

Supporting Research and Dialogue in Consumer Protection: A Policy Guide

(Volume II)



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Association of Southeast Asian Nations

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ASEAN-Australia Development Cooperation Program Phase II

Introduction

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Policy Digest 13:

Manufacturers' and Retailers' Warranties



This policy digest was written by Associate Professor Jeannie Marie Paterson under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States (AMS).

1. Introduction

Manufacturers and retailers of goods, other than those for immediate consumption, regularly offer consumers an ‘express warranty’ — an undertaking to repair or replace the goods should they break or otherwise prove defective within a specified period. In some cases these express warranties are ‘voluntary’, in the sense that they are provided by the retailer or manufacturer without additional charge. Retailers and manufacturers may use this type of voluntary warranty as a way of signalling their confidence in the quality of their goods to the market. Correspondingly, consumers may use the availability of a generous voluntary warranty as a way of selecting reliable goods and a trustworthy retailer/manufacturer who is prepared to stand behind the quality of their product.

Another type of express warranty is an extended warranty — an undertaking by the provider of the express warranty (who may be the retailer, the manufacturer or a third party) to repair or replace faulty goods for a specified ‘extended’ period, over and above the period of the voluntary express warranty. It is purchased by the consumer through a contract separate from the original purchase. Extended warranties are often offered for ‘white goods’ (such as refrigerators and dishwashers) and large electrical items (such as televisions, computers or sound systems).¹ Consumers often purchase extended warranties to provide themselves with the ‘peace of mind’ of knowing that any problems with the goods will be remedied within the warranty period.²

The benefits provided to consumers by both of these types of express warranties are dependent largely on the terms of the warranty and the consumers’ own preferences. Two additional critical factors that may be addressed by consumer protection legislation are:

- the rights of the consumer to enforce the warranty against the retailer or manufacturer who provided it
- whether sufficient information is available to consumers to allow them to make meaningful choices based on the existence of the warranty.³

¹ Commonwealth Consumer Affairs Advisory Council, Department of Treasury, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties — Final Report* (2009), pp 82–3.

² National Education and Information Advisory Taskforce, National Baseline Study on Warranties and Refunds, Research Paper No 2 (2009) 47.

³ See generally Twigg-Flesner C, ‘Dissatisfaction Guaranteed? The Legal Issues of Extended Warranties Explored’ [2002] (4) *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2002/issue4/twigg-flesner4.html>> accessed 2 August 2012.

This digest discusses best practice in the consumer protection law in place in AMS, Australia, and the European Union in responding to these issues. Consumer rights and guarantees in regard to goods and services that are provided by statute are discussed in Digest 11.

2. Ensuring consumers can enforce an express warranty

One important issue facing consumers who seek to rely on an express warranty is whether the warranty is enforceable against the retailer or manufacturer who provided it. An express warranty may operate as a contract between consumer and provider, but this will not always be the case. For example, where a manufacturer provided an express warranty, it may be difficult to show that there is any contractual relationship between the consumer and the manufacturer because they will not have had any direct dealings. Legislation in Malaysia clarifies this situation and ensures the protection of consumers by providing that an ‘express guarantee’ relating to the quality of goods or provision of services is binding on a manufacturer, to the extent specified in the statute.⁴ Similarly, legislation in the Philippines provides that ‘all written warranties or guarantees issued by a manufacturer, producer, or importer shall be operative from the moment of sale’.⁵ Retailers may also be liable under the express warranty if the manufacturer or distributor fails to fulfil their obligations.⁶ Legislation ensuring retailers’ or manufacturers’ express warranties can be enforced by consumers is also in place in the European Union⁷ and in Australia.⁸

3. Information about the express warranty

The role of warranties in influencing consumers’ choice of product depends on consumers having relevant information about the warranty. It is only with information that consumers can make an informed decision as to whether the goods and or any extended warranty represent good value for money.

⁴ (Malaysia) Consumer Protection Act 1999 s 38.

⁵ (Philippines) Consumer Act 1991 Article 68.

⁶ (Philippines) Consumer Act 1991 Article 68.

⁷ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees Article 6(1).

⁸ Australian Consumer Law s 59.

There are at least two types of information relevant to consumers:

- general information about the express warranty, including about the provider of the express warranty, the scope of the express warranty, limitations on the express warranty and how to make a claim on the express warranty
- information about the relationship between the express warranty and any rights or guarantees provided to consumers under statute.

General information about the express warranty

Consumers sometimes find it difficult to obtain information about the scope of their express warranty. The provisions of an express warranty may be found in the packaging in which goods are contained and not available for scrutiny until after the purchase. The opportunity to purchase an extended express warranty is commonly only presented to consumers at the point of final sale for the product in question, when consumers are unlikely to give sufficient attention to the terms and conditions of the express warranty contract.⁹ It has further been reported that the terms of extended warranties are often less than transparent, with reports of a 'lack of clarity about who offers the cover', hidden limitations on the scope of the cover, insufficient explanation of the basis on which the warranties have been priced (that is, whether the price is commensurate with the likely cost of repairs) and a lack of disclosure of the commissions that are sometimes payable to retailers for the sale of an extended express warranty.¹⁰

Legislation may address this information 'asymmetry' between suppliers and consumers by requiring information about an express warranty to be clearly expressed and easily accessible to consumers. Indonesia imposes a general requirement for such information, putting an obligation on entrepreneurs 'to provide correct, clear and honest information with regard to the condition and express warranty of the goods and/or services and provide explanation on the use, repair and maintenance'.¹¹

⁹ Commonwealth Consumer Affairs Advisory Council, Department of Treasury, Consumer Rights: Reforming Statutory Implied Conditions and Warranties — Final Report (2009), pp 82–3. See also Choice, Submission to the Commonwealth Consumer Affairs Advisory Council, Review of Statutory Implied Conditions and Warranties, July 2009 <<http://archive.treasury.gov.au/documents/1614/PDF/CHOICE.pdf>> accessed 2 August 2012, p 5.

¹⁰ See Australian National Education and Information Advisory Taskforce, National Baseline Study on Warranties and Refunds, Research Paper No 2 (2009).

¹¹ Law on Consumers' Protection 1999 Article 18.

In the Philippines, an express warranty from a seller or manufacturer must:

- set forth the terms of express warranty in clear and readily understandable language and clearly identify himself as the warrantor
- identify the party to whom the express warranty is extended
- state the products or parts covered
- state what the warrantor will do in the event of a defect, malfunction or failure to conform to the written express warranty and at whose expense
- state what the consumer must do to avail of the rights which accrue to the express warranty
- stipulate the period within which, after notice of defect, malfunction or failure to conform to the written express warranty, the warrantor will perform any obligation under the express warranty'.¹²

Countries outside the ASEAN region also specify the information that must be provided to consumers about the general terms and limitations of the express warranty. In the European Union, an express warranty, or 'commercial guarantee', must include the duration of the guarantee, its territorial scope and the name and address of the guarantor.¹³ Similarly, in Australia, consumers must be provided with the information about any 'express warranty against defects', including details of who is giving the express warranty, the period for which the express warranty applies and how to claim under the express warranty.¹⁴

Information about the relationship between the express warranty and consumers' existing statutory rights

As discussed in Digest 11, legislation in a number of AMS provides consumers with implied rights that goods and services will meet minimum standards of quality. These are outlined in the table below.

¹² (Philippines) Consumer Act 1991 Article 67.

¹³ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

¹⁴ (Australia) Competition and Consumer Regulations 2010 (Cth) reg90.

AMS	Legislation
Brunei Darussalam	Sale of Goods Act 1999 ss 14 – 18
Malaysia	Consumer Protection Act 1999 Parts V – IX
Singapore	Sale of Goods Act 1979; Consumer Protection Act 2009, as amended by the Consumer Protection (Fair Trading) Amendment Act 2012, ss 12A – 12E
Philippines	Consumer Act 1992 Chapter III

In some cases, an express warranty provided by the manufacturer or retailer will not give consumers many real benefits over and above the rights provided by legislation. Yet it is likely that many consumers, and indeed retailers and manufacturers, do not understand the relationship between express warranties and the implied terms or consumer guarantees provided under consumer protection legislation. If consumers are not aware of or do not understand their rights under statute, it is unlikely that they will be able to assess accurately whether additional benefits are provided by an express warranty. Moreover, the existence of an express warranty may wrongly suggest to consumers that these warranties are the only source of protection against defective or faulty goods.

For example, the mere opportunity to purchase an extended express warranty may induce consumers wrongly to believe that there are no (free) statutory rights. Consumers may also wrongly consider that the period specified in an express warranty defines the temporal limits of their rights to a remedy for defective goods. In fact, express warranties supplement rather than replace statutory rights or guarantees and, in the event of conflict, it is the statutory rights that prevail.¹⁵

As a practical matter, the longer the period between the purchase of goods and the appearance of a defect or fault, the more difficult it may be for a consumer to establish that the defect was caused by a lack of acceptable quality in the goods, rather than by fair wear and tear or improper use. One advantage of an express warranty may be that for the period of the warranty, consumers can bypass this evidentiary difficulty. For example, consumers who seek a remedy for defective or faulty goods covered by an express warranty do not have to establish that the goods became defective

¹⁵ See also the (Singapore) Unfair Contract Terms Act 1977 s 5.

within the reasonable time that those goods should have been expected to last for the purposes of the statutory protections. The consumer can simply demand a remedy according to the terms of the express warranty.

A number of countries outside of the ASEAN region address this issue by requiring providers of an express warranty to give consumers specific information about their rights under legislation and also in some cases to explain what additional rights, if any, are provided by the warranty. Thus in the European Union, an express warranty must be clearly drafted and indicate what rights it gives on top of consumer' legal guarantees.¹⁶ In Australia, a written document providing an express warranty against defects must expressly advise consumers of the existence of the consumer guarantees under the Australian Consumer Law, as follows:¹⁷

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

This provision may alert consumers to the possible overlap between their statutory rights and the supplementary rights provided by an express warranty. One weakness in this strategy is that the information only needs to be provided in the written express warranty document and thus will only be made available to consumers after they have already committed to purchasing the product, or extended express warranty, in question. By this time, consumers may feel they cannot back out of the transaction. This type of problem is addressed in the case of consumers purchasing an extended express warranty for electrical goods in the United Kingdom. Traders that supply extended warranties on domestic electrical goods must provide consumers with certain information before the sale of the extended express warranty as well as a 45-day 'cooling off' period in which the consumer can cancel the extended warranty.¹⁸

¹⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

¹⁷ Competition and Consumer Regulations 2010 (Cth) reg 90(2). This requirement came into effect from 1 July 2011.

¹⁸ Supply of Extended Warranties on Domestic Electrical Goods Order 2005.

4. Specific prohibitions on misleading conduct

In addition to being provided with clear and accurate information about any express warranty, consumers should also not be misled about such warranties, particularly about the relationship between express warranties and consumers' rights under legislation. Many AMS have general prohibitions on misleading conduct.¹⁹ Australia also includes specific prohibitions in its consumer protection legislation, with penalties for contravention, on misleading consumers as to their rights under statute or the need to pay for rights that are already provided under that legislation.²⁰

5. Policy recommendations

Warranties provided by retailers and manufacturers may be an important factor in consumers' decisions whether to purchase particular goods. To ensure consumers' expectations are met, consumer protection law may need to intervene to ensure that retailers and manufacturers stand by their promise to provide a remedy for defective goods and also to ensure that consumers are properly informed about the scope of any express warranty. While some AMS do regulate this issue, the remaining AMS might usefully consider uniform legislation in this field, possibly based on the best practice model from the European Union.²¹

¹⁹ See eg (Brunei) Consumer Protection (Fair Trading) Order 2011 s 4(a); Unfair Contract Terms Act 1999 ss 10 – 12; (Cambodia) Law on the Management of Quality and Safety of Services and Services 2000 article 21; (Indonesia) Law on Consumers' Protection 1999 Article 7, 9 – 11; (Malaysia) Consumer Protection Act 1999 Part II; (Philippines) Consumer Act 1991 Art 50 and Chapter VI; (Singapore) Consumer Protection (Fair Trading) Act 2003 ss 4 and 6; (Thailand) Consumer Protection Act 1979 ss 4 and 22; (Viet Nam) Law on Protection of Consumers' Rights 2010 Articles 8 and 10.

²⁰ Australian Consumer Law ss 29(1)(m) and (n).

²¹ See Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees Article 6(1).

Policy Digest 14:

Interface between competition and consumer protection policies in utilities markets



This policy digest was written by Professor Caron Beaton Wells under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States (AMS).

1. Introduction

Access to essential public utilities such as clean water, sanitation, electricity and telecommunications underpins social and economic development. For many countries, expanding access to these services remains a policy priority, particularly for rural populations. ASEAN countries vary significantly in the degree to which their populations have access to these utilities.¹

Developing and maintaining utility services is a highly capital intensive activity. Although considered an essential public service, many countries, including a number across the ASEAN region, are looking to the private sector to help finance and operate these services.²

By avoiding duplication, single ownership of utility infrastructure will most efficiently connect consumers to services. Where this entity is a private enterprise there is a need to regulate its monopoly services, to strike a balance between the incentives for investment and the interests of consumers.

In other parts of the utility supply chain, such as electricity generation, and the retail of energy and telecommunication services, contestable markets³ can be created to facilitate competition in the interests of consumers. The complexity of utility markets requires clear market rules to be established. This may be done in a range of ways, but needs to be sensitive to tensions between competition and consumer protection.

Economy-wide competition and consumer protection laws play an important part in the regulation of utility services. These need to be supplemented by industry-specific regulation due to the unique features of utility services and to reflect the characteristics and policy objectives of individual countries.

¹ According to the World Bank, the percentage of the population that has access to improved drinking water source across ASEAN countries ranges from 71% to 100%; <http://data.worldbank.org/indicator/SH.H2O.SAFE.ZS>, while access to electricity ranges from 34% to 100%; <http://data.worldbank.org/indicator/EG.ELC.ACCS.ZS>.

² The approach to private sector involvement varies significantly across ASEAN, including full privatisation (Singapore), concession agreements (Malaysia), minority share holding (Viet Nam), joint ventures and ownership of small scale infrastructure (Viet Nam), and Public Private Partnerships (all).

³ A contestable market is one in which multiple businesses compete with each other to supply the market (wholesale), or end-users (retail).

Part 2 of this digest identifies the general policy objectives and issues underpinning utility regulation. Parts 3 and 4 examine two different categories of utility regulation — structural and behavioural — and address how it is possible to regulate in a way that is responsive to both competition and consumer protection concerns in respect of each. Part 5 briefly considers the relevance of the institutional design of utility regulators.

2. Regulating utilities

While all countries regulate their utilities, individual countries often have different reasons and priorities for regulation.

If utilities are government-owned and consumers cannot choose between suppliers, the need for regulation may be limited to technical and safety standards as well as price. Government ownership of utilities remains a common feature across many ASEAN countries (e.g. Thailand, Indonesia, Malaysia and Viet Nam).

Privatisation of government utilities has been pursued in many countries. Reasons included to access the capital required to expand or modernise services, to reduce government debt and to improve operating efficiency. Privatisation is often accompanied by restructuring of vertically integrated utilities⁴ in order to separate potentially contestable services from natural monopoly⁵ elements of the supply chain. For example, following the opening up of the Singapore telecommunications market in 2000, nine network facility operators and 256 companies offering services to consumers have been licensed.⁶

Following privatisation, the promotion of effective competition is necessary to avoid risks to consumers and the economy of private monopolies. Creating utility markets may also be an objective of wider national competition policy.

⁴ Vertical integration is where a company owns multiple parts of a utility supply chain. For electricity utilities the supply chain typically involves generation, transmission, distribution and retail. In water the supply chain may include water storage, distribution, sale, waste water treatment, and reuse.

⁵ A natural monopoly is where the economies of scale in production are so large that the market can be served at least at cost by a single enterprise: Robert Baldwin et al, *Understanding Regulation: Theory Strategy and Practice* Second Edition (Oxford, 2011) 16.

⁶ <https://tls.ida.gov.sg/tls/TlsLicenceSearchFormAction.do?dispatch=listLicence>.

⁷ A retail market is one that involves competition between utilities for contracts to supply utility services to end users.

The nature and form of consumer protection required in retail markets⁷ depends on the level of actual competition in these markets. This depends, in part, on how network service providers and wholesale markets are regulated.

Objectives

Utility regulation typically seeks to balance the need for new investment and industry efficiency through competition and consumer protection policies, particularly where the provision of these utilities are privatised.

Matching supply and demand is a constant challenge for utilities. Reliability is expected, and timely investment in new infrastructure is needed to meet future demand. This requires ensuring adequate returns for utility network services and sufficient price signals in wholesale markets to encourage investment in new supply. To this end, adequate regulation is important in attracting sufficient private investment. However, regulation that results in over-investment will be inefficient and result in higher utility prices.

In contestable utility markets, industry efficiency is promoted by effective competition. This requires consumers to be actively engaged. However, often consumers will have insufficient knowledge, experience or interest in participating in utility markets. An objective of utility regulation may be to overcome barriers to consumer participation. Regulation may be required to ensure that consumers are not penalised for not participating in the market, particularly where consumers are unable to participate, or are not profitable to serve.

Many utility consumers have very limited choice about whether or not to use utility services. This essential service characteristic is critical in the design of appropriate consumer protection regulation and requires the determination of the standards of service that are essential. It also needs to penalise conduct that is not in accordance with these universal service standards.⁸

⁸ Universal service obligations are a form of consumer right that require strong protection to ensure compliance. For example, disconnection of electricity from some types of a household can have life threatening consequences e.g. where medical life support equipment is being used.

Issues

Even if the objectives of utility regulation are clear, there are inevitable tensions between potentially competing objectives.

Regulatory certainty encourages private investment. Investors need certainty regarding how utility prices will be determined and regulatory changes are to be made. However, certainty needs to be balanced with flexibility to ensure regulation is able to respond to changing market structures, or to address conduct, which result in detriment to consumers.⁹ Such detriment may take the form of higher prices, reduced service quality or choice, reduced innovation, or insufficient supply in the future as a result of under-investment.

The inherent complexity of utility services creates significant information asymmetries between utility service providers and consumers which affect all stages of the contractual relationship. Households and small businesses are not able to negotiate the terms of their utility contract, and are in a weak position to secure utility compliance, or remedies for breach of contract. Retail regulation is therefore needed to address these sources of potential consumer detriment.

These issues may be addressed by both structural and behavioural regulation.

3. Structural regulation

Structural regulation of utility sectors aims to protect consumers by limiting the exercise of monopoly power and promoting efficiency. Typically, structural regulation:

- prevents common ownership or control of natural monopoly and contestable elements of the supply chain
- defines the geographic and functional boundaries of utility networks
- determines the conditions of entry into contestable utility markets
- prohibits anti-competitive mergers or acquisitions of utilities.

⁹ The emergence of new technologies and service innovation may also create new consumer protection challenges that require changes to regulation.

Cross-ownership controls may be used to exclude utility network businesses from retail markets. Such controls prevent network owners from leveraging their monopoly power to create a competitive advantage. These provisions may limit efficiency by reducing economies of scope. However, the efficacy of alternative approaches such as ring-fencing¹⁰ depends heavily on the capacity of the regulator to effectively monitor and enforce compliance.

Utility network owners are typically granted a geographic monopoly. Limiting the grant to the area of the existing network may reduce economies of scale, but may allow a degree of competition when networks are expanded. Lower costs may be achieved by requiring existing operators to bid for the right to operate extensions to networks into new geographic areas. Defining the monopoly services as narrowly as possible limits economies of scope but may enable other contestable markets to be created.

Licensing is commonly used to regulate entry into contestable utility markets. Licence applicants must be able to meet particular conditions, typically linked to their capacity to comply with approved service standards. Licensing creates barriers to entry and is a source of inefficiency. It is necessary to balance the impact of these barriers against the need to safeguard the integrity of utility markets and maintain consumer confidence.

General competition regulation may apply to the merger and acquisition of utilities. Regulators may allow anti-competitive transactions where public benefits outweigh the anti-competitive effects. The nature and scope of public benefit needs to be clearly defined before objective assessments can be made. The role of courts in review of the decisions of the regulator may be important as judicial decisions can have a long-lasting impact on utility industry structure and conduct. Decisions of courts may include defining what constitutes a utility market, and specifying when a utility does and does not have market power.

4. Behavioural regulation

Behavioural regulation of utility sectors aims to protect consumers by defining and enforcing standards and procedures relating to a range of matters, including:

¹⁰ Ring-fencing is defined as ‘the identification and separation of business activities, costs, revenues and decision making within an integrated entity that are associated with a monopoly element, from those that are associated with providing services in a competitive market’: Australian Energy Regulator, *Position paper: Electricity Distribution Ring-fencing Guidelines, September 2012*.

- the formation and terms of customer contracts
- forms of conduct that may be of particular detriment to consumers
- dispute resolution
- customer switching.

When a consumer moves into a property and takes supply of a utility service, a deemed contract may be formed without the consumer being aware of its terms. When a consumer decides to change supplier, they may or may not be fully informed about the new contract terms. These issues are typically addressed by a combination of general prohibitions against misleading and deceptive advertising, and industry-specific regulation that prescribes the process of contract formation¹¹ and some or all of the contract content.¹² Overly prescriptive regulation of contract terms may be inefficient if it limits the capacity of utilities to differentiate their services.

Consumers face challenges in dealing with utility suppliers if they are unable to pay their bill. Regulation is typically needed to provide consumers with an opportunity to maintain their essential service while making repayment arrangements. Regulations may include binding hardship policies, disconnection procedures and payment plans. The cost of compliance of such regulations is typically shared across all consumers.

Information asymmetries mean that consumers face significant disadvantages if they have a dispute with their utility supplier. While remedies may be available through courts and tribunals, cost may be prohibitive. Specific utility dispute resolution is common, such as mandatory participation in utility ombudsman schemes. The costs of such dispute resolution processes are typically met by individual utilities in proportion to the number of their disputes.

Active consumer participation in utility markets requires access to comparable information on utility service quality and price. Comparison websites may reduce search costs and improve competition, thereby lowering prices. However, the reliability of such information may be

¹¹ Regulation of utility contract formation may include mandatory cooling-off periods, publication of statements outlining the nature and standard of service offered, and requirements on utilities to maintain evidence of fully informed consent.

¹² Terms and conditions of utility contracts may be set out in retail codes with which utilities must comply as a condition of licence, or be defined in statutory rules and regulations.

influenced by factors such as whether a commission is paid to the owners of the website by utilities for customer referrals. Regulators may therefore need to maintain and publish independent price and service quality information.

5. Utility regulators

Beyond determining the nature and form of utility regulation required, there is a need to identify who will be responsible for its administration. The design of regulatory institutions is a key driver of utility performance. For example, in Latin America and the Caribbean, independent regulatory authorities that are transparent, accountable and free from political interference have been seen to contribute positively to sector performance.¹³

Across the ASEAN region, utilities are regulated through diverse institutional arrangements — from independent regulatory authorities to government departments. The governance of utility regulators is important in addressing political independence and regulatory risk. The scope of the objectives and functions of a regulator are also important.

