

A COMPARATIVE ANALYSIS OF A CONSUMER'S RIGHT TO INFORMATION IN VIETNAM AND AUSTRALIA

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ABSTRACT

The rapid rise in the sums expended by companies on advertising and promotional campaigns, together with the increase in the volume of commercial transactions, have made a customer's right to information an important legal right. In such a context, it is critical to ensure that consumers have a clear and comprehensive right to obtain information as to the attributes of the goods and services they purchase and the terms on which they purchase them. Such a legal right to information both supports the creation of competitive markets and enhances the contractual freedom of consumers in commercial transactions. Besides, the challenge for consumer protection emerged from the reality that only in 2017, the Vietnamese Department of Competition and Consumer Protection (Ministry of Industry and Trade) received and handled over 1,400 complaints and requests of consumers related to violations of consumer rights.¹ To accomplish this objective, it is imperative that Vietnam develops an effective legislative framework to protect the consumer's right to information. Furthermore, such a right to information needs to be fortified by effective consumer protections relating to the prohibition of misleading or deceptive conduct and the prohibition of unfair terms in contracts. This issue is particularly significant for Vietnam as Vietnam's consumer laws display a variety of deficiencies in structure and content that potentially reduces their effectiveness.

The central objective of this dissertation is to compare the consumer's right to information under the consumer laws of Vietnam with that of Australia in order to analyse the effectiveness of the Vietnamese regulatory structure and propose recommendations for reform. As Australia has a mature legal framework in this area that has been regularly updated to address the evolving commercial landscape, this comparative legal analysis will help identify weaknesses in the Vietnamese law and inform the reform discourse. The thesis will begin by considering an optimal theoretical model of consumer protection that can provide relevant indicia for assessing the effectiveness of consumer law. Building on

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

this theoretical foundation, the thesis will critically analyse provisions in the Vietnamese consumer law on the consumer's right to information, the prohibition against misleading or deceptive conduct and the prohibition against unfair contract terms, and compare such provisions to equivalent terms in the Australian consumer law to design effective reforms to Vietnamese laws in the area.

Applying a doctrinal research methodology and a comparative legal method, case law, legislation, and legal theories will be evaluated for the purpose of addressing the central research question. The thesis will identify similarities and differences between Australia's and Vietnam's regulatory frameworks, measure the merit of rules on the topic, and determine the conditions and consequences of such differences. The fundamental differences in the structure of the laws, the design of the definition of consumer generally and the design of regulations on misleading or deceptive conduct and unfair contract term specifically will be identified and analysed. The thesis will conclude by presenting recommendations to reform the Vietnamese consumer law to both better serve the interests of individual consumers and support economic efficiency.

As the contemporary economy is rapidly changing in response to evolving commercial and societal developments, it is imperative that laws are amended and refined as necessary to regulate such change. It is hoped that the thesis will contribute to the improvement of Vietnamese consumer law, and inspire comparative studies related to the process of improving the quality of private law system in other developing countries so as to enrich contemporary commercial and legal life.

STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Signed: _____

Lam Uyen Lu

Date: 18 September 2018

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The opinions expressed in this thesis are entirely mine, and I alone take full responsibilities for any shortcomings and omissions.

LIST OF ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASEAN	Association of Southeast Asian Nations
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CPV	Communist Party of Vietnam
EU	European Union
LCP	Law on Consumer Protection
MUTRAP	Multilateral Trade Assistance Project
OECD	Organisation for Economic Co-operation and Development
TPA	<i>Trade Practices Act 1974</i> (Cth)
UK	United Kingdom
US	United States

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QDSV Holdings Pty Ltd v TPC (1995) 59 FCR 301; 131 ALR 493

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S & I Publishing Pty Ltd v Australian Surf Life Saving Pty Ltd

Seven Network Ltd v News Interactive Pty Ltd [2004] FCA 1047; 63 IPR 28

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WEA International Inc. & Anor v Hanimex Corp Ltd (1987) 17 FCR 274, 77 ALR 456

Weir and Weir v Screen and Screen Investments Pty Ltd [2013] ACTSC 188

World Series Cricket Pty Ltd v Parish (1977) 16 ALR 181

Chapter 1:

Introduction

The dramatic increase in the sums expended by companies on advertising and promotional campaigns and the rapid rise in the number of commercial transactions have made the effectiveness of consumer protection laws in preventing infringement of the customer's right to information a critical issue. In this context, this thesis examines the effectiveness of Vietnam's present consumer protection laws in providing consumers with a right to information. The right to information, which is available throughout the provisions of consumer law and emerges from its most important regimes, is considered the core of consumer protection.² As the right of information is built about the broader regulatory framework preventing misleading and deceptive conduct, this thesis will also consider the regulations governing the nature, structure, and types of such behaviours with a particular focus on misleading advertising. Further, as the right to information supported by consumer laws prevents unfair terms in contracts, the effectiveness of protections in this area will be considered within the critical analysis of the right to information. A comparison of the consumer law of Vietnam with that of Australia will be used to provide insights into the effective operation of the respective laws and help inform options for reforming the Vietnamese regulatory framework. This thesis will conclude by presenting options for improving and refining the present regulatory framework in Vietnam to better articulate and frame the consumer's right to information to ensure that consumers receive accurate and comprehensive information.

1.1 Background

After 10 years of applying reform policies and transforming from a centrally planned economy to a market economy, Vietnam issued the first commercial law in 1997. A number of important contents on sales and purchase of goods and services, commercial transactions, advertising, procurement, trade exhibitions, settlement of disputes and so forth are governed by this law. This law is also the first step in the history of legislation on consumer protection in Vietnam as indicated by the principle that 'the protection of the

² Gillian K Hadfield, Robert Howse and Michael J Trebilcock, 'Information-based principles for rethinking consumer protection policy' (1998) 21(2) *Journal of Consumer Policy* 131, 141.

legitimate interests of the producer and consumer.³ Accordingly, the providers of goods or services are obliged to provide full and accurate information on their goods and are banned from performing such practices as counterfeiting, misleading advertising, and unconscious promotion. In the midst of the unavoidable flow of socio-economic growth, the Vietnamese Government issued an Ordinance in 1999, further promoting consumer protection to a more specific level. However, due to the lack of specific and practical clauses, the Ordinance failed to be effective in protecting the consumer.

In 2010, the Ordinance was replaced with the Law on Consumer Protection (LCP), effective from July 2011, marking a remarkable development in the history of consumer protection legislation in Vietnam. The law defined the rules for protecting consumers' information and their rights and interests in the transactions with unregistered trading entities, as well as recognising specific rights of the consumers including 1) being protected safely as to their life, health, property, and other legitimate rights and interest; 2) being provided accurate and complete information about the source and origin of goods, manufacturers, distributors and other necessary information about goods and services; 3) being entitled to file an action against the manufacturers or distributors to have their rights and interests protected; and 4) being entitled to require compensation if the provided goods do not match features, standards or pricing as announced. Adding to the banned behaviours of business entities, such as misleading advertising and provision of misleading information, the LCP also established measures on consumer protection, regimes on settlement of disputes and management responsibilities of the state and society in regard to consumer protection.

Generally, the LCP was a meaningful step in consumer protection legislation in Vietnam. Like the Australian Consumer Law (ACL) (set out in the *Competition and Consumer Act 2010* (Cth) [CCA] ch 2), the LCP clearly marks state intervention in supporting consumers with weaknesses to help them balance their interests with that of providers, which previously were mostly regulated through previously. However, the LCP is different from the ACL in that it is considered as consumer law in Vietnam from a problem-solving approach instead of legal transplantation.⁴ Therefore, it is unavoidable that the LCP

³ Virginie Diaz Pedregal and Muriel Figuié, 'What is the Place of a Consumer Movement in a Transitional Economy? The case of VINASTAS in Vietnam' (Paper presented at the The third Vietnam Development Forum, Tokyo Conference on the Development of Vietnam Tokyo.), 123.

⁴ Cuong Nguyen, *The drafting of Vietnam's Consumer Protection Law: an analysis from legal transplantation theories* (Phd Thesis, University of Victoria, 2011) 292.

contains comprehensive and long-term strategic adjustments. Seeking the rationales to develop the foundation of the LCP and other legal fields in the legislative system of Vietnam is always a difficult task. In the proposal of the draft LCP filed with the Vietnamese Government there was no foundation to explain the construction of legal consumer protection policy in Vietnam, rather it acknowledged three points: 1) protect the consumers and interests of business entities; 2) ensure the balance of interests between them; and 3) the state plays a central role in protecting the consumers as well as emphasising the socialisation of consumer protection.⁵ These acknowledgments are considered as the most fundamental principles that govern a socio-economic relation, but they are not comprehensive and thorough enough to become a rationale for consumer protection.

However, there is always a theoretical framework and ideological underpinning behind any legal field.⁶ Regulations on consumer information on Vietnam have always been included in consumer protection provisions in Commercial Law 1997 and the LCP. The obligation to provide buyers with information in commercial contracts in Commercial Law 1997, for example and the banned practices of misleading advertising and unconscionable conduct and consumer guarantee in the LCP are results of information-based adjustments. However, an unavoidable consequence of lacking a clear and consistent recognition of a consumer protection rationale is the improper ability to adjust matters of consumer protection in Vietnam in which focus is placed on the restrictions of consumer's right to be informed.

One of the features of the LCP is that important regimes such as unconscionable conduct, misleading or deceptive conduct, and consumer guarantees are not designed as separate components and widely governed like the ACL. They are only listed in 12 articles of the LCP in the form of banned behaviours and responsibilities of business entities towards the consumer. Moreover, most of these key regimes are mentioned in the LCP, but in a simple and brief manner meanwhile, they are essentially contents that show the application of necessary information theories in an ideal consumer protection law. Indeed, applying the terms of the LCP for consumer protection in Vietnam or a study of consumer protection legislation in Vietnam by reviewing the provisions of the LCP is insufficient; these require additional use of terms in the Commercial Law, Civil Law, Competition Law, Advertising

⁵ *Submission Report No. 45/TTr-CP dated 4 May 2010 on the draft of Law on Protection of Consumers' Rights and Interests 2010 (To trình so 45/TTr-CP ngày 4/5/2010 ve Du an Luat Bao ve QUYEN loi Nguoi tieu dung)* (Government of Vietnam).

⁶ John Goldring, 'Consumer Law and Legal Theory: Reflections of a Common Lawyer' (1990) 13(2) *Journal of Consumer Policy* 113, 113.

Law and more. It is interesting that the ACL, an achievement of a country of a common law system, contains comprehensive regulatory terms on consumer protection. Conversely, in a country such as Vietnam that traditionally follows civil law, in addition to legislative documents, it is necessary to study other legal documents that govern similar matters. However, even with such additional legal documents considered important regimes such as those mentioned above still contain weaknesses and gaps that render Vietnamese consumers' right to information ineffectively protected. Consumer protection legislation originates from a complex combination of private law and public intervention, thus in developing countries, inexperience in public intervention in the market economy is one of the main reasons for the restricted effectiveness of consumer protection.

The LCP has been enforced for over seven years which provides a good opportunity to review its practical value. 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. Nguyen Thanh Hai, Deputy Director of the Hanoi Department of Industry and Trade, said that during market inspection and investigation the Market Management Force checked 8,000 violation cases on average and resolved 7,500 cases, and collected total penalties of over 100 billion dong⁷ in Hanoi City. However, this was small compared to the actual situation in the capital city and the country as a whole.⁸

1.2 Central Research Questions and Issues to be Examined

This thesis examines to what extent the LCP effectively protects the consumer's right to information and, through comparison with the ACL, makes recommendations to reform regulations in Vietnam. This thesis will begin by considering the doctrine of consumer information protection and the history of its development to discover trends in its movement and determine the optimal model of state intervention in this field. Then, in light of an optimal model of adjustment, the comparative and legal analysis will examine

⁷ 100 billion VND could be equal 4,310,000.00 USD

⁸ 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 in Vietnam, Ha Noi, <<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>>.

regulations against misleading and deceptive conduct and unfair contract terms in the respective consumer laws of Australia and Vietnam. The thesis will conclude with some recommendations for Vietnam for reforming consumer protection laws to increase their effectiveness.

Chapter 2 examines the legal reasoning and theory relating to the existence and standards of an ideal customer's right to information. This chapter examines the origins of the consumer's right to information being based on the characteristics of a market economy and consumer behaviours to define the rationale of consumer's right to information. This chapter also analyses and proposes a theoretical framework to advocate this right in terms of a competitive market and to limit it based on an economic analysis of law. Through this analysis, this thesis combines legal reasonings for seeking the best method of regulating the consumer's right to information. Chapter 3 provides an overview of the provisions on consumer's right to information under the respective laws of Australia and Vietnam and a comparative analysis of these laws at the general level including overall structure and the rationales of these laws. Chapters 4 and 5 focus on consumer's right to information in relation to the issues of misleading or deceptive conduct and unfair contract terms. This analysis is undertaken as a method of comparison between Australian and Vietnamese laws, thereby identifying their similarities, differences, strengths, and weaknesses. Chapter 6 will propose some solutions to reform the LCP for the purpose of enhancing and effectively implanting protection for consumer's right to information in Vietnam.

From the overview of applicable laws and practices in the past eight years, two research questions are posed: Can the LCP establish an effective legal framework to protect consumers in Vietnam? How is the consumer's right to information protected under the LCP and is this right regulated reasonably and thoroughly? Using the comparative law method is an effective way to answer these questions. The ACL, a desirable legal achievement of a developed country, is a good case to compare with the LCP. The characteristic of common law that judges can creatively explain provisions based on the fundamental legal rationale becomes a significant supplement when investigating the statutory law of civil law countries. Thus, two additional research questions arise: Compared to the ACL, what are the similarities in regard to regulations on consumer's right to be informed in the LCP and what are the differences that may result in the limitation and failure of legal rules? Taking direction from the ACL, how are regulations on the consumer's right to be informed in the LCP necessary to be amended and supplemented

such that the LCP can protect consumers effectively? To answer these questions, it is necessary to conduct a thorough study of the central legal institutions of the ACL and the LCP that most clearly and centrally reflect the assurance of the consumer's right to be informed, compare them and seek solutions to the problems faced by Vietnamese consumer law.

The central research question of this study is: In light of comparison with the ACL, what solutions can be proposed to reform the LCP for the purpose of more effectively protecting the consumer's right to information? To answer this, this thesis investigates the provisions on the consumer's right to information in the ACL and in Vietnamese law. This study identifies the universally accepted relevant concepts and general points of policy intervention to guarantee consumer's welfare and the differences in regulations between Australia and Vietnam to determine the conditions and consequences of such differences. This analysis is done to discover existing problems and weaknesses in the LCP, thus enabling formulation of solutions to amend the provision of the LCP to more effectively protect the consumer's right to information in Vietnam.

The central research question entails the need to examine a variety of interrelated and specific issues related to the different forms of expressing the right to information. There are two important aspects of protecting right to information including information as a market precondition for establishing a transaction, which is governed by regulations against misleading or deceptive conduct, and information as a factor in a contracting transaction adjusted by a regime of the unfair contract term. That is, to what extent are the contents of the consumer's right to information in the LCP regulated compared to the corresponding regulations in the ACL? The central research question entails the following sub-questions:

- 1) What are the similarities and differences in fundamental issues between the ACL and the LCP, including legal rationales on consumer protection, the structure of the law and definition of consumers? How do such differences influence the effectiveness of the protection of consumer's right to information in Vietnam?
- 2) How do the ACL and the LCP regulate misleading and deceptive conduct? What are the differences? To what extent is the customer's right to information guaranteed?
- 3) In the unfair contract terms of the ACL and Vietnamese law, how is the consumer's right to information regulated? What are the similarities and differences between the two systems of law and what are the consequences of this?

- 4) From the identified similarities and differences and associated strengths and weaknesses of the ACL and the LCP, what recommendations can be made to amend and improve the quality of the LCP to more effectively protect the consumer's right to information?

1.3 Methodology

1.3.1 Overview

To define the parameters of legal research, the Pearce Committee (Australia) categorised research into three kinds: doctrinal, reform-oriented research and theoretical.⁹ It is necessary to clarify the objectives of this thesis to determine the category of this research. The objective of this thesis is to analyse the regulation of the consumer's right to information in the ACL and Vietnamese law for the purpose of identifying similarities and differences to propose solutions for Vietnam to strengthen the protection of the consumer's right to information. Accordingly, this thesis examines the rules governing a particular legal category of which actual sources are legislation and case law. Along with comparing the two legal systems, this research 'provide[s] a systematic exposition of the rules, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development.'¹⁰ To accomplish these objectives this thesis uses many study methodologies of legal science, adopting two major methods—the traditional legal method (doctrinal) and comparative legal method.

1.3.2 Traditional Legal Method (or Doctrinal Research)

Doctrinal research methodology is a qualitative, unique research method which uses arguments and forms of reasoning including induction, deduction, and analogy.¹¹ This legal research method consists of two parts, finding the law and interpreting and analysing the document or text.¹² While the first is concrete legislative fact, the latter requires a rich knowledge, analytical skills, and critical thinking.¹³

⁹ D.C. Pearce et al, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Pub. Service, 1987) 17.

¹⁰ Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melb. UL Rev.* 1065, 1068.

¹¹ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin L. Rev.* 83, 116.

¹² *Ibid*, 110.

¹³ Terry C Hutchinson, *Researching and Writing in Law* (Lawbook Co./Thomson Reuters, 2010).

The method is adapted to analyse and systematise specific regulations and related statutory systems and case laws—that is, such sources as legal documents, case laws, interpretations, and theories are reviewed, evaluated and analysed as the basis of considering the underlying topic and seeking answers to established questions. In applying the above methods, this thesis will adopt descriptive, dialectical, summary, comparative and analytical tools. The ultimate purpose of this method is to study existing laws on consumers' right to information in the legal systems of Australia and Vietnam. This method is not just a simple description of laws; it is intended to approach certain rules and the legal and technical significance of relevant legislative provisions. After discussing the relevant legal areas, this thesis will scrutinise the legal concepts of constituting words and integrate them into a comprehensive analysis. The traditional legal method is primarily used in Chapters 2, 3 and 6.

1.3.3 Comparative Legal Method

Zweigert and Kötz stated that the primary aim of the comparative law method is knowledge and referred to a descriptive, comparative law which 'has no other aim than that of furnishing information.'¹⁴ However, per Gutteridge, in applied comparative law, the aim is not only to describe the differences between concepts but to reach the core of the matter with a definite purpose in view.¹⁵ This purpose is also an explanation of how to use the comparative legal method in legal research since the fundamental characteristic of comparative law is understood as a method.

This thesis uses the comparative legal method to compare the various models of legislation on the consumers' right to information in Australia and Vietnam to draw lessons for Vietnamese regulations. With such a practical aim in mind, it is categorised as applied comparative law. To explain how this method is applied, the criteria and steps of the comparative process are clarified below.

According to Schmitthoff, undertaking a comparative process needs to satisfy the following conditions:

¹⁴ Konrad Zweigert et al, *Introduction to comparative law* (Clarendon Press Oxford, 1998) vol 3.

¹⁵ Harold Cooke Gutteridge, *Comparative Law an Introduction to the Comparative Method of Legal Study and Research* (CUP Archive, 1946) 9.

- 1) The subject of comparison must be comparable. Accordingly, the unity of the problem is defined and becomes a clue for examining how several legal systems react to the same legal problem. This also requires that the comparison be extended to the same evolutionary stage of the different legal systems.
- 2) The legal problem and social background must be relevant. It is explained that a comparatist has to investigate the problem in totality, even the sociological influences of a non-legal character, such as history, economics, and ideology, may be taken into account on the factual side of a comparative study of law.
- 3) An analytical classification of an impartial and purely scientific character must be applied to the matters under investigation. In comparative legal research, a critical analysis must be carried out, and it should be made in an accurate and fair manner.¹⁶

Based on these conditions, Australia and Vietnam are good cases to compare. The criteria to be compared is the guarantee of the consumer's right to information in consumer protection legislation. This study is conducted to examine the guarantee of consumers' right to information in Australia and Vietnam, focusing on the regulation of misleading and deceptive conduct and unfair contract terms. Legislative provisions and case law will be investigated and analysed to determine the similarities and differences between the two legal systems and measure the merit of regulations. The interdependence and non-correspondence among these systems will be analysed. At a macro level, this thesis compares these systems with each other in terms of spirit, style, method, and structure of law. At a micro level, the comparative method is adopted to study the similarities and differences in legislative provisions. This thesis determines the causes of such differences and explains their relation to the structure of the system in which they were constructed. This thesis will investigate the gaps between the law in statute and the law actually applied by courts in light of explanation and rationale to discover the legal reasoning behind the provisions. This method is used in Chapters 4, 5 and 6.

Additionally, laws will be interpreted in the context of a close relationship to historical conditions. Knowledge of legal sources and historical statutes is the necessary foundation for describing and analysing existing laws. Further, analysing changes in history and their impact on the development of laws will be useful to help clarify the problem.

¹⁶ M Schmitthoff, 'The Science of Comparative Law' (1939) 7(01) *The Cambridge Law Journal* 94, 96.

1.3.3.1 Justification for Selection of Australia for Comparative Study

To address the central research question, a critical issue is identifying the best model of consumer's right to information protection that should be applied as the general standard of doctrine in this legal area. This is achieved by an analysis of the theoretical development milestones in this field to determine the advocacy model of consumer protection. Likewise, in light of such an ideal model, for a developing country such as Vietnam, any proposed reform of its regulatory legislation should be based on the legislative designation of developed countries like Australia.¹⁷ At present, Vietnam does not have a developed regulatory framework to ensure the consumer's right to information is fully and effectively protected. Thus, the LCP needs to be examined to identify to what extent it protects the consumer's right to information and identify solutions for any shortcomings through comparison with the ACL.

The ACL was chosen as the basis for comparison due to its specific features. It is a legal system that is capable of satisfying the country's demand and a progressive law of a developed country, with sufficient appeal of excellence and persuasion by representing the universal values in the field—both are important benchmarks to inform Vietnamese consumer protection laws. Further, the ACL is suitable for comparison with Vietnamese consumer regulations in terms of certain economic, social and political criteria that the two legal systems have in common. The ACL can provide Vietnam with useful experiences and reform suggestions. The values of the ACL, analysed in Chapters 3, 4 and 5, showcase good experience applicable to that Vietnam and are convincing reasons for choosing the ACL to compare with the LCP. Specific reasons for the selection of the ACL, rather than the law of another developed country, for comparison with Vietnam are detailed below.

First, being in the top three countries in the world for business and political environments, in 2016 Australia was ranked in the 97.6th percentile for regulatory quality (reflecting the ability of the government) and ranked in the 95.19th percentile for the rule of law.¹⁸ 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,

¹⁷ See Cuong Nguyen, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories* (Phd Thesis, University of Victoria, 2011), 294-295. Cuong states that most of the key policy ideas in the LCP have foreign origins. However, the designation of a new law are always influenced or even shaped by many constraints, both official and informal, which are embedded in the culture of law-making activities in Vietnam.

¹⁸ See worldwide governance indicators at <http://info.worldbank.org/governance/wgi/index.aspx#home>.

Australia is a country with a long tradition of legal and cultural traditions, while legal philosophy is something that Vietnam is lacking and transplanting.¹⁹ 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.²⁰

Second, the ACL was enacted in 2010 following the global financial crisis in 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. Further, Australia has well-established organisations, internationally recognised and respected in the field of competition and consumer law. A complete policy framework adapted in the midst of the global financial crisis and its aftermath and such experienced institutions are a good reference for Vietnam.

Third, Australia is more comparable to Vietnam than Europe or the United States (US). Although Australia has been involved in historical conflicts, this country does not evoke sensitive feelings as it has recently started to gain a reputation as an 'honest broker'.²¹ Australia is not geographically distant and has a comparable policy. Australia also underwent national policy reforms in the mid-1990s in which the country's economic structure was changed, removing legal burdens and reforming the government's monopoly.²² These are the milestone that Vietnam, where government holdings and participation still dominate the market, will soon have to implement.²³

While the importance of a global act on consumer protection is undeniable, the level of consumer protection laws varies from country to country. This gap is widening between Australia, with a long-established market economy, and Vietnam, transforming 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

¹⁹ 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.

²⁰ Horst Lucke, 'Legal History in Australia: The Development of Australian Legal/Historical Scholarship' (2010) 34(1) *Australian Bar Review* 109, 115.

²¹ Editorial, 'Australia's Role in Competition and Consumer Policy in the Asian Century' (2012) 19 *CCLJ* No 3 *Competition & Consumer Law Journal* 173, 174.

²² *Ibid*, 173.

²³ ANT Consulting Co. Thanh Tung, 'Vietnam is Recognized by 69 Countries as a Market Economy: Opportunities to Promote Trade and Investment', *Investment Newspaper (online)* (6 February 2018) <<http://www.antconsult.vn/news/vietnam-is-recognized-by-69-countries-as-a-market-economy-opportunities-to-promote-trade-and-investment.html>>. This article show that Vietnam has not been recognised by the US and EU as a market economy, as the US and the EU still believe that the Vietnam economy has not met the technical standards.

appearance of their economies and the development of their markets is incorrect. From a legal perspective, that difference is the result of acknowledging and applying different legal philosophies and theories of consumer protection. It is also the consequence of adopting either correct or incorrect, superficial economic theories and applying either refined and subtle or half-baked lawmaking techniques.²⁴ Meanwhile, both economies have followed the inevitable trend of recognising and developing consumers' rights and protection.

Currently, although Vietnam has launched the LCP, Vietnam's legal framework of the consumer's right to information is not comprehensive or effective. In Vietnam, the prevalence of consumer rights violations indicates the need to analyse and reform the regulations on consumers' right to information.²⁵ Thus, it is necessary to analyse the LCP and compare it with the consumer law of a country comparable in terms of the history of legal intervention and demonstrative of explicit and effective legal techniques of consumer protection. In the context of the legal histories of Australia and Vietnam, consumer protection was regulated in civil law and trade law before the countries introduced their respective consumer laws in 2010. This explains the existence of identical important legal issues in the consumer law of both countries. Conversely, due to good legislative techniques and by dint of being a developed country, Australia has a sophisticated legal framework for consumer protection—a standard for Vietnam to aspire to and, therefore, one against which to compare Vietnam's current regulations. Thus, it is necessary to consider the merits of the ACL and analyse why and to what extent it provides insights for the purpose of reforming Vietnam's current consumer law.

1.3.3.2 Similarities Between Vietnamese and Australian Law

There are many similarities between the respective developments of legislation on consumer protection in Australia and Vietnam. In both countries, before the enactment of a specific law, regulations for consumer protection were provided here and there in the

²⁴ H.J.M. Boukema, *Good law: Towards a Rational Lawmaking Process* (Verlag Peter Lang GmbH, Frankfurt am Main, 1982) 30-31.

²⁵ 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.

See more at Vietnam Competition Administration, *Meeting: Summing up Consumer Protection Activities in Vietnam in the period 2011-2015 (Hoi nghi tong ket cong tac bao ve nguoi tieu dung Vietnam giai doan 2011-2015)*, (21 January 2016) <<http://sct.haiduong.gov.vn/Tin-moi/ket-qua-cong-tac-cai-cach-hanh-chinh-nam-2015-cua-so-cong-thuong-Ui2buTVvl6.htm>>

The report presented by Trinh Anh Tuan, the President of Vietnam Competition Administration, pointed out one of shortcomings and limitations in the consumer protection in Vietnam during the period 2011 - 2015 that are ineffective state intervention and consumer dispute settlement, and emphasised the need to improve the legal framework for Vietnam in the area.

Commercial Law, Civil Code and so on. Both countries adopted federal consumer protection laws in 2010, however, there are differences between these in terms of the level of protection, comprehensive governance of consumer relations and techniques in formulating terms and designing laws. In particular, these differences emphasise the consumer's right to information because the core of consumer right protection relies on the right to be informed.²⁶

Australian consumer protection legislation originated from the United Kingdom (UK) 1962 report of the Committee of Consumer Protection and was developed into state-level regulations on consumer protection before a commercial practice act, including these regulations, was enacted at the federal level in 1974. This was also the period when the principle of caveat emptor was criticised for equity²⁷ and states intervened in the market, including in consumer protection matters, which resulted in the introduction of a series of new legislative provisions. Over a long period of development, regulations on consumer protection in the *Trade Practices Act 1974* (TPA) and the *Trading Act 1999* were officially replaced with a uniform act, the CCA. The ACL marked the end of the 30-year existence of TPA and Australia's development into one of the top consumer protection countries.²⁸ 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.'²⁹

Such objectives are achieved through the ACL in five chapters that provide comprehensive and specific regulations. General protections detail banned acts by businesses, including the general ban on misleading and deceptive conduct, unconscionable conduct in trade or commerce and specific bans on unconscionable conduct in consumer and some business transactions. A provision that makes unfair contract terms in consumer contracts void and consumer guarantee are notable elements of the ACL. After ascertaining general protections, the ACL provides specific protections including for specific unfair practices in trade or commerce, consumer transactions for goods or services, the safety of consumer

²⁶ Hadfield, Howse and Trebilcock, above n 1, 2.

²⁷ Norbert Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14(3) *Journal of Consumer Policy* 257, 293.

²⁸ Rod Sims, 'The Bite and the Park of Consumer Law (Australia)' (2012) Vol.50(4) *Law Society Journal* 74(4), 74.

²⁹ Standing Committee of Officials of Consumer Affairs, 'An Australian Consumer Law: Fair Markets: Confident Consumers' Treasury, 2009).

goods and product-related services, and the making and enforcement of information standards.³⁰

Despite of the existence and wide application of the ACL across Australia, there has not been any comprehensive legal theory elucidated on consumer protection in Australia.³¹ However, this does not prevent the clever and wide application of the achievements of economic theories and information that provide little argument for their appropriateness in developing and executing consumer protection law in Australia. The Productivity Commission identified the rationale for a consumer policy framework, showing the application of consumer sovereignty theory, modern theory of information and theory on consumer behaviour to the policy of consumer protection in Australia. Accordingly, the ACL is developed not only with the objective to correct market failures but within the presence of externalities and public goods, and it does not apply whole economic theories on information and consumer behaviour in a strict manner but in ‘case by case assessment so that the costs of that intervention do not outweigh the prospective benefit’.³² From this it can be seen that the rationale for consumer protection in Australia has been founded in the last few decades on widely accepted and globally developed theories. Therefore, the whole system of regulations in the ACL is a scientific and consistent structure directed by a modern and exemplary rationale on existing consumer protection policy.

In the foreword of the 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. Any legal framework of consumer protection is an information-based rationale, though it does not directly improve consumer information, and Australia is no exception.³³ 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

³⁰ 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>>.

³¹ Louise Sylvan, 'Activating Competition: The Consumer-Competition Interface' (2004) 12(2) *Competition and Consumer Law Journal* 191, 192.

³² Productivity Commission, 'Review of Australia's Consumer Policy Framework' (2008) *Inquiry Reports*.

³³ Howard Beales, Richard Craswell and Steven C Salop, 'The Efficient Regulation of Consumer Information' (1981) 24(3) *The Journal of Law & Economics* 491, 493.

information,' which is proven by the terms of ACL. Therefore, the ACL is an ideal model for by which to assess and compare the protection of the consumer's right in Vietnam.

1.4 Theoretical Basis of the Consumer's Rights to Information and Consumer Protection Laws

This comparative study of consumers' rights between Vietnam and Australia includes the establishment of theoretical frameworks as a basis for examining and evaluating legal regulations in this area. Thus, it is necessary to provide an overview of the theoretical foundations of consumer protection and right to information to introduce these theoretical frameworks.

Consumer-related matters are always an interesting problem for lawmakers and researchers because of two characteristics: consumers participate in the market with a weak, imbalanced position of powers compared to suppliers, and consumers are individual persons. These characteristics are closely related to the two objectives of a well-formulated act on consumer protection: to improve market efficiency by correcting market failures and ensuring equity.³⁴ The speech given by then-US President John Kennedy on consumers' rights, which became the topic in actions programs for consumers across the world, was inspired by the basic rights of a human in which the consumer's right to be informed was based on a person's right to know. At that time, some economic theories proved the correctness of the necessity to protect consumer's rights, especially the right to be informed.

The demand for protection of consumer right to information derived from the asymmetry of information and imperfect information which is explained as the consequences of market failures. The theory of market failures in the 1950s of the last century opened up the possibility of state intervention with market operation to correct market failures that lack conditions to ensure competitiveness.³⁵ In his hypothesis of four conditions of a perfectly competitive market, Edwin Mansfield described the condition on perfect information:

Perfect competition requires that consumers, firms, and resources owners have perfect knowledge of the relevant economic and technological data. Consumers must be aware of all prices. Laborers and owners of capital must be aware of how much their resources will bring in all possible use. Moreover, in its purest sense,

³⁴ Iain Ramsay, 'Framework for Regulation of the Consumer Marketplace' (1985) 8(4) *Journal of Consumer Policy* 353, 354.

³⁵ Ibid.

perfect competition requires that all of this economic decision-making units have an accurate knowledge of the future together with the past and present.³⁶

However, the natural existence of a perfectly competitive market as mentioned above is utopian. Economists held that ‘no magic machine exists in the real world,’³⁷ in which the first listed factor of failure is imperfect information. There is an information gap between buyers and sellers that affects buyers’ choice of products and, therefore, influences effectively competitive in the market. Clearly, in a commercial transaction, buyers have more choices to make purchase decisions, but they do not have much information on offered products as do sellers. Imperfect information also manifests itself by the fact that, in addition to lacking data about the price of goods and even the quality variation of products,³⁸ consumers may lack the ability to process and evaluate data that they obtain effectively.³⁹

Following the theory of market failures in this information respect, the theory of information asymmetry⁴⁰ further affirms the imbalance between buyers and sellers in possessing information on the products in a commercial transaction. Thus, ‘market for lemon’ remains a nightmare for consumers when they make purchase decisions. The more products are available in the market, the greater the information asymmetry between buyers and suppliers, and far easier for buyers to choose the lemon. There is no doubt that consumers’ weaker position and the imbalance of power between consumers and suppliers are important and noteworthy characteristics of the market.

Conversely, given the above-market characteristics, the economy saw the development of a competition policy that emphasised the consumer’s role and the need to take proactive measures to protect the interests of consumers. Sellers have to compete with each other to acquire consumer’s choices, and purchase decisions give sellers an indication of

³⁶ Edwin Mansfield, *Microeconomics: Theory and Applications* (WW Norton & Co, 1988) 290–291.

³⁷ Jack Hirshleifer, Amihai Glazer and David Hirshleifer, *Price Theory and Applications: Decisions, Markets, and Information* (Cambridge University Press, 2005) 418–419. Hirshleifer said that ‘A perfect market would instantaneously digest the inputs and proclaim the correct market-clearing price. But no such magic machine exists in the real world. So a farmer bringing vegetables to a city produce market may by cleverness or chance realize a sale at a price higher than the (unknown) true equilibrium. Or unluckily, the farmer may accept a price lower than might have been obtained’.

³⁸ Phillip Nelson, ‘Information and Consumer Behavior’ (1970) 78(2) *Journal of Political Economy* 311, 311.

³⁹ Shmuel I Becher, ‘Asymmetric Information in Consumer Contracts: The Challenge That is Yet to Be Met’ (2008) 45(4) *American Business Law Journal* 723, 735.

⁴⁰ George Akerlof, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’, *Essential Readings in Economics* (Springer, 1995) 175–188. In this paper, Akerlof demonstrated the concept of information asymmetry through the using of the image of a lemon, known as a symbol of defective used cars in the marketplace. The buyers, not knowing the real quality of this lemon, are willing to pay an average price that would be higher than what might have been deserved.

consumers' preferences, making it a motivation for competition by manufacturing products valued by consumers.⁴¹ This power of consumers is evaluated as a kind of 'sovereignty' and has become a familiar term in competition and consumer protection laws. The theory of consumer sovereignty focuses on consumer's practice which is intended to make sure that there are many subjects available for selection in the market and that consumers have the ability to make an effective selection.⁴² It is clear that consumers can only make good choices if they possess the relevant information on price, quality, and terms and that they have enough time to process the presented information.⁴³ Therefore, to satisfy the second condition, the issue of information is again raised as a prerequisite, and the problem of imperfect information must be corrected and minimised.

Since one of consumer sovereignty's objectives is to make sure that economical operation is effective, this theory does not focus on the fact that individual consumers are not fully informed. Thus, this traditional theory does not focus on whether a consumer's lack of information would result in uncompetitive prices or terms in the market.⁴⁴ However, outcomes of increasing consumers' powers by providing information to limit the inequality are also assurances of consumers' interests. As a result of applying the theory on correcting the imperfection of information, because 'uninformed choice is not an effective choice and without that, there will be no effective competition,' policies on consumer protection in most countries set their core principles based on the information. Regulations on disclosure of information; prohibition of unconscionable, misleading or deceptive conduct; and product liability have become fundamental contents of laws in countries to protect and minimise adverse effects on consumers in the market.⁴⁵

As such, consumers, a market player, are subjects of state regulation attempting to correct market failures, especially in regard to protecting the right to information. However, it was not until the 1960s, after the speech given by President Kennedy regarding the four basic rights of consumers, that consumer protection was widely introduced.⁴⁶ Since then,

⁴¹ Iain Ramsay, 'Rationales for Intervention in the Consumer Marketplace: An Occasional Paper Prepared for the Office of Fair Trading' (Office of Fair Trading, 1984) 25.

⁴² Neil W Averitt and Robert H Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65(3) *Antitrust Law Journal* 713, 716.

⁴³ J Edward Russo, 'More Information is Better: A Reevaluation of Jacoby, Speller and Kohn' (1974) *Journal of Consumer Research* 68, 71.

⁴⁴ Iain Ramsay, *Consumer Law and Policy* (Portland: Hart Publishing 2007).

⁴⁵ Alexander Bruce, *Consumer Protection Law in Australia* (LexisNexis, 1st ed, 2011) 14.

⁴⁶ John F. Kennedy, 'Special Message to Congress on Protecting Consumer Interest' (Speech delivered at the President's Office Files., 15 March 1962 <<https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx>>. President Kennedy mentioned 'the right to be protected against fraudulent and misleading

consumer protection law has independently developed and carved its own history alongside the development histories of economic and legal theories. Recent decades have seen the unprecedented developments in engineering, technology, and mass production. Product diversity offers consumers numerous choices, and fierce competition among sellers has promoted the 'deity' role of consumers, although this has the consequence of increasing the difficulty of selection faced by consumers. Studies on economics and consumers' behaviours, which originally indicated the imbalance between buyers and sellers in the market, have developed many theories resulting in a stronger affirmation of consumers' need to be protected in trading transactions.⁴⁷ This requires lawmakers and policy formulators to continuously develop and streamline an effective legal system of consumer protection. In that respect, protecting the consumer's right to information is one of the most important tasks of the laws in this field.

Prior to the 1960s, contract laws based on the UK commercial law were the source of consumer protection laws applied in most (especially English-speaking) countries.⁴⁸ In this period, one widely accepted key principle, especially in the common law system, was the principle of caveat emptor. This principle promoted the role of freedom in trading transactions by stating that buyers should be allowed to control risks and make decisions themselves in the transactions with sellers who could be at ease after relinquishing possession without worrying about legal product liability.⁴⁹ The Industrial Revolution and the rapid growth of urbanisation in the 1960s and 1970s saw internal changes in the society and a new perception of public intervention in economic activities including consumer protection. During this period, neoclassical theories provided strong evidence of the need to correct market failures and maintain perfect competition to ensure market efficiency.

However, modern economies have seen the associated rapid development of new aspects of economic and information theories, including revaluation of the effectiveness of previous theory-based consumer protection policies. Some scholars believe that modern information theory still promotes the role of information in commercial transactions, introducing the study of material differences which observes sophisticated and subtle effects of information

advertisement and labels, the right to be protected against unsafe or worthless drugs or other products, the right to choose from variety of products at competitive price'.

⁴⁷ Sutton-Brady, Catherine, Patty Kamvounias, and Tom Taylor. "A model of supplier-retailer power asymmetry in the Australian retail industry" (2015), *Industrial Marketing Management* 51, 122-130, 129.

⁴⁸ John Goldring [and] L.W. Maher. Foreword by Mr. Justice White., '*Consumer Protection Law in Australia*' (Butterworths, 1979) 1.

⁴⁹ Alan M Weinberger, 'Let the Buyer Be Well Informed-Doubting the Demise of Caveat Emptor' (1996) 55 *Md. L. Rev.* 387, 394.

on market dynamics and more bargaining establishments (compared to previous theories which only focused on the market and acknowledged the costs of being informed as simply one factor to be considered).⁵⁰ Researchers hold that any intervention of the state must be done with due consideration of the costs and benefits.⁵¹ In light of modern information theory, it is thought that consumer protection policies should be reasonably revised so that consumer protection measures become truly effective including in terms of economic performance.

1.5 Literature Review

1.5.1 Vietnamese Literature

1.5.1.1 Pre-2007 Literature

Academic literature on the topic of the consumer's right to information in Vietnam is extremely limited. Before the drafting of the LCP in 2007, research into consumer protection legislation was lacking. During this period, Tran Tri Hoang's *A Debate on Consumption Under Socialism*⁵² was a pioneering work on theoretical matters of consumption and one of two foundational studies on consumer protection in Vietnam, presenting a fundamental theoretical analysis of operational rules, situations and consumption relations in the movement and development of the economy. The book presented five major problems—the concept of consumption, consumption, consumption structure, consumer behaviour and consumers' rights—and was notable in being one of the few studies to refer to and apply the theoretical results of consumption in Western literature to the context of Vietnam during the first steps of its shift to a market economy. Although the only preliminary analysis was undertaken of the consumer's rights mentioned in the study (such as the right to be informed, quality assurance, safety, selection and compensation claim), the theoretical matters on consumer protection raised were groundbreaking and foundational for future studies in this area in Vietnam.

The second foundational study in the area of consumer protection in Vietnam was the Institute of the State and Laws's 'A Study on Consumer Protection Laws in Other

⁵⁰ Hadfield, Howse and Trebilcock, above n 1, 131.

⁵¹ Ramsay, above n 42, 38.

⁵² Hoang Tran Thi, *A debate on consumption under Socialism (Ban ve Tieu dung cua Chu nghia Xa hoi)* (National Politics Publishing House, 1999) 225.

Countries and the Matter of Consumer Protection in Vietnam.’⁵³ In addition to raising the difficulties faced by Vietnamese consumers in the ‘tornado’ of a market economy, as demonstrated by such adverse effects as defective products or polluted food, the work introduced the contents of consumer protection laws in other countries including Thailand, Singapore, Japan, South Korea, and India. This was a valuable primary source of material for experts and authors in Vietnam to refer to foreign experiences in developing consumer protection laws. However, the work was limited in that it introduced foreign laws but did not undertake any analysis or comparison with the Vietnamese Ordinance on consumer protection in force at the time.

1.5.1.2 Literature from 2008 to 2010

During the period of preparing and drafting (from 2006) to enacting the LCP (in 2010), studies on consumer protection in Vietnam became more prolific. The upcoming introduction of a major law in this area triggered excitement and interest among domestic legal researchers and attracted attention from international organisations in promoting the development of policies for Vietnam. In addition to studies on the design of consumer protection laws which are beyond the context of this dissertation, research works and studies on consumer protection in this period can be classified into three categories which are discussed in the following sections.

1.5.1.2.1 Comprehensive Studies on Consumer Protection in Vietnam

Some valuable research outputs on consumer protection were the Memorandum of Scientific Conference on ‘Law on Consumer Protection - International Experience, Current Situation and Prospects in Vietnam’, held by Institute of State and Law and Konrad Adenauer Stiftung in Ho Chi Minh City on 16–17 November 2009, the European Union (EU) – Vietnam Multilateral Trade Assistance Project (MUTRAP) report ‘Systematization and Review of Regulations on Consumer Protection in Vietnam’⁵⁴ and Consumer

⁵³ Institute of the State and Laws, *A Study on Consumer Protection Laws in Other Countries and the Matter of Consumer Protection in Vietnam* (‘*Tim hieu Luat bao ve nguoi tieu dung cac nuoc va van de bao ve nguoi tieu dung o Viet Nam*’) (Labor Publishing House 1999).

⁵⁴ Hanh Le Hong, Vu Thi Bach Nga, et al, ‘*Report No 1. ‘Systematization and Review of Regulations on Consumer Protection in Vietnam’ [‘Bao cao 1- Ra soat, He thong hoa cac Quy dinh Hien hanh ve Bao ve Nguoi tieu dung’]* (MUTRAP Report No 1, 2009) (31 July 2009). <<http://mutrap.org.vn/index.php/vi/explore/finish/52/510>>.

International's report 'Roadmapping Capacity Building Needs in Consumer Protection in ASEAN'.⁵⁵

'A Number of Theoretical Issues in Consumer Protection Law'⁵⁶ was also a significant contribution, presenting and analysing important matters such as establishing the position of consumer protection law in the legal system, exception to a contractual agreement, control of general transaction conditions, manufacturer's responsibilities to defective products, class actions and simplified procedures. This article presented the author's thorough view on the rights of consumers in their dialectical relations with others, pursuing the notion that exceptions had to be established for consumers' rights such as an exception to the freedom of contracting because of the imbalance of power between buyers and sellers.

The article 'Consumer protection in the aspect of governmental administration'⁵⁷ presented an overall introduction to legal institutions in the legal system on consumer protection and advantages and analysed the limitations of relevant regulations on consumer protection. The article presented a strong argument for the necessity of an effective 'legal system' and good post-inspection regime, stating that the legal system of consumer protection in Vietnam was outdated and its application was ineffective.

Generally, the articles and studies in this category presented overall analyses of regulations of the LCP and introduced fundamental theoretical comments including proposals for solutions to improve certain institutions in the field of consumer protection. However, there was no deep or comprehensive analysis of any specific matter.

⁵⁵ Consumer International, *Roadmapping Capacity Building Needs in Consumer Protection in ASEAN* (15 June 2011) <http://www.asean.org/wp-content/uploads/images/2015/January/Community-ASEAN_economic_community-consumer_protection-key_document/REGIONAL%20REPORT-FINAL-15June2011.pdf>.

⁵⁶ Phat Nguyen Nhu, 'A Number of Theoretical Issues in Consumer Protection Law (Mot so Van de Ly luan Xung quanh Luat Bao ve Ngươi tiêu dùng)' (2010) (02) *State and Law Journal* 28.

⁵⁷ Loan Dinh Thi My, 'Consumer protection in the aspect of governmental administration (Bao ve Ngươi tiêu dùng Nhìn Từ Góc độ Quản lý Nhà nước)', *Vietnam Consumer Protection Law Handbook* (National Politics Publishing House, 2006) 42.

