [1990] 94 ALR 719, ATPR 51 para 274.

considered part of a corporation's trade or commerce; therefore, they can be included in the ambit of 'in trade and commerce'.<sup>92</sup> In the case where statements are made in the course of public debate, such as films or advertisements, Australian courts confirm that whether such statements are made 'in trade and commerce' depends on whether it was 'designed to advance or protect commercial interests of the exhibitor or publisher'.<sup>93</sup> With the variety of explanations presented by these judgments, the concept of 'in trade and commerce' has been well-clarified to play a significant role in determining prohibited conduct and help to enforce the ACL's consumer protection regulations efficiently.

Among the crucial factors constituting misleading or deceptive conduct are fault and intention. The TPA and the ACL do not have a specified statutory test to prove these factors in the case of impugned violations. Likewise, determining the effect of the conduct, as well as manifesting the cause and consequences of the violation that reflect the link between the behaviour and the state of mind of a relevant person or class of persons,<sup>94</sup> are not also identified in the laws. Thus, it should be made clear whether the breach of the consumer's right to information was carried out intentionally, or its consequence required to prove or not by way of application and analysis of the case laws. The Australian High Court does not recognize the requirement of intention as a necessary element constituting an infringement,<sup>95</sup> while it is essential to clarify that 'conduct by silence' must be an intentional failure to disclose information.<sup>96</sup> Likewise, for conduct to fall foul of the ACL, it can amount to a breach purely because it is misleading or deceptive in nature, regardless of whether a person actually have been misled or deceived.<sup>97</sup> Conversely, the consequential loss or damage from the infringement will be considered as the basis of liability and compensation for consumers.<sup>98</sup>

*What constitutes misleading or deceptive conduct?.* Although the regulation on misleading or deceptive conduct in the ACL derives from the TPA, neither the TPA nor the ACL defines what constitutes misleading or deceptive conduct. In *Seven Network Ltd v News Interactive Pty Ltd*, it was determined that 'it's not enough if the conduct simply causes confusion or uncertainty'.<sup>99</sup> On one hand, the conduct must have 'a meaning which is inconsistent with the truth'.<sup>100</sup> On the other, the misleading or deceptive behaviour must 'lead [the consumer] into the error' or have a 'tendency to lead a person into error'.<sup>101</sup> The definition also includes the existence of 'a real or not remote chance or possibility regardless of whether it is less or more than fifty percent'.<sup>102</sup> Meanwhile, others argue that that it is likely to be unnecessary to investigate whether the conduct caused misleading and deception in a practical situation, since the phrase is understood more broadly.<sup>103</sup>

Moreover, consideration of whether misleading or deceptive conduct includes confusion or not, and the difference between confusion and deception, determines the content of prohibition. By

<sup>92</sup>*Patrick v Steel Mains Pty Ltd* 77 ALR 133; (1987) ATPR para 40–794; *Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486, *Walker v Salomon Smith Barney Securities Pty Ltd* [2003] FCA 1099; 140 IR 433, 10 October 2003.

<sup>93</sup>Bruce (n 86) 65.

<sup>94</sup>Lockhart (n 73) 94.

<sup>95</sup>*Hornsby Building Information Centre Ltd v Sydney Building Information Centre Ltd* [1978] 140 CLR 216 para 228.

<sup>96</sup>*Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 477; (1999) ATPR para 41–696; 45 IPR 453.

<sup>97</sup>*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20.

<sup>98</sup>*Hornsby Building Information Centre Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; 18 ALR 639 at 647 (Stephen J); CLR 234; ALR 651 (Murphy J).

<sup>99</sup>*Seven Network Ltd v News Interactive Pty Ltd* [2004] FCA 1047; 63 IPR 28.

<sup>100</sup>Lockhart (n 73) 85. Lockhart analyzes the cases *World Series Cricket Pty Ltd v Parish* [1977] 16 ALR 181 [201] per Brennan J; *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 [88], 55 ALR 25 [30] per Powen CJ, Lockhart and Fitzgerald JJ.