Utility regulators may have a single objective and be given a range of powers to achieve that objective. They may or may not be required to consider other policy objectives (e.g. incentives for investment, competition and efficiency, social and environmental policy) in their decision-making. Regulators may also be required to balance multiple objectives, sometimes under political guidance. Some regulators have more narrowly defined roles such as determining prices for particular monopoly services, or enforcing statutory obligations and rules and regulations made by other bodies.

In determining the objectives and functions of a utility regulator, there is a need to be clear about the responsibility for enforcement of general competition and consumer protection statutes, and the powers of other regulators that have like responsibilities. There is also a need to be clear about the role of the courts in reviewing regulatory decisions.

¹³ L. A Andres, J Schwartz and J. L Guasch, *Uncovering the Drivers of Utility Performance: Lessons from Latin America and the Caribbean on the Role of the Private Sector, Regulation and Governance in the Power, Water and Telecommunication Sectors*, 2012, Washington D.C: World Bank.

Conclusion

The need for utility regulation arises from the natural monopoly character of utility networks, combined with their complexity and essential service characteristics. Effective competition in contestable elements of the supply chain will promote efficiency but may need to be actively promoted and protected. Regulation of both the structure of utility markets and the behaviour of utility companies must balance incentives for private investment, the benefits of competition and consumer protection. To achieve these objectives, specialist utility regulation is typically needed in addition to general competition and consumer protection regulation.

Policy Digest 15:

Consumer rights under insurance contracts



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1. Introduction

ASEAN adopted the ASEAN Economic Community (AEC) Blueprint in 2007, entitled *A Coherent Master Plan Guiding the Establishment of the ASEAN Economic Community 2015*. The AEC Blueprint requires members to liberalize their insurance and re-insurance markets.

ASEAN economies are growing significantly. Southeast Asia's economy is projected to grow at an average rate of 5.4% per annum between 2014 and 2018. A robust and competitive insurance market for both businesses and consumers can play an effective role as a catalyst for economic growth. The insurance industry is seeking to expand its presence within the ASEAN marketplace.¹ The ASEAN Insurance Regulators' Meetings (AIRMs), for instance, seeks to facilitate this growth.

To grow, the industry needs to be trusted by businesses and consumers, be well regulated and meet international standards for good governance and practice. International standards include the International Association of Insurance Supervisors' (IAIS) insurance core principles (ICPs). The IAIS is a membership organisation of insurance supervisors from 140 countries and promotes effective and globally consistent supervision of the insurance industry.² Failure to comply with its standards can result in a country receiving an adverse finding from the IMF/World Bank's Financial Sector Assessment Program. This would likely cause international pressure for systemic reform.³ The ICPs require that insurance supervisors 'set requirements for the conduct of business of insurance to ensure that customers are treated fairly, both before a contract is entered into and through to the point at which all obligations under a contract have been satisfied'.⁴

As the consumer insurance marketplace expands, there is a need for specific regulation to protect consumers from unscrupulous operators and unfair or onerous contract terms and insurance practices. The ICPs require that consumers who are party to insurance contracts be treated fairly. This Digest outlines the potential consumer protection issues that may arise as

¹ OECD Secretary General, 'Countdown 2015: Towards Inclusive and Sustainable Growth in the ASEAN Economic Community, Speech, 24 January 2014.

² International Association of Insurance Supervisors.

³ Independent Evaluation Office of the IMF, Evaluation Report: Financial Sector Assessment Program, 2006.

⁴ International Association of Insurance Supervisors, Insurance Core Principles, 2011.

the ASEAN insurance marketplace liberalises and grows. It also outlines best practice regulation to address these issues.

2. ASEAN insurance market

There are two broad types of consumer insurance policies: indemnity insurance, which allows the consumer to pay for losses arising from an insured event (e.g. damage to a car or house from fire, flood, theft or some other event) and contingency insurance, in which a claimant receives a payout for a specified event such as the death of the insured.

A number of different forms of insurance exist:

- **Auto insurance** protects the owner of a vehicle against losses caused by any incident involving their vehicle, such as an accident or theft
- **Property insurance** pays the replacement cost of the policy holder's property if it is damaged, destroyed or stolen. It may include a number of specialised forms of insurance, such as flood insurance, earthquake insurance or home insurance
- **Casualty insurance** protects the policy holder (i.e. consumer) against various forms of loss that are not necessarily connected to their property. For example, third party automobile insurance contracts protect the vehicles of other drivers if the policy holder is found 'at fault' in an accident, but do not protect the property of the policy holder. A policy holder may also take out insurance against losses to others that are caused by the policy holder's negligence
- **Health insurance** covers the cost of medical expenses incurred when the policy holder becomes unwell
- **Life and disability insurance** provides a benefit to the consumer's family or other beneficiaries if the consumer suffers disability or dies
- **Unemployment insurance** pays a policy holder's wage for a specified period if they are unable to work.

Insurance contracts are generally regulated by a specific, overarching piece of legislation. Some jurisdictions have specific legislation for particular types of insurance, such as the Competition Act 2010 in Malaysia, which establishes a specific framework for motor vehicle insurance.

Insurance markets in ASEAN

In general, consumer insurance markets in ASEAN have grown significantly. For example, Indonesia's non-life premiums are projected to grow at 17% in 2014. Similarly, Philippines non-life premiums are expected to grow by 9% in 2014, while Singapore, Thailand and Malaysia will both grow in the high single digits.

Country	Total premiums (\$US M)	Cost of insurance per citizen (\$)	Total insurance penetration (premium % of GDP)
Singapore	19,463	3,972.04	5.8%
Malaysia	14,272	502.54	5.1%
Thailand	15,246	222.24	4.4%
Indonesia	14,092	59.89	1.7%
Philippines	2,881	30.20	1.2%
Viet Nam	1,845	20.78	1.6%

Source: Ernst & Young, 2013 Global Insurance Outlook

An area for strong growth potential is micro insurance, which provides for protection for low-income people at low premiums. ASEAN regulators, especially in the Philippines and Thailand, seek to provide a regulatory environment to facilitate the growth of the market for this product. The Philippines has recently drafted regulations for this purpose.

3. ASEAN regulatory environment

Most ASEAN nations follow a similar model for regulation of the insurance industry. Typically, there is overarching legislation dealing with the content and formation of insurance contracts, insurer licensing requirements, corporate governance requirements and the establishment of an oversight body. In all ASEAN countries, the insurance industry is supervised by a government authority. The authority may be specifically established to oversee the insurance industry (e.g. the Philippines Insurance Commission), or the regulatory powers may be held by a generalist financial services regulator (e.g. the Monetary Authority of Singapore).

Cambodia

The Cambodian insurance industry is governed by the Insurance Law, which came into effect in 2000. The Insurance Law is supplemented by a significant number of pieces of more granular legislation.

Indonesia

The Indonesian insurance industry is regulated under the Insurance Law Number 2 Year 1992. Insurance companies in Indonesia must be licensed and supervised by the Indonesian Financial Services Authority. The sector is also subject to the Indonesian Insurance Companies Law and other government regulations.⁵

Malaysia

The Malaysian insurance industry is governed by the Insurance Act 1996, while the Islamic insurance industry is regulated by the Takaful Act 1984. Both acts provide a legislative framework for ensuring operational and financial discipline, transparency of policies and practices and protection of policy holders in Malaysia. Insurers in Malaysia are regulated by the Malaysian Central Bank, Bank Negara Malaysia, and must be licenced by the Minister of Finance.⁶

Myanmar

Myanmar's Insurance Business Supervisory Board gave conditional approval for twelve local insurance companies to begin operating in 2012. Myanmar has passed an Insurance Business Law, supported by Insurance Business Rules, to govern its insurance industry.⁷

Philippines

The Insurance Commission of the Philippines, a government agency under the Department of Finance, regulates the Philippine insurance industry. The commission regulates and supervises the insurance industry to ensure that adequate protection is available to the public at a fair and reasonable cost, and that the industry is financially stable enough to meet all legitimate claims promptly and equitably.⁸

⁵ Indonesia Financial Services Authority: <http://www.ojk.go.id/en/insurance>

⁶ Bank Negara Malaysia: <http://www.bnm.gov.my/>

⁷ Norton Rose Fulbright, Insurance Regulation in Myanmar, 2013: <http://www.nortonrosefulbright.com/files/insurance-regulation-in-myanmar-100732.pdf>

⁸ Insurance Commission of the Philippines: <http://www.insurance.gov.ph/>

Singapore

Singapore's insurance industry is regulated by the Monetary Authority of Singapore, which is charged with promoting a strong corporate governance framework for financial institutions in Singapore.⁹

Thailand

Thailand's insurance industry is divided into two categories: life and general insurance. General insurance companies must be registered under the Non-life Insurance Act B.E. 2535 (Amended B.E. 2551), while life insurance companies must be registered under Life Insurance Act no 2 B.E. 2525 (Amended B.E. 2551). Under both acts, the Office of Insurance Commission regulates and supervises the operation of all insurance companies, agents and brokers to achieve business stability, conformity to law and regulation and efficiently raise incentives and savings.¹⁰

Viet Nam

The Insurance Industry in Viet Nam is regulated under The Law on Insurance Business (December 9, 2000). The law is implemented by the Ministry of Finance, which is responsible for regulating Viet Nam's insurance industry.¹¹

4. Potential areas for reform

Policy holder's protection fund

If an insurance company is bankrupted during the term of an insurance contract and there are insufficient underwriting arrangements, the insured consumer might not be able to claim under the policy. This is particularly likely to occur when a significant disaster occurs, such as a catastrophic flood, requiring an insurer to pay out on many claims at the same time.

To protect consumers from the failure of an insurance company, Singapore has instituted a 'Policy Owner's Protection Scheme', financed by a levy on all insurers that are members of the scheme. If an insurer-member of the scheme fails, the Monetary Authority of Singapore will compensate policy holders if their claims cannot be paid.

⁹ Monetary Authority of Singapore: <http://www.mas.gov.sg/>

¹⁰ Office of Insurance Commission, Thailand: <http://www.oic.or.th/en/webblink/index.php>

¹¹ Ministry of Finance, Viet Nam: http://www.mof.gov.vn/portal/page/portal/mof_en

Customer data

Insurers have access to a broad range of consumer data, which they use to determine the risk of loss by the consumer and therefore set premium levels. Some jurisdictions have implemented legislation to prevent insurers from using customer data to cross-sell additional services. For example, Malaysia's Personal Data Protection Act 2010 specifically prohibits the use of customer data by insurers in direct selling or telemarketing.

Duty of disclosure

Generally, consumers are under a duty to disclose to the insurer any fact the consumer knows (or ought to know) may be relevant to the insurer's decision to accept the risk. Failure to disclose may lead the insurer to refuse the claim. The implementation of this requirement can be very problematic in practice. Often consumers were unaware when they submitted their insurance proposal form that certain information was relevant and was required to be disclosed. Sometimes the insurer's grounds for refusing the claim because of alleged non-disclosure are narrow and technical. This can make highly unpredictable as to whether an insurer will likely pay up on a claim. The law and practice on this issue is often a prime area for reform.

Best practice legislation requires that insurers inform the consumer of the duty of disclosure, to help ensure that the consumer does not inadvertently leave out relevant information that later results in the contract being cancelled. In addition, insurers should be prohibited from cancelling the contract if the information that was not disclosed would not have had any effect on the decision of the insurer to take on the risk, or the price of the insurance contract.

Education

Insurance may be distributed through an agency network, in which agents sell insurance to customers on behalf of an insurance company. Consumers may be vulnerable to the sale of unnecessary or expensive insurance contracts by agents, who are incentivised based on commission payments. In the Philippines, agents must be of good character, have sufficient understanding of the insurance products they are selling, and pass an examination before they are provided with an insurance agency licence.¹²

¹² Insurance Commission of the Philippines, Role of the Insurance Commission, 2006: <http://www.insurance.gov.ph/html/faq.asp>

Dispute resolution

Dispute resolution processes in AMS can potentially be expensive and drawn out. Insurance companies are likely to have significant resources available to litigate claims, making it difficult for consumers to assert their rights through the court system. In addition, consumers bringing an action for an insurance company to pay a claim may be under significant financial stress resulting from the loss, meaning they are less likely to be able to afford litigation.

There is a need for an independent, cost-effective way of resolving disputes between insurers and consumers. In Singapore, the Financial Industry Disputes Resolution Centre adjudicates claims between insurers and consumers up to S\$100,000. All insurers in Singapore voluntarily agree to submit to the jurisdiction of the centre. The cost of adjudication is largely borne by the insurer, with the consumer only required to pay an adjudication fee of S\$250.¹³

Consideration could be given to establishing an industry funded independent dispute resolution scheme.¹⁴ In Malaysia the Financial Mediation Bureau is a non-profit organisation established in 2005 on the initiative of Bank Negara Malaysia to resolve complaints between financial service providers (including insurers) and their customers.¹⁵ Similar schemes exist in a number of countries including South Africa¹⁶, Ireland¹⁷, Canada¹⁸, the UK¹⁹, New Zealand²⁰ and Australia²¹.

Further Reforms

Given ASEAN's objective of greater economic harmonisation and the considerable existing and potential size of the consumer insurance

¹³ Financial Industry Disputes Resolution Centre, Background, 2005: <http://www.fidrec.com.sg/website/disputerp.html>

¹⁴ D Thomas and F Frizon 'Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman A practical guide based on experience in western Europe' The World Bank Global Program on Consumer Protection and Financial Literacy, 2012

¹⁵ <http://www.fmb.org.my/en/>

¹⁶ <http://www.osti.co.za/>

¹⁷ <http://www.ombudsman.gov.ie/en/>

¹⁸ <https://www.giocanada.org/>

¹⁹ <http://financial-ombudsman.org.uk/>

²⁰ <http://www.iombudsman.org.nz/>

²¹ <http://www.fos.org.au/>

market within ASEAN, consideration might be given to developing a set of minimum standards and requirements for member nation's insurance laws. Improved minimum standards of consumer protection would boost consumer confidence in purchasing insurance products. This would benefit both insurers (through market growth) and the insured (by having insurance and having a lower risk of rejection of legitimate claims).

Alternatively, and more ambitiously, consideration could be given to developing harmonised insurance laws. This offers the prospect of reducing regulatory and compliance costs for insurers in that they would not be required to maintain different compliance systems for each member nation. These savings could be passed onto consumers.

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Policy Digest 16:

Enforcing product liability



This policy digest was written by Professor Luke Nottage under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

If courts can provide compensation to consumers harmed by defective products, manufacturers will be incentivised to supply safer products. Making them strictly liable, as under product liability (PL) law reforms in force in six ASEAN Member States (AMS),¹ makes this mechanism more effective even for lower-value injuries or consequential property loss to other goods. But often the amount of harm suffered by each individual consumer is too low to justify bringing a compensation claim through regular court procedures, even though the total amount of harm caused by the unsafe products is collectively very large. This problem is compounded in developing and even middle-income countries, where courts are under-resourced or face other generic problems, or accessing them still runs counter to prevailing social norms. This helps explain the limited impact of strict liability PL law reforms observed in Southeast Asia.² The consequent under-enforcement of consumer law is problematic from the viewpoint of economic efficiency as well as broader justice concerns, resulting in calls for improved court-based collective redress mechanisms.³ Such mechanisms create incentives for manufacturers and others in the supply chain to internalise more fully the costs of risks associated with their consumer goods, complementing other mechanisms enhancing the corporate responsibilities of producers and distributors.

2. Judicial mechanisms for better enforcing PL law

A recent report on ASEAN Complaint and Redress Mechanism Models compares eight major models for consumer dispute resolution, noting a strong emphasis on schemes encouraging mediated settlements but that five AMS also now provide for a Model involving small claims courts, tribunals or adjudicative procedures. Generally these can enforce substantive consumer rights by providing swift and inexpensive redress for small-value disputes, limiting involvement of private lawyers (typically

¹ See **Digest 2** (with further references). The six AMS with strict liability regimes are: the Philippines (enacted in 1992), Indonesia and Malaysia (1999), Cambodia (2007), Thailand (2008) and Viet Nam (2010).

² See **Digest 6** (with further references, and recent examples of individually low-value harms suffered by consumers of cosmetics or foodstuffs).

³ Eigenmuller, Horst and Engel, Martin (2014), 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe', *Ohio State Journal on Dispute Resolution*, 29(2), 261-97.

more readily available to suppliers rather than consumers), and facilitating settlement ‘in the shadow of the law’ – namely, a decision enforceable ultimately through the regular court system.⁴

A major study has similarly compared consumer redress mechanisms within the European Union (EU) member states (and some other countries) that go beyond regular civil court proceedings, broadly divided into: court-related procedures (for injunctions or damages); administrative redress mechanisms; and privately-supplied alternative dispute resolution (ADR) services.⁵ The EU subsequently introduced a Directive on Consumer ADR and a Regulation on Consumer Online Dispute Resolution, aimed at bolstering ADR.⁶ However, the EU and individual member states remain cautious about proposing a US-style (‘opt-out’) class action procedure to facilitate the pursuit of individually small claims through national courts,⁷ even though such a procedure is also now well established in Canada and Australia.⁸

Small claims courts or tribunals

A more recent study into ‘designing efficient consumer rights systems’ criticises the current EU approach, as giving too much priority to mediated settlements. It argues instead for court-based procedures facilitating enforcement of consumer law, in light of both efficiency and broader justice rationales, including ‘due process’ values (such as the dispute resolver’s neutrality, familiarity with the applicable substantive law, and accountability).

⁴ Asher, Allen et al (6 December 2013), ‘ASEAN Complaint and Redress Mechanism Models’, <http://aseanconsumer.org/misc/Output%208%20i.Complaint%20and%20Redress%20Models%20-%209Jan14.pdf>, pp 20 and pp 49-51 (Brunei, Malaysia, Philippines, Thailand (fast-track procedures and other assistance for consumer complaints within regular courts), and Singapore).

⁵ See European Commission Project SANCO 2005/B/010 ‘An analysis and evaluation of alternative means of consumer redress other than individual redress through ordinary judicial proceedings’ (2007), at http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm. I contributed the chapter comparing developments in Australia. See also Hodges, Christopher J. S., Benöhr, Iris, and Creutzfeldt-Banda, Naomi (2012), *Consumer ADR in Europe* (Oxford: Hart).

⁶ Respectively, Council Directive 2013/11; Commission Regulation 524/2013, at (A Directive has to be incorporated into national law by each EU member state, whereas a Regulation has direct effect.) The United Nations Commission on International Trade Law is also developing a Model Law for cross-border ODR: <https://web.archive.org/web/20140709180402/>, http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.

⁷ Cf Commission Recommendation 2013/396, ‘Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law’.

⁸ Kalajdzic, Jasminka, Cashman, Peter, and Longmoore, Alana (2013), ‘Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding’, *American Journal of Comparative Law*, 61, 93-148.

The authors note the decline of cases being brought before small claim courts in Germany, the United Kingdom (UK) and the United States (US), but advocate the strengthening of such rights-based procedures (already found in most EU member states) by restoring especially their cost-effectiveness for consumers.⁹ Specifically, they propose a model small claims court procedure involving:¹⁰

- a low-entry initiation mode (online, very short complaint form, but with the capacity to upload key documents related to the claim)
- a simple but rights-based dispute resolution procedure (requiring a prompt online response from the defendant business, highlighting areas of agreement as well as disagreement, perhaps with a facility to escalate the dispute to a more elaborate court process in the more unusual event of evidentiary issues being contested)
- quick enforcement of the outcome, ultimately through the regular court process (including execution against the losing party's assets, and publication of the results to guide future behaviour of other suppliers and other dispute resolvers both in and out of court).

Only a few of these features are currently found within AMS, or indeed the wider Asia-Pacific region.¹¹ Even in Singapore's Small Claims Tribunals established in 1985, for example, there is not yet a general facility to file proceedings and supporting documentation online, or for web-based publication of Tribunal decisions, and there is no jurisdiction for claims against manufacturers for personal injury (even below the monetary thresholds).¹² At least some features to promote small claims adjudication could be usefully harmonised by ASEAN authorities through best-practice 'guidelines', including recommendations as to online dispute processing and reporting, the maximum amounts claimable (adjusted for purchasing power parity) and the types of disputes that can be addressed through such procedures.

⁹ Above n3, p268. They also indicate (at pp 294-5) that the EU encouragement instead of consumer ADR may be related to the EU's still-limited powers to harmonise civil procedure laws within member states, as opposed to cross-border civil procedure law (such as the unsuccessful European Small Claims Procedure introduced by Council Regulation 861/2007: see pp 267 and 295).

¹⁰ *Ibid*, pp285-6.

¹¹ Cf generally Kellam, Jocelyn (ed.), (2009), *Product Liability in the Asia-Pacific* (Sydney: Federation Press).

¹² Asher et al, above n4; <https://www.statecourts.gov.sg/SmallClaims/Pages/GeneralInformation.aspx> (including Checklist on jurisdiction) and <https://www.statecourts.gov.sg/SmallClaims/Pages/LodgingaClaim.aspx> (lodging by fax or in person). Cf also Durray, Anne, 'Some Thoughts on Current Issues of Natural Justice and Tribunals, Paper Presented at the 5th Annual AIJA Tribunals Conference, 2002, <http://www.aija.org.au/Tribs02/Anne%20Durray.pdf>, pp 6-7 (anticipating unrestricted filing of complaints via the internet).

However, the benefits of such harmonisation will depend on the extent to which consumers move across jurisdictions, and it may be difficult to persuade courts, in particular, to adjust existing procedures.¹³ A further problem is that such highly expedited small claims procedures are more likely to be appropriate for consumer contract disputes, which increasingly involve transactions over the internet generating quite straight forward claims.¹⁴ They are unlikely to be suitable even for most (individually) small-scale PL claims, given that safety complaints typically involve more complicated issues of fact and law.¹⁵

Multi-claimant actions

Traditionally, civil procedure laws have facilitated the aggregation of (smaller) claims by allowing for:

- **‘consolidation’** of claims¹⁶ (but usually only by and within the same court,¹⁷ which is less efficient where defective goods cause harm across multiple jurisdictions) and
- **‘joinder’** of claims¹⁸ (but usually only where relief is sought arising out of the same transaction or series of transactions, and with each joint plaintiff’s claim typically still being considered individually¹⁹).

¹³ Even within Australia, for example, constitutional requirements have resulted in largely rights-based adjudication and ultimately enforceability through the courts. However, some states have created small claims courts whereas others (including NSW and Victoria) have administrative tribunals subject to court review, and original decisions are rarely made public. There also remains considerable variability in the maximum amount claimable in these various courts and tribunals, as well as types of cases (generally excluding PL claims), despite recommendations for greater harmonization urged by the federal government’s Productivity Commission in 2008. See Nottage, Luke (2009), ‘The New Australian Consumer Law: What About Consumer ADR?’, QUT Law and Justice Journal, 9(2), 176-97.

¹⁴ Mainly non-delivery, non-compliance with sample, or inadequate functionality. Cf generally Eigenmuller et al, above n3.

¹⁵ Including, for example, characterization of the safety issue as involving manufacturing, design and/or warning defects: see generally Kellam, above n11.

¹⁶ See eg Malaysia, allowing the court to consolidate claims where common questions of law or fact arise, rights to relief arise from the same transaction, or it is otherwise desirable: Lim, Chee Wee and Gill, RavneetKaur (2009), ‘Malaysia’, in Jocelyn Kellam (ed.), *Product Liability in the Asia-Pacific* (Sydney: Federation Press), p296.