1.5.1.2.2 Specific Rights and Content of the LCP

In this category, noteworthy works were ‘Assurance of the Consumers’ Right to be Informed in Our Country’⁵⁸, ‘The Consumer’s Right to Information and the Current Enforcement of This Right’⁵⁹, ‘Assurance of Consumers’ Right to Claim for Damages in Our Country’, ‘Consumer Protection From the View of a Lawyer’⁶⁰, ‘Assurance of Consumers’ Right to be Educated in Vietnam’.⁶¹ ‘Assurance of the Consumers’ Right to be Informed in Our Country’ was especially noteworthy in that it specifically addressed the consumers’ right to be informed. The article presented an overview of some legal regulations on the right to be accurately informed of quality, price, usage method, and service and stated that this right was not currently respected as indicated by untruthful practices in advertising, promotion and product liability of suppliers. Based on this analysis, the article proposed recommendations for amending relevant laws and regulations. However, this article was published prior to the enactment of the LCP and was based on an analysed the 1999 Ordinance. Moreover, the article only demonstrated the existing legal regulations and situation of Vietnamese consumers’ right to be informed and failed to present an overall analysis of this right.

1.5.1.2.3 Consumer Protection Approaches from Popular Theories in Foreign Countries

Works in this category were the most numerous, reviewing foreign laws on consumer protection and applying these to develop and improve consumer protection laws in Vietnam. Notable works in this category include ‘Comparative Research of Consumer Protection Laws of Some Countries - Lessons and Proposal for Vietnam’⁶², ‘Experiences in

⁵⁸ Hoe Tran Thi, “Assurance of the Consumers' Right to be Informed in Our Country” (Bao dam Quyen duoc Cung cap Thong tin cua Nguoi tieu dung o Nuoc ta Hien nay) (A national research of *Institute for Human Right Study* 2007).

⁵⁹ Viet Tran Quoc, ‘The Consumer’s Right to Information and the Current Enforcement of This Right’ (Quyen duoc Thong tin cua Nguoi tieu dung va Viec Bao dam Thuc thi Hien nay) (2017), (02) *Science and Technology Information Journal* 26.

⁶⁰ Tuan Luong Van, ‘Consumer Protection From the View of a Lawyer’ (Bao ve Nguoi tieu dung tu Goc nhin cua Luat su) (2010), 3 *Liberty and Law Journal* 2.

⁶¹ Hai Hoang Hung, Nguyen Duy Son ‘Assurance of consumers' right to be educated in Vietnam” (Bao dam Quyen duoc Giao duc cua Nguoi tieu dung o Viet Nam Hien nay) (2007) *Institute for Human Right Study* 37.

⁶² 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://cuts-hrc.org/images/stories/doc/full%20report_so%20sanh%20mot%20so%20luat%20bv%20ntd%20tren%20the%20gioi%20%20de%20xuat%20cho%20vn.pdf>.

Designing Legal Provisions on Product Liability of Some Asean Countries’⁶³, ‘The Basic Principles of Product Liability Regulations in the United States and Some Other Countries’⁶⁴ and ‘Improvement of Consumer Protection Law in Vietnam in the Context of International Integration’.⁶⁵ All of these studies investigated and analysed the regulation of the LCP in general terms instead of focusing on specific consumers’ right. Moreover, there was no intensive research on consumers’ right to information.

1.5.2 International Literature

The consumer’s right to information has long been recognised in the international literature. There have been many intensive studies on consumer protection, especially on information-based principles of consumer protection policy and debates on this topic. These studies range from research and reports by the United Nations, Organisation for Economic Co-operation and Development (OECD) and Association of Southeast Asian Nations (ASEAN) to works by independent researchers. Notable works include ‘Rationales for Intervention in the Consumer Marketplace’ (1984)⁶⁶, ‘Diverse Approaches to Consumer Protection Philosophy’ (1992)⁶⁷, ‘Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis’ (1979)⁶⁸, ‘The Bite and the Bark of Consumer Law’ (2012)⁶⁹ and ‘Information-Based Principles for Rethinking Consumer Protection Policy’ (1998)⁷⁰.

⁶³ Hong Tran Quang, Truong Hong Quang, ‘Experiences in Designing Legal Provisions on Product Liability of Some Asean Countries’ (Kinh nghiệm Xây dựng Pháp luật về Trách nhiệm Sản phẩm của Một số Nước Asean), 07 *Law Journal* 46.

⁶⁴ Hanh Le Hong, Truong Hong Quang, ‘The Basic Principles of Product Liability Regulation in the United States and Some Other Countries’ (Cac Nguyên lý Cơ bản của Chế định Trách nhiệm Sản phẩm tại Hoa Kỳ và Một số Quốc gia trên Thế giới) (2010), 2 *State and Law Journal* 35.

⁶⁵ Loan Dinh Thi My, “Improvement of Consumer Protection Law in Vietnam in the Context of International Integration” (Hoàn thiện Pháp luật Bảo vệ Quyền lợi Người tiêu dùng ở Việt Nam trong Bối cảnh Hội nhập Kinh tế Quốc tế) (2006) *Ministry of Commerce*.

⁶⁶ Iain Ramsay, ‘Rationales for Intervention in the Consumer Marketplace: An Occasional Paper Prepared for the Office of Fair Trading’, *Office of Fair Trading*, 1984.

⁶⁷ Norbert Reich, ‘Diverse approaches to consumer protection philosophy’ (1992) 14(3) *Journal of Consumer Policy* 257-292.

⁶⁸ Alan Schwartz, and Louis L. Wilde, ‘Intervening in markets on the basis of imperfect information: A legal and economic analysis’, (1978): 630, *U. Pa. L. Rev.* 127.

⁶⁹ Rod Sims, ‘The bite and the bark of consumer law’ (2012) 50(4) *Law Society Journal* 74.

⁷⁰ Hadfield, Gillian K., Robert Howse, and Michael J. Trebilcock., ‘Information-based principles for rethinking consumer protection policy’, (1998) 21(2), *Journal of Consumer Policy* 131-169.

1.5.2.1 Guiding Policy of International and Regional Organisations

The United Nations Guidelines for Consumer Protection⁷¹ provides valuable global principles and guidance for consumer protection. The guidelines cover a wide range of key areas in consumer protection, including general principles, good business practice and specific guidelines for national policy, and plays an important role in defining modern standards in the field. Ensuring the consumer's right to information is one of the general principles and accounts for most of the national policy guidelines on consumer protection. Accordingly, the national policy guidelines address issues of assurance and enhancement of right to information, including guiding member states to establish clear rules and regulations to enable consumers to contact business and regulators and enforcement authorities and assess information regarding goods or services, contract terms, process of confirmation, and cancellation, return or refund of transactions.

The OECD provides an analysis of the economic aspects of consumer protection policy in the 'Report on the Second Roundtable on Economics for Consumer Policy'.⁷² Questions raised among OECD policymakers and scholars focused on the core issue of consumer protection embodied in section II of the report. The report points out that the two factors of information failure and behavioural failure must be taken into account when evaluating consumer policy initiatives due to regulators being subject to them, which explains why policy analysis should be considered in the context of the corresponding, admittedly imperfect market and admittedly imperfect legal system. The report covers provide substantial coverage on mandatory information disclosure in light of theories where disclosure is costly or costless. While confirming that disclosure provides substantial benefits, the report indicates its unintended consequences and the need for controlled testing on relevant consumers (based on pre or post-implementation observation or comparison of requirements for disclosure between different jurisdictions) to evaluate the benefits and consequences for preventing inappropriate disclosure.

In the context of ASEAN, the *ASEAN Consumer Protection Digests, and Case Studies: A Policy Guide* provides policy digests for most the important regimes of consumer

⁷¹ David Harland, 'The United Nations guidelines for consumer protection' (1987) 10(3) *Journal of Consumer Policy* 245.

⁷² OECD, "'Report on Second Roundtable on Economics for Consumer Policy' (2007) *OECD Digital Economy Papers*.

protection to promote consumer confidence.⁷³ The report provides an overview of the regulatory framework for key consumer protection issues, current regulatory reviews in the regulations of member states and general guidelines to assist member states in establishing an appropriate regulatory framework on consumer protection. Two case studies—of the online consumer marketplace in Kuala Lumpur, Singapore and Jakarta⁷⁴ and regulating unfair contract terms in Myanmar, Malaysia and Singapore⁷⁵—provide analysis of the procedural and substantive fairness provisions of unfair contract terms and a detailed view of the adjustment of unfair contract terms in the ASEAN region.

1.5.2.2 Comparative Research

A fairly comprehensive comparative 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’.⁷⁶ The study identifies emerging issues and developments in consumer policy and alternative approaches to consumer protection in a number of specific areas including unconscionable or highly unfair trading practices, regulation of e-commerce and peer-to-peer transactions, and measures to facilitate access to justice. The first section of the report indicates possible legislative approaches to issues and determines the (general) approach of Australia. The work examines the policy objects and specific provisions of the ACL and comparable regimes in the EU, the UK, the US, Canada and Singapore and highlights the fundamental differences among these approaches and jurisdictions, providing a legal framework for the protection of consumers in the respective countries.

A similar approach was undertaken in ‘Comparative Consumer Law Reform and Economic Integration’,⁷⁷ which undertook a comparative analysis of the general legal frameworks protecting consumers in New Zealand and the EU, occasionally using the ACL as a comparative framework. Analysis of the Consumer Credit and Consumer Law Reform Bill 2011 (NZ) outlines New Zealand’s consumer protection framework and policies and highlights new features and improvements. The study points out New Zealand’s regulatory

⁷³ ASEAN and Australian Aid, ‘*ASEAN Consumer Protection Digests and Case Studies: A Policy Guide*’ (Volume 1) (Directed by 2014).

⁷⁴ Ibid, 136.

⁷⁵ Ibid, 168.

⁷⁶ Stephen G Corones et al, *Comparative Analysis of Overseas Consumer Policy Frameworks* (April 2016). <<https://eprints.qut.edu.au/95636/1/95636.pdf>>.

⁷⁷ Luke R Nottage, Christine Riefa and Kate Tokeley, ‘Comparative Consumer Law Reform and Economic Integration’ in J. Malbon and L. Nottage (eds), *Consumer Law and Policy in Australia and New Zealand*, (Federation Press, Australia.2013)

imitation of the ACL in the proposed ban on unfair contract terms in the standard consumer contract in New Zealand consumer law, including a grey list of contract terms.

However, under the policy of less regulation, New Zealand did not regulate unfair and unconscious behaviour⁷⁸ in the Consumer Law Reform Bill 2011. Meanwhile, the EU introduced the notion of ‘good faith’ to regulate business-to-consumer contracts,⁷⁹ which Australia adopted through the regulation of legitimate interest in unfair contract terms. The authors argued that the new provisions of the EU’s directive on consumer rights represent a mixed-access approach allowing the state to intervene only in certain sectors. Unfair commercial practice and the EU’s most recent consumer protection initiatives are clarified in the study, including the introduction of the notion ‘good faith’, the black list of 31 unfair practices and general safety requirements for product liability and safety regulation.

1.5.2.3 Consumer Protection Research Focusing on the Consumer’s Right to Information

Beales, Craswell, and Salop⁸⁰ stressed the importance of the information-based principle of consumer protection. They examined some alternative legal standards applied to information issues and analysed how the generation and dissemination of consumer information were affected by market forces. The authors made significant policy recommendations which focused on consumers’ right to information. Recommendations for restricting imperfect information were described in detail in ‘Information Remedy for Consumer Protection’,⁸¹ including removing information restraint, ensuring truthful information and providing complete information. Three specific solutions were recommended—setting metrics, required disclosure and prohibited information. The analysis accompanying these solutions provides a useful general review in addressing incomplete information problems.

Averitt and Lande discussed the relationship between antitrust and consumer protection law, developing and analysing the doctrine of consumer sovereignty.⁸² They defined two fundamental conditions of sovereignty—a range of consumer options made possible through competition and customers’ capacity to choose effectively among these options.

⁷⁸ Ibid, 65.

⁷⁹ Ibid, 80.

⁸⁰ Howard Beales, Richard Craswell and Steven Salop, ‘Information Remedies for Consumer Protection’ (1981) 71(2) *The American Economic Review* 410.

⁸¹ Ibid.

⁸² Averitt and Lande, above n 40, 36.

They analysed practical consequences of the consumer sovereignty model relating to antitrust and consumer protection authority, the possibilities of the government in determining particular antitrust and consumer protection cases, and business practices which violate the underlying purpose of consumer protection or antitrust statutes. This study reveals that the consumer's right to information has played an important role in forming consumer sovereignty and, consequently, effective competition.

Geraint Howells stated that increasing the information available to the consumer is undoubtedly significant,⁸³ 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. These limitations were examined for the purpose of seeking which consumer policy approaches should be adopted. While recognising the importance of the strategy of information as the key tool available to enhance consumer protection, Howells suggested three other approaches—altering the default rules, using bans and regulations and risk sharing.

Information rationales were also comprehensively discussed by Iain Ramsay.⁸⁴ He noted information failure as a rationale for state intervention and analysed connections between market structures and consumer protection. The theory of information was also examined in light of modern economics in which information—the base policy of consumer protection—should be balanced between the cost and benefit of the intervention. In this, Ramsay argued along the same lines as Franziska Rischkowsky and Thomas Döring.⁸⁵ These researchers stressed the need to apply new economic approaches from the economics of information to amend the informational economics framework.

Nguyen Cuong's dissertation⁸⁶ is an interesting study on consumer protection law in Vietnam. By examining how Vietnam improved the legal regulation of consumer transactions through the lens of legal transplantation theories, he examined deviations in Vietnam's legislative methodology and concluded that the drafting process of the CPL

⁸³ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 349.

⁸⁴ Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Bloomsbury Publishing, 2012).

⁸⁵ Franziska Rischkowsky and Thomas Döring, 'Consumer Policy in a Market Economy Considerations from the Perspective of the Economics of Information, the New Institutional Economics as well as Behavioural Economics' (2008) 31(3) *Journal of Consumer Policy* 285.

⁸⁶ Cuong, above n 3.

tends to pursue the problem-solving approach rather than a legal transplantation process. This tendency when drafting consumer protection law causes weaknesses and legal gaps in consumer protection in Vietnam.

1.5.3 Gaps in the Literature and Significance of the Research

Recent decades saw the developments of engineering, technology, and mass-production with a loss of exceptional achievements. Product diversity offers consumers numerous choices and fierce competition among merchants has promoted the 'deity' role of consumers; on the other hand, however, this also has them face with many difficulties in making the right expenditure decision. Studies on economics and consumer's behaviors, which originally indicate the imbalance between buyers and sellers in the market, have developed many theories resulting in a stronger affirmation of the consumers' needs to be protected in trading transactions. This requires lawmakers and policy formulators to continuously develop and streamline an effective legal system on consumer protection. In that respect, protecting the consumer's right to be informed is one of the important tasks of the laws in this field.

From the review of international and Vietnamese literature, it is clear that no study has comparatively examined and analysed the regulations of the consumer's right to information in Australia and Vietnam. Instead, previous international studies have analysed the customers' right to information using a theoretical approach based on the information principle. They did not examine national consumer laws in terms of their effectiveness in practice or overall benefits. Previous studies have discovered, applied and explained the customer's right to information and developed the theory of information following the standards of modern economics. As the 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. Moreover, no comprehensive research has focused on the consumer's right to information in Vietnam or undertaken a comparative study between this legal framework of this right in Vietnam and that of another country. This thesis aims to fill these gaps in the literature.

This thesis has theoretical and practical value. This thesis will become the first intensive study on the consumer's right to information in Australia and Vietnam using the comparative law method. This study will provide significant information on theoretical matters in relation to the consumer's right to information and serve as reference material

for study. In terms of its practical value, this thesis will also be helpful in satisfying the consumers and businesses seeking information on the concepts and forms of the consumer's right to information, through which they can discover ways of avoiding and/or defending against such infringements. Further, proposed solutions to be offered to improve the Vietnamese legal system in regard to the quality of consumer law.

1.6 Thesis Scope and Structure

The thesis examines the legislative provisions on consumers' right to information in Australia and Vietnam and analyses the similarities and differences between these two legal systems for the purpose of recommending law reform in Vietnam. It focuses on two main areas of consumer protection legislation—misleading or deceptive conduct especially misleading advertising, and unfair contract terms. Among diverse conduct related to consumers' right to information regulated by consumer laws, the thesis focuses on these two critical contents as the scope of the thesis. While examining and analysing the constituent elements of behaviours and their manifold and subtle manifestations in commercial practice, the thesis also investigates these research objects on both aspects of trading of goods and service. In other words, the scope of the thesis is extended to both trade in goods and services relating to misleading or deceptive conduct and unfair contract terms. However, while expanding the scope of the investigation of the two types of behaviour in trading of goods and services, the specific regulation governing specialist areas such as medical, banking, tourism, telecom are beyond the scope of the study. Also, trade practices in the digital economy such as e-commerce or activities of sharing economy are not covered by the thesis.

The thesis comprises six chapters.

Chapter 1 has described the background of the research, articulated the research questions and outlined the research methodology and significance. This chapter has also undertaken a literature review and which has provided an outline of the rationale for existing legal frameworks of consumer protection.

Chapter 2 details the origin, rationale and debates on consumer protection policy relating to the consumer's right to information. After analysing the definition of the consumer's right to information, this chapter examines the information model as a traditional consumer

protection policy in the context of information asymmetry and consumer sovereignty, as well as analysing modern information theory and its influences on consumer protection.

Chapter 3 provides an overview of consumer protection legislation in Australia and Vietnam and analyses their characteristics. This chapter also undertakes a general comparison between Australia and Vietnam in terms of the structure of consumer law, legal rationales for consumer protection and definition of a consumer and explains the consequence of these differences in Vietnam.

Chapter 4 investigates and comparatively analyses the regulations pertaining to misleading and deceptive conduct in the ACL and Vietnamese law. After highlighting the advantages of the ACL and comparing its provisions on misleading advertising and some other misleading conduct to equivalent regulations in various Vietnamese laws, this chapter compares the differences and defines their consequences in regard to guaranteeing consumers' right to information in Vietnam.

Chapter 5 investigates and comparatively analyses the regulations on unfair contract terms in Australia and Vietnam and guarantees of consumers' right to information through legislation provisions and case law. The regulations on standard form contract, unfair terms, and exemptions from unfair contract terms are comparatively analysed, focusing on legal techniques and country tradition. The differences between the two legal systems treatment of these topics are examined to identify possible legal reforms for Vietnam.

Chapter 6 concludes the thesis, providing recommendations to amend Vietnam's existing consumer law and other statutory laws relating to the consumer's right to information, especially in regard to misleading and deceptive conduct, unfair contract terms and consumer guarantees. The proposed reforms are divided into two groups—strategic, long-term solutions which involve legal techniques and rationale of consumer protection policy, and specific solutions for law reform on the three aforementioned areas of consumer protection.

Chapter 2 (pages 31-68) of this thesis have been removed as they contain creative component.

Chapter 3:

Present Regulatory Frameworks Governing Consumer Protection in Vietnam and Australia

To evaluate the merits of the present right to information in the Vietnamese consumer law and recommend options for reform, it is useful to examine a comparable and laudable legal framework. As outlined in Chapter 1, Australia has been selected for this purpose. The comparative analysis of the two different legal systems, even relating to only one specific legal field, provides insights into the nature of the law. The legal thinking in each country is derived from the political, economic and moral origins which clarifies the differences between the laws of the countries. While Chapter 2 analysed theoretical frameworks and identified the optimal adjustment model in state intervention for consumer protection, Chapter 3 provides a comparative overview and analysis of the consumer protection laws of Vietnam and Australia, laying the foundation for the area-specific analysis undertaken in Chapters 4 and 5. To do this, this chapter provides an analytical overview of the important features of the Vietnamese and Australian legal systems and consumer policies which are associated with specific national political and economic views, and identifies similarities and differences in the structure of consumer law and the definition of a consumer which are the main contents likely to affect the effectiveness of regulation.

This chapter comprises four sections. Section 3.1 analyses the characteristics of Vietnam's legal system and the LCP. Through historical analysis of the current Vietnamese legal system, the features of socialist law will be mentioned in terms of aspects affecting the consumer's right to information in the areas of misleading conduct and unfair contract terms. The argument of whether socialist law belongs to civil law system or distinct family law is analysed to clarify features that could explain the existence of some disadvantages in Vietnamese consumer law. Section 3.2 analyses the history of the ACL's development and provides an overview of the relevant regulations. The section explains in detail the evolution of Australian consumer policy, showing that Australia's current model is consistent with the optimal model identified in Chapter 2 and an ideal benchmark for comparison with Vietnam. Section 3.3 undertakes a comparative analysis of similarities and differences in the structure of the statute and definition of a consumer. Accordingly, the section identifies the differences of the relating regimes between the two laws and their

consequences which contribute to determining the differentiation of effectiveness of regulations on consumer right to information between the two legal systems of Vietnam and Australia.

3.1 Consumer Protection Legislation in Vietnam

3.1.1 Introduction to the Vietnamese Legal System

Through dramatic vicissitudes, Vietnam history has left its evident marks in the culture, society and legal background in the country. Among the many criteria that can be based on to draw historical milestones of Vietnam, the changing in legal thinking and the legislative system could be the significant ground to consider. Vietnam has witnessed tremendous impacts on the country and the legal background based on changes in the periods when influenced by China, French, the Soviet Union and the Doi Moi policy. In other words, Vietnamese legislation can be divided into four periods of development corresponding to significant changes in the history of Vietnam.

During the first period, before the French occupation of Vietnam, law was deeply influenced by Confucianism derived from China.¹ As a result of 1,000 years of Confucian influence, Vietnamese society retains the imprint of behaviour judgment based on sentiment rather than proofs, even though there are several feudal legal provisions regulating some commercial activities. The sentimental view also causes the state not to encourage the development of legal doctrines, and they are not seen as the source of law.²

The second period, starting with French entry into Vietnam in the mid-nineteenth century, marked a dramatic change whose legacies continue today. The French brought new legal thinking, ideologies, and techniques to Vietnam that drew a new image for the Vietnamese legal system. The ancient concept of law was almost abolished, and a new wealth of legal knowledge was established in Vietnamese society.

Cuong Ngo analyses the development of the Vietnamese legal framework during the French colonial period as characterised by three characteristics: 1) changing the legal foundation of morality to the justice, 2) extending the judge's right to interpret the law and

¹ Cuong Ngo Huy, 'Some Features of Commercial Law in Vietnam (Mot vai dac diem cua Luat thuong mai Viet Nam)' (2011) 27 *VNU Journal of Science, Law* 252, 252.

² Cuong Ngo Huy, 'The Influences of the French Law on the Private Law in Vietnam (Su anh huong cua phap luat Phap toi luat tu o Viet Nam)' *eLegislation Research Journal (online)* <<http://www.ncrp.org.vn/su-anh-huong-cua-phap-luat-phap-toi-luat-tu-o-viet-nam>>

3) encouraging the development of legal doctrine.³ These achievements have played a very important role in shaping the legal thinking and resources in Vietnam. However, this development has not flowed continuously from the French colonial period to later stages, and Vietnamese legal history has witnessed a regrettable break in the process of the legal development.

The third period marked from 1954, North Vietnam transplanted the law of the Soviet Union; and legal thought of Marxist–Leninist thought and the Soviet legal system, especially after 1975, saw the Soviet legal tradition recognised as the model of socialist law in Vietnam. Since 1975, Vietnamese law has been deeply influenced by Soviet law and Marxist–Leninist thought under the control of the Communist Party of Vietnam’s (CPV) policy—so-called socialist law.

During the fourth period, from 1986 to the present, Vietnam adopted the Doi Moi policy and enacted the Constitution in 1992 in which the state recognised a new ownership regime with the promotion of private commercial rights. While the principle of democratic centralisation from Marxist–Leninist thought persisted, Vietnam started applying the policy of opening up and encouraging foreign investment. In the third period, laws showed dramatic changes in the quantity and quality of promulgation and enforcement. However, it is precisely the preservation of these principles of state operation that have led many Western scholars to argue that socialist law in Vietnam, influenced by macroeconomic institutions and the CPV’s control, no longer fit into the present mixed economy.

Referring to the Vietnamese legal system as socialist law, three doctrines constitute basic socialist policy—socialist legality, democratic centralism and collectivisation.⁴ All three support the most important factor which is the unique central leadership of the CPV. To understand the characteristics of the Vietnamese legal system, is necessary to outline the socialist state, the CPV and its policy. In socialist countries, the party and state (led by the party) holds ownership of all important state property including the land use rights.⁵ Law is seen as a tool for state control and a means of carrying out the party’s policy. The principle of democratic centralism is a basic feature of the socialist legal system.⁶

³ Ibid.

⁴ John Gillespie and Pip Nicholson (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reforms* (ANU E Press and Asia Pacific Press, 1st ed, 2005), 47.

⁵ *Land Law No. 45/2013/QH13 (Luật Đất đai)* (Vietnam National Assembly), s 4.

⁶ *Vietnamese Constitution 2013*, s 8.

The principle of democratic centralism sees ultimate power held by the party and allocated to the administrative and judicial branches. All state agencies are operated in accordance with the party's policy and the central body. Socialist law is seen as a tool of governmental control, the result of which is law that reflects the party's policy.⁷ Even the law is an auxiliary tool for the administration of a centrally planned economy, while the instrumental role belongs primarily to the party's policies and resolutions, administrative orders, and document.⁸ During 1945–1975, Vietnamese law demonstrated two consequences of being influenced by Soviet law. First, the nature of the planned economy with the abolition of private ownership suppressed the role of civil law that had resulted from the positive legal influence set by the French. This impedes the legal system by removing the capability of private law to provide major legal solutions to other legal fields. Second, one of the characteristics of Soviet law is the overemphasis of public law to strengthen the role of the proletarian dictatorship for political purposes. This has seen the Vietnamese law system focus on public law, rather than private law.⁹ During the fourth period of legal development, Vietnamese law promoted political power instead of the reality of life, with the consequence that the law was constituted from the CPV's policy, not actual needs.

Beginning in 1986, Vietnam witnessed an important shift in socio-economic life as the CPV adopted the Doi Moi policy. The Doi Moi process started with the vigorous reform of state-owned enterprises and the development of the private sector as the result of applying the open policy to promote trade relations with developed countries. These changes provoked the need for necessary reforms in the existing legal system between 1986 and 1991.¹⁰ The desire to make timely adjustments to commercial development prompted the Vietnamese Government to rush out nearly 120 new laws and ordinances from 1992 to 1999 and thousands of regulations and guidelines for implementation.¹¹ A number of new laws were enacted in the areas of land, resources, finance, banking, foreign investment, companies, and technology transfer. The demand to enact new laws ensured a challenge to change the Soviet legal thinking to strongly import foreign laws. Foreign trade encouraged introducing new laws and new economic policy, which are the most visible manifestations

⁷ Office of the Party Central Committee, 'Nghị quyết Đại hội Đảng lần thứ 12 (12th Party Congress Resolution)' (2016).

⁸ Pip Nicholson, 'Vietnamese Jurisprudence: Informing Court Reform' in John Gillespie and Nicholson, Pip (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reforms* (ANU E Press and Asia Pacific Press, 1st ed, 2005), 159, 174.

⁹ Ngo, above n 2.

¹⁰ Hanh Do Thi Mai, 'Transplanting Common Law Precedents: An Appropriate Solution for Defects of Legislation in Vietnam: part 1' (2016) 25 *European Scientific Journal*. 82, 85.

¹¹ Brian JM Quinn, 'Legal reform and its context in Vietnam' (2001) 15 *Colum. J. Asian L.* 219, 223.

of the changes in the socialist law in Vietnam.¹² These changes show the reflection of social relations of the laws instead of only operating in accordance with the CPV's will.

Though Vietnamese leaders insist on Marxist–Leninism as the most progressive scientific thought, the socialist theory began to apply more flexibly in Vietnam.¹³ Hanh argues that the legal system at this stage was marked with three basic changes that are a precondition for undermining the character of the socialist legal system in Vietnam. First, adding to Marxist–Leninism, Ho Chi Minh espoused transplanting legal theories from developed capitalist countries on the grounds that Vietnam would maintain its cultural values while learning from the good achievement of other countries without considering their political regimes. Second, the concept of the legal state in developed countries was gradually introduced into Vietnam; accordingly, it raised the spirit of complying with the laws of state agencies, organisations and citizens as well as promoting the tendency of laws in regulating the behaviour of state agencies and individuals, rather than relying on morality and the CPV's policy. Third, the Law on the Promulgation of Legislative Documents in 2006 and 2008 significantly improved the process and quality of law enactments in Vietnam.¹⁴ These developments have contributed to an essential shift in the Vietnamese legal system compared to the pre-1986 period. The emergence of more private statutes as a result of the overarching internal opening process has made public law lose its prior position in the legal system.¹⁵ The Vietnamese law system is no longer a copy of the Soviet law but influenced by the legal doctrines of Western law.¹⁶ This was also the period when the need for the formation of new legal thinking was raised in Vietnam of which the identification of the source became a preoccupation of legal writers. Trade laws transplanted from developed countries were also an important source which inspired the development of a new legal mindset in Vietnam. At this stage, while arguing that China's legal theories were underdeveloped, Vietnamese legal writers were afraid of new legal

¹² Nicholson and Gillespie, above n 4.

¹³ Hanh Le Hong, *"Textbook on State and Law" (Giao trinh nha nuoc va phap luat)* (People Police 1998). 319.

¹⁴ Hanh, above n 10.

¹⁵ Ibid 86.

¹⁶ AusAid-Vietnam, 'Legal and Judicial Development, 'Vietnam: Legal and Judicial Development' ' <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan015810.pdf> >. 12 August 2016. See also John Gillespie, *Transplanting Commercial Law Reform - Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 60–62. Gillespie states that the civil code in 1995 was transplanted from French law and Japanese law, while the law on enterprise in 1990 was based on the principles originating in Anglo-American company law.

ideas from Western countries.¹⁷ There were two tendencies of explanation of legal theories in Vietnam at this time. A group of experts which advocated for Soviet theory with some changes to adapt to the local situation by applying new metaphors in this theory, and a second group attempting to apply an explanation of central Western and Marxism–Leninist laws combined with what they called Ho Chi Minh thought or Confucian language to explain legal thinking in Vietnam.¹⁸

After more than 10 years of reform, the Vietnamese legal system has shown impressive development. The large volume of law with a diversity of regulations accompanied by an increasingly legitimate legal mindset are clearly visible signs of this development. However, the characteristic of Vietnamese law as a socialist law is still a fundamental feature associated with the nature of the current political regime.¹⁹ Consequently, although Vietnamese laws are promulgated quite adequately, there remain distinct characteristics capable of negatively affecting the efficiency of the laws.

There are two prominent features of Vietnam’s socialist legal system. First, in the Vietnamese legal system, most laws are not based on a legal philosophy which should be clearly defined at the time of drafting the laws. The lack of legal thinking and less focus on the development of legal philosophy in practice is evident in Vietnam due to the interrupted development of legal thinking and Vietnam’s unique historical factors. While not escaping the moral and ethical beliefs of Confucianism, Vietnamese intellectuals opposed the thought of being dependent on French law, which reduced the positive influence of French legal foundations.²⁰ Given the formulation of pre-1986 laws in the context of the Marxist–Leninist policy of the CPV, the question is raised as to whether their outcomes (successful or otherwise) depended on a repressive regime.²¹ Consequently, the increasing openness of

¹⁷ John Gillespie, ‘Changing Concepts of Socialist Law in Vietnam’, in J Gillespie and P J Nicholson (eds), *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Asia Pacific Press 2005) 45, 66.

¹⁸ Tong Le Minh, ‘Some Issues about the Law Based State in the Context of Vietnam (Mot So De Ve Nha Nuoc Pha Quyen Trong Boi Canh Viet Nam)’ (Paper presented at the Conference on Rule of Law and its Acceptance in Vietnam,, Ha Noi, 11 September 2000). 1–2.

¹⁹ Matthieu Salomon and Vu Doan Ket, ‘Achievements and Challenges in Developing a Law-Based State in Contemporary Vietnam: How to Shoe a Turtle?’, in John Gillespie and Albert H Y Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, 2010) 134; Thiem H Bui, ‘Deconstructing the “Socialist” Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam’s Constitutional Reform Process (2014) 36(1) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 77, 82. Matthieu Salomon and Vu Doan Ket describe the Soviet doctrine of law-based state (nha nuoc phap quyen) as ‘dualist thinking, mixing of “rule of law” and “rule of the Party”’.

²⁰ John Gillespie, ‘Private Commercial Rights in Vietnam: A Comparative Analysis’ (1994) 30 *Stan. J. Int’l L.* 325, 333.

²¹ Inga Markovits, ‘The Death of Socialist Law?’ (2007) 3 *Annu. Rev. Law Soc. Sci.* 233, 234.

that regime and the legacy of reliance on repressive measures leave serious gaps in the development of Vietnam's legal thinking. Although Vietnam has tried to borrow the progressive ideas of Western law, the announcement of legal doctrines and purpose of the law is absent in the drafts laws. Normally, there are only provisions in submissions or drafts of laws available for discussion before they are approved. More recently, some legal research documents have been attached to draft laws to help lawmakers transplant foreign legal experiences when designing laws for Vietnam. There has been no statement about the mission and legal doctrine of the laws, but rather principles guided by the CPV's policy.²² Although court's judgments, in some cases, have a value of judicial precedents,²³ scholars and practitioners argue that court precedents tend to show solutions for the cases rather than providing legal reasoning.²⁴ The lack of a specific legal doctrine for a statute to be based on to define its mission and aim likely results in fragmentary and inconsistent laws. This is also one of the reasons why lawmaking techniques in Vietnam remain a challenge for lawmakers.

Second, although the Vietnamese Government has made an effort to recognise private commercial rights, the level of promotion of private commercial rights in Vietnam remains limited compared to protection of the interests of the state and collective organisation. Vietnamese law is the transformation of the CPV's policies²⁵ which tend to protect the social interest rather than private commercial rights.²⁶ This feature has long been influenced by Confucian thought in which the primacy of public or common interests is favoured over individual interests.²⁷

During the period when Marxist–Leninist theory was dramatically transplanted in Vietnam, the ownership of the state and collective organisations was promoted while private

²² Normally, in each law there is a clause stating the principle of state management in the field governed by the law, for example, the principles of state management on price (Law on Price, art 5), the principle of state management on product quality (Law on Quality, art 5).

²³ Vi Tran, Gia Hi, 'Should Precedents be Used in Trials? (Nên Áp Dụng An Le Khi Xét Xu?)' (2009) *Ho Chi Minh City Law Newspaper (Phap Luat Thanh Pho Ho Chi Minh)* in Bui Bich Lien, 'Legal Interpretation and the Vietnamese Version of the Rule of Law' (2011) 6 *NTU L. Rev.* 321.

²⁴ Lien Bui Bich, 'Legal Interpretation and the Vietnamese Version of the Rule of Law' (2011) 6 *NTU L. Rev.* 321, 332.

²⁵ Office of the Party Central Committee, above n 7. It states that the laws institutionalises the policies of the Party that are implemented through the state apparatus, ensuring that the Party's guidelines and policies become reality in the social life in the country. See more at Gillespie, above n 20, 337. John quotes Truong Chinh's speech at the Sixth National Party Congress: 'The law is the institutionalization of Party lines and policies and a manifestation of the people's will; and it must be applied uniformly throughout the country'.

²⁶ Gillespie, above n 20, 336.

²⁷ Nghia Pham Duy, 'Confucianism and the Conception of the Law in Vietnam' in John Gillespie and Nicholson, Pip (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reforms* (ANU E Press and Asia Pacific Press, 1st ed, 2005), 84.

ownership was discouraged, which made the self-understanding of private commercial rights seriously strangled. Berman argues that socialist law is defined as family rules, whereby the state treats individuals like a child or young person dependent on the state and requiring training or guidance.²⁸ This feature has faded after a series of economic and policy reforms in Vietnam.

During the application of the Doi Moi policy, private commercial rights began to appear in statutes, manifested by the recognition of the right to establish an enterprise followed by the development of trade law.²⁹ However, the vestiges of a lack of awareness of individual rights in Vietnamese law are sufficient to show the clear distinction between Vietnamese law and Western law. In choosing whether private rights or social resources or welfare should be protected, Western countries likely assume neutrally in that two subjects are equal and tend to weigh in favour of private rights.³⁰ The development of Western private freedoms is nourished by such traditional, judicial promotion.³¹ Meanwhile, under the influence of Marxist–Leninist thought that is hostile to private commercial rights and concludes that the promotion of the legislation is a form of legal fetishism, the priority of socialist law is social resources and collective organisations, while personal interests are protected only when they coincide with state policy.³²

At present, although Vietnam's laws are becoming more open and the development of private commercial rights has made considerable steps, they are assessed as only recognition on the surface of the law. Gillespie analyses the difference between private ownership recognition between Vietnam and Western countries based on two characteristics. First, he argues that private commercial rights in Vietnam were used as a means of carrying out activities not prohibited by the law, rather than as a mechanism for protecting their rights among individuals.³³ In contrast, Western laws consider a right not to be operated unless it is protected in courts in a disputed context. Second, private

²⁸ Harold Joseph Berman, 'What Makes Socialist Law Socialist' (1971) 20(5) *Problems of Communism* 24, 288.

²⁹ Communist Party of Vietnam Resolution No 16 of 1988 launched permission of the existence of the private sector in parallel with state-owned enterprises.

³⁰ Henry Mintzberg, 'Managing Government - Governing Manager' (1996) Reprint 96306 *Harvard Business Review* 75, 83. See more at Gillespie, 'Private Commercial Rights in Vietnam: A Comparative Analysis', above n 20, 361.

³¹ Gillespie, above n 20, 336-362.

³² Ibid. This may explain the approach of the Vietnamese lawmakers in regulating misleading advertising as discussed in Chapter 4. Accordingly, the LCP, the Advertising Law and the Competition Law prohibit comparative advertising and puffery because it favours a competitive market stability, rather than maximising the protection of the individual's right to information.

³³ Ibid, 369.

commercial rights in Western countries manifest in the close legal relationship of the substantive and procedural aspects, whereas in Vietnam this link is likely not strong, significantly reducing the effectiveness of private commercial rights recognition. From this perspective, Gillespie argues that the power of exercising private commercial rights in Vietnam depends on whether it is convenient and fully aligned with the administrative bodies' will, rather than whether it is protected to be effectively operated in courts.³⁴ This comment by Gillespie, made in the 1990s when Vietnam started a process of reform, remains valid. It is possible to make an argument extensively in considering this feature from the perspective of the mode of action for reforming the law in Vietnam. The court system is only effective in practice after being triggered by at least one petition, while the mechanism of private litigation has not been familiar in Vietnam until the present time. Thus, the impact of a judicial system reform should not be so emphasised such that the design of laws is neglected. The rules of empowerment and the identification of a mechanism for individuals to exercise their private commercial rights in courts need to be consistently developed in the whole legal system. Such effort may result in gradually building the sense of using the law of individuals and helping the private commercial rights in Vietnam to become more substantive.

In Vietnam, the Constitution, the highest legal, political statute of the state, was adopted on 28 November 2013. Under the Constitution is the legal document system in which validity is ranked from high to low including acts, ordinances, decrees, and circulars guiding the implementation of acts.³⁵ Being parallel to Vietnam's system of state agencies organised in the form of centralised democracies, these legal documents of the administrative and judicial agencies are also enacted in accordance with the Constitution which expresses the CPV's policies.

Most Vietnamese legal writers agree with Dennis Zvinakis's statement that 'Vietnam is a developing country which has the legal system belonging to the civil law system'.³⁶ In light of this legal tradition, it can be clearly seen that the Vietnamese legal system must be

³⁴ Ibid, 370.

³⁵ *The Law on Promulgation of Legal Normative Documents 2015 (Luat ban hanh van ban quy pham phap luat 2015)* (Vietnam National Assembly). Art 4 lists the system of legal documents by level of effect from high to low.

³⁶ Tung Nguyen Xuan, 'The Tradition of Socialist Law in Vietnam: Some Opinions (Truyen thong phap luat XHCN tai Viet Nam: Doi dieu suy ngam)' <<http://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/119/635>>. See also Dennis Zvinakis, 'Introduction of Volume 1' (Speech delivered at the Special Magazine of the People's Courts on the Cassation Review Decisions on Civil, Business, Commerce, and Labour in the Year 2003-2004) in Do, above n 10, 88.

constructed from specific written laws, rather than from court judgments. The source of Vietnamese laws is mainly legal documents enacted by the legislative and executive bodies, while the judiciary is only the law-enforcing institution in the courts.

Such a system of legal documents becomes one of the important characteristics to classify Vietnamese law into a specific legal family. There have been some discussions among Western scholars about whether socialist law belongs to civil law system or distinct family law.³⁷ Initially, it should be noted that the exploration of family law pertains to the early socialist law when these socialist countries have not implemented their economic and legal reforms. At this time, the characteristics of the legal system following Marxist–Leninist theory are very clear. Western scholars have considered some features of socialist law similar to the civil law system. They agree that socialist law has some imprints of Romano-German law built on the basis of Roman law, whereby laws are designed by establishing in written general rules of conduct.³⁸ This feature is admitted to be the clearest indication of the civil law system in the view of a lawyer.³⁹ Vietnamese laws were also constructed as a system of written statutes and legal documents, which is considered as a distinct characteristic of the civil law system. In addition, another feature of Vietnamese laws similar to that of the continental legal systems is a clear distinction between public and private law. Public law is recognised as a broad legal field regulating the relationships in organising and operating state agencies and the relations with a state party.

At present, although in Western civil law countries the basic concepts have been supplemented by social and public factors that have narrowed the distance between public law and private law,⁴⁰ this distinction remains clear in Vietnam. However, many Western scholars agree that socialist law is a separate legal system despite having the basic characteristics of the civil law system.⁴¹ The basis of this claim is based primarily on the manifestations of the nature of socialist law that does not exist in the civil law system including 1) the aim of socialist law is to end the ownership of personal property, to dissolve social classes and to transform into a communist social order; 2) the existence of the one-party regime; 3) the role of the state in the economy results in public law

³⁷ John Quigley, 'Socialist Law and the Civil Law Tradition' (1989) 37(4) *The American Journal of Comparative Law* 781, 781–783. Quigley summarises the views of David, Hazard, Merryman, Ancel, Osakwe, Bogdan, and Constantinesco on the discussion of whether socialist law forms a family of law separate from the civil law family.

³⁸ Ibid, 782.

³⁹ Peter G Stein, 'Roman Law, Common Law, and Civil Law' (1991) 66 *Tul. L. Rev.* 1591, 1594.

⁴⁰ Quigley, above n 37, 783.

⁴¹ Ibid, 781–782.

outweighing the private law; and 4) the law considered as privileges rather than rules.⁴² However, due to economic and legal reforms, some of these features exist in the present Vietnamese legal system. It can be said that the objective of ending the existence of the law and the establishment of the communist social order has become distant, as gradually the rule of law comes with the intensive rise of private commercial rights recognition in Vietnam.⁴³ The notion that the state and collective organisations play a central role in the economy has shifted to the variety of private ownership and promotion of foreign investment. However, the CPV's sole leadership along with the persistence of Marxist–Leninism and democratic centralism are still features that make socialist law unlikely to be considered as part of the civil law system. Therefore, according to the criterion that the only source of socialist rules is the laws which manifest the CPV's will,⁴⁴ Vietnamese law is still a part of the socialist law.

Identifying the characteristics of the Vietnamese legal system can help to define its overall perspective and the means to accelerate the legal reform process in Vietnam, especially in the field of consumer protection. The systematic characteristic of Vietnamese legal documents shows that its stability is mainly formed by a system of legal written documents whose validity depends on the power ranking of the state bodies that enacted them. From the current Constitution to the lowest legal document, all of these documents could be a manifestation of the CPV's will. They are a duplicate of the democratic centralism regime in respect of the legislation. However, because of this characteristic, it is quite difficult to change a specific regulatory philosophy in the legal intervention in any area in Vietnam. An impact on the reform of the law deprived of subordinate legal factors is unlikely to make a real change in practice until the discussions of these reforms are sufficient to affect the CPV's policy and the highest lawmaking mechanism.

As discussed above, influenced by French law, Vietnamese laws have a specific feature of a civil law system that is the legal system of the country being in writing normative legal documents. Therefore, the legal system of Vietnam is considered regarding the normative form expressed through the system of legal documents. The system of legal documents in Vietnam includes the following documents: Constitution, Code, Law and legal documents under the law as shown below:

⁴² Ibid, 783.

⁴³ Gillespie, above n 20, 17.

⁴⁴ Quigley, above n 37, 783.

The system of legislative documents					
The Constitution (National Assembly)					
Codes (National Assembly)		Law (National Assembly)		Resolutions (National Assembly)	
Ordinances (Standing Committee of the National Assembly)		Resolutions (Standing Committee of the National Assembly)		Joint Resolutions between Standing Committee of the National Assembly and Management Board of Central Committee of Vietnamese Fatherland Front	
Orders (the President)			Decisions (the President)		
Decrees of the Government			Joint Resolutions between the Government and Management Board of Central Committee of Vietnamese Fatherland		
Decision of the Prime Minister					
Resolutions of Judge Council of the People’s Supreme Court					
Circulars of executive judge of the People’s Supreme Court;	Circulars of the Chief Procurator of the Supreme People’s Procuracy	Circulars of Ministers, Heads of ministerial agencies	Joint Circulars between an executive judge of the People’s Supreme Court and the Chief Procurator of the Supreme People’s Procuracy	Joint Circulars between Ministers, Heads of ministerial agencies and executive judge of the People’s Supreme Court, the Chief Procurator of the Supreme People’s Procuracy	Decisions of State Auditor General
Resolutions of the People’s Councils of central-affiliated cities and provinces					
Decisions of the People’s Committees of provinces.					

Legislative documents of local governments in administrative - economic units
Resolutions of the People's Councils of districts, towns, and cities within provinces
Decisions of the People's Committees of districts
Resolutions of the People's Councils of communes, wards, and towns within districts
Decisions of the People's Committees of communes

The table above shows the legal validity of documents from high to low, along with the state agencies' name corresponding to each type of legal document. The application of these documents system follows some principles stipulated in the Law on Promulgation of Normative Documents 2015. These principles are established based on the time of issuance, the level of validity of the legal documents and the subject of adjustment. The system of legislative documents is applied under the principles including:

- (i) Are applicable from their effective date, and they shall be applied to the acts committed at the time such documents are valid, except for those that have retrospective effect.
- (ii) If various legislative documents contain different regulations on the same issue, the above document shall apply.
- (iii) If various legislative documents promulgated by the same agency contain different regulations on the same issue, the one that is promulgated later shall apply
- (iv) If the new legislative document does not contain legal liability or impose a less legal severe liability on the acts committed before the effective date of the document, the new document shall apply.⁴⁵

It is necessary to examine the principles of application of legal documents in the Vietnamese legal system to understand the interconnection and complementarity in the systematic overall of these legal documents. The priority of applying the legal documents according indicates that, if there are exceptions to the application of these legal documents for a particular issue, exception rules must be written in the text. For instance, according to

⁴⁵ *Luat ban hanh van ban quy pham phap luat 2015 (Law on Promulgation of Legal Normative Documents 2015 (National Assembly). art 156.*

the above principles, when two documents simultaneously adjust the same legal relationship, the legal document that was enacted later will take effect. Thus, in case the previous legal document wants to be referenced applicable to a later one, it should be stated in that legal document that the scope of their terms is extended to regulate so. If there are no such provisions, the application of legal provisions in practice may be reasonable but will be inconsistent with the rule of law. The delimitation of the application of the LCP and some other related laws, as analysed in the following sections, will show the shortcomings of the lack of provision indicating how to apply the legal document in the field of consumer protection.

