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Dan Svantesson
Bond University, Dan_Svantesson@bond.edu.au

Roger Clarke
University of New South Wales

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Recommended Citation
Dan Svantesson and Roger Clarke. (2010) "A best practice model for e-consumer protection" *Computer law and security review,* 26 (1), 31-37.

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A best practice model for e-consumer protection

Dan Svantesson[1] and Roger Clarke[2]

1. Introduction

E-commerce is beneficial for several reasons. For example, it provides convenient access to products that may otherwise not be accessible, which is particularly important in rural areas. It is an efficient way of entering into transactions, both for consumers and e-retailers. Further, e-commerce has made possible low value cross-border transactions on a scale that previously was unimaginable.

To a large extent, e-consumers have the same requirements and needs as traditional consumers. However, in many ways, e-consumers are more vulnerable as they typically cannot examine the product prior to purchasing it and may not know who they are buying from. In light of this, it could be suggested that the need for "trust" is even greater in e-commerce than in offline trade. Yet businesses have been poor at creating trust in e-commerce, and in many jurisdictions consumer protection laws continue to be weak.

With e-retailers failing to create the necessary trust, the law plays a crucial role in creating consumer trust in e-commerce - trust that will benefit businesses, consumers and society in general. Consequently improved e-consumer protection will increase consumer confidence leading to greater e-consumerism, which benefits businesses (greater sales), consumers (greater options) and society (e.g. isolated communities).

This article outlines a set of criteria for assessing the value of e-consumer protection schemes. It is intended that it be used as a tool, for policy-makers, industry associations, corporations and consumer organisations in all jurisdictions, seeking to assess the appropriateness of their consumer protection regulation. It can be used to devise new, or improve existing, policies, and it can also be used to compare the usefulness of e-consumer protection in different jurisdictions.

This article commences with a brief review of existing frameworks for the protection of e-consumers, which demonstrates the need for a model that uncompromisingly presents the needs of consumers. An overview of the model is provided, followed by a presentation of the model's key features. A further section identifies the several ways in which the model can be applied in order to improve the usefulness of e-consumer protection.

An earlier version of the model was published in checklist form[3]. The present article revises and expands that checklist, and presents the rationale underlying each item in it.

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[1] Associate Professor, Faculty of Law Bond University, Gold Coast Queensland 4229 Australia, Ph: +61 7 5595 1418, E-mail: Dan_Svantesson@bond.edu.au, (http://www.svantesson.org).

[2] Principal of Xamax Consultancy Pty Ltd, Canberra and a Visiting Professor in the Cyberspace Law & Policy Centre at the University of N.S.W., and in the Department of Computer Science at the Australian National University, Ph: +61 2 6288 1472, E-mail: Roger.Clarke@xamax.com.au (http://www.rogerclarke.com).

[3] Clarke R. 'A Major Impediment to B2C Success is ... the Concept 'B2C' Invited Keynote, Proc. ICEC'06, Fredericton NB, Canada, 14-16 August 2006, at http://www.rogerclarke.com/EC/ICEC06.html#TNT

2. Existing Frameworks

The second-named author has conducted a series of analyses over the last decade, which have shown that eMarketers have sustained the rapacious attitudes that worked during the era of 'mass media', despite their inappropriateness in the Internet era[4].

Consumer protection issues in the context of e-commerce have gained a considerable amount of attention both from academics and policy-makers. Furthermore, governments[5] as well as inter-governmental organisations[6] have discussed the issues involved and developed various frameworks. Some of those instruments deal with e-commerce consumer issues specifically,[7] while others address consumer protection more generally.[8]

Despite this attention, a review of existing legal frameworks shows that they have failed consumer needs. Some have been driven by corporate interests. Others have emerged within public policy frameworks dominated by commitments to economic progress, to freedom of corporations to do business as they choose, and to light-touch regulation, rather than to consumer rights. Even those frameworks that have begun from the consumer perspective have been significantly compromised by the exercise of market power by corporations and industry associations, or by a lack of will on the part of the drafters to produce a document whose provisions may appear to financially powerful organisations to be far-reaching.