¹⁷ See eg *MBf Capital Bhd&Anor v Tommy Thomas & Anor (No 6)* [1998] 3 Current LJ Supplementary 390 (Malaysia).

¹⁸ See eg Cambodia’s Code of Civil Procedure Art 39: Tayseng, Ly (2009), ‘Cambodia’, in Jocelyn Kellam (ed.), *Product Liability in the Asia-Pacific* (Sydney: Federation Press), pp58-9; Ramirez, Michael (2012), ‘Thailand’, *Product Liability in 33 Jurisdictions Worldwide*, p180.

¹⁹ In Canada, powers to order consolidation have recently been expanded to include situations where a common question of fact or law arise may arise: Paul, Susan and Cavanagh, Peter (2009), ‘Canada’, in Jocelyn Kellam (ed.), *Product Liability in the Asia-Pacific* (Sydney: Federation Press) p81. Malaysian law requires both a common question and claims arising out of the same transaction: Lim et al, above n16 p296.

The main difficulty with these procedures is that consumers have to 'opt-in' by becoming parties to the court proceedings, which requires knowledge that they are underway as well as costs. Further, in countries that follow the 'English rule' whereby a losing party must pay the (reasonable) lawyers' costs incurred by the winning party, there is a further disincentive to becoming party to proceedings.

These problems have traditionally been reduced by providing for a 'representative action'. In Malaysia, for example: '... the plaintiff is the self-elected representative of himself and others. He does not have to obtain the consent of the other persons whom he purports to represent, and they are not liable for costs, though.... they will be bound by the result of the case'.²⁰ However, there usually must be a claim where numerous persons have clearly the same interest, there is no requirement to notify (potential) class members or capacity for the court to assist in notifications, the court has discretion to order the proceedings to be discontinued, and enforcement of the judgment against any non-party requires leave of the court.²¹ The Singaporean Court of Appeal recently indicated that it will take a more flexible approach towards determining whether the plaintiffs have the 'same interest', and then allowing the claim to proceed (to promote access to justice), but that involved a claim concerning renegotiated club membership contracts.²²

By contrast, in the field of tort law claims arising from defective products, concerns about the limits of traditional 'representative action' procedures have prompted public debates and some reforms related to US-style 'class actions'. In the federal courts in Australia since 1992, in conjunction with the introduction of strict PL law, class actions were authorised where: (i) seven or more persons have claims against the same person, (ii) those

²⁰ EH Riyid v Eh Tek[1976] 1 Malayan LJ 262. See also in Hong Kong: Leung, Allan (2009), 'Hong Kong', in Jocelyn Kellam (ed.), *Product Liability in the Asia-Pacific* (Sydney: Federation Press) p172.

²¹ See also Choong, Choy Yeow and Balan, Sujata (2009), 'Malaysia: Principles and Procedural Obstacles', *Annals of the American Academy of Political and Social Science*, 622, p291.

²² Chong Chiah & Ors v Treasure Resort Pte Ltd [2013] SGCA 52. In the quite similar earlier case of Raffles Town Club Pte Ltd v Tan Chin Seng & Ors [2005] 4 SLR 351, the Court also got around the old common law rule that only declaratory relief (not individual damages) could be awarded in a representative action: Lim, Molly and Tong, Roland (2006), 'Class and Public Interest Litigation: The Raffles Town Club Saga', Paper presented at the 9th General Assembly of the ASEAN Law Association, <http://www.aseanlawassociation.org/9GAdocs/Singapore.pdf>. Compare eg the Philippines, *Re Request of the Heirs of the Passengers of Dona Paz*, AM No 88-1-646-0 (3 March 1988), discussed in Corona, Renato (2006), 'Class Action, Public Interest Litigation and the Enforcement of Shared Legal Rights and Common Interests in the Environment and Ancestral Lands in the Philippines', Paper presented at the 9th General Assembly of the ASEAN Law Association, <http://www.aseanlawassociation.org/9GAdocs/Philippines.pdf>.

claims arise out of the same or similar circumstances, and (iii) they give rise to a substantial common issue of law or fact.²³ Once filed, the court directs how anyone within such a class can opt-out and therefore not be bound by awards of damages (which can be amounts specified or calculated in a particular manner, or an aggregate amount to be later distributed among all plaintiffs). There is no preliminary 'certification' step, as in the US. Costs can only be ordered against the losing representative plaintiffs, not the other class members, and since 2006 it is clear that third-party litigation funders can finance the litigation (including providing reimbursements for cost orders against the representative claimants) in exchange for a percentage of any damages awarded by the court.

Governmental reviews conclude that such class action procedures have significantly improved access to justice for consumers, despite initial concerns about frivolous lawsuits and over-enthusiastic plaintiffs' lawyers.²⁴ Major judgments and settlements have been reached in PL claims.²⁵ This contrasts with only one example of the regulator (the Australian Competition and Consumer Commission) using its power to get advance consent from an individual plaintiff to bring a claim under the strict PL law regime introduced also in 1992.²⁶

From 1999 in Indonesia, in addition to the possibility of a consumer protection non-government organisation filing a representative suit, the Consumer Protection Act (Law No 8 of 1999) has provided for a class action procedure, supplemented by Supreme Court Rules introduced in 2002. However, it includes a court certification step,²⁷ and most suits are against government authorities and not related to defective products.²⁸ A major impediment is the relatively high costs involved in notifying potential class members. As legal aid funding from the government is limited,

²³ Clark, Stuart, Harris, Christina, and Kellam, Jocelyn (2008), 'Representative Actions: A Review of 15 Years of Product Liability Class Action Litigation in Australia', *Trade Practices Law Journal*, 16/3-4, 165-89/249-75. Similar class actions have been permitted since 2000 in the Supreme Court of Victoria.

²⁴ Victoria Law Reform Commission (2008) at [http://www.lawreform.vic.gov.au/all-projects/civil-justice/Productivity Commission \(2014\) at http://www.pc.gov.au/inquiries/completed/access-justice/report](http://www.lawreform.vic.gov.au/all-projects/civil-justice/Productivity Commission (2014) at http://www.pc.gov.au/inquiries/completed/access-justice/report).

²⁵ Most recently, see eg this beverage imported from Japan: <http://www.smh.com.au/business/bonsoy-to-pay-soy-milk-victims-25m-in-record-class-action-20141124-11spe4.html>

²⁶ *Glendale Chemical Products v ACCC* (1998) 90 FCR 40.

²⁷ Deradjat, AgusAhadi and Kurniawan, Herry (2014), 'Indonesia', *Product Liability 2014*, <http://www.iclg.co.uk/practice-areas/product-liability/product-liability-2014/indonesia>, Part 4.3.

²⁸ However, one case has involved a claim for tainted water supplied by a local government: Sundari, Elisabeth (2013), 'The Cost Barrier of Consumers Class Action in Indonesia', *European Scientific Journal*, 9 (31), <http://ejournal.org/index.php/esj/article/view/2050>.

one commentator advocates introducing a third-party litigation funding regime.²⁹

In Thailand, the Securities and Exchange Commission drafted in 2001 a 'Bill on Class Actions for Securities Proceedings', which was referred by the Council of State to the Civil Procedure Code Revision Committee to consider applying such a scheme more widely to enhance consumer access to justice.³⁰ A new draft Bill was developed with input also from US organisations. Differences from the Australian class action system included the possibility of a pure contingency fee (paid to lawyers, as opposed to third-party litigation funders) but capped at 30% of damages awarded. However, the Bill encountered business sector opposition and did not progress through the National Legislative Assembly. Instead, Consumer Act Procedure Act BE 2551 (2008) allows for government-certified consumer organisations to bring PL and other consumer law claims. This Bill also facilitates litigation by consumers more generally, not just in multi-plaintiff situations.³¹ The Office of Consumer Protection Board (within the Prime Minister's Office) is authorised to initiate PL claims on behalf of consumers, and a Japanese automobile company settled one claim before proceedings were commenced by the Board on behalf of the consumer harmed by a torn seat belt.³²

Similarly in Viet Nam, the Consumer Protection Act 2010 allows representative actions to be brought by certified social organisations registered for consumer protection.³³ However, such organisations currently lack resources and expertise to file such actions.

Japan, which has exercised significant influence on law reform discussions and initiatives in Viet Nam and other AMS, also enacted an innovative

²⁹ Ibid. In case private funding is not forthcoming, moreover, she urges the establishment of a public interest litigation fund. Indonesia's class action regime is also currently undergoing a comprehensive review.

³⁰ Ratanachaichan, Chukiart (2006), 'A Primer on the Thai Draft Law on Class Actions', Paper presented at the 9th General Assembly of the ASEAN Law Association, <http://www.aseanlawassociation.org/9GAdocs/Thailand.pdf>.

³¹ Henderson, Alastair and Srangsomwong, Surapol (2009), 'Thailand', in Jocelyn Kellam (ed.), *Product Liability in the Asia-Pacific* (Sydney: Federation Press) pp464-6.

³² Thanitcul, Sakda (2013), 'Law and Legal Process of the Product Liability Act in Thailand', *Journal of International Cooperation Studies*, 20(2), pp36-40.

³³ Pham, Thi Phuong Ahn (2013), 'Viet Nameese Law on Consumer Protection: Some Points for Traders', *Viet Nam Law & Legal Forum*, June, 16-20.

two-stage class action mechanism on 11 December 2013.³⁴ Due to take effect from 2016, the Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers (Law No 96 of 2013) will allow ‘specified qualified consumer organisations’ to bring PL and other consumer law claims, but only for a declaratory judgment on liability of the business operator. This judgment binds members of the class represented by the organisation, which have to meet legislative criteria of minimum numbers of claimants and a common cause for the damages, and predominantly common issues. If the court upholds liability, the successful organisation and (on its request) the defendant business must notify potential plaintiffs. They must then opt-in to allowing the organisation to proceed to the second stage: filing individual claims for damages (which, if successful, can include a fee or costs reimbursement for the organisation).³⁵ It is unclear whether this unique hybrid approach will be successful.

3. Recommendations

The risk of systematic under-enforcement of consumer law rights, especially for individual small-value PL claims, requires improvements in court-related procedures for collective redress:

- Small claims courts or tribunals should be made more accessible, especially for consumers claiming against suppliers for isolated manufacturing defects. As well as the usual features associated with small claims procedures, such as low filing fees and fast-track proceedings,³⁶ accessibility can be enhanced by providing for online case filings and publication of (important decisions), and by ensuring that jurisdiction is available for personal injury and consequential property loss claims against manufacturers and others subject to PL law.

³⁴ See generally Nakata, Kunihiro (2012), ‘Recent Problems of Group Rights Protection for Consumers in Japan’, in Stefan Wrška, Steven Van Uytsel, and Mathias Siems (eds.), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge: Cambridge University Press), 169-79.

³⁵ If the business then contests the damages claim, the matter is initially assigned to a simplified (documents-only) procedure; if further contested, it is transferred to the ordinary litigation track. The Act builds on a 2007 amendment to the Consumer Contracts Act of 2000, allowing certified consumer organisations to bring injunction claims regarding unfair contracts on behalf of consumers. This supplements joinder, consolidation and (opt-in) representative party (*senteitajisha*) procedures under general civil procedure law, which are unattractive for small claims by consumers: Madderra, Michael (2014), ‘The New Class Action in Japan’, *Pacific Rim Law & Policy Journal*, 23 (3), 795-830.

³⁶ Asher et al, above n4.

- For unsafe goods with design or warning defects, which typically affect higher volumes of products and therefore more consumers, regular courts also should consider introducing multi-plaintiff procedures so that consumers can obtain collective redress efficiently and consistently. In particular, more AMSs should consider introducing class action procedures, especially on an opt-out basis, as these are more effective than opt-in schemes, even in developed countries.³⁷

If and when class or representative actions are introduced more widely in AMSs, policy-makers must also consider limiting the validity of arbitration agreements that waive such rights. This remains a controversial issue particularly in the US,³⁸ albeit arising more often in the context of direct contractual relationships created between consumers and suppliers.

As for private mediation of PL disputes between consumers and manufacturers, the limited caseloads recorded for industry association-based schemes in Japan³⁹ suggest little scope for dispute resolution procedures out of court in this field.

Effective adjudicative procedures therefore remain an important part of the PL enforcement landscape for AMSs. They can encourage producers and distributors to bolster their efforts to improve consumer product safety through better manufacturing, design and warning procedures, as well as other product safety related activities such as taking out adequate PL insurance and developing internal complaint processing and record-keeping systems.

³⁷ See also eg Sweden: Persson, Annina (2012), 'Collective Enforcement: European Prospects in the Light of the Swedish Experience', in Stefan Wróblewski, Steven Van Uytsel, and Mathias Siems (eds.), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge: Cambridge University Press) 341-63.

³⁸ Wagner, Gerhard (2015), 'Private Law Enforcement and ADR: An Arranged Marriage', in Joachim Zekoll, Moritz Baelz, and Iwo Amelung (eds.), *Formalisation and Flexibilisation in Dispute Resolution* (Leiden: Brill), forth coming.

³⁹ Nottage, Luke (2004), *Product Liability and Safety Law in Japan: From Minamata to Mad Cows* (London: Routledge Curzon).

Policy Digest 17:

Consumer law enforcement



This policy digest was written by Professor Caron Beaton Wells under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

Effective enforcement is a key element of a well-functioning consumer protection regime. Compliance with consumer protection laws will depend on the actual and perceived vigour with which potential breaches are monitored and responded to by enforcement agencies. Inadequate enforcement risks creating the perception that an otherwise appropriate regulatory regime is not working properly. This in turn may undermine consumer and investor confidence, with adverse implications for competition and the economy broadly.

The institutional arrangements for consumer protection enforcement vary significantly across ASEAN Member States (AMS). In most countries, education about consumer rights and dispute resolution are the primary mechanisms for enforcement. In all, however, there is a wide range of agencies involved in enforcement. These include the primary agency responsible for administering the general consumer protection law (either an independent statutory authority or a government department), agencies that have specific responsibility for enforcing laws relating to specific sectors or industries (for example, utility sectors) and non-governmental organisations or groups that represent consumer interests. The result is a complex regulatory landscape in which consultation and coordination between agencies is desirable to ensure that enforcement is carried out in the most efficient and effective way possible.

Enforcement functions include obtaining remedies for harms caused by breaches of the laws. Policy Digest #16, 'Enforcing product liability', covers aspects of consumer redress in relation to product safety and Policy Digest #19 deals with 'Access to consumer remedies' generally.

2. Factors influencing enforcement

There are a number of factors that shape approaches to consumer protection enforcement:

- The legal framework, including the legislative goals, corresponding rules and institutional arrangements — The complexity and specificity of the legislation affects the flexibility and discretion enforcement agencies have in deciding on appropriate enforcement strategies. For example, Thailand's legislation sets out a series of consumer

rights¹ and establishes a Consumer Protection Board² with broad powers to protect these rights.³ Viet Nam takes a similar approach to consumer rights, and empowers a number of enforcement agencies to undertake particular tasks. Singapore's legislation and associated regulations deal in detail with a range of unfair practices⁴ and provide the relevant minister with the power to appoint 'specified bodies'⁵ to carry out particular enforcement functions.

- The range of enforcement tools and sanctions available to the enforcement bodies — Having a range of tools and sanctions at their disposal allows enforcement bodies to respond most appropriately to any given situation. Across AMS, tools and sanctions are generally applied by courts and specialised enforcement bodies. However, in some countries, consumer associations also play a role in enforcement, with powers to initiate criminal,⁶ civil,⁷ and representative proceedings.⁸ Flexibility in the use of tools and sanctions, needs to be balanced with an effort to standardise the exercise of discretion to reduce inconsistencies in decision-making, minimise uncertainty and lower compliance costs. Standardisation may be particularly important where multiple agencies are involved in enforcement.
- The investigative **powers and resources of the enforcement agency** — Pursuing formal enforcement approaches, particularly litigation (and criminal prosecutions especially), will only be a realistic option if the agency has adequate detection and investigative powers. Such powers are available in many ASEAN countries and include search and seizure of property and documents,⁹ requiring individuals to provide evidence to investigators,¹⁰ and the protection of informers and providing rewards for information.¹¹ These powers are particularly critical to the collection of evidence for formal proceedings. The number and skills of enforcement staff will also be relevant to the agency's capacity to

¹ (Thailand) Consumer Protection Act 1979 s 4.

² (Thailand) Consumer Protection Act 1979 s 9.

³ (Thailand) Consumer Protection Act 1979 s 10.

⁴ (Singapore) Consumer Protection (Fair Trading) Act 2003, Schedule 2.

⁵ (Singapore) Consumer Protection (Fair Trading) Act 2003, s 8(10).

⁶ (Thailand) Consumer Protection Act 1979 ss 40–41.

⁷ (Singapore) Consumer Protection (Fair Trading) Act 2003 ss 8–10.

⁸ (Viet Nam) Law on Protection of Consumer Interests 2010 Article 28(1)(b).

⁹ (Malaysia) Consumer Protection Act 1999 ss 125–127; (Thailand) Consumer Protection Act 1979 s 5(2).

¹⁰ (Malaysia) Consumer Protection Act 1999 s 128; (Thailand) Consumer Protection Act 1979 s 5(4).

¹¹ (Malaysia) Consumer Protection Act 1999 ss 134–135.

undertake formal enforcement action, as well as to conduct large-scale education or advocacy campaigns. The nature of the party to which enforcement is directed — Factors such as the extent to which the business understands its obligations under consumer protection laws and its attitude towards compliance are relevant in deciding how to respond to a breach. For example, if the business is well-intentioned but ill-informed, persuasion and education may be more appropriate than prosecution. Some ASEAN countries empower enforcement agencies to settle offences without prosecution, including by payment of the applicable fine or a negotiated amount.¹²

- The **nature of the conduct** that is the subject of enforcement action — Other factors that influence an agency's enforcement strategy include the nature of the contravention (whether one-off or persistent), the seriousness of the contravention in terms of the extent and type of harm caused, and the offender's culpability (ie, whether the contravention was careless, negligent or deliberate). Across ASEAN countries, penalties vary to reflect the seriousness of the conduct,¹³ whether it was repeated or continuing,¹⁴ and the intention of the parties.¹⁵
- The **culture or style of the enforcement agency** — Enforcement actions involve the exercise of public power affecting the community, businesses and individuals and should therefore conform to principles or values that reflect the responsibility that comes with such power. Such principles require an enforcement agency to have a culture that upholds standards such as legality, consistency, rationality, proportionality, transparency, accountability and fairness.¹⁶

3. Enforcement policies and principles

An agency should have policies or guidelines that set out their philosophy on and approach to enforcement. These should be publicly available and drafted in simple 'lay' terms, although they may be supplemented by internal guidelines. They should also be regularly reviewed.

¹² (Thailand) Consumer Protection Act 1979 s 62; (Malaysia) Consumer Protection Act 1999 s 146.

¹³ (Viet Nam) Law on Protection of Consumer Interests 2010 Article 11.

¹⁴ (Thailand) Consumer Protection Act 1979 ss 47 and 51; (Malaysia) Consumer Protection Act 1999 s 145(1).

¹⁵ (Thailand) Consumer Protection Act 1979 s 47.

¹⁶ See eg, KYeung, *Securing Compliance, a principled approach* (2004); RBaldwin, MCave and MLodge, *Understanding Regulation: Theory Strategy and Practice* (2012).

Enforcement policies raise awareness and promote compliance between consumers and businesses, encourage the development of a proactive and systematic approach to enforcement, guide enforcement staff in choosing enforcement responses, support transparency, consistency and accountability in enforcement decisions and establish the basis for working relationships between enforcement agencies in related areas.

An enforcement policy should clearly identify the objectives of the agency's enforcement program. Objectives are likely to include:

- stopping the unlawful conduct
- deterring future offending conduct (both on the part of the specific offender and on the part of the business community generally)
- obtaining redress for consumers and other remedial action (e.g. product recalls, corrective advertising) that addresses the problem caused by the offending conduct
- punishing the offender, including through penalties and 'naming and shaming' measures
- encouraging the effective use of compliance systems.

Unless clearly inappropriate in the circumstances, enforcement policies should also cover the:

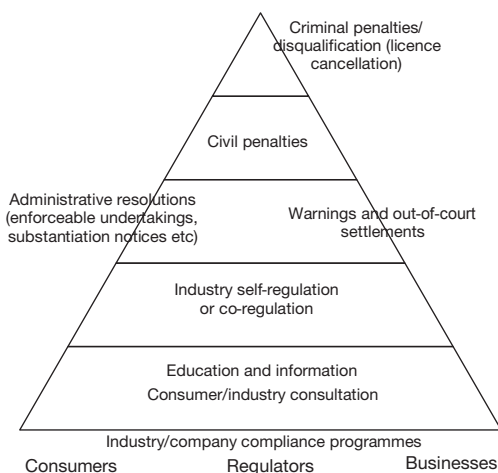
- types of action available to the enforcement agency
- principles behind each of these actions
- criteria involved in the decision to pursue one or more of these actions
- agency's relationship with other enforcement agencies
- agency's current enforcement priorities.

A widely used framework underpinning enforcement decision-making is known as the enforcement or compliance 'pyramid'.¹⁷ This framework advocates a layered approach, where compliance measures of increasing intensity and sanctions of escalating severity are imposed on a hierarchy of breaches.

¹⁷ See Ayres and J Braithwaite, *Responsive Regulation* (1992).

According to this approach, enforcement agencies should deploy educative or persuasive strategies (at the base of the pyramid) and progressively escalate to more stringent or punitive strategies (at the top of the pyramid) only where necessary. If enforcers follow this approach, then most matters should be dealt with towards the bottom of the pyramid – an outcome that promotes both effective and efficient enforcement.

Figure 1: The enforcement pyramid for compliance



Source: Australian Productivity Commission, 'Review of Australia's Consumer Policy Framework Volume 2'

Examples of enforcement policies along the lines suggested can be found on the websites of the Australian Competition and Consumer Commission¹⁸ and the New Zealand Commerce Commission policies.¹⁹

4. Enforcement tools

A consumer protection enforcement agency should have a range of tools at its disposal to be able to respond appropriately and proportionately to breaches. This should be in a way that meets its enforcement objectives while also being cost-efficient given limitations on agency resources.

¹⁸ Australian Competition and Consumer Commission, *Compliance and enforcement policy* 2014.

¹⁹ New Zealand Commerce Commission, *Enforcement Response Guidelines* 2013.

Education, advice and persuasion

In countries where awareness and understanding of consumer protection laws is low, enforcement agencies are more likely to focus their resources on educating consumers about their rights and businesses generally about their legal obligations. This is a high priority for countries early on in the development of a consumer protection regime. Malaysia has recently developed a National Consumer Policy (NCP) that aims to both empower consumers to protect their own interests, and facilitate self-regulation by business. The Viet Nam Competition Authority (which also has responsibility for consumer protection) has also increased its outreach and training activities in recent years, holding country-wide seminars and workshops to educate business people, as well as government officials in trade and industry, in consumer protection.²⁰ Such activity, which is proactive and preventative in orientation, is an important supplement to, albeit not a substitute for, an enforcement program that both incentivises business compliance and responds to non-compliance.