<sup>101</sup>Lockhart (n 73). Lockhart refers to the cases *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] 149 CLR 191; *Campell v Backoffice Investment Pty Ltd* [2009] HCA 25, 238 CLR 304; 257 ALR 610 para 25 (French CJ); *ACCC v TPG Internet Pty Ltd* [2013] HCA 54; 304 ALR 186 para 39 (French CJ, Crennan, Bell and Keane JJ).

<sup>102</sup>*Global Sportsman Pty Ltd v Mirror Newspaper Ltd* [1984] ATPR para 40–463.

<sup>103</sup>Svantesson (n 75) 19.



analyzing case law, the authors conclude that proof of confusion, a determination of which is a short but essential step,<sup>104</sup> appears as an evidential element for a deception;<sup>105</sup> however, it is not sufficient for the conduct to merely cause confusion.<sup>106</sup> The erroneous assumption doctrine was expressed by the Australian Federal Court in *McWilliam's Wines Pty Ltd v McDonald's System of Aust Pty Ltd*. There, the Court considered the misleading elements of representation applied in that case, and held that it is neither a breach of Article 52 of the TPA nor Article 18 of the ACL if the misunderstanding of consumers is not a result of the alleged conduct, but a consequence of their own erroneous assumption.<sup>107</sup>

The centrepiece of the process of considering whether the impugned conduct tends to confuse consumers, is to view it as a whole and in context. It is, therefore, essential to examine the context of the conduct to discover the signs that satisfy the structure of the offense. Lockhart distinguished between the internal and external contexts and asserted that some elements cannot be ignored when analyzing the context of the violation.<sup>108</sup> In *Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd*, Chief Justice Gibbs opined that it is impossible to just pick a few words when discussing the infringement allegedly caused by those words while ignoring other words that also contributed to its concept.<sup>109</sup> Likewise, statements in negotiations, brochures, or other forms of promotion such as advertisements are reviewed in their entirety or holistically in the context of the whole document.<sup>110</sup> While an analysis of the internal context requires a comprehensive understanding of the nature of the conduct, an examination of the external context must consider issues arising from the environment in which the conduct influences. The external concept is composed by factors that relate directly to the plaintiff and defendant rather than to any class of persons to whom the conduct is directed. With case law, these factors have been supplemented by Australian judges, including the nature of the parties, the character of their transaction, and their conversations, which can attribute to the information they know.<sup>111</sup> The elements of the external concept are also focused on the medium size of the target audience, audiences to which the conduct is directed, the relationship between the alleged contravention and the victim, and the habits and characteristics of the market where the conduct is associated to several other factors.<sup>112</sup> Australian judges often focus and examine the offending elements of the impugned conduct from the perspective of their impacts to the community in general, before isolating the characteristic features of the group audience that the conduct is targeted at, and considering whether the prohibited elements are present in such conduct.<sup>113</sup> To conclude whether an impugned conduct can cause confusion or deceive the target group, the identification of the specific characteristics and knowledge of a target audience group is an essential tool to determine the suitability of the impugned conduct. With respect to behaviour or words directed at the general public, when a determination of a specific purpose for a particular group audience cannot be made, it does not suffice that only some people are confused under the conduct's influence.<sup>114</sup>

*A four-step test.* In *Taco Company of Australia Inc v Taco Bell Pty Ltd*,<sup>115</sup> the Australian Federal Court developed a four-step test to determine whether a conduct is misleading or deceptive

<sup>104</sup>Lockhart (n 73) 89.

<sup>105</sup>Lockhart (n 73) 88.

<sup>106</sup>*Taco Company of Australia Inc. & Anor. v. Taco Bell Pty. Ltd. & Ors.* (1982) ATPR para 40-303.

<sup>107</sup>*McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd* [1980] FCA 188; 49 FLR 455.

<sup>108</sup>Lockhart (n 73) 96.

<sup>109</sup>*Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd* (1982) 149 CLR 191.

<sup>110</sup>Lockhart (n 73) 97.

<sup>111</sup>*ibid* 100.

<sup>112</sup>*ibid* 100.

<sup>113</sup>*ibid* 101.

<sup>114</sup>*ibid*.