The situation in the European Community, for example, is highly unsatisfactory from a consumer perspective. The fact that there is an acknowledged need for an EU Consumer Policy Strategy 2007-

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[4] Clarke R. *The Willingness of Net-Consumers to Pay: A Lack-of-Progress Report*, Proc. 12th Int'l Bled Electronic Commerce Conf., Bled, Slovenia, June 7 - 9, 1999, at http://www.rogerclarke.com/EC/WillPay.html, Clarke R. *A Major Impediment to B2C Success is ... the Concept 'B2C'*, Invited Keynote, Proc. ICEC'06, Fredericton NB, Canada, 14-16 August 2006, at http://www.rogerclarke.com/EC/ICEC06.html, and Clarke, R. *B2C Distrust Factors in the Prosumer Era*, Proc. CollECTeR Iberoamerica, Madrid, 25-28 June 2008, pp. 1-12http://www.rogerclarke.com/EC/Collecter08.html (accessed 12 June 2009).

[5] See e.g. Roger Tassé and Kathleen Lemieux, *Consumer Protection Rights in Canada in the Context of Electronic Commerce – A report to the Office of Consumer Affairs Industry Canada* (July 31, 1998) http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/cdrcec_e.pdf/$FILE/cdrcec_e.pdf (accessed 12 June, 2009).

[6] Such as the Organisation for Economic Co-operation and Development (OECD).

[7] Such as the OECD's Guidelines for Consumer Protection in the Context of Electronic Commerce (2000) http://browse.oecdbookshop.org/oecd/pdfs/browseit/9300023E.PDF (accessed 12 June, 2009), Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, and Canadian Code of Practice for Consumer Protection in Electronic Commerce (16 January, 2004) http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_e.pdf/$FILE/EcommPrinciples2003_e.pdf (accessed 12 June, 2009) .

[8] Such as the United Nations, Guidelines for Consumer Protection approved by the General Assembly in 1985 http://www.un.org/documents/ga/res/39/a39r248.htm (accessed 12 June, 2009), European Commission's Recommendations 98/257/EC and 2001/310/EC relating to out-of-court settlement of consumer disputes and *Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995).*

2013[9] attests to the current state of affairs. Even more striking is the list of 31 'banned commercial practices' that is a current target of the EU Unfair Commercial Practices Directive of 2005[10]. These are behaviours that the public reasonably would have expected to be already the subject of effective enforcement. The sophistication of consumer protection is so low that fundamentals still are not in place.

Our Model takes account of, and builds on, existing instruments. However, its purpose is to define the needs of consumers, not to present a model compromised by the interests of other parties.

3. About the model

In this section, we provide an outline of the model that we propose is needed to reflect consumers' needs.

We have identified four areas of central importance to the effective protection of e-consumers. First, consumers must have access to appropriate information so as to make it possible for them to become familiar with the advantages as well as disadvantages of entering into a particular transaction. Such information must be relevant, accurate, comprehensive and accessible. A jurisdiction with useful consumer protection will ensure that consumers have access to such information.

Second, consumers must be able to contract on fair terms. As a consumer typically never enters into any negotiation of the terms of the contract, and instead, it is the business that dictates the terms of the contract, it is crucial that the law ensures reasonable balance in the terms in consumer contracts. Jurisdictions with satisfactory consumer protection ensure that their consumers can contract on fair terms.

Third, it is essential that consumers' personal data is protected as they enter into transactions. While data protection is important, offline as well as online, e-consumers have reason to be particularly concerned about their privacy. The protection of consumers' personal data is an integral part of consumer protection.

Fourth, with a large and increasing number of consumer disputes, it is of fundamental importance that consumers have access to adequate dispute resolution mechanisms. Initially the responsibility lies with the merchant, but where necessary, quasi-judicial and ultimately judicial processes are needed. Ensuring consumer access to adequate dispute resolution mechanisms is difficult in the context of low-value cross-border transactions. However, a jurisdiction with adequate consumer protection must have such dispute resolution mechanisms in place.

