

## **The Protection of Online Shopping Consumer Rights in Australia**

**Oleh:**

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### **ABSTRACT**

As one of the advanced countries in the world, Australia is putting technology as main instrument in dealing with daily activity, included in shopping. Therefore, nowadays, many Australian rely on online shopping. It seems everything becomes easier when it is dealt online. People do not need to go outside their home and spend their money. What they can merely need is just sit at home and wait for the order. Thus, online shopping can be argued is more effective and efficient in this era. However, beyond this positive aspect, there are also some negative aspects. Among them is the quality of the product. Buyers (consumers) would never see goods or services directly. They only view the products or services through pictures or videos which are available on the website. The problem is, these images and videos might not be as good as reality. The vendors post the high quality pictures and videos on the site merely to attract consumers. Another issue is, difficult to communicate with the seller after buying the product. During the negotiation, it is easy to contact seller, but after the products are sold, majority vendors would “disappear”. Security payment is among on the risk list as well. Therefore, it is interesting to be researched, how the Australian law then protects its society from such risk. The Government claims that the Australian Competition and Consumer (ACC) Act 2010 has become law umbrella in protecting Australian in dealing with online shopping.

**Keywords** : Online Shopping, Consumer Rights, Australia

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### **A. BACKGROUND**

In this technology era, online shopping has become more popular within society. Although it has not defeated the ‘offline’ shopping yet, but from year to year the number of people who are shopping online increased sharply. The reason is, online shopping is considered more effective and efficient. Consumers do not need to go to markets or shopping centres and spend their money for petrol as they could conduct it online. As a result, they could save much time and money because of it. What they merely need to undertake is, open their computer, connect to the internet then search the product that they want to buy. Nowadays, this phenomenon is happened globally, including in Australia.

Australia itself according to data released by Roy Morgan Research, it is found that the number of Australian who is shopping online is continued to increase every year. The finding revealed that in 2014 the number of Australian who did online shopping has reached around 7,630,000 people. Majority of them aged of 14 year olds above (which represent 40 per cent

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of the Australian population). In 2011, on the other hand, the figure was around 5,704,000. Thus, during the three years, there was more than 3 million people have purchased online. Majority of them were buying more than one product within 4 weeks<sup>2</sup>. In addition, compare to traditional retailer, online shopping has increased triple than traditional sales<sup>3</sup>. In general, it could be argued that more than 50 per cent of Australian is shopping online<sup>4</sup>.

This figure tells us how Australian depends on the online shopping in the current day although many of them have little aware about the risk of doing it<sup>5</sup>. For example, buyers (consumers) would never see goods or services directly. They only view the products or services through pictures or videos which are available on the website. The problem is, these images and videos might not be as good as reality. The vendors post the high quality pictures and videos on the site merely to attract consumers. Another issue is, difficult to communicate with the seller after buying the product. During the negotiation, it is easy to contact seller, but after the products are sold, majority vendors would “disappear”. Security payment is among on the risk list as well.

So, the risk such as misleading or deceptive conduct, unconscionable conduct, passing off, and conditions and warranties are potentially to happen during online shopping especially from overseas vendors. Surely, consumers would be disadvantaged by the above risks. Thus, the protection toward their rights is very crucial. It could be imagined what would happen if there is no law which protect these consumer rights, consumers will encounter a big loss.

## **B. RESEARCH QUESTION**

Based on the above description, some possible research question would be interesting to be researched more deeply are:

1. How Australia Law protect its consumer from possible deceptive issue when they do online shopping?
2. What kinds of penalty would be imposed for those are againts the law?

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<sup>2</sup> Roy Morgan Research, ‘Online Shopping on the Rise for More Retail Categories’ (Press Release, 6095, 19 March 2015) <<http://www.roymorgan.com/findings/6095-online-shopping-on-rise-201503182332>>.

<sup>3</sup> Brien McDonald, ‘NAB Online Retail Sales Index: February 2016’ (Monthly Update Report, National Australia Bank, 30 March 2016) <<http://business.nab.com.au/nab-online-retail-sales-index-march-2015-16054/>>.

<sup>4</sup> ABC News, ‘More than 50 Per cent of Australians Shopping Online’, *Consumer Affairs*, 4 June 2013 (Amy Bainbridge) <<http://www.abc.net.au/news/2013-06-04/more-than-50-per-cent-of-australians-shopping-online/4731590>>.