An educative approach will also be appropriate when the offending business has clearly acted in ignorance of the unlawfulness of its conduct. In such cases, the enforcement agency should not only advise the business on the relevant law and the way in which their conduct has contravened it, but also on measures to ensure the conduct does not occur again (for example, through the implementation of a compliance program).

If the conduct appears to be a sector-wide issue, the agency could consider working with industry associations or other representative bodies to introduce industry charters or voluntary codes of conduct that apply the requirements of the law to the particular circumstances of the sector. Malaysia's NCP, for example, includes strategies to encourage business adoption of a Code of Ethics, improve consumer conscious business practices, and enhance the role of business organisations.

Informal resolution

Where the harm caused by the conduct and/or the culpability of the offender are low, the appropriate enforcement response is likely to be informal. An informal resolution may involve requiring the business to give

²⁰ See Viet Nam Competition Authority, Summary On Protecting Consumer Activities In 2013 and Directions For 2014.

commitments to the enforcement agency in correspondence or a signed agreement. Such commitments could include agreeing to stop the conduct, compensate those who have suffered any detriment and take measures to prevent recurrence. For example, in Singapore a supplier may be invited to enter into a voluntary compliance agreement that requires the supplier to compensate the consumer, reimburse the enforcement agency's costs and publicise the agreement. In some jurisdictions, agencies also have administrative powers to secure commitments from businesses (that may be enforceable) and issue notices that provide public warnings or require businesses to substantiate marketing claims as a means of resolving issues informally. For example, in the Philippines, consumer protection agencies are able to accept voluntary assurances of compliance or discontinuance from the respondent which may include various conditions relating to compliance and redress.

These administrative powers are widely used in AMSs and are valuable discretionary tools that enable agencies to respond to breaches in a way that is quicker, cheaper and more flexible than formal action. At the same time, such instruments may lack transparency and can be less effective in promoting general deterrence than formal enforcement action.

Formal proceedings

In some jurisdictions, enforcement agencies have the power to make infringement decisions and impose sanctions. In others, the agency must bring court or tribunal proceedings to have liability determined and sanctions imposed. However, irrespective of whether there is an administrative or judicial system, formal enforcement action is unlikely to be regarded the appropriate response to consumer protection breaches in all or even the majority of cases. This is particularly so in AMSs where the consumer protection regime is relatively new and the focus, appropriately, is on education. The cost and complexity of formal action are also considerations for enforcement agencies where resources are limited. In these countries, in addition to educative activity, promotion of self-regulation and informal resolution are likely to be more cost-effective.

In judicial systems, some countries (such as Viet Nam and Malaysia) have both criminal and civil sanctions, whereas in others (such as Singapore), only civil sanctions are available. Where both types of sanctions exist, enforcement agencies are likely to be even more cautious in proceeding

with criminal prosecution, given the higher standard of proof and more onerous evidentiary requirements. In some countries, criminal proceedings may also require the enforcement agency to refer the matter to a central independent prosecutor, which may add further to the uncertainty, delay and cost of achieving a satisfactory outcome.

In general terms, formal proceedings should be considered where they are necessary to achieve the particular enforcement objectives of deterrence (general deterrence especially) and punishment. Such proceedings should be pursued in cases where the conduct is particularly egregious, where there is reason to be concerned about the risk of the conduct continuing and/or where the offending party is unwilling to provide an effective resolution on an informal basis.

The factors that are most relevant in deciding whether formal action is warranted include whether the conduct:

- is of significant public interest or concern (e.g. where it involves serious product safety issues)
- has resulted or is likely to result in substantial consumer detriment (e.g. where the conduct is industrywide or likely to become widespread)
- demonstrates a blatant disregard for the law (e.g. in cases involving a repeat offender) or
- affects disadvantaged or vulnerable groups (e.g. low-income or elderly consumers).

5. Intersections with other enforcement regimes

Enforcement of general consumer protection laws often sits alongside enforcement of other laws that protect consumers' interests, such as competition laws, product and service standards and industry-specific regulation of particular businesses. Where multiple agencies are involved, enforcement under both general consumer protection laws and industry-specific laws may be appropriate. For example, where there is a requirement to hold a licence to operate in a particular industry, such as telecommunications or energy, systemic and ongoing breach of general consumer laws and regulations may provide grounds for enforcement

action by the general consumer protection agency, but also grounds for revocation of the industry-specific licence by the sector regulator.

Good regulatory design can ensure that different enforcement regimes work together to both incentivise conduct that achieves the overall goals of consumer protection, and ensure that particular standards of service to consumers are delivered. However, there is also the risk of both overlap and gaps in enforcement activity. A key strategy of Malaysia's NCP is to establish a coordination mechanism among agencies involved in consumer protection, including the exchange of consumer protection information at the national level. Where there is enforcement agencies have a particular area of shared interest, they may enter into a memorandum of understanding that formalises cooperation between them.

Consumer bodies, particularly those that provide dispute resolution services to consumers, are often well placed to identify gaps in both the regulatory regime and enforcement. In Viet Nam, for example, consumer organisations are funded and empowered by the State to participate in formulating laws, guidelines, policies and directions to protect the interest of consumers. Such organisations also play a valuable role in ensuring that consumers have access to remedies where they are dissatisfied with goods or services. Consumer remedies are discussed in Policy Digest #19.



Policy Digest 18:

Protecting vulnerable consumers through general prohibitions on unfair practices



This policy digest was written by Associate Professor Jeannie Marie Paterson under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

This digest considers the use of general prohibition on unfair business practices to protect vulnerable consumers. The concern is with consumers unlikely to be able to protect their own interests (due to old age, inexperienced, or reduced mental capacity) who are targeted through manipulative marketing strategies to sell goods or services for which the consumers have no real need or cannot afford. Legislative responses to this kind of predatory conduct range from bans and prohibitions on certain types of transaction, to 'bright line' rules that regulate specific kinds of sales strategies and then to 'standard based' regulation that impose general prohibitions on unfair practices. This paper focuses on standard based prohibitions. In a comprehensive and effective consumer protection regime, general prohibitions on unfair business practices can provide an important 'safety net' response to predatory business practices not otherwise caught by more specific regulation.

2. Taking advantage of vulnerable consumers

Many ASEAN Member States (AMS) (discussed below in Part 3) have consumer protection legislation prohibiting practices that are unfair in their effect on consumers, including bans on misleading conduct, and aggressive practices. This discussion is not focused on a different type of wrong doing, namely the conduct of traders who take advantage of the special vulnerability of particular consumer groups. To respond to this concern it is necessary to identify when a trader's business practices offends community values and when it simply represents ordinary commercial hard bargaining.

Mere inequality of bargaining power between a trader and the consumers with whom it deals is unlikely to be a sufficient reason for legislation setting aside an otherwise valid transaction. There is almost always an inequality of bargaining power between traders and consumers. The fact consumers have entered into a transaction they later regret or that the business has done a 'good deal' does not make the conduct of the trader unfair. To conclude that a business model has crossed the line from hard bargaining to unfair or predatory advantage taking that should be prohibited by legislation, the trader will usually need to be implicated in the vulnerable position of the consumer. This might be found in the trader actively contributing to the

vulnerable position of consumers, such as through manipulative marketing strategies or deliberately using a confusing sales structure. The trader might also be found to have behaved unfairly where, having knowledge of the vulnerable position of the consumer, the trader proceeds with the transaction without providing any assistance to protect the interests of the consumer, such as, for example, recommending independent advice or other help. In these cases, there will be a real and foreseeable risk that risk that consumers will enter into a transaction they do not fully understand and end up with a product that is unsuitable for their needs or which they cannot afford.

The spectrum of wrongdoing that might be involved in predatory business practices is illustrated in two cases from Australia.

In *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd*,¹ a company's sale strategy was found to infringe the prohibition on misleading or deceptive conduct through making false statements about the extent of coverage available in remote regional areas of Australia under the mobile phone plans it was selling. The company was found to infringe the prohibition in the Australian Consumer Law on undue harassment or coercion in its debt collection practices, which involved sending intimidating letters and phone calls,² including the threat to involve a highly aggressive lawyer who was a 'killer in front of a judge' and the (false) claim that the lawyer would repossess all of the consumers' assets, even the children's toys.³ The court also found that the company had engaged in unconscionable conduct contrary to the Australian Consumer Law through its telemarketing sales strategy that aimed to commit consumers to a mobile phone plan with an unusual structure, unsuitable for most telephone users, and in which consumers were given little opportunity to understand or reflect upon the merits of the transaction.⁴

In *Walker v DTGV1 Pty Ltd*,⁵ unconscionable conduct was found in the combination of manipulative marketing, a lack of transparency in the

¹ [2013] FCA 350 (18 April 2013) [184]–[185].

² *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (18 April 2013) [208]–[210].

³ *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (18 April 2013) [43].

⁴ *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (18 April 2013) [172]–[178].

⁵ *Walker v DTGV1 Pty Ltd* [2011] VCAT 880 (12 May 2011).

transaction structure and a highly vulnerable consumer. A woman with mental illness on a disability pension entered into a finance lease she did not understand for a low-value vehicle that she was unable to afford. Both of these factors were or ought to have been known to the lessor company, providing a ground for discharging the transaction as unjust or unconscionable. In the Victorian Civil and Administrative Tribunal, Senior Member Mackenzie was highly critical of ‘the length of the stay at the dealership, the delay in clearly explaining what the nature of the transaction was, the speed and inadequacy of explanations of the transaction given, the lack of real choice in car selection, and the lack of real opportunity given to read or understand the consumer lease’.⁶

3. Different models for legislation prohibiting unfair practices

Prohibitions on specific unfair practices

Some AMS have specific prohibitions on unfair practices, which may be effective in protecting consumers, see Table 1. These include for example a ban on conduct involving:

- ‘making a materially inaccurate claim about the nature and extent of risk to the personal security of the consumer and his family if the consumer does not purchase the product’⁷
- ‘a statement which will cause misunderstanding in the essential elements concerned goods or services’.⁸

Brunei	Consumer Protection (Fair Trading) Order 2011 schedule 1 s 12
Singapore	Consumer Protection (Fair Trading) Act 2009 (revised) schedule 2 s 12
Thailand	Consumer Protection Act 1979 s 4(2)

⁶ *Walker v DTGV1 Pty Ltd* [2011] VCAT 880 (12 May 2011) [130].

⁷ (Brunei) Consumer Protection (Fair Trading) Order 2011 schedule 1 s 12; Consumer Protection (Fair Trading) Act 2009 (revised) schedule 2 s 12; Consumer Protection (Fair Trading) Act 2009 (revised) schedule 2 s 12.

⁸

Prohibitions on aggressive practices

Some AMS have prohibitions on sales conduct that is aggressive or harasses consumers (Table 1). For example, in Indonesia, traders are prohibited from ‘offering goods and/or services by using force or any other methods which can cause either physical or psychological annoyance to the consumers’.⁹ These provisions go some way to protect vulnerable consumers.¹⁰ However, they may not catch more subtle forms of misconduct. In particular they may not catch conduct that does not involve actual force or threats but, as in the examples in the introduction, rely on taking advantage of consumers who are vulnerable in the sense of not being able to protect their own interests in a sales transaction.

Table 1. General prohibitions on aggressive practices

Brunei	Consumer Protection (Fair Trading) Order 2011 s 4
Indonesia	Law on Consumers’ Protection 1999 Art 15
Myanmar	Consumer Protection Law 2014 s 13
Singapore	Consumer Protection (Fair Trading) Act 2003 schedule 2 s 12
Viet Nam	Law on Protection of Consumers’ Rights 2010 Articles 10(2) and (3)

Prohibitions on unfair advantage taking

Many AMS also have general consumer protection laws that prohibit traders from taking advantage of vulnerable consumers (Table 2). These rules cover a broader range of misconduct, as they will catch less overt strategies to manipulate or exploit vulnerable consumers unable adequately to protect their own rights. Prohibitions on both aggressive and advantage-taking conduct are also found in Australia¹¹ and in the European Union.¹²

⁹ Law on Consumers’ Protection 1999 Art 15.

¹⁰ See (Indonesia) Law on Consumers’ Protection 1999 Article 15; (Myanmar) Consumer Protection Law 2014 s 13; (Viet Nam) Law on Protection of Consumers’ Rights 2010 Article 10(2). Also (Thailand) Consumer Protection Act 1979 s 4(2).

¹¹ Competition and Consumer Act 2010 (Cth) Schedule 2 (‘Australian Consumer Law’) (‘ACL’) Sections 20–21.

¹² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149, p. 22 (‘Unfair Commercial Practices Directive’).

Table 2. General prohibitions on unfair advantage taking

Brunei	Consumer Protection (Fair Trading) Order 2011 s 4(c)
Malaysia	Consumer Protection (Amendment) Act 2010 s 24C
Philippines	Consumer Act 1991 Art 52
Singapore	Consumer Protection (Fair Trading) Act 2009 (revised) s 4(c)
Viet Nam	Law on Protection of Consumers' Rights 2010 Article 10(3)

General prohibitions on unfair conduct that aim to protect vulnerable consumers will be most effective when they are sufficiently broad to catch different forms of misconduct and also provide some direction to courts and stakeholders about the type of conduct that is prohibited and how it is assessed. Different models of broad standard based prohibitions on unfair conduct, which also direct attention to the issues of key concern, are illustrated by the regimes in Singapore/Brunei, the Philippines and Malaysia.

Vulnerability and one sided transactions

In the Philippines, the Consumer Act 1991 provides that:

An unfair or unconscionable sales act or practice by a seller or supplier in connection with a consumer transaction violates this Chapter whether it occurs before, during or after the consumer transaction. An act or practice shall be deemed unfair or unconscionable whenever the producer, manufacturer, distributor, supplier or seller, by taking advantage of the consumer's physical or mental infirmity, ignorance, illiteracy, lack of time or the general conditions of the environment or surroundings, induces the consumer to enter into a sales or lease transaction grossly inimical to the interests of the consumer or grossly one-sided in favor of the producer, manufacturer, distributor, supplier or seller.¹³

This provision has the attraction of identifying the range of features that make a consumer vulnerable as compared to the trader. The provision also requires the transaction to be grossly one-sided transaction in favour of the trader in order for consumer to obtain relief. In other jurisdictions it is the advantage taking behaviour that is penalised with less focus on the outcome of the transaction.

¹³ (Philippines) Consumer Act 1991 Art 52.

Vulnerability and knowledge

In Singapore, the Consumer Protection (Fair Trading) Act 2009 (revised) allows consumers a right to a remedy if they are affected by an unfair practice. An unfair practice covers misleading conduct, specific examples of unfair practices,¹⁴ and also unfair advantage-taking conduct. Thus, it is a prohibited unfair practice:

‘To take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer:

- (i) is not in a position to protect his own interests; or
- (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter relating to the transaction’.¹⁵

This approach to unfair advantage-taking conduct focuses on the inter-related elements of consumers who have a reduced ability to protect their own interests, or who cannot reasonably understand the transaction and the traders’ response to that position of vulnerability. Under this provision, it is the trader’s conduct in knowing of the disadvantageous position of the consumer and still proceeding with the transaction that gives rise to unfairness. A similar provision is in place in Brunei under the *Consumer Protection (Fair Trading) Order 2011*.¹⁶

Vulnerability and factors affecting the consumer’s ability to understand the contract

In Malaysia, the Consumer Protection Act gives courts certain rights over a contract term that are procedurally or substantively unfair.¹⁷ Procedural unfairness is a broad category, capable of responding to unfair advantage taking of vulnerable consumers. The Act provides that:

*A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and supplier.*¹⁸

¹⁴ See Schedule 2.

¹⁵ (Singapore) Consumer Protection (Fair Trading) Act 2003 s 4(c).

¹⁶ Consumer Protection (Fair Trading) Order 2011 s 4(c).

¹⁷ (Malaysia) Consumer Protection Act 1999 s 24G.

¹⁸ (Malaysia) Consumer Protection Act 1999 s 24C(1).

The Act sets out matters that may be taken into account in making this assessment. These direct the courts' attention to the types of considerations that may make the consumer relevantly vulnerable:

'the knowledge and understanding of the consumer in relation to the meaning of the terms of the contract or their effect;

....

whether or not, even if the consumer had the competency to enter into the contract based on his or her capacity and soundness of mind, the consumer—

- (i) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered; or*
- (ii) suffered serious disadvantages in relation to other parties because the consumer was unable to appreciate adequately the contract or a term of the contract or its implications by reason of age, sickness, or physical, mental, educational or linguistic disability, or emotional distress or ignorance of business affairs'.¹⁹*

The factors also include a more general range of considerations relevant to the consumers' ability to understand the transaction, for example:

'the knowledge and understanding of the consumer in relation to the meaning of the terms of the contract or their effect;

...

whether expressions contained in the contract are in fine print or are difficult to read or understand'.²⁰

4. Policy priorities

One purpose of consumer protection law is to protect vulnerable consumers from being exploited by traders who seek to take advantage of them. Responses to this type of conduct may be made through specific targeted rules. There is also a place for a general 'safety net', to protect consumers from unfair conduct that falls through the net of more specific rules. AMS

¹⁹ (Malaysia) Consumer Protection Act 1999 s 24C(2).

²⁰ (Malaysia) Consumer Protection Act 1999 s 24C(2).

might well look to the models utilised in the Philippines, Singapore/Brunei or Malaysia that have legislation responding with these concerns. These models make clear that the focus of concern is:

- with traders knowingly taking advantage of vulnerable consumers unable to protect their own interests in the transaction and
- that this relevant vulnerability of consumers may be found in a range of different factors, including
 - age,
 - sickness,
 - physical, mental, educational or linguistic disability,
 - emotional distress or
 - ignorance of business affairs.²¹

Active, engaged regulators and consumer advocates are also necessary to ensure that vulnerable consumers are treated with dignity and respect in the market and are not exploited. These consumers are unlikely to themselves be able to pursue their legal rights for the very reasonable that made them vulnerable to exploitation by unscrupulous traders. Thus vigilant protection of the interests of vulnerable consumers by those charged with monitoring the effectiveness of the relevant consumer protection laws is crucial.

²¹ Cf(Malaysia) Consumer Protection Act 1999 s 24C(2).



Policy Digest 19:

Access to consumer remedies



This policy digest was written by Professor Caron Beaton Wells under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

Consumers benefit when businesses deliver goods and services of expected quality at competitive prices in a way that meets accepted standards of conduct. However, even in markets that perform well overall, consumers may be dissatisfied with their purchase, or the way they were treated by a supplier. In some cases, they may also have been harmed or lost money.

Many consumer transactions are of low monetary value. As a result, without simple, low-cost ways to resolve problems with goods or services, consumers may not complain to their supplier; those who do may not obtain a satisfactory outcome. Ensuring mechanisms are available to resolve consumer grievances in an inexpensive and straight forward manner is therefore a crucial element of effective consumer policy. It is consistent with the United Nations Guidelines for Consumer Protection, which emphasise the right of consumers to obtain redress.¹

The capacity of consumers to change supplier in response to unsatisfactory performance drives competition and provides an important context for consumer redress. Consumer law enforcement also plays an important role in deterring poor performance by suppliers, thereby reducing the need for redress.

Although underpinned by some common principles, a range of different redress mechanisms can deliver effective outcomes for consumers.² This policy digest summarises principles and avenues for consumer redress, addresses the relationship between general and industry-specific redress mechanisms, examines challenges for consumer redress in utilities markets and explores the role of non-governmental organisations (NGOs).

2. Principles and avenues

An effective redress mechanism should:

- be known to consumers who understand how the mechanism works and are able to use it without third party assistance

¹ See also OECD Recommendation on Consumer Dispute Resolution and Redress (2007).

² See the detailed study of redress models in FEMAG, Models for Internal Complaint Systems and Internal Redress schemes in ASEAN, 2013.

- be able to deal with the particular issues and concerns that consumers have about their supplier
- enable impartial consideration of the merits of individual cases
- deliver outcomes that reflect the nature and scale of the impact on the consumer
- minimise the resources that need to be expended by all parties
- resolve disputes within a reasonable timeframe
- ensure that parties can be bound by any resolution
- provide for sanctions where a party breaches a settlement agreement
- be sensitive to the needs of disadvantaged and vulnerable consumers.³

The wide range of avenues for consumer redress across ASEAN and other jurisdictions fall into three broad categories:

- schemes operated privately by business or industry
- schemes administered by government
- courts and tribunals.

Different avenues place varying weight on each of the principles described above. The avenues found in ASEAN member states reflect their divergent legal and administrative systems, stages of market development and levels of consumer awareness and activism. However, mature systems, such as in Indonesia and Singapore, typically include a number of different avenues, formally or informally linked to create a tiered system, with complementary and mutually reinforcing redress avenues.

Industry avenues

Some businesses and industry organisations operate consumer complaint schemes driven primarily by market forces. These schemes should provide effective cost-efficient processes for internal complaints handling, private alternative dispute resolution services, protections for payment cardholders in merchant disputes and customer satisfaction codes with standards of

³ See e.g. OECD Recommendation on Consumer Dispute Resolution and Redress (2007); OECD Consumer Policy Toolkit (2010), p102; International Standards Organisation, *ISO100002-2004: Quality Management – Customer Satisfaction – Standards for Complaints Handling in Organization* (2004).

performance and responses.⁴ An increasingly common feature of these schemes is the use of online systems for dispute resolution, particularly in the context of e-commerce transactions.⁵

Such self-regulatory mechanisms aim to resolve complaints in a manner that protects the reputation of the business and/or the industry as well as the relationships with customers. They also enable businesses to collect customer feedback, enabling improvement in their offerings, operational processes and market focus.

These schemes work best where the market is highly competitive and consumers have real alternatives, both in their choice of supplier and in ways of meeting their needs (e.g. in markets for recreation, communication, transport or energy services). Self-regulation may emerge as a response to public concerns about industry conduct. It may also be an attempt to avoid or delay government regulation.

Industry schemes, such as the Malaysian Financial Mediation Bureau, are typically established by agreements between members to adhere to an industry code of conduct. If consumers are unable to have their concerns addressed by a participating business, they may access the industry dispute resolution scheme.

Common criticisms are a lack of timeliness in resolving complaints, lack of independence and weak enforceability. Such issues may be addressed through government mechanisms for approval or endorsement of industry schemes that meet specific criteria and/or by making the code enforceable under legislation.⁶

Government avenues

Where self-regulation is inadequate, governments may establish statutory complaints and dispute resolution schemes (as operated, for example, by the Thailand Office of the Consumer Protection Board).

In industries that operate under licence, maintaining effective internal complaints and redress mechanisms may be a condition enforceable

⁴ Australian Treasury, *Benchmarks for Industry Based Consumer Dispute Resolution Schemes* (2009).

⁵ OECD Consumer Policy Toolkit 2010, p. 101.

⁶ See e.g. Australian Government *Treasury Policy Guidelines on Making Industry Codes of Conduct Enforceable under the Trade Practices Act 1974* (2009).

by government (for example, licences granted under the Malaysian Communication and Multimedia Act 1998). While such schemes are controlled and operated by industry, their main elements and standards of conduct require government approval.