A fifth area was considered, but intentionally omitted from the model. Consumers benefit from having access to a wide range of options, both in relation to the available products and the available providers

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[9] EU consumer policy strategy 2007-2013, at http://europa.eu/legislation_summaries/consumers/general_framework_and_priorities/l32054_en.htm

10 EU Directve 2005/29/EC on Unfair Commercial Practice, at http://ec.europa.eu/consumers/rights/; and The Blacklist, at http://www.isitfair.eu/blacklist_en.html.

of those products. Consequently, a healthy regulation of anti-competitive conduct is an important part of consumer protection. However, in light of the wide variety of approaches to competition regulation, and taking account of the need to keep the scope of the article manageable, we do not discuss competition regulation in our model.

We will now discuss each of the four areas, mentioned above, in greater detail.

4. Appropriate information

An informed consumer is considerably better equipped to look after her/his own interests than is an uninformed consumer. Businesses must be required to make all relevant information available that can help the consumer assess the benefits and risks of entering into a particular transaction. Having access to such information equips the consumer to decide whether to contract or not, and ensures that the consumer knows what to expect. Hence unnecessary disappointments, with subsequent disputes, are avoided.

E-consumers are particularly dependent on appropriate information being provided, because such information acts as a substitute for the real-life "touch-and-feel" that occurs during offline transactions. In addition, e-commerce is a particularly suitable transaction form for the supply of information. While it would be virtually impossible to provide signage or printed information materials outlining the specifications of all items sold in physical shops, it is easy for an e-retailer to include links to detailed information about the products it sells. Thus, legal regulation requiring e-retailers to provide detailed information about their products, the sales process, etc. is not particularly onerous for the e-retailers.

The type of information that e-retailers should be required to provide can be broken down into six categories; information about the e-retailer, information about the product, information about the sales process, information about the terms of the contract, information about how the consumer's personal data will be dealt with and information about applicable dispute resolution processes.

4.1 Information about the e-retailer

The Internet is a particularly suitable communications medium for those seeking to engage in fraud – a web shop with a professional look can be created in a couple of hours, it can be operated at distance and can be moved, and removed, as suits the needs of the criminal. Consequently, consumers need information that allows them to assess the reliability of the e-retailer. E-consumer protection regulation must require e-retailers to provide, at least, the following:

- Information regarding the e-retailer's identity;
- Information regarding the e-retailer's place of registration (where applicable);
- Information regarding the e-retailer's physical location; and
- Information regarding the e-retailer's contact details, including physical address, postal address, e-mail address and telephone number.

4.2 Information about the product

Perhaps the most obvious type of information needed by a consumer is such information that allows the consumer to assess the characteristics, quality and price of the product. E-consumer protection regulation must consequently require e-retailers to provide, at least, the following:

- An accurate, and appropriately detailed, description of the product, its characteristics, uses, limitations (including e.g. geographical constraints on use), compatibility, as well as the need for services and maintenance;
- Information as to the full price of the product, including applicable taxes and surcharges (such as delivery costs);
- All costs itemised;
- The applicable currency;
- Information regarding applicable warranties and guarantees;
- Information regarding any applicable after-sales service provided by the seller, manufacturer or a third-party; and
- Safety-related information.

4.3 Information about the sales process

E-retailers have worked hard to ensure a streamlined sales process, making it as easy as possible for consumers to place their orders. However, the simplicity of the ordering process is typically coupled with complex terms and conditions governing the transaction. In other words, while it may be very easy to order a particular product, it may be very difficult for a consumer to understand the rules governing the sales process. It is consequently important that e-consumer protection regulation requires e-retailers to provide, at least, the following information about the sales process:

- Information about the technical steps to be followed in order to conclude a contract;
- Information about any constraints placed on the sale (such as non-delivery to certain jurisdictions);
- Information about the expected delivery time and method;
- Information about any applicable order tracking system in place;
- Information about the payment process;
- Information about the parties' rights to cancel, terminate or retract, as well as applicable refund, exchange and returns possibilities;
- Information about what will appear on credit card statements in case of sale by credit card; and
- Information about the security measures applied to the transaction.