<sup>5</sup> Anthony D Miyazaki and Ana Fernandez, ‘Consumer Perceptions of Privacy and Security Risks for Online Shopping’ (2001), *Journal of Consumer Affairs* 27, 35 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1745-6606.2001.tb00101.x/abstract>>.

## C. ANALYSIS

The Australian Government has legislated the Australian Competition and Consumer (ACC) Act 2010 (Cth) where the Australian Consumer Law is located. However, this Act does not specifically govern online shopping; oppositely more provisions are governing “offline” shopping. It becomes worse because until recent day Australia still does not have specific regulation which precisely regulates online shopping. So, the only exist law is the ACC Act. In this stage, perhaps many consumers are a bit worried about their rights when they involve in online shopping.

In respond to the worried, the Australia Competition and Consumer Commission (ACCC) explains that although Australia has not had the specific regulation regarding online shopping yet, all of consumer rights regulated in the ACL would also apply to the consumer when they buy a product online in or outside Australia<sup>6</sup>. Section 5 of the Act indicates that this rule will apply to business run outside Australia as long as the business are run by “bodies corporate incorporated or carrying on business within Australia; or Australian citizens; or persons ordinarily resident within Australia”<sup>7</sup>. This means that Australian consumer rights are still protected by the ACL when they are dealing with goods or services online. Although it arises another question, how strong this ACL could protect the consumer rights online?

### 1. Misleading and Deceptive Conduct

As mentioned above, among the online shopping problems, misleading or deceptive and unconscionable conducts are the most frequently to happen. Due to there is no specific laws governing this online shopping, all of the provisions in the ACL will be applied as well to online shopping consumers. Thus, if the consumers are facing any problems during the online transactions, they could use this Act to sue the vendors.

Nevertheless, another different consumer laws may also apply during the online transactions. For example, if a consumer is dealing with home loans, leases, mortgages, personal loans and using credit card, then the law of consumer credit will apply in this area as well. Another law which might possibly to apply is the Electronic Funds Transfer Code of Conduct which was regulated in 1986. This code of conduct is protecting consumer rights regarding e-payment transaction<sup>8</sup>. But, regarding commerce or trade, ACL is more suitable to apply for consumer protection.

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<sup>6</sup> Australia Competition and Consumer Commission, *Shopping Online* (n.d.) <<https://www.accc.gov.au/consumers/online-shopping/shopping-online>>.

<sup>7</sup> *Australia Competition and Consumer Act 2010 (Cth)-Schedule 2*.

<sup>8</sup> Australian Securities and Investments Commission, *E-Payment Code* (20 September 2011) <<http://asic.gov.au/regulatory-resources/financial-services/epayments-code/>>.

Misleading or deceptive conduct is regulated in the section 18 Schedule 2 of the Competition and Consumer Act 2010 (Cth) which states “misleading or deceptive conduct, a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”<sup>9</sup>. The conducts included in this area are statements and actions such as promotions, quotations, advertisements, representations and any statement which is made by a person<sup>10</sup>. Later, the courts differentiate between the misleading and deceptive conduct. The court explains that when someone is doing deceptive, it is required the intention to deceive or fraud. Misleading, on the other hand, is required no intention or particular state of mind. The underline is, this is an illegal conduct that cannot be carried out by any business to their consumer. With or without intention, a vendor would still be categorised of breaching the section 18 if the conduct make consumers suffer from loss<sup>11</sup>.

Regarding what the conduct is, the CCA in section 4(2)(a) interprets that a conduct is “a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant”<sup>12</sup>. So, section 18 of the ACL, court’s explanation and section 4(2)(a) of the ACC Act give clear explanation regarding misleading or deceptive conduct though there is not clear explanation regarding online shopping.

Although section 18 is regulated under Australian Consumer Law, but it is not restricted to the transaction of consumer only. Besides that, it is subjected to business to business as well. Thus, the presence of ACL is really helpful for consumers because under this Act they can bring to the courts if there are sales representative (offline or online) who try to attract consumers with over enthusiastic when they sell products. By using this Act they could ask them to stop from misleading or deceptive them.