Regarding enforcement, the system of enforcement agencies in Vietnam includes courts and state management agencies in each specific area. In Vietnam, two-tiered systems trial courts are divided into three levels including the Supreme People's Court, People's Court of central-affiliated cities and provinces, People's Court of districts, towns and cities within provinces. Besides, administrative management is an essential branch of law enforcement, which performs the task of inspecting and handling some infringements. State management controlling business activities within the legal framework plays a significant role in the context of limited commercial and civil lawsuits in Vietnam,

3.1.2 A Brief History of Consumer Protection in Vietnam

Before 1986, the shadows of the centrally planned economy insulated Vietnam from free trade and consumerism. At this time, there was no legal free trade relationship in Vietnam since the collective regime had eliminated the supply and demand attribute. There was no legal regulation between the private seller and the buyer and no research on consumer relation in this period—thus, consumer protection law did not exist. It was not until the emergence of economic reform in 1986 that significant changes marked a dramatic turnaround to further legal developments thereafter. The trading relationship started forming and developing among manufacturers, suppliers of goods and services and the buyers to satisfy individual consumption. This relationship reflects the reciprocal relationship between sellers' seeking profit and buyers' satisfying increased demands.

The history of Vietnamese consumer law began after the enactment of the 1992 Constitution in the Doi Moi period. The development of Vietnamese consumer law can be divided into three periods—from 1992–1999, 1999–2010 and 2010 to the present. These

periods were marked with the birth of specific legislative documents regulating consumer relations.

In the 1992–1999 period, after the Constitution of the Doi Moi period was enacted, there was no specific act to protect consumers' rights in Vietnam. Consumer protection was regulated by many provisions scattered across a variety of legal documents. The Constitution asserted a consumer protection policy in art 28, which became the most important legal basis and a prerequisite for the establishment of consumer protection regulations in statutes and other sub-laws. Consumer protection policy in the Constitution was detailed in the Civil Code 2005, whereby basic rights of consumers became the subject of protection in contractual regulations including the responsibility of ensuring the quality of goods, warranty liability, model contract and compensatory damages for the breach of the contract. The Penal Code 1999 also contained many provisions regulating crimes in the field of consumer protection such as customer deception and counterfeiting. The introduction of criminal punishment against consumer protection violations showed the state's strict attitude in protecting the interests of consumers.⁴⁶ It can be stated in this period that although consumer protection was not regulated by a specific statute, legal regulations in this field initially established the basic legal framework and created a prerequisite for the stable development of this area of law.

The second period was marked by the introduction of the first legal document specialising in consumer protection, the Consumer Protection Ordinance 1999. The Ordinance defined the concept of consumers and admitted consumer rights that fully implemented the eight basic rights of the 1985 United Nations Guidelines on Consumer Protection.⁴⁷ Decree No. 5/2008/ND-CP, dated 24 April 2008, regulated in detail the implementation of consumer protection with the establishment of a mechanism for dispute settlement through making a claim and lawsuit against consumer protection violation. The characteristics of this period can be described as progress in building specialised documentation regulating the field of consumer protection. Also, the involvement of a wide range of commercial legal documents containing consumer-related provisions made consumer protection become a topic with a large amount of interest. Regulations on controlling the market entry and adjustment of market activities of organisations and individuals were also present in the

⁴⁶ Hanh Le Hong, Vu Thi Bach Nga, et al, Report No.1- Review and Systematize the Current Regulations on Consumer Protection (Bao cao 1- Ra soat, he thong hoa cac quy dinh hien hanh ve bao ve nguoi tieu dung), EU-Vietnam Mutrap III, 31/07/2009 <<http://mutrap.org.vn/index.php/vi/explore/finish/52/510>>

⁴⁷ Ibid, 7.

Enterprise Law, Commercial Law, Competition Law, Advertising Law, Measurement Law and Price Law. A legal mechanism of consumer protection based on parties' reciprocal rights and obligations was basically established. Accordingly, the Ordinance clarified the obligations of manufacturers and suppliers who must ensure good quality of goods and services for consumers, and the information provided to consumers must be complete, honest and not misleading. However, as assessed by MUTRAP, the Ordinance was only at the level of naming, enumerating the rights and obligations rather than protecting the consumer's rights substantively.⁴⁸ In practice, inadequate and overlapping regulations hindered progressive objectives towards the implementation of set consumer protection policy. The awareness and concern of state agencies for consumer protection at different levels directly affected the level of consumer protection in the legal documents they enacted. Therefore, the effectiveness of consumer protection was uneven during this stage.⁴⁹ Moreover, the overcoming of consequences caused by the infringement of consumers' rights was almost ineffective due to the lack of regulation on how to calculate damages in most of the laws.⁵⁰ This period, though considered as an important new step in the field of consumer protection, was the only expression on the surface of the law rather than substantively protecting the consumer's rights.

The third developmental period began with the introduction of the LCP in 2010, effective 1 July 2011. The LCP was passed with an overwhelming vote of 82.35%, an indicator of the determination to address the gaps and weaknesses in the Ordinance 1999.⁵¹ This was a significant improvement in the field of consumer protection—this was the first time consumer relations were regulated by a statutory whose legal validity was just after the Constitution. In essence, LCP's regulations are clearer and more comprehensive than those of the Ordinance, with the LCP recognising more adequately corporate responsibility and the mechanism of dispute settlement.⁵² The consumer protection norms scattered in many different statutes continue to do their task, but since consumer protection laws have been enacted, they have become systematic and linked together more consistently, although some shortcomings remain.

⁴⁸ Ibid, 9.

⁴⁹ Ibid, 28.

⁵⁰ Ibid, 28.

⁵¹ Consumer International, above n 46.

⁵² Ibid, 29.

3.1.3 Overview of the LCP

The LCP is an act born in the context of legal reforms relating to private commercial rights in Vietnam having achieved some development. There was a need for a more effective legal framework for effective enforcement, not just as formal declarations. Therefore, the LCP was expected to be a more effective way of protecting consumers than the Ordinance through dispute settlement.

In the national legal system, the LCP is defined as a specialised statute of legal validity second only to the Constitution. From the perspective of the application of the law, in accordance with the principle of the Law on the Promulgation of Legal Documents in Vietnam, the specialised statute shall apply the legal-specific relationships in the field regulated by such specialised law, while the general legal principles in the code will apply when they are contrary or not found in the specialised law.⁵³ In the field of consumer protection, the Civil Code is seen as a basic legal document. Therefore, fundamental civil legal principles will be used for consumer protection laws as complementary and encapsulated regulations. Therefore, in a certain way, the provisions of the LCP must not be contrary to those of the Civil Code. Whereas, in comparison with other laws that have the same border of the LCP including the Commercial Law, Competition Law, and Advertising Law, the LCP is independent and has a reciprocal relationship. Under the LCP would be a decree regulating details and the circulars guiding the implementation of the provisions of the law.

The LCP consists of six chapters with 51 provisions. The content detailed in every chapter almost comprehensively covered the legal aspects that need to be ruled in this area. Chapter 1 outlines the general provisions which state the principle of consumer protection, clarifies the state's policy in consumer relations and affirms the rights of consumers legally recognised and protected. The law has protected consumers' specific rights including: (i) The right to life, health and property safety; (ii) The right to information; (iii) The right to select goods and services in terms of their circumstances; decide whether or not to participate in transactions with organisations and individuals dealing in goods or services; (iv) The right to provide comments to organisations and individuals dealing in goods and services; (v) The right to participate in the development and implementation of policies and legislation on the consumer protection; (vi) The right to claim damages; (vii) The right to

⁵³ *Luật ban hành văn bản quy phạm pháp luật 2015 (Law on Promulgation of Legal Normative Documents 2015 (National Assembly). art 156.*

make complaints, denunciations and lawsuits; and (viii) The right to be counselled, supported and instructed in consuming knowledge.⁵⁴ In Chapter 1, in addition to systematising the rights and obligations of consumers existing in many other statutes, the LCP has mentioned the protection of consumer's private information for the first time in Vietnam. Chapter 2 defines the responsibilities of organisations and individuals dealing in goods and services for consumers, including the responsibility of producing and supplying goods related to quality and specifications. The liability to compensate for damage caused by consumer right violation and the issue of the model contract have also been specified in this chapter.

Chapter 3 shows the responsibility of social organisations in the protection of consumers' interests, while Chapter 4 establishes the basic legal framework for the dispute settlement between consumers and the sellers. In Chapter 4, the methods of dispute settlement in consumer relations are raised including negotiation, conciliation, arbitration, and judicial procedures in court. This is the first time the right to file a lawsuit carried out by an individual consumer is clearly stated in the law. A lawsuit made by an individual consumer with a value of less than 100 million Vietnam Dong can be applied in accordance with the simple procedure as provided for in the Civil Procedure Code. While the final chapter regulates enforcement provisions, the responsibility for the state management of consumer protection is set out in Chapter 5. Accordingly, the state agencies directly responsible for consumer protection are the People's Committees, the Ministry of Industry and Trade and the Government, the highest level of the administrative body in the state.

According to the National Assembly's report, with 10 new points compared to the Ordinance of 1999, it seems that the LCP has completed the legal framework for this field.⁵⁵ New regulations mentioned in the report include the provisions on consumer's private information, more specific consumer obligations and prohibited behaviour of manufacturers, suppliers of goods and services dealing goods and services. According to the report, the important new regulation in the LCP is the provision of binding obligations on third parties, advertising companies, in providing information on goods and services to consumers. The general regulations on commercial transactions and contracts and the requirement of responsibility of organisations and individuals dealing in goods and services

⁵⁴ *Law on Consumer Protection 2010 (Luật bảo vệ người tiêu dùng) 2010* (National Assembly). art 8.

⁵⁵ Ho Chi Minh City Department of Justice, *Introduction to the Law on Consumer's Interests Protection (Đề cương giới thiệu Luật bảo vệ quyền lợi người tiêu dùng)* (22 May 2012) <<http://www.vinalaw.vn/forum/index.php/home/detail/116/>>

to consumers are also considered new points compared with the ordinances. The LCP also provides for additional bargaining methods for resolving disputes between consumers and organisations and individuals dealing in goods and services, and exemptions from proof obligations and the cost of litigation when consumers bring manufacturers or sellers to the courts.⁵⁶ These striking new regulations have prompted the LCP in the hope of attaining more effective enforcement of consumer protection laws.

In Vietnam, most laws are normally explained and regulated in more detail by the Decree, the type of legal document promulgated by the highest executive body. The LCP is regulated in detail by the sub-law including Decree No. 99/2011/ND-CP detailing and guiding the implementation of some articles of Law 59 and Decree 185/2013/ND-CP on administrative punishment in trade of counterfeit goods, prohibited goods, and protection of consumer rights. From the view of the scope of regulations and the diversity of the subjects including consumers, manufacturers, sellers, third parties, collective organisations, and the state, it can be concluded that the LCP marks a new level of development in the field of consumer protection in Vietnam.

3.2 Consumer Protection Legislation in Australia

3.2.1 A Brief History of Consumer Protection Law in Australia

Australian consumer policy history shows the change and subsequent development of legislative thinking about consumer protection. Historical examination demonstrates the process by which Australian law adapted by changing sequentially in line with economic and social development, the global consumer movement in response to dramatic revolution in the field.

The historical development of consumer protection legislation in Australia begun at an early stage focused on simple notions of equity, with less emphasis on the negative impact of the economy in the long run.⁵⁷ Australia's policies and regulations in the early years of colonialism manifested as rigid interventions by regulations that mainly focused on quality guarantee instead of promoting the freedom of choice of consumers.⁵⁸ When goods were

⁵⁶ Ibid.

⁵⁷ Stephen Hally-Burton, Siddharth Shirodkar and Simon Winckler, 'Harnessing the Demand Side: Australian Consumer Policy' (2008)(4) *Economic Round-up* 91, 93.

⁵⁸ Ibid, 94.

produced in the mid-nineteenth century, the caveat emptor⁵⁹ principle became popular in Australia, whereby the spirit of letting buyers be aware was applied to allow consumers to make a purchasing decision for themselves relying on their assessment.

The caveat emptor principle, on the one hand, shows that the consumer protection philosophy at this time in Australia was primarily based on consumers being self-aware of risks in commercial transactions. On the other hand, this prudent principle was also a sign that information imbalance began to be recognised in Australian society which inspired new ideas and policies.⁶⁰ The Australian Government, in the late nineteenth and early twentieth centuries, consistently made efforts to improve information asymmetry through regulations such as standardising measurements and minimal requirements for professions. However, fair market orientation efforts did not manifest as concerns about the party's rights and obligations relating to the consumer contract.⁶¹

By the end of the nineteenth century, legislation in the field of commerce and trade, including consumer protection, underwent a dramatic change. The breakthrough derived from the influence of the Sale of Goods Act 1893 in England, which Australia and the colonies subsequently enacted under the law. The development in the commercial transactions regulation manifested in the requirement of the quality of goods and the right to inspect the receipt of the buyer's goods. These regulations demonstrated the shift from regulating the seller's conduct to the process of the commercial transaction itself.⁶² It can be said that the present consumer protection in Australia has found a relatively balanced direction between the desire to protect fair trade with rigid intervention in the behaviour of the producer. However, at this stage, state interventions were introduced by industrial and commercial management without the consumer's voice and involvement.

The consumer movement was formally launched in Australia and worldwide in the 1900s and was marked by the speech of President Kennedy focused on the four fundamental rights of consumers. Australia engaged in the powerful flow of this movement by first activating women's rights to demand the best quality merchandise for household shopping, followed by the birth of the Australian Consumer Association. Along with the breadth of

⁵⁹ See the meaning of this doctrine in Alan M Weinberger, 'Let the Buyer Be Well Informed: Doubting the Demise of Caveat Emptor' (1996) 55 *Md. L. Rev.* 387, where the Latin maxim is provided in its entirety: 'Caveat emptor, qui ignorare non debuit quodjus alienum emit' ('Let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution').

⁶⁰ Hally-Burton, Shirodkar and Winckler, above n 57, 96.

⁶¹ *Ibid.*, 96.

⁶² *Ibid.*, 96.

the consumer movement, industrial production had dramatically increased the volume of merchandise available, making consumers' choice of goods face new challenges. In response to these new demands and led by the 1962 UK report on the consumer protection (the Molony report), Victoria enacted the Door to Door Sale Act of 1963, and New South Wales issued the Consumer Protection Act of 1969. At this time, the question was how state intervention should be limited to protect effectively without causing adverse effects on the economy and the consumers.⁶³ Some new regulations responding to this question emerged in the law through the ban on fraudulent advertisements and bidding frauds.⁶⁴

The historical evolution of consumer protection in Australia, however, only occurred when the TPA was enacted in 1974. This law marked the end of the caveat emptor principle for, as Senator Murphy stated in the draft debate, this principle no longer fit with complex commercial practice. Such a vigorous declaration opened the government's commitments and efforts in the field of consumer protection with new policies and practices. State intervention in commercial activities has continued while expanding to a deeper level. Specific manifestations of this development can be found through regulations that substantively regulate the content of the transaction, not just its form, such as the widespread banning of fraudulent conduct in trade.⁶⁵ At the same time, this period saw a significant development in Australia's consumer policy. The idea that the issue of consumer protection is closely linked and adapted to competition policy to create effective competition has been initiated and become a target of the TPA.

From 1974 to the 1990s, in the context of continuous economic development, consumption policy pursued social equity and fundamental rights, while legal and economic factors continued to influence consumer policy.⁶⁶ The perception of a strong link between consumer protection and competition policy was sustained and developed to a new level. Accordingly, the Australian Government recognised that it was prudent to select the subject of regulation and to consider the measures and levels of government interventions in consumer protection. Otherwise, it would be counterproductive and harmful to consumers. It seemed that such careful consideration could be effectively implemented in light of economic analysis studies. The culmination of this view is the Australian Government's transfer of responsibility for consumer affairs to the Treasury in 2007. This move, coupled

⁶³ Bruce Smith and Graeme Wiffen, 'Consumer Protection Does Anyone Know What It is?' (1984) 9 *Legal Service Bull* 263., 264.

⁶⁴ Ibid, 265.

⁶⁵ Hally-Burton, Shirodkar and Winckler, above n 57, 97.

⁶⁶ Ibid, 110.

with keeping consumption and competition policy as a responsibility of the Ministry of Finance, manifested the intimate connection between consumer protection and economic policies.

From 1974–2010, consumer protection in Australia was regulated at the Commonwealth level through the TPA, the *Australian Securities and Investments Commission Act 2001* (Cth) and 17 different laws in states and territories. The difference between the Commonwealth and state laws in consumer protection became increasingly apparent when new regulations were updated in major states. The differences are not only in regard to implied conditions and warranties and industry-specific regulation, product standards but different approaches to law enforcement and policy development.⁶⁷ By contrast, markets have grown in size, some of which have erased consumer frontiers through increasingly interstate and international transactions which challenge national consumer policy.⁶⁸ This is one of the main reasons why the demand for a generic national consumer law emerged and became a specific task in Australia in 2006.

From 2007–2010, Australia experienced some updates in the enactment of a national legal framework for consumer protection. On 2 October 2008, a new law at the Commonwealth level was enacted, and a state-wide consensus on consumer protection enforcement regulations was reached.⁶⁹ In June 2009, the TPA was changed to the CCA to reflect the more comprehensively policy of the Act to promote both competition and consumer protection.⁷⁰ After implementing a rigorous and prudent lawmaking process, in July 2009, the Council of Australian Governments signed an Intergovernmental Agreement to draft the ACL based on the TPA, accompanied by some amendments including two tranches. The first part passed as the *Trade Practices Amendment (Australian Consumer Law) Act (No 1)* in March 2010, contained provisions regulating unfair contracts, the Australian Competition and Consumer Commission's (ACCC) new and powerful role of enforcement, and new civil pecuniary penalties for contraventions of certain consumer protection

⁶⁷ Standing Committee of Officials of Consumer Affairs, 'An Australian Consumer Law. Fair Markets: Confident Consumers' (Treasury, 2009) 8.

⁶⁸ Nicola Howell, 'Searching for a National Consumer Policy Reform Program?' (2005) 12 *Competition & Consumer Law Journal*/(2005) 294, 295.

⁶⁹ The Standing Committee of Officials of Consumer Affairs, *The Australian Consumer Law -Consultation on draft Regulation Impact Statements*, (27 November 2009) <http://archive.treasury.gov.au/documents/1665/PDF/Consultation_ACL_RIS.pdf>

⁷⁰ Editorial, 'How well is Australia's consumer law fairing five years on?' (2016) CCLJ No 3/Editorial *Competition & Consumer Law Journal* 197.

provisions. The second tranche of the ACL reforms, including the introduction of the ACL, was introduced in the Trade Practices Amendment Bill (No 2) 2010.⁷¹

Schedule 2 of the CCA set out the ACL as a generic consumer law applied across Australia and took effect on 1 January 2011. The ACL's subjects are consumer transactions for all goods and services throughout Australia, excluding financial services regulated by the *Australian Securities and Investment Commission Act 2001*, the *Corporations Act 2001* and the *National Consumer Protection Act 2009* and *National Credit Act*.⁷²

3.2.2 Characteristics and Legal Theory of Consumer Protection

Analysis of the history and characteristics of consumer policy applied in Australia could provide a basis for understanding the causes and significance of existing consumer protection laws in Australia. Likewise, the revolution of consumer policy in Australia will mirror the way that Vietnam may have to undergo in the process of reform of consumer protection legislation. The continued development of the commodity market along with growing awareness of fair trade and consumer rights have made Australia's legal doctrines of consumer protection reach the most recent advanced values. Australia's consumer protection philosophy has gone through periods of change and is influenced by economic development, the consumer movement and the contributions of global psychological and social studies. As one of the developed, leading countries in competition and consumer protection legislation, the evolution of Australia's consumer policy has largely reflected the global development of the philosophy history in the field.

It is appropriate to explore consumer protection policy in Australia from the endless debate over the choice of paternalistic legal intervention or prior guarantee for individual liberty.⁷³ Caveat emptor is likely a crude form of self-determination and self-protection in trade which has existed in Australia for a long time, though it is not considered as a means of government intervention, existing in the common law. However, the development of commodity economics and new insights into policy thinking have prompted the Australian Government to adopt an active intervention in consumer protection to optimise the

⁷¹ Ibid 197.

⁷² The Law Handbook, *Australian Consumer Law* (30 June 2017) <http://www.lawhandbook.org.au/2018_07_02_01_australian_consumer_law>

⁷³ Kate Tokeley, 'Consumer Law and Paternalism: A Framework for Policy Decision-Making' in Susy Frankel and Deborah Ryder (eds), *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, 2013) 265.

effectiveness of market activities, rather than let the market adjust itself to its inherent defects.

Like other developed countries, Australia has consistently followed both soft paternalism (paternalistic ‘nudges’) and hard paternalism (paternalistic ‘pushes’)⁷⁴ in the market with careful consideration of the benefits and harms of each intervention. Chris Field provided explanations for paternalism while maintaining a free market and choice for consumers that showed the consistency in competition and consumer protection policy in Australia.⁷⁵ This is quite understandable since by Australian Government does not follow the model of a deregulated state but preferentially became a regulated state with reasonable interference in the economy, competition, and consumer protection.⁷⁶ Kate Tokeley argues that Australia has developed stronger paternalistic interventions in the ACL by the regulations that prohibit unfair contract terms and produce interest rates caps on credit for small amounts of money.⁷⁷ Meanwhile, the US allows consumers to protect their interests in light of liberalism.⁷⁸ It is necessary to look back at its history of consumer policy development to understand the current consumer protection philosophy in Australia. In the history of consumer policy development in Australia, consumer protection policy has gone through three levels of development.

The first consumer protection policy in Australia that manifested as a hard intervention with gradual progressive development of the object of regulation existed from the early years of colonialism to the late nineteenth century. In this time, the Australian Government pursued rigorous interventions through strict regulations on quantity, price and quality of goods and set criteria and professional standards for some important occupations.⁷⁹ At the beginning of this period, regulations were limited to the subjects of the behaviour and characteristics of the producer. The way of interference then became more comprehensive by regulating the trading activities itself through consumer contract.⁸⁰ However, this strict consumer policy, while responding to the requirement of fair trade in the short term caused

⁷⁴ Ibid.

⁷⁵ Chris Field, 'Having One's Cake And Eating It Too – An Analysis Of Behavioural Economics From A Consumer Policy Perspective' (Paper presented at the Roundtable on Behavioural Economics and Public Policy 9 August 2007) 4–6.

⁷⁶ John Goldring, 'Consumer Protection, Globalization and Democracy' (1998) 6 *Cardozo J. Int'l & Comp. L.* 1, 22.

⁷⁷ Tokeley, above n 73.

⁷⁸ Ibid.

⁷⁹ Hally-Burton, Shirodkar and Winckler, above n 57, 97.

⁸⁰ Ibid, 97.

a negative influence on the economy in the long run.⁸¹ At the same time, in consideration of the total benefit that consumers receive, excessive state interventions during this period were overall harmful to consumers since they significantly reduced freedom of choice.⁸²

Australia's second level of consumer protection policy derived from global economic development and the convincing achievement of international research in this field. In the 1970s and 1980s, new paradigms emerged that argued for state intervention in the field of competition and consumer protection. Some prominent economists and legal scholars in Europe put forward numerous critical arguments for paternalism in the field of consumer protection based on the effectiveness criteria of microeconomic theory. Norbert Reich points out Coase theorem with two objections to this theory to traditional intervention.⁸³ The first argument, based on the transaction cost interpretation of consequence, is that resource allocation should not be the work of legal rules when transaction costs do not exist. Thus, the interventionist approach should not proceed because it will be an obstacle preventing the efficient allocation of resources.⁸⁴ The second argument to an interventionist or regulatory approach is under the influence of the political theory of the welfare state. Accordingly, the imperialism of state intervention should impact less on some autonomous social areas including consumer choice.⁸⁵ The argument may not have strongly affected Australia since the Australian Government does not follow a 'rugged individualism' and does not favourably apply the consumer policy in which consumer fully manage themselves to maximise their benefits.⁸⁶ Meanwhile, the first argument regarding economic factors affected policymakers in Australia and contributed to guiding new policy trends in this area. Also, the increasingly diversified and complex development of the market altered the notion of rights-based intervention and made the principle of caveat emptor in common law meaningless.⁸⁷

⁸¹ Ibid, 96.

⁸² Ibid.

⁸³ Norbert Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14(3) *Journal of Consumer Policy* 257, 262.

⁸⁴ Ibid, 262.

⁸⁵ Ibid, 263.

⁸⁶ Goldring, above n 76, 21. Goldring states that the UK and much of Europe are not convinced by 'rugged individualism' and implies that these states accept the slight inconvenience of a legitimate state with social welfare system rather than follow the vague advantages of individualism that are promoted in some countries like the US.

⁸⁷ Allan Asher, 'Going Global: A New Paradigm for Consumer Protection' (1998) 32(2) *Journal of consumer affairs* 183, 184. See also Hally-Burton, Shirodkar and Winckler, above n 56, where the authors refer to Senator Murphy, during the debate of the Trade Practices Bill in Parliament, declaring the caveat emptor principle to be dead.

As a result, Australia has witnessed a shift in consumer protection regime from the demands of practice and new insights, marked by the emergence of the TPA which was seen as an important development in this field.⁸⁸ The change in focus from consumer 'protection' to consumer 'affairs' showed the government's attempt to prevent the criticism that protection was 'anti-business'.⁸⁹ From placing consumers in a position of resistance to the market and regulating consumer relations under a rights-based government intervention, the Australian Government has transformed into a philosophy of mutual benefit protection through market-based intervention.⁹⁰

Efforts to protect consumers during this period were emphasised in light of economic theories in the context of the market operation, in which the apparent interaction between consumer law and broad market regulation were significantly considered.⁹¹ This stage showed that the consumer policy of Australia at that time was set in a global perspective, linking the effects of economic policy, competition and the recognition of market failures.

Two specific theories of market-based consumer protection influenced the consumer policy of developed countries, including Australia, in this period—the theory of information failure and economics of information. Akerlof's lemon doctrine introduced asymmetric information between consumers and sellers and market information deficiencies. This was the time when a well-informed consumer image was an aim of consumer protection in developed countries, including Australia. Information failure highlighted during this period is one of the justifications for the government's first level intervention policy on welfare grounds.⁹² The requirement on information obligations in the TPA was strict because the information disclosed must be accurate. Otherwise, the person who is responsible for providing the information will be held liable even if they have no subjective intention to deceive.⁹³ Also, the development of the economics of information in the 1970s also led governments to seek a balance of information gains and the cost of obtaining information.⁹⁴

⁸⁸ David Harland, 'The Liability to Consumers of Manufacturers of Defective Goods—An Australian Perspective' (1981) 5(3) *Zeitschrift für Verbraucherpolitik* 212, 212.

⁸⁹ Amanda McLeod, 'Legislating in the Consumer Interest: The Victorian Consumers Protection Council 1964 – 1970' in Robert Crawford, Judith Smart and Kim Humphery (eds), *Consumer Australia: Historical Perspective* (Cambridge Scholar Publishing, 2010) 115.

⁹⁰ Asher, above n 87, 183.

⁹¹ Hally-Burton, Shirodkar and Winckler, above n 57, 107.

⁹² AJ Duggan, 'Some Reflections on Consumer Protection and the Law Reform Process' (1991) 17 *Monash UL Rev.* 252, 262.

⁹³ Stephen G Corones and Sharon Christensen, *Comparison of Generic Consumer Protection Legislation* (Queensland University of Technology, Faculty of Law, 2007) 5.

⁹⁴ Joseph P. Mulholland, *Behavioral Economics and the Federal Trade Commission* (12 December 2007) <<https://ssrn.com/abstract=1091745>>

The government considers the transaction cost in choosing the most beneficial consumer protection policy. When assessing the attribute of the TPA in 1976, the Swanson Commission referred to the need to weigh the effectiveness of consumer protection in the offset between the benefits afforded to consumers and the damage caused by higher prices and limited consumer choice, freedom or innovation.⁹⁵ Consistent with such a view, the interplay between competition and consumer protection that affects the effective allocation of resources has become a priority for policy considerations in Australia. The government began to hesitate in designing directly rigid legislative provisions of which the costs of enforcement were lower than its benefits. Instead, the Australian Government applied a range of market interventions favourably and supported consumers to help them protect their interests such as guidelines, codes of conduct, rules, standards, and dispute resolution mechanisms, as well as information disclosure requirements.⁹⁶ The objective of equity and consumer welfare remained, but it was focused on a more comprehensive landscape where a well-developed market aims for the welfare of society. These desires are obvious in the TPA's stated objective of promoting effective competition and fair trade, combining the protection of consumer's interests to enhance the welfare society. The Australian Securities and Investments Commission also stated its objective 'to promote the confident and informed participation of consumers and consumers in the financial system'.⁹⁷ The ultimate goal of the Australian National Competitiveness Policy demonstrated that economic restructuring by promoting competition and improving the efficiency of the market operation increases consumer welfare.⁹⁸

The third development, the current consumer protection framework in Australia, is designed from the insight of the previous policy framework⁹⁹ while also growing to a new level. The current consumer protection policy in Australia, the ACL, reflects the selective absorption of developments in some prominent theories related to this field in recent decades. More than three decades after the promulgation of the TPA, behaviour economics emerged as a theory that combines the study of economics with psychological theory and significantly influenced consumer policy in developed countries. Behaviour economics

⁹⁵ Trade Practices Act Review Committee, *Report to The Minister for Business and Consumer Affairs* (1976). 7–9.

⁹⁶ Asher, above n 87, 184.

⁹⁷ Corones and Christensen, above n 93, 25.

⁹⁸ Hally-Burton, Shirodkar and Winckler, above n 57, 107.

⁹⁹ Brendan Sweeney, 'Direct Marketing Code of Practice: An Important Cog in the New Consumer Protection regime' (2000) 28(1) *Australian Business Law Review* 35. Regulation of commercial activities to protect consumers is moving from a rights-based model to a market-driven model.

theory provides supplementary justification for state-based interventions due to its discovery that the consumer usually owes misconception to not being rational as recognised by conventional understanding.¹⁰⁰ This explains the choice of substantive intervention, rather than interfering with previous procedural factors, manifested by the regulation of unfair contract terms in the ACL.¹⁰¹ Behaviour economics has also put forward a number of new issues that require careful consideration by governments such as regulating for self-control and choice overload.¹⁰²

Also, the emergence of new insights into a quite contradictory concept, the ‘empowered consumer’, in which the previous image of well-informed consumer needs to be replaced by the image of a ‘confident consumer’. This concept has derived from the New Labor Party’s reconsideration and determination of new policy in the Third Way project, which culminated in the 2007 white paper ‘Modern Market, Confidential Consumer’. This project has identified a change in the target from promoting competition among UK industries to improving social justice.¹⁰³ The Third Way project also asserts that social wellbeing must be built on trust, whereby consumers are empowered to become knowledgeable, self-confident, assertive and self-reliant.¹⁰⁴ It is obvious that the vibrant development of theories and economic and social objectives has increasingly required governments to update their consumer protection policy. A modern policy of consumer protection should integrate achievements in the newest policy research and global trends. It should be a policy that only restricts information failure to protect consumers’ interests by promoting a competitive competition but one that also empowers consumers while retaining the balance in which both economic growth and social welfare are attained at an optimal level.

In response to the new development of the market and consumer policy overseas, the Australian Government adopted a new policy in the last decades of the TPA’s lifespan, the so-called ‘post-interventionist’ approach.¹⁰⁵ The post-interventionist approach is likely a

¹⁰⁰ See Christine Jolls, Cass R Sunstein and Richard Thaler, ‘A Behavioral Approach to Law and Economics’ (1998) *Stanford Law Review* 1471.; Hanneke A Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Intersentia, 2010) 164, 49.

¹⁰¹ Jeannie Marie Paterson, ‘The Australian Unfair Contract Terms Law: the Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts’ (2009) 33(3) *Melbourne University Law Review* 934, 936.

¹⁰² Steven Kennedy and Australian Treasury, ‘The Future of Consumer Policy: Should We Regulate to Protect Homo Economicus?’ (Report, Australian Treasury) 1213.

¹⁰³ Ajit Nayak and Antony Beckett, ‘Infantilized Adults or Confident Consumers? Enterprise Discourse in the UK Retail Banking Industry’ (2008) 15(3) *Organization* 407, 460.

¹⁰⁴ Ibid 460. See also Office of Fair Trading, ‘Unfair Contract Terms Guidance - Guidance for the Unfair Terms in Consumer Contracts Regulations 1999’ (2008) 6.

¹⁰⁵ Reich, above n 83, 267, 271.

flexible consumer policy focus on consumer protection in relation to competition, political and sociological issues. Such a consumer protection framework would prove to be effective as it belongs to, and is largely a representation of, a philosophy of consumer protection incorporating a complex matrix of economic, sociological and political participation.¹⁰⁶ In such a position, consumer protection tends to take the form of strong state intervention but still guarantees adequate attribution to enhance consumer confidence in the market.

The post-intervention policy has been further developed as Australia entered the new consumer protection era with the introduction of the ACL. The Australian Government clearly identified the objective of their consumer protection legislation which was stated in the ACL. This final target, along with the way it will be performed, has asserted the result of diverse approaches to map out policy frameworks. These approaches include reviewing specific TPA and *Trading Act 1999* provisions related to consumer wellbeing with considerable application of the behavioural economics, especially for vulnerable and disadvantaged consumers. Also, the government has focused on the interaction and linkages between consumer and competition policy and placed consumer protection policy in relation to other sectors of the economy.¹⁰⁷ The comprehensive review has resulted in the specific objective of Australia's consumer protection policy:

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.¹⁰⁸

From the above statement, it is possible to see the two most clearly expressed ideas including the promotion of effective competition and the activation of confident consumer participation. The ultimate goal is to maximise consumer wellbeing by maintaining effective competition that is 'created by empowered consumers and responsive suppliers that trade fairly'.¹⁰⁹ It can be seen that the goal of consumer protection in Australia has been raised to a new level, not only to protect consumer's interests but to improve their active participation in the market to enhance the wellbeing of each consumer. The

¹⁰⁶ Louise Sylvan, 'Activating Competition: The Consumer-Competition Interface' (2004) 12(2) *Competition and Consumer Law Journal* 191; L D Griggs, 'Intervention or Empowerment - Choosing the Consumer Law Weapon!' (2007) 15(1) *Competition & Consumer Law Journal: A Journal of Trade Practices Law* 111, 117.

¹⁰⁷ Productivity Commission, *Review of Australia's Consumer Policy Framework*, (Inquiry Report, 2008) 6–7.

¹⁰⁸ *Ibid.*, 4.

¹⁰⁹ *Ibid.*

empowerment element to create consumer confidence alongside the task of consumer protection is also manifested as a way to attain the ultimate goal.¹¹⁰

Throughout this objective, it is clear that Australia's consumer protection philosophy demonstrates the combination of both efficiency and equilibrium. Such a fairly comprehensive policy is likely the result of the application of the basic principles of policymaking called the 'Wellbeing of the Treasury', whereby the first principle is the guarantee of 'the opportunity and freedom that allows individuals to lead lives of real value to them'.¹¹¹

Australian policymakers argue that only competition policy is insufficient to carry out two basic ways to achieve this ultimate goal.¹¹² It is asserted in rationales for consumer protection that competition policy alone cannot guarantee a well-functioning market or reduce the potential disadvantages for consumers. An Australian consumer protection policy must ensure fair trade and achieve harmonisation, balancing the interests of the supply and the demand side. It is striking that in the set of goals listed in the review report, the second objective is to promote effective competition, which is likely the result of this balance. Moreover, the consideration of effective practices to attain the goal has been driven by two main approaches. The first is the economics of law, in which the cost of interventions must be taken into account for efficiency, and the second is the application of behavioural science to consumers.¹¹³ The application of new doctrines in consumer protection policy has made Australian policymakers tend to choose the post-interventionist approach after prudent consideration.

However, the Australia Government insists that it does not choose a pure paternalism intervention, but a co-regulatory approach that must meet some essential criteria.¹¹⁴ Allan lists some essential measures including addressing consumer concerns, consultation with consumer and community agencies, developing a code of conduct in important industries and conduct periodic assessments of the effectiveness of the code.¹¹⁵ Also, self-regulation

¹¹⁰ The Standing Committee of Officials of Consumer Affairs, *An Australian Consumer Law Fair Markets: Confident consumers*, (17 February 2009) <http://archive.treasury.gov.au/documents/1484/PDF/An_Australian_Consumer_Law.pdf> 11.

¹¹¹ Hally-Burton, Shirodkar and Winckler, above n 57, 12.

¹¹² LD Griggs, 'Intervention or Empowerment-Choosing the Consumer Law Weapon!' (2007) 15(1) *Competition & Consumer Law Journal: A Journal of Trade Practices Law* 111, 7, 112.

¹¹³ Sylvan, above n 10.

¹¹⁴ Chris Field, 'Consumer Dealings - Reviewing Australian Consumer Protection' (2007) 35(1) *Australian Business Law Review* 46, 46.

¹¹⁵ Asher, above n 87, 184.

as a form of expression of liberalism in consumer protection is an option considered by the Australian Government. However, this method has been assessed as limited and only effective in certain small markets. Thus, self-regulation at the federal level is evaluated as a priority intervention in the consumer market, but other interventions are also used to attain their policy objectives.¹¹⁶

3.2.3 Overview of the ACL

The ACL is a generic national consumer law that applies to Australia, including all states and territories. The legislative regulation of the ACL is based on the provisions of the TPA along with some amendments by developments in Australia's new consumer protection policy. Set out in sch 2 of the CCA, the ACL was the first law to demonstrate the consistency of the cross-Australian consumer legal framework as it replaced the 20 consumer laws of states and territories.¹¹⁷ While the CCA covers virtually all aspects of market operation among suppliers, wholesalers, retailers and consumers, the ACL regulates consumer relationship across all types of goods and services excluding financial services.¹¹⁸ There were two stages to be introduced as the ACL, the *Trade Practices Amendment (Australian Consumer Law) Act 2010* (Cth), which took effect from 1 July 2010, and the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), most of which were valid from 1 January 2011.

The ACL is a consumer law at the federal level and is applied law whose validity extends to all states and territories in Australia. For federal states such as Australia, the national legal framework is particularly significant. It shows the importance of this area, which encompasses the need for consistent application and the broad scope of the regulated field. Also, Australia has experienced a long period of overlapping discrepancies between states' consumer laws under which regulations have become complex and left Australia lagging in

¹¹⁶ Howell, above n 67, 4. Howell refers to Productivity Commission, 'Taskforce on Industry Self-Regulation, Industry Self-Regulation in Consumer Markets' (2000) <http://www.consumersonline.gov.au/content/SelfRegulation/finalreport_taskforce/default.asp>, and Department of Industry Science and Tourism, 'Codes of Conduct Policy Framework' (1999) 3 <<http://www.consumersonline.gov.au/content/SelfRegulation/codes.asp>> to explain the role of self-regulation and co-regulatory approaches in achieving outcomes for consumers as stated in the Productivity Commission's discussion draft.

¹¹⁷ Australian Collaboration, above n 72.

¹¹⁸ Deloitte Access Economics and ACCC, *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>>

the field of consumer legislation.¹¹⁹ In this context, the nature of the ACL's national applied law makes it a mark of a new era of consumer protection in Australia.

The ACL consists of five chapters and is structured into two parts, general protection, and specific protection. Accordingly, the ACL provides general protection through Chapter 2 with a general ban on misleading and deceptive conduct in trade or commerce, unconscionable conduct in consumer and business transactions, and the elimination of validity of unfair contract terms in consumer contracts. Specific protection in the ACL is manifested in the provisions of Chapter 3 covering consumer guarantee regime, product safety, and product liability regime. This chapter also contains the provisions that prohibit unfair practices in trade or commerce, consumer goods for goods or services such as pyramid selling, bait advertising, and harassment and coercion. The rest of the chapters provide the definitions and interpretive provisions of the ACL; introduce a criminal consumer protection regime relating to the some prohibiting provisions; and cover enforcement and remedies detailed with civil pecuniary penalties, substantiation notices, and information gathering power.¹²⁰ After being promulgated, the ACL has been amended to include three important changes, 1) the extension of the unfair contract term to a small business contract, 2) the interpretative principles of unconscionable conduct provisions and unified provisions relating to consumers and businesses, and 3) permission to issue exemption clauses for the class of representations from the component's pricing requirements if the circumstances meet certain conditions.¹²¹

Many law researchers in the field of competition and consumer protection have positively assessed the advent of the ACL. The ACL is said to have made significant, powerful changes and created a rare move in consumer protection legislation and the commercial law system in Australia.¹²² The historical change of the ACL is seen as providing more tools for consumers' interests protection, which are basic in all three areas, including the introduction of consumer guarantees, unfair contract terms, and clarification of product safety requirements.¹²³ More specifically, the ACL consists of new progressive regulations

¹¹⁹ Luke Nottage, 'Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism' (2009) 9 *Queensland U. Tech. L. & Just. J.* 111, 111.

¹²⁰ Bruce, above n 63.

¹²¹ The Australian Government Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (March 2017) <https://cdn.tspace.gov.au/uploads/sites/86/2016/03/ACLreview_issues_paper.pdf>

¹²² AO Robert Baxt, 'The Australian Consumer Law Revolution - Is this truly the most Significant Reform in Australian Competition and Consumer Law in 35 Years' (2010) *Australian Business Law Review* 38, 251.

¹²³ Guzyal Hill, 'The New Consumer Legislation and the Legal Profession' (2012) 20 *Australia Journal of Competition and Consumer Law* 18, 18.

for the purpose of enhancing consumer protection and reducing the uncertainty for consumers and business such as designing a national unfair contracts regime, producing a national legislative scheme for consumer product safety, statutory consumer guarantees and strengthening the powers of the regulators relating to the process of enforcement the law.¹²⁴ These reforms have created clarity and consistency in consumer rights and fair legal protection to individuals across Australia.¹²⁵ The ACL is 'arguably the most significant statutory development in Australian consumer protection history'.¹²⁶

3.3 Comparative Overview of Vietnamese and Australian Consumer Protection Law

This section undertakes an initial examination of the consumer protection laws of Vietnam and Australia to identify the significant differences in terms of legal philosophy and theoretical frameworks. These differences suggest the need for further consideration at the next level of general relevance, that is, the structure of the law and definition of a consumer, which plays an important role in influencing and determining the effectiveness of the law.

3.3.1 Definition of a Consumer

When evaluating whether a consumer protection law is sufficient, considering how the definition of a consumer is designed is important as the notion of a consumer can delimit the circle of persons entitled to extended legal protection.¹²⁷ The consumer definition clause is the primary provision showing who will be entitled to the protection of consumer law, before the need for an assessment of the scope and effectiveness of such protection. This provision is necessarily a measure of the success of a consumer protection law because it directly indicates the protected objects, which is also the purpose of the law. Therefore, this definition should be designed with proper technique so that it can minimise the ambiguities when applied to reality. Further, to compare the consumer's right to information as treated under Australian and Vietnamese consumer laws allows clarification of the similarities and

¹²⁴ Jacqueline Downes, 'The Australian Consumer Law – Is it really a New Era of Consumer Protection?' (2011) 19 *Australian Journal of Competition and Consumer Law* 05, 12–13.

¹²⁵ George Kamencak, 'Australian Consumer Law Reforms': Offering Greater Consumer Protection and Simplifying Interstate Trade [online]. ' (Feb 2011) 33 *Bulletin (Law Society of South Australia)* 24, 24.

¹²⁶ Aviva Freilich and Lynder Griggs, *Consumer law & Policy in Australia and New Zealand* (The Federation Press, 2013), 130.

¹²⁷ Margus Kingisepp and Age Varv, 'The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive-a Significant Change of Paradigm' (2011) 18 *Juridica Int'l* 44, 44.

differences in the definition of consumers—this is an exploratory channel at the general level that concerns the object of regulation of the two consumer protection laws.

The principle of overcoming the imbalance in the bargaining power of consumers and businesses providing goods and services is a basis of consumer definition.¹²⁸ The bargaining power imbalance is defined as the result of their difference in the knowledge and information relating to the commodity that affects purchase decision as well as their inequality in financial and technical resources. The question of whether the difference in negotiating position between the parties in commercial transactions, whether bargaining power imbalance is high or low, should assist lawmakers in designing consumer definition provision. A precise definition in such a deliberate context is expected to provide 'relative scale of bargaining power' that stipulates which customers will be subject to the protection of consumer law and which corresponding obligations will bind suppliers. In addition to the goal of offsetting bargaining inequality, lawmakers must also ensure a simple regulatory approach that allows buyers to identify their consumers' position.¹²⁹

To determine who should be protected as a consumer, the ACL indicates the four transaction characteristics that can be relied upon to design the definition: 1) the characteristics of the buyer of the goods, services; 2) the purpose of purchasing goods, services; 3) types of goods and services are the subject of sale and purchase of the transaction and 4) the value of the transaction.¹³⁰ The four signs are based on characteristics such as the buyer's education, age, occupation, financial status, the purchase for consumption or redistribution, commercial industry and the size of the transaction manifested by the value of the goods or the frequency of previous.¹³¹ These factors can show or use only a few elements depending on the extent to which the subject is protected under the consumer protection policy of a country. Usually, the purpose of using goods and services for personal or household use is the common factor chosen to design consumer definitions in most consumer laws around the world.

When analysing consumer definitions, there is a clear distinction between consumer protection laws in Australia and Vietnam reflected in two factors. First, what is the

¹²⁸ Trish O'Sullivan, 'The Definition of Consumer - Will the Real "Consumer" please Stand up?' (2016) 24 *CCLJ Competition & Consumer Law Journal* 23, 23.

¹²⁹ Gary A Rumble, 'Eligibility for Consumer Contract Protection under the Trade Practices Act' (1978) 9 *Fed. L. Rev.* 457, 464.

¹³⁰ O'Sullivan, above n 128, 23.