<sup>115</sup>(1982) ATPR para 40-303.

based on the effect of the conduct on the target. This four-step test requires courts to: (1) determine the target section of the public to whom the conduct is directed, (2) examine the characteristics of all those falling within the target section relating to their knowledge and understanding such as their intelligence, education, and their age; (3) consider the inner context to identify whether the conduct is or is likely to be misleading or deceptive; and (4) review and evaluate evidence of misrepresentation or deception caused by the conduct rather than by other factors, in which there must necessarily be a sufficient nexus between the conduct and misunderstanding.<sup>116</sup>

While these steps are almost uniformly applied in cases, the second step of identifying consumer misconceptions differs in the point of view of some cases. In applying this test, the analysis of the Australian judges in recent cases tend to favour the selection of ordinary or reasonable persons. However, some cases identify the necessity of determining whether some people or hypothetical individuals are mistaken due to the conduct's consequence. In some cases, the Australian courts have held that it is necessary to examine the reaction of ordinary or reasonable members of the class to whom the representation is directed,<sup>117</sup> while other Australian judges held that this is unnecessary.<sup>118</sup> According to Justice Finkelstein in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd*, it would be sufficient for the court to require that the conduct has likely misled only a hypothetical individual from the determination section of the group.<sup>119</sup> Recently, a decision in *Telstra Corporation Limited v Singtel Optus Pty Ltd* before the Australian Federal Court, which followed the decision in *ACCC v TPG Internet Pty Ltd*, confirms that the test that should be applied is whether ordinary and reasonable members of the class would be misled, with the number of reasonable persons who might be misled being irrelevant.<sup>120</sup>

The process of considering the audience factor as part of the external context in Australia also has many theoretical approaches. The High Court of Australia have adopted two approaches for determining the reasonable member of the target audience: a context-based approach and a pragmatic approach. While the first one is thought to be normative and abstract, the latter tends to seek to concretize the factors based on the facts of the case. In *ACCC v TPG Internet Pty Ltd*, the High Court of Australia applied the pragmatic approach that adheres to the actual factors of a specific case to consider whether the subject was affected by the alleged breach. In this case, the Court considered a possibility for impugned advertisements to fail to take reasonable care of a targeted audience's interests by identifying whether the targeted audience viewed the advertisements with 'their substantial purchase in mind focused on the subject matter of their shopping', or whether the advertisements were 'an unbidden intrusion on the consciousness of the target audience'.<sup>121</sup> Meanwhile, the application of the context-based approach is illustrated in *Butcher v Lachlan Elder Realty and Miller & Assoc Insurance Broking Pty Ltd v BMW Aust Finance Ltd* by defining the standard of care issue of specific individuals based on a consideration of whether the success or failure of making reasonable inquiries of an experienced and professional party in a commercial transaction is relevant to the misleading non-disclosure.<sup>122</sup>

Lockhart mentions that the process of establishing misleading or deceptive conduct consists of three steps: it is necessary to (a) define whether the impugned conduct was done in trade or commerce; (b) determine what the impugned conduct/s meant; and (c) examine whether the alleged act was misleading or deceptive.<sup>123</sup> At the primary stage of defining the first factor, similar fact

<sup>116</sup>Svantesson (n 75) 19–20.

<sup>117</sup>ibid 19. Svantesson refers to the case *Seven Network Ltd v News Interactive Pty Ltd* [2004] FCA 1047; 63. IPR 28.

<sup>118</sup>ibid 20. Svantesson refers to the case *Campomar Sociedad v Nike International Ltd.* [2000] HCA 12; 202 CLR 45; 169 ALR 677.

<sup>119</sup>*.au Domain Administration Ltd v Domain Names Australia Pty Ltd* [2004] FCA 424.

<sup>120</sup>*Telstra Corporation Limited v Singtel Optus Pty Ltd* [2020] FCA 1372 (25 Sep 2020).

<sup>121</sup>Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54 (12 Dec 2013).

<sup>122</sup>Lockhart (n 73) 108.