In order to establish the misleading or deceptive conduct, it needs to ensure if the impugned conduct is really contain misleading of deceptive. Also, it should happen in commerce or trade and the claimant have suffered from the loss. Another important thing is,

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<sup>9</sup> Australian Contract Law, *Misleading or Deceptive Conduct* (n.d.)  
<<http://www.australiancontractlaw.com/law/avoidance-misleading.html>>.

<sup>10</sup> NSW Government, *Misleading or Deceptive Conduct* (n.d.)  
<[http://www.fairtrading.nsw.gov.au/ftw/Businesses/Acceptable\\_business\\_conduct/Misleading\\_or\\_deceptive\\_conduct.page](http://www.fairtrading.nsw.gov.au/ftw/Businesses/Acceptable_business_conduct/Misleading_or_deceptive_conduct.page)>.

<sup>11</sup> Australia Competition and Consumer Commission, *Advertising and Selling Guide* (n.d.)  
<<https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/avoid-misleading-or-deceptive-claims-or-conduct/misleading-or-deceptive-conduct>>.

<sup>12</sup> *Australian Competition and Consumer Commission v Valve Corporation* (No 3) [2016] FCA 196  
<<https://assets.documentcloud.org/documents/2778501/20160324-NSD886-14-ACCC-v-Valve-No-3-Judgment.pdf>>

by undertaking an objective test. In the case of *Campbell v Backoffice Investment Pty Ltd* (2009) 238 CLR 304 at 341-2; 257 ALR 610 at 639, judges Hayne, Heydon, Kiefel JJ and Gummow approved the statement as stated below by McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR at 625; 212 ALR 357 at 383-4:

“The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. Thus, where the alleged contravention of section 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole. The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document (25)”<sup>13</sup>.

In the case of *Google v ACCC* (2013) HCA, it could be seen how the court interpreted misleading or deceptive conduct regarding advertisement. In the case, Google has been accused of breaching section 18 of ACL because they displayed the web address of advertiser as a sponsored link which also included the competitor's name<sup>14</sup>. In another case, *ACCC v Scoopon Pty Ltd*, we could also see the similar approach done by courts to give the meaning of misleading or deceptive conduct regarding advertisement<sup>15</sup>. Rosanne in her article analysed more about how actually the decision of *Google v ACCC* puts the responsibility of advertisement to the advertisers to avoid from misleading or deceptive conduct<sup>16</sup>.

## 2. Unconscionable Conduct

In the ACL, there are three sections regulating unconscionable conduct. Namely section 20 regarding unconscionable conduct within the meaning of the unwritten law. Section 21 regarding unconscionable conduct and section 22 related unconscionable conduct in business transactions. However, in 2012, these three sections were merged become two

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<sup>13</sup> *Butcher v Lachlan Elder Realty Pty Limited* (2004) HCA 60; 218 CLR 592; 212 ALR 357; 79 ALJR 308 (2 December 2004) 109 <<https://www.coursehero.com/file/p2sgqgo/Second-there-is-no-reason-in-principle-why-the-requirement-should-exist-Third/>>.

<sup>14</sup> *Google v ACCC* (2013) HCA 1

<<http://www.australiancontractlaw.com/cases/google.html>>.

<sup>15</sup> *Australian Competition and Consumer Commission (Accc) V Scoopon Pty Ltd*

<sup>16</sup> Rosanne Sands, 'Google v ACCC: The High Court Considers Misleading and Deceptive Conduct' (2013) 15 *University of Notre Dame Australia Law Review* 152-165, 163 <<http://search.informit.com.au/documentSummary;dn=268417767580236;res=IELAPA>>

sections only because the Competition and Consumer Act 2010 (Cth), where the ACL is located, was amended by the Competition and Consumer Legislation Amendment Act 2011 (Cth). So, in the “new” Act, the existing section are section 20 and 21 is concerning with the statutory unconscionability and section 22 is dealing with an interpretative provision which help the court to interpret section 21.

The meanings of unconscionable conduct based on unwritten law might be concluded as follow:

1. Generally speaking, conduct will be ‘unconscionable’ when that conduct is against good conscience or cannot be reconciled with what is right or reasonable in the circumstances of the transactions.
2. Equitable relief will not be granted unless the conduct falls within the accepted categories of cases that attract the term ‘unconscionable’.
3. If conduct is unconscionable within the meaning of ACL s 20, an aggrieved party will then be able to access the remedies under the CCA<sup>17</sup>.