¹³¹ Rumble, above n 129, 464.

difference in consumer exposure as showed by the extent to who is protected by the law? The answer to this explains the coverage of consumer law in each country and clarifies whether consumer protection policy is consistent with the recent global developments in consumer law. Second, the way of using the four characteristics to formulate the notion of consumer shows legislative techniques for defining rules, which contributes to the effectiveness of consumer protection regulations.

The notion of the consumer in the ACL indicates the objects that the ACL defends in a general rule at the ACL s 3 that applies to many types of transactions, including consumer guarantees, unsolicited consumer agreements, lay-by sales agreements, itemised bills, the definition of continuing credit contracts, and linked credit.¹³² Some related regulations refer to similar skillful terms to the definition of the consumer but not subject to this definition including consumer goods and consumer contracts for unfair contracts and safety conduct such as safety standards, safety warning notice, bans on consumer goods and product related.¹³³ Per the ACL s 3, the general definition of a consumer is:

Acquiring goods as a consumer:

(1) A person is taken to have acquired particular goods as a consumer if, and only if:

(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:

(i) \$40,000; or

(ii) if a greater amount is prescribed for the purposes of this paragraph -- that greater amount; or

(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

(a) for the purpose of re-supply; or

¹³² Downes, above n 123, 11.

¹³³ Adrian Coorey, *Australian consumer law* (LexisNexis Butterworths, 2015) 31.

(b) for the purpose of using them up or transforming them, in trade or commerce:

(i) in the course of a process of production or manufacture; or

(ii) in the course of repairing or treating other goods or fixtures on land.

Acquiring services as a consumer

A person is taken to have acquired particular goods as a consumer if, and only if:

(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:

(i) \$40,000; or

(ii) if a greater amount is prescribed for the purposes of this paragraph-- that greater amount; or

(b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

A consumer under the ACL is defined in two parts. The first section explains the circumstances that comprise the significant conditions determining a monetary limit, the objective test and the nature of the use of the goods or services, while the second part provides the characteristics of using the goods or services.¹³⁴ Accordingly, a person who acquires goods less than A\$40,000 is a consumer if the acquirer does not have one of three eliminations without regard to whether the nature of the products is of a kind ordinarily acquired for personal, domestic or household use or consumption or not. Conversely, if goods and services are valued at more than A\$40,000 and do not come within the exclusion, the characteristics of using the goods or services will need to be considered at issue.¹³⁵

The ACL's consumer definition includes vital norms that are important to the parts that contribute to the description of the consumer. These criteria include the acknowledge that who 'the person' is, the concept of goods and services, and the understanding of the term 'in commerce and trade'. Almost all of these concepts are clarified in the ACL's

¹³⁴ Stephen G Corones, *The Australian Consumer Law* (Thomson Reuters Lawbook Co, 2011) 87.

¹³⁵ Ibid, 87.

regulations.¹³⁶ In particular, relating to the identification of the consumer subject, a ‘person’ in the ACL’s is defined in s 22(a) of the *Acts Interpretation Act 1901–1973* as ‘body politic or corporate as well as an individual’. Thus, it is clear that ‘consumer’ in the ACL’s includes both natural individuals and businesses.

Thus, with this definition, the ACL has conceded consumer status with two objects, including individual consumers and small businesses, as long as their purchase intentions do not fall within the exclusions. Small companies enjoy protection by the ACL as defined by any fundamental, with any goods or services valued at A\$40,000 or less without being any of the exclusions. It seems that allowing small businesses to enjoy the same level of protection as individuals fit the rationale for unfair trade bargaining, meaning small businesses, in some specific situations, are also in as weak a position as individuals.¹³⁷ In a 2008 report, the Australian Productivity Commission considered whether they should maintain the definition of consumers applicable to the full protection of the small business. They concluded that small businesses, like individuals, also face shortages of resources that prevent them from efficiently negotiating a good deal, which also leads to an imbalance in the bargaining power of the transaction.¹³⁸ Also, the intention to protect business enterprises from the purchase of goods used for business purposes without the re-supply or resale in the ACL has been affirmed by the notification of some specific cases. The Australian Government has considered that if abolishing all transactions made for business purpose, the ACL could be ineffective in the situation where firms buy computers, or a hotel buys a carpet, or a school buys some air conditioners.¹³⁹

Compared with the terms defined in the LCP, the difference is quite clear. Consumer definition under the LCP remains in an interpretation clause in art 3.1: ‘Consumer means the buyer or user of goods or service for consumption or day-to-day activities of a person, a household or an organization’.

According to this definition, the basis of defining a consumer in the LCP comprises three factors including 1) the object as ‘a person’; 2) the purpose of a goods or service for consumption or day-to-day activities of a person, a household or an organisation; and 3)

¹³⁶ Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010. Section 2 of the ACL defines clearly what goods and services includes—a ‘supply (including re-supply) by way of sale, lease, hire or hire purchase’—and what the term of in commerce and trade means.

¹³⁷ O’Sullivan, above n 128, 32.

¹³⁸ Ibid, 32.

¹³⁹ Consumer Affairs Australia and New Zealand Affairs, above n 119, 11.

consumer relations determined through contract or direct use of goods or services.¹⁴⁰ According to this definition, a subject protected as a consumer is identified as a ‘person’, but it is not stated whether this includes business or not. Moreover, no provision defines the general understanding of this term in any statutes. The draft of the LCP defined both natural individuals and organisations as a consumer, but when enacting the law, the phrase ‘individuals and organizations’ were excluded.¹⁴¹ The use of the word ‘person’ easily results in many different interpretations because it can include natural individuals and businesses or only refer to natural individuals.¹⁴² However, many legal writers in Vietnam recognise the concept of ‘person’ to include natural individuals and businesses.¹⁴³ This interpretation derives from two reasons. First, in practice in Vietnam, the word ‘person’ is usually used to refer to both the individual and the legal entity. Second, the purpose of use mentioned in the definition includes the intended use of the organisation’s consumption, which implies that the LCP protects organisations as consumers.

Conversely, in Vietnam, the protection of market transactions carried out for consumption purposes by businesses is typically considered from the perspective of the right to use goods or services of an employee and workers, rather than from the perspective of directly establishing the transaction of small business. Tran Thi Quang Hong and Le Hong Hanh stated that the purpose of protecting employees and workers is still achieved as consumer protection law defines consumers as the people who use goods and services but does not require them to deal with suppliers of goods and services. Consequently, they argue that the LCP does not need to mention a consumer as an organisation in its definition of consumer.¹⁴⁴ For the purpose of ensuring the manufacturers’ product liability, the LCP can protect consumers using goods and services but not directly entering into contracts with manufacturers. Therefore, Vietnamese lawmakers have never raised the issue of protecting small businesses in transactions where these small businesses need protection due to their vulnerable position.

¹⁴⁰ Thu Nguyen Thi, *Improving Current Consumer Protection Law in Vietnam (Hoan thien phap luat bao ve nguoi tieu dung o Vietnam hien nay)* (Phd Thesis, 2013) 31.

¹⁴¹ Article 3.1 of the Vietnam Draft Law on Consumer Protection provides that ‘Consumers are individuals and organizations who purchase or use goods or services not for the purpose of resale’.

¹⁴² Thanh Nguyen Van, ‘Laws on protecting consumers’ interests of some countries and territories around the world and lessons for Vietnam (Phap luat bao ve quyen loi nguoi tieu dung cua mot so nuoc, vung lanh tho tren the gioi va bai hoc kinh nghiem doi voi viec xay dung Luat bao ve nguoi tieu dung tai Vietnam)’ (2011) *National University of Hanoi, Vietnam* 35, 38.

¹⁴³ Thu, above n 140, 31.

¹⁴⁴ Hong Tran Thi Quang, Le Hong Hanh, ‘Should an Organization be Regulated as a Consumer in Consumer Law? (Luat bao ve nguoi tieu dung co nen quy dinh to chuc la nguoi tieu dung?)’ (2012) <http://vnclp.gov.vn/ct/cms/tintuc/Lists/kinhtexahoi/View_Detail.aspx?ItemID=78>

There has been no clear explanation for the definition of the goods or services mentioned in the description of a consumer in the LCP. The consequence of this leads to a vast range of possible goods and services, or this concept could be borrowed from other Vietnamese laws such as the Civil Code, Commercial Law or Product Quality Law. However, the application of the provisions defining the goods and services in these statutes in Vietnam now is likely inadequate because it is not broad enough to cover all required goods and services, which reduces the level of protection provided by the LCP.¹⁴⁵ According to art 3 of the Law on Goods and Services Quality, product means ‘the output of a production or service provision process for a commercial or consumer purpose’, while ‘goods means products put on the market or for consumption through an exchange, sale or marketing’. These definitions lack other essential activities such as leasing, transferring and franchising.

Thus, in terms of determining who a consumer is, there are similarities and differences between the ACL and the LCP. Like most consumer laws, both focus on the purpose of the acquirer when purchasing goods or services that are personal, domestic or household use or consumption. Both the ACL and the LCP have used the meaning of the particular acquirer in transactions as the basis of the definition of a consumer. Accordingly, both laws do not accept consumers who buy goods or services for re-supply. This is consistent with the nature of consumer law to protect individual consumers because they are inherently vulnerable and often placed in imbalance position of negotiation with businesses in transactions for living and consumption purpose.

However, the first distinction between the ACL and the LCP is the difference in the range of the subject defined as a consumer. The scope of consumer definition under the ACL is broader than that of the LCP, even when the unclear definition in the LCP is understood to include organisations. The reason for this difference lies in the fact that, despite the LCP protect organisations as consumers, it has the sole aim of protecting the user of goods and services for personal, domestic or household use or consumption, thus acquiring goods or services of the organisation must be only for this purpose. In Vietnam, if ‘a person’ in the consumer definition of the LCP was defined as an organisation and if they fell into an imbalanced negotiation with large companies, a small business would be not protected as a consumer when dealing with low-value transactions. Conversely, a small business can be

¹⁴⁵ *Commercial Law 2005* (Vietnam National Assembly). art 3.1: Goods include: (a) All types of movables, including those to be formed in the future; (b) Things attached to land.

considered as a consumer in Australia if they acquire tools worth less than A\$40,000 for use in the manufacturing process.¹⁴⁶

Apparently, neither the purpose of acquiring goods and service for personal, domestic or household use or consumption or the name of the natural or business person should be the basis of a definition of consumer. The aim of choosing the target audience could be to overcome the imbalance of bargaining power. With the description mentioned in the ACL, Australian lawmakers have shown consistency and loyalty to this mission with acknowledging who can be placed at a disadvantage when there is an imbalance of bargaining power. Contrary to Australia's regulation based on the essence of the issue, in the LCP the only emphasis on the nature of use for domestic consumption expressed in the consumer definition has created a significant gap. Given that small and micro enterprises currently, form the majority of businesses in the Vietnamese economy,¹⁴⁷ the need to broaden the range of consumer objects, similar to Australia's approach, is significant for Vietnam.

The second difference between the ACL and the LCP is the way in which the elements constituting a transaction are used to design the definition of a consumer. In other words, this difference lies in the technique for establishing the legislative definition. These differences can be analysed as follows.

First, while the LCP requires the purpose of acquiring goods and services ordinarily for personal, domestic or household use or consumption by the explicit statement in the regulation, the ACL approaches this aim with the control of exclusion. Referring to the consumer's purpose in the legislative regulation of definition of a consumer can require the obligation of consumers to prove their purpose of use of goods and services.¹⁴⁸ Such a requirement is likely clumsy; thus, it is necessary to have a regulation to release this

¹⁴⁶ Corones, above n 134, 92.

¹⁴⁷ Tuan Do Anh, *The Role and Position of Small and Medium Enterprises in the Period of Integration (Vai tro, vi tri cua doanh nghiep nho va vua thoi hoi nhap)*, (30 March 2016) <<http://doanhnghiepv.vn/vai-tro-vi-tri-cua-doanh-nghiep-nho-va-vua-thoi-hoi-nhap-d66705.html>>. Currently, small and medium enterprises account for 98% of the total number of enterprises operating in the country, of which medium enterprises account for 2.2%, small enterprises 29.6%, and super tiny the remaining 68.2%.

¹⁴⁸ Vietnam Competition Administration, *Comparative research of consumer protection laws in some countries in the world - Lessons and proposal of some basic contents for Vietnam consumer law (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 cua Vietnam)* (2009) <http://cuts-hrc.org/images/stories/doc/full%20report_so%20sanh%20mot%20so%20luat%20bv%20ntd%20tren%20the%20gioi%20de%20xuat%20cho%20vn.pdf>. 22.

obligation for the consumer. There is, however, no provision in the LCP to cancel this requirement for those the law aims to protect.

Meanwhile, for the same objective, the ACL has used the method of exclusion with three purposes listed in s 3(2) (acquiring goods or services for the purpose of re-supplying or using goods, service or transforming them in the course of a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land). This technique only requires proof that the acquirer has one of these three purposes for not being considered as a consumer. Apparently, the evidence of three objectives accompanying with logical analysis can be more easily shown than justifying the purpose of personal, domestic or household use or consumption. Moreover, in the ACL the lawmakers have also applied two additional factors to increase the rigidity of the regulation. The first is a A\$40,000 monetary rule that prevents the obligation from proving that it is not a part of the exclusion if the value of the goods or services is below this level. The second is a combination of using regulations on the use of goods and services for personal, domestic or household use or consumption in the ACL. With that, Australian policymakers have practically used all four elements commonly found in designing the consumer definition.¹⁴⁹

Trish O'Sullivan stated that basing on features of goods or services and the purpose(s) of acquiring them are not ways to balance inequality in negotiation power between parties in transactions, arguing for a regime based on the characteristics of acquirers themselves.¹⁵⁰ The definition of consumer in the LCP merely uses the acquirer's purpose of goods and services use or consumption by directly regulating that purpose in the words of the law instead of using the exclusion method. It seems that, compared to the skilful compound combination shown in the ACL, the short description of a consumer in the LCP explains the lack of coherence.

Third, the ACL contains a series of additional explanatory clauses to clarify the terms mentioned in the definition, including the definition of goods, services, supply, re-supply, and the words 'in commerce and trade'. There are no such clauses in the LCP. It is clear that the lack of descriptive terms results in the unclear and incoherent definition in this law.

¹⁴⁹ The characteristics of the acquirer was added to the definition of small business relating to regulation on unfair contract terms in 2016, which shows Australian lawmakers focus on the acquirers, rather than the features of the goods or services or the purpose of using them.

¹⁵⁰ O'Sullivan, above n 128, 23.

3.3.2 The Structure of the Law

The efficiency of an act depends very much on how the act is structured and designed.¹⁵¹ As a result, comparing even a part of the content of two law, as in an examination of similarity and differences in their structure, shows the technical level of the statute design. Understanding the respective structures of the ACL and the LCP is, therefore, of great importance in assessing the effectiveness of the application of the LCP and drawing out relevant legal reforms for Vietnam.

The LCP is divided into two main parts, including the general and specific provisions, with six chapters: general rules (Chapter 1), responsibilities of organisations or individuals trading goods and/or services to consumer (Chapter 2), responsibilities of social institutions in protecting the interests of the consumer (Chapter 3), settlement of dispute between consumers and organisations or individuals trading goods and/or services (Chapter 4), state management responsibilities for the protection of consumer's interests (Chapter 5), and provisions for implementation (Chapter 6). The general provisions clarify the scope of application, the subject of regulation, interpretation of terms, the principle of consumer protection and national policy on consumer protection. However, the chapter does not contain a clause defining the purpose of the statute that the general provision should have. They consist of the principles of consumer protection,¹⁵² state management of consumer affairs,¹⁵³ rights and obligations of consumers, and dispute settlement principles in the violation. In other words, the general section of the LCP does not contain a statement of the purpose of the consumer protection law, nor does it only include definitions of the terms used to explain the concepts in the LCP. It consists of general regulation provisions of the fundamental rights of consumers by incorporating them into the first chapter of the law. The remaining chapters are designed based on the relationship of rights and obligations of consumers with other sectors including business relations and social organisations, while the last two chapters focus on the mechanisms for resolving consumer disputes and state management responsibilities in the consumer sector.

In general, the LCP's structure shows the following fundamental inadequacies. First, the aim of promulgating the LCP was unclearly stated. In Report No 45, Vietnamese lawmakers identified the objective of the LCP in Section II under the heading 'The

¹⁵¹ H J M Boukema, *Good Law: Towards a Rational Lawmaking Process* (Peter Lang, 1982) 57.

¹⁵² *Vietnamese Law on Consumer Protection 2010* (National Assembly of Vietnam). art 4.

¹⁵³ *Ibid*, art 5.

principal guidelines and direction of design the law' in three subsections. Accordingly, in addition to a subsection affirming the central role of the state and the social organisations in consumer protection, the other two subsections stated that the only objective is to protect consumers by ensuring the balance of interests between consumers and businesses.¹⁵⁴ Such an overarching goal does not indicate the context of a competitive market in which consumer protection is placed. Consequently, the LCP failed in determining the mission of the law since it skips the task of protecting the interests of consumers by enhancing effective competition. Moreover, Vietnamese lawmakers have also not mentioned operational objectives to specify the overall purpose. In the LCP, the general provisions including principles of consumer protection (art 4) and national policy in the field of consumer protection (art 5) tend to reflect this objective, but they remain unclear. Typically, to a lesser extent, the purpose of enacting a law could be acknowledged through state policy in the field that law is enforced. However, it is difficult to realise the aim of the LCP through state policy as art 5, pt 1 of the general provisions only describe the types of work to be carried out by the principles of state management instead of expressing the expectations of Vietnamese Government in the field of consumer protection.

The consequence of the lack of a clause specifying the objectives of the LCP results in a reasonably inconsistent and loose structure and content of regulation. It would be difficult to acknowledge what the LCP protects consumers from when approaching this law from the aspect of its construction. The sections of provisions of the LCP, therefore, are not seamlessly interconnected but fragmented. The chapters of the LCP that should be focused on the forms of conduct and consumer transaction and design the regulation provision thereof are classified based on the criteria of the relationship between consumers and other market factors. Such a design of regulation provisions distorts the normal expression of a consumer protection law that is used to regulate consumer behaviour and transactions, rather than a document listing and analysing social relations of consumers.

Further, consumer protection is the field where specific issues can be addressed in a variety of ways, and also where the short- and long-term benefits of state intervention sometimes become inconsistent.¹⁵⁵ Therefore, the limitation of stating the objectives of the law along with a confusing concept implies the potential for incompatible state intervention, which led a failure in ensuring that all responses do not go beyond its aim. A clear statement of

¹⁵⁴ *Submission Report on the draft Law on Protection of Consumers' Rights and Interests 2010* [To trình so 45/TTr-CP ngày 4/5/2010 ve Du an Luat Bao ve quyen loi nguoi tieu dung] (Government of Vietnam).

¹⁵⁵ Deloitte Access Economics and Commission, above n 116, 10.

the objective of the law is needed in that it helps the courts and law enforcement agencies to interpret the law in a broad sense under the logical inference from that statement.¹⁵⁶ With such a defect in the LCP, judges could find it difficult to make their decisions when relying on the ambiguous basis in some practical situations that may require an application of consumer protection regulation in a flexible way.

Second, the LCP contains a general provision, but there is no specific protection for every form of conduct and consumer transaction. It could be explained that the LCP's structure is not designed by approaching the regulation from the respect of consumer behaviours and transactions. Instead, Vietnamese policymakers classify the provisions based on the relationship between consumers and different market players. Therefore, the structure of the LCP does not separate into the general protection and specific protection, rather all the principles, policy statements, and general protection clauses are considered as a general section. The rest of the provisions are divided into some smaller parts that regulate the relationship between consumers and different groups of market players. However, such a design is not easily accessible to consumers.

Regarding the structure of the ACL, the differences between the LCP and the ACL may be worthwhile suggestions for modifying the LCP. The structure of the ACL is professionally designed with many terms that are much larger than in the LCP. The ACL consists of five chapters with 20 parts, 287 sections and over 67,000 words.¹⁵⁷ Accordingly, the ACL is designed by using the method in which Australians determine three processes including 1) the nature of the prohibitions that the law will make to protect consumer's interest, 2) in which case these prohibitions are considered to be violated and then 3) the consequences caused by the violations.¹⁵⁸ In other words, this structure is made up of a clear and linked concept among the prohibitions, conduct, and consequence. The structural features of the ACL, as well as significant differences between the ACL and the LCP, are evidenced by the following factors.

First, before the promulgation of the ACL, the Productivity Commission made a clear statement of the overarching objective of designing the ACL and six operation objectives to

¹⁵⁶ Corones et al, above n 134, 203.

¹⁵⁷ Coorey, above n 133, 3.

¹⁵⁸ Bruce, above n 63, 18.

clarify the overall purpose.¹⁵⁹ The four advantages of establishing the ACL's mission clauses that Vietnamese lawmakers can look to are as follows.

First, the overall objective of the ACL has set out the concept of consumer interest at the most comprehensive level of wellbeing, consumer prosperity. The notion of wellbeing represents not only the economic and material aspects but the aggregate of the spiritual values of the consumer, such as freedom and the guarantee of human dignity when they participate in the market. While referring to the economic benefit is to mention merely material interests through particular transactions, the objective of enhancing the wellbeing of the consumer expresses a more overarching and comprehensive approach concerning overall state policy. Once the purpose of consumer policy is to attain consumer prosperity, in some cases it may be allowed for short-term economic benefits to be ignored to ensure the overall objective. Such a whole purpose could be abstract and sufficient enough for judges and law enforcement agencies to interpret some specific cases that are difficult to apply the law in the usual way.

Second, this overall objective represents the latest development of consumer law in the world as it integrates the core value of research on theories of consumer protection. This can be proved by the adoption of the latest trend in consumer theory that is to ensure that consumers can engage confidently in the market. Positively recognising the position of consumers in the market, thereby encouraging their participation in the market as a decisive factor, is a form of advocacy of consumer sovereignty.

Third, the overarching objective of the ACL was established in a comprehensive view of putting consumer protection in the context of a competitive market, thereby asserting that consumer protection is a useful tool to enhance an effective competition. As a result, consumer protection is not perceived in a single, static context but a dynamic movement along with the operation of a competitive market. Since strengthening an effective competition is to ensure operational efficiency of the market as well as sustainable benefits of the business, such a view would make the idea of providing a balance between the consumer and the company that the LCP wants to emphasise becomes more acute and persuasive. Simultaneously, this approach also makes the objective of the ACL to ensure consumer rights become more convincing than that of the LCP.

¹⁵⁹ Deloitte Access Economics and Commission, above n 118, 63.

Fourth, in the Review of Australia Consumer Policy, policymakers carefully announced six functional objectives that are specifically detailed from the overall objective. These specific aims spread all respects that a consumer protection law needs to mention. Detailed statements of the purpose of the ACL determine the path it must go through, which in turn makes access to the ACL, whether carried out by researchers, state agencies or consumers, much easier. Such detailed statements should be essential for consumer protection law in Vietnam, especially in the context that consumer protection regulations in Vietnam are currently scattered across many legal documents.

The second structural characteristic of the ACL is the technique of construction of the law's content in which all chapters are logically designed—general provisions (Chapter 1), general protection (Chapter 2), specific protection (Chapter 3), the consequence for the breach of the ACL (Chapter 4) and enforcement power and remedies (Chapter 5). The general protection contains three overall categories of misleading or deceptive conduct, unconscionable conduct, and unfair contract terms. Meanwhile, the specific protection regulates certain practices or standard forms of conduct caused damage to consumers. They are organised and named under the name of every type of prohibitions, rather than the relationship between the consumer and other participants in the market as designed in the LCP. This design allows consumers to quickly identify the bans by directly naming the nature of conduct. Simultaneously, the manifestation of state intervention in consumer protection through regulating conduct and consumer transactions is a right choice. At this point, the LCP appears to be limited in both terms of quantity of provisions and technique of designing the regulation. Thus, the effectiveness of the LCP from the perspective of law construction is likely to be significantly limited.

By learning from the ACL, reform of the LCP could be carried out immediately, but some solutions need to be development within the context of Vietnam. The next learning element is to adopt a structure model of consumer protection law similar to that of the ACL as well as modify the concepts of the definition of a consumer to make them more logical and clearer. It is necessary to divide the LCP into general provisions, general protection and specific protection, which regulate the forms of conduct and consumer transactions as analysed above. The addition of the necessary clauses clarifying the concept of consumer definition by the same way as designed in the ACLs will be an essential prerequisite to help the LCP to hold the precise consumer definition that is one of the most critical norms among those defined in a consumer protection law.

However, some issues need to be considered from the perspective of applicability of learning the ACL experience. The addition of regulation provision asserting encouragement of consumer's confidence in the market for the LCP may not be challenging. Although the LCP needs to be reformed to attain more significant sufficient level, it is somehow explained that the objective of enhancing consumer confidence could still be within the national strategy of consumer protection law. Also, placing consumer protection in the context of competition is not too strange for Vietnam. Throughout active legislative development relating to commerce and trade, Vietnam has experienced designing laws against misleading advertising and promotions, unfair trade practices and unfair competitive practices.

These prohibitions are also against unfair commercial practices to protect the interests of consumers. As a result, placing consumer protection in the context of competition will not be difficult for Vietnam. However, the challenge may lie in the fact that the concept of effective competition has not been mentioned and analysed in the legal environment in Vietnam until recently. However, the primary regulations of effective competition which provides enough substitutes for consumers to freely choose and for sellers to maximise their opportunity to market their goods and services¹⁶⁰ has still appeared more or less in competition law, trade law and consumer protection law in Vietnam. Focusing on an effective competition is the path to expand and deepen the regulations that have faded in the Vietnamese commercial law system. Thus, the need to acquire the new norm, effective competition, thereby opening up research, discussion, and updating of development trends in competitive theory and consumer protection is increasingly necessary for Vietnam.

3.4 Conclusion

Vietnam has a long history of legal development with profound legacies in the process of building its laws. The legal system of Vietnam, alongside its economy, is transplanting strongly from developed countries and is changing rapidly. However, under the socialist law, institutionalisation of the CPV's policies and direction, theoretical frameworks and legislative philosophy in many areas in Vietnam have not been clearly demonstrated through the legal text or the practice of legal science. The inadequacies of the common

¹⁶⁰ Blackwell Smith, 'Effective Competition: Hypothesis for Modernizing the Antitrust Laws' (1951) 26 *NYUL Rev.* 405, 429. Smith states that 'effective competition' would be defined by law as that business rivalry, existing and potential, which tends to result in the kind of performance that provides adequate alternatives so that consumers have reasonable opportunities for freedom of choice among goods and services and sellers have reasonable opportunities to market their goods and services.

characteristics of the Vietnamese legal system affect the way the objectives are set, transforming the objectives into legislative regulations in each statute including consumer law. It also influences the way the structure of the law is designed and the tendency to establish substantive ground rules throughout the law. Meanwhile, Australia has a developed legal system of common law. In consumer protection, Australia's policy development goes hand in hand with the progressive movement of the field in the world, evident in the current Australian consumer policy. Thus, differences in the structure of the law, the purpose of the law and the definition of a consumer between the LCP and the ACL are clear and significant. This chapter has provided a portrait of the legal system and consumer law in Vietnam and Australia, analysed their distinctive features and identified similarities and differences in structure and the definition of consumers. These differences show that the shortcomings of Vietnamese law need to be revised. Differences between two specific issues, misleading conduct and unfair contract terms, are analysed in Chapters 4 and 5.

As discussed above, Australia's consumer policy is currently a combination of two models based on traditional understanding and equilibrium analysis while promoting a confident consumer image in the market.¹⁶¹ Thus, compared with the optimal model identified in Chapter 2, Australia's consumer policy represents almost the full complement of recommended features. However, Australian policymakers and lawyers have not stated the need to focus on subjectivity, and such an insight could make policymaking measures clearer and stronger. Nevertheless, the choice of the ACL as a basis for comparison with the LCP is perfectly consistent with the general theoretical framework discussed in Chapter 2.

¹⁶¹ See at page 98, paragraph 2, section 3.2.2

Chapter 4:

The Right to Information and the Prohibition of Misleading or Deceptive Conduct

In the field of protecting consumer right to information, regulations against misleading or deceptive conduct play an important role as a useful way of supporting consumer welfare by encouraging truth in business and commerce.¹ This is because one of the underlying causes for the emergence and development of consumer protection is the lack of frankness of the traders, especially advertisers, associated with the technical complexity of products.² Consequently, it is challenging for consumers to be fully informed as to the attributes of goods and services in the contemporary period. Therefore, to find legal solutions to improve the effectiveness of consumer protection by strengthening a consumer's right to information in Vietnam, it is useful to examine regulations governing misleading or deceptive conduct in the comparative analysis with the corresponding provisions in the ACL and determine how such laws can work together to strengthen the protection of consumers engaged in commercial transactions.

This chapter analyses to what extent regulations in Vietnam consumer protection legislation against misleading or deceptive conduct effectively protect a consumer's right to information. In addressing this issue, special attention is paid to misleading marketing practice because in misleading or deceptive conduct advertising is one of the first areas considered for many reasons related to its central role in the field of industry, economics, and culture.³ By comparing regulations regulating misleading or deceptive conduct in the LCP, with emphasis on misleading marketing practices and that of the ACL, it is possible to ascertain certain similarities and differences between the two legal systems, thereby clarifying shortcomings that lead to inadequacies and inefficiencies of this legal area in the LCP. The chapter is divided into six sections. Section 4.1 provides an analysis of regulation against misleading or deceptive conduct in the LCP, while Section 4.2 provides this analysis for the ACL. Section 4.3 compares these provisions. Section 4.4 provides an

¹ Colin Lockhart, *Misleading or deceptive conduct: issues and trends* (Federation Press, 1996) 6.

² Bruce Donald and John Dyson Heydon, *Trade Practices Law* (Law Book Company, 1978) cited in *ibid* 3.

³ Richard W Pollay, 'Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform' (1968) 17 *U. Kan. L. Rev.* 625, 625.

analysis of regulation against misleading advertising in the LCP, while Section 4.5 provides this analysis for the ACL. Section 4.5 compares these provisions. Section 4.6 concludes the chapter.

4.1 Prohibition of Misleading or Deceptive Conduct in Vietnamese Laws

4.1.1 Overview of Regulations Against Misleading or Deceptive Conduct in Vietnam

The practice of unfair trade in Vietnam, especially misleading or deceptive conduct, has increased in recent years, affecting the business environment and consumers' right to information.⁴ Preventing these breaches was one of the top priorities of Vietnamese lawmakers in designing the LCP. However, if analysing this statute in a vacuum, the overall regulations against misleading or deceptive conduct are few. In LCP is characterised by the lack of many necessary provisions that have to be included in an effective consumer protection law. The content of these regulations in the LCP is constructed only with two articles—one that admits the right of consumers to be informed about goods and services and another that exposes the prohibitions against the providing false information and conducting misleading leading the consumers into error. Given the importance of prohibiting unfair trade practices, the existence of only two articles in the LCP represents an introductory note of inadequacy of the Vietnamese legislation in this area.

However, the reasons for this deficiency are seen when examining the systematic aspects of laws in the field of trade and commerce in Vietnam. Regulations in this area are scattered across many other legal statutes enacted before the LCP. These laws are closely related to the objective of protecting consumers in trade practices, including the Advertising Law, Law on Measurement, Law on Quality, Competition Law and Commercial Law. For example, the Law on Quality art 10 places more obligations on firms relating to ensuring goods quality and information than the corresponding art 12[5] of the LCP.⁵ Therefore, an adequate assessment of regulations against misleading or deceptive conduct in Vietnam must include the provisions in these laws.

⁴ To Uyen, 'The Right of "God" is still Seriously Violated (Quyền của "Thượng đế" vẫn bị xâm phạm nghiêm trọng)' *Finance Times (online)* (14 March 2018) <<http://thoibaotaichinhvietnam.vn/pages/nhip-cau-tieu-dung/2018-03-14/quyen-cua-thuong-de-van-bi-xam-pham-nghiem-trong-54865.aspx>>

⁵ Sua Le Van, 'Some Provisions of the Law on Protection of Consumer Rights - Inadequacies Need to be Improved' (Một số quy định của pháp luật về bảo vệ quyền lợi của người tiêu dùng - Bất cập cần hoàn thiện)' (2015) *Ministry of Justice (online)* (15 May 2017) <<http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=1901>>

The aforementioned situation leads to the dispersed and discrete nature of the regulations against misleading or deceptive conduct in Vietnam—a clear weakness. Since there are many regulatory provisions against misleading or deceptive conduct in many different statutes, it is necessary to design a provision that establishes a legal basis for the reciprocal application of these rules. Typically, by the tradition of civil law, the legal document at the highest level, the Civil Code, will provide the overall principles while applying regulations of many lower-level acts such as the LCP and Commercial Law.⁶ In other words, some of the provisions considered as general principles in the code shall be automatically recognised and applied to the lower valid acts without the requirement of a rule granting such applicability. However, this feature will not be accepted automatically in the case of application of regulations of acts being at the same level of legal validity. Therefore, for these regulations to be applied mutually, it is necessary to have a reference provision that allows such an application in the LCP itself. Currently, there is no such provision in the LCP.⁷ Consequently, the regulation against misleading or deceptive conduct in Vietnam is dispersed and loose given the lack of a link between the legislative provisions.

4.1.2 General Prohibition Against Misleading or Deceptive Conduct in the LCP and Related Laws

4.1.2.1 Regulations Against Misleading or Deceptive Conduct in the LCP

From a general perspective of regulatory technique construction, regulation on misleading or deceptive conduct in the LCP is designed in a way that asserts rights and then exposes the prohibitions to protect the rights. Correspondingly, there are two principal terms in the LCP that express this structure—art 8 that admits consumers’ right to information and a general prohibition article.⁸ Article 8 of the LCP recognises and affirms the rights of consumers as follows:

Being provided accurate and complete information about organizations or individuals trading goods or services; contents of transaction of goods and/or

⁶ Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) 15 *Am. J. Comp. L.* 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 generalization based upon a scientific structure of classification'.

⁷ Le, above n 5. Le argues that despite art 10 of the Law on Quality, which stipulates producer’s obligations in more detail than art 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.

⁸ *The Law on Consumer Protection 2010 (Luật bảo vệ người tiêu dùng 2010)* (Vietnam National Assembly) art 10.

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.⁹

Article 8 of the LCP presents a statutory recognition of the consumer's right to information not only in the LCP but in the general legislative system of the country. Under normal circumstances, such an affirmation of 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 the right to information of consumers. However, in the context of consumer protection legislation in Vietnam, the existence of art 8 has played a significant role. As discussed above, the statutory provisions of consumer information in Vietnam are not confined to the LCP, but present in different laws that are essential for the enforcement of the LCP. In the absence of a legal basis provision for invoking and linking these provisions, art 8 can be expected to play a meaningful alternative role. Although this gap is not a recommended solution, this article appears as an escape route for the regulatory system. In resolving disputes between consumers and businesses regarding information obligations, courts may invoke more specific provisions in relevant laws by art 8 of the LCP.

Article 10 of the LCP imposes the details of the principle of protection of the consumer's right to information mentioned in art 8. This is the only clause in the LCP regulating misleading or deceptive conduct. Article 10 directly prohibits these conducts 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 art 10 shows the traditional style of regulation of Vietnamese lawmakers in which only the most apparent conduct and manifestations of these conduct are described.

⁹ Ibid, art 8.

Specifically, art 10.1 of the LCP is comprised of two descriptions including the form of misleading or deceptive conduct and the information relating to goods and services used to cause confusion or deception. Analysis of art 10 reveals the characteristics of the regulation on the right to information in the LCP as follows.

It can be seen that there is no definition of what is misleading or deceptive conduct in art 10 or in the LCP. Also, such a determination cannot be found in any relevant law in the Vietnamese legal system. The lack of a definition of what misleading or deceptive conduct is makes it difficult for judges and authorised agencies to understand and enforce the regulations in this area since they are used to merely basing decisions in dispute resolution on statutory provisions. Considered a country of civil law tradition, Vietnam spent a long time denying the use of precedents.¹⁰ Although case law was recently recognised as a source of law in 2015,¹¹ there have been not many cases in this area that can make a significant supplementary to actual practice. As a result, the other provisions providing specific prohibition like art 10 could be expected to help to clarify the gap in general prohibition.

However, the response of the expectation is not satisfied. Article 10.1 is the only clause that serves as the indication of the specific prohibition against misleading or deceptive conduct in the LCP. Unfortunately, this particular prohibition is limited to narrow and insufficient content, whereas it should have been designed more technically and considerably so that this regulation can efficiently protect consumers' right to information. In art 10, there are two forms of misleading or deceptive conduct including misleading, deceptive advertising and concealing or providing incompletely or inaccurately information about goods or services. Thus, the term used in art 10 of the LCP implicitly indicates two forms of conduct, one that is misleading or deceptive advertising and conduct relating to providing information that leads the consumer into error. The latter could consist of all types of giving information relevant to selling goods and services. Except for art 10, the LCP has no provisions appear as the specific prohibition to detail the regulation referred in art 10.1. The rest of the rules in art 10.1 define the types of information of goods or services that may cause confusion or mislead consumers. These types are categorised into three broad

¹⁰ 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.

¹¹ *Resolution on the Process of Selecting, Promulgating and Applying Case law 2015* (Nghị quyết số 03/2015/NQ-HĐTP về Quy trình Lựa chọn, Công bố và Áp dụng Án lệ) (Vietnam National Judiciary Committee).

categories—those 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, there are no further provisions in the LCP that detail the specific elements involved in these three categories of information.

From the above analysis, it can be seen that art 10.1 is a broad general provision which represents one of the unusual characteristics of the Vietnamese legal system since Vietnamese socialist legal thinking has always been fragmented.¹² The coverage of this provision is difficult, as there is no specific prohibition supplementary for art 10.1. This characteristic makes the article play a role as a general protection of the consumer's right to information. Because of being the unique provisions in the LCP that regulates misleading or deceptive conduct, the pros and cons of this provision could be the basis for assessing the effectiveness of regulations of the LCP. The lack of specific protection in LCP presents a severe defect of the LCP, which could be one of the main reasons resulting in ineffective enforcement of protection of the consumer's right to information in Vietnam. Explicitly, this is a significant shortcoming of the LCP that needs to be addressed and requires revision as soon as possible.

However, 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, Competition Law, and Advertising Law. Therefore, when resolving disputes relating to consumer information, specifically for misleading or deceptive advertising, courts and other mechanisms automatically apply the provisions in these relevant laws. Consequently, consideration of the protection of consumer right to information in this area is bound to be subject to 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 the country 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

¹² John Gillespie and Pip Nicholson, 'The Diversity and Dynamism of Legal Change in Socialist China and Vietnam' (2005) *Asian Socialism and Legal Change* 1, 7.

about the level of the dwelling of the content of issues, by which it is impossible to identify the purpose and mission of each statute.

However, as Vietnam has already established the LCP, it is only possible to use the provisions of this law and other laws to make a decision in dispute resolution if—and only if—such an application is stipulated in the LCP.¹³ In case there existed such a regulation, the general principle of *lex specialis derog legi generalis* ('*lex specialis*') would be applied in which the LCP would play the role of general law while the relevant laws would be specialised laws.¹⁴ Such a reference through a statutory provision will become a legal basis for judges and other authorised agencies to apply when making a decision. Thus, this analysis will go in the direction of selecting and analysing the provisions in specific laws detailed provisions and specifying the prohibitions in art 10 of the LCP.

There are two forms of conduct related to the information 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 this analysis, the consumer's right to information regulations in Vietnam can be assessed.

4.1.2.2 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 as an obligation dealing with the sale of goods and services in the Law on Measurement,

¹³The Law on Promulgation of Legal Normative Documents 2015 (*Luật ban hành văn bản quy phạm pháp luật* 2015) (Vietnam National Assembly) art 156.3 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.

¹⁴Gerard Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 11 *German LJ* 966, 986–987. Conway describes this traditional rule as follows: 'It is important to note that the application of *lex 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*'.

Law on the Quality of Goods and Services, and Commercial Law. Also, the Commercial Law regulates more commercial practices relating to traders' obligation to provide information such as a 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 following.

The Law on Measurement (No.04/2011/QH13 dated on 11/11/2011) requires the obligation of producers and traders of prepackaged goods:

Producers and traders of prepackaged goods have the following obligations:

- a/ To provide truthful information on quantities of prepackaged goods;
- b/ To notify customers and consumers of required conditions for transporting, storing, preserving and using prepackaged goods;

The Law on Quality of Goods and Services (No.05/2007/QH12 dated on 21/11/2007) set the rules of business's information obligations relating to selling goods and services. Accordingly, art 8 lists the prohibitions against providing misleading information:

Giving untruthful information or advertisement or committing fraudulent acts related to product and goods quality or goods origin.

Concealing information on the products' and goods' capability of causing unsafety to humans, animals, plants, assets or the environment.

Meanwhile, art 16 establishes sellers' obligation relating to information:

Article 16. Obligations of sellers

To supply truthful information on product and quality of goods,

To notify purchasers of conditions to be ensured during the transportation, storage, preservation, and use of goods,

To supply purchasers with information on goods warranty,

To supply documents and information on goods subject to examination of quality controllers, and product and goods quality examination teams and agencies,

To promptly supply purchasers with information on the goods' capability of causing unsafety and preventive measures upon receiving warnings from producers or importers.

In general, the provisions on information obligations in the sale of goods and services in the two laws mainly require businesses to perform acts associated with the designation of information types must be disclosed. The overall feature of listing these types of information in these laws is that each law lists just some information type and the content of which is still incomplete. If compiling all the information specifications for goods and services required by these laws to be disclosed to the consumer, a well-defined set of information could emerge. However, they are all information related to goods and services, not the type concerning the manufacturer, the supplier or the principal transaction between the two parties. Therefore, in the view of the additional aspect to the provisions on obligation information in the LCP, these laws are not as complementary as they should be.

Additionally, one of the essential forms of the prohibition against misleading or deceptive conduct is silence as a non-action conduct. However, this kind of conduct is only mentioned in a single article in the Law on Quality of Goods and Services which prohibits concealment of information about the possibility of causing unsafety of goods. The provision of information concealment in the form of silence with such content is incomplete, potentially ignoring silence over various types of information that must be disclosed to the consumer. This is a significant shortcoming of the LCP and should be amended.

4.1.3 Commercial Law

Consumer protection is one of the principles of commercial activity presented in art 9 of the Commercial Law. From the perspective of protecting the right to information of consumers, the provisions on businesses' information obligations are expressed in the Commercial Law with 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 not in line with the goods being traded regarding quality, price, utility, design, type, packaging, warranty period and quality indicators and businesses must display and introduce of goods for comparison with other businesses.¹⁵

In connection with art 8 of the LCP, art 123 of the Commercial Code may be invoked as the forms of conduct of the first group mentioned in the LCP as providing misleading or

¹⁵ *The Commercial Law 2005 (Luật Thương Mại 2005)* (Vietnam National Assembly). art 123.

deceptive information about goods or services. Relating to information obligations in the promotion activities of traders, the Commercial Law requires traders to ‘strictly follow the announced promotion program and commitments with customers’ (art 96), to publicly inform customers about prices of goods and services for sale promotion, related expenses for the delivery of goods and services for sale promotion, conditions of participation in promotion and use of benefits received from promotional activities. If the promotion is in the form of donation, the trader must notice the price of the goods or services donated; if the promotion is by way of a discount, traders must declare the deduction compared to the regular price before the promotion period. The specific benefits that customers receive through other promotional forms and the costs incurred by customers must also be disclosed.¹⁶

The above prohibitions against misleading or deceptive conduct by the Commercial Law may be stipulated more specifically than that of the LCP. As a result, they could be applied by courts and other authorised agencies to add to the provisions of the LCP in disputes resolution involving consumers’ right to information. However, the supplementary provisions of the Commercial Law, Law on Measurement and Law on Quality of Goods and Services show characteristics of the Vietnamese legal system.

First, the way in which the rules are formulated is not different from the techniques used to describe the prohibition in the LCP. In the laws above, there are no regulations that determine signs of the nature of constituting misleading or deceptive information that can be used to conclude whether conduct is in violation of the ban. The advantage of these regulations is to clarify the group of prohibited behaviours in the LCP by specifying in detail the smaller types of conduct in this group. However, these regulations do not describe how 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 for laws of which the task is to ensure proper performance of trade and commerce in the market, rather than to protect the rights of consumers.

Thus, from the above analysis, the general prohibition rules in the LCP and in other related laws that supplement it show inadequacies and shortcomings. All of these laws lack a

¹⁶ TPA art 97.

system of definitions that clarify the signs of misleading or deceptive conduct, especially a description and identification of what misleading and deceptive information is. Also, the system of specific behaviours governed by these laws appears to be somewhat vague. As noted in art 10.1, except for misleading advertising, the rest of the regulation merely prohibits the two form of conduct including concealing information relating to products or providing misleading or deceptive information. These forms of behaviours remain unclear since many questions of their nature have not been clarified. These questions can focus on complex, subtle ways of the conduct and need to be explained, such as conducting a prohibition in case the information given by sellers is true, but the full information in the whole context was partly concealed and leaves consumers confused about the ultimate truth of goods or services (i.e., half-truth). The next question examines similar questions in the context of this legal regime in Australia.

4.2 Misleading or Deceptive Conduct in the ACL

4.2.1 Overview of Regulations Against Misleading or Deceptive Conduct in the ACL

Regulations on misleading or deceptive conduct in the ACL have taken an essential consideration of the consumer protection legislation of this law. Consumer protection against misleading or deceptive conduct is stipulated in the ACL in two levels, general protection, and specific protection. The general protection section is designed to create general standards or norms of constituting conduct to guide the commercial practices of businesses. As a result, it is expected to find regulatory provisions of definitions, the nature, and structure of misleading conduct in this general protection section. It is also within the general provisions in the ACL that the regulatory construction techniques of the Australian lawmakers can be seen in the performance of professionalism and prudence. For the specific protection section, the legislative regulation in the ACL shows the lawmaker's effort to enumerate the forms of conduct so that they could not miss out any breach in this area. Simultaneously, each kind of conduct is adequately noted in the specific protection that contributes to clarify the diversity of prohibitions, efficiently contributing to the protection of the consumer's right to information for the ACL.

As a general rule, the protection of consumers' right to information against misleading or deceptive conduct in the ACL represents a profound and comprehensive level of protection. This is evidenced by the abundance of terms and technical norms designed throughout this section. The structure of general protection and specific protection in the ACL

demonstrates the advantage of achieving high levels of efficiency in avoiding violations. 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 this section makes it possible to cover and predict many of the potential forms of conduct that the lawmakers may not acknowledge at the time of designing the statutory provisions. The general protection, therefore, requires a broad, abstract legislative thinking, a comprehensive descriptive structure, and the most accurate words that can determine the nature of the prohibition. The general protection against misleading or deceptive conduct in the ACL, as will be discussed in the following sections, has met these requirements.