Alternatively, a dispute resolution mechanism may be established by law and operated independently of the industry, for example, under an ombudsman scheme, such as the Indonesian Consumer Dispute Settlement Agency.

Government authorities responsible for regulating specific markets may also be responsible for consumer complaints. While dispute resolution may complement the enforcement activities by the authority, their objectives are different. Enforcement aims to deter future non-compliance, whereas complaints and dispute resolution mechanisms provide remedies for past market failure. Where these functions are combined in one agency, finite resources may direct attention to systemic problems that affect many consumers, rather than dealing with individual cases.

Judicial avenues

Mainstream court systems are poorly suited to resolving individual consumer disputes, unless there has been substantial loss or harm. However, many jurisdictions, including Malaysia⁷ and Indonesia,⁸ have small claims courts or tribunals of limited jurisdiction, with relatively simple processes for making claims, up to a fixed sum. Such bodies complement and provide a substitute for other consumer dispute resolution mechanisms.⁹

Courts and tribunals may also be able to provide consumer remedies where representative action is permitted, either through class action or by granting standing to government or NGOs to take action on behalf of consumers.

3. General vs industry-specific mechanisms

Statutory remedies may involve general or industry-specific mechanisms.

⁷ Malaysian Ministry of Domestic Trade Cooperatives and Consumerism, Tribunal for Consumer Claims.

⁸ Indonesia Consumer Dispute Settlement Agency.

⁹ Productivity Commission, *Review of Australia's Consumer Policy Framework* Volume 2, 2008, p. 210.

General schemes

Some ASEAN countries provide remedies for breach of general consumer standards that apply to advertising, labelling and consumer contracts, for example.¹⁰ Legislation typically facilitates access to such remedies through consumer complaints bodies that receive and investigate complaints, and endeavour to negotiate remedies with the suppliers.

There are two main advantages of generic remedies. First, overtime, consumers may become more aware of their rights and the standard of conduct expected of all suppliers, irrespective of the industry, goods or services provided. As a result, consumers become more empowered to complain, understand how to do so, and therefore play an active role in regulating the market. Second, the cost of compliance may be lower if standards are consistent across industries. The main disadvantage is that generic remedies cannot assure specific quality standards are met.

Industry-specific schemes

Where consumers are not readily able to judge the quality of the good or service in advance of purchase, minimum standards are typically set by regulation. Such regulation is often more prescriptive than generic consumer protection standards and can be quite complex. As a result, industry-specific bodies are often needed to help deal with consumer grievances.

The advantage of such schemes is that they prescribe standards tailored to the industry. They may also enable compensation to be paid for standard breaches, for example, for wrongful disconnection from an essential service. Where compensation is available in addition to civil penalties for non-compliance, industry will have particularly strong compliance incentives that promote certainty and consumer confidence.

A key disadvantage is that individual consumers may find it difficult to navigate the complexity which may deter them from making a complaint. However, across ASEAN there are a number of statutory bodies that have been established to help consumers resolve individual complaints, such as the Malaysian Financial Mediation Bureau. Where dispute resolution and enforcement are carried out by separate bodies, effective communication

¹⁰ See e.g. Thailand, Consumer Protection Act B.E. 2522 as amended by the Consumer Protection Act (No.2) B.E. 2541; Viet Nam, Law on Protection of Consumer Interests 2010 QH12.

between these bodies can help identify systemic regulatory failures and emerging conduct that may harm consumers.

Industry-specific regulation can nonetheless create barriers to entry favouring incumbents, thereby reducing potential competition. There is also a need to avoid duplication with generic consumer regulation and ensure appropriate cross referral and coordination between regulators. The balance between generic and industry-specific schemes across ASEAN will need to reflect the stage of development of consumer markets, consumer protection and consumer engagement in each country.

4. Challenges for consumer redress in utilities markets

Consumer utilities markets have certain characteristics that can make it particularly challenging for consumers to obtain remedies in the case of service failure.

Market structure and ownership

Network services are natural monopolies which means that consumers experiencing problems with reliability or service quality cannot switch supplier. Incentives to meet service standards and provide remedies for service failure must come from regulation. Utility consumers therefore typically depend on statutory complaints and dispute resolution mechanisms for redress. Where network service providers are government owned, a level of political accountability may assist consumers to resolve their complaints.

In some ASEAN utility markets, contestability has been introduced into parts of the supply chain, in particular for the retail of energy and telecommunication services. However, this can add complexity for consumers who may have to seek redress from their network service provider, their retailer or both.

Complexity of contracts and regulations

Utility service supply is inherently complex. As a result, regulation often prescribes standard terms and conditions of utility contracts, while industry codes may address issues such as marketing conduct, obligations regarding

contract formation, access to dispute resolution and compensation for particular failures. But consumers may have limited awareness of their contractual and statutory rights, placing them at a disadvantage in any dispute with their utility supplier.

A typical response to this is to establish an ombudsman scheme. Membership of such a scheme may be a condition of a utility licence. Utilities may pay for the scheme through fees based on the number of consumer complaints handled. An important design question is whether ombudsmen have the power to determine rather than just mediate a complaint.

Role of regulators in dispute resolution

In some jurisdictions, utility regulators may also have a role in dispute resolution, even where an ombudsman scheme exists. This may occur in particular, where specific regulation is needed to protect vulnerable and disadvantaged consumers. The ombudsman may refer complaints to the regulator where the number and nature of such complaints indicates that there may be a systemic issue. Regulators may also have additional powers of investigation, standing in the courts and payment of compensation. However, utility regulators are generally not resourced to deal with individual complaints, and are necessarily focused on broader industry compliance.

5. The role of NGOs

NGOs play an important role in consumer policy; in ASEAN, they have a long history and are highly active.¹¹ Their functions include:

- educating consumers, businesses and government
- research on consumer trends and business practices
- product safety testing and alerts
- advocacy on consumer policy issues
- handling consumer complaints and resolving disputes
- representing consumers in courts and tribunals.

NGOs are valuable because they are less formal or bureaucratic than

¹¹ Examples include Consumers Association of Singapore (CASE); Consumer Association of Brunei Darussalam (CAB); Consumers Association of Indonesia; Foundation for Consumers (FFC); IBON Foundation (Philippines); Viet Nam Standards and Consumers Association (VINASTAS).

government agencies and hence often more accessible to consumers. They are also often able to work more closely with industry to train business people on consumer issues and can take action more expeditiously and at lower cost. They are also more readily able to use tools like ‘naming and shaming’.

Given these strengths, government bodies should work closely with NGOs to harness their reach, reputation and resources, for example, through joint campaigns, events, training seminars and accreditation schemes, as well as through regular consultation and information sharing.

More formally, NGOs can supplement enforcement activities of public agencies through collective/representative proceedings on behalf of large groups of consumers.¹² Consideration could also be given to creating a ‘super-complaint’ mechanism requiring public authorities to give privileged attention to complaints by certified NGOs, as a way of alerting authorities to systemic or emerging issues in the market place.¹³

Conclusion

Across ASEAN, a range of mechanisms are available to deal with consumer complaints and remedies. Some countries (particularly where markets are competitive, and consumers informed and engaged) have multi-pronged systems that harness the strengths of industry schemes while also providing statutory avenues. Where markets are less developed, or there are monopoly suppliers, statutory avenues are essential.

Statutory schemes may be general or industry-specific but, where both exist, careful design is needed to ensure the overall system does not become so complex as to be impenetrable, costly and not user-friendly. There is also a need to have systems for collecting consumer complaint data as a means for analysing market trends and evaluating the overall redress system on an ongoing basis. The effectiveness of the system can be enhanced by ongoing dialogue between regulators, independent dispute resolution schemes and NGOs.

¹² For example, in Viet Nam, the Consumer Protection Act 2011 and in Thailand, the Consumer Act Procedure Act 2008 allow representative actions to be brought by certified consumer organisations.

¹³ Such a mechanism has existed in the UK since 2002, and has been considered for adoption in both Australia and New Zealand.

Policy Digest 20:

Food safety regulation under national and international law: integrating consumer regulators in proliferating standardisation projects



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1. Introduction

Public regulation of food safety is typically an early and major priority for law reformers at the national level, given potentially high risks and degrees of harm from unsafe foods.¹ Despite this, serious food safety failures continue to occur in both developing and developed countries (as outlined in **Part 2**, below).² General food laws have been enacted in ASEAN member states. As shown in a recent comparison of Indonesia, Malaysia, Thailand and Singapore, they generally impose criminal and/or administrative sanctions for food adulteration, foods injurious to health, food unfit for human consumption, insanitary facilities, and false labelling or deceptive advertising. (Indonesia's Food Act 1996 further provides specific civil remedies for consumers harmed by unsafe food.)³ Yet enforcement is problematic: food quality and safety standards are usually strictly followed for exportable food commodities, but not always enforced for food destined for the domestic market.⁴

In addition, such food laws tend to fall under the jurisdiction of ministries of agriculture and/or health. To minimise conflicts of interest, namely agriculture ministries favouring suppliers rather than consumers, there is a tendency to establish independent food agencies, as in the US (although the agriculture department still regulates some products) or Myanmar (within the health ministry). This is especially true for risk assessment functions, as in the European Union (EU) since 2002, and Japan since 2003 (for risk management if harm eventuates, Japan's agriculture ministry still regulates farm safety while the health ministry deals with the subsequent supply chain).⁵

However, other government departments are also increasingly involved in food safety regulation. On the one hand, ministries of commerce or

¹ See generally Kellam J et al (eds) *International Food Law* (Federation Press, 2000), including chapters on Myanmar, Singapore, Viet Nam and the international Codex Alimentarius.

² For products that present lower risks, for which it is more difficult to mobilize political resources to regulate, product liability regimes can also incentivise manufacturers to consider food safety, especially if potential harm is extensive, liability is strict and court systems work effectively (see generally **Digests 6 and 16**). Further incentives can come from reputational effects, in the context of growing (social) media coverage of food safety concerns.

³ Ismail R, Food and Consumer Protection: A Study on Food Legislation in Selected Countries, ASLI Working Paper No 017, <https://law.nus.edu.sg/asli/pdf/WPS017.pdf>.

⁴ Editorial, 'Make Food Safety A Regional Priority', 2 April 2015, <http://m.bangkokpost.com/opinion/516167>.

⁵ Matsuo M, Restructuring Japanese Food Safety Governance, *European Food and Feed Law Review*, 4-2013, 250-8.

trade get involved because international treaties now require science-based, proportionate regulation of import safety, preferably based on internationally agreed standards, as outlined in **Part 3** below. On the other hand, there is existing and potential scope for consumer affairs regulators to become (more) involved in food safety regulation, even though they may constitute smaller and more recently created public authorities, because:

- they often have or share responsibility for enforcing food standards set by other departments (as seen in the consumer protection laws enacted in Viet Nam in 2010 and Myanmar in 2013)
- consumer regulators may also be given a coordinating role, or ‘back-up’ powers to regulate if a harmful food product falls outside the jurisdiction of other agencies (e.g. konnyaku jelly snacks in Japan until the Consumer Affairs Agency was established in 2009)⁶
- consumer regulators may have powers to bring representative actions (as in Thailand) or order compensation (as in Myanmar) on behalf of consumers harmed by non-compliant foods.

Consumer regulators also develop helpful expertise in consumer behaviour and risk communication more generally.⁷ This is valuable for law-making that is also related to food nutrition (i.e. ‘healthy eating’) – a broader contemporary policy concern than food safety (i.e. avoiding food-borne illnesses).⁸

Accordingly, there is a need to expand capacity in food-related health issues among consumer regulators in the AMS. They need enhanced

⁶ Ibid, p252 (choking deaths before 2009 where thought to be outside the jurisdiction of the health ministry which applied the Law on ‘Food Sanitation’; also outside the agriculture ministry’s JAS Law which dealt with labelling but not dangerous product shape; and outside the previous Consumer Product Safety Law as food products were expressly excluded). In Australia, the consumer regulator was able to exercise jurisdiction to ban smaller snacks permanently from 2004 (<http://www.productsafety.gov.au/content/index.phtml/itemId/970799>), although the primary regulator for food safety standards is FSANZ (<http://www.foodstandards.gov.au>).

⁷ Increasingly within ASEAN, as elsewhere, effective risk analysis is increasingly conceptualised by policy-makers as involving (science-based) *risk assessment*, largely distinct from (broader policy-based) *risk management*, both underpinned by *risk communication*. See e.g. Mazlan bin ISA, ‘Risk-based Food Safety Standards’, ILSI International Conference for Sharing Information on Food Standards in Asia (21 Feb 2012).

⁸ As explained by the Consumers International regional representative at the inaugural ASEAN Consumer Protection Conference, held in Viet Nam over 8-9 November 2014 (<http://aadcp2.org/home/technical.php>), promoting healthy diets is a priority because adverse health effects associated with obesity are now spreading to Southeast Asia. See further <http://www.consumersinternational.org/our-work/food/key-projects/campaign-for-healthy-diets/>.

opportunities to engage with other national regulators (with shared or primary responsibility for food safety regulation) as well as the growing numbers of international, inter-governmental or public-private partnership organisations involved in generating shared food safety standards in the region. This is especially important given that the ASEAN Economic Community (AEC) project, promoting free trade in goods and services by 2015, includes harmonisation of agri-food standards as a priority action item (as elaborated in **Part 3**).

2. Persistent challenges for food safety globally and in ASEAN

Expanding participation in modern agri-food value chains offers great potential to lift the world's farmers and intermediaries out of poverty, but food-related safety issues remain a major problem globally. In developing countries, food and waterborne diseases are leading causes of illness and death, killing some 2.2 million people annually – mostly children.⁹ The South-East Asia Regional Office of the World Health Organization (WHO) recently called for food safety to be made a more widespread priority as around 700,000 children die every year in the region.¹⁰

Even in a developed country like the US, there are around 50 million episodes and 3000 deaths annually from food-borne illnesses, and progress in improving food safety outcomes has stalled over the last decade. Common problems are that 'multiple pathogens from different sources cause food-borne illness; multiple individuals and entities handle food products before they reach end users; and consumers often do not handle food safety'.¹¹ In addition, under-reporting makes data difficult to collect and analyze, the food industry is now very large in many economies (generating political pressure for less burdensome regulation) and the globalisation of food production highlights weak regulation anyway in some exporting nations. Following major safety failures, both the US and EU enacted stricter food

⁹ World Bank (3 December 2012), 'Indicative Roadmap' at <http://www.foodstandards.gov.au/science/international/apec/Documents/1%20%20GFSP%20Roadmap%20%285%20Dec%2012%29.pdf>, p3.

¹⁰ The WHO also highlighted emerging threats associated with climate change, environmental contamination, new technologies and infections, and antimicrobial resistance. <http://www.thejakartapost.com/news/2015/03/31/make-food-safety-a-priority-who.html>

¹¹ Stewart, K and Gostin, L, Food and Drug Administration Regulation of Food Safety, Journal of the American Medical Association (JAMA), 2011; Georgetown Public Law Research Paper No. 11–88, <http://ssrn.com/abstract=1865442>.

regulation in 2011.¹² The EU and Japan also comprehensively revised their approach to food safety risk assessment after outbreaks of BSE (mad cow disease) more than a decade ago, and Japan expanded its risk management capacity when it established an independent Consumer Affairs Agency in 2009.¹³

In ASEAN, there is also strong interest in both expanding the agri-food industry and improving food safety, in the shadow of some ongoing product safety failures. Impacting directly on food exporters, Thailand temporarily banned export of 16 herbs and vegetables to the EU in order to pre-empt an import ban after EU inspections had repeatedly found excess pesticide residues.¹⁴ Also in 2011, Japanese authorities identified dangerous chemicals in seafood imports from Viet Nam.¹⁵ In 2013, lead and other contamination was reported in some rice imported from Viet Nam and Thailand.¹⁶ Local news reports about such health risks highlight the potential impact on local consumers as well. In addition, consumers in ASEAN have faced health scares from imported goods. For example, the Philippines ordered the recall of nearly 70 brands of Taiwanese ‘bubble tea’ and other products suspected of containing dangerous plasticisers.¹⁷ Also in 2013, Thailand recalled imported dairy products associated with a raw material supplied by a major New Zealand manufacturer,¹⁸ although subsequent tests found that the material was not in fact contaminated with deadly bacteria.¹⁹

¹² Ibid; Oertel, K and Shulz, E, New European Food Information Law from 13 December 2014, Australian Product Liability Reporter, 25(8), 2014, 118–23.

¹³ Matsuo 2013 op cit.

¹⁴ Editorial, ‘Thailand’s Unsafe Food’, Bangkok Post, 21 Jan 2011.

¹⁵ ‘Japan Still Find Antibiotic in Viet Nam Seafood’, Viet Nam News Brief Service, 20 Sept 2011.

¹⁶ [http://oryza.com/content/us-rice-producers-blast-us-importer-Viet Nam-rice](http://oryza.com/content/us-rice-producers-blast-us-importer-Viet-Nam-rice) (but see <http://www.saigon-gpdaily.com.vn/Business/2013/6/105321/>; and generally <http://www.lead.org.au/lanv14n2/lanv14n2-7.html>); <http://healthland.time.com/2013/04/11/high-levels-of-lead-found-in-imported-rice/>.

¹⁷ <http://newsinfo.inquirer.net/11274/70-food-brands-from-taiwan-recalled-from-market-shelves>.

¹⁸ http://www.nytimes.com/2013/08/05/world/asia/china-bans-milk-powder-from-new-zealand-over-botulism-fears.html?_r=0.

¹⁹ <http://www.malaysiandigest.com/288-uncategories/483815-danone-to-sue-fonterra-over-baby-formula-recall.html>.

3. Expanding cross-border agri-food trade while maintaining safety standards

Anticipating and managing food safety issues involving consumers or suppliers within ASEAN and counterparts outside the region can potentially be facilitated nowadays by a growing network of free trade agreements (FTAs). Inside the region, the AEC Blueprint (2007) envisages and promotes a single market and production base by 2015 that includes food, agriculture and forestry as important components. Priority action areas include harmonisation of ‘the safety and quality standards for horticultural and agricultural products of economic importance in the ASEAN region, in accordance with international standards/guidelines’ but ASEAN is ‘mindful that consumers cannot be precluded in all measures taken’ to achieve economic integration through the AEC.²⁰

One reason for seeking to expand food supply chains within Southeast Asia is that exports of agro-based products from Member States within the ASEAN region were less than 15% of their total exports in 2010, with the share of such intra-ASEAN exports having only increased slowly since 2003 (11%). Food Industry Asia, established in 2010 in Singapore mainly by large multi-national food and beverage suppliers, therefore seeks to expand cross-border trade through more harmonised food regulation based on shared principles of: (i) good governance (including transparency), (ii) rigorous impact assessment (of costs and benefits of regulation),²¹ (iii) scientific basis, proportionality and non-discrimination, (iv) open consultation, and (v) minimal restrictiveness.²² In promoting such harmonisation, Food Industry Asia interacts mainly with ASEAN bodies under the leadership of the ASEAN economics ministers.

Harmonising food product safety standards is also the primary focus for an older industry-based association, the International Life Sciences Institute (established in Washington DC in 1978), which has 15 branches including one for the Southeast Asia Region.²³ The latter worked with the WHO and the Food and Agriculture Organization (FAO) from 2001 to establish a

²⁰ <http://www.asean.org/archive/5187-10.pdf> pp 6-7 and 19.

²¹ Cf generally Digest 21.

²² Food Industry Association, ‘Harmonisation of Food Standards in ASEAN: A Shared Vision for Regulatory Convergence’ (2012) <http://foodindustry.asia/documentdownload.axd?documentresourceid=659>, pp 3, 8 and 11.

²³ Centred in Singapore since 1993: http://www.ilsa.org/SEA_Region/Pages/Who-We-Are.aspx.

Working Group on ASEAN Food Safety Standards Harmonisation, which generated from 2003 the ASEAN Food Safety Standards Database – currently listing food additive standards for all AMS.²⁴

The AMS can also be involved in food regulation harmonisation through the inter-governmental APEC (Asia Pacific Economic Cooperation) Food Safety Cooperation Forum, established in 2007 under the APEC Sub-Committee for Standards and Conformance. Bringing together food safety regulators and co-chaired by Australia and China, the Forum aims to assist APEC economies to achieve:

- ‘transparent information-sharing...
- food safety regulatory systems within economies, including food inspection/assurance and certification systems that are consistent with members’ rights and obligations under the Sanitary and Phytosanitary Measures (SPS) and the Technical Barriers to Trade (TBT) Agreements of the World Trade Organization (WTO), and are harmonised, to the extent possible, with international standards (such as Codex [Alimentarius administered by the FAO and WHO, etc])
- enhanced skills and human resource capacities ...’.²⁵

In 2008, APEC’s Forum established the Partnership Training Institute Network to engage the food industry and academia with regulators, to strengthen capacitybuilding in food safety, especially risk analysis, supply chain management, food safety incident management and laboratory capacity.²⁶ Capacity building has been enhanced through a memorandum of understanding signed in 2011 with the World Bank. The latter built on this initiative to launch in 2012 the public–private Global Food Safety Partnership, to improve the safety of food in developing and middle-income countries more generally.²⁷ Since 2012, APEC, ASEAN, FAO and WHO also work together through the Food Safety Cooperation Working Group.²⁸

²⁴ <http://aseanfssdatabase.com/>.

²⁵ <http://www.foodstandards.gov.au/science/international/apec/Pages/apec-background.aspx>.

²⁶ <http://fscf-ptin.apec.org/>.

²⁷ For its first annual report and workplan (2014), see <http://www.worldbank.org/en/topic/agriculture/brief/global-food-safety-partnership>. The World Bank has also collaborated since 2001 with the WTO, WHO and FAO in the Standards and Trade Development Facility, which supports developing countries in building their capacity to implement international SPS and food safety standards, such as through a recent review of measures applying to imports into four member states, available via <http://www.standardsfacility.org/facilitating-safe-trade>.

²⁸ <http://www.foodstandards.gov.au/science/international/apec/Pages/default.aspx>.

The major emphasis of this wave of cooperative activity on food safety, at regional and global levels, has traditionally been on harmonising regulations in light of international obligations, beginning with those set under the WTO Agreements in force since 1994 (including for all AMS).²⁹ Its General Agreement on Tariffs and Trade provides for national treatment or non-discrimination between local and imported goods. This is subject to the importing state's capacity to introduce consumer protection measures 'necessary' to preserve human health as long as these are not a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade aimed instead at protecting local producers. The WTO's more specific SPS Agreement further encourages harmonisation of food, animal and plant safety standards, especially by presuming that national measures on imports are compliant if they conform with specified international standards (notably, the Codex Alimentarius for foods). The importing state can impose more stringent measures if it can show they are justified scientifically, after a risk assessment based on scientific evidence. The importing state can then set an appropriate level of protection (i.e. undertake risk management), including discriminating against imported products as long as this is not more trade restrictive than necessary. An importing state must accept other members' SPS measures as equivalent, even if differing from their own or other states' measures trading in the same product, but only if the exporting state 'objectively demonstrates' that its measures achieve the importing state's appropriately-set level of SPS protection.