Furthermore, e-retailers must be required to ensure that any commercial communication (e.g. e-mail or website) is clearly identified as being of a commercial nature.

4.4 Information about the terms of the contract

Studies show that few consumers ever take the time to read the terms and conditions they agree to when entering into contracts online. For example, in one such study 90% of the respondents indicated that they never read the whole agreement, while at the same time 64% indicated that they always click "I agree". Furthermore, 55% did not believe that they entered into a legally binding contract when clicking "I agree"![11]

However, that should not be seen as an indication that e-retailers need not provide their consumers with information about the terms and conditions of the contract. Instead, the fact that few consumers ever take the time to read the terms and conditions they agree to highlights that: (1) businesses, including e-retailers, must be required to provide easily accessible information about the terms and conditions they stipulate in their contracts, and (2) the law must be structured to meet the consumers' legitimate expectations of protection. The latter issue is discussed in detail below. Here we focus on the information that must be provided so as to ensure that consumers may be informed about the terms of the contract.

Any jurisdiction aiming at providing useful consumer protection regulation must insist on e-retailers providing their consumers with the following:

- The terms of the contract expressed in clear, unambiguous and simple language;
- Information of any avenues for negotiating the terms of the contract; and
- Technical facilities for the safekeeping of the terms (such as printing or downloading).

Furthermore, it is not enough that e-retailers are required to provide the types of information listed above. Satisfactory regulation must also demand that the information be presented in accessible language.

4.5 Information about how the consumers' personal data will be dealt with

A consumer's personal information is a significant resource, with a commercial value. As a consequence, e-retailers typically have an incentive to collect as much personal information as they can. This creates a conflict with the consumer's privacy interest.

At a minimum, e-consumer protection regulation must require e-retailers to provide existing, and potential, consumers with detailed, yet accessible, information about:

- How it collects data;

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[11] A Gatt, "The Enforceability of Click-wrap agreements" (2002) vol. 18 no. 6 *Computer Law & Security Report*, 408.

- What that data will be used for;
- Who will have access to the data; and
- How the data will be kept safe.

Such regulation should also require e-retailers to highlight the consumer's rights in relation to the data, such as access and correction rights.

A further concern arises relating to the lack of power of consumers to negotiate terms, and the risk that e-retailers generally will make the sacrifice of privacy a condition of doing business. This is addressed in a later section.

4.6 Information about applicable dispute resolution processes

Few consumers take account of the availability of a dispute resolution process when deciding whether or not to purchase a particular product. However, consumer re-visits and customer loyalty will be greatly harmed by negative experiences, and aggrieved consumers and consumer advocacy organisations can be expected to generate critical media coverage of unfair behaviour by e-retailers. Moreover, if exposed to information about the applicable dispute resolution process, consumers are better placed to assess the risks of engaging in the transaction. Consequently, e-consumer protection regulations should require e-retailers to provide, at least, the following information about the applicable dispute resolution process:

- Limitations to the consumer's legal rights, such as lawful exclusion, or limitation, of the seller's liability;
- Limitations to the consumer's avenues for redress, such as binding choice of forum clauses;
- Applicable choice of law clauses;
- Arbitration clauses;
- Options for mediation;
- Applicable internal complaint systems; and
- Applicable external complaints systems.

4.7 Accuracy and validity of information

In addition to requiring e-retailers to provide the above-mentioned information, consumer protection regulation should prescribe that the types of information listed above should be made available both before and after the transaction is entered into. Furthermore, such regulation should prescribe a time limit for how long the information must be accurate. In other words, it is not sufficient that the information in question is accurate at the time a consumer visits the e-retailers website, the information must also remain valid and accurate for a reasonable period of time after the visit. For example, it is of little comfort to an aggrieved consumer that the e-retailer's contact details were valid

at the time of contracting, if the e-retailer then stops using those contact details so as to avoid being contacted by the consumer.

Unless a consumer can be sure that no alterations have been made to the information provided, consumers would have to read all the information at the start of each visit to a website. However, if an e-retailer indicates the date that the information was posted, and brings attention to changes where changes are made, a consumer can assess whether she/he needs to re-read parts of the information. Consequently, it is crucial that consumer protection regulation requires the use of version numbering on all information provided by e-retailers. Further, consumer protection regulation must require old versions of information to be stored by the e-retailers in a manner that make them accessible to the consumers for future reference in case of a dispute.