Additionally, many case laws relating to the dispute in the area of misleading or deceptive conduct in Australia have contributed significantly to the determination of standards of the prohibitions. This actual practice is beneficial for protection of consumers' right to information for two main reasons. First, Australia belongs to the common law system, where precedent¹⁷ is a source of law enforcement. By the profound interpretation which 'certain guidelines on the path to their decisions'¹⁸ applied to each specific case arising from reality, the precedents are considered professional and practical enough to establish valuable guidance for the dispute resolution. Second, the regulations against misleading or deceptive conduct in the ACL are a primarily unapologetic simulation of the article that presented in the TPA without a difference in its essence.¹⁹ Thus, some longstanding cases have remained applicable to the present with the effect of the ACL.

4.2.2 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 regulations against misleading or deceptive conduct in ACL follows the structure which starts with the general prohibition and then provides particular prohibition of each form of conduct. In the general protection section, the ACL sets out the general prohibition clause in s 18(1):

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

¹⁷ 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'.

¹⁸ Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (LexisNexis Butterworths 4th, 2014) 95.

¹⁹ Stephen G Corones, *The Australian Consumer Law* (Thomson Reuters Lawbook Co, 2011) 95.

Analysing this general protection article finds that three elements should be clarified in the ACL or explained in cases as a basis for application of the regulations: 1) determining what forms of 'engage in conduct' are, 2) define how is considered as 'in trade and commerce', and 3) what 'misleading or deceptive conduct' means. The analysis of each element in the general prohibition clause shows its significant effect in performing the task as an overall provision of the legal framework of prohibition. Contemporaneously, the analysis of general prohibitive factors in the ACL will clarify the shortcomings of the LCP as there is no such general ban in the LCP.

4.2.2.1 'Engage in Conduct'

Determination of 'engage in conduct' is the direct objective of the prohibition to indicate what forms of conduct are implied. At the most general level, the forms of conduct explained in s 2(2) of the CCA consist of two forms of 'doing or refusing to do any act...'. The CCA also specifies 'refusing to do any act' mean the two forms in s 2(2)(c) including 'refraining (otherwise that inadvertently) from doing that act or making it known that the act will not be done'. These regulations, in conjunction with s 18 of the ACL, are quite adequate and fulfil their role as the broadest coverage provisions in the classification of misleading or deceptive conduct without neglecting any type of conduct that could be available in actual situations.

Also, judges define more specifically the general definition in the text of the law through case laws with their judgments and interpretations. Judges' comments and explanations accompanied by the variety of case laws, in turn, have provided guidelines as a significant supplement and valuable insight into the process of defining the nature of the prohibition. This source of case laws in accordance with the CCA and the ACL has become adequate in addressing the task of identifying the forms of the breach. They respond to questions raised by the reality of disputes, such as is misleading or deceptive conduct valid only in the form of representation? If the concept of misleading or deceptive conduct is understood in the context of the relationship between seller and consumer, the types of conduct will be identified by representation. For the first time, the High Court noted that the term 'conduct' in art 52 of the TPA extends its scope of meaning as a 'representations' in *Butcher v Lachlan Elder Realty Pty Ltd*.²⁰ It may comprise many pre- and post-contractual

²⁰ Dan Svantesson, 'Some Observations on the Regulation of Misleading or Deceptive Conduct' (2007) 13(1) *The National Legal Eagle* 6, 18.

misrepresentations in the context of trade and commerce such as advertising, franchising, property sales and rent.²¹

However, judges and legal researchers in Australia have analysed many case laws to conclude that the term of conduct was related not only to misrepresentation. This is evident in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* in which the judges state that ‘misleading or deceptive conduct under TPA, s 52 generally, though not always, consists of representations’.²² Some judgments have subsequently provided a vivid explanation for non-representational forms of the breach including non-disclosure, opinions, statements as to future matters, statements of law and the authorised use of character images.²³ Without being constrained in the conceptions that misleading or deceptive conduct only covers representation, judges and legal scholars extend their considerations to specific types of refusal to perform conduct. Stephen Crones also divides misleading or deceptive conduct into the two categories of conduct by silence and intermediary involving the relaying of information that means the conduct in the form of performing a particular action, while Collin Lockhart divides them into the two categories of acts and omissions.²⁴ Silence is considered as a form of refusing to do any act according to *Commonwealth Bank of Ireland Act v Mehta* (1991), the types of which Crones specifies into two broad categories including silence in isolation or mere silence and half-truth. Accordingly, silence in isolation means the form of entirely not disclosing to the public, and half-truth means the information is revealed to be real on its face, but it causes the consumer to misrepresent the whole objective truths due to what the sellers show, or ‘while the information is true on its face, it misrepresents the true state of affairs because of what it is unsaid’.²⁵ This second type of conduct is also divided into two situations—the first is to provide incomplete information, and the second is to fail to disclose subsequent changes which render that information no longer accurate.²⁶ Thus, by combining the statutory provisions of the law and the supplementation of case laws, subtle forms of conduct that may constitute sufficient breaking of prohibition are almost comprehensively determined. The sufficiency of these regulations and practice provides the role of great value in

²¹ Corones, above n 19, 99.

²² *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 at 504.

²³ Lockhart, above n 18, 52.

²⁴ Lockhart, above n 18, 95.

²⁵ Corones, above n 19, 100. Corones analyses the case of *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*.

²⁶ *Ibid*, 101.

protecting consumers' interests against ingenious modifications from diverse commercial activities in reality.

4.2.2.2 'In Trade and Commerce'

Analysing what misleading or deceptive conduct constituted in the term of 'in trade and commerce' is an interesting task when examining consumer law. While the definition of consumer indicates who are influenced and protected by the law, the very scope of the term of 'in trade and commerce' will determine what subjects of prohibitions are. Therefore, the more defined the features of 'in trade and commerce', the more adequately the kinds of the subject that can be prohibited by the law. As a result, the efficiency of the application of the law can be enhanced by this clarity and detail of the regulation.

The term 'in trade and commerce', as clarified by the TPA and analysed through the case laws, is asserted to refer the conduct regarding real and potential consumers, and defined as 'promotional activities in relation to or for the purpose of the supply of goods and services'.²⁷ 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'.²⁸ In fact, Australian courts initially apply the 'in trade and commerce' context in an extensive meaning, and then narrow it to focus closer to the requisite nature of this norm, which is due to the need for distinguishing between 'in trade and commerce' and 'in connection with trade and commerce'.²⁹ *Concrete Construction v Nelson* is a good experience where the interpretation of the High Court indicates the distinction of understanding this term in practical situations. Accordingly, 'in trade and commerce' should be understood 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'.³⁰

However, practical situations continue to pose questions that challenge the application of the courts. These are situations such as the individual sale of real or personal property,

²⁷ Ibid, 56. Corones analyses the cases of *Peterson v Sharpe & Dohme (Aust) Pty Ltd* (2010) FCA 180; 184 FCR 1 at 888; *ACCC v SMS Global Pty Ltd* (2011) FCA 855 at 39.

²⁸ Ibid, 57. Corones analyses the cases of *Taylor v Crossman (No 2)* (2012) FCAFC 11; 199 FCR 363; *Astra Resources Plc v Full Expose Pty Ltd* (2012) FCA 1061 at 28–31; *Weir v Screen* (2013) ACTSC 188 at 86–90.

²⁹ Alexander Bruce, *Consumer Protection Law in Australia* (LexisNexis, 1st ed, 2011).

³⁰ Ibid, 60. Bruce analyses the case of *Village Building Company Ltd v Canberra International Airport Pty Ltd* (2004) 210 ALR 114, ATPR 42–019.

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 of influencing the trade and commerce of the other businesses.³¹ The judgments in many case laws have provided explanations for each case in these situations. Although the Australian courts do not always choose to adopt the same interpretation and application to deal with these cases, the diversity of judges' interpretations has brought the colour scheme for the consumer law while clarifying the variety of the different interpretative approaches that can be applied.

For conduct performed in the form of individual sale, judges determine two aspects of which not considered as 'in trade and commerce' in two cases *Orbien v Smolobogov* and *Argy v Blunts*. The assertion that an individual sale is not defined as a form of 'trade and commerce' is likely consistent across the judges' decisions. The argument expresses that it is 'not something done by the appellants in the course of carrying on a business, and it lacked trading or commercial character as a transaction' even though it uses 'facilities commonly employed in commercial transactions',³² or it uses agents to advertise, to make auction or negotiate a private treaty.³³

However, for the statements made in an employment context, the variety of understanding seems to lead to different explanations among the judges. One line of authority belongs to the Federal Courts using concrete construction principles to assert that negotiations between an employer and a prospective or existing employee are about but not 'in trade and commerce',³⁴ whereas the other line states that they must be understood in the concept of 'in trade and commerce' because no business that conduct any form of trade and commerce with the employees.³⁵ In the case of statements made in the course of public debate, such as films or advertisement, the court confirms the principle to determine these statement's character of being constituted 'in trade and commerce' depending on whether it was 'designed to advance or protect commercial interests of the exhibitor or publisher'.³⁶ The case law clarifies the feature of 'in trade and commerce' have played a significant role in determining the subject matter of the prohibition and help to enforce these consumer

³¹ Ibid, 61.

³² Ibid, 62. Bruce analyses the case of *Smolonogov v O'Briens* (1982) 43 ATPR 847, The Federal Court.

³³ Ibid, 63. Bruce analyses the case of *Argy v Blunts* (1990) 94 ALR 719, ATPR 51, 274.

³⁴ Ibid, 63. Bruce analyses the case of *Martin v Tasmania Development and Resources* (1999) 163 ALR 79; (1999) ATPR Digest 46–193

³⁵ Ibid, 65. Bruce analyses the case of *Fasold v Roberts* (1997) 70 FCR 489, ATPR 41–561 at FCR 490.

³⁶ Ibid, 65.

protection regulations in reality efficiently. It can be said that while the ACL's clear consumer definition has been quite successful in identifying the interested audience as a result of words using the technique, the substantive determinant of those who conduct the prohibition reflected through the judgments and analysis of the Australian judges is likely very vivid and persuasive.

Among the crucial factors constituting misleading or deceptive conduct are fault and intention. The TPA and the ACL do not have the specific regulatory requirement to prove these factors for impugned violation. Thus, it should also be made clear whether the breach of the consumer's right to information was carried out intentionally or not by way of application and analysis of the case laws. Likewise, determining the effect of conduct reflects the link between the behaviour and the state of mind of relevant person or class of persons, which manifest the cause and consequences of the violation.³⁷ In other words, determination of these factors means to define whether consideration of intention, an element of the structure of conduct, need to be essential. Australian judges have asserted through many case laws that it is unnecessary to prove intent when examining impugned conduct. The High Court does not recognise the requirement for intentional misrepresentation as a necessary element constituting an infringement.³⁸ Even for conduct by silence, it is essential to clarify that the person who constitutes conduct must fail to disclose information intentionally and deliberately. Such structural, behavioural approach seems to be appropriate as it is not readily proven; sometimes the demand for this element will even interfere with the application of the law. Likewise, a consequence caused by the conduct also does not need to be considered mandatory to conclude a violation. Consumer's redirection, under the influence of misleading or deceptive conduct, manifested through the purchase of the person instead of the others is not involved in the determination of whether the breach is facilitated. Conversely, the consequential loss or damage of the infringement will be considered as the basis of liability and compensation for consumers.³⁹

³⁷ Lockhart, above n 18, 94.

³⁸ Ibid, 90. Lockhart analyses the case of *Hornsby Building Information Centre Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; 18 ALR 639 at 647 per Stephen J; CLR 234; ALR 651 per Murphy.

³⁹ Ibid, 95.

4.2.2.3 What is Misleading or Deceptive?

Although the regulation on misleading or deceptive conduct in the ACL derives from the TPA, neither the TPA nor the ACL defines what misleading or deceptive conduct is. 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’. On the one hand, the conduct must mean ‘a meaning which is inconsistent with the truth’.⁴⁰ On the other hand, the misleading or deceptive behaviour must also lead to the consequences in the term of consumer’s perception, which is ‘lead into the error’ or ‘tendency to lead a person into error’.⁴¹ The definition of what is ‘likely to mislead or deceptive’ is also analysed to show that the concept is referred to as ‘a real or not remote chance or possibility regardless of whether it is less or more than fifty percent’.⁴² Meanwhile, some other arguments prefer to state that the term ‘likely to mislead or deceptive’ means more broadly that investigation of whether the conduct caused mislead and deception in a practical situation is unlikely necessary.⁴³

Also, consideration of whether misleading or deceptive conduct includes confusion or not and the difference between chaos and deception in misleading conduct law determines the content of prohibition. By analysing case laws, the commentators also conclude that proof of confusion, though it is a short but essential step,⁴⁴ appears as an evidential element for a deception.⁴⁵ The erroneous assumption doctrine was expressed by The Full Federal Court in *McWilliam’s Wines Pty Ltd v McDonald’s System of Aust Pty Ltd*. Considering misleading elements of representation applied in this case, the court explains that it is not a breach of the TPA art 52 and the ACL art 18 if the misunderstanding of consumers is not a result of the conduct, but a consequence of their own erroneous assumption.⁴⁶

The centrepiece of the process of characterisation of the impugned conduct is to consider that whether the conduct tends to confuse consumers when it is viewed as a whole. It is,

⁴⁰ Ibid, 85. Lockhart analyses the cases of *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 201 per Brennan J; *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 88, 55 ALR 25 at 30 per Powen CJ, Lockhart and Fitzgerald JJ.

⁴¹ Ibid, 85. Lockhart refers to the cases of *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 at (25) per French CJ; *ACCC v TPG Internet Pty Ltd* (2013) HCA 54; 304 ALR 186 at (39) per French CJ, Crennan, Bell and Keane JJ.

⁴² Ibid, 86. Lockhart refers the case of *Global Sportsman Pty Ltd v Mirror Newspaper Ltd* (1984) ATPR 40–463.

⁴³ Svantesson, above n 20, 19.

⁴⁴ Lockhart, above n 18, 89.

⁴⁵ Ibid, 88.

⁴⁶ Ibid, 109.

therefore, essential to examine the context of the conduct to discover the signs that satisfy the structure of the offense. Collin Lockhart distinguishes between internal context and the external context in which he asserts some elements that cannot be ignored when considering the context of the violation. By citing judges' comments from law cases, Collin states that it is impossible just to pick a few words when discussing the infringement of words while ignoring other words that also contribute to its concept.⁴⁷ Likewise, statements in negotiations, words of brochures or other forms of promotion such as advertising are reviewed in their entirety or the context of the whole document.⁴⁸ While the internal context requires a comprehensive understanding of the nature of the conduct, the external context is considered from the external objective aspects in which the conduct influences. The elements of the outer concept are focused including medium, the size of the target audience, the audiences which the conduct is directed, the pre-existing relationship between the alleged contravention and the victim, the habits and characteristics of the market where the conduct engaged associated with several other factors.⁴⁹ Judges often focus and examine the offending elements of impugned conduct from the perspective of their impacts to community in general, and then isolate the characteristic features of the group audience that the conduct may target and consider whether the prohibited elements are included in such conduct.⁵⁰ Identification of the specific characteristics and knowledge of a target audience group will be an essential tool for judges to determine the suitability of the impugned conduct with these characteristics to conclude whether they can cause this group a confusion and deception. In the case of behaviour directed at the general public, or in other words, when a determination of a specific purpose for a particular audience group cannot be made, a conclusion of whether conduct becomes an alleged contravention would be impossible if only some people are confused under the conduct's influence.⁵¹ With case laws, judges analyse elements in particular cases in which external context will not be from any class but directly relates to the individual. Through case laws, factors considered have been supplemented by judges, including the nature of the parties, the character of their transaction and their conversations which can attribute to the information they know.⁵²

A process of making a case decision relating to misleading or deceptive conduct has been outlined in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40–303. It is

⁴⁷ Ibid, 96.

⁴⁸ Ibid, 97.

⁴⁹ Ibid, 100.

⁵⁰ Ibid, 101.

⁵¹ Ibid.

⁵² Ibid, 100.

a four-step test: 1) determining the relevant sections/sections of the public; 2) considering the characteristics of the hypothetical individual from the group of the relevant section relating to their knowledge and understanding such as their intelligence, education, age of men and women; 3) The test of internal elements, in which the inner context analysis is performed with the note that neither someone mistaken/cheated nor actual damage must be required; 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.⁵³

While steps 1, 3 and 4 are almost uniformly applied in cases, the second step of identifying consumer misconceptions differs from the point of view in some cases. In the course of this test, the analysis of the judges in recent cases tends to favour the selection of ordinary or reasonable members in the section of the public at large. However, there have been different views in some cases from identifying the necessity of whether some people or hypothetical individuals are mistaken due to the conduct's consequence. There is the argument that it is necessary to examine the reaction of ordinary or reasonable members of the class to whom the representation is directed,⁵⁴ while other judges state that a requirement of a significant number of members in a specific area being misled is unnecessary.⁵⁵ According to His Honor, it would be sufficient for the court to require only a hypothetical individual from the determination section of the group have been likely misled by the conduct.⁵⁶

The process of considering the audience factor as part of the external context in Australia also has many theoretical approaches. While legal considerations in many cases are thought to be normative and abstract in the way to determine the reasonable member of the target audience, other cases tend to seek to concretise the factors based on the facts of the case. There are two approaches to this practice which the High Court recognised as a pragmatic approach and a context-based approach. Accordingly, applying a pragmatic approach that adheres to the actual factors of a specific case is to consider the subject affected by the alleged breach. The recent case of *ACCC v TPG Internet Pty Ltd* decided by the High Court applied the pragmatic approach. In this case, the judge adopted a standard based on a

⁵³ Svantesson, above n 20, 19–20.

⁵⁴ Ibid, 19. Svantesson refers to the case of *Seven Network Ltd v News Interactive Pty Ltd* [2004] FCA 1047; 63 IPR 28.

⁵⁵ Ibid, 20. Svantesson refers to the case of *Campomar Sociedad v Nike International Ltd*. [2000] HCA 12; 202 CLR 45; 169 ALR 677.

⁵⁶ Ibid.

hypothetical individual's more care for goods and services, namely their substantial purchase in mind focused on the subject matter of their shopping in the showroom they had come.⁵⁷ Meanwhile, a context-based approach was illustrated in *Butcher v Lachlan Elder Realty* and *Miller & Assoc Insurance Broking Pty Ltd v BMW Aust Finance Ltd*, defining the standard of care issue of specific individuals. This standard is based on the success or failure of making reasonable inquiries of an experienced and professional party in a commercial transaction regarding misleading failure to disclose or not.⁵⁸

Collin Lockhart mentions that the process of identifying whether alleged conduct is a violation of prohibition consists of three factors: 1) it is necessary to define whether the impugned conduct was engaged in; 2) it is necessary to determine what the impugned conduct/s was meaning; 3) examination of whether the alleged act was misleading or deceptive. This process primarily identifies three fundamental issues: the existence of the conduct, the violation of the prohibition and the actual consequences of the conduct.

At the stage of defining the first factor, one of the analytical techniques for concluding this kind of case in Australia is the application of similar fact evidence. In the process of proof, the courts consider identical fact evidence, provided that 'it raises, as a matter of common sense or experiences, the objective improbability of some events having occurred other than alleged'.⁵⁹ This method applies to the examination of whether similar fact evidence provides 'striking similarity', 'unusual features', 'underlying unity' and 'system or pattern'⁶⁰ between impugned conduct and the actual evidence to conclude that whether the alleged conduct could be against the prohibition. Elements used to determine a similar fact evidence include 1) opportunities for which the conduct may cause misleading, 2) similarity and difference between impugned conduct and the conduct related to similar fact evidence, 3) the significant distinction between the situation of supposed breach in which the consumer is affected, and 4) the time elapsed between each statement of the conduct. This technique is in the form of looking for negative elements to exclude in which the exclusion would be the condition of deciding the violation. It may be said that the use of similar fact evidence is likely an additional expression of the widespread use of excluded methods along with an argumentative technique for case decision about misleading conduct in Australia. The application of such exclusion technique cannot eliminate the involvement

⁵⁷ Lockhart, above n 18, 108.

⁵⁸ Ibid.

⁵⁹ Ibid, 114.

⁶⁰ Ibid.

of factors related to the presumption of a contravention. However, they keep the analysis as objective as it can be.

In the process of identifying the second factor, the analysis of the definition of misleading and deceptive element is ultimately determined by case law. It is essential to decide on the meaning of statements, and judges put a lot of effort into identifying what constitutes the semantics of the statement, then determining the confusion of its meaning. They are considered to be surrounding circumstance evidence, including 'habit and attitudes of the conduct's the target audience, relevant marketing techniques in common use, the setting in which person is likely to be exposed to the conduct and the target audiences' understanding of a particular designation of commercial origin'.⁶¹ Also, the multiple meaning of conduct is always taken into consideration, rather than focusing on a single manifestation that is likely to cause misleading. When a statement has more than one sense that tends to violate the prohibition, it can be considered a contravention, as well as the conduct directed at the public conveying a misleading meaning to a significant number of people (regardless of whether they are misled or deceived or not), are also likely to violate the prohibition.

4.2.3 Specific Protection Relating to Misleading or Deceptive Conduct in the ACL

The ACL ch 3 pt 3.1 div 1 provides some specific prohibitions. This section contains 37 articles detailing the forms of conduct and the provisions of an application to information providers. Compared to the general protection, the behavioural patterns appearing in this section with three new features, including those explicitly listed for each form of conduct, named directly as a 'representation' and characterised as 'false and misleading' instead of the term 'misleading or deceptive' as mentioned in the general protection.

Among these three characteristics, the first is the performance of the task of a particular legal framework for consumer information protection. The false and misleading conduct are categorised in subdivisions 29 to 37 inclusive of false or misleading representations about goods and services, about sale etc. of land, relating to employment, as to the nature etc. of goods, about certain business activities and some other particular forms such as

⁶¹ Ibid, 117. Lockhart refers and analyses the cases of *WEA International Inc v Hanimex Corp Ltd* (1987) 17 FCR 274 at 280, 77 ALR 456 at 462 per Gummow J (Fed Ct); *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 388, 111 ALR 577 at 618 per Gummow J (Balck CJ and Lockhart agreeing); *Netcomm (Aust) Pty Ltd v Dataplex Pty Ltd* (1988) 81 ALR 101 at 105 per Gummow J (Fed Ct); *QDSV Holdings Pty Ltd v TPC* (1995) 59 FCR301 at 311, 131 ALR 493 at 502 per Sackville J (Full Fed Ct); *Horgan v Pacific Dunlop Ltd* (1988) 83 ALR 403 at 234 per Gummow J (Fed Ct); *Thai World Import and Export Co Ltd v Shuey Shing Pty Ltd* (1989) 17 IPR 289 at 296; (1990) ATPR 40–988 per Gummow J (Fed Ct).

offering rebates, gifts, prizes etc., and wrongly accepting payment. The regulations in this section may well be the significant effort by Australian lawmakers to enumerate fully and in detail the types of behaviour and the types of misleading information that cause consumers confusing in commercial transactions.

About the new term appearing in the specific protection section, the word 'false' in this section is defined as 'contrary to fact' and does not require the deliberation of the person making the representation.⁶² Thus, the use of the word 'false' in the same way of using the term 'misleading or deceptive' as in the general protection does not make any difference in the application of the law. However, the form of conduct as a representation, which is given by the expression 'a statement, made orally or in writing or by the implication of words or conduct',⁶³ does not cover all the types of behaviour as described above. In *Henjo Investment Pty Ltd v Collon Marrickville Pty Ltd*, Lockhart states that misleading or deceptive conduct includes representations primarily whether by express or by silence, but it is erroneous to conclude that they have limited expression only in some forms of representation. Further, the Full Federal Court in *S & I Publishing Pty Ltd v Australian Surf Life Saving Pty Ltd* stated:

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...

Also, in *Henjo Investment Pty Ltd v Collon Marrickville Pty Ltd*, the term used in the law required courts to investigate the impugned conduct irrelative to whether it is representational in character to define whether it constitutes a breach.⁶⁴

Thus, despite including conduct by silence as a form of representation, judges assert that misleading or deceptive behaviours not only include representation forms but possibly other forms. These forms are not indicated by enumerating, but they exist as a result of an extrapolation to make conclusions in situations where the law must be interpreted as such. The extrapolation has been formally admitted as one of the ways that help judges to decide on dispute resolution without hesitancy when, as Hayner states, 'there is no little danger in attempting to extrapolate from the decided cases to a rule of general application'.⁶⁵ Such

⁶² Australia and Russell Victor Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia Limited, 2017) 1583.

⁶³ Ibid.

⁶⁴ Lockhart, above n 18, 52.

⁶⁵ Ibid, 126. Lockhart analyses the case of *Google Inc v ACCC* (2013) HCA; 294 ALR 404 at (100).

prudence is necessary because the task of the judge is to dig deeply into the nature of prohibition while the external manifestation of the pattern of conduct is unlikely always identical to the kind of its content.

However, this may have been ignored by the ACL when the norm ‘representation’ is used to name the form of prohibition in specific protections at ch 3 pt 3.1 div 1. Consequently, it may cause limitation of the impugned conduct conquered by the ACL. It can be likely understood that the behaviours not considered as a representation are implicitly regulated only in the general protection. However, in the circumstances to be construed as explained, should the ACL add to the general protections a statutory provision that indicates such distinction?

This thesis argues that conduct by silence is also representative of the negative dimension of the conduct. Regarding its nature, the interactions and information of behaviour by silence carry the same meaning as that of action, though their external appearance is the opposite. However, conduct by silence conveys information in the direction of reception available for consumers to refer that information is understood as absent, which means that the representation of conduct by silence itself still exists. Therefore, conduct by silence should be taken is also a form of representation. As a result, it is precisely for the specific protection provisions against misleading or deceptive conduct designed in the ACL known as representations.

The legislative achievement that the ACL has attained in the protection of consumer right to information lies not only in the designing specific types of behaviour listed in this section. The significant point is that thanks to the regulatory technique applied for the general prohibition section along with the use of words allowing flexible manipulations of specific protections, the ACL can cover potential breaches that are not listed in particular provisions. This advantage is more effectively implemented through the use of case law in the common law country.

The most vivid instance of this is the ability to handle violations constituted in the form of conduct by silence and intermediary involving the relaying of information which is a behaviour done by performing a particular action as categorised by Stephen G Crones⁶⁶ or acts and omissions as classified by Collin Lockhart.⁶⁷ Crones clarifies two broad categories

⁶⁶ Crones, above n 19, 100.

⁶⁷ Lockhart, above n 18, 95.

of the form ‘silence’, silence alone or mere silence and half-truth. Accordingly, ‘silence in isolation’ is a form that the defendant did not disclose information where it should be, while half-truth is defined as the type of representation that provides information to be true on its face but causes misconception to consumers due to the other information concealed by the defendant. This form of conduct is described as ‘while the information is true on its face, it misrepresents the true state of affairs because of what it is unsaid’.⁶⁸ It is noteworthy that the form ‘the literally true of fact to misleading or deceptive’ has been applied very early in cases concerning this prohibition of the TPA,⁶⁹ where judges stated that ‘factually correct statements are, in truth, likely to create false impressions’.⁷⁰ These types of infringements are easily overlooked when prohibition regulations could not 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.

4.3 Differences in the Regulations Against Misleading or Deceptive Conduct Between the ACL and Vietnamese Laws

The overall and most essential difference in the regulation of misleading or deceptive conduct between Vietnam and Australia is the structure and designation of statutory provisions. In Australia, except for the consumer protection in banking services,⁷¹ all of the regulations relating to the protection of the consumer’s right to information are in the ACL, while in Vietnam these temporary regulations are not solely in the LCP but scattered across many different laws. This distinction is the reason for the other differences which, in turn, are responsible for the gaps and weaknesses in the legal system that protects consumers’ right to information in Vietnam. Further, as discussed above, these additional regulations in various Vietnamese laws are not linked by an appropriate reference that should have accompanied the LCP.⁷² Thus, while the structure of the ACL, in terms of protecting consumers’ right to information, provides an impression of professional regulatory techniques, this is seen as lacking in the unclear and scattered provisions in Vietnamese legislation. These differences may lead to a lack of efficiency in the protection of consumer rights in Vietnam for a number of reasons.

⁶⁸ Corones, above n 19, 100. Corones refers to the case of *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*.

⁶⁹ Lockhart, above n 18, 127.

⁷⁰ *Ibid*, 127.

⁷¹ Consumer protection regulation in relation to financial services is regulated by Commonwealth of Australia, *The Australian Securities and Investments Commission Act (2001) (Cth)* (2001).

⁷² See at page 119, paragraph 1, section 4.1.1.

First, from the perspective of structure, the LCP does not contain general protections formed with a general prohibition against misleading or deceptive conduct as distinguished from specific protections (as designed in the ACL). Such general protection is extensively designed in the ACL, with the use of terms such as ‘engage in conduct’, ‘in trade and commerce’ and ‘misleading and deceptive’. The method of these terms establishes the necessary foundation for identifying the constituent signs of infringement, thereby avoiding the possibility of missing some forms of a breach in practice. The general protection of the LCP, instead of defining a general ban as in the ACL, merely asserts the protection of the consumer’s right to information. Consequently, the LCP has forfeited the opportunity to identify the most common elements that underpin the prohibition that should have been built into the general section, or at least into a general prohibition article. The part needed to identify the breach of the consumer’s right to information also cannot be found in other acts that supplement the LCP. Because of this lack of general protection, it is difficult to see the most important factors as presented in the ACL that underpin the theory and practice of enforcing consumer information protection in the legislative system of this area in Vietnam. As a consequence of the lack of such elements as those established in the ACL, the two vital signs of identifying the contravention are missing from Vietnamese legislation—these are factors that determine the subjects and the forms of conduct’s performance. More specifically, the signs of identifying the subject are also aimed at the ultimate purpose of defining the types of conduct and the characteristics of the ability to constitute misleading or deceptive conduct.

Also, a noteworthy feature of the LCP’s structure is that the lack of a general prohibition provision could lead to systematic legislation against misleading or deceptive conduct in the LCP focusing only on misleading information, not on the conduct transferring misleading information. As such, the information, a material of conveying the confusion, is centred, while the ways by which the contravention constituted are ignored. Meanwhile, the ACL has accurately called the name of forms of conduct under ‘representation’,⁷³ and from this basis, it has defined many types of conduct based on the characters and expression of representation. The concept of representation is not used in the LCP, the result of which is the subtle forms of misleading or deceptive conduct are not conveyed adequately in the law. This makes a clear distinction between the LCP and the ACL, as Vietnamese

⁷³ *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*. ch 3 pt 3.1 div 1 regulates unfair practices in the specific protection section.

lawmakers focus on information relating to products and the Australian legislative agencies emphasise the presentation as to goods and services.

However, when considering information as the object to be used to mislead the consumer, the requirement for examining the characteristics, nature, and forms of information should be focused. To address issues related to the condition of information as a significant tool to enhance consumer's welfare, the ACL provides the specific part called information standards in the regulation of the particular protection. Accordingly, the information standards of goods, services, declaring information standard and supplying products not complying with information standard are specified in this section.⁷⁴ In addition, in the specific protection section of the ACL, the statutory provisions specifying the forms of false, misleading presentation also list misleading elements of information in a much more detailed manner than in the LCP. Compared to the ACL, even concerning information that is likely the most prominent part of the LCP's regulation in this area, the LCP still lacks many of the rules governing some other categories of misleading information and the law on information standard as designed in the ACL.

Second, the forms of breach found in the LCP are not relatively adequate due to missing many of expression of contravention of the consumer's right to information. The specific protection section of the LCP has the article that admits consumers' right to information and another article that regulates only two forms of conduct including misleading advertising, and the rest of breaches related to providing misleading information about goods and services constituted by the enterprises. These conducts may be listed including all forms of disclosing information related to the sale of products. However, types 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, there are a variety of types of conduct that should be prevented from breach of misleading and deception. Its richness manifests itself in the subject aspect, the mode of expression and even the inaction of conduct. By the regulatory technique and the structural design along with digging layers of their meaning deeply through the case law, the ACL can discover and examine the forms of conduct that are listed by their name of the articles in the specific protection section. Clearly, the abundance of breach cannot be conveyed only with a provision in the LCP specifying the form of conduct along with some other complementary laws which are just faint additions to the rules of the LCP.

⁷⁴ Ibid, pts 3–4.

It is possible to list many of the forms of violations not covered by the LCP, but they are entirely present and listed directly under the name of the subdivisions of the specific protection section of the ACL. They are enumerated in the text of the ACL such as disclosed, half-truth, misleading conduct relating to employment, false or misleading representations about a sale, etc. of land, or they are analysed through cases. One of the forms of conduct that is not mentioned in the LCP is silence, not disclosing information that should be provided to consumers. As discussed above, the Law on Quality refers only to the prohibition against concealing information about the possibility of causing loss of safety of goods. Such a regulation misses many other types of information related to product and transaction that must be disclosed by sellers. Meanwhile, the type and amount of information about particular products and services that traders must provide to consumers are set out as information standard in the ACL cl 134.⁷⁵ With the technique of using overarching prohibition in the general protection section and then specifying forms of conduct, the ACL maximises its coverage capacity, avoiding omissions that can occur in a very diverse commercial practice. In the case that the LCP or other related Vietnamese laws attempt to enumerate specific breaches against the consumer's right to information, it is impossible to exclude the possibility that new forms of conduct may emerge due to the rapid change and development of the market. Thus, the substitution of an overarching prohibition provision by a general article affirming the right is the option containing many of the inadequacies that need to be overcome in the LCP.

4.4 Regulations on Misleading Advertising in Vietnam and Australia

Among misleading or deceptive conduct, misleading advertising could be a concern with the importance and sensitivity of consumer information and increasingly a key issue in consumer protection relating to organisational communication.⁷⁶ Researchers have argued that advertising not only performs information enrichment functions, but it also does not cost consumers to buy information. The cost of collecting information to consumers is normally greater than the difference as advertising costs are added to the actual price of the product.⁷⁷

⁷⁵ 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.

⁷⁶ OC Ferrell, 'Business Ethics and Customer Stakeholders' (2004) 18(2) *Academy of Management Perspectives* 126, 127.

⁷⁷ Blakeney and Barnes, 'Advertising Regulation in Australia—An Evaluation' (1982) 8 *Adel L Rev.* 29, 33.

However, advertisers use information as a tool and convey information by the variety of ways to reach the goal of encouraging consumers to buy their product. Thus, the information that the advertiser uses is selective, incomplete⁷⁸ and often confusing as it is unlikely used in its entirety but to a certain extent of its terms. As such, advertising becomes noticeable among misleading behaviours due to its ability to provide the most information, and this same characteristic, in turn, also becomes the second element of advertisement exposure. The focus is that it contains the risk of the confusing consumer with misleading information and having a bad impact on a consumer's purchasing decision. This is partly why this issue is analysed in a separate section in this thesis.

Advertising has been selected for examination as a typical misleading behaviour for comparative analysis between the Vietnamese law and Australian law on the protection of consumer right to information since the characteristics of the Vietnamese regulations relating to this area are essentially expressed. In other words, the shortcomings and weaknesses in the legal regime of the misleading or deceptive conduct of Vietnam law are seen easily and clearly in the regulations on advertising. This section also showcases many embarrassing gaps in Vietnamese law that should be reformed by seeking the legislative techniques of a developed country as a reference. Thus, the similarities and differences in misleading advertising between the two law systems—the sharpest points in the two regulatory systems—enable this thesis to identify solutions to the legal reform in Vietnam in the field of protection of consumers' right to information.

Also, the specific feature of the construction of laws involved in the advertising could be another reason for selecting advertising for analysis. According to Petty, the development of advertising law is based on the legal characteristics simulated from each other among countries pursuing different legal traditions. Petty states that countries are more likely to consider and refer to the practice of advertising legislation in other countries, rather than to develop this legal field based solely on their legal and social traditions.⁷⁹ As a result, the law on advertising, particularly regarding protection of consumer's right to information, has a relatively large degree of openness and flexibility through which developing countries could refer to experiences from developed countries with longstanding consumer society to establish appropriate legal reform. The researcher selected this analysis in the hope that this possibility applies to Vietnam.

⁷⁸ Ibid, 55–56.

⁷⁹ Ross D Petty, 'The Law of Misleading Advertising: An Examination of the Difference between Common and Civil Law Countries' (1996) 15(1) *International Journal of Advertising* 33, 45–46.

4.4.1 Regulations on Misleading Advertising in Vietnamese Legislation

4.4.1.1 Overview

Vietnamese law does not place the regulations for the protection of consumers' right to information in the field of advertising in an unfair trade practice act. They are not included in the LCP as they are in the ACL. As previously discussed in previous sections, the LCP has only two provisions on misleading or deceptive conduct, in which misleading advertising is referred to only as one of two general forms of the conduct.

In the above analysis, the nature of the LCP art 10 was clarified as specific protection of right to information and also undertaking the duty of listing the forms of conduct and types of misleading and deceptive information. Thus, as a part of art 10, misleading advertising is inevitably image and not subject to appropriate regulation. The adequate part of art 10, which also clarifies for misleading advertising, is to enumerate the types of information that may be confusing to consumers.

Also, except for art 10, there are no provisions in the LCP specifying misleading advertising. As discussed previously, Vietnamese lawmakers apparently admit that forms of advertising prohibited in practice are not governed in the LCP, necessitating referral to other relevant laws. Thus, with a similar application of the general regulations against misleading or deceptive conduct, research on misleading advertising in Vietnam also needs to examine many of the regulatory provisions in this area in other relevant laws. Accordingly, misleading, false advertising is also found in other statutes including the Commercial Law, Competition Law, and Advertising Law.

The provisions against misleading advertising in these laws support the protection of right to information of consumers in the field of advertising in Vietnam. From the perspective of the mission of law, although these laws are closely interrelated, they do different tasks. The differences in functions between them show the difference in their approach to consumers' right to information in advertising. Accordingly, while the anti-misleading advertising regulation in the LCP must give priority to the protection of the consumer, the Commercial Law focuses on the rights and obligations of parties in commercial transactions in the field of advertising.

The task of the Commercial Law in protecting consumers is usually defined only as an adjunct to the regulations regulating the commercial activities of traders; however, in the

Competition Law, consumer protection has a more precise and more significant position. In the view of the Competition Law, consumers play a role as a participant in the market, a unique member who was directly influenced as well as being the aim to achieve by businesses in competition. Consumers protected in the Competition Law are not only in their interests but also guarantee the fairness and freedom of competition in the market, which is also the purpose of enhancing the welfare society.⁸⁰ Therefore, when viewed through the lens of the Competition Law, the consumer's right to information is not only as a tool to make maximised-benefit decisions of purchasing goods and services. Moreover, the value of the protection of consumer information right also means protection of consumers' freedom of choice in the diversity and abundance of goods and the competitive market. Consumers' freedom of choice may be affected in cases traders try to influence consumers' purchase by their psychological characteristics instead of providing information about goods and services. This is an extension of the forms of supply of information to consumers that potentially harms consumers' freedom of choice and impedes free competition.

In general terms, regulations prohibiting misleading advertising in the Vietnamese legal system can be divided into two groups—the group focusing on the categories of the misleading information used in advertising and the group prohibiting specific ways that constitute misleading advertising by businesses. Accordingly, the information considered misleading or confusing contained in advertising is banned, and the method of using direct comparison is prohibited. Therefore, the next section will analyse the anti-misleading advertising regulations in Vietnam in two parts to address these two groups. After the analysis of anti-misleading advertising legislation in the ACL, this thesis will point out (in Section 4.4.1.3) the shortcomings and gaps of the limited forms of misleading advertising.

4.4.1.2 Advertising Containing Misleading Information

In Vietnam, the prohibition against advertising containing false, misleading information is affirmed in laws such as the LCP, Commercial Law, Competition Law, and Advertising Law. In particular, art 10 of the LCP provides a brief description of misleading advertising in the same content as other forms of misleading or deceptive conduct relating to information on goods and services as follows:

⁸⁰ Christopher Decker, 'Concepts of the Consumer in Competition, Regulatory, and Consumer Protection Policies' (2017) 13(1) *Journal of competition law & economics* 151, 151.

The 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.

As can be seen, misleading advertising is simply named without any clarification of which elements constitute the type of conduct. Meanwhile, the factor of misleading information is well described and listed its characteristics and classification. Thus, although the LCP is the basic law in the field of consumer protection, in terms of protection of the consumer's right to information relating to advertising, it can only be referred to in some limiting certain types of disputes by the courts. The remaining contraventions against the right to information of consumers are supplemented by other relevant statutes, including the Commercial Law, Advertising Law, and Competition Law.

Commercial Law, the most longstanding of the three laws, regulates as follows:

Enterprises are prohibited: False advertising as to one of the contents of quantity, quality, price, utility, design, origin, type, packing, a way of service and warranty period of goods and services.

The Advertising Law art 8.9 states:

Enterprises are prohibited: False or misleading advertising as to ability of the organization or individual to trade in products, goods or services, to provide products, goods or services as to quantity, quality, price, utility, design, package, trademark, origin, type, service mode, warranty period of goods and services.

For the purpose of analysing the provisions of these laws, it is possible to see their complementarity to clarify two information objects that may mislead the consumer including information about goods, services, and information related to manufacturers and suppliers of goods and services. Thus, the provisions of the two laws contain more specific elements explaining the concept that the lawmakers referred to in the LCP art 10. However, defined similarly to the LCP, the provisions of the Commercial Law and the Advertising

Law that govern false or misleading advertising also limit the extent to which information can be misleading but do not specify particular types of conduct causing misleading. General characteristics of the category of information to be addressed are the goods, services and the suppliers of goods and service. As discussed above, Vietnam's consumer protection law does not have a general protection clause established by a general prohibition article. Thus, the inclusion of potentially confusing categories of information is prohibited in the LCP, and the two laws could become dangerous as they will confine potentially violated information only in the form of information listed by these laws. Fortunately, the risk has been remedied by the advertising regulations in the Competition Law.

The only exception is having the possibility of upholstery, which limits the omission of information elements that can be misused by the business to mislead consumers as the Competition Law art 45 cl 3 pt (c) thanks to the prohibition of 'other misleading or deceptive information':

Enterprises are forbidden to carry out the following advertising activities: Issuing false or misleading information to customers on one of the following contents:

- a/ Prices, quantities, quality, utilities, designs, categories, packing, date of manufacture, use duration, goods origin, manufacturers, places of manufacture, processors, places of processing;
- b/ Usage, mode of service, warranty duration;
- c/ Other false or misleading information.

With the exclusion rule specified in art 45.3(c), the Competition Law is a useful addition to the LCP's regulations in this area. This provision paves the way for the opportunity of alleging infringement of consumers' right to information as a violation of both the LCP and the Competition Law. It is also open to the possibility of not missing out on complex information types may appear in the reality of sharing economies.

The most common form of advertising that involves the use of information in advertising is puffery. Vietnamese laws do not allow business to make puffery unless the business proves that the information they assert, even if it is an exaggeration, is true in scientific documents. Specifically, the provisions of the Advertising Law exclude the use of terms such as 'best', 'unique', 'the best', 'number one' or words with similar meaning as provided in the Advertising Law art 8.11:

Prohibited acts in advertising:

Advertising used the words ‘best’, ‘the best’, ‘unique’, ‘number one’ or words with similar meaning without legitimate documents proving so as prescribed by the Ministry of Culture, Sports, and Tourism.

This provision of the Advertising Law expresses that Vietnam does not accept puffery—an exaggerated, fanciful form of advertising—unless the goods or service provider can demonstrate what they describe. The widening of the scope of prohibited words through a ban on ‘words of similar meaning’ may limit the use of other words with the emphasis on the product superiority. This rule seems to be quite strict for businesses because exaggeration in advertising has long been familiar to the public and seen as its characteristic. With this strict ban, regulations governing advertising in Vietnam seem to be moving in the direction of limiting information flow, rather than increasing the amount of information to consumers.

Although advertising violations are considered popular in Vietnam, the number of cases handled by courts and administrative bodies is quite small. However, some typical cases clearly show the gaps in the legal regulations in Vietnam in this area. Panasonic’s advertisement of Envio I2 and Envio P2 air conditioners could be a typical case in this field.

Panasonic Vietnam launched the advertisement of their new air conditioners Envio I2 and Envio P2 on November 14, 2008. According to this advertising, the new air conditioner Envio I2 and P2 are not only active cooling, saving up to 50% of power consumption, but also having excellent air filtration and purifier 99% removal of bacteria, virus, and mold. Also, Panasonic also launched a new refrigerator product that, as its advertisement showed, has the feature of enhancing vitamin content of food up to 12%.⁸¹

Since these advertisements were suspected of violating the Competition Law and Advertising Law, the Competition Administration Department issued an investigation decision No. 50 / QD-QLCT on April 22, 2010. The investigation outcome showed that the feature of the "inactivation of 99.9% of bacteria and mold" is not real because Panasonic

⁸¹ Linh Ha, “Analyzing a case of unfair advertising” (*Phan tich mot truong hop quang cao canh tranh khong lanh manh*), Prezi (online) (15 December 2018) <https://prezi.com/yqo6w6yt6rk0/phan-tich-vu-viec-quang-cao-nham-can-h-tranh-khong-lanh-manh/>

tested antibacterial effects against only two strain Staphylococcus and Escherichia Coli which could kill all viruses and bacteria as implied in the advertisement. For refrigerator advertising, the test results provided by Panasonic only apply to vegetables, not for all food.

On June 16, 2010, the Competition Administration Department issued Decision No.66/QD-QLCT sanctioned Panasonic Vietnam Co., Ltd. with an amount of VND 30 million for the violation of the Competition Law, article 45.3.

This case is considered typical misleading advertisings that lead consumers to errors in Vietnam. Panasonic made an unclear presentation on the quality of the products in order to direct consumers to misrepresent the advertised products. This form of half-truth is within the scope that the ACL can cover to eliminate the violation of consumers' rights to information. However, this conduct is not explicitly regulated by the LCP but must be referred for handling from the Competition Law. Due to the lack of a general prohibition clause and Article 10, the LCP only focuses on misleading information rather than a method of making a representation; a half-truth is not included in the form of conduct. Applying the Competition Law to handle in this case could be a temporary use, especially in the case that the LCP does not contain legal provisions to refer to the application of the Competition Law in Consumer Law as analysed above.

4.4.1.3 Regulations Against Comparative Advertising

In addition to the prohibited types of information and words, some forms and content of advertisements in Vietnam are banned under the Advertising Law and Competition Law.⁸² Among the advertising prohibited, comparative advertising is directly related to the consumer's right to information in the field of advertising.