The general think that unconscionable conduct based on the unwritten law may apply limited as mentioned in section 20 of the ACL. For example unconscionability does not arise simply because of an imbalance in a bargaining position, even if it is a marked imbalance. Or it is not an unconscionable conduct unless the conduct contains to predatory or exploitative conduct<sup>18</sup>. Interestingly, unconscionable conduct based on section 21 related to goods or services is wider that as defined in unwritten law. It is stated that a person must not, in trade or commerce, in connection with; the supply or possible supply of goods or services to a person (other than a listed public company); or the acquisition or possible acquisition of goods or services from a person (other than a listed public company), engage in conduct that is, in all the circumstances, unconscionable<sup>19</sup>.

Although, it has been stated in the Act, but there is no precise meaning regarding unconscionable conduct in the ACL. So far, the definition of it, is taken from case laws which defined the meaning of unconscionable conduct. The conduct is considered unconscionable if the conduct is conducted really unfair or even against with the social norms within society or irrational at all. In the business context, a behaviour is considered unconscionable conduct if the conduct is done with harsh and oppressive or beyond the business bargaining context. For instance, the court is summarised that the conduct is categorised unconscionable if the

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<sup>17</sup> Alex Bruce, *Consumer protection law in Australia*, (LexisNexis, 2<sup>nd</sup> edition, 2014) 132.

<sup>18</sup> *Ibid*, 147.

<sup>19</sup> Above 6.

conduct is done deliberately and involve conduct which is clearly unfair and unreasonable or serious misconduct<sup>20</sup>.

However, in determining whether a party is considered of doing unconscionable conduct, there are three question needed to be asked to the parties;

1. Is one of the parties to the contract at some sort of special disadvantage by comparison to the other party, such that the special disadvantage creates a reasonable degree of inequality between them?
2. Is the stronger party aware of the special disadvantage?
3. Is it unfair or unconscientious of the stronger party, knowing of this special disadvantage, to enter into the contract or arrangement with the weaker party?<sup>21</sup>

### **3. Fine and Penalty**

In the legislation, it is stipulated that for those who contravene the ACL will be penalised with fines and pecuniary penalties. Fines are monetary penalty or also called criminal penalty which is determined by courts in criminal proceedings. However, the criminal standard of proof is highly required in this proceedings. Pecuniary penalties, on the other hands, is monetary fines which is imposed and collected by civil courts. The procedure of the balance of probabilities is required in determining the penalty<sup>22</sup>. Section 151 of the Schedule 2 of ACC Act 2010 (Cth) stipulated that for those who commit unconscionable, misleading and deceptive conduct will be charged \$1,100,000 if the person is a body corporate and \$220,000 if the person is not a body corporate for maximum<sup>23</sup>.

For the consumer who suffer from unconscionable conduct they will be awarded with a variety of remedies, namely; financial compensation; compensation for loss or damage; having the contract declared void in whole or in part; a refund of performance of specified services; and having the contract or arrangement varied<sup>24</sup>. For those who become the victim

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<sup>20</sup> Australia Competition and Consumer Commission, *Unconscionable Conduct* (n.d.)  
<<https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>>.

<sup>21</sup> Above 16, 135.

<sup>22</sup> Australia Competition and Consumer Commission, *Fines and Penalties* (n.d.)  
<<https://www.accc.gov.au/business/business-rights-protections/fines-penalties>>.

<sup>23</sup> Tasmanian Law Handbook, *Unconscionable Conduct under the ACL* (2013)  
<<http://www.hobartlegal.org.au/tasmanian-law-handbook/consumers-money-and-debts/australian-consumer-law/unconscionable-conduct>>.

<sup>24</sup> Australia Competition and Consumer Commission, *Unconscionable Conduct* (n.d.)  
<<https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>>.

misleading or deceptive conduct will be awarded with some of remedies as well such damages and contractual avoidance or variation<sup>25</sup>.