<sup>123</sup>Lockhart (n 73) 113.

evidence, one of the analytical techniques defined as ‘evidence of facts similar to those which are in issue at trial’,<sup>124</sup> can be applied. Whether an impugned conduct was performed depends on the admission that ‘just more than one occurrence of a similar fact, perhaps making the occurrence in question more probable’.<sup>125</sup> The assessment of similar fact evidence is based on the criterion of admissibility of the probative force of evidence, that ‘it raises, as a matter of common sense or experiences, the objective improbability of some events having occurred other than alleged’.<sup>126</sup> The significant probative value of the evidence is evaluated by examining whether similar fact evidence provides ‘striking similarity’, ‘unusual features’, ‘underlying unity’, and ‘system or pattern’<sup>127</sup> in relation to an impugned conduct to conclude the probability that the conduct was performed. Accordingly, elements used to assess the probability of the existence of an impugned conduct include (a) opportunities for which the conduct may cause misleading, (b) similarity between the impugned conduct and evidence of similar facts; (c) the significant distinction between the situation of a supposed breach in which the consumer is affected, and (d) the time elapsed between the earlier alleged conduct and the current one.<sup>128</sup>

The second and the third factor are ultimately examined based on analyzes of the characteristics of the impugned conduct and definition of a ‘misleading and deceptive conduct’ to determine whether the overall net impression is misleading or deceptive. Circumstantial evidence, including ‘habit and attitudes of the conduct’s the target audience, relevant marketing techniques in common use, the setting in which a person is likely to be exposed to the conduct and the target audiences’<sup>129</sup> may be used in determining whether the conduct is misleading or deceptive in nature. It should also be noted that conduct is defined broadly, rather than focusing on a single manifestation. When a representation conveys more than one meaning to reasonable consumers, one of which where the conduct conveys a misleading or deceptive and is directed at a significant number of people regardless of whether they are misled or deceived or not, the conduct is likely to also violate the prohibition.

### *Specific protection relating to misleading or deceptive conduct in the ACL*

Division 1 of Part 3.1 of Chapter 3 of the ACL provides specific prohibitions in 37 provisions. Different from those involving general protection, these provisions contain three features: (1) misleading or deceptive conduct is pleaded by reference to a ‘representation’, (2) a ‘representation’ is characterized as ‘false and misleading’ rather than ‘misleading or deceptive’ as mentioned in the general protection provisions, and (3) they explicitly enumerate types of misleading representation. In this section of the ACL concerning specific protections, the word ‘false’ is defined as ‘contrary to fact’ and does not require the deliberation of the person making the representation.<sup>130</sup> Thus, the use of the word ‘false’ in the same way as using the term ‘misleading or deceptive’ in the general protection provisions means that there are no differences in the application between the two sets of provisions. However, the use of the term ‘representation’ tells a different story.

<sup>124</sup>Andrew Palmer, ‘The Scope of the Similar Fact Rule’ (1994) 16 *Adelaide Law Review* 161, 161.

<sup>125</sup>Bernard Robertson & Amelia Wheatley, ‘Similar Fact Evidence in Civil Proceedings: Proof or Policy’ (2007) 26 *University of Queensland Law Journal* 99, 102.

<sup>126</sup>*Hoch v The Queen* (1988) 165 CLR 292 (5 Oct 1988).

<sup>127</sup>*ibid.*

<sup>128</sup>Lockhart (n 73) 115.

<sup>129</sup>Lockhart (n 73) 117. Lockhart refers and analyzes the cases *WEA International Inc v Hanimex Corp Ltd* [1987] 17 FCR 274, 280; 77 ALR 456, 462 (Gummow J) (Fed Ct); *Interlego AG v Croner Trading Pty Ltd* [1992] 39 FCR 348, 388; 111 ALR 577, 618 (Gummow J) (Balck CJ and Lockhart agreeing); *Netcomm (Aust) Pty Ltd v Dataplex Pty Ltd* [1988] 81 ALR 101, 105 (Gummow J) (Fed Ct); *QDSV Holdings Pty Ltd v TPC* [1995] 59 FCR 301, 311; 131 ALR 493, 502 (Sackville J) (Full Fed Ct); *Horgan v Pacific Dunlop Ltd* [1988] 83 ALR 403 para 234 (Gummow J) (Fed Ct); *Thai World Import and Export Co Ltd v Shuey Shing Pty Ltd* [1989] 17 IPR 289, 296; [1990] ATPR para 40–988 (Gummow J) (Fed Ct).