Despite the SPS Agreement providing for WTO member states to conclude further bilateral or regional agreements actively acknowledging equivalence in national standards and therefore mutual recognition, until recently this has happened only rarely.³⁰ However, as bilateral and regional FTAs have proliferated, treaty provisions increasingly promote such mutual recognition arrangements, as well as other technical and institutional cooperation measures related to human health and safety, including:

- product control, inspection and approval procedures
- enhanced transparency and dispute management around SPS measures

²⁹ See further (including citations to the relevant Articles in these WTO Agreements) Part 3.4 of Nottage L, ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015) Sydney Law School Research Paper No. 15/07, <http://ssrn.com/abstract=2562695>.

³⁰ See e.g. Epps T, International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement (Elgar, Cheltenham, 2008) p125.

- encouragement of bilateral coordination on SPS issues discussed in multilateral fora (such as the Codex Alimentarius)
- exchange of information and personnel or capacitybuilding for regulators.³¹

4. Conclusions

Food safety regulation has emerged quite early in many national economies, and shares many common features including across AMS, but there are problems with enforcement. It has also tended to remain a quite self-contained field. However, agriculture and health departments have begun to share responsibility in policymaking and implementation, particularly with trade ministries, partly due to new disciplines associated with international treaty regimes like the WTO. Other international bodies like the World Bank, FAO and WHO, and regional entities like APEC and ASEAN, are also increasingly working on initiatives to unify food safety standards. The main emphasis remains on trade liberalisation and greater market access for imported foods. Consumer regulators in the AMS should be also aware of, and involved in, these proliferating cooperative activities to ensure that consumer concerns are being heard, and to build up further whole-of-government capacity in food safety risk assessment, management and communication.

³¹ Epps T, 'Regulatory Cooperation and Free Trade Agreements', in Susy Frankel and Meredith Kolsky Lewis (eds) *Trade Agreements at the Crossroads* (London: Routledge, 2014) 141 at pp152–5

Policy Digest 21:

Best practices for developing consumer protection policy



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1. Introduction

The *United Nations Guidelines on Consumer Protection* were published in 1985 and outlined minimum standards and broader advice on consumer rights primarily, for national governments worldwide. They were extended in 1999 to emphasise sustainable consumption. Since 2012, the UN Conference on Trade and Development (UNCTAD) has been consulting widely on revising those guidelines,¹ to address further contemporary concerns for consumers, especially in e-commerce and financial services.² The guidelines' main focus remains on:

- identifying consumer problems
- recommending policy action.

In 2010, the Organisation for Economic Co-operation and Development (OECD) released the *Consumer Policy Toolkit*,³ examining how consumer markets have evolved and providing insights for improved consumer policy making. It additionally urges policy makers and stakeholders to:

- assess whether identified potential consumer problems in fact generate sufficient 'consumer detriment'
- assess a proportionate policy response
- review the effectiveness of such responses.

The toolkit's approach was influenced by an inquiry report into consumer policy by the Australian Government's Productivity Commission in 2008.⁴ The toolkit in turn generated the Australian Government's 'companion' report in 2011.⁵

These documents from the Australian Government and the OECD are heavily influenced by economic and empirical perspectives on consumer policy, whereas the UN guidelines adopt a more rights-based or normative

¹ See <http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>; and e.g. presentation by Dr Hassan Qaqaya at the 1st ASEAN Consumer Protection Conference, Ha Noi, 8-9 2015 (<http://www.asean.org/news/asean-secretariat-news/item/asean-continues-to-strengthen-consumer-protection>) available at <http://aadcp2.org/home/technical.php>.

² The next meeting of UNCTAD's Ad hoc Expert Meeting on Consumer Protection, to consider the draft revised Guidelines and resolution to be approved by the UN General Assembly, is planned for 22-23 February 2015 in Geneva: <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=642>.

³ <http://www.oecd.org/sti/consumer/consumer-policy-toolkit-9789264079663-en.htm>.

⁴ <http://www.pc.gov.au/inquiries/completed/consumer>.

⁵ http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer_policy/cp_policy_toolkit.htm.

approach. This digest compares them in more detail, with particular emphasis on implications for ASEAN Member States, especially developing countries.

2. The United Nations Guidelines for Consumer Protection

The UN guidelines were inspired partly by the famous speech to the US Congress on 15 March 1962 by then President Kennedy, who advocated four basic rights for consumers:

- 1) a right to safety
- 2) a right to be informed (and not deceived by false advertising, etc)
- 3) a right to choose (among competitive products)
- 4) a right to be heard (especially when seeking redress against suppliers).⁶

Consumer groups such as Consumers International (CI, the leading worldwide federation) have elaborated such rights over subsequent decades, as indicated by Table1 below, arguing that:

- the 'right to be heard' must also emphasise (5) a right for consumer expectations and experiences to be heeded in policymaking and product development as well as (6) a right to consumer education
- consumers also have (7) a right to have their basic needs satisfied and (8) a right to a healthy environment.⁷

Table 1 shows significant overlap between such rights and the UN guidelines, which CI significantly contributed to, both in their original form (1985) and revised form (1999). However, the guidelines further divide up some topics, such as safety issues, or essential goods and services.

⁶ <http://www.presidency.ucsb.edu/ws/?pid=9108>.

⁷ See <http://www.consumersinternational.org/who-we-are/consumer-rights/>, noting also that a CI president in the 1980s also promoted complementary 'consumer responsibilities' which also now guide consumer groups such as CI, including critical awareness, involvement or (assertive) action, social responsibility (for other citizens), ecological responsibility and solidarity.

Table 1. Basic consumer rights vs UN guidelines

1962 US President Kennedy's 'Consumer Bill of Rights' [and CI's 8 basic consumer rights]	1985 UN guidelines (revised 1999)	UN guidelines: proposals for 2015
1. right to safety*	a. physical safety	
2. the right to be informed** (including against misleading conduct)	b. promotion and protection of consumers' economic interests	
3. the right to choose (including competition)		
See also above: * / **	c. standards for the safety and quality of consumer goods and services	
[(7) right of satisfaction for basic needs ***]	d. distribution facilities for essential consumer goods and services	
4. right to be heard (including redress)	e. measures enabling consumers to obtain redress, education and information programmes	h. domestic frameworks for consumer protection i. mechanisms for consumer protection enforcement j. dispute resolution and redress mechanisms l. dispute avoidance and awareness of dispute mechanism [sic]
[(5) right to be involved in policymaking and execution, as well as product or service development]		k. private sector co-operation
[(6) right to consumer education]		
See also above: ***	f. measures relating to specific areas (food, water, and pharmaceuticals)	m. e-commerce n. financial services
[(8) right to a healthy environment]	g. promotion of sustainable consumption (1999)	

UNCTAD's draft revisions of the guidelines, proposed for discussion in 2015, would maintain such rights or topics for consumer policy action, but add further guidance in specific fields — particularly consumer redress and enforcement mechanisms,⁸ e-commerce and financial services. The background to this initiative, actively supported by groups such as CI, includes the growth of the internet and the digital economy, associated with burgeoning cross-border trade (in turn hindering complaint processing) and concerns over privacy protection (for consumers' personal information), but also the potential for the internet to make relevant consumer legislation and guidance freely available online in local languages.⁹

There also remains widespread concern about inadequate regulatory frameworks and enforcement of rights for consumers of financial services, in the wake of the 2008 Global Financial Crisis. That led to 20 major world economies (G20) developing the *High-level Principles on Financial Consumer Protection* in 2011, to ensure that regulatory frameworks did not rely too much on narrow rules that could result in gaps or be subverted (intentionally or unintentionally) by business operators.¹⁰ To address similar risks, UNCTAD's draft revisions to the UN guidelines add a new Part IV (before the more specific Part V Guidelines in areas (a)-(n) listed in Table 1, above) which contains general 'Principles for Good Business Practices', regarding:

- a) fair and equitable treatment (including towards vulnerable consumer groups)
- b) behaviour and work ethic (including avoiding unfair commercial practices)
- c) disclosure and transparency (including for fees and contractual terms)
- d) education and awareness (especially for financial services)
- e) protection of privacy
- f) complaints handling
- g) conflicts of interest.

⁸ Cf also generally the ASEAN Complaint and Redress Mechanism Models (2014) report, now available at <http://aadcp2.org/home/technical.php>; and Digest 16 (on enforcing product liability laws) for the present project.

⁹ CI refers to the latter as a 'right to access': see e.g. <http://a2knetwork.org/guidelines/>.

¹⁰ For those principles and an implementation report, see <http://www.oecd.org/finance/financial-education/g20-oecd-task-force-financial-consumer-protection.htm>.

The proposed revisions have mostly been welcomed, although there are concerns about repetitiveness¹¹ (e.g. in the additional draft guidelines on consumer redress, or the new Part IV ‘Principles for Good Business Practices’ compared to some aspects of Part III ‘General Principles’¹²). The original and 1999 guidelines have already been influential in assisting UN Member States (especially developing countries) when enacting consumer protection laws across major problem areas,¹³ and the new guidelines are likely to be useful for ASEAN Member States as well.

However, the main focus and strength of the guidelines lie in identifying such areas, based on worldwide experience, for some forms of regulatory response. Arguably, they lack sufficient detail in assessing the extent of harm caused to consumers, as well as the most effective ways to address those problems, in particular countries or contexts.

3. The Productivity Commission and OECD toolkit approaches to consumer policy

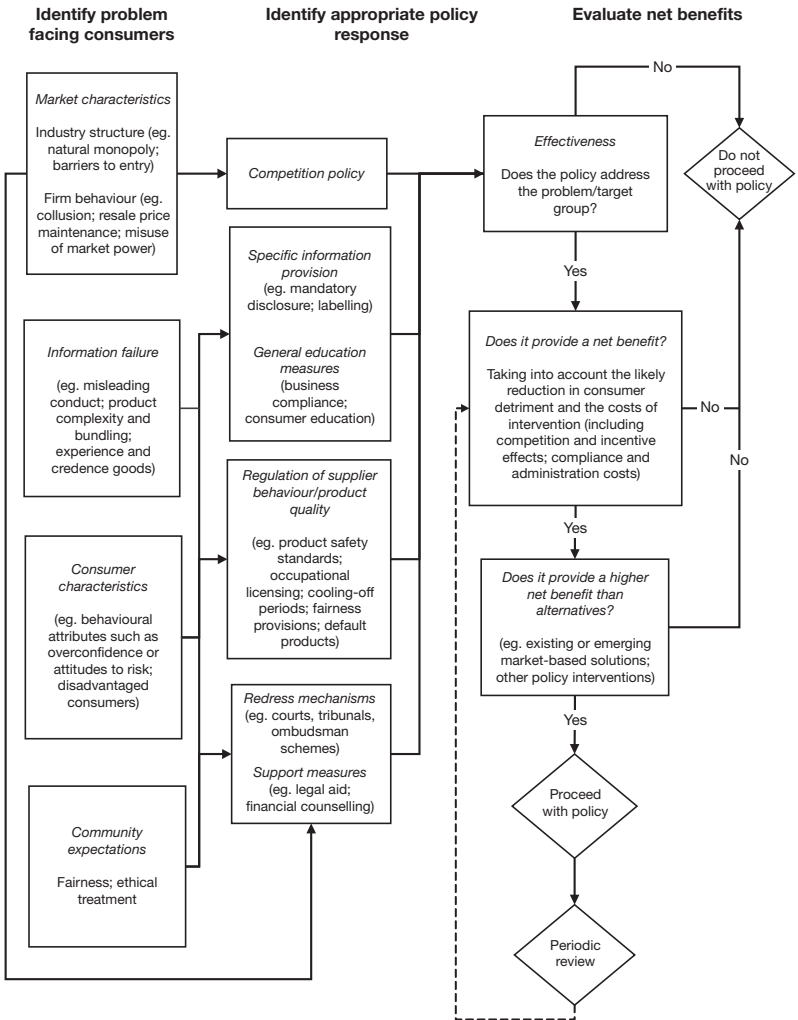
Other international and national bodies can provide useful additional guidance for developing and implementing specific consumer law policy initiatives. In 2008, as part of a public inquiry into harmonising fragmented consumer law within Australia and in light of developments in its major trading partners (including in Asia and Europe), the government’s Productivity Commission advocated a three-step process, shown in Figure 1.

¹¹ See e.g. CI’s submission via <http://www.consumersinternational.org/news-and-media/news/2015/01/ci-comments-on-ungcp-revision/>.

¹² Those earlier general principles are mostly directed at public authorities but, for example, already include (at para 10) a requirement for all enterprises to obey the laws of the countries in which they do business.

¹³ David Harland, ‘The United Nations Guidelines for Consumer Policy: Their Impact in the First Decade’ in Iain Ramsay (ed), *Consumer Law in the Global Economy—National and International Dimensions* (1997) 1; UNCTAD, *Implementation report on the United Nations Guidelines on Consumer Protection (1985–2013)* (TD/B/C.I/CLP/23) (via <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=350>).

Figure 1. PC's consumer policy making process



The first step involves identifying the problem facing consumers: if it involved industry structure or collusive firm behaviour, for example, the solution was likely to lie with competition policy rather than consumer

protection regulation.¹⁴ If the problems were instead information failures, consumer characteristics (e.g. attitudes to risks or vulnerability) and/or community expectations (including conceptions of fairness), policymakers should secondly identify appropriate policy responses, such as providing information, regulation of supplier behaviour or product quality, and/or redress mechanisms.

However, the Productivity Commission then goes beyond the UN guidelines. A third step emphasises the need to evaluate whether the proposed solutions will provide a net benefit, reducing consumer detriment compared to the costs of intervention (including impact on competition and incentives, as well as compliance and administrative costs). Even if the government proceeds with a policy intervention because a net benefit is anticipated, compared to other alternatives (including market-based solutions), the commission urges a ‘periodic review’ to reassess net benefits before maintaining the policy.

There are clear parallels with the policy making recommendations subsequently proposed in the OECD *Consumer Policy Toolkit*, although the latter proposes a six-step process¹⁵ rather than the commission’s three-stage process outlined above (compared in Table 2).

Table 2. Consumer policy recommendations from the OECD, Productivity Commission and UN

OECD’s Consumer Policy Toolkit (six steps)	Productivity Commission’s Review of Australia’s Consumer Policy Framework (three stages)	United Nations’ Guidelines on Consumer Protection
1. What is the problem (and its source)?	(i) Identify the problem	Identify problem areas
2. How serious is it (measuring consumer detriment)?	(i) and (iii) Quantify the problem	

¹⁴ On differences and overlaps between both fields, see Digests 7 and 8 (at http://www.asean.org/resources/publications/item/consumer-protection-digests-and-case-studies-a-policy-guide-volume-1?category_id=382) and presentations at the 1st ASEAN Consumer Law Conference (above n 1).

¹⁵ For more details, see the Appendix, taken from above n 5, p36.

3. Is action required?	(iii) Evaluate net benefits from policy responses	
4. What are the options (alternatives for the policy objective)?	(ii) Identify policy response(s)	
5. What option is best (evaluating options)	(iii) Evaluate net benefits (compared to alternatives)	Propose (general) solutions
6. How effective is the policy (after a review)?	(iii) Re-evaluate (with periodic review)	

By contrast, the UN guidelines largely assume that problems do or will exist in certain areas (such as physical safety of consumers, from defective goods) and accordingly recommend some (often general or base-level) policy responses. Only a few provisions address matters such as how to go about assessing the extent of consumer detriment versus the costs of various possible regulatory interventions,¹⁶ or the need to review the latter over time to ensure they remain effective in achieving policy goals.¹⁷

However, this approach may be justified in that the UN guidelines derive from wide-ranging consultations with UN member states (both developing and developed) as well as other international or regional bodies. This provides some evidential base for determining existing or likely problem areas for consumers, and commonly-used mechanisms for protecting them against such harms. Nonetheless, the challenge for individual states is to determine what priority to give to particular areas identified in the guidelines, and to determine the most effective policy responses in particular national contexts.

¹⁶ For example, under Part III General Principles, paras 9 and 11 do note:

'9. Member States should provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population.

...

11. The potential positive role of universities and public and private enterprises in research should be considered when developing consumer protection policies.'

¹⁷ In the section on 'Measures relating to specific areas' – originally food, water and pharmaceuticals; adding energy, utilities and tourism, for the proposed revisions – the draft revised Guidelines do conclude (after para 89) by remarking:

'In addition to the priority areas indicated above, Member states are invited to periodically re-examine specific provisions to ensure that they adequately meet the purposes for which they were originally intended.'

4. Implications and recommendations

For ASEAN policymakers and stakeholders, it is important first to keep abreast with the OECD toolkit and the more recent revision of the UN guidelines. ASEAN Member States still have opportunities to notify UNCTAD informally or formally¹⁸ about the types and degrees of consumer detriment emerging in Southeast Asia, and experiences or plans to address such problems, so that the revised UN guidelines include provisions most relevant to this region.

Secondly, both the UN guidelines and more recent OECD toolkit have been, and will continue to be, influential in guiding regulatory thinking and frameworks at national, regional and international levels, and it is important to appreciate that they are largely complementary. However, the toolkit (and the earlier Productivity Commission report) offer more resources for developing policy making *processes*. These incorporate scope for more detailed assessments (and ongoing reassessments) of net benefits from possible interventions to address significant consumer detriments. ASEAN Member State policy makers should consider whether their existing processes meet this evolving best practice. Nonetheless, they should recognise at least four potential challenges inherent in the toolkit approach, especially for developing countries:

- a) When ‘defining the consumer problem’, some countries may have competition law systems which are even less functional (in terms of formal laws or enforcement capacity) than consumer protection regulation. In that case, addressing the problem through consumer law may be sub-optimal, but still better than nothing.
- b) When ‘measuring consumer detriment’, developing countries may lack sufficient (financial and human) resources to undertake qualitative or especially quantitative research. By contrast, for example, in its companion to the OECD toolkit, the government notes that in Australia consumer information can be found from multiple sources such as:
 - consumer complaints mechanisms
 - accident data (including mandatory reports from businesses¹⁹)
 - parliamentary inquiries (both at federal and state levels)

¹⁸ Formal ‘contributions’ for UNCTAD’s January 2015 meeting included some from Hong Kong, India and South Africa: <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=642>.

¹⁹ Cfe.g Digest 2, noting the lack of any such accident reporting requirement in consumer product safety laws within ASEAN member states.

- reports commissioned by the government as well as from well-established consumer groups and academic communities
- active media outlets
- reports from overseas bodies²⁰.

If such sources are less extensive, ASEAN Member States may need to place greater emphasis on overseas research, experiences or models relating to various types of consumer detriment and effective responses. However, this needs to be done carefully, as shown by a recent comprehensive analysis of the policy and legislative process for Viet Nam's Consumer Protection Law of 2010.²¹ There should be a keen awareness that if a foreign regulatory model is adopted or adapted, it may lack or develop insufficient ineffectiveness (not fitting well with local circumstances) or complicate the path for future reforms (making it harder to add new consumer protection measures derived from different foreign models or local laws and experiences).

- c) When evaluating consumer detriment compared to policy response options, Member States should not be limited to quantifiable economic factors, although these should be given considerable weight. Both the OECD and Australian Government acknowledge that a variety of moral, legal, political and social criteria are relevant to consumer policy decision-making.²² In any case, in some countries those charged with consumer protection may come from a variety of backgrounds.
- d) Both the OECD toolkit and the Productivity Commission approach advocate a formal 'review' process to assess whether consumer protection measures remain effective. This is appropriate, particularly where the regulatory framework is already expansive and there exist broader political concerns about 'over-regulation'. Especially in developing countries, however, the problem instead tends to be gaps in consumer protection coverage ('under-regulation' or under-enforcement). Accordingly, there should be a feedback loop allowing for periodic reassessments of decisions not to introduce consumer protection measures (e.g. due to inadequate resourcing for effective regulation at that time) in light of new circumstances.

²⁰ Above n 5, p14.

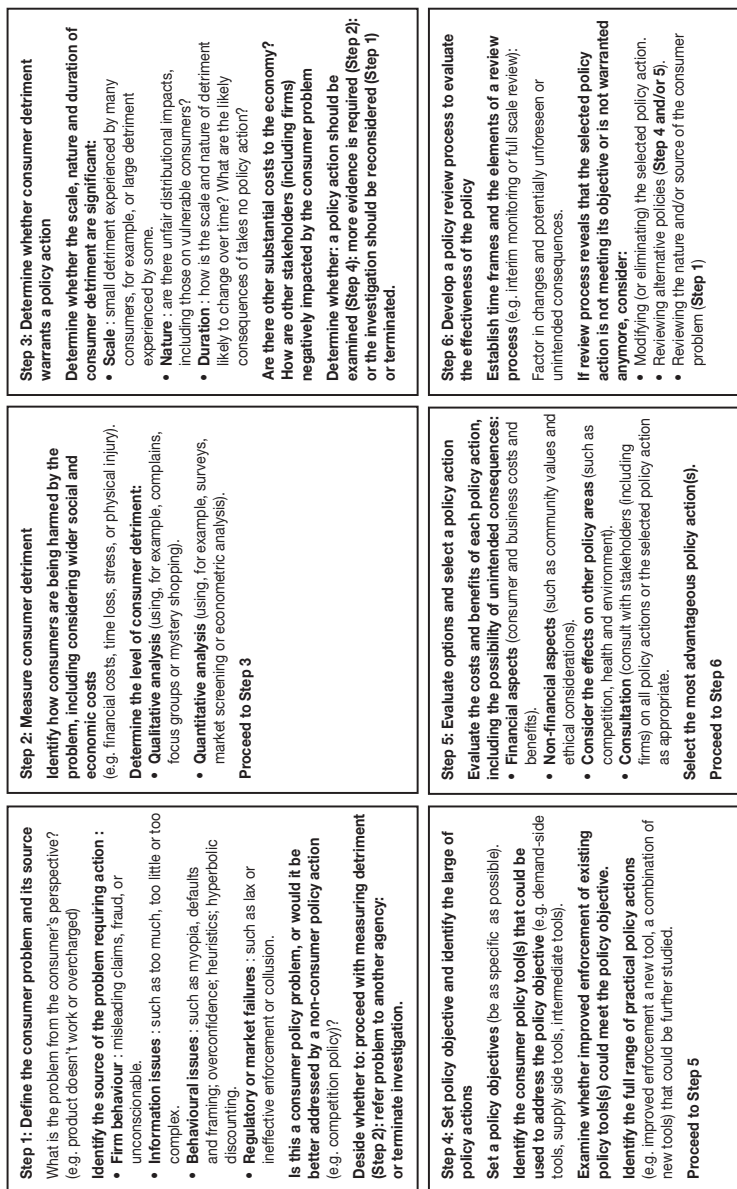
²¹ CuongNyugen, 'The Drafting of Viet Nam's Consumer Protection Law: An Analysis from Legal Transplantation Theories', PhD in Law thesis, University of Victoria, 2011, at <http://www.law.unimelb.edu.au/files/dmfile/CuongEnglish2.pdf>.

²² Above n 5, p11. The Australian Government's Treasury even developed a 'Wellbeing Framework' (2010) comprising five elements for assessing public policy issues in general.

Appendix: OECD toolkit process

Consumer policy in Australia

Figure 3. Consumer policy-making steps



Source : OECD Consumer Policy Toolkit

Policy Digest 22:

Cosmetics regulation under national and ASEAN law



This policy digest was written by Professor Luke Nottage under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN member states.