Comparative advertising is recognised as a good way to increase consumer information by allowing consumers to evaluate the performance of the product in comparison with another

⁸² Prohibited advertising is detailed in the Advertising Law art 8 such as advertisements that (1) reveal the state secrets, harm the independence and national sovereignty, national defence, and security, or use advertisement inartistically, contrary to Vietnam's history, culture, ethics and traditional customs, or (2) degrade the respectability of the national flag, the national emblem, the national anthem, the Party's flag, national heroes, cultural celebrities, the leaders of the state and the party, advertisements that express racial discrimination, sexual discrimination, prejudice against disabled people, or (3) violate the freedom of belief and religion, or (4) use advertisements that offend the prestige, honour, and dignity of other organisations and individuals, or (5) affect the urban scenery, the traffic safety and the social order.

to assist in the making of better-informed consumer choices.⁸³ The amount of information that comparative advertising offers to consumers is more than that of conventional advertising as it addresses the characteristics of many product objects. Also, with the broad publicity of advertising, comparative advertising has a great impact on consumers. It gives consumers the opportunity to choose good products by showing the product's outstanding features. A comparison of the product characteristics that a comparative advertisement offers consumers is always about the influence of the psychology of the superiority of the product being compared. Comparative advertising helps consumers save time and effort to select the best product in the increasingly diverse product market. Thus, from a consumer perspective, comparative advertising brings many benefits while in the course of business activity, comparative advertising facilitates businesses to inform their advantages to consumers and helps businesses distinguish them from the unique identities of modern markets.⁸⁴ Comparative advertising, therefore, is a preferred way of promoting products, especially after business applies the technological innovation to create competitive advantages that increase more benefit for consumers.

There is no denying the importance and benefits that comparative advertising can bring to consumers in terms of information. Comparative advertising, however, also implies a high risk of a situation which any state that values the efficiency of the market needs to consider. There are two main reasons why comparative advertising is always taken into account when governed by the legislative system of many countries. The first is that comparative advertising has a higher potential for the misleading use of information in comparison with other forms of advertising.⁸⁵ In comparative advertising, a business will refer to at least two products and provide information on the characteristics of these products in a comparative concept. The greater the information content and the subject of the information in competition are, the more likely that misleading information will be used. Comparative advertising, therefore, is one type of conduct that is easier to violate the regulation of consumer right to information if it satisfies all the components of the breach in this area. Thus, in this case, comparative advertising is also the form of advertising using false, misleading information prohibited by the general ban to protect the consumer's right to information.

⁸³Gheorghe Orzan et al, 'The Protection of the Consumer's Rights Regarding Online Misleading and Comparative Advertising in the Context of The European Union Strategy' (2014) 2 *Annals-Economy Series* 13,16.

⁸⁴ Ibid,16.

⁸⁵ Mark Armstrong, 'Interactions between Competition and Consumer Policy' (2008) 4(1) *Competition Policy International* 97, 133–134.

The second cause is attention and consideration, which is the risk of comparative advertising potentially causing unfair competition in the market. The comparison that businesses use in advertising is susceptible to being exploited in subtle ways, for example, by offering comparative links which can implicitly exploit a competitor's reputation or the very act of giving false information damages the reputation of a competitor. Such comparative advertising is unfair trade practice, causing direct harm to the business of the product being compared and distorts the proper functioning of competition in the market. Such unfair comparative advertising is subject to competition law in the performance of its duty to safeguard the freedom and health of competition. Consumers will eventually suffer the consequences of distorted competition once the competition is affected by unfair advertising.

Since comparative advertising serves a great value in providing information and at the same time owe a potential for confusion of information for consumers, businesses and effective competition environment, legal systems in countries have designed various adjustment options during their legal history. While the US has allowed and encouraged comparative advertising since the early 1970s, European countries have only legitimised comparative advertising in 1997, provided that comparative advertising is not considered unfair competition conduct.⁸⁶ In general, most countries recognise the importance of comparative advertising in promoting competition and improving access to information for consumers. Clarification to remove harmful comparative advertising is a task set for lawmakers with the goal of balancing the benefits and possible negative effects of such behaviour. Comparative advertising is, therefore, permitted in most countries accompanied by the necessary prudential requirements in construction of consumer protection law and competition law.

However, in Vietnam comparative advertising is strictly prohibited under the Competition Law and Advertising Law. The provisions of these two laws almost exclude the possibility of comparative advertising being used by a business without the act being considered illegal. The Competition Law stipulates this controversial prohibition that is also applied consistently in Vietnam as a supplement to the LCP: 'Enterprises are forbidden to carry out the following advertising activities: comparing their goods, services directly with those of the same kind of other enterprises'.⁸⁷ Accordingly, Vietnamese lawmakers prohibit

⁸⁶ Orzan et al, above n 83, 15-17.

⁸⁷ *The Competition Law 2004 (Luật Cạnh tranh)* (Vietnam National Assembly), art 45 para 01.

enterprises directly comparing their goods and services with the same kind of products of other businesses. The ban on comparative advertising is more specific in the Advertising Law, including the following restrictions:

Advertising using the direct comparison of the prices, quality and efficiency of their products, goods, and services to that of the other's products, goods, and services of the same kind.⁸⁸

Both the Competition Law and Advertising Law explicitly prohibit the direct comparison of goods and services concerning the characteristics listed in the regulations. As such, not all comparative advertising is prohibited in Vietnam, only advertising using the new direct comparison method is prohibited. However, there has been no rules or judge's comments currently that explain what 'direct comparison method' is and how it is determined. According to the practice of dispute solving in Vietnam, the court and the Vietnam Competition Authority applies the most common definition of the words in the context of the law. In particular, an advertisement in which the business name, image, trademark, etc. of a competitor are mentioned at the level that consumers can define them in comparison with that of the advertiser may be concluded to be a breach of direct comparative advertising regardless of whether the information given is true or false. In contrast, a comparative advertisement in which the business does not name or have signs or images that particularly address other businesses could not be alleged as contravention as the comparison is not made by the direct way. It seems likely that the purpose of the ban on comparative advertising in Vietnam law has been defined incorrectly. Comparative advertising should be prohibited not because it is a direct or indirect comparison. In other words, the mode of doing the behaviour, by comparison, is not enough for lawmakers to identify it as a sign of violation. Instead, a comparative advertisement should only be banned when it is, or is likely to be, misrepresentation, false or misleading by representing information, images and/or signs causing damage to another business. As a consequence, the prohibition of 'direct comparison' as stipulated in Competition Law and Advertising Act has not yet been established on the core of the cause of harm to consumers and competition.

While many countries recognise comparative advertising as meaningful support for informed decision-making of consumers and for enhancing consumer welfare, Vietnam's strict ban on comparative advertising is unlikely to follow this trend. Moreover, the

⁸⁸ *The Advertising Law 2012 (Luật Quảng cáo)* (Vietnam National Assembly), art 8 para 10.

regulations of Competition Law and Advertising Law not established in the proper nature of conduct have led to many shortcomings in practice in Vietnam. Many comparative advertisements that present true information in a fair, straightforward correlation could be banned unreasonably. On the other hand, indirect comparison advertising is allowed even if they perform an unfair comparison. The prohibition on comparative advertising by direct correlation in Vietnam, therefore, is proved to be ineffective. This regulation has blocked access to more information to consumers through comparative advertising. It seems to go against the process of increasing consumer information in an era when consumer welfare is central to the economy. Even considering the aspect of safeguarding a fair competition, the ban on direct comparative advertising, as analysed above, also contains many inadequacies that make it a strong barrier to the development of consumer protection in Vietnam.

The case considered as one of the Noodle Wars in Vietnam involves misleading comparative advertising. On May 23, 2011, Acecook Co., Ltd filed a complaint to the Vietnam Competition Administration Department, stating that the advertisement of Tien Vua's sour cabbage which is impugned as misleading comparative advertising.⁸⁹ The advertisement of Masan Food Corporation showed two blocks of instant noodles, one with "Tien Vua" (brand of Masan) and the other with no brand. After being dipped in hot water, one block turned to a darker color than in the "Tien Vua" cup, which, as the advertiser emphasized, was attributed to unhealthy food coloring. The first part of the advertisement mentioned the phrase "toxic color," which made the consumers worried about the dark yellow noodles. Previously, in 2009, Masan also had advertised Tien Vua noodles in which they provided information such as "oil-fried noodles", "noodles fried so many times that its color changes from fresh gold to dark yellow, which is not good for health", "I only buy fresh yellow noodles from now on". This advertisement can impress consumers that dark yellow noodles are not good for health.

⁸⁹ Quynh Nhu, "Acecook vs Massan – Advertisement blaming the opponent, how to judge?" (Acecook vs Massan, Quang cao nói xấu đối thủ, xử sao?) (15 December 2018) <http://cafef.vn/cau-chuyen-kinh-doanh/acecook-vs-masan-quang-cao-che-san-pham-doi-phuong-xu-sao-20111016102755302.chn> See more at Tran Vy Sy, Nguyen Xuan Hien, 'Against the Tide: Regulations on Comparative Advertising in Vietnam', Vietnam Law & Legal Forum Magazine (online) (27 May 2013) <<http://vietnamlawmagazine.vn/against-the-tide-regulations-on-comparative-advertising-in-vietnam-3770.html>>., Luat Duong Gia, A case of unfair advertising (Vu viec thuc tien quang cao nham canh tranh khong lanh manh), (11 August 2015) <<https://luatduonggia.vn/vu-viec-thuc-tien-ve-quang-cao-nham-canh-tranh-khong-lanh-manh>>.

However, the Vietnam Competition Administration Department returned the complaint to Acecook since they could not handle the case. The reason is that Massan did not make a comparison directly between the noodles of Massan and Acecook. They insisted on the opinion that it must be "direct" to violate, while Masan does not call the specific name of the noodles Acecook.

Thus, it can be seen that the regulation that only direct comparative advertising is banned has faced a complex case in reality. Considering the essence of the prohibition of comparative advertising, the LCP, Competition Law and Advertising Law did not take into account the core factor that should be strictly prohibited, that is misleading information, caused by even indirect comparative advertising. As analysed above, instead of allowing comparative advertising while ensuring that comparative advertising is not misleading, Vietnamese laws focus on whether it is direct or indirect comparative advertising.

4.4.2 Regulations on Misleading Advertising in the ACL

4.4.2.1 Overview

In the ACL, misleading advertising, in a general concept as designed in specific protection, is a form of representation. Except for an additional form of bait advertising, the ACL does not have any other specific provisions for advertising. Thus, misleading advertising in Australia is governed by the general signs designed for general protection. Also, the specific prohibitions that Australian regulators impose for misleading conduct in subdivision one also apply to advertise. The characteristics of advertising differ from that of misleading conduct in general, and will typically be analysed by judges with specific comments in cases. The distinctive features of advertising lie in the broad nature of the general public that may result in the deep approaches to a large audience by misleading information. The court must pay attention to the characteristics of an advertisement that is published to the world at large and accessible by a wide range of persons.⁹⁰ Determining these characteristics will help the judge quickly conclude whether an advertisement constitutes a breach of misleading conduct.

In addition to the written ACL and case laws, advertising regulation in Australia is also implemented through industry self-regulation. The Media Council of Australia established

⁹⁰ Adrian Coorey, *Australian Consumer Law* (LexisNexis Butterworths, 2015). Coorey refers to the case of *Goldberg J Telstra Corp Ltd v Cable & Wireless Optus Ltd* [2011] FCA 1478.

five codes including the Code of Ethics, Alcoholic Beverages Advertising Code, Slimming Advertising Code, Therapeutic Goods Code, and Cigarette Advertising Code. These regulations are controlled and applied by the Advertising Standards Council.⁹¹ The Commercials Acceptance Division of the Federation of Australian Commercial Television Stations is the agency that previews all television commercials which are within the scope of the Media Council's codes. These important industry agencies establish, maintain and improve advertising standards in the form of regulations applicable to businesses related to the industry and media owners. In this way, the regulations established by these agencies play an important role in controlling its member by testing and preventing potentially sensitive advertisement before they are made available to the public.⁹² An example of this function is the provision of the code that a proprietary drug advertisement must be substantiated before the advertisement is published and the information provided about the product must be evaluated by an independent health professional.⁹³

Self-regulation regulations have great advantages since they contain specific provisions on some types of advertising not covered by the law. Also, the types of rules can immediately block misleading advertisements without having to go through complex and time-consuming court proceedings. However, statutory legislative regulations, compared to self-regulation, still play a more important and meaningful role in regulating advertising and consumer protection. In common law countries, including Australia, the statutory rules and case law against misleading advertising provide the basis for the establishment of self-regulation regulations.⁹⁴ In jurisdictions like Australia, it is possible to acknowledge the source of self-regulation of advertising as a good combination of regulation in the ACL and cases provided by Australian courts. It can be concluded that the regulatory framework for misleading advertising in Australia is based on both the regulatory framework and an industry-funded, self-regulatory framework that is a strong guarantee of effective enforcement to protect the benefit of consumers and the fair competition in advertising in Australia.

⁹¹ Debra Harker, 'Towards Effective Advertising Self-regulation in Australia: the Seven Components' (2003) 9(2) *Journal of Marketing Communications* 93, 95.

⁹² Debra Harker, 'Achieving Acceptable Advertising: An Analysis of Advertising Regulation in Five Countries' (1998) 15(2) *International Marketing Review* 101, 118.

⁹³ Blakeney and Barnes, above n 77, 59.

⁹⁴ Petty, above n 79, 34.

4.4.2.2 Regulations on Misleading Advertising According to the ACL and Case Law

Misleading advertising is included in the form of representation in the ACL. The prohibition designed for the general protection and the provisions of s 29 of the specific protection cover the advertising behaviour. As a result, the general principles applicable to misleading conduct shall also apply to the consideration of the true and fair act of advertising.

As previously discussed, since the violations of misleading conduct are listed in full detail in the specific protection, advertising behaviour included in this section is also likely under very tight regulation. In the form of advertising, the special feature of advertising is not in the characteristics of information but the mode of information transmission. Thus, putting advertising under the same general protection as a representation is reasonable. Examining the prohibited forms of information used in the general protection and the specific protection section can confirm that almost no information can be omitted as a result of applying the provisions of this section on dispute resolution involves the particular form of advertising. Information elements that may be false or misleading are discussed in detail in the specific protection of the ACL.⁹⁵

However, the information in advertising also needs to be evaluated from the point of view of usage, the coverage of information that is spread widely and directly through the media, and, hence, misleading advertising may cause a serious disadvantage for consumers.⁹⁶ These factors cannot help influencing the decision-making related to the possibility of contravention of impugned mislead advertising in court. This case is resolved in a way that fits the case law alongside comments considered as exemplary references by judges in Australia. Thus, the principles and considerations that exist in advertising practice in Australia have been formed by analysing the case law and the written statutory regulations, even though it is not dealt with separately in the ACL.

From the case law, it can be concluded that the basic element of determining whether an advertisement is misleading or not is based on the answer as to whether it leads to an

⁹⁵ *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) (2010)*. Part 3.1. Division 1 stipulates kinds of information can be considered misleading or deceptive

⁹⁶ William Leiss et al, *Social communication in advertising* (Routledge London, 1990) vol 2, 10-13. See more at Australia and Russell Victor Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia Limited, 2017) 1462

error.⁹⁷ The general test will be implemented flexibly in each case decided by the judge in court. Each of the cases is to be decided in accordance with particular facts and the court's impression of the particular advertisement.⁹⁸ Stephen and Philip stated that the following factors are particularly relevant to advertising, and therefore, worthy of special consideration. These factors are issues that need to be examined in the test: 1) the target audience; 2) the entirety of the advertisement; 3) the nature of the transaction and the product involved; and 4) whether the advertisement is misleading, or merely unfair.⁹⁹

More specifically, Hunt J explains the principles used to evaluate an impugned advertisement as misleading or deceptive through a test focused on the subject matter of the advertisement.¹⁰⁰ The test requires the content of advertisement must be reasonable, based on the view that the audience is an ordinary reasonable reader with fair, average intelligence who is neither perverse nor morbid or suspicious of mind, nor avid for scandal. They may be experienced or untrained, educated or uneducated, smart and well-informed people but may also include those who do not have these characteristics.¹⁰¹

However, the court does not entitle to speculate that these subjects can understand ignorant facts or the ambiguities by themselves.¹⁰² Considering the ordinary reasonable reader as audience affected by the advertisement, the test focuses on examining their interest in the articles, their level of analytical attention to them and degree of authenticity they expect in article/newspaper. In addition, the method of publication is also a material element that needs to be considered to determine what imputation is, for example, the effect of a book is different from that of the newspaper and television advertisement.¹⁰³ In the test of the words used in the advertisement, the parts of words will be evaluated in the entire context of the advertisement, not to separate the word parts to conclude the misleading of the advertisement.¹⁰⁴ If the advertisement is likely to have two meanings, each one will be

⁹⁷ Adrian Coorey, *Australian Consumer Law* (LexisNexis Butterworths, 2015) 179. Coorey refers to the case *Global One Mobil Entertainment Pty Ltd v ACCC* [2012] FCAFC 134 per Greenwood, Logan and Yates JJ [53].

⁹⁸ Australia and Miller, above n 62, 1462.

⁹⁹ Stephen S Corones and Philip H Clarke, *Consumer protection and product liability law: commentary and materials* (Lawbook Co., 2002) 153.

¹⁰⁰ Coorey, above n 85, 181. Coorey refers to the case of *Telstra Corp Ltd v Cable & Wireless Optus Ltd* [2011] FCA 1478 per Goldberg J at [21]–[25].

¹⁰¹ *Ibid*, 181.

¹⁰² *Ibid*, 179.

¹⁰³ *Ibid*, 179

¹⁰⁴ *Ibid*, 180. Coorey refers to the case of *ACCC v TPG Internet Pty Ltd* (2013) 304 ALR 186 per French CJ, Crennan, Bell and Keane JJ (35).

considered as to whether the advertisement leads to an error according to that meaning.¹⁰⁵ Thus, the test for the advertisement does not differ significantly from the evaluation of a misleading behaviour in general. Like the case of misleading conduct, actual damage is not a required factor for misleading advertising. It is not necessary that the misrepresentation must appear at the time of sale for being concluded as a breach, advertising containing untrue representation is prohibited as soon as it is published or shown to the world.¹⁰⁶ Misleading advertising at such a serious level does not need to wait for the consumer's access as well as the consequences for consumers as a condition to conclude the violation. Advertising can be misleading even if it fails to mislead the wary readers.¹⁰⁷

While the general assessment process is almost similar, some specific types of advertising behaviour remain to be mentioned. The following types of advertising have emerged from the cases that have been resolved in court and have become traditional cases.

4.4.2.2.1 Puffery

Puffery is an advertisement containing a mere puff, a self-evident, exaggerated statement about the qualities of a product that is no reasonable consumer would take as the literal truth.¹⁰⁸ In general, puffery is not considered misleading advertising and allowed in Australia. Although there is no legal distinction between puffery and misleading or deceptive conduct, puffery is an area where the law has traditionally allowed some latitude to advertisers and sellers.¹⁰⁹

When judges analyse the cases relating to commercial activities, they also acknowledge that many dealings of transactions require some level of puffery, which is thought to be 'a part of the ordinary stuff of commerce'.¹¹⁰ In particular, for television advertising, Lockhart J agrees on a robust approach to this form as the community is used to exaggeration of advertising.¹¹¹ The distinction between a mere puff and an actionable misrepresentation is

¹⁰⁵ Ibid. Coorey refers to the cases of *ACCC v On Clinic Aust Pty Ltd, Men Only Medical Clinic Pty Ltd Potent – C Clinic* (1996) 35 IPR 635 per Tambelin J at [7]; *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634 per Allsop CJ at [46].

¹⁰⁶ Ibid, 180. Coorey refers to the case of *ACCC v TPG Internet Pty Ltd* (2013) 304 ALR 186 per French CJ, Crennan, Bell and Keane JJ at (50).

¹⁰⁷ Ibid, 180. Goldberg J stated this in *Telstra Corp Ltd v Cable & Wireless Optus Ltd*.

¹⁰⁸ Bruce, above n 29, 89.

¹⁰⁹ Australian Competition & Consumer Commission, *Advertising and Selling Guide* (April 2014) <https://www.accc.gov.au/system/files/722_Advertising%20and%20selling_FA_Nov%202017.pdf>

¹¹⁰ *General Newspaper Pty Ltd v Telstra Corp* (1993) 117 ALR 629 (Davies andinfeld JJ), 642.

¹¹¹ Coorey, above n 85, 183. Coorey refers to the case of *Stuart Alexander Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 37 ALR 161 per Lockhart J at 164–165.

shown in its category in the term of information. The type of information used in a mere puff that bears the feature of exaggeration is expressed as a statement of opinion, rather than a statement of facts. They cannot be quantified, measured and evaluated specifically as a representation.¹¹² Also, puffery simply causes consumers an uncertainty, which has a fine line between what is misleading or deceptive.¹¹³ As the result of thorough analysis from case law, puffery in Australia can only be considered misleading if it leads, or is likely to lead consumers to error, as determined by specific evaluation principles mentioned above.

According to the ACL s 18, puffery can be considered misleading depending on the specific facts examined in light of the usual incident and the features of trading conduct.¹¹⁴ Thus, the conclusion of whether an advertisement using puffery is misleading or deceptive depends on the specific case, rather than the general rule that prohibits the use of exaggerated words in advertising by the ACL.

4.4.2.2.2 Comparative Advertising

Comparative advertising was defined by Merkel J in *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* (2002) 193 ALR 629 as quoted from the Federal Trade Commission: ‘advertising that compares alternative brands on objectively measurable attributes on price, and identifies the alternative brand by name, illustration or other distinctive information’. In this same case, Heerey J affirmed the role of comparative advertising in furnishing information about commodities by providing consumers with accurate facts about competitors of the businesses and helping them to make better-informed purchase decisions. Along with this statement, the judges also stated that the conclusion of the imputation of comparative advertising needs to be considered carefully by the court under the assessment process that is not different from the other cases.¹¹⁵

As such, comparative advertising is not strictly prohibited in Australia. It is considered a case of special care when the plaintiff institutes proceedings against the advertiser alleging that the advertisement is misleading or deceptive. However, there are two factors that need to be taken into account in the test to conclude whether a comparative advertisement is false or misleading. First, the comparison should be made with information that ensures

¹¹² Bruce, above n 29, 90.

¹¹³ Ibid, 90.

¹¹⁴ Coorey, above n 87, 182. Coorey refers to the case of *Petty v Penfold Wines Pty Ltd* (1994) 49 FCR 282 at [17].

¹¹⁵ Ibid, 203.

accuracy.¹¹⁶ The accuracy of information in comparative advertising requires the nature of the information to be verifiable, including the price and quality of the product. Therefore, information in comparative advertising should be in the form of statements of fact, rather than a statement of opinion.

Second, the comparison should be between actual competitors and between competing products on the market.¹¹⁷ This requirement is needed to explain the rationality of comparative advertising because truthful comparisons are made with the purpose of pointing out the advantages of the product, which only make sense when they are made between the competing products of competitors. Similarly, regarding consumer interests, if this factor is guaranteed, comparative advertising is considered necessary to provide consumers with valuable information about goods and services prior to asking a purchase decision. Third, the comparison between the two products should be made in an appropriate manner.¹¹⁸ Although explaining what is appropriate comparison is not presented in this case, the emphasis of relevance in the analysis of the judges by the incident also shows that the focus of the evaluation of making a comparative advertisement is nature and characteristics of the comparison while the comparison itself is still considered neutral and should be encouraged.

4.5 Similarity and Differences Between Regulations on Misleading Advertising in the Consumer Protection Laws of Vietnam and Australia

The analysis of the regulations on advertising regulation in Vietnam and Australia has shown significant similarities and differences in the state policies of consumer information protection and legal and technical construction of the law. The differences were analysed by in the following two groups—the first mentioning the differences in the view of the lawmakers in regulating the legal area, and the second focusing on the differences as a consequence regarding the legal gap in the establishment of the prohibition of the Vietnam laws.

¹¹⁶ Commission, above n 104.

¹¹⁷ *Makita (Aust) Pty Ltd v Black & Decker (A/Asia) Pty Ltd* (1990) 18 IPR 270. Wicox J stated that the commercial made by Black & Decker was misleading in contravention of the former s 52 of the TPA because it did not compare 'like with like'.

¹¹⁸ Coorey, above n 85, 183. Coorey refers to the cases of *Gillete Australia Pty Ltd v Energizer Australia Pty Ltd* (2002) 193 ALR 629 per Heerey J at [22]–[24] per Lindgren J at [53] and per Merkel J [90] [94].

Regarding the first group, from the perspective of the policy of regulating advertising behaviour there is a similarity, though not entirely, between the two laws. In both legal regimes, the role of information in advertising and the consumer's right to information is valued and affirmed, by the entitlement provision in the LCP and the general prohibition in the ACL. Also, as lawmakers in both countries are aware of the potential negative impact of advertising on consumer information and the competitive environment, they designed many provisions to limit this risk in both laws. Policymakers in both Vietnam and Australia try to find a balance by considering the pros and cons of advertising. This equilibrium will be set at a level that, according to lawmakers, ensures both the right to consumer information at the highest level and removes the likelihood of confusion for consumers and the negative effect to market competition. Openness, flexibility, and level of economic and legal development in each country may influence how the equilibrium is determined. In most cases, the equilibrium point shows that the consumer protection policy of a country is strongly integrated into the global development trend or still framed within the margin of safe state intervention, especially in the field of publicity as advertising.

Thus, the first group of differences in policies and views on governing advertising between Vietnam and Australia is those showing the two equilibriums of the two laws. Vietnamese lawmakers directly restrict certain forms of advertising that, in their view, are at risk of violating consumers' right to information. Specifically, puffery and direct comparative advertising are prohibited under Vietnamese laws, while Australia allows businesses to carry out this behaviour in commercial practice. These prohibitions immediately create a low level of equilibrium, negatively affecting the ability of consumers to access information thanks to the variety of information source provided by the advertisers. By these prohibitions, the method of determining the equilibrium of Vietnam laws in this field can be found through banning certain types of advertising. Meanwhile, Australia does not directly prohibit the way of performing an advertisement or the exaggeration of information used in advertisements.

From the perspective of different regulations as indicated above, this can be seen as the expression of the difference between Australia and Vietnam in the approach to ensure consumer right to information against misleading or deceptive conduct. Accordingly, Australian policymakers stick to the core of the issue of misleading consumers and use the rationality test of impugned conduct based on qualitative and quantitative factors as a basic tool for establishing an equilibrium. Their method of determining the equilibrium point is

likely established with a dynamic, flexible, open and rigid situation, rather than by prohibiting certain forms of advertising like the way Vietnam is designing. With such an equilibrium choice, the level of protection of consumer right to information in Australia is significantly higher than that of Vietnam. The systematic and consistent adjustment of the ACL is highly persuasive to the researcher when approaching Australian law in this area.

There are some reasons explaining the existence of distinct differences in the regulations of advertising behaviour between Vietnam and Australian as presented above. One basic reason is that the explicit principles of the legal framework for the protection of consumer rights and the consistency in pursuing these principles when designing the law are fundamentally different between Vietnam and Australia. The statutory provisions governing misleading advertising in the ACL are manifested consistently within Australia's policy on consumer information protection, which is to eliminate information restrictions for the purpose of improving the well-being of consumers.

The consistency within the ACL's policy of enhancing information keeps the point of view of consumer protection applicable to each specific case of commercial practice. It is the tendency to enhance information flows, ensuring that consumers have the highest level of access to product information for making better-informed purchasing decisions. As navigated from this solid standpoint, Australian laws always encourage advertising that provides consumers with truthful information as much as they can. In such an information policy, all restrictions on consumer right to information are restricted and prohibited only if it is concluded that the impugned advertisements may mislead consumers or may cause bad impact to market competition. Therefore, the ACL does not prohibit exaggerated or comparative advertising behaviour. These conduct are only forbidden when they contain factors satisfying the test for concluding an act as misleading or deceptive. Australia lawmakers identify the explicit policy framework from the beginning and then follow its nature closely to establish statutory regulations that deal with specific forms of behaviour, which prove robustly its effectiveness in the field of lawmaking techniques relating this legal area.

Meanwhile, even though the consumer's right to information is asserted in the beginning provisions of the LCP, there has been no policy framework in which the important principles regulating this field are specified as in the ACL. This gap is likely the reason for the lack of consistency when applying the spirit of protection of consumer right to

information to regulating specific misleading behaviours. The LCP show the policymakers' embarrassment in governing these cases. It does not completely prohibit exaggerated advertising but requires businesses using exaggerated words in their advertisement to prove that all information they provide is true. The LCP does not prohibit all kinds of comparative advertising but stipulates that comparing products by direct method in the advertisement are not allowed. However, the fact that the business can use exaggerated advertisement along with its proof or merely prevent direct comparative advertising does not demonstrate that the lawmakers are consistent with the policy of maximising the ability to access consumer information. On the contrary, those provisions manifest that they both restrict the consumer's right to information unreasonably and fail to accomplish the objectives that result in the presence of these rules themselves as analysed in the previous section.

The second group of differences between regulations on misleading or deceptive advertising of Vietnam and Australia comes as the result of the application of legal technique relating to construction legislative terms and institutions. They are the consequence of the lack of regulation available in the LCP but not in the ACL. In some cases, the difference is the reflection of the implication reasonably inferred from the terms used in the ACL. These differences are analysed from the perspective of the applicability of legislation regulating advertising in commercial practice.

First, it is impossible to handle misleading advertising effectively caused by omission or half-truths in Vietnam, while such conduct can be regulated in Australia under the ACL. Omission or half-truth is a form of providing information in an incomplete manner, even though the information given by traders is truthful, the hidden information causes a misconception completely wrong with the truth. They are the concealment of parts of information that, if disclosed, would alter the general perception of consumers about the product. While the information is still provided correctly on the surface, the attributes of the product are not honest and confusing. Russo, Metcalf, and Stephens state that the core of misleading advertising is to assert or imply a misconception about objective reality, which is a combination of objective attributes of products and/or subjective representation of the product in the mind of the customer.¹¹⁹ Therefore, it could be a form of misleading advertising in case the information provided in the advertisement is true to the product's

¹¹⁹ Orzan et al, above n 83, 16-17.

objective characteristics while the concealed information (half-truths) make consumers to build the untruthful subjective representation of the product in their mind by themselves.

The causes of the non-adjustment of the forms of half-truth and omission in the LCP lies in the absence of regulation on the general ban as discussed above. In addition, the LCP did not approach misleading conduct comprehensively from its nature. The LCP only stipulates that the information provided by traders in the advertisement must be true, not misleading, but does not mention the formal nature of the information as a representation. This means the LCP only refers to the expression of information on its surface and in its active expression. Meanwhile, a method of representation in the negative dimension, inaction, and wholeness of information should be placed in the context in which it evokes the consumer association. This shortcoming of the LCP has been addressed by in this thesis in the analysis of regulations on misleading conduct in general (see Section 4.1). This gap becomes more serious in regulating misleading conduct, as analysed in the same section. This becomes very serious in the field of advertising because of the prevalence of this activity in commercial practice. A number of Vietnamese businesses have exploited this shortcoming to carry out some misleading advertising that administrative agencies and the court have failed to deal with.

4.6 Conclusion

From the analysis of misleading or deceptive conduct regulations of Vietnamese consumer law, especially misleading advertising in comparison with the ACL, it is possible to make some conclusions.

The underlying cause of the legal gaps in the regulations against misleading or deceptive conduct as analysed above derives from the inadequacies of the structure of the LCP as discussed in Chapter 3. Accordingly, the LCP has no general protection provision by way of a general ban on conduct with signs of infringement, resulting in factors that determine the subject and patterns of behaviour cannot be established, which leads to the absence of a test that allows assessment of whether an impugned conduct is misleading or deceptive or not.¹²⁰ In the regulations against the misleading or deceptive conduct of the LCP, the direct consequence of lacking a test that includes the elements suggested by the general prohibition show the inconsistent approach to dealing with misleading or deceptive

¹²⁰ See at page 121, paragraph 3, section 4.1.2.1

conduct. In some cases, as for puffery, the law is too focused on the truthfulness of information. However, in contrast to other behaviours such as comparative advertising, the law interferes excessively on the mode of conduct regardless of whether the nature of the behaviour is misleading to consumers. Also, two misleading advertising conduct, including half-truth and omission, cannot be adequately dealt with in practice due to these gaps in the LCP.

Second, when comparing the characteristics of the model of state intervention discussed in Chapter 2, the above analysis of the misleading or deceptive conduct provisions of Vietnamese consumer law shows the model of adjustment that Vietnam chooses to apply. The approach focusing on information and restricting specific forms of advertising shows that Vietnam's alignment tends to be a right-based approach (consumer-based approach), rather than a market-based approach.¹²¹ Conversely, the ban on comparative advertising is an indication of the low level of optimising consumers' right to information that should have been encouraged by the model based on opportunity criteria as discussed in Chapter 2. Conversely, the rigid regulatory regime in the ACL expresses that Australia incorporates a conventional modular approach along with equilibrium analysis and opportunity criteria to enhance consumers' confidence as an active participant in the market.¹²² Accordingly, the sign of application of the traditional model marked with a requirement for the disclosure of information expressed through the prohibition of omission and regulation on information standards. Also, a test of whether alleged conduct is misleading or deceptive that consist of many careful steps considering the context of impugned conduct as a whole and features of the related large audience shows the type of adjustment based on equilibrium analysis. Thus, Australia's experience in the design of regulations against misleading or deceptive conduct further demonstrates its importance as a benchmark for improving this legal field in Vietnam.

In addition to the rigid statutory provisions of Australian law, there is always room for comments on specific cases decided by judges in courts. Judges' comments and case law are publicly available and are a source of reference and discussion among scholars, lawyers, and jurists. It is a flow of trade life, not fixed as a rule but always fresh. This flow requires a ground that needs to be solid enough to rely on without being lost as well as being sufficiently open to not freeze lively reality in the rigid regulations of the law. The

¹²¹ See at page 54, paragraph 3, section 2.4.1

¹²² See at page 67, paragraph 3, section 2.6.

characteristics of the common law country help Australia to inherit the elite values of how the law is designed and performed. With a civil law country's effort to understand the value of case law, Vietnam has also issued the regulation on the application of precedents from judgments made by the courts.¹²³ This is a new legal basis after the LCP's enactment eight years ago. This solution promises to provide consumers in Vietnam more effective enforcement and protection of opportunities than ever before.

However, in enabling this solution to be efficiently implemented in the field of consumer information protection, Vietnam faces two significant challenges. First, it is still necessary to build a general prohibition, a legal framework that guarantees the foundation of the regulation, otherwise, judges will make their own decisions differently on particular cases, with the consequence that the consistency of the legal system will be seriously compromised. Second, the principle in which a case can only be taken into the process by the alleged conduct breaking a specific written statutory provision is still widely applied in Vietnamese courts at all levels. As a result, if the LCP and other relevant laws do not explicitly prohibit false and misleading conduct in the text, the courts will not accept the case and consider the flexibility of application of the regulation. Thus, a general ban providing common indications of infringement of consumer right to information as established in the ACL is a valuable reference for the LCP.

Third, through cases along with judges' analysis and comments in Australia, a process of testing the offending factors to conclude whether impugned conduct constitutes an infringement at the Australian courts has been established, detailed and widely accepted, while such a process has never been discussed in Vietnam. The test is often filtered from many cases, experienced through the application of many judges, as a result of much discussion, supplementation and admitted by the majority of judges and legal experts. The use of the process of testing helps judges save time and effort while increasing the accuracy and effectiveness of enforcement of the law. Therefore, it cannot be denied that the formation of the tests, the critical steps in the process of judging the case, is an excellent advantage that Vietnam should attain. However, the question is how Vietnam can set up a standard test that can be applied to dealing with violations of consumer information similar to that of Australia? The ability to legalise such a process by modifying the LCP is excluded because the details of such a test are not in accordance with the statutory

¹²³ *Resolution on the Process of Selecting, Promulgating and Applying Case law 2015. (Nghị quyết số 03/2015/NQ-HĐTP về Quy trình Lựa chọn, Công bố và Áp dụng Án lệ)* (Vietnam National Judiciary Committee). It has taken effect from 16 December 2015.

provisions of the law. Therefore, it is only possible to hope for the application of cases in Vietnamese courts to address this question. The issue returning to the same approach as set out above is that, without a general prohibition section, what signs will Vietnamese judges rely on to build the steps of the process of assessment of impugned conduct? As such, it is more important to design a general protection section containing the general prohibition provision for the LCP.

Chapter 5:

The Consumer's Right to Information and Unfair Contract Term

As delineated in Chapter 1, the consumer's right to information is supported by regulations prohibiting the inclusion of unfair terms in contracts. Information plays a vital role throughout the process of making contracts as it helps consumers avoid the potential disadvantages of not well understanding the terms of a contract. The regulation of unfair contract terms derives from the need to regulate the fairness of the contract term rooted as the consequence of the information asymmetry between the seller and the buyer. The information element of this regime is considered from the perspective of the transparency and fairness of the provision, in which justice can only be established by information transparency and access to the terms of the contract. Consequently, ensuring the right of consumers' information must be adequately and effectively developed from the perspective of providing the effectiveness of the unfair contract term regulation. This chapter analyses the regime of the unfair contract term in Vietnamese consumer law compared to with the corresponding regulations in Australia to identify weaknesses and inadequacies in the Vietnamese regime and propose solutions to improve this regulatory framework.

This chapter comprises four sections. Section 5.1 analyses the broad background of the regulatory framework that governs unfair contract terms in a combination of free and fair contract theory, economics information theory and behavioural studies. This section also outlines the aspects of protection of consumers' right to information in the unfair contract term in connection with the models of regulatory policies analysed in Chapter 2. Sections 5.2 and 5.3 show the assessment and conclusions based on the analysis of regulations governing unfair contract terms in Vietnam and Australia respectively. In these two sections, the typical content of the adjusted viewpoint and the differences between Vietnamese and Australian laws are analysed comparatively. Section 5.4 compares the similarities and differences between the two laws regarding unfair contract terms legislation in an effort to tease out solutions for improving the legal framework in this area for Vietnam.

5.1 Protecting Consumers' Right to information from the Legal Theories on Unfair Contract Terms

5.1.1 Theory of Contractual Freedom and Development of Unfair Contract Term Regime

The three most prominent models on the protection of the consumer's right to information in consumer legal institutions—traditional methods, the equilibrium model and the model of promoting consumer's choice—were analysed in Chapter 2. Sequential development in the construction of legal institutions in this area generally begins with traditional views, whereby information needs to be broadened and diversified to close the gap between the seller and the buyer in terms of information asymmetry. The next step is to review state intervention in light of economic analysis, thus demanding an effective balance between information cost and benefits. However, the second mode of balancing the equilibrium is to take a closer look at the traditional viewpoints to argue the traditional model from the perspective of economics.

It is in the third mode, however, that the argument for revising the traditional viewpoint is more drastic and open to consumer protection of new dimensions. The development of the third mode focuses on the image of the confident consumer in the market with the policy of following the philosophy of openness and ensuring their freedom of choice in the market and the most reasonable restrictions for both consumer and business. While the regulations against misleading conduct (analysed in Chapter 4) developed well in line with the three models, the legal regime on unfair contract terms follows an opposite order of development, establishing a wide range of approaches to consumer protection varying in flexibility from a general protection perspective to a specific protection regime.

The overall consumer protection policy first goes from the strict specification of the obligation to disclose to the later, more flexible perspective of protection in the direction of respect for the freedom of consumer choice. In contrast, the theory of constructing the unfair contract term regime first developed from the promotion of contractual freedom in which the parties have full power and voluntarily agree on terms, which then change to restrain reasonably freedom of contract that is more strongly intervened under the demands of the consumer. The developmental steps in the unfair contract term are discussed below.

As mentioned above, the fundamental theory of the unfair contract term first laid the foundations of respect for contractual freedom, which is considered one of the uncertain assumptions of expression of the neoclassical economic school.¹ The core content of this theory focuses on the freedom of the parties to the contract, reflected in the voluntary choice of contracting parties relating to the type of contract they engage in and the terms of the contract.² In light of the promotion of freedom of contract, the content of the contract, when voluntarily entered into by the parties, must be respected and acknowledged, even if their terms are unfair.³ The procedural fairness of the contract by requiring only evidence that the parties knowingly and completely voluntarily choose the contractual relationship between them actually implies that the belief of the parties and regulator of good faith, is a manifestation of trust based on true ethics of parties in the transaction.⁴ In addition, the inference of freedom between parties is based on the conventional theory, whereby consumers have the ability to make a rational choice provided that they are adequately provided information and free access to resources as well as freedom of choice.⁵

State interventions aimed at regulating contractual matters, including the unfair contract term regime, are based on the traditional contract theory combined with liberal political thought.⁶ One of the concrete manifestations of liberal political thought in the development of consumer protection law is the requirement to disclose information to balance the bargaining position between buyers and sellers.⁷ A request for disclosure of information along with the hypothesis of minority information⁸ is the basis for the institutionalisation of the standard form contract. As such, the standard form contract, a familiar form of the commercial practice commonly modified by contracting jurisdictions around the world, is

¹ Alexander Bruce, *Consumer Protection Law in Australia* (LexisNexis, 1st ed, 2011) 138.

² John N Adams and Roger Brownsword, 'The Ideologies of Contract' (1987) 7(2) *Legal Studies* 205, 206–210.

³ Jeannie Paterson, *Unfair Contract Terms in Australia* (Thomson Reuters, 2012) 4.

⁴ BJ Reitier, 'Good Faith in Contract' (2011) 17(4) *Valparaiso University Law Review* 705, 732.

⁵ Howard Beales, Richard Craswell and Steven C Salop, 'The Efficient Regulation of Consumer Information' (1981) 24(3) *The Journal of Law & Economics* 491, 514.

⁶ Paterson, above n 3, 4.

⁷ Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Bloomsbury Publishing, 2007) 34. Paolisa refers to the rationale of unfair term control that derived from the French Loi Scrivener's school of thought which is in favour of the consumer against the exploitation of the superior economic power of professional side.

⁸ Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts' (2014) 43(1) *Journal of Legal Studies* 09, 25. Yannis, Marotta-Wurgler and Trossen argue that consumers' comparison among traders in their providing of good terms would help to make the effective balance in consumer contract's interests between consumers and traders. They state 'the size of informed minority required to induce sellers to provide good terms depends on the trade-off between the gross profit from selling to informed buyers (determined from the marginal cost of the product) and the cost of providing better contract terms'.

one of the responses to the trend of information disclosure of traditional consumer protection. Although it is prepared by the seller and must ensure that the buyer knows all the contractual information and freely enter into the standard form contract, the bottom line of the validity of such a contract lies in the fact that the parties accept to be voluntarily bound by the contract. In other words, freedom of contract in harmony with the disclosure of contract terms is the dominant theory that overlaps the entire contractual legal regime at this stage.

The standard form contract is promoted under the lens of economic theory by its contribution as an effective factor of resources allocation in the market.⁹ The doctrinal development in the regime of the unfair contract term, in line with the development of economic science, has been argued in light of cost–benefit analysis. The rational choice of consumers in the view of the cost–benefit study has led economists to believe in the effectiveness of the standard contract.¹⁰ They insist that the standard form contract saves on drafting and negotiating costs, while still ensuring that consumers can choose which provider offers them the best contract as long as the competition remains in the market.¹¹

However, it is argued that standard form contract needs to be reviewed in light of behavioural theories and empirical research on consumers' reading the fine print. The strongest argument against a standard form contract is that the explanations are based on overconfidence and self-serving bias which are expressed in the phase of accessing the terms of the contract. This argument holds that consumers, who are confident in their knowledge, often misinterpret clauses in the sense that they are more beneficial to them than disadvantageous.¹² Also, consumers suffer from cognitive limitations and frequently face a large amount of complex information on products, resulting in them underestimating potentially damaging terms in the standard form contract.¹³ Bar-Gill, Gabaix, and Laibson argue that the ability of sellers to manipulate consumers is entirely possible even in the context of a standard form contract as consumers' psychological biases and limitations are

⁹ Stephen A Smith, *Contract Theory* (OUP Oxford, 2004). 47 in *Unfair Contract Terms in Australia* (Thomson Reuters, 2012), 5.

¹⁰ Laurence Koffman and Elizabeth Macdonald, *The Law of Contract* (Oxford University Press, 2010), 159.

¹¹ ACCC, 'Advertising and Selling Guide' (April 2014)

<https://www.accc.gov.au/system/files/722_Advertising%20and%20selling_FA_Nov%202017.pdf> 151.

¹² Lawrence Solan, Terri Rosenblatt and Daniel Osherson, 'False Consensus Bias in Contract Interpretation' (2008) 108 *Colum. L. Rev.* 1268. cited in M G Faure and H A Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 348.

¹³ Brenton Lee Worth, 'Are we there yet? A Return to the Rational for Australian Consumer Protection' (2016) 24 *Australian Journal of Competition and Consumer Law* 33, 45.

significant barriers to their reading and understanding contract terms.¹⁴ Thaler and Sunstein note that consumers spent a lot of time and money on product selection, so they do not want to spend more on considering the contract.¹⁵ Many empirical studies also provide evidence that consumers ignore the reading of a standard form contract.¹⁶

These ground-breaking theoretical and practical premises cause policymakers to rethink the application of the standard form contract and to respond to the need for more effective protection. This requirement forces regulators to intervene more strictly in freedom of contract by designing a substantive unfair test. Accordingly, standard form contracts do not automatically take effect regardless of whether the terms are unfair if contracting parties agree to enter into the contract. Terms of these contracts have to pass a substantive unfair test once they are impugned for voiding. Control of the nature of the provisions is considered as a measure of limiting the loss of benefits; due to the use of a contract favouring a party due to disclosure, it may not solve the problem of adverse choice, and low-quality terms continue to exist.¹⁷ It is believed to be a way to promote a fairer and more efficient market by creating a balance between the interests of consumers and businesses in the marketplace.¹⁸

The application of a substantive unfair test has faced a number of criticisms. From the perspective of the balance of benefits and costs, economists state that the interference through such a test unnecessarily increases the cost of contracting while not improving the interests of consumers. This argument holds that imbalance between parties resulting from the standard form contract will be determined by consumers seeking a replacement or appropriate compensation.¹⁹ Therefore, in this view, interventions aimed at ensuring a substantive fairness test do not seem to bring optimal efficiency. Meanwhile, some lawyers

¹⁴ Bakos, Marotta-Wurgler and Trossen, above n 8, 8.

¹⁵ Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (HeinOnline, 1999). cited in in Faure and Luth, above n 11, 348.

¹⁶ Bakos, Marotta-Wurgler and Trossen, above n 8, 35. The authors cite some empirical researcher that shows the small number of consumers who read a standard form contract before entering into a contract. These statistics report that only three of every 100 purchasers of HP inkjet printers reported that they were informed about replacement cartridge ink costs at the time of purchase of the printer (Hall, 1997). Only four per cent of 92 contracts students at Cornell Law School who purchased products online claimed to read standard form contracts 'as a general matter' (Hillman, 2006). Sixty per cent of 147 students in law and other areas claimed they skim or read parts of a standard form contract before entering a transaction (Becher and Unger-Aviram, 2009). About 80 per cent of 182 undergraduate students did not to read standard form contracts and much of the remainder claimed to skim them (Bartlett and Plaut, 2009).