If we look at to the provisions regarding misleading or deceptive and unconscionable conduct in the ACL, it is clear that the protection of consumer rights is very tight. There is no space for business owner to avoid from this provision. If they disobey, then the huge penalties will be given as explained above. So, regarding offline shopping, there is no doubt that ACL has regulated very good about this. Nonetheless, ACL is still becoming new challenge when it deals with the online shopping. As we have explained above, the online shopping has it owns problem, goods or services cannot be seen directly, difficult to make a contact after buying and etc. It will become worse when the vendor is located overseas. Does ACL protect the consumer rights? To answer this question let we illustrate a case, then try to analyse.

The case is a consumer is buying a product after he/she was searching from the Internet. Let say, the product is sold by Indonesia vendor which is located in Indonesia as well. They do not have representative overseas, including Australia. The owner posts on the website that if we buy one product we will get two products. This means that the buyer will get another one free product if he/she buy a product. The seller also wrote that they will do refund, repair if the buyers receive unacceptable quality product as mentioned in section 54 of ACC Act 2010 (Cth). Then the product was sent. Unfortunately, the consumers received one product only, not two as promised by seller through websites. After emailing the vendor, then vendor said that it is correct consumer would get two products, it would happen if consumer buy a product in a packet, for example. Unfortunately, this information is not mentioned in the website.

It could be guessed what would happen next, surely, the buyer will sue the seller because the seller is considered of doing misleading or deceptive conduct. And if we refer to the section 18 it is true that the seller has done misleading or deceptive conduct because he did not provide completed information regarding the product that would be sold. It seems the vendor has intention to deceive the buyer. So, in order to answer this question, first of all we need to refer to the section 5(1) of the ACC Act which stipulates that the protection of consumer rights would be well protected by the ACL if the vendors who run business outside Australia are bodies corporate incorporated or carrying on business within Australia; or Australian citizens; or persons ordinarily resident within Australia<sup>26</sup>. Now, the problem is

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<sup>25</sup> Australian Contract Law, *Misleading or Deceptive Conduct* (n.d.)  
<<http://www.australiancontractlaw.com/law/avoidance-misleading.html>>.

<sup>26</sup> *Australia Competition and Consumer Act 2010 (Cth)*.



coming because the vendor is not an Australian and also they do not have representative within Australia jurisdiction. In this stage it is very difficult to sue the seller.

What about carrying on business within Australia as stated in 5(1) (g) of the ACC Act, can the above consumer use this subsection to sue the seller? Literally the conduct doing by vendor perhaps fulfils this section because they send the product to their consumer within Australia jurisdiction. But, in practice, it is difficult to apply because there is no fixed definition regarding carrying on business within Australia in the ACL, although the vendor, let say, sends the goods or provide services regularly in Australia. So, this conduct is not strong enough to claim if the vendors are doing carrying on business within Australia, except they have representative in Australia<sup>27</sup>.

Interestingly, in the case *ACCC v Valve Corporation* (No 3) [2016] FCA 196, the court considered that Valve, which based in the USA, can be considered as carrying on business in Australia because they send product regularly to Australian consumers. But, Valve said that the ACL did not apply to their business<sup>28</sup>. In this regard, it might be argued that Valve was considered carrying on business in Australia because it is one of the big video game companies in the world and also has around 2.2 million users in Australia. Perhaps, these factors have encouraged courts to decide if they are considered of fulfilling carrying on business in Australia. But, this decision may not automatically be applied to the Indonesian vendor case because the business is too small and there is no explanation how many consumer they have in Australia. However, it is still possible to sue them.

#### **D. Conclusion**

Thus, from the above description, we could conclude that the protection of consumer from unconscionable, misleading and deceptive conduct by online vendors of goods and services who are located overseas by Australian consumer law is still weak. ACL is very difficult to enforce because there is no self-regulation regarding this and also in the ACL does not specifically mention regarding online shopping. Perhaps, by making cooperation with the states where the vendor is located could help and proceed the implementation of the Australian consumer law.

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This is also cited in the website of the Treasury  
<<http://www.treasury.gov.au/PublicationsAndMedia/Publications/2011/Extraterritorial-conduct>>

<sup>27</sup> John Griffiths, 'Application of the Australian Consumer Law to Government Commercial Activities' (2015) 29 (3) *Commercial Law Quarterly*, 3-15

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<sup>28</sup> *ACCC v Valve Corporation* (2016) FCA 196.

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