4.8 Confirmation of the transaction

Consumer protection regulation should require e-retailers to provide consumers with a prompt confirmation of the transaction as soon as an order has been placed. That confirmation should contain information acknowledging that the order has been accepted, information regarding expected delivery time and method used, as well as information regarding payment and applicable cancellation rights and procedures. Furthermore, the confirmation should be printable and possible to store in electronic form (for example, e-mailed at consumer's option or made available as a downloadable file).

5. Fair contracts

As noted above, studies have shown that few consumers ever take the time to read the terms and conditions they agree to when entering into contracts online.[12] There are several reasons for this. First of all, some consumers simply do not think that the terms and conditions are legally binding.[13] Second, most consumers are poorly equipped to understand the significance of the terms of the contracts they enter into. Consciously or subconsciously, they rely upon the legal system to protect them from unfair contractual clauses. They take a more or less calculated risk, hoping to be treated fairly by the law. If this is true, it could be argued that consumer protection laws have created lazy and irresponsible consumers who do not take the time to seek to protect their interests. However, the counter argument is that people are exposed to such a mass of contracts of adhesion that even the most cautious consumer cannot take the time to fully understand the standard contracts they are continually subjected to. Further, many standard contracts contain complex legal clauses, such as choice of forum clauses and exclusion clauses, that even legally trained people may struggle to fully comprehend. As a result, consumers in general do not read the terms and conditions of the contracts they enter into.

Below, we discuss a range of features any useful consumer protection regulation must possess. These features can be divided into two categories: features relating to the regulation of contract formation

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[12] A Gatt, "The Enforceability of Click-wrap agreements" (2002) vol. 18 no. 6 *Computer Law & Security Report*, 408.

[13] A Gatt, "The Enforceability of Click-wrap agreements" (2002) vol. 18 no. 6 *Computer Law & Security Report*, 408.

and features relating to the regulation of the terms of the contract. However, there is some degree of overlap between these two categories of features, such as the need for an adequate regulation of unconscionable conduct.

5.1 Adequate regulation of misleading conduct

Any contract entered into based on one party's misunderstanding caused by the conduct of the other party (or a third party acting on behalf of the other party) should be void or voidable. Such contracts are likely to be unfair and will not lead to a result anticipated by both parties. There are many ways in which a country's law can be structured to address this issue.

5.2 Adequate regulation of unconscionable conduct

Unconscionable conduct comes in many forms. For example, it is unconscionable for an e-retailer to put undue pressure on a consumer. It is also unconscionable for an e-retailer to take advantage of a consumer's mistake or other weakness. Satisfactory consumer protection regulations must adequately protect consumers against such unconscionable conduct. The following are some examples of unconscionable conduct that are typical, or particularly relevant, for the e-commerce context:

- Useful consumer protection regulation ensures that e-retailers cannot use sales processes that confuse consumers into entering into an agreement or appearing to accept unreasonable terms. All sales processes should contain a step at which the consumer is asked to verify the purchase, and at that step, the consumer should have access to an easy mechanism for correcting or cancelling the order;

- The impossibility of knowing who you contract with places a particular onus on e-retailers to avoid contracting with consumers who lack, or have limited, legal capacity. Consumer protection regulation should contain special rules protecting consumers who lack, or have limited, legal capacity, such as children and mentally ill, and their guardians;

- Unconscionability rules must also prevent e-retailers from holding a consumer liable for purchases not authorised by the consumer. For example, an e-retailer should not be allowed to seek payment from a consumer where the consumers' credit card has been used in an unauthorised manner; and

- E-retailers, like their offline counterparts, often include clauses in their standard contracts, giving them the right to unilaterally vary the terms of the contract. The scope of the unconscionability rules must be broad enough to ensure that such unilateral variation is not allowed.