1. Introduction

Consumer goods associated with higher risks, and often also extent of harm, tend to generate public regulatory interventions.¹ Many countries begin by enacting legislation on foodstuffs, although obligations under international agreements increasingly lead to harmonised safety standards.² Cosmetics are another example, although international trade law places fewer constraints on national legislators.³ The US relies on voluntary industry self-regulation (plus more threat of private lawsuits for product liability), whereas the EU favours more interventionist public regulation.⁴ Nonetheless, the EU's 1976 Cosmetics Directive aimed to balance consumer protection with harmonised standards to facilitate cross-border trade, especially within and into Europe. Because the EU's cosmetics manufacturers are more likely to sell into the more regulated European markets than American manufacturers, the EU can also support European manufacturers by encouraging countries and regions in other parts of the world to 'trade up' to the EU, rather than the laxer US regulatory approach, when developing their own laws and practices.⁵ Already, by 2004, the lists of ingredients set under the 1976 EU Cosmetics Directive had been adopted by 30 countries, including under Mercosur and Andean Pact regional arrangements. Other countries have reproduced significant features of the EU model.⁶

The EU model has also been adopted through the 'Agreement on the ASEAN Harmonized Cosmetics Regulatory Scheme', signed in 2003 to advance the ASEAN Free Trade Area program.⁷ Importantly, ASEAN member states committed to implement by 1 January 2008 the 'ASEAN Cosmetics Directive' (ACD) set out in Schedule B(Art 2(3)). The ACD closely

¹ See generally Digest 2.

² See Digest 20.

³ Nottage, Luke, 'Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era' (October 4, 2011) Sydney Law School Research Paper No. 09/125, <http://ssrn.com/abstract=1509810>.

⁴ Zakaria, Zalina, *Cosmetics Safety Regulations: A Comparative Study of Europe, the USA and Malaysia* (PhD thesis, University of Manchester, 2012) <https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170807&datastreamId=FULL-TEXT.PDF>, pp22–6. Comparing product liability regimes, see **Digest 6** (with further references).

⁵ Cf generally Vogel, David, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1997).

⁶ As noted by Zakaria, Zalina, 'Regulation of Cosmetics: What Has Malaysia Learned from the European System' (2015) 38 *Journal of Consumer Policy* 39–59, p46 n54.

⁷ See e.g. the Preamble to the 2003 Agreement, <http://www.asean.org/communities/asean-economic-community/item/agreement-on-the-asean-harmonized-cosmetic-regulatory-scheme-phnom-penh-2-september-2003>.

tracks the EU directive, including by requiring the member states to 'adopt the Cosmetics Ingredients Listings of the EU Cosmetics Directive 76/768/EEC including the latest amendments'. Supported by the ASEAN-EU Programme for Regional Integration Support, by 2013 all ASEAN member states had implemented the ACD. It has therefore been described as 'one of the first concrete instances of economic integration between ASEAN countries'.⁸

However, the EU itself replaced its directive in 2009 with a Cosmetics Regulation, which on 11 July 2013 came into direct effect in all EU member states. The EU regulation similarly attempts to enhance cross-border trade through harmonisation, expanding consumer choice while respecting public health, for example by adding new requirements to label cosmetics (such as sunscreen) that include nanoparticles.⁹ As mentioned below, the EU regulation is already having a further impact on ASEAN regime, and this influence is expected to be ongoing.

Part 2 of this policy digest takes a closer look at key features of the ACD, including some differences that remain compared to the original EU model (and the US regulatory regime), as well as implementation and other challenges. Part 3 recommends some improvements that could be made to this approach for harmonising consumer product safety law, but suggests it might eventually be extended to other sectors. It is also already relevant to general consumer regulators, even if the primary jurisdiction over cosmetics usually remains with health officials.

2. The ASEAN cosmetics directive: features and challenges

On the one hand, the ACD **promotes cross-border** trade, both among ASEAN member states and into the region, in two main ways:

- The supplier only has to *notify* the regulators, in each member state where the cosmetics are to be marketed, about the place of manufacture

⁸ Zakaria 2015 p45. (However, non-conforming cosmetics can still be supplied for up to three years after the Directive is adopted by an ASEAN member state: Art 12(2)). Zakaria notes also (at p46) that the EU has actively promoted its model through forums such as International Cooperation on Cosmetic Regulation (involving regulators from the EU, Japan, Canada and the US) and the EU-Japan Centre for Industrial Cooperation on Cosmetic Regulation.

⁹ Zakaria 2015 pp40–3, and generally Zakaria, Zalina, 'Evaluating What Will Work in Regulating the Safety of Nano-Cosmetics' (2014) *The Law Review* 51–62, via http://umexpert.um.edu.my/papar_cv.php?id=AAAcOPAAWAAArVzAAAX.

or initial importation, before placing the product on the market, and then keep the product's technical and safety information readily accessible for such regulator (Art 1(3)(4)). This replaces national laws that had required prior *approval* by government regulators (e.g. in Malaysia, before the cosmetics could be marketed). This change reduces the regulatory burden on suppliers, but also governments because they no longer need to assess every application, and expands choice and timeliness of products coming onto the market for consumers.¹⁰

- Compliance costs are also reduced for suppliers into ASEAN member states because they need only check that their cosmetics (defined in Art 2, with an illustrative list in Appendix I) comply with ingredients listed under three broad categories:
 - a so-called 'negative list' of banned or prohibited ingredients (Annex II)
 - a 'restricted list' allowing ingredients only subject to specified limits, fields of application, or warnings (Annex III)
 - a 'positive list' permitting only specified colouring agents, preservatives or UV filters (Annexes IV, VI and VII).¹¹

Furthermore, under Art 4, these derive overwhelmingly from the listings under the EU regime, developed and updated by the Scientific Committee on Consumer Products. Nonetheless, ASEAN member states were permitted to authorise other ingredients for up to three years from implementing the directive (Art 5), subject to certain conditions including a reasoned request as to whether or not such substances should remain listed in the 'ASEAN Handbook of Cosmetic Ingredients' (Annex VIII). However, such national listings lose effect if the request is denied by the ASEAN Cosmetics Committee (ACC), assisted by its ASEAN Cosmetic Scientific Body to review 'ingredient lists, technical and safety issues' and consisting of representatives from the regulatory authorities, the industry and the academe' (directive Art 10). The latter also advises the ACC if a supplier requests permission to use a new ingredient, for example, based on new safety data.¹² The ACC comprises regulators assigned by the ASEAN member states,

¹⁰ Zakaria 2015 pp48–9.

¹¹ 'General Information Booklet on ASEAN Harmonized Cosmetic Regulatory Scheme' <http://www.asean.org/images/archive/18354.pdf>, p11. Annex V lists substances that, if included in cosmetics, take them outside the scope of the Directive and for which ASEAN member states can then 'take measures as they deem necessary'.

¹² Ibid pp 11–12.

but the 'ASEAN Cosmetics Industry, such as ACA [ASEAN Cosmetics Association], will be invited to meetings of the ACC and shall be consulted on all matters concerning the Cosmetic Industry' (Art 6 of the framework agreement).¹³ Further variation can arise compared to the EU listings, if the ACC delays in introducing changes (as occurred recently in response to the EC directive becoming a regulation with effect from 2013).¹⁴ However, the ACA can consider and recommend updates and encourage its members to promote changes even before formally accepted by the ACC.¹⁵

On the other hand, the ACD regime **maintains consumer protection**, consistently with the EU rather than US regulatory approach.¹⁶ There are several ways it implements *pre-market* regulation:

- The listings of ingredient are much more stringent, banning more than 1300 substances compared to only 11 under the US federal regime.¹⁷
- The ACD includes a general safety provision: suppliers may not place cosmetics on the market that 'cause damage to human health when applied under normal or reasonably foreseeable conditions of use', taking into account its presentation, labelling, instructions or warnings (although such warnings do not exempt the supplier from other Directive requirements: Art 3). Certification by a qualified 'safety assessor' is expected, as part of the product information file requirement explained below.¹⁸ By contrast, the US regime only imposes an indirect and arguably less extensive obligation, by prohibiting the supply of adulterated (including contaminated) or misbranded cosmetics.¹⁹

¹³ The ACA has promoted cross-border trade and regulatory harmonisation of cosmetics since 2001, and comprises industry associations from Indonesia, Malaysia, the Philippines, Singapore and Thailand: <http://aseancosmetics.org>.

¹⁴ In January 2015, the ACC banned five parabens as preservatives, consistently with the EU Regulation but which was enacted in 2009 and fully in force since 2014, with existing products allowed to remain on the market until 30 July 2015 (or 31 December, in Thailand and the Philippines): See e.g. 'ASEAN Bans Five Parabens, Restricts Triclosan in Cosmetics' (15 January 2015) <https://chemicalwatch.com/22542/asean-bans-five-parabens-restricts-triclosan-in-cosmetics>.

¹⁵ 'Asia-Pacific Update: ASEAN Mirrors EU Regulation' (27 August 2014) <http://www.cosmeticsandtoiletries.com/regulatory/region/asia/Asia-Pacific-Update-ASEAN-Mirrors-EU-Regulation-272730691.html>.

¹⁶ Zakaria 2015, pp50–7.

¹⁷ But cf the stricter regime introduced in the California Safe Cosmetics Act of 2005: Zakaria 2012, pp159–61.

¹⁸ Zakaria 2015, pp50–3.

¹⁹ Cf Zakaria 2012, pp202–3; and Wilson, Robin, 'Enlarging the Regulation of Shrinking Cosmetics and Sunscreens' (2012) *Washington and Lee Public Legal Studies Research Paper* No. 2012-12, pp259–60.

- Claims about cosmetics must comply with the ASEAN Cosmetics Claim Guideline (Appendix III), although: 'In general, product claims shall be subjected to national control'. Claimed benefits must also generally be 'justified by substantial evidence and/or the cosmetic formulation or preparation itself', although suppliers can 'use their own scientifically accepted protocols or designs in generating the technical or clinical data' if justifications are provided (Art 7).
- Cosmetics must also comply with the ASEAN Cosmetic Labeling Requirements (Directive Appendix II), with the required information to be 'in legible and visible lettering' and 'special precautions' needed for conditions of use specified in Annexes III-VIII (Arts 6(1)-(2)). Further, ASEAN member states must 'ensure that, in labelling, putting up for sale and advertising ... text ... or other signs are not used to imply that these products have characteristics which they do not have' (Art 6(3)). In addition, for example, Malaysia has added additional labelling requirements for four product types, including children's oral care and sunscreen, which were not found in the EU requirements. The national regulators reportedly believed that their (or ASEAN) citizens may have more sensitive skin type or lack awareness of safety issues.²⁰

The ACD also imposes significant *post-market* controls:

- From when the supply is notified to the relevant ASEAN member stateregulator, the supplier must keep readily accessible a product information file,including:
 - technical information about the product
 - the safety assessment (even something has already been carried out say in the EU, again arguably because skin types or climate in ASEAN countries may differ)
 - supporting data for any claimed benefits from using the cosmetics
 - manufacturing methods (complying with the ASEAN Guidelines for Cosmetic Good Manufacturing Practice set out in Appendix VI, as well as adequate knowledge or experience under the legislation and practice of any member states where the product is manufactured or imported).

²⁰ Ibid, pp52–3.

This file must also include 'existing data on undesirable effects on human health' from using the cosmetics (Art 9(1)). It must be kept in the member state's national language(s) 'or in a language readily understood' by the regulatory authority (Art 9(2)). In addition, the member state may require (such or further) 'appropriate and adequate information on substances used in cosmetics products ... be made available', but only 'for purposes of prompt and appropriate medical treatment in the event of difficulties' (Art 9(3)). By contrast, US regulators have limited powers to extract information from suppliers.

- The 'Guidelines for Control of Cosmetic Products in Malaysia' clarify that adverse event reports in the product information file must be kept updated.²¹ In addition, *A Guide Manual for the Industry: Adverse Event Reporting for Cosmetics Products* from the ACC (2005) defines 'adverse event', requires reporting at least for a defined 'serious adverse event', and sets out time limits (especially for fatal or life-threatening events).²² It appends a Report Form headed 'confidential', although the directive or the guide otherwise does not specifically state that incident reports must be kept confidential by the relevant member state regulator(s). Arguably, each national regulator should be able to share such reports at least with counterparts in other member states. There are also good policy arguments for disclosure to other Free Trade Agreement partners, or indeed the general public (at least in high-risk situations).²³ The EU regulation requires incident reporting and for the national regulator to disclose to all EU counterparts, whereas under US federal law there is still no reporting duty on suppliers.
- The ACD allows for an ASEAN member state to temporarily ban or restrict supplies due to there being a substantiated 'hazard to health or for reasons specific to religious or cultural sensitivity', and national law may also regulate certain product claims (Art 11(1)), if notified to other member states and the ASEAN Secretariat (for advice then from the ACC). However, mandatory recall powers are not mentioned, so will depend on other national laws. This is similar to the EU, where they derive from the General Product Safety Directive; US federal regulators lack such powers altogether.²⁴

²¹ Para 6.1 (2009) via <http://portal.bpfk.gov.my/index.cfm?menuid=63&parentid=34>.

²² Available via http://www.hsa.gov.sg/content/dam/HSA/HPRG/Cosmetic_Products/Attachment%20A%20-%20A%20Guide%20Manual%20for%20the%20Industry%20-%20Adverse%20Event%20Reporting%20of%20Cosmetic%20Products.pdf.

²³ Digest 2.

²⁴ Zakaria 2012, pp212–5.

3. Recommendations

The ACD regime is quite a surprising success story for regional regulatory harmonisation, effectively balancing free trade with consumer protection. It has underpinned sustained and balanced development in AMS, with the ASEAN organic cosmetics market expected to account for nearly 6.6% of the global organic cosmetics market by 2020. Although international brands still predominate, other players are also emerging.²⁵

The main challenges facing the ACD regime have been delays and lack of (human and technical) resources for full implementation, especially in developing ASEAN member states and for post-market surveillance. Even in Malaysia, for example, audits of product information files have found significant non-compliance. There have also been problems with suppliers using the definition of cosmetics, including the intended use, to avoid the requirements for prior approval for pharmaceuticals, as well as illegal ingredient product formulations (especially for skin whitening products, widely used in ASEAN countries), non-cosmetic or misleading claims, incorrect labelling, and fake products.²⁶ Another difficulty is the lack of a one-stop online portal containing or linking to national laws implementing the ACD, or for ASEAN-wide incident reporting (as for food).²⁷ ASEAN policymakers also need to look closely at recent developments in the EU, including the move from a directive to a regulation (which no longer allows member states to adopt any different rules), as well as specific innovations such as the nanoparticles disclosure duty.

Ongoing capacity issues in member states may be further addressed by the regulators with primary jurisdiction over the cosmetics industry working more closely with general consumer regulators. After all, the latter increasingly have general powers to enforce prohibitions on misleading conduct or false labelling. In Malaysia, moreover, the Consumer Protection Act 1999 includes a general safety provision for all consumer goods (not just cosmetics). General consumer regulators may also be able to provide valuable input into the ACD's process for updating or reviewing ingredient listings, especially since that body does not expressly require any consultation with consumer groups but only with industry. These

²⁵ <http://www.futuremarketinsights.com/reports/asean-organic-cosmetics-market>.

²⁶ Ibid, pp193–4; Zakaria 2015, pp55–56.

²⁷ Cf Art 12(4), requiring ASEAN member states to notify national cosmetics laws to the ASEAN Secretariat, for the ACC; and <http://www.arasff.net/>.

regulators, as experts in consumer behaviour generally and with experience in other sectors, can assist even further in assessing and managing risks from reported product failures and health risks (e.g. through bans). They may also have shared or sole responsibility for conducting mandatory recalls of cosmetics, depending on national laws in the member states. Finally, general consumer regulators themselves need to build capacity, by engaging with cosmetics regulators, as they may need to exercise powers to bring representative lawsuits for product liability if consumers are harmed (as in Thailand) or to settle such disputes (as in Myanmar).²⁸

Despite such ongoing challenges, the ACD approach deserves consideration in other fields where there is strong interest and potential for further harmonising national laws in ASEAN member states, such as aspects of food regulation, toys (which also continue to generate safety incidents throughout the region),²⁹ and even some (e.g. over-the-counter) drugs. Relevant harmonising instruments in the EU could again provide major reference points, while allowing scope for national variations and enforcement, as seen with cosmetics regulation.

²⁸ See Digest 16, on enforcing product liability.

²⁹ See e.g. notifications via <http://www.aseanconsumer.org/alerts/>.



Policy Digest 23:

Developing ASEAN recall guidelines for consumer products



This policy digest was written by Professor Luke Nottage under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

Recalling or withdrawing consumer products from the marketplace or taking other ‘corrective action’ regarding actually or potentially unsafe or sub-standard products are important parts of consumer law and practice. Manufacturers and other suppliers can be incentivised to monitor the ongoing safety of their products after delivery into the supply chain for consumers, and then undertake corrective action to minimise harm, by private law mechanisms (such as tort claims for negligence brought by consumers) or reputational considerations (loss of customer goodwill etc).¹ However, especially in developing countries experiencing problems with access to justice through the courts or limited media or NGO activity with respect to consumer affairs, public regulation relating to recalls has become significant.

National laws in ASEAN Member States mostly now provide for regulators to require suppliers to undertake mandatory recalls, under specific legislation enacted for (higher-risk) sectors such as automobiles, health products or foods,² and/or under general consumer protection laws.³ In the shadow of such powers, regulators can also more effectively encourage or negotiate with suppliers to undertake (semi-) voluntary recalls. Sometimes suppliers even decide to undertake (purely) voluntary recalls, even without prior consultation with regulators or knowing their extent of their mandatory recall powers.

However, Member States still lack general consumer protection laws that oblige suppliers to notify regulators promptly after undertaking such voluntary recalls, similar to those required by amendments in 1986 in Australia and 2013 in New Zealand. Nor do such laws impose a broader product accident or hazard reporting duty on suppliers, even if the latter have not yet initiated a recall, as required in Australia since 2010 as well as the EU since 2001, Japan since 2006, Canada since 2010, and the US.⁴

¹ See e.g. Kellam, Jocelyn, ‘Post-sale Duty to Warn and Product Recalls in Australia’ (2005) 16 *Australian Product Liability Reporter* 113; and generally Digest 2.

² Cf generally Digest 20.

³ See the Appendix in Nottage, Luke R., ‘ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements’ (February 7, 2015) Sydney Law School Research Paper No. 15/07, <http://ssrn.com/abstract=2562695>. In some countries, such as Australia and (since 2009) Japan, the general consumer regulator has jurisdiction with respect to all consumer goods even if subject also to a specialized regulator under more specific legislation, but usually lets the latter take the lead in coordinating safety-related activities such as recalls.

(The closest regime is under Viet Nam's 2010 Law on the Protection of Consumers.⁵) Both types of obligations can encourage and assist suppliers to undertake recalls more effectively, through drawing on the technical expertise and communication networks of the consumer regulators.

If other ASEAN Member States amend their national consumer protection laws to require suppliers to notify regulators about voluntary recalls, it is especially important to define what is meant by 'recall' or whatever broader term (like 'corrective action') may be used in the relevant legislation, and provide guidance on when and how to undertake such remedial action effectively. Defining a 'recall' is important anyway, given existing powers for ASEAN's general consumer regulators to order mandatory recalls. (Viet Nam's 2010 Law sets out recall obligations with respect to a 'defective product'.⁶)

In many major economies that have introduced duties on suppliers to make disclosures to regulators, on top of legislation providing for the latter's back-up powers to order mandatory recalls, guidelines have recently been published or updated that elaborate quite extensively on rather sparse legislative provisions relating to recalls. These include quite detailed guidelines or handbooks publicised recently by authorities in the EU, the US, Australia, and Japan (although only in Japanese). By contrast, there is little publically available guidance provided in ASEAN Member States. For example, the *Guidelines on Product Defect Reporting and Recall Procedures* are issued by the Health Sciences Authority of Singapore as a relatively short (undated) webpage, and only relate to health products.⁷

This policy digest, therefore, compares such recent guidance materials to identify key components and features that might be elaborated into 'ASEAN recall guidelines' for consumer products generally. Such guidelines would be aimed primarily at suppliers and regulators, facilitating

⁴ See Digest 2.

⁵ Article 22 requires manufacturers and importers to (a) suspend supplies of 'defective products' that threaten to cause harm to consumers, (b) publicise through newspapers, radio or TV a recall of such products already in circulation, (c) bear the costs involved for consumers, and (d) report to relevant local consumer regulators after completing the recall.

⁶ Defined in Article 3(3) as including a product containing a one-off manufacturing defect, a design defect, or a warning defect.

⁷ http://www.hsa.gov.sg/content/hsa/en/Health_Products_Regulation/Safety_Information_and_Product_Recalls/Guidelines_on_Product_Defect_Reporting_and_Recall_Procedures.html/.

In Malaysia, see also e.g. the Medical Device Authority's summary on 'Recalls and Alerts': http://www.mdb.gov.my/mdb/index.php?option=com_content&task=view&id=28&Itemid=66.

evolving information-sharing platforms such as the ASEAN Product Alert website assembling national reports on some mandatory and voluntary recalls,⁸ but would also benefit consumers. Accordingly, peak consumer associations or relevant NGOs should be closely consulted in elaborating such ASEAN recall guidelines. Providing enhanced guidance, in this way, should encourage suppliers to engage in better corrective action, and also assist consumer regulators when exercising mandatory recall powers given concerns about lack of enforcement activity.⁹

2. Key considerations for ASEAN recall guidelines

Table 1 below compares the topics and structures of five sets of guidance documentation on consumer product recalls.

The first two are developed primarily by specific regulators: the Health Science Authority in Singapore (because the above-mentioned guidelines apply to the regulatory regime only for health products), and Japan's Ministry of Economy, Trade and Industry (presumably because it retains some consumer protection policy and enforcement capacity, and had earlier developed guidance for suppliers).¹⁰ The EU's recommendations, sub-titled 'Guidelines for businesses to manage product recalls and other corrective actions',¹¹ were developed with funding from the European Commission's Directorate-General for Public Health and Consumer Protection (DG-SANCO) but led by Prosafe (comprising the product safety enforcement agencies in EU Member States) together with three peak business organisations and ANEC (the international NGO partly supported by the Commission and which represents the consumer voice in product standard-setting, etc). The US recalls handbook,¹² and the Australian

⁸ At <http://www.aseanconsumer.org/alerts/>.

⁹ For example, only one mandatory recall has ever been ordered under Malaysia's Consumer Protection Act 1999: <http://consumer.org.my/index.php/safety/household/514-an-effective-product-recall-mechanism-badly-needed>. The Consumers Association of Penang therefore goes further to propose enactment of new legislation dealing exclusively with recalls, administered by a specialist agency, applying extra penalties if suppliers fail to conduct timely recalls.

¹⁰ http://www.meti.go.jp/product_safety/recall/handbook2010.pdf. The overarching regulator, established as an independent agency from 2009, also provides information and input into recall activities: see <http://www.consumer.go.jp/recall/site/>.

¹¹ http://ec.europa.eu/consumers/archive/safety/rapex/docs/corrective_action_guide_march2012.pdf.