<sup>130</sup>Russell Victor Miller, *Miller’s Australian Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia Ltd 2017) 1583.

A ‘representation’ in the specific protection provisions refers to ‘a statement, made orally or in writing or by the implication of words or conduct’.<sup>131</sup> A representation may consist of express representation and implied representation, including something written, something oral, a gesture, a silence, or a combination of these things.<sup>132</sup> Some Australian judges asserted that misleading or deceptive conduct do not only include representation forms but possibly other forms. Chief Justice Gleeson and Justices Hayne and Heydon observed in *Butcher v Lachlan Elder Realty Pty Ltd* that the expression ‘conduct’ extends beyond ‘representations’.<sup>133</sup> In *Henjo Investment Pty Ltd v Collon Marrickville Pty Ltd*, although Lockhart J agreed that misleading or deceptive conduct generally includes representations both made expressly or through silence, he commented that ‘it is erroneous to approach [section] 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation’.<sup>134</sup> He also stated that ‘section 52 operates in a variety of situations. It may not be limited to cases where the conduct complained of is a misrepresentation, although that is the normal cases which present itself’.<sup>135</sup> Further, as mentioned in *Henjo Investment Pty Ltd v Collon Marrickville Pty Ltd*, disregarding whether the conduct is representational in character or not, it is necessary for the courts to investigate the nature of the impugned conduct to define whether it constitutes a breach.<sup>136</sup>

However, in general, expressions of ‘conduct’ tend to refer to something done by the defendant rather than concern consumers, while the manifestation of ‘representation’ is likely to be neutral. As such, if the assessment of whether there is a contravention of the ACL or not shifts from being based on the respondent’s conduct to relying on the possibility for consumers to be misled, then ‘representation’ is more broadly conceived than ‘conduct’. This is because, from the consumer’s perspective, the instances where they can be misled can only be discovered as a result of a comprehensive examination of the case as a whole and in context, where all forms of conduct have to be taken into account and evaluated. Silence or non-disclosure is a good example of a conduct to analyze. In such a context, there are different ways of justifying whether silence or non-disclosure is a type of representation or conduct when it constitutes a contravention of the ACL. Accordingly, apart from being considered as a form of implied representation, silence is construed as something ‘actionable’ in the context of a conduct.<sup>137</sup> However, it may be understood that silence is considered to be the ‘negative film of a photograph’ of behaviours. Regarding its nature, the interactions and information of behaviour by silence carry the same meaning as that of action, though it is by omission. Silence still conveys information that consumers may understand to be absent. Therefore, silence should also be understood as a form of representation.

Although they assert that ‘representation’ is not co-extensive with ‘conduct’,<sup>138</sup> Australian judges do not limit their legal decision within the superficial ambit of these terms. The use of precedents and analogy in this common law jurisdiction supplements the legislation and allows courts to extrapolate from decided cases when the present case is ‘concerned with the application of a statutory text, expressed in general terms, to particular facts’.<sup>139</sup> The extrapolation has been formally admitted as one of the ways that help judges resolve disputes without hesitancy when, as stated in *Google Inc v Australian Competition and Consumer Commissions*, ‘there is no little danger in

<sup>131</sup> *ibid* 1583.

<sup>132</sup> Christian Juebner, ‘Misleading or Deceptive Conduct Claims Practical Hints for Practitioners’ (Victoria Bar) <<https://www.vicbar.com.au/file/5691/download?token=hsbloa4Y>> accessed on 04 July 2021.

<sup>133</sup> *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 para 32.

<sup>134</sup> *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (No 1) 4 (1988) 39 FCR 546, 555.

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid*.