5.3 *In dubio* rules

One way of ensuring that businesses take care to draft clear and accessible contracts is to implement rules stipulating that inconsistent or unclear clauses are interpreted in a manner favourable to the party that did not draft the contract. Useful consumer protection regulation must include such rules.

5.4 Adequate regulation of product quality and suitability

Consumer protection regulations must ensure that products sold meet an adequate quality and safety standards. Further, where a consumer has made clear the purpose for which a product will be used, the law must ensure that the e-retailer may only deliver products suitable for the purpose described by the consumer. Finally, products provided must correspond with any descriptions provided of the product.

5.5 Adequate regulation of liability issues

A contract under which the e-retailer excludes all forms of liability would rarely be fair to the consumer. Consumer protection regulations must make clear that an e-retailer may only exclude liability in specific circumstances, where a reasonable balance of risks between buyer and seller has been prescribed by law.

5.6 Adequate regulation of return, exchange and refund issues

Useful consumer protection regulation should include provisions protecting the consumer's right to return or exchange products where appropriate. Such regulations should also ensure that consumers have a right to a refund where it is reasonable to ask for one. For example, a right to refund should exist where a faulty product has had to be returned or where a payment error has occurred.

It is also important that consumer protection regulation provides for an adequate "cooling off" period. In other words, such regulation must give consumers the right to return goods or cancel a service within a reasonable time of entering into the contract for that product. Where goods are returned to the seller, the cost for the return may fall on the consumer.

5.7 Adequate regulation of the rights in the goods

Consumer protection regulations must include adequate rules regarding the consumer's legitimate right to title in, and quiet possession of, products they purchase. Furthermore, such regulation must address at what point the risk in the product passes from the e-retailer to the consumer.

6. Adequate privacy protection

Much has already been written about what is required, by way of regulation, to ensure a sufficient level of protection of consumers' privacy. Furthermore, the work of international organisations has resulted in a certain degree of international harmonisation of different countries' privacy regulation.[14]

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[14] See further: Clarke R. (2005) 'Privacy Statement Template' Xamax Consultancy Pty Ltd, December 2005, at http://www.rogerclarke.com/DV/PST.html.

Here, we will merely repeat and draw attention to the key elements required in any scheme aiming at providing appropriate protection of e-consumers' personal information.

The starting point of any attempt at protecting e-consumers' privacy must be an aim that as little data collection as possible takes place, and that data that necessarily must be collected ought to be non-personal where possible. Further, data protection schemes must ensure that where personal data is collected, the data subject is made aware of the collection, its purpose and uses, and has the right to access and correct that data. The data collector must also make sure that the data is kept safe, and is only used and disclosed for the purpose it was collected for. Finally, scheme aiming at providing useful protection of e-consumers must adequately protect e-consumers' engaging in cross-border trade, and should provide particular protection for sensitive data (such as, for example, health related information).

7. Fair dispute resolution

Ensuring a fair resolution to a dispute between an e-retailer and a consumer requires a multi-facetted approach. The starting point must be a realisation of two fundamental considerations: (1) the combination of the small values typical of consumer e-commerce transactions and the complexities of, and costs associated with, litigation means that few consumer disputes are suitably handled by the legal system; and (2) a consumer's right to seek redress is an important incentive to businesses to not try to avoid their responsibilities. Taking account of these two considerations, the conclusion must be that any useful consumer protection regulation ought to provide consumers with a realistic avenue for taking legal action against the seller, but with the alternative or prior step of a more appropriate dispute resolution system.

7.1 A realistic avenue for taking legal action

Because litigation, particularly where it crosses borders, is complex and typically very costly, few consumer transactions justify legal action being taken. A consumer is usually better advised to accept the loss than to take legal action against the seller. Indeed, anecdotal evidence suggest that consumers often expect to be "defrauded" in a number of online transactions, but that they consider the overall gain to outweigh the losses so caused.

This is detrimental to consumers, and consumer doubts about the fairness of e-trading represents an impediment to the adoption of efficient electronic mechanisms. Hence consumers must always have a realistic avenue for taking legal action against the seller, as the existence of such avenues puts pressure on the e-retailers to not simply ignore consumer complaints. There are two key components in ensuring that consumers have some degree of access to taking legal action against a seller.