¹⁷ Faure and Luth, above n 11, 352.

¹⁸ ACCC, above n 11, 422.

¹⁹ Michael J Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26(4) *The University of Toronto Law Journal* 359, 376.

are sceptical of such interference as a form of nudge, a hard interference in a contractual relationship that traditionally respects freedoms.²⁰

These objections were denied sharply by arguing that contract freedom would only produce efficient results if the seller and buyer had the same level of information²¹ which does not happen in market practice. Despite the objections of cost and benefit analysis and the demand for respect for freedom of contract, unfair contract term regimes are increasingly being adopted by many countries in the direction of applying the substantive test of an unfair term. Consequently, consumer contracts, initially adjusted to be open and flexible, were voluntarily entered into the contract as a basis, but there is an ongoing adjustment to the regime. This approach has become more stringent because of the terms. Although the development of this regime seems to be in stark contrast to other consumer protection regulations, it is also lawmakers' aims to maximise the effectiveness of consumer protection and effective competition. Therefore, the need to ensure that the combined advantages of the protection methods discussed in Chapter 2 remain in place should be maintained. The question is how the combination of the equilibrium and opportunity criteria, as analysed in Chapter 2, show in this regime, namely in the LCP and ACL, and whether the current regulation is sufficient to ensure the harmonisation of the two modes of optimum efficiency in consumer protection.

5.1.2 Protection of Consumers' Right to Information in the Unfair Contract Term Regime

Obviously, the regime of the unfair contract term is a popular and important regulation in the field of consumer protection. However, the nature of the consumer contract embodied in this protective role is often emphasised in its ability to ensure fairness, rather than the right to information. There can be no doubt that ensuring equitable terms is the goal of regulations against unfair contract term, but this goal will lose ground in the absence of the information economy. The expression of the informative features of an unfair contract term regime is in need of its presence through the manifestation of the regulation and the operation of this regulatory mechanism.

²⁰ Hugh Collins, *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International, 2008) vol 15, 43–56.

²¹ John Vickers, *Economics for Consumer Policy*, Proceedings of the British Academy 287, 295.

The unfair contract term setting implies the need for fair balance between contracting parties as embodied in the name of the regulation. Fairness between contracting parties is an important factor that should be established on the basis of each party's autonomy. Accordingly, the buyer's autonomy is emphasised and becomes an element that needs to be supported since the unbalanced position between the seller and the buyer appear as the consequence of the asymmetry of a variety of resources, especially an information asymmetry in market transactions.²² Thus, the impact of balancing the information gap between the seller and the buyer could be a significant means of helping the consumer gain a balanced autonomy. Information has become a profound objective in the hunt for the fairness of contract terms that is a key factor in the revision of the unfair contract term.

The regime of unfair contract term derived from the need of adjusting information asymmetry between the seller and the buyer in which direct objects of the regulatory intervention is a standard form contract. The contract is a text containing the information that affects and binds parties' rights and obligations. The information is needed for consumers to understand meanings and judicial consequences of the contract and play a primary role in all phases of a transaction including the phase before a contract, the phase while making a contract and the phase after signing a contract.²³ Specifically, in the period before signing the contract, information supports consumers better evaluating the market through making the comparison and selection of suppliers who offer the best terms. During the formation of the contract, information gives buyers opportunities to negotiate better as they understand the meaning of the terms in the contract adequately. After the contract is concluded, the information becomes a useful tool for consumers to use advantageous contractual provisions to perform their rights as a contracting party, even the right to prevent unfavourable results to them.²⁴ In this way, the nature of the unfair contract term regime is not beyond the objective of enhancing the perception of information, a valuable asset to help consumers to decide on their participation in transactions. Recognising and understanding the information given by contract terms can provide a basis to establish the autonomy of each party and the foundation of fairness between the parties to the consumer contract.

²² Shmuel I Becher, 'Asymmetric Information in Consumer Contracts: The Challenge that is Yet to be Met' (2008) 45(4) *American Business Law Journal* 723, 735.

²³ Adrian Coorey, *Australian Consumer Law* (LexisNexis Butterworths, 2015) 314.

²⁴ *Ibid.*

Information also plays a role not only as the core cause of the establishment of unfair contract term regulation but as a mean of its regulatory operation in practice. The direct adjusted object of the unfair contract term regime is a standard form contract with terms related to the transaction information. Knowing and understanding the terms of the contract is nothing other than knowing and understanding the information it expresses and how it binds the consumer in dealing with the seller. In addition to the construction of a standard form contract, regulators also set blacklists, grey lists, and substantive tests to regulate unfair contract terms to achieve the objective of transparency and fairness for the transaction. Such methods use the information element as an adjustment tool, and these objects can be proved on the ground of information theory.²⁵ In consumer contract, information appears significant not only in need for clarity and transparency but in the way to achieve meaningful goals, the fairness of contract terms.

Specifically, consumer protection requirements in consumer contracts in certain unfair contract terms need to satisfy two main contents, transparency and impartiality, also considered as the representations of procedural fairness and substantive fairness. In that sense, transparency is a factor in terms of form and procedures as well as the foundation formality, procedural factor, and is the basis without which the substantive impartiality of the contract cannot be formed. Transparency of contracts expressed in two prominent factors, the requirement that the contents of the contract binding the consumer need to be accessible to them, and the terms of the contract must be clear and shown in a simple way.²⁶

In essence, the transparency of the contract, known as procedural fairness, is seen as a procedural manifestation of fairness where 'procedural fairness is concerned with the fairness of the process through which the contract was made'.²⁷ The second requirement that a fair contract term should meet is the substantive fairness of the terms of the contract. The eligibility criteria for the fairness test set standards that ensure ethical requirements in an entire view of the relationship between contracting parties in transactions. Thus, a complete unfair contract term regime must include the following three factors.

²⁵ Faure and Luth, above n 11, 351.

²⁶ Jeannie Paterson, 'The Elements of a Prohibition on Unfair Terms in Consumer Contracts'(2009)' 37 *Australian Business Law Review* 184, 88.

²⁷ Ibid, 188.

First, it is necessary to establish a rule that consumers can access the terms of the contract as a prerequisite for the terms to become a standard form consumer contract. Second, it is necessary to establish a rule to control fairness of terms in standard form contract; thereby the designation can be modelled by a general clause defining the criteria for impartiality assessment along with a list of terms may be viewed as unfair. Third, it is necessary to establish a rule of interpretation of the contract that emphasises that the terms of the unfair standard contract will be clarified to favour consumers at courts.²⁸ The characteristics of information in the unfair contract term as described above have drawn a clear image of the consumer's right to information which lies behind the right to fairness in the performance of a standard form contract. They require the unfair contract term, which has originated from the clear theory of contracts opposed to the less rigid theories of right to information, be considered from the perspective of policy adjustment as analysed in Chapter 2.

Because the characteristics of the unfair contract term develop in the opposite direction to the misleading conduct, the application of these types of adjustments will carry many differences from the traditional logic analysis for each type of adjustment. Specifically, the model of equilibrium analysis and the model focusing consumer's choice along with the encouragement of consumer's confidently entering the market will be intervention models applied to the legal systems promoting contract freedom. Accordingly, a freely negotiated contract between the parties is presumed to represent the consumer choice that the law should respect. It is also the expression of the equilibrium where agreement is reached in a market in which competition is guaranteed. In contrast, the tendency of applying the substantive fairness test of the contract terms reflects the spirit of traditional regulatory adjustment that requires disclosure but at a more subtle and profound level. The disclosure of information in the unfair contract terms is not limited to informative and clear statements but requires a higher degree of transparency. Such information must ensure that there is no imbalance that implies unfairness between parties in respect of rights and obligations in the contract. Thus, state intervention to ensure a compromise between all three of these regulation models will pose challenges for policymakers.

The comparative analysis of the regulations on unfair contract terms in consumer protection law in Vietnam and Australia, undertaken in the following sections, shows the flexible

²⁸ Ministry of Justice, *Controlling standard form contract in the field of pay television in Vietnam and some countries around the world (Kiem soat hop dong theo mau trong linh vuc truyen hinh tra tien o Vietnam va mot so nuoc tren the gioi)* (11 January 2018 <<http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2269>>

application of these three methods in each legal system. This will provide useful suggestions for reforming regulations on unfair contract terms for Vietnam.

5.2 Regulations on Unfair Contract Terms in Vietnamese Legislation

5.2.1 Overview

The contract is an essential regime in commercial law and civil law in Vietnam. The regulation on contract is designed in the Civil Code 2015, section 7, chapter XV, part three: "obligations and contracts" from article 385 to article 569. The Civil Code is the fundamental legal document of which provisions can be applied to all types of contracts. They are the ground for designing regulation of commercial contract in the Commercial Law as well as provisions of other specialized laws. Based on the general contractual provisions of the Civil Code, depending on the peculiar nature of the relationships or transactions, specific laws may have particular contractual provisions to adjust the relationship in particular areas. Thus, regulation on contract in Vietnam has scattered in Commercial Law, Investment Law, Construction Law, Insurance Business Law, some other laws and sub-law documents.

The Civil Code, article 385 stipulates the definition of a contract: "A contract is an agreement between the parties to establish, change or terminate civil rights and obligations". This definition partly shows a high degree of contractual freedom in the law of contract in Vietnam. However, it needs previously met the conditions for effective civil transactions as stipulated in the Civil Code as follow:

1. A civil transaction shall be effective when it satisfies all of the following conditions:
 - a) Participants in the transaction have legal personality and/or legal capacity in conformity with such transaction;
 - b) Participants in the transaction act entirely voluntarily;
 - c) The purpose and contents of the transaction are not contrary to the law and/or social ethics.
2. The forms of civil transactions shall be the conditions for its effectiveness in cases where it is so provided for by law.²⁹

Except for the above factors need to be satisfied in any transaction, the regime of contract in Vietnam is built on the principle of freedom. The principles of signing contract are

²⁹ The Civil Code 2015 art 117.

stipulated in Article 3 of the Civil Code including (1) Principle of equality (2) Principles of freedom, voluntary commitment and agreement (3) Principle of being kind and honest (4) Principles to respect the interests of the State, public interests, legitimate rights and interests of others (5) Principles of civil liability.

Among these principles, contractual freedom is a prominent feature and applied consistently in practice. The freedom to enter into contract means that contracting parties are free to choose objects of a contract, a form of a contract, and content of contract implementation and the responsibilities of the parties. The contracting parties are entitled to sign and implement contract voluntarily provided that the content of the contract does not make any violation against the laws and social ethics. The key contractual provisions of the Civil Code define a contract, the principle of signing, the content and the form of a contract. Accordingly, the subject of the contract may be an individual or legal entity or other types of entities. The object of a contract is property, goods or services. A form of a contract is agreed upon by the parties, except it was defined specific form by other law.

The above- mentioned regulation on contract show that the principle of freedom of contract is explicitly recognized in contract law in Vietnam. In the context of examining unfair contract terms, it emerges that what to extend the consideration should make between the full application of the principle of contractual freedom and the appropriate intervention into this principle to ensure consumers' right to information. Solving this problem will also attain reasonable solutions to protect effectively the freedom to enter into a contract in Vietnam.

In Vietnam, before the enactment of the LCP in 2010, control of standard form contract was quite vague in both legislative regulation and empirical research. For a long time, study of the legal issues of adjustment of standard contract terms did not appear in Vietnam. The law on unfair contract terms in this period was mainly the regulations on standard form contract in the Civil Code 1995 and the later Civil Code 2005. However, these two laws did not provide sufficient legal mechanism to protect consumers in the standard contract form.

The issue of unfair contract terms in Vietnam is centred on two mainstreaming legal texts, the Civil Code 2015 and the LCP (and supplementary legislation). The legal validity of the provisions of the Civil Code 2015, in accordance with the hierarchy of the legal system, are

of a higher legal level than those of the LCP and, therefore, priority is given to the Civil Code 2015 in case of inconsistency with the spirit of the provisions of the LCP.

In addition to these two major legal documents, some other specialised laws also regulate standard form contracts and common contractual terms and conditions, but these focus only on the registration procedure of standard form contracts in specific areas managed by state agencies in the respective industry. In regard to the underlying content, all other specialised legal documents regulating standard form contract and common contracting terms and conditions are governed by the Civil Code 2015 and the LCP.

Generally, regulations on unfair contract terms in the Vietnamese legal system are currently undergoing initial development with a focus on procedural fairness. The provisions of standard form contract and common contractual terms and conditions only come in the form of definitions and principles explaining unfavourable terms and blacklisted terms considered as voidable due to detrimental to consumers. The substantive fairness element was initially mentioned, but there is still a lack of regulations that underlie the interpretation and application of the practice, which is still very unclear. There is a strong focus on procedural fairness strongly expressed in the Civil Code and the LCP.

The following analysis of the legal provisions governing unfair contract terms in Vietnam tends to follow closely two important aspects of this field, procedural fairness, and substantive fairness. Such an analysis is consistent with the current level of development of this regulation in Vietnam with an emphasis on procedural fairness, rather than sufficient attention to substantive fairness through the terms of the consumer contract.

5.2.2 Regulations on Unfair Contract Terms Under the Civil Code 2015 and the LCP

Among the provisions of the LCP regulating unfair contract terms, there is an important clause referring to the application of the provisions of the Civil Code. This is a familiar feature of the law of a civil law country, whereby the content of the unfair contract term must first be consistent with and regulated in a way that covers and supplements the Civil Code. According to this logic, understanding the basics of the unfair contract term in Vietnam begins with the provisions of the Civil Code.

The Civil Code 2015 sets out two clauses regulating consumer contracts in the term of fairness. These two clauses are designed in the same four-part structure: 1) the definition of standard form contract and common contractual terms and conditions, 2) mandatory

disclosure to inform consumers about the existence of standard form contract/common contractual terms and conditions, 3) the principle of interpretation in case a contract containing ambiguous terms in favour of the consumer, and 4) regulation voiding contract terms allowing sellers to be exempt from or increase the liability or removing the legitimate interests of the other party unless the contracting parties agree about this.

This structure is similar to the regulations of this regime in the LCP. The LCP has seven articles regulating issues related to unfair contract terms. Although the regulations in the LCP do not follow the four-part structure of those in the Civil Code, the elements articulated (e.g., definitions of the standard form contract and general trading conditions) are essentially the same albeit separated by explanatory sections.³⁰ The requirement of public disclosure of standard form contracts and general transaction conditions is conveyed in the form of regulations stating that enterprises dealing in goods and services subject to regulations must carry out procedures for registration of standard form contracts and general transaction conditions with competent state agencies.³¹ The principle of interpretation of the contract when it is possible to understand the terms in different ways is provided in a spirit similar to that of the Civil Code in a separate clause (LCP art 15). Similar content also includes a blacklist of terms automatically considered null and void in the consumer contract.³²

Basically, the LCP does not have any rules except for the four basic contents that emphasise procedural fairness as regulated in the Civil Code, but some of these provisions still contain clearer contents than the Civil Code. More specific content in the LCP is the definition of standard form contract and general transaction conditions. While the Civil Code provides the definition of contract according to the pattern and conditions of dealing with entities at the broadest level, including all individuals and organisations performing contract transactions, the LCP restricts the scope of contracting subjects to businesses and individuals, and the recipients of standard form contracts are consumers. Accordingly, the standard form contract is defined as ‘a contract unilaterally drafted by a business individual, organization for making transactions with his/her consumers’. Article 3.5 also introduces the concept of ‘general transaction condition’ to ‘include rules and regulations relating to the sale of goods or supply of services which are unilaterally announced and

³⁰ *The Law on Consumer Protection 2010* arts 3.5, 3.6.

³¹ *Ibid*, art 19.

³² *Ibid*, art 16.

applied by a business individual, an organization to their customers'.³³ General transaction conditions of the LCP are explained in an informal manner³⁴, and the definition expresses three basic characteristics: 1) general transaction conditions are rules and conditions drafted by unilateral traders, 2) these are applicable primarily to consumers, and 3) these apply to multiple consumers and multiple uses. A standard form contract is also considered one of the types of general transaction conditions. However, the difference is that general transaction conditions may be contained within the standard form contract or may be specified in a separate document provided that they are publicly disclosed by the supplier.³⁵

The second specifiable point lies in the provision that supports the transparency of a standard form contract under the designation 'control of standard form contract and general transaction conditions'. Accordingly, the disclosure of terms in the standard form contract should be made for consumers to access and know about these terms (as required by the Civil Code). Further, the LCP also regulates that enterprises dealing in goods and services in the specific list³⁶ must register their standard form consumer contract and general transaction conditions with the relevant state agencies. This regulation aims to publicise the contents of the standard form contract that may bring consumers to disadvantageous liability, expressing the state's efforts to protect the interests of consumers in some important areas where their interests are most at risk. The final highlight, the focus of regulating the unfair contract term of law, could be to specify the blacklist of terms that are of no legal validity when they belong to the corresponding set of cases listed.³⁷

The provisions in the above two legal documents show that lawmakers have paid attention to the design of consumer protection regulations through standard form contracts and

³³ Ibid, arts 3.5, 3.6.

³⁴ These characteristics are expressed only in the subjective opinion of the members of the drafting committee and do not exist in a formal regulation of the law.

³⁵ Nam Do Giang, *Comments on Regulations Relating to Standard Form Contract and General Transaction Conditions in the draft of Civil Code (amended)* ("Binh luan hop dong theo mau va dieu kien giao dich chung trong du thao Bo luat dan su (sua doi))" <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_TAILIEU/Attachments/1967/Cac_quy_dinh_lien_quan_den_hop_dong_mau_Tai_lieu_tham_khao.docx>

³⁶ *Decision for Amending a Number of Articles of the Decision No. 02/2012/QĐ-TTg on Promulgation of Essential Goods and Services for which Contract Forms and General Transaction Conditions must be Registered. (Quyết định Sửa đổi một số Điều khoản của Quyết định số 02/2012/QĐ-TTg về Danh mục Hàng hóa, Dịch vụ Thiết yếu phải Đăng ký Hợp đồng theo mẫu, Điều kiện giao dịch chung)* The list includes: 1) supply of electricity for residential consumption; 2) supply of tap water; 3) pay television; 4) terrestrial fixed telephone services (form of payment: prepay service); 5) terrestrial mobile information services (form of payment: postpaid service); 6) internet access services; 7) air transport of passengers; 8) rail transport of passengers; 9) Purchase and sale of apartments, daily-life services provided by apartment-managing units; 10) issue of inland debit cards, open and use payment account service (applicable to individual customers), individual borrow service (for consumption purpose); and 11) life insurance.

³⁷ *The Law on Consumer Protection 2010* art 16.

general transaction conditions. Lawmakers in Vietnam shows more regard to standard form consumer contracts which always tends to be a potential danger to consumers due to this type of contract being unilaterally drafted without negotiation in the transaction.³⁸ Consumer protection through regulating the standard form contract is consistent with the development of consumer protection policies through the unfair contract term, which is increasingly being considered by many legal systems around the world. The presence of these regulations in the LCP and the Civil Code 2015 proves that this regime is recognised as fundamental in the legal system of Vietnam.

However, the entire provisions on standard form contracts and general transaction conditions in these laws clearly illustrate the most prominent feature of this regulation in Vietnam. It shows that the adjustment in the field of standard form contracts and general transaction conditions are unlikely to guarantee the fairness of contract terms in respective of substantive content. That is, the level of consumer protection of the LCP and supplementary regulations only stops at the level of procedural fairness protection, rather than at the level of substantive fairness protection. This can be substantiated by the following arguments.

Firstly, the Vietnamese legal system ensures procedural fairness through the Civil Code 2015 and the LCP, focusing on two core principles, the transparency, and openness of the standard form contracts and general transaction conditions. These principles require a business to publicise standard form contracts and general transaction conditions to consumers and give them the appropriate time to read and understand the contract.³⁹ Transparency is also regulated at higher levels of control through the requirement that business entities in the certain industry must register standard form contracts with the Vietnam Competition Authority. However, this control of state agencies only touches on the formalities, through the disclosure obligation of the standard form contract of the enterprise, rather than control fairness of the terms of the contract. The provisions in the Civil Code and the LCP relating to this obligation almost require only a trader's acting of registration without further regulation on the approval of the state agency with respect to the terms of the standard form contracts. Thus, the registration is purely procedural to ensure transparency, while also supporting consumer access the content of standard form

³⁸ The development of the Civil Code 2015 from the Civil Code 2005.

³⁹ The Civil Code 2015 art 405 regulates 'The standard form contract must be public in order for the parties to know or should know the contents of the contract', while the LCP art 16 requires 'Upon entry into a standard contract, the business individuals, organizations must provide a reasonable period of time for the consumers to consider the contract'.

contracts. This proves the tendency towards a procedural fairness level of protection in the LCP and the Civil Code.

Meanwhile, substantive fairness adjustment in the Vietnamese law manifests itself in a faint and defective way. In comparison with respect to the obligation to publicly disclose the terms of the general transaction and the standard form contract, the clauses expressing control over the substantive content of the contract account are smaller in number and contain many shortcomings. This shows the moderation of substantive content of this regulation in Vietnamese law is still limited.

Both the LCP and the Civil Code 2015 lack a general definition of what constitutes an unfair term, and there no regulation of the fairness test of the terms of standard form consumer contracts. The words 'fair' or 'unfair' are not mentioned in either law when looking at the face of the terms used in their regulations. In the absence of an effective test mechanism, a regime of unfair contract terms cannot establish a framework that includes the essential provisions underpinning the application of the judges and administrative bodies on consumer protection. In other words, the Vietnamese law has not yet established sufficient basis for the effective implementation of the protection of the fairness of contract terms.

In the LCP's regulations, two signs of control over the fairness of the contract terms are found in terms of the implication of clauses, but they all have defects, and the LCP's content in terms of the adjustment objective is rather faint. These two signs are expressed in the two laws as follows.

The first sign is that the recognition of the principle of interpretation of unclear contract terms is in favour of the consumer. Article 405.2 of the Civil Code 2015 stipulates that 'where a standard form contract contains terms and conditions which are unclear, such terms and conditions shall be interpreted in a manner favoring the offeree'. In the LCP, this principle is specified in art 15: 'if contents of the contract can be interpreted in different ways, the contracts shall be interpreted in favor of the consumers by person or organizations authorizing to handle violations'. The principle of explaining the unclear clauses of Vietnamese law based on the *contra proferentem* theory is also widely recognised in the legal system of other countries, whereby once contract terms show their unclear meaning, priority should be given in the opposite direction to the interests of the

drafting party.⁴⁰ Of the three fundamental factors that need to be established in a regulatory framework governing the unfair contract term, this provision of Vietnamese law satisfies the second element of modifying the substantive content of the contract terms. However, the effectiveness of this application in practice is influenced by a number of other factors that have defects.

The second sign is to prohibit against the unfair contract term through a blacklist, which enumerates the terms of disclaimer or limitation of liability of the seller or increasing consumer's disadvantageous obligation will have no legal effect. The LCP provides a total of nine categories of terms likely to disadvantage consumers and threaten the fairness of the contract, and states explicitly that these terms would void if they exist in the standard form contract or general transaction conditions.⁴¹ The regulation of such a list in the Vietnamese legal system is consistent with the trend of countries in trying to find optimal ways to ensure fairness of standard form contracts to protect consumer interests. The use of this method also shows that the state policy embodied in the LCP is that it does not hesitate to severely limit the parties' contract freedom for the purpose of guaranteeing the equity of this kind of contract.

However, the provision of the blacklist of terms in the regulations of Vietnamese laws reveals many weaknesses due to the lack of a general definition of what is unfair terms, and there no regulation on a substantive unfairness test in the legal system as mentioned above. The first shortcoming is that without a framework of elements constituted from a generic definition and a substantive fairness test on which a term would be considered unfair, this list lacks the basis that can explain their existence reasonably.

An argument that exploits these gaps in Vietnam's legislation is to argue the rationale for the list of terms of exemptions or limitation of liability which could be considered to be void in the standard form consumer contract. This argument is based on the assertion that the waiver clause is beneficial in ensuring the effectiveness of the transaction because it can reduce the cost of risk, litigation, and transaction and help the parties bravely invest for the transaction.⁴² Therefore, it is unreasonable to stipulate that the presence of these terms in

⁴⁰ Khanh Nguyen Ngoc, *Contract Interpretation under the Vietnamese Civil Code*, (Jurisprudence Publishing 2007), 266.

⁴¹ *The Law on Consumer Protection 2010* art 16.

⁴² Net Le, 'Comment on the Draft of Civil Code (amended) on Exemption Provisions from Liability and Limitation of Benefits in the Contract (Gop y du thao Bo luat Dan su (sua doi) ve dieu khoan mien tru trach

the contract will automatically make themselves voidable, but the probability of their unfairness should be assessed in overall consideration of the contract and the actual situation of the transaction.⁴³ A feature of just focusing on fairness in terms of formality instead of the substantive fairness makes this regulation in Vietnam hard to be called a regime of unfair contract term in the proper way. The governing of fairness of the contract terms is rather unclear, and the general terms of the rights and interests of the parties to the contract are not mentioned. As a result, procedural equity emerges sharply in terms of transparency requirements for terms, rather than the objective of promoting fairness of standard form consumer contracts. Further, in the regulatory system of this regime in Vietnam, the transparency is unlikely regulated at its profound meaning but only limited to the requirement for consumers' access to the terms of the contract. Meanwhile, the transparency is also of clarity and purity—in other words, of fairness at the highest level of transparency itself. Such a requirement is challenging for Vietnamese policymakers. Such a request can only be made through the examination of the content of the contract, which is also the consideration of the fairness of the contract terms. Transparency is linked closely to fairness and can only be achieved on the basis of transparency. Therefore, once adjustments to the substantive unfairness of the terms have not been finalised, even the procedural fairness regulations can hardly be enforced effectively in Vietnam.

In addition, the handling of waiver terms between the Civil Code 2015 and the LCP is inconsistent. The LCP, a specialised law with a particular task for consumer protection, was enacted before the Civil Code 2015 and promulgated on the basis of amendments to the Civil Code 2005. The blacklist as prescribed by the LCP is automatically considered as voidable terms. As a consequence, it is impossible to bind the contracting parties in respect of these terms. However, the Civil Code 2015 provides another way of dealing, whereby 'a standard form contract contains provisions exempting the party providing such standard form contract from liability, or increasing the liability of or waiving legitimate interests of the other party, such provisions shall be ineffective unless otherwise agreed'. As such, in the case that the parties have agreed that they have understood and voluntarily agreed to enter into these terms and conditions of the standard form contract or general transaction conditions, they shall remain effective in accordance with the provisions of the Civil Code 2015.

nhiệm vụ hạn chế quyền lợi trong hợp đồng)' (2005) 2 *Journal of Legal Science* (10 February 2008) <<https://thongtinphapluatdansu.edu.vn/2008/02/10/135/>>

⁴³ Ibid.

The inconsistency between these two laws shows the change of Vietnamese regulators in view of the handling of exempting terms. With regulations on how to deal with the exclusion clause in the LCP, regulators in Vietnam follow the strict trend of eliminating unfair terms with hard intervention in contracts freedom. According to the LCP, exempting terms are automatically null and void regardless of whether the parties voluntarily enter into these terms. However, with the advent of the Civil Code 2015, the views of regulators have been more flexible in the direction of respecting the choice of the parties to the contract.

Considered from the perspective of the selecting adjustment model, the change in the policy of publicising the standard form contract and treatment of unfair terms in Vietnam reflects the move from the traditional adjustment model to the current trend of promoting consumers' choice. To open the possibility for the parties to freely choose unfair terms and still validate these terms in Vietnam may be considered as a manifestation of the modality between the conventional model and the new trend as discussed in Chapter 2. However, such a smooth combination could succeed and be effective in a comprehensive legal system capable of limiting to a minimum the risk of major disadvantage for consumers. This can be achieved in a whole legal system in which the likelihood of detriment to consumers is minimised thanks to comprehensive coverage and an effective containment system which makes violation by businesses subject to the cost of compensation.

Such a situation, when assessing the overall regulatory provisions and structure of the LCP as previously described, is unlikely to be achieved. Thus, respect for the choice of consumers in the legal context of many shortcomings exposes consumers to more risks than benefits. It is necessary to reform the legal provisions to better protect consumers, rather than to limit the freedom of choice of consumers.

5.3 Regime of Unfair Contract Terms in the ACL

5.3.1 Overview

The unfair contract term regime in Australia derives from the *Consumer Contracts Regulations 1994* (UK) made pursuant to the *European Communities Act 1972* (UK).⁴⁴ It is also based on conjunction with the unfair contract term provisions of the former *Fair*

⁴⁴Australia and Russell Victor Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 2017) 1569.

Trading Act 1999 (Vic) pt 2 and the *Contract Review Act 1980* (NSW) which deals with unjust consequences or unjust contracts meaning unconscionable, harsh or oppressive.⁴⁵ Although separate legal texts in this area appeared in the states, an unfair contract term regime at the national level in Australia did not originally constitute since the courts in common law countries tend not to intervene in contract freedom for the reason that the consumer contract is voluntarily entered into by the parties.⁴⁶

The provisions on unfair contract terms were triggered by a Productivity Commission report that emphasised the importance of the need to enact a national regime in the area of unfair contract terms. Accordingly, limiting the interests of consumers due to the existence of unfair contract terms requires state intervention in this regard both economically and morally.⁴⁷ It was reported that adjustment of the unfair contract term in Australia could be made possible by the application of unconscionability provisions in theory, but such application was assessed as costly and slow. The presence of a national unfair contract term regime can also prevent and remove some industry-specific arrangements dealing with the issue of unfairness.⁴⁸

5.3.2 Mechanism for Modifying Unfair Contract Terms in the ACL

The ACL regulates unfair contract terms through the five sections (ss 23–28); however, the whole structure of a complete design requiring a high abstraction in Australia's regulatory design has been clearly demonstrated. The regime of unfair contract terms is constituted from a central institution supported by three additional tools that play an important role in completing the regulatory structure.

The centre of the regime is the definition of the unfair contract term, which outlines the factors that go along with its substantive fairness test of terms with specific criteria. This central institution is supported by three more straightforward tools, like the three-legged combination of central institution implementation which include provisions on transparency of the provisions, a blacklist of unfair terms and regulations about examining the contract and its terms as a whole.

⁴⁵ Ibid.

⁴⁶ Stephen S Corones and Philip H Clarke, *Consumer Protection and Product Liability Law: Commentary and Materials* (Lawbook Co, 2002) 153, 192.

⁴⁷ ACCC, above n 11, 34.

⁴⁸ Ibid, 34–35.

5.3.2.1 A Test of the Unfairness of Contract Terms—A Principal Tool of Adjustment

The primary content of the ACL's unfair contract term regulation is in s 24(1) providing conditions that help the court determine whether a term is unfair. Under s 23(1) of the ACL, three conditions must be met when considering unfair terms in a contract: 1) the contract must be a consumer contract, 2) the contract must be a standard form contract, and 3) the contract term must contain a term that is unfair.⁴⁹ Accordingly, the process of determining unfair terms under the ACL must go through the steps of determining what a consumer contract is, what a standard contract is and what an unfair contract term is.

5.3.2.1.1 Consumer Contract and Standard Form Consumer Contract

While the contract term unfairness test is the core element of state intervention, the two remaining preconditions relate to the subject of regulation, a contract, also under the strict control of the ACL. The characteristics of a consumer contract as defined in the ACL require that the buyer be an individual in a business-to-consumer transaction, except the case in respect of a contract between a business and a sole trader.⁵⁰ The concept of determining whether a consumer contract is unfair seems to focus on identifying the reason consumers acquiring goods and services through consulting contracts, rather than focusing on the nature of the goods or services.⁵¹ The purpose of the buyer at the time of acquiring goods, service or interest in land rather than later⁵² is important for determining the nature of the consumer contract; thereby, the purpose must be 'wholly or predominantly for personal, domestic or household use or consumption'. The core of the review, however, is not in itself intended but in the purpose of a provision, which may be with regard to the fact that consumers insert a clause into the contract that the goods or services are required wholly or predominantly for personal, domestic or household use or consumption and that they enter into a contract for this substantial purpose.⁵³

With respect to the second element of the regulation, the ACL does not provide a definition of a standard form contract that is commonly called as 'take it or leave it' contract or non-negotiable contract. The Productivity Commission's report recognised that these kinds of contracts have advantages for consumers, as the cost savings from the issuance of a one-

⁴⁹ Coorey, above n 23, 332.

⁵⁰ *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth)*.

⁵¹ Australia and Miller, above n 43, 1571.

⁵² Coorey, above n 23, 333.

⁵³ Corones, above n 45, 186.

party contract will be passed on to consumers as lower prices. However, the Productivity Commission also claims that because of the complexity and apparent terms of the contract, consumers often do not read them which promotes enterprises' ease use of these unfair terms.⁵⁴ Thus, the standard contract form is the primary subject of state intervention in the field of the unfair contract term. Accordingly, s 27 of the ACL provides some suggestions for determining the features of a consumer contract. These suggestions revolve around issues that the court needs to take into account in determining whether a contract is a consumer contract, including whether all or most of the bargaining power of one party to the contract, the contract is prepared by one party before discussing the transaction, another party is required to accept or cancel the terms of the contract, another party is given a reasonable opportunity to negotiate terms in the contract and the terms of the contract take into account the specific characteristics of another party or the particular transaction. The two conditions that are relevant to the subject matter of the regime are to assist the functioning of the central test in determining the elements of an unfair term.

5.3.2.1.2 The Test of an Unfair Term

The test for the unfairness of contract terms is rather specific and complete thanks to the technique of using the definition-based structure to map out the necessary criteria for unfair terms in the ACL. Accordingly, s 24 of the ACL sets a three-limb test for unfairness. Specifically, the court will have to consider three main issues arising from the terms: 1) significant imbalance in the parties' right and obligations arising under the contract, 2) unreasonably necessary to protect the legitimate interest of the party who would be advantaged by the term, and 3) causing detriment to a party when the terms are applied or relied on.

The lawmakers' deliberate consideration in selecting the factors to consider are expressed through the characteristics of these three factors. They are a fairly balanced division of choice involving the parties when a factor favours the seller's interests, another factor disadvantages the buyer, and the last factor addresses the degree of imbalance of rights and obligations between the seller and the buyer.

The first factor relates to two issues that need to be identified in the test—the existence of an imbalance of parties' rights and obligations and whether that imbalance is significant.

⁵⁴ ACCC, above n 10, 159.

Overall evaluation of this element gives some views that are sometimes contradictory. In *Director General of Fair Trading v First National Bank Plc*, President Mori argued that the examination of a significant imbalance in the parties' rights involves normative judgments, whereas Cavanaugh J asserts its inquiry is quantitative.⁵⁵ These arguments show a variety of approaches towards assessing of whether an imbalance appears significant or not. The qualitative feature of this requirement likely contributes to the complex process of making a decision of judges in courts. This is likely one of the reasons why the blacklists of unfair terms could play a useful role in examining the unfairness of contract terms in reality.

Generally, there are three approaches recognised in Australian case law in assessing the significant imbalance of parties' rights and obligations in standard form consumer contract. The first model of assessment can be approached from the perspective of asymmetry in terms of parties' rights and obligations.⁵⁶ Elements related to a significant imbalance in parties' right and obligations emphasise the quantitative difference in entitlement and performance of obligations between parties.⁵⁷ Claims on rights and obligations to consumers that do not match respective the rights and obligations placed on traders may be viewed as an imbalance in this approach.⁵⁸ Such imbalance also needs to satisfy the level of 'significant' in which they should bear the features like 'significant in magnitude' or 'sufficiently large to be important', being a meaning not too distant from 'substantial'.⁵⁹ The second approach of the examination base is on the extent to which the allegedly unfair terms detracts from the consumer's common contract rights.⁶⁰ Under this approach, common law rights of consumers accumulated throughout the length of constant judicial scrutiny can provide the benchmark that is supposed to be a fair imbalance in the rights and obligations of the contracting parties. The alleged terms that are not in accordance with the requirements based on these default rules will be considered to have caused significant imbalances. The third model provides a more proactive approach based on the degree of warping between the reasonable expectations of consumers in the contract and the consequences that the term causes or is likely to cause.⁶¹

⁵⁵ Paterson, above n 3, 76.

⁵⁶ Ibid, 73.

⁵⁷ Coorey, above n 23, 338; *Jetstar Airway Pty Ltd v Free* 2008 VSC 539.

⁵⁸ Paterson, above n 3, 73.

⁵⁹ Coorey, above n 23, 338.

⁶⁰ Chris Willett, *Fairness in consumer contracts: The case of unfair terms* (Routledge, 2016). 47.

⁶¹ Ibid, 49.

The assessment of significant imbalances in Australia expresses some features rather differently from other regimes, including the UK, Europe and Vietnam.⁶² When the words in question bear more than one possible meaning, the Australian courts favour the interpretation that gives the most reasonable result based on what the parties are capable of having intended.⁶³ Accordingly, the High Court claims that the explanation must ensure to ‘avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust’.⁶⁴ This approach shows that Australian regulators keep tabs on the right object of unfair contract term law which aims to protect the fairness in its original meaning, rather than the interests of the consumer. It is appropriate to place the philosophy of the approach in the context of the classical contract theory which focuses on equality and voluntary agreement between the parties. It maintains the regulations of the unfair contract term, which is often criticised as a regime deeply interfering in contract freedom, obtaining a neutral and consistent appearance as implied in its name. Conversely, the introduction of the principle of explaining ambiguity based on rationality makes the amplitude of the meanings of these terms broadened, leading to a reduction in the likelihood of terms being judged unfairly by the court’s decision.⁶⁵

In the second step, the respondent must prove that there is a legitimate interest under the common law of the restraint of trade and the reasonable necessity of the provision to protect that interest.⁶⁶ The proof of the existence of legitimate interest is simple, done by showing that the terms were drafted to protect the business from risks arising in the transaction.⁶⁷ However, the justification of the reasonable necessity of the presence of terms is also abstract and must be examined by the proportionality of the term.⁶⁸ The proportionality is expressed in terms of the importance of the legitimate interest that the business needs to protect or the risk that the business must avoid and need to be consistent with the obligations placed on the consumer or the circumstances that the traders put forward in the contract. If a disproportionate response between benefits and risk is established, it will be considered that there is no reasonable necessity for the protection of the legitimate interests of the traders.

⁶² Paterson, above n 3, 66–67.

⁶³ Ibid, 66.

⁶⁴ Ibid, 66; *Australia Broadcasting Commission v Australian Performing Right Association Ltd.*

⁶⁵ Ibid, 66.

⁶⁶ Corones, above n 45, 196.

⁶⁷ Paterson, above n 3, 80.

⁶⁸ Ibid, 80. *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, [50]; *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092, [175]; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims) [2009] VCAT 754, [248]–[250].

The consideration of whether legitimate interest protection is reasonably necessary or not emphasises the reasonable necessity of the terms of the seller's right. Section 24(4) of the ACL requires the business to provide evidence that the party advantaged by the term was done so in a manner reasonably necessary to protect its legitimate interests. It is a rigid assumption that these kinds of contract terms are not reasonably necessary for businesses unless they prove otherwise.⁶⁹ Evidence that can be admitted comprises the kind of goods or services provided, the nature and structure of the business and its costs, the risks of litigation and industry practices.⁷⁰ This rule clarifies the liability of the business when arising dispute and helps the courts to implement the dispute effectively. The third element of the test relates to the financial and non-financial detriment to the consumer if the terms of the contract are applied.⁷¹ The nature of the detriment is extended even to the non-financial consequences of allowing the court to consider in a wide range of forms likely to cause a considerable disadvantage for consumers.⁷²

Based on the three factors discussed, it seems that state intervention in regard to unfair contract terms is assumed to be relying primarily on the irrationality of the terms of standard form contracts, rather than the basis of the requirement of the consumer's right to information. The issues such as a quantitative assessment of significant imbalance of parties' rights and obligations, an emphasis on critical requirements to ensure reasonable necessity of legitimate interest and an examination of financial and non-financial detriment to consumers are not directly informative considerations. However, all of these elements are expressed through the terms of the contract, so the information conveyed by these terms greatly influences the process of reviewing the unfairness of the terms. Further, in addition to these tests, there are three other tools that give powerful support for these tests. These are analysed below in terms of protecting right to information over claims to fairness in consumer contracts in the ACL. These three tools contribute greatly to the fact that the right to information is the basis for ensuring the fairness of contract terms. These tools primarily show that the right to information is the ground for guaranteeing the operation of the unfair contract term regime.

⁶⁹ Coorey, above n 23, 340.

⁷⁰ ACCC, *Unfair Contract Terms - A guide for Businesses and Legal Practitioners* (March 2016) <http://consumerlaw.gov.au/files/2015/09/Unfair_Contract_Terms_Guide.pdf> 11–12.

⁷¹ Coorey, above n 23, 341.

⁷² *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) s 5.33.

5.3.2.2 *Supporting Tools*

First, the transparency requirements of contract terms are set forth in s 24 (5) of the ACL where consumers' right to information in the unfair contract term is most apparent. A series of conditions to clarify the terms of a standard of transparency are the information expression through the characteristics of the content of the terms and expressions on the surface of the words used as terms including reasonably plain language, legibility, clear presentation and readily available to parties affected by the term. These conditions are expressed in respect to language, formality, and content. Specifically, in terms of language, it must be written in the reasonable plain language, the content must be presented clearly, and these terms must be legible and readily available to any party affected by the term. The transparency of content requires plain language to be intelligible to ordinary members of the public.⁷³

From the respective of formality, transparency is directly determined by the specific signs of the legible, including the requirements of style and the size of the font used in a standard consumer contract.⁷⁴ While these two requirements show caution in the regulations on transparency, it is arguable that the contract must be readily available to any party is unlikely to cover the circumstances to be anticipated by law. This review argues that such a regulation does not specify the time disclosure required before the contract is entered into for a reasonable period of time sufficient for the consumer to fully understand the terms of the contract.⁷⁵ On the other hand, the regulation on transparency under the ACL requires consumers to be given notice of unusual terms in the contract.⁷⁶

The transparency requirements of contract terms represent an informative assessment of the unfairness of a term is recognised as the demand for procedural unfairness. Thus, trading practices that the court may consider are centred around promoting the chances for consumers to be aware of and have time to consider the terms before entering into contracts. As defined by the Office of Fair Trading, the transparency of the standard form consumer contract does not require traders to interpret terms to ensure that consumers understand every word of the contract. It is important that they have a real chance to understand the terms that can bring unpleasant experiences by the time the contract

⁷³ Office of Fair Trading, 'Unfair Contract Terms Guidance - Guidance for the Unfair Terms in Consumer Contracts Regulations 1999' (2008) 87.

⁷⁴ Paterson, above n 3, 87.

⁷⁵ Ibid, 89.

⁷⁶ Corones, above n 45, 198.

becomes binding. Consequently, the relevant factors that the court may consider as set forth in the ACL revolve around evidence such as a notice or an explanation given to consumers, a practical opportunity to consider the terms or professional advice provided before signing the contract.⁷⁷

In some court cases, the problem is solving the following question: When a transparent clause has been notified to the consumer, which sufficiently satisfy the requirement of procedural unfairness, should it be considered substantive unfair by the court? For judges who favour the principle of contract freedom under a contract theory, once the conditions of transparency and voluntary participation in the contract are met the contract must be respected, and the terms within the contract would bind the contracting parties.⁷⁸

There is, however, another view that procedural consideration is not a shield that naturally ensures traders escape the liability of unfairness.⁷⁹ Substantive considerations by which to make an assessment of the balance of clause content must be taken into account as an essential element. The third approach is likely a search of a neutral point between the loyalty to the principle of contract freedom and the strict intervention in voluntary contracting. According to Morris J, if reasonable notice of a standard term is given then consumers will be bound by them, even if the consumer is unaware of the terms or could not have read or understood the terms, whereas some other terms can be considered unfair and void under the same conditions.⁸⁰ It is difficult, however, for those who follow this approach to determine which contract terms just need to satisfy the requirement of procedural fairness and which contract terms must guarantee substantive fairness.

When looking at the issue of adjusting unfair contract terms on the basis of emphasis on the importance of the consumer being informed and voluntarily entering into contracts, the protection of the consumer's right to information appears extremely important. It becomes an indispensable condition to identify or eliminate the possibility that a contract term is

⁷⁷ Office of Fair Trading, above n 72, 11.

⁷⁸ Paterson, above n 3, 62. The author mentioned the statement of Harbison J in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd*: 'it appears to me to reflect the common sense view that terms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair', and in the *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims): 'I can envisage that such a term might be perfectly fair if it was brought to a consumer's attention prior to signing of a contract'.

⁷⁹ Corones, above n 45, 199.

⁸⁰ Paterson, above n 3, 62; *Thompson v London, Midland & Scottish Railway Co* [1930] 1 KB 41. The author referred to the statement of Morris J in the case (*Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493 at [48]): 'there will be other terms in consumer contract which will not be regarded as unfair if, and only if, individually negotiated, or, if, and only if, brought to the attention of the consumer'.

unfair. In other words, such an approach makes protection of fair autonomy in the drafting and conclusion of consumer contracts become the protection of consumers' right to information—the right to know, understand and have reasonable opportunity to consider the content of the contract terms.

5.3.2.2.1 Assessment of Standard Form Consumer Contract as a Whole

The second supporting tool for the test of the unfair term is the requirement for examination of a term in the view of contract as a whole.⁸¹ In light of this, Australian regulators have come up with a context for counterbalancing terms where a potentially unfair term is included in the contract but is counterbalanced by additional benefits such as low price.⁸² Thus, the unfairness of a term is justified by looking at the terms in relation to the others of the contract to determine whether the existence of harsh terms in contracts is equal to benefits for a compensation.⁸³ Consequently, a perception of a contract as a whole should be taken into account including the review of the purpose of the alleged terms and the consequence of the impossibility of enforcing this term and determine whether the term relates to consumers enjoying a compensation profit or not.⁸⁴ This requirement manifests informative demand over the terms in standard form consumer contract. Such a request is a vivid representation of the presence of information elements and of the requirements for evaluating information. The information disclosure in the terms will operate best and properly in the overall information that a contract represents. Considering a term individually will not allow understanding of the meaning of the term; the term must be considered as it was created and intended to be performed in the consumer contract as a whole. Therefore, the regulation that a contract term needs to be assessed as a whole seems to clearly express that the nature of unfair contract term adjustment is a form of regulating right to information in the ACL.

5.3.2.2.2 Grey List of Terms

The third supporting tool for the test of an unfair term is the list of terms that may be considered unfair as set forth in the ACL. The list includes a variety of terms listed in ACL s 25(1). However, these terms are only considered examples of terms that may be unfair. In each specific case, the determination of whether such a term is unfair depends on the

⁸¹ ACL s 24(2)(b).