<sup>137</sup> Charles Chew, ‘The scope and limitations of the doctrine of misleading or deceptive conduct in the context of guarantees: some perspectives and uncertainties’ (2006) 3 Macquarie Journal of Business Law 79, 88.

<sup>138</sup> *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 488.

<sup>139</sup> *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

attempting to extrapolate from the decided cases to a rule of general application'.<sup>140</sup> However, it is important that each case is considered on the basis of reference to the statutory text and the particular facts identified as relevant to the application of that text.<sup>141</sup>

Specifically, consideration of the forms of conduct or representation that a case involves, apart from explicitly examining the relevant surrounding facts and circumstances, a proper understanding of the full factual context in which respondent's 'conduct' or 'representation' was made. Although there is a dissimilarity between the ambit of what counts as 'conduct' and 'representation' respectively, the word 'conduct' in the general prohibition section of the ACL provides a reference to statutory text for the courts to decide cases, allowing flexible application that are not listed in specific provisions. An example of this is the judgments in cases involving silence including silence in isolation, half-truth, omission, and intermediary involving the relaying of information. Among these cases, cases concerning half-truth – where defendants provide information that is true on its face but causes misconception in consumers due to a part of information being concealed – was influenced, very early on, cases concerning this prohibition in the TPA.<sup>142</sup> These types of infringements are easily overlooked because statutory text cannot cover all signs of a breach. Thus, this is one of many proofs of the success and effectiveness of consumer information protection laws in Australia.

### Insights to be gained from Australia

The most substantive difference between the regulation of misleading or deceptive conduct in Vietnam and Australia is the structure and designation of statutory provisions. In Australia, except for consumer protection in banking services,<sup>143</sup> all other regulations relating to the protection of the consumer's right to information are in the ACL. On the other hand, in Vietnam, these temporary regulations are not solely in the LCP but scattered across many different laws. Further, as discussed above, these additional regulations in various Vietnamese laws are unclear and not linked by a reference to an appropriate statutory text that should be mentioned in the LCP. These differences may lead to a lack of efficiency in the protection of consumer rights in Vietnam for a number of reasons.

First, structurally, the LCP does not contain general protections on top of specific protections with respect to prohibition against misleading or deceptive conduct as compared to the ACL. Such general protection is extensively provided for in the ACL, with the use of terms such as 'engage in conduct', 'in trade and commerce', and 'misleading and deceptive'. These terms establish the necessary description for identifying the constituent signs of a contravention, thereby limiting omission of some forms of breach in practice. Article 8 of the LCP, instead of defining a general ban as in the ACL, merely asserts the protection of the consumer's right to information. Neither are there any forms general protection in other statutes that supplement the LCP. This lack of a general protection section in the LCP results in a gap in the most important elements that underpin the theory and practice of enforcing consumer information protection in Vietnam. The ACL also does not contain two vital factors to determine breach: factors that determine the subjects and the forms of conducts' performance. More specifically, the signs for identifying the subject are also aimed at the ultimate purpose of defining the types of conduct and determining whether a conduct constitutes a 'misleading or deceptive conduct'. Moreover, the LCP's lack of a general prohibition provision could lead to a myopic focus only on types of misleading *information* instead of misleading *conduct* which is an essential element to constitute a contravention. This clearly distinguishes the LCP from the ACL: as Vietnamese lawmakers focus on information relating to products, Australian legislative agencies emphasize the presentation as to goods and services. Neither 'conduct' nor 'representation'

<sup>140</sup>Google Inc v Australian Competition and Consumer Commission [2013] HCA 1; 249 CLR 435.

<sup>141</sup>ibid.

<sup>142</sup>Lockhart (n 73) 127.

<sup>143</sup>Consumer protection regulation in relation to financial services is regulated by The Australian Securities and Investments Commission Act (2001) (Cth).

are found in the LCP, consequently, both popular and subtle forms of misleading or deceptive conduct are not regulated adequately in the law.