First, to be effective, a consumer protection scheme must ensure that the consumer, in an e-commerce transaction, can take legal action at her/his place of residence or domicile. This main rule may be departed from where the consumer has actively and consciously misled the e-retailer on the matter. It may also be departed from where a consumer is located outside their country of habitual residence and, while entering into the transaction, specifically identified their actual location at the time of the transaction. In such a case, the consumer may reasonably be limited to take action at that location.

Second, the consumer in an e-commerce transaction should always be allowed to rely upon the consumer protection provided by their country of residence or domicile. The same two limitations as are discussed in the context of where the consumer can sue would also be applicable in this context.

In addition, useful consumer protection regulation will also ensure that consumers have adequate access to advice and assistance where they take legal action. Meeting this requirement will typically involve the work of a governmental department or agency working with consumer protection questions. Such a department or agency ought to have the capacity to act on consumers' behalf in both local and cross-border litigation.

Furthermore, domestic consumer protection agencies should actively participate in international cooperation so as to maximise the chance of successfully protecting consumer interests in cross-border trade.

Finally, taking account of the typical weakness of individual consumers, useful consumer protection regulation requires that consumers have the option of participating in class actions.

7.2 An appropriate alternative dispute resolution system

It is common in many jurisdictions to require retailers to have established business processes for handling complaints received from customers. In some industry sectors, industry-wide complaints-handling schemes are available. In addition, many jurisdictions have mature dispute resolution mechanisms that operate administratively or as tribunals, with less strict rules and lower costs than the courts.

For an alternative dispute resolution mechanism to be adequate, it must be cost-effective, easy to understand, accessible, credible, timely, transparent to the parties, fair and capable of providing effective remedies. Further, a consumer must have the right to be represented, and or assisted, by a third party.

8. Applying the best practice model to a jurisdiction's e-consumer protection

This article has described the necessary components of useful consumer protection regulation. To meet the best practice benchmark of this model, a particular jurisdiction's consumer protection regulation must contain all the components described above.

The model is of potential value to several parties, including academics, consumer protection professionals, consumer marketing corporations that are looking for constructive ways to project a consumer-friendly stance, consumer advocacy organisations, law reform agencies, and those regulatory agencies that are actually seeking to identify and address weaknesses in current consumer protections. There are at least five ways in which the best practice model can be used.

The first is to examine a particular jurisdiction's regulation and identify the extent to which it contains the components outlined above. Doing so may identify gaps in the regulation. However, it will also highlight those areas in which the regulation in question is particularly strong. Carrying out such a benchmark exercise is a suitable first step to assess the need for law reform.

The second way in which the model can be used is comparative in nature. The model can be used to compare various jurisdictions' consumer protection regulation by examining how well they measure up to each of the best practice model's requirements. Such an exercise may both spark law reform and be a valuable tool for studies of the various approaches to consumer protection.

The third possibility is applicable in jurisdictions in which no e-commerce consumer protection exists or the existing framework is inadequate and a new scheme is desired. In such contexts, the model represents a basis for the design of consumer protection laws.

Fourth, from a more critical perspective, it represents a means of evaluating the extent to which frameworks proposed by inter-governmental organisations, government agencies and industry associations are consumer-friendly, and the extent to which they are compromising consumer interests.

Finally, the model presents an opportunity for consumer marketing companies to critically examine their interactions with their customers, and devise ways to cost-effectively project customer-orientation superior to the stances of their competitors.

9. Concluding remarks

Above we have outlined and discussed a range of features necessary for any useful consumer protection regulation. Few, if any, of the features we have discussed are revolutionary or novel. Instead, the novelty of our work lies in the fact that we have consolidated and structured the features in a manner conducive to their use as a basis for evaluating and designing consumer protection regimes.

The authors are in the process of applying the model.[15] We hope that it will be used by others as well, to spark and guide law reform leading to better consumer protection regulation in the context of e-commerce.

[15] Assisted by a small grant from the auDA Foundation, the authors are in the process of applying the model to Australian consumer protection regulation.