⁸² ACCC, 'A Guide to the Unfair Contract Terms Law (2010) 13.

⁸³ Corones, above n 45, 199.

⁸⁴ Ibid, 200.

judges' assessment based on the facts of the case⁸⁵ and the satisfaction of the factors mentioned in the test of the unfair term.⁸⁶ The terms listed in s 25(1) only provide a regulatory indication, but do not limited the use of these terms in a contract or considered them to be automatically unfair.⁸⁷ Even an exclusion clause is not considered unfair if the consumer understands the consequences of the term or if they have been reasonably notified of the existence of the term.⁸⁸

This regulation demonstrates the technical consistency of the unfair contract regulatory mechanism in Australia's consumer protection policy. A grey list does not, however, go beyond the test of the unfair term that has justified the existence of the terms themselves in that they satisfy criteria of being unfair. Further, the design of such a blacklist in the protection mechanisms ensures that it is a supporting tool for the test and does not disrupt the consistency and rationality of the overall adjustment mechanism on unfair contract terms in the ACL.

Conversely, the terms listed in the ACL s 25(1) are a clear manifestation of the use of information elements to govern fairness in the terms of standard form consumer contracts. The possibility of being an unfair term is given by whether it can be translated into a term containing certain information. Unfair elements have been filtered and concentrated in the list of terms considered as examples of unfair terms. It also shows that identifying these terms is also a useful way for traders and consumers to access the information and make careful preparations before entering into contracts. From this perspective, such a method of enumerating terms in the regime of an unfair contract term becomes an example of adjustments directly related to the consumer's right to information.

As discussed above, the majority of Vietnamese regulations on unfair contract terms regulate standard form contract and general trading conditions. Decision No. 02/2012/QĐ-TTg stipulates a list of goods and services, then it was modified with No. 35/2015 / QĐ-TTg and supplemented recently by Decision 38/2018/QĐ-TTg on promulgating the list of essential goods and services that must be registered as standard form contract. The regulation that requires a registration of standard form contract at a competent authority is significant to limit the violation of consumers' rights to information in contracting in

⁸⁵ Australia and Miller, above n 43, 1574.

⁸⁶ *Trade Practices Amendment (Australian Consumer Law) Act (No 2)*, (2010). (Cth) ss 5.44–5.45.

⁸⁷ Coorey, above n 23, 345.

⁸⁸ *Ibid*, 347.

Vietnam. However, as mentioned above, the lack of an examination of the fairness of contract terms is a fundamental cause of Vietnam legislation's shortcomings against unfair contract terms. The dispute between Mrs. Nguyen Thi Hong and Binh Chanh Construction Investment Joint Stock Company (BCCI) is a real case of this inadequacy.

Nguyen Thi Hong signed a real estate purchase contract with BCCI to buy an apartment Nhat Lan 3.⁸⁹ This contract is a standard form contract provided by BCCI, in which BCCI committed to handing over the house to Nguyen Thi Hong on December 31, 2011. In the contract, BCCI deliberately eliminated the rights to request unilateral termination of the contract when the apartment is delivered late but was entitled to unilaterally terminate the contract if the buyer delays making payment for the purchase. In August 2013, Nguyen Thi Hong sued BCCI since BCCI did not deliver the house by the commitment. In the county court, Binh Tan People's Court stated that BCCI did not hand over the apartment by their agreement and BCCI deliberately included the unfair terms in the contract. As a result, Nguyen Thi Hong's request was accepted to cancel the contract and BCCI was forced to return the deposit and interest caused by its violation. However, at the appeal tribunal, the Ho Chi Minh City People's Court requested the county court to correct the judgment, dismissed Nguyen Thi Hong's request basing because there were no provisions for contract termination when the seller handed over late within the agreement.

Since the contract was signed in 2011 when the list of essential goods and services for which contract forms and general trading conditions must be registered had not been promulgated yet. However, standard form contracts are regulated under the Civil Code 2005. Accordingly, the Civil Code stipulates that once a term of a standard form contract is unclear, it should be explained in favour of consumers' interest. This regulation is evaluated to clearly show the viewpoints of consumer protection from the perspective of state policy. However, in case Nguyen Thi Hong v BCCI, the unfair term written directly into the contract does not contain an ambiguous expression.

As a consequence, it is not possible to apply a better explanation in favour of consumers in this case. On the other hand, due to the lack of a test of fairness of the terms in the LCP and

⁸⁹ Tung Quang, "Cancel real estate purchase contract due to delay in hand over of flat, why not?" (Huy hop dong mua ban can ho do cham giao tai san, tai sao khong?) (19 December 2019) <http://www.nhandan.com.vn/tphcm/tin-chung/item/23613302-huy-hop-dong-mua-ban-can-ho-do-cham-giao-tai-sao-khong.html>

other relevant laws, the judge of Appeal Tribunal based only on the voluntarily signing the contract of the parties to dismiss Nguyen Thi Hong's request. Such a judgment may not be given after the real estate purchase contract has been included in the list of essential goods and services for which contract forms and general trading conditions must be registered and approved by the competition authority. However, a test of fairness of contract terms including many specific steps as analysed above is likely the best way to control this situation.

5.4 Conclusion

From the above analysis, the similarities in the regulation of unfair contract terms between Australian and Vietnamese legislation are apparent. The first similarity is that the regulatory tools in both law systems are informational and relate to the consumer's right to information. Specifically, the subject matter and tools of regulation, including the standard form consumer contract, regulation on the transparency of the contract and the list of terms, are reserved for certain interests. On the basis of the use of these modalities, the perspective of the unfair contract terms regime in both systems is relatively homogeneous.

In Australia, the introduction of a regime regulating unfair contract terms is expected to contribute to national consistency in consumer protection legislation⁹⁰ and the overall policy regulating this area is 'merely the extension of existing ethical principles about fairness in contracts, to cover substantive terms that appear to be manifestly unfair in most circumstances'.⁹¹ Similarly, the regulatory policy of Vietnam is also to eliminate unfair terms in the standard form consumer contract in an effort to protect the legitimate interests of consumers. When meeting at the same purpose of constructing regulations against unfair contract terms, it is certain that both law systems must have in common the basis for achieving that objective which would involve protecting consumers' right to information in standard form consumer contracts at various levels.

Although the aim of state intervention in this area is similar, the designation of provisions under the ACL has some differences compared to that of the regulations in Vietnam. Differences in the technical regulations established between the two law systems lead to a different level of consumer protection in this area even predicted theoretically. This is analysed below in terms of the impact on consumers' right to information.

⁹⁰ ACCC, above n 11, 433.

⁹¹ Ibid, 151.

As analysed in Section 5.1, the factors related to right to information link to the requirement of fairness of the terms in many respects. Thus, the factors that represent the levels of procedural and substantive regulation of an unfair contract term in a contract also contain protection of consumers' right to information. The fundamental difference in regulating this regime between the two legal systems is that the rules governing unfair contract terms in Vietnam only focus on a contract term's formality, rather than its unfair content. Whereas, the provisions in the ACL focus on both the procedural unfairness and substantive unfairness of terms in standard form consumer contract. Since the LCP and the Civil Code 2015 only regulate the procedural unfairness of a contract term, there exist some shortcomings and limitations.

First, the LCP lacks a test on an unfair term in which the substantive content of term would be focused on determining whether a contract clause is unfair. While the test of substantive unfairness defines specifically factors for assessments courts of the possibility of an unjust term under the ACL, such a test is absent in the LCP and replaced by a list of terms automatically considered unfair under the LCP and the Civil Code.

The absence of such a test leads to the consequence that consumers and traders cannot take opportunities adequately to defend their rights. Incidents of consumers successfully impugning an unfair term that is not in the list regulated under the LCP has become very rare, as there is no legal basis for consideration on which judges can base their decision. Conversely, traders cannot prove that the term they drafted is not unfair because there are no regulatory criteria under which an unfair provision is determined. In addition, the lack of a test of an unfair term makes the list of terms deemed unfair unconvincing since it is unclear whether they are set based on critical standards. This regulatory gap has the potential to not only to limit consumers' ability to protect against unfair terms but is a major obstacle to the exercise consumers' right to information.

A test of unfair terms, broadly, within the unfair contract term regime serves as a last resort for the protection of consumer information. This is because the unfair contract term regulations are established in consumer protection laws for the purpose of redressing the restriction on the practice of consumer information including not being notified of the existence of the provisions, or knowingly but not being able to assess the risks that the provision may bring to consumers. It can be imagined that, after all the disclosure requirements and regulations that prevent the consumer from being misled in choosing

goods and services, regulators make a state intervention in drafting and enforcing contract terms in a commercial transaction. This intervention is made by regulations controlling unfair contract terms in an attempt to create ultimate protection of consumers' right to information in the last phase. Thus, it may be advisable to rethink approaches to mechanism controlling unfairness of contract terms as a shortcoming in the protection of consumers' right to information in the LCP such that this limitation should be addressed. As previously discussed, the LCP does not regulate substantive unfairness content of a contract term but focuses on the elements surrounding the contract, such as regulation of registration of standard form contracts, obligation to give consumers notice of contract terms and a list of alleged unfair terms. One interesting factor is that such an intervention focusing on the procedural unfairness of a term in the LCP tends to be more pronounced in the protection of right to information than in the protection of fairness of the contract terms.

In addition to the major differences between the principal regulatory regimes, the regulations relating to supporting tools between the two jurisdictions also have some differences. Even from the perspective of procedural unfairness control, the LCP's regulations have many limitations compared to the corresponding strict regulations in the ACL. In particular, the regulators do not name the provisions explicitly on transparency by the name of an article or a regulatory section. The requirement of the text format of standard form consumer contract is rather simple without rules on the words' font size. Whereas in the ACL, requirements of transparency of contract terms are carefully set forth such as the demand of notifying the consumer to be aware of contract terms, using certain font sizes in the contract and terms being readily available to the consumer. Specifying the criteria of transparent clause demonstrates an emphasis on the role of transparency in the design of the test of the unfair term under the ACL. It is a sign that, in view of the regulators in Australia, the fairness of the contract must necessarily be implied and established on the basis of transparency, which also means that in the sense of ensuring the information role of consumer contracts.

Further, the difference between the ACL and the LCP is expressed in terms of the list of terms that may be considered unfair. Based on the Civil Code and the LCP's regulations, judges and authorised agencies in Vietnam automatically conclude the list of terms enumerated in these two legal texts as unfair. While the Civil Code and the LCP regulate differently in the legal validity of the terms in the list, when the contracting parties enter voluntarily into the contract they are consistent with the general view that the terms listed

are by their nature unfair. Meanwhile, although the list of terms is even more abundant, the ACL states that the provisions in this list are only examples of cases where an unfair term may be constituted. The factual conclusion that a term is unfair should be considered specifically to each case where the judge will rely on the test of an unfair term to make a judgment.

Regulations against unfair contract terms support the protection of consumer right to information in two ways. They ensure transparency of contracts by ensuring accessibility of contract terms and clarity of contract clauses and enhance the substantive fairness of the terms. While the former is obvious in respect to information right protection, the latter needs to be assessed from the perspective that substantive fairness between contracting parties is one of the means of improving the imbalance of bargaining power that derives from information asymmetry.

Compared with the optimal adjustment model in Chapter 2, both Vietnam and Australia approach the trend of advancing consumer protection. Accordingly, the optimal consumer protection model should adopt flexible policies in a way that maximises opportunities for choice while limiting this possibility to exceptional circumstances reasonably. The unfair contract term is an essential exception. Vietnam and Australia have a legal framework for regulating the unfair contract term by using strict tools including the list of terms considered unfair or a test of an unfair term. At the same time, in their current regulatory frameworks against unfair contract terms both Vietnam and Australia have shown a trend towards moving from objectivity to subjectivity in consumer protection. However, the shortcomings of Vietnam's consumer protection law analysed in this chapter need to be addressed to improve the efficiency of consumer protection in this area.

Chapter 6:

Conclusion and Recommendations

The thesis has examined and comparatively analysed regulations against misleading and deceptive conduct and unfair contract terms in the consumer laws of Vietnam and Australia. It has identified inadequacies and gaps in Vietnam's consumer law and analysed them as factors that limit the efficiency of regulations of consumer's right to information. This chapter concludes the thesis and proposes some solutions to improve the quality of Vietnamese consumer law to enhance the effective protection of consumers' right to information in Vietnam.

This thesis responded to the research question and sub-questions set in Section 1.2. In doing so, the thesis has:

- 1) determined the theoretical framework and the optimal mode of adjustment to the consumer's right to information in accordance with the trend of progressive development of modern consumer protection theory;
- 2) identified similarities and differences in the structure of consumer laws and the definition of the norm consumer regulated in Australia and Vietnam, thereby identifying shortcomings related to this designation and the negative consequences of the differences
- 3) identified similarities and differences in the misleading and deceptive conduct between the Australian and Vietnamese consumer laws, thereby finding the shortcomings associated with this regulation and the negative consequences of the difference;
- 4) determined the similarities and differences in the regulation of unfair contract term between the Australian and Vietnamese consumer laws, thereby discovering weaknesses and gap in this field and their negative consequences for enforcing Vietnamese consumer law.

6.1 Theoretical Implications

The thesis identified theoretical implications at the general level in Chapter 2 and the specific level in Chapter 3. Chapter 2 developed a general theoretical framework of the consumer's right to information and Chapter 3 established theoretical analysis relating to

the object and the scope of the thesis defined as Vietnam consumer protection law and the ACL.

Chapter 2 accomplished two objectives, defining a fundamental philosophy that serves as the theoretical basis for consumer information protection and formulating the optimal adjustment model of the consumer's right to information. This theoretical framework and the optimal type of adjustment were used as a basis for exploring the consumer protection provisions of Vietnam compared to those of Australia to detect weaknesses in the Vietnamese regulations and seek solutions.

This thesis found the framework for adjusting the consumer's right to information to satisfy the aspects of expression of right to information, which is in line with the progressive development of the consumer protection doctrine, modern economic studies and behaviour theory. Chapter 2 examined the doctrine of consumer sovereignty and information asymmetry theory as the cornerstones of establishing a legal framework for the protection of consumer right to information. The thesis analysed two theories existing separately and linked them by association through right to information, thus confirming the basis of consumer information theory based on the close link between these two theories. The doctrine of consumer sovereignty was used to assert and explain the existence of consumer power over the supply side. This power is merely exercised when consumers have the freedom to choose, while the freedom of choice can only be effective once the consumer's right to information is secured. Asymmetric, imperfect information proves that the impediment to consumers exercising the right to information comes from as natural function of market failure. Chapter 2 pointed out that the contradiction between the importance of right to information and the unfavourable exercise of this right shows their complementarity in the essence of the nature of the fundamental rationale of right to information. The thesis concluded that these institutions have established a firm theoretical foundation for the protection of right to information.

The thesis analysed three specific models of information right adjustment—the adjustment model based on conventional understanding, the equilibrium analysis and the opportunity criteria—applied as consumer protection policy applied in many countries. Chapter 2 explored the trend in the theory of consumer protection, expressed through these three models of adjustment, as having moved from objectivity to subjectivity. This chapter specified this shift needed to be taken into account in finding the optimal model for

adjusting the protection of consumer's right to information. After examining the advantages and disadvantages of all three models, Chapter 2 defined the advocacy tendency of these models and analysed the case of exception to the content of the unfair contract term. Chapter 2 concluded that the best option for protection of right to information should take subjectivity as its grounding based on the principle of ensuring consumer choice in combination with the reasonable consideration of limitation of this freedom in certain cases.

Chapter 3 examined the legal framework of the research problem at the specific level, the consumer law of Vietnam and Australia. Chapter 3 determined the evolution of the consumer protection philosophy applied in Australia, analysed policy development through the history of consumer protection in Australia and found that the philosophy of Australia's consumer protection is geared towards the combination of both efficiency and equilibrium while promoting the wellbeing of individual consumers. Australia's current adjustment model was seen to approach the optimal consumer protection philosophy identified in Chapter 2 and determined as a suitable model for comparison with Vietnamese law. Chapter 3 also analysed the development of the Vietnamese legal system, the transition from Soviet law/Marxist–Leninism to flexible transplantation of legal theories from developed countries.

On this basis, Chapter 3 pointed out two important features in the current Vietnamese laws—the lack of a fundamental philosophy to guide the spirit and objectives of law while constructing the law, and the practice of lawmaking in Vietnam expressing the priority of the object that it chooses to protect. When it comes to considering protection of collective majority or protection of individual commercial rights, Vietnam's laws tend to sacrifice individual rights for the sake of stability and social development, though the benefits are not intrinsic and ultimately detrimental to the collective itself. The analysis in Chapter 3 showed the historical cause and explanation for the shortcomings in the protection of consumer's right to information in Vietnamese law as foundation for the specific analysis in Chapters 4 and 5. Chapter 3 also provided an overview of consumer law in Vietnam and Australia, showing the position of these laws in the legal system of each country, their common characteristics and their key contents.

6.2 Recommended Reforms to Vietnamese Regulations on the Consumer's Right to Information

The empirical findings of this thesis are in Chapters 3–5. The thesis analysed and identified the differences between the consumer law of Vietnam and Australia. Chapter 3 pointed out the differences in the structure of the law and the design of provision defining consumers; Chapter 4 showed important differences in dealing with misleading and deceptive conduct, with particular emphasis on misleading advertising; and Chapter 5 identified differences in the regime of the unfair contract term. Based on the differences identified in these chapter, this dissertation proposed modifications and reforms to increase the effectiveness of Vietnamese regulations in these areas.

The findings are divided into two groups: 1) the fundamental differences related to the selected contents analysed in previous chapters, and 2) the proposed solutions for reforming the consumer law of Vietnam. The first group is summarised in Tables 1–3. Table 1 summarises the identified differences in the philosophy of construction of consumer law, legal structure and definition of consumers. Table 2 summarises the identified differences in regulations against misleading and deceptive conduct and misleading advertising. Table 3 summarises the identified differences in regulations against unfair contract terms.

The core research of this was identification of solutions to reform Vietnamese consumer protection law, as set forth in the central research question (see Section 1.2), which is concentrated at the end of Chapters 3, 4 and 5 (Sections 3.4, 4.6 and 5.4 respectively). The thesis identified two sets of proposed solutions to improve the effective protection of right to information in Vietnamese consumer law—a general solution related to the structure of law and the definition of the consumer, and specific solutions to particular issues of the consumer's right to information.

6.2.1 Overall Findings and Proposals for Vietnam

Section 3.4 accomplished a significant step in comparing the provisions of the consumer laws of Australia and Vietnam. This section explored two important overall factors in determining the success of the consumer law—the structure of the law and provisions that provide the definition of consumer. Similarities and differences between Vietnamese and Australian law regarding these two factors were identified and analysed in Section 3.4. These findings are summarised in Table 1.

Table 1: Differences in the Philosophy of Construction of Consumer Law, Legal Structure and Definition of Consumers.

Differentiation Criteria	Vietnamese Consumer Protection Law	Australian Consumer Law (ACL)
Legal position in the national legal system	Part of the legislative, legal system including different laws which regulate trade activities such as the Commercial Law, Quality Law, Advertising Law and Competition Law. The LCP is not the only law that adjusts the field of consumer protection.	Set out in the <i>Competition and Consumer Act 2010</i> (Cth) (the ACC) sch 2, the ACL was the first law to demonstrate the consistency of the cross-Australian consumer legal framework. The ACL regulates consumer relationships across all types of goods and services (excluding financial services).
Structure of the law	Six chapters, 51 articles. There are some provisions providing the general principles, but no specific adjustment for each type of conduct that may contravene consumers' rights and interest. The general protection section covers the principal clauses, policy statements and acknowledges of some consumer rights. There is no specific adjustment to particular conduct ⁵⁹⁴ , but acknowledgement of responsibilities of the subjects which are classified by basing on relationship with the consumer, including the responsibility of the organisation and individual	Five chapters, 20 parts, 287 sections. ACL comprises general protection (ch 2), specific protection (ch 3) the consequence for breach of the ACL (ch 4) and enforcement power and remedies (ch 5). The general protection includes the regulation of the general prohibition on misleading or deceptive conduct, unconscionable conduct and unfair contract terms. The specific protection regulates certain practices, or popular forms of conduct caused damage to consumers.

⁵⁹⁴ See at page 112, paragraph 2.

	business with consumers (ch II), the responsibility of the social organisation for consumers (ch III) and the responsibility of state management of consumer protection (ch V).	
The objective of the law	<p>The aim of promulgating the LCP was stated unclearly in Report No 45 in which Vietnamese lawmakers identified the objective of the LCP in Section II under ‘The principal guidelines and direction of design the law’ which included three subsections.⁵⁹⁵</p> <p>These sections affirm the central role of the state and the social organisations in consumer protection and state the only objective is to protect consumers by ensuring the balance of interests between consumers and businesses.</p>	<p>The objectives of the ACL are stated in the Productivity Commission’s ‘Review of the Australian Consumer Policy’ report, including an overall goal of overarching objectives and six operational objectives.</p> <p>The overall goal is ‘To improve consumer well-being through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly’.</p>
Objects are protected as consumers	<p>A consumer is defined as a ‘person’, but it is not explicitly stated whether this refers only to natural persons or to natural persons and organisations, including inquirers for goods and services that do not have direct contract with traders.⁵⁹⁶</p> <p>Small businesses are not considered as a consumer to be</p>	<p>Consumers are those being individual consumers and small businesses, provided that their acquiring of goods and services is not an excluded case.</p> <p>Small business can be considered as a consumer if they acquire tools worth less than A\$40,000 for use in the</p>

⁵⁹⁵ See at page 110, paragraph 2.section 3.3.2.

⁵⁹⁶ See at page 106, paragraph 1, section 3.3.1

	protected by the LCP since the direct use of goods or services for domestic consumption is the only required purpose by the LCP and by the reality of enforcing the law. ⁵⁹⁷	manufacturing process.
Legal technique in designing the definition of the consumer: the purpose of acquiring goods or services	<p>The LCP requires the purpose of acquiring goods and services ordinarily for personal, domestic or household use or consumption by the explicit statement in the regulation on the definition of a consumer.⁵⁹⁸</p> <p>Referring to the consumer's purpose in the legislative regulation of definition of a consumer can require the obligation of consumers to prove the purpose of their use of goods and services.</p> <p>There is no regulation on maximum transaction value.</p>	<p>The ACL has used the exclusion method, whereby the acquiring of goods or services will be included to be considered a consumer, except for the three purposes listed in s 3(2):</p> <ul style="list-style-type: none"> - acquiring goods or services for the purpose of re-supplying or - using goods, service or transforming them in the course of a process of production or manufacture or - in the course of repairing or treating other goods or fixtures on land. <p>A rule of A\$40,000 monetary is used to restrict large transactions in which the subject should not be protected by the ACL.</p>
Regulations provide additional	There are no additional regulations that provide explanation and guidance for the understanding of the concepts of terms used in the definition of consumers.	The ACL contains a series of additional provisions to clarify the terms mentioned in the definition of consumer, including the norms such as goods, services, supply and re-supply, and

⁵⁹⁷ See at page 106, paragraph 1, section 3.3.1.

⁵⁹⁸ See at page 108, paragraph 4, section 3.3.1.

explanation of the terms used in the definition of consumer		the term of ‘in commerce and trade’.
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6.2.1.1 Proposal for Overall Reforms Relating to the Objective and Structure of Vietnamese Consumer Law

Based on the findings of the structural differences between Vietnam and Australia and the purpose of the respective consumer laws, along with the analysis of inadequacies arising from these differences, this thesis proposes some solutions for the amendment and supplementation of Vietnam's consumer law as follows.

First, clear and widely publicised objectives need to be set out, which could accompany operational objectives listed in the Vietnamese consumer law. These objectives should express the spirit of the optimal model of state intervention in consumer protection as concluded in Chapter 2. Accordingly, it is necessary to specify the overall objective of the LCP as follows:

- 1) to promote the consumer's freedom of choice and the consumer's participation in the market
- 2) to improve consumer wellbeing through consumer empowerment and protection
- 3) to maintain the operation of an effective competition market.

Second, along with the full re-establishment of the consumer protection provisions in the LCP, it is necessary to design a statutory legal provision asserting its role as a basic, main law in the field of consumer protection.⁵⁹⁹ Likewise, due to their currently being many other laws regulating some conduct relevant to consumer protection, it should be stated in the law that the provisions of such these laws must not be contrary to the regulation of the LCP. This provision plays the role of opening up the possibility of uniform application of consumer protection regulations currently scattered across many laws in Vietnam. After being amended and reformed, the LCP could then fix the shortcomings that still exist in these laws to enhance the effectiveness of consumer protection.

Third, it is urgent to add a general protection section (mirroring that of the ACL) to the LCP stipulating the general prohibitions on three categories of conduct including misleading or deceptive conduct, unconscionable conduct and unfair contract terms. The general protection should be formulated with the necessary foundational provisions for identifying the elements of comprising an infringement, thereby helping to prevent other

⁵⁹⁹ See at page 120, paragraph 1, section 4.1.1

forms of conduct occurring that specific protection cannot cover adequately.⁶⁰⁰ Accordingly, these general prohibition provisions should provide for the common elements constituting offenses prohibited by the law, including the determinants of the subject and forms of expression of conduct.

Fourth, it is necessary to supplement the specific protection section of the LCP to correspond to the three categories of conduct established in the general protection section. In each of these specific protections, lawmakers should develop provisions regulating certain practices or popular forms of conduct causing damage to consumers. These behaviours should be sorted and classified into groups corresponding to the three major categories established in a general ban on general protection.

6.2.1.2 Proposal for a Revised Definition of Consumers

To improve the efficiency of consumer protection regulation in accordance with the objectives of the law, this thesis proposes some solutions for amendments and supplements to the definition of consumers in the LCP as follows.

First, there is a need to expand the scope of consumers in the LCP (mirroring Australia's approach) so that it can protect those who are likely to be in a position of imbalance in bargaining power. The expansion of what constitutes a consumer is important as 98% of businesses in Vietnam are small or micro enterprises. Accordingly, consumer should be defined to include individuals and traders with certain transaction value limits (as in the ACL).⁶⁰¹

Second, the regulation of exclusion should replace the provision of the purpose of consumption of consumer goods and services. Accordingly, it should be stated that the acquirer shall not be regarded as a consumer in the following cases: 1) acquiring goods or services for re-supply, 2) using goods and services up or transforming them in the course of a process of production, and 3) goods or services used up in manufacture or in the course of repairing or treating other goods or fixtures on land.⁶⁰²

Third, additional explanatory provisions should be added to the terms mentioned in the definition of the consumer to clarify the definition, including terms 'goods, services',

⁶⁰⁰ See at page 115, paragraph 1, section 3.3.2.

⁶⁰¹ See at page 106, paragraph 1, section 3.3.1.

⁶⁰² See at page 108, paragraph 4, section 3.3.1

‘supply and re-supply’ and the term ‘in commerce and trade’. In the case that these terms have been interpreted in other relevant laws, a general citation should be sought to ensure that the LCP retains the role of basic law in the field of consumer protection.

6.2.2 Findings and Proposals on Misleading and Deceptive Conduct

Chapter 4 examined the provisions against misleading and deceptive conduct in the consumer laws of Vietnam and Australia, identified similarities and differences and identified the corresponding shortcomings in Vietnamese consumer protection law. The analysis in Chapter 4 was divided into two parts—review of the general regulations on misleading and deceptive conduct and analysis of important aspects of misleading advertising. The findings are summarised in Table 2.

Table 2: Differences in Regulations Against Misleading and Deceptive Conduct and Misleading Advertising.

Issue	Vietnamese Consumer Protection Law	Australia Consumer Law (ACL)
	<p>The LCP: The consumer protection provisions relating to misleading and deceptive conduct are located not just in the LCP but in many other statutes.</p> <p>Other relevant laws: Regulations on consumer protection against misleading and deceptive conduct are in the Competition Law, Commercial Law and Advertising Law.</p>	<p>The ACL is the unique federal statute in Australia that regulates consumer relationship across all types of goods and services against misleading and deceptive conduct (excluding financial services).</p>
	<p>The LCP: Does not have separately general protection section and specific protection section to regulate misleading and deceptive conduct.⁶⁰³</p> <p>Other relevant laws: Only certain forms of conduct are covered by the scope of these laws as adjusted in the statutes.</p>	<p>Misleading and deceptive conduct are regulated in the ACL under two levels—general protection and specific protections.</p>
	<p>The LCP: has no general prohibition against misleading and deceptive conduct, only asserting the consumer's right to information can be protected based on general principles in ch 1.⁶⁰⁴ Thus, the LCP does not establish the necessary foundation for identifying the common signs of infringement</p>	<p>The ACL generally prohibits misleading and deceptive conduct in accordance with requirements set out in ch 2 pt 2.1 s 18.</p>

⁶⁰³ See at page 125, paragraph 2, section 4.1.2.2

⁶⁰⁴ See at page 121, paragraph 3, section 4.1.2.1

	<p>of right to information.</p> <p>Other relevant laws: Only some forms of conduct are covered by the scope of these laws as adjusted in the statutes.</p>	
	<p>The LCP: does not define misleading or deceptive conduct as representation. The LCP focuses on misleading information, rather than erroneous forms of misrepresentation.⁶⁰⁵</p> <p>Other relevant laws: Do not refer to the general form of conduct as representation but specifically regulate the offense corresponding to the area governed by the respective statute. For example, misleading advertising is adjusted by the Advertising Law, and unfair advertising is regulated by the Competition Law.</p>	<p>The ACL designs the identification of misleading and deceptive conduct by naming the expression of nature as representation. A representation is ‘a statement, made orally or in writing or by the implication from words or conduct’.¹</p> <p>Various forms of misleading and deceptive conduct considered violations are classified based on the character and expression of the representation.</p>
Regulations on information standards	<p>The LCP: does not regulate information standards, and lack of regulations on types of information that can be misleading.⁶⁰⁶</p> <p>Other relevant laws: There is no regulation on information standards in the other statutes associated with the field of consumer information protection.</p>	<p>Information standards are set in specific protection (pt 3.4), including 13 information standards of goods, services, declaring information standard, the signs of supplying goods and services not complying with these information standards. Under the specific protections (ch 3), the provisions on false and misleading presentation specify information that may be</p>

⁶⁰⁵ See at page 142, paragraph 2, section 4.3

		considered confusing due to the very detailed description.
Misleading and deceptive conduct	<p>The LCP: Adjusts two specific forms of conduct (deduced from art 10): misleading and deceptive advertising, and the rest of traders' conduct that may provide information about goods and services to consumers.</p> <p>The LCP cannot regulate the following forms of misleading and deceptive conduct: silence, half-truth, misleading conduct relating to employment, and false or misleading representations about the sale of land.⁶⁰⁷</p> <p>Other relevant laws: These include the Commercial Law arts 9, 123, 96, 97; Advertising Law art 45; Competition Law; Law on Quality of Goods and Services arts 8, 16; Law on Measurement; Law on Quality of Goods and Services. These set the rules of prohibitions on concealing information on</p>	<p>The ACL specifically prohibits false or misleading representations in ch 3 pt 3.1 div 1, which contains 37 articles detailing the forms of conduct. One article refers to the application of provisions to information providers as follows:</p> <ul style="list-style-type: none"> - False or misleading representations about goods or services - False or misleading representations about sale etc. of land - Misleading conduct relating to employment - Offering rebates, gifts, prizes, etc. - Misleading conduct as to the nature etc. of goods - Misleading conduct as to nature etc. of services - Bait advertising - Wrongly accepting payment - Misleading representations about certain business activities.

⁶⁰⁷ See at page 166, paragraph 2, section 4.5.

	products' and goods' capability to cause unsafety to humans, animals, plants, assets or the environment.	
Test for impugned conduct	<p>The LCP: Based on the specific provisions referred to in the law to examine whether the impugned conduct satisfies requirements that are specified in these provisions.</p> <p>Other relevant laws: Based on the specific provisions referred to in the law to examine whether the impugned conduct satisfy requirements that are specified in these provisions.</p>	<p>The process of identifying whether impugned conduct is misleading or deceptive is conducted through the test and typically involves the following steps:</p> <ol style="list-style-type: none"> 1) determine the relevant section/sections of the public (the medium, the size of target audience) 2) examine the characteristics of the hypothetical individual that are related to their perceptions and knowledge such as intelligence, education and age 3) examine the content elements, in which the analysis of the internal context in its entirety or in the context of the whole document, the pre-existing relationship between alleged contravener and victim, the familiarity and characteristics of the market where behaviour is engaged with the other elements, the nature of the parties, and the characteristics of the transaction between them. 4) review and evaluate evidence of misrepresentation or deception caused by behaviour rather than by other factors, which necessarily have a sufficient nexus between behaviour and misunderstanding.

		There is no need to present someone who has been misled/cheated and no requirement for actual damage to have occurred due to the misleading or deceptive conduct.
Puffery and comparative advertising	<p>The LCP: does not allow puffery and direct comparative advertising. The LCP requires businesses who use exaggerated words in advertising to prove that the exaggeration is true. Direct comparative advertising is prohibited.⁶⁰⁸</p> <p>Other relevant laws: The Advertising Law, Commercial Law and Competition Law do not allow puffery or direct comparative advertising. The requirements for permission need to be satisfied as regulated in the LCP.</p>	The ACL allows puffery and comparative advertising in commercial practice provided that they are not misleading or deceptive representations.
Omission or half-truths	<p>The LCP: Has no regulations pertaining to misleading advertising caused by omission or half-truths.⁶⁰⁹</p> <p>Other relevant laws: Has no regulations pertaining to misleading advertising caused by omission or half-truths.</p>	Can be handled by courts as specified in the ACL if they satisfy the requirements set out in the test.

¹ Australia and Russell Victor Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 2017) 1583.

⁶⁰⁸ See at page 143, paragraph 2, section 4.3

⁶⁰⁹ See at page 165, paragraph 3, section 4.5

Based on the differences between the consumer law of Vietnam and Australia for misleading and deceptive conduct, this thesis proposes some modifications to the LCP as follows. First, the name of misleading and deceptive conduct should be defined as a representation, which is a statement made orally or by implication. The term 'representation' should be used in the general protection section and be categorised as some specific forms of representation as defined in the ACL. The use of identifying the name of conduct by its nature and mode of expression represents in conjunction with the general prohibition provision in the general protection section (proposed in Section 6.2.1). With these two structural construction techniques, the LCP will be able to regulate mere silence, misleading omission and half-truth, which are not currently regulated in Vietnam.

Second, a test of examining whether impugned conduct is misleading or deceptive should be established in a legal document providing the guidance for implementing the LCP. The test could consist of four basic steps derived from Australia's experience:

- 1) define the relevant section/sections of the public
- 2) examine the characteristics of the hypothetical individual from the group of relevant sections related to their perceptions and understanding of intelligence, education and age
- 3) a test of the content of conduct in which the internal context analysis is performed with the notion that there is no need to present someone who has been misled/misleading and no requirement for actual damage to have occurred due to the misleading or deceptive conduct
- 4) evaluate evidence of confusion or deception caused by impugned conduct, rather than by other factors, which necessarily have a sufficient nexus between the behaviour and the misleading.

Third, besides the ban on misleading and deceptive conduct in a general protection section which defines the overall requirements of misleading or deceptive information, it is necessary to supplement the information about the manufacturer, supplier or the purchase transaction between the parties that are able to be considered misleading or deceptive in the specific protection section of the LCP.

Fourth, it is necessary to consider cancelling the prohibition on using the words 'only', 'best', 'unique', 'number one' or similar without showing the valid documents to prove the accuracy of the meaning of those words as currently regulated in the Advertising Law. The optimal policy of state intervention in the field of consumer protection as proposed for

Vietnam should go in the direction of encouraging consumers' choice. Therefore, the limits on the rights of businesses and consumers' ability to disseminate information need to be removed.

Fifth, the prohibition on direct comparative advertising as regulated in the Competition Law and Advertising Law should be removed. Instead, the LCP should establish additional regulations that limit comparative advertising that is misleading or deceptive or unfair. Accordingly, the LCP should stipulate that comparative advertising is allowed if it does not satisfy the requirements of a test to be considered misleading or deceptive representation as referred in general protection section and meeting the following conditions:

- 1) comparative information is those whose accuracy can be proved
- 2) comparative advertising contains comparisons between actual competitors and between competing products in the market.

6.2.3 Empirical Findings for Unfair Contract Term Regime

After analysing the contents of the respective unfair contract term regimes of Australia and Vietnam in Chapter 5, differences were identified. These differences are summarised in Table 3.

Table 3: Differences in Regulation of Unfair Contract Terms.

Differentiation Criteria	Vietnamese Laws	Australia Consumer Law (ACL)
Consumer contract and consumer standard form contract	<p>The LCP: According to the definition of a standard form contract, its subjects are defined as the businesses and a sole trader, and the consumer. There are no additional clarifications on the definition of consumer contracts and standard form contract.⁶¹⁰</p> <p>The Civil Code 2015: The subjects of standard form contract and the terms of the general transaction include all individuals and organisations making transactions. There are no additional clarifications on the definition of consumer contracts and standard form contract.</p>	<p>Requires the buyer to be an individual in a business-to-consumer transaction, except in respect of a contract with a business and a sole trader. Focuses on the purpose of consumer's acquiring goods and services with 'wholly or predominantly for personal, domestic or household use or consumption'.</p> <p>There are elements that courts need to take into account in determining whether a contract is a consumer contract: whether all or most of the bargaining power of one party to the contract, the contract is prepared by one party before discussing the transaction, another party is required to accept or cancel the terms of the contract, another party is given a reasonable opportunity to negotiate terms in the contract, and the terms of the contract take into account the specific characteristics of another party or the particular transaction (s 27).</p>

A test for unfair term	<p>The LCP: Does not provide a test for substantive unfairness terms.⁶¹¹</p> <p>The Civil Code 2015: Does not provide a test for unfairness to determine whether a clause is unfair.</p>	<p>Three conditions must be met when considering unfair terms in a contract (s 23(1)):</p> <ol style="list-style-type: none"> 1) the contract must be a consumer contract 2) the contract must be a standard form contract 3) the contract term must contain a term that is unfair. <p>Three-limb test for unfairness (s 24):</p> <ol style="list-style-type: none"> 1) significant imbalance in the parties' right and obligations arising under the contract 2) unreasonably necessary to protect the legitimate interest of the party who would be advantaged by the term 3) causing detriment to a party when the terms are applied or relied on.
Transparency of standard form consumer contract	<p>The LCP: Transparency of standard form consumer contract is not clearly defined by the name of a provision of the law. There are no regulations on font or font size of the contract's text.⁶¹²</p> <p>The Civil Code 2015: There are no regulations on the transparency of the standard form contract.</p>	<p>The ACL requires reasonably plain language, legibility and clear presentation and that the contract be readily available to parties affected by the terms (s 24(3)). The contract must be readily available to any party and consumers must be given notice of unusual terms in the contract.</p> <p>The ACL mentions oral statements and the incorporation of an</p>

⁶¹¹ See at page 185, paragraph 3, section 5.2.2.

		oral statement into the standard form contract.
Blacklist and grey list of terms	<p>The LCP: Lists nine types of terms that are likely to affect consumers and considered unfair terms. The LCP makes it clear that if these terms exist in the contract they will be void (art 16).⁶¹³</p> <p>The Civil Code 2015: Specifies that ‘a standard form contract contains provisions exempting the party providing such standard form contract from liability, or increasing the liability of or waiving legitimate interests of the other party, such provisions shall be ineffective unless otherwise agreed’. That is, if the parties have voluntarily agreed that they have understood and enter into the terms and conditions of a standard form contract or general transaction conditions, these shall remain effective.</p>	<p>Section 25(1) lists a variety of terms considered examples of terms that may be unfair. These terms only provide a regulatory indication, but use of these terms in a contract is not prohibited nor are they considered automatically unfair. The determination of whether such a term is unfair depends on judges’ assessment based on the facts of the case and the satisfaction of the factors mentioned in the test of the unfair term.</p>

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From these differences along with the analyses of the shortcomings of Vietnamese consumer laws, this thesis proposes some solutions to improve Vietnamese regulations as follows. First, it is necessary to design the regulation for a test of unfair terms of the standard form consumer contract. Such a statutory regulation can be incorporated into the provision of the definition of the unfair contract term, which could be provided in the general protection section of the LCP. This regulation in the LCP requires the set of three elements that a term must satisfy to be considered unfair:

- 1) significant imbalance in the parties' right and obligations arising under the contract,
- 2) unreasonably necessary to protect the legitimate interest of the party who would be advantaged by the term,
- 3) causing detriment to a party when the term is applied or relied on.

Second, it is necessary to remove the regulation in LCP that automatically presumes terms in the blacklist to be unfair and have no legal validity. The list of terms should not be considered invalid until such a conclusion is made after applying the test of the unfair term (as in the ACL) in which the terms do not meet the requirements of being unfair. Likewise, this new regulation should be consistent with the provisions of the Civil Code 2015 on the recognition of the validity of the provisions. Particularly, once consumers understand the consequences of inserting the terms into the contract, or they have been reasonably notified of the existence of the terms, the LCP should recognise the legal validity of this agreement.

In order to implement the specific proposals set out in the above sections, the tasks should be focused on three main areas, including legislative activities, court trial and the support of social organizations in the enforcement of consumer protection laws. These activities need to be quickly deployed and coordinated with each other, precisely as follows:

First, the legislative action to be taken is to amend and supplement the Law on Consumer Protection. The process of enacting or amending a law in Vietnam is carried out following the procedures stipulated in the Law on the Promulgation of Legal Documents 2015. This process consists of two major stages: (i) proposing the introduction of the LCP into the legislative programs of the National Assembly (ii) drafting and approving the revised LCP by the National Assembly. Those who propose the amendment of the LCP can be members of the National Assembly, The Ministry of Industry and Trade or the Government. To perform the first stage, many tasks must be initiated, these tasks include (i) summarizing the implementation of regulations of law related to the request for law amendment;

surveying, assessing social relationships relevant to the request for law amendment; (ii) conducting scientific research into relevant issues to assist the request for law amendment; studying information, materials, international agreements to which the Socialist Republic of Vietnam is a signatory relevant to the request for law amendment; (iii) requesting relevant organizations and individuals to provide documents and information related to the request for law amendment where necessary; (iv) formulating proposed policies in the request for law amendment; assessing the impact of such policies; (v) estimating resources and conditions for assurance of implementation of the law or ordinance after it is ratified by the National Assembly or Standing Committee of the National Assembly.

After the Government adopts the proposal, which is verified by the Law Committee and approved by the National Assembly, the process will move to the next stage. The revised law on consumer protection will be drafted by the drafting committee established under the law, then consulted with stakeholders and then verified by The Ministry of Justice before being submitted to the National Assembly for approval. The whole process requires the determination of the state to improve the legal framework to protect consumers in Vietnam.

Second, in addition to the fundamental requirements to amend and supplement the Law on Consumer Protection, the judiciary could be the second mechanism to implement legal reforms in the field of consumer protection. Accordingly, judges can flexibly apply the recommendations in the above sections when judging disputes related to consumers' rights to information. Currently, as case law has been recognized and applied in Vietnam, judges can also become a source of law, helping to speed up the legal reform process to protect the right to information of consumers in Vietnam in a more efficient and faster way.

Third, consumer organizations play an essential role in speeding up the process of proposing the Law on Consumer Protection. In Vietnam, there has been currently 49 consumer protection associations all over the provinces.⁶¹⁴ These organizations play the role of supporting and propagating to help consumers understand their rights, making the balance of profit of consumers and businesses in the negotiation and reconciliation of some

⁶¹⁴ The 6th National Congress of the Vietnam Association of Standards and Consumer Protection (12 December 2019) (*Dai hoi Dai bieu toan quoc lan thu VI Hoi Tieu chuan va Bao ve Nguoi tieu dung Vietnam*) <http://tcvn.gov.vn/2018/08/dai-hoi-dai-bieu-toan-quoc-lan-thu-vi-hoi-tieu-chuan-va-bao-ve-nguoi-tieu-dung-viet-nam/>

disputes. These organizations also have the rights to participate in the proposal of laws, state policies and measures to protect consumers' rights. Therefore, it is necessary for the above-proposed recommendations to become the proposals of consumer protection association themselves.

6.3 Conclusion

Consumer's right to information is likely a cross-cutting research topic and involve almost every area in the market. However, the scope of the thesis is limited as defined in Chapter 1. Accordingly, consumer's right to information is a legal right arising in commercial transactions between sellers and buyers who are determined as consumers under the consumer laws of Vietnam and Australia. Although this relationship in trade is quite broad, the object of the thesis does not include e-commerce. While consumer's right to information in the service sector is still within the research scope of the thesis, some specific service areas are excluded due to their specificity including medical, banking, tourism, telecom, and other particular areas. However, since these topics do not go beyond the theoretical framework examined by the thesis, they may be quite exciting researches in the future. The thesis is desired to critically reconstruct theoretical insights on consumer right to information, along with examining and analysing legal gaps and shortcomings in the consumer law of Vietnam. With such a result, the thesis could be a useful proposition for the study of consumers' right to information relating to specific issues of e-commerce and sharing economy.

Vietnam has undergone much development and innovation in its efforts to reform its economy and build a corresponding legal system that governs social relations in this developing economy. In the commercial law system, Vietnam's efforts to protect consumers through the promulgation of the LCP in 2010 marked a remarkable achievement in a legal system that is still undergoing a period of adaptation. It is in realising the limits of a young legal foundation seeking solutions for reforming consumer law that opens Vietnamese law to the opportunity for reform.

In comparison with the ACL, the main reason for the shortcomings of Vietnam's consumer law appears to be its lack of a coherent consumer protection policy, rather than a state management policy in the field of consumer protection. Such a consumer protection policy needs to be sufficiently abstract, comprehensive and up to date on the evolution of consumer protection in a growing economy such as Vietnam. After establishing such a

policy, it is necessary that it is specified as an overall and operational objective of the consumer law so that it can navigate the whole system consistently and serve the purpose of the law. In addition, legislative techniques could be another element that needs to be addressed in the design of the content of every chapter, section and specific provision in each regime of consumer's right to information. Once Vietnamese consumer law overcomes these two shortcomings, it is reasonable to conclude that these reforms will be rewarding in providing an effective legal framework for enforcing the protection of consumer right to information in Vietnam.

Appendix 1

VIETNAMESE LAW ON CONSUMER PROTECTION 2010

Appendix 1 (pages 231-246) of this thesis have been removed as they may contain copyright material.

Appendix 2

VIETNAMESE LEGAL PROVISIONS EXTRACTED FROM THE LAW ON CONSUMER PROTECTION AND OTHER RELEVANT LAWS

Appendix 2 (pages 248-253) of this thesis have been removed as they may contain copyright material.

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