Second, the expression of forms of breach in the LCP are not adequate due to the provision of only two forms of conduct, including misleading advertising, and providing misleading information about goods and services. These conduct may be categorized as forms relating to information disclosure as to products. However, species of misleading or deceptive conduct are not only limited to advertising and other categories of providing information. As explained in the above analysis of the regulations of the ACL, the concept of conduct is approached and determined in respect of the subject, the mode of expression, and even inaction. Professional legal drafting in conjunction with Australian courts' employing the common law and using precedents to purposively interpret legislation can help judges to handle effectively breaches of the ACL. Clearly, a single provision in the LCP (including other complementary statutes) is incapable of encapsulating all forms of breaches.

It can be clearly seen that silence and half-truth forms of misleading conduct relating to employment, false or misleading representations about a sale of land are absolutely absent in the LCP. As discussed above, the Vietnamese *Law on Quality* refers only to the prohibition against concealing information about the possibility of causing loss to the safety of goods while ignoring many other relevant types of information. Meanwhile, the type and amount of information about particular products and services that traders must provide to consumers are set out as information standards in the section 134 of the ACL.<sup>144</sup> With the technique of using overarching prohibition in the general protection section and then specifying forms of conduct, the ACL maximizes its coverage capacity, avoiding omissions that can occur in a very diverse commercial practice. Because of the absence of a general protection section, even though the LCP or other related Vietnamese laws attempt to enumerate specific breaches against the consumer's right to information, it is impossible to cover all new forms of conduct that may emerge due to rapid change and development of the market. Thus, the substitution of an overarching prohibition provision with a general provision affirming the right is *the* option for containing many of the inadequacies that need to be overcome in the LCP.

Based on the above-discussed differences between Vietnamese and Australian consumer law, it is suggested that there are a variety of law reforms that will enhance the operation of Vietnamese consumer law.

First, a general protection section should be added in the LCP to create standards of business conduct in the market, including a general ban in the form of a catch-all provision against misleading conduct or representation in trade and commerce. The terms 'conduct' or 'representation', 'in trade and commerce', 'misleading or deceptive or is likely to mislead or deceive' should be explicitly used in this general protection section.

Second, it is necessary to supplement the LCP with specific protections which address identified forms of business conduct as mentioned in the ACL. Accordingly, the LCP should set out the statutory rule to prohibit certain false or misleading representations and information standards about the information required to be provided by suppliers of consumer goods and of services. With these two structural construction techniques, the LCP will be able to regulate instances of silence in isolation, misleading omission, half-truth and other potential forms of contravention, which are not currently regulated in Vietnam.

Third, a test of examining whether impugned conduct is misleading or deceptive should be established in a legal document in order to provide specific guidance for upholding and enforcing the obligations created by the LCP. It is proposed that this test should consist of four fundamental steps derived from the Australian statutory framework:

- (1) define the relevant section of the public;
- (2) consider the characteristics of all those falling within the relevant section relating to their knowledge and understanding such as their intelligence, education, and their age;

<sup>144</sup>To make regulations more detailed, the Country of Origin Food Labelling Information Standard 2016 (the Information Standard) was made in accordance with the ACL (cl 134, effective 1 July 2016).

- (3) identify whether the conduct is or is likely to be misleading or deceptive by its nature without requiring that somebody was in fact misled or deceived, and without the need to prove that actual damage to have occurred due to the misleading or deceptive conduct;
- (4) evaluate any evidence of confusion or deception caused by the conduct to find a causal link between the defendant's conduct and the misconception.

Vietnam has undergone strong strides in its efforts to reform the economy and build a corresponding legal system that governs social relations in the developing economy. However, this country is still enduring a period of adaptation to keep up with the legal development of many countries around the world. It is in realizing the limits of a young legal foundation that seeking solutions for reforming consumer law in Vietnam is an open opportunity. By adopting this matrix of the LCP reforms that are modelled on the ACL, it is suggested that Vietnam can improve regulations against misleading conduct to protect consumer's right to information, and create an equitable environment for trade and commerce.

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### Author Biographies

**Lam Uyen Lu**, Lecturer, School of Law, the University of Economics Ho Chi Minh City.

**Niloufer Selvadurai**, Professor of Law, Macquarie Law School, Macquarie University, Australia; Solicitor and Barrister of the Supreme Court of New South Wales.