¹² <http://www.cpsc.gov/pagefiles/106141/8002.pdf>.

guidelines (originally from 2010),¹³ were developed by their respective general consumer regulatory bodies.

The respective documentation varies greatly in terms of detail and page length. The Singaporean material is shortest, perhaps because it is in webpage format and/or focuses on a more highly regulated industry (health products) involving a smaller number of larger suppliers which can be expected to collaborate more closely and amicably with the specialist regulator if problems arise with their products and when planning or undertaking recalls. In terms of recommendations for consumer products generally, Australia's guidelines are the most succinct, whereas Japan's are the most detailed (albeit with many appendixes, including, for example, reporting forms). The EU and US documents lie in between, being similar in terms of page length and level of detail.

The structure and topics are broadly similar, but the Japanese and EU guidelines resemble each other quite extensively and arguably provide the most logical structure, as highlighted in grey in Table 1.

Table 1. Guidance documents on consumer product recalls

Singapore – Guidelines on Product Defect Reporting and Recall Procedures (health products) approx. 3pp	Japan – Recall Handbook for Consumer Products (2010) 117pp	EU – Corrective Action Guide (2011) 47pp	US – Recall Handbook (2012) 29pp	Australia – Consumer Product Safety Recall Guidelines (rev'd 2014) 19pp
Objective	I. (1) Aim	1. Aim	Background	Introduction
Definitions: product 'defect', 'recall'	& definition of 'recall'	2. Scope: definition of 'corrective action'	II. Identifying a 'defect'	
Responsibility of the company: (a) inform health authority if receives any 'defect' information, & recall ...	(2) Why recall?	2. obligations under (EU) law	I. Reporting requirements	1. Legal requirements & supplier responsi- bilities

¹³ Via <https://www.recalls.gov.au/content/index.phtml/itemId/1000105>.

Initiation of recall: (a) by company (b) by health authority	(3) Who recalls?	producers vs distributors		
	(4) Which authorities?	EU vs Member States	III. Regulator's evaluation of Reports	Background: why ACCC?
Responsibilities of the company: ... (b) maintain sales records (c) establish Standard Operating Procedure for recalls	II. Preventive measures	3. Preparing corrective action strategy	V. Putting together a corrective action plan: A. Preparing for a product recall VIII. Developing a company policy (e.g. designated recall coordinator) IX. Records maintenance	
Responsibilities of the company: ... (d) implementation of recall ('flowchart') (e) maintain updated contact details; (mass) media release for consumers, but first consult health authorities (discuss with authorities) Assessment of recall: (a) classification of recall: Class 1 (life-threatening) > 2 (b) Level of recall: wholesale, retail, consumer	III. Responding quickly to Accidents etc	4. Assessing the risk	(Risk assessment is also mentioned in Part II. Identifying a 'defect')	2. Mitigating a product safety risk: [1] identifying a hazard
		Annex E: risk estimation and evaluation		

		5. Managing corrective action	V. Putting together a corrective action plan: B. Elements of a Recall VI. Communicating Recall Information	2. Mitigating a product safety risk: [2] conducting a recall: - Objectives - notification, strategy, communication plan ...
	Appendix 1: 8 examples of whether and how to recall			
	Appendix 2-1: example of ad or newspaper announcement	Annex A: example of good announcement	VI.A-C: News, Video, Poster releases	Attachment A: Guidance on recall communication plan
	Appendix 2-2: guidance for website announcements		VI.D-F: Social media, other forms, toll-free numbers	
	Appendix 3: forms for notifying regulators			
Health authority provides the company with a specified timeline for the recall	3. Monitoring recalls		VII. Monitoring product recalls	2. Mitigating a product safety risk: [2] conducting a recall: - ... (conducting a recall, cont'd): retrieval of affected product, reporting on recall
	Appendix 4: NITE data / reports			
	3.5 Feedback from information obtained	6. Learning from experience		

Comparing structure and topics, focusing especially on the Japanese and EU documents, future ASEAN recall guidelines could usefully elaborate recommendations across the following five broad headings:

- i. **General background:** This should clarify that the *aim* is broadly to assist suppliers and regulators to collaborate in reducing actual or potential product-related health hazards to consumers, by providing guidance into when and how to undertake recalls or other corrective actions (such as repairs or monitoring) depending on the type of hazard. This section should explain the legal backdrop, identifying provisions in national laws on consumer protection generally dealing with mandatory and possibly voluntary recalls, and the roles of general versus specialist consumer regulators. It can also point to evidence (including some case studies) where timely and effective recalls have enhanced rather than undermined product or brand appeal.
- ii. **Planning for corrective action:** This should emphasise the need for advance coordination both within the organisation (e.g. appointing a recall coordinator) and with major trading partners (including any abroad), and effective maintenance of sales, complaints and other product-related records (even if not required by specific legislative provisions).
- iii. **Risk assessment:** This is separated out in the EU guidelines from ‘risk management’. This is useful; it should be a more objective and science-based analysis because it is increasingly recognised under international and national laws dealing (e.g. food safety).¹⁴ Especially for industries with smaller firms, more basic guidance may be needed, such as the possible types of risks or indeed defects (manufacturing, design or instruction/warning defects).¹⁵ The EU guidelines include a detailed annex (including a flowchart and indicative scenarios), drawing on Commission Decision 2010/15/EU, involving:
 - a) Unambiguous description of the product
 - b) Identifying the relevant type of consumer
 - c) Description of the injury scenario
 - d) Determination of the injury’s severity
 - e) Determination of its probability

¹⁴ See Digest 20.

¹⁵ Cf e.g. ACCC Guidelines (2014), p6.

- f) Overall assessment of the risk level (low, medium, high, serious)
- g) Possible adjustment depending on the level's plausibility
- h) Development of various injury scenarios to identify the product's highest risk
- i) Documenting and passing on the risk assessment.

Further assistance can come from the International Standards Organisation, for example, namely the recommendations contained in ISO/IEC 31010:2009, *Risk management – Risk assessment techniques*.¹⁶

- iv. **Managing the risk and corrective action:** This involves developing a proportionate and appropriate response to the identified risk, including effective communication with regulators, suppliers (especially if only a trade-level recall is deemed necessary) and consumers. Contemporary guidance documents include useful materials on effective communication channels and techniques, especially in an internet era. Monitoring and documenting progress is another important aspect of managing the identified risks and selected corrective action program. Again, further guidance can be obtained from ISO 31000:2009, *Risk management – Principles and guidelines*.¹⁷
- v. **Learning from experience:** The EU guidelines, and to a lesser extent the Japanese handbook, usefully emphasise that there should be feedback loops institutionalised and implemented so that the organisation (and indeed the regulators) learn from what went well or otherwise during the recall.

3. Recommendations

There is significant overlap in the approach and coverage of recalls guidelines recently released in major economies. These can be quite easily adapted into 'ASEAN recalls guidelines for consumer products' in general, with support from the regulators in those economies as well as ASEAN Member States, together with the ASEAN Secretariat and relevant international organisations (such as the Organization for Economic Cooperation and Development, which had developed a Global Recalls

¹⁶ Available via <http://www.iso.org/iso/home/standards>.

¹⁷ <http://www.iso.org/iso/home/standards/iso31000.htm>.

Portal).¹⁸ National authorities in ASEAN Member States can make these guidelines publically available, perhaps adding an annex with more detail (e.g. on national legislation, on general and/or specific consumer products, or on the special circumstances in developing country environments).

In principle, the general consumer regulators should take the lead in developing such ASEAN recalls guidelines. However, there should be close collaboration with specialist regulators with extensive experience in corrective actions (e.g. in health products, foods and vehicles). Peak industry and consumer groups can also be consulted.

These guidelines can begin with more general material or fewer details (e.g. closer in length to the current Australian guidelines), but make cross-reference to the other documentation mentioned above. The ASEAN guidelines may later develop more specific details, and should certainly be periodically revised in light of regional and global experiences with product recalls.¹⁹

¹⁸ <http://globalrecalls.oecd.org/>.

¹⁹ For example, the EU has been reviewing its product safety regulation generally, including proposed enhancements regarding traceability of products, which impacts significantly on the effectiveness of recalls. See e.g. Freeman, Rod et al, 'Reform of EU Product Safety Laws' (June/July 2013) *Australian Product Liability Reporter* 108-12; and http://ec.europa.eu/consumers/consumers_safety/product_safety_legislation/product_safety_and_market_surveillance_package/index_en.htm.



Policy Digest 24:

Resolving cross-border disputes within ASEAN



This policy digest was written by Professor Justin Malbon under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

The ASEAN Economic Community (AEC) Blueprint commits ASEAN to transforming to a single market that is highly competitive, has equitable economic development and is fully integrated into the global economy.¹ The development of a single market has five key elements, namely the free (or freer) flow of goods, services, investment, capital and skilled labour. Such freer flows will in part make it easier for consumers to buy goods and services across ASEAN borders.

As the ASEAN single market becomes further developed, the volume and value of cross-border consumer transactions is likely to increase significantly. This presents ASEAN members considerable challenges in providing for the consumer protection in cross-border transactions. One of the challenges is establishing mechanisms for resolving cross-border disputes efficiently, cost effectively and fairly. There are a range of international developments that can inform ASEAN reforms, some of which are set out below.

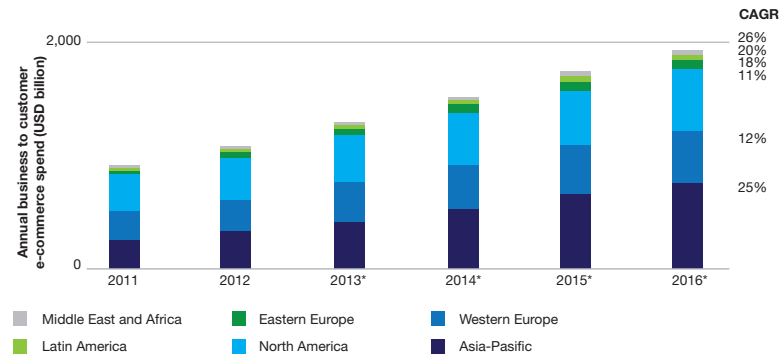
2. Cross-border disputes

Cross-border disputes involving consumers were relatively rare before the widespread use of the internet. Despite a worldwide increase in internet users, ASEAN remains a relatively underpenetrated market, with less than 20% of the population using the internet. Nevertheless, the number of ASEAN internet users has increased by 20% per annum over the past 5 years.² As the ASEAN middle class continued to grow over the next decade, internet penetration is likely to radically increase to match regions like the US and Europe. The volume and value of online trade in goods and services is also likely to increase. It is projected that by 2016, the Asia-Pacific will spend more on e-commerce than any region in the world, with a substantial proportion of goods and services being purchased across borders (Figure 1). This will likely lead to an increase in the number of cross-border disputes.

¹ ASEAN Economic Community Blueprint (2008), 2.

² Internet Society, *Global Internet Report 2014*, 22.

Figure 1. Forecast e-commerce growth by region



3. Issues in resolving cross-border disputes

Many of the issues that are likely to arise in cross-border consumer disputes are similar to those in domestic disputes. These include complaints about goods or services that:

- do not match the seller’s description
- are not of merchantable quality or fit for purpose
- are not the ones the purchaser agreed to buy
- are not delivered by the agreed time.

Resolving these issues can be complex enough in ordinary consumer protection cases; it is often more so in cross-border cases, as illustrated with the following hypothetical example. A consumer and a seller are in different countries, and the consumer purchases a product using the seller’s website. Invariably, the consumer will click an icon stating they agree to terms and conditions that are set by the seller. Often, under these terms, the consumer agrees to forego their consumer rights, including the right to complain that the product is defective or otherwise not fit for purpose. In addition, the consumer often agrees that any dispute will be resolved by arbitration in a jurisdiction and using an arbitrator chosen by the seller, who will often not be in the consumer’s country.

³ Compound annual growth rate.

⁴ Internet Society, *Global Internet Report 2014*, 80.

Even if a law provides that the law of the consumer's jurisdiction applies to the transaction, the seller will often refuse to consent to be a party to any dispute dealt with by a court or tribunal in the consumer's jurisdiction. Even if the consumer were to succeed in any action against the seller in the consumer's jurisdiction, the enforcement procedures against a seller in another jurisdiction are likely to be expensive and time-consuming. In practice, consumers have very few *effective* legal rights, or any real capacity to enforce rights they may have.

Because the consumer has almost no real capacity to gain legal redress, he or she has to hope the seller will voluntarily respond to their complaints. This de facto voluntary system allows sellers to either ignore complaints or to only deal with them as they see fit. Consumers are often aware of their weak position, and attempt to protect themselves by only dealing with sellers who they perceive to be trustworthy. Sellers with a large online presence, such as Amazon and Apple, have built reputations for trustworthiness, which helps them attract a large customer base. It can be difficult, however, for less recognised or emerging sellers (including those in the ASEAN region) to establish a reputation for trustworthiness amongst a large number of potential consumers. This difficulty effectively reduces online competition.

4. International mechanisms for resolving disputes

One way of countering this is to create an environment in which disputes can be dealt with quickly, cheaply and fairly. According to the OECD

... the availability of effective dispute resolution and redress mechanisms can increase consumer confidence and trust in the online and offline marketplace, encourage fair business practices, and promote cross-border commerce, including electronic and mobile commerce.⁵

A number of international organisations are attempting to develop ways of dealing with low-value, high-volume business-to-consumer disputes. So far, a global consensus has not yet been reached on the appropriate

⁵ OECD Recommendation on Consumer Dispute Resolution and Redress (2007) Preface www.oecd.org/general/oecdurgesgovernmentandindustrytooverhaulconsumerprotectionforinternetandother shoppers.htm.

mechanisms for resolving such disputes. It may therefore be appropriate for ASEAN members to retain a watching brief on international developments, and to actively engage with international organisations in developing these mechanisms.

OECD Recommendation on Consumer Dispute Resolution and Redress

In July 2007, the OECD Council adopted recommendations on consumer dispute resolution and redress, which sets out principles for an effective and comprehensive dispute resolution and redress system, which can be applicable to cross-border disputes.⁶

The recommendations propose that member countries review their existing dispute resolution and redress frameworks to ensure they provide consumers with access to fair, easy to use, timely, and effective dispute resolution and redress without unnecessary cost or burden. It recommends that measures be taken to improve consumer awareness of, and access to, dispute resolution and redress mechanisms and to enhance the effectiveness of consumer remedies in cross-border disputes. It also recommends that private sector cooperation be encouraged.

Organisation of American States Protocol for e-Commerce Consumer Complaints

The Organisation of American States Protocol for e-Commerce Consumer Complaints establishes a practical online dispute resolution system that would provide ‘quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions’.⁷ Consumers can file a complaint online against a seller in another state for claims such as non-delivery or late delivery, misrepresentations about goods, improper charging and damaged goods. After the claim is filed, the buyer and seller can negotiate a binding agreement online. If they cannot, the case is referred to an online arbitrator to facilitate an outcome or issue an arbitral award, which will be enforced in the seller’s jurisdiction through the usual channels.

⁶ OECD Recommendation on Consumer Dispute Resolution and Redress (2007) Preface www.oecd.org/general/oecdurgesgovernmentandindustrytooverhaulconsumerprotectionforinternetandother shoppers.htm.

⁷ OAS-ODR Protocol for e-Commerce Consumer Complaints, 1

UNCITRAL Draft Procedural Rules for Online Dispute Resolution for Cross-border Electronic Commerce Transactions

The United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Online Dispute Resolution (ODR) mechanisms recently presented, at a working party meeting in New York in February 2015, Draft Procedural Rules for Online Dispute Resolution for Cross-border Electronic Commerce Transactions.⁸ The ASEAN members who attended were representatives of the Philippines and Singapore.

The preamble to the draft rules states that they are designed:

- for an easy, fast, cost-effective procedure for dispute resolution in low-value, high-volume electronic commerce transactions
- to create a safe, predictable legal environment for transactions, to ensure traders' confidence in the online market
- to facilitate micro-, small- and medium-sized enterprises' access to international markets through electronic commerce and mobile electronic commerce.

The rules require a tiered procedure to resolving disputes in which the parties must first attempt negotiations. If this fails, a process is set out for adjudication through binding arbitration. The draft rules (when finalised) would be activated when both parties agree to the rules under their sales contract (or by other means of agreement).

EU developments

The European Union adopted in 2013 a Regulation on Consumer Online Dispute Resolution (ODR Regulation) and the Directive on Consumer Alternative Dispute Resolution (ADR Directive).⁹

The ODR Regulation establishes a Europe-wide alternative dispute resolution online platform, which is due to commence early 2016. It aims to be a single entry point for resolving online cross-border consumer e-commerce complaints. Sellers are not compelled to use the platform. EU

⁸ A/CN.9/WG.III/WP.133; UN General Assembly; 29 November 2014; <http://daccess-ods.un.org/TMP/3420516.2525177.html>.

⁹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013; Directive 2009/22/EC (Regulation on consumer ODR)

members may compel certain sellers under their domestic laws to use the platform. Sellers using the platform are required to inform their customers of this. Once a dispute is registered on the site, facilitators will be appointed by the relevant authorities of the Member States where the consumer and the seller are located.

Enforcement of monetary awards

If a consumer succeeds in obtaining a judgment or an award from a court or tribunal and the seller refuses to pay the amount ordered, the consumer might wish to enforce the judgment or award in the jurisdiction where the seller has its assets.

Many countries have bilateral arrangements that allow for the recognition of money judgments made in one bilateral member's court (the foreign court) by a court in the other bilateral member's court (the domestic court). That is, the foreign judgement, upon registration in the domestic court, is treated as if it were a judgment made by the domestic court. Presently, there is no consistent set of treaties dealing with the recognition of foreign judgments, so enforcement relies on the consumer being lucky enough to have purchased goods or services from a seller located in a treaty jurisdiction.¹⁰

These bilateral arrangements usually only provide for the recognition of the judgments of 'superior' courts. This generally means that the foreign judgments of small claims courts and consumer tribunals cannot be registered in a domestic court.

It is recommended that ASEAN members provide for a judgment or award made in any ASEAN member country to be capable of being registered in any other ASEAN member country. These judgments or awards would include the judgments or awards of a small claims court or consumer tribunal. If an ASEAN alternative dispute resolution online platform were to be established, any arbitral decisions made via the platform would also be capable of being registered in the courts of ASEAN members.

¹⁰ OECD, *Consumer Dispute Resolution and Redress in the Global Marketplace*, 2006, 42.

5. Potential areas for reform

Potential areas for reform to enable the fair and efficient and low-cost resolution of low-value, high-volume business-to-consumer disputes include each ASEAN member developing laws and procedures that:

- render void any contract terms that purport to have consumers forego their consumer rights
- give effect to the OECD recommendations
- give effect to the UNCITRAL Draft Rules when they are finalised
- enable disputes involving consumers and sellers in ASEAN countries to be resolved by an online platform developed along the lines of the proposed EU dispute resolution platform
- enable the recognition of judgments and awards by a court, tribunal or online platform arbitration in an ASEAN member country by a relevant court in another ASEAN country.

Case Studies



one vision
one identity
one community

Case Study 3:

Interface between consumer protection and competition policies: institutional design



one vision
one identity
one community

This case study was written by Professor Caron Beaton-Wells under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II (AADCP II). The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Introduction

This case study explores the extent to and ways in which consumer protection and competition policies, laws and enforcement are and should be coordinated from an institutional perspective in ASEAN. Consumer protection and competition policy-making and implementation ensure markets function effectively in the interests of enhancing consumer welfare.¹

There are strong indications supporting the merits of coordinating these two regulatory tools. However, policy coordination raises substantive issues. Policies and laws should be formulated in a way that is sensitive to both competition and consumer protection concerns; that is, in a way that addresses market failure from both supply (competition) and demand (consumer protection) perspectives. The substantive dimension of the competition–consumer protection interface was examined in Policy Digest 7, and explored in greater depth in the context of professional services markets and utilities markets in Policy Digests 8 and 14, respectively. However, policy coordination has an institutional dimension also, and that is the focus of this casestudy. Specifically, this case study examines the allocation of responsibilities for competition and consumer protection policy-making, implementation and law enforcement as between- and within-government agencies in ASEAN Member States.

1.1 Context

Over the last decade, the design of institutions and assessment of their performance and effectiveness have emerged as significant issues in national and international discourse, particularly in relation to competition policy, law and enforcement, but to a lesser extent for consumer protection policy.² This reflects the growing recognition that a policy or law is only as

¹ See, e.g., OECD, *The Interface between Competition and Consumer Policies*, OECD Round tables, 2008; OFT, 'Joining up Competition and Consumer Policy The OFT's approach to building an integrated agency', December 2009; M Armstrong, 'Interactions between Competition and Consumer Policy' (2008) 4 *Competition Policy International* 97; L Sylvan, 'The Interface between Consumer Policy and Competition Policy' (Speech delivered at the 2006 Consumer Affairs Victoria Lecture, 2006) 8–9.

² That said, the focus has been predominantly on institutions responsible for competition law enforcement. For literature reflecting this emphasis, see e.g. D Crane, *The Institutional Structure of Antitrust Enforcement*, 2011; M Trebilcock and E Iacobucci, 'Designing Competition Law Institutions: Values, Structure and Mandate' (2010) 41 *Loyola University of Chicago Law Journal* 455; W Kovacic, 'Achieving Better Practices in the Design of Competition Policy Institutions' (2005) 50(3) *Antitrust Bulletin* 511; W Kovacic, 'Rating Competition Agencies: What Constitutes Good Performance?' (2009) 16 *George Mason Law Review* 903; Kovacic and Hyman, 'Competition Agency Design: What's on the Menu?', (2012) 8 *European Competition Journal* 527. These developments have spurred the International Competition Network to establish an 'Agency Effectiveness' working group: see <http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx>.

good as its implementation or enforcement.³

The scope of institutional issues is broad, encompassing questions relating to independence, accountability, approach to governance, internal organisational structure, strategic planning and resource allocation, matching capabilities to commitments, allocation of roles relating to investigation and adjudication, and performance review and evaluation, amongst others.⁴ The focus of this case study, however, is on a particular aspect of institutional architecture — that is, the scope of policy and/or enforcement mandate for institutions in the fields of competition and consumer protection. In particular, it is concerned with questions relating to the integration of or coordination between agencies with competition and consumer protection responsibilities and functions.

There is a growing trend towards government agencies having multiple policy and enforcement functions.⁵ A recent study reported that, as of 2013, almost 50% of competition agencies have a multiplicity of mandates, including responsibilities for consumer protection, sectoral regulation, intellectual property and public procurement, amongst others.⁶ Moreover, some agencies with multiple functions are examining ways in which to maximise the synergies and efficiencies associated with their span of responsibilities. In 2009, for example, the (former) Office of Fair Trading of the United Kingdom undertook a fundamental internal organisational reform to develop a unified approach to its competition and consumer protection work.⁷

³ As pointed out by Kovacic and Eversley: “Discussions about the implementation of competition policy tend to focus more heavily upon the question of *what* competition authorities should do than on the question of *how* they should do it. The issues of substantive doctrine and policy that so often command our attention take shape amid institutional arrangements that determine how competition authorities can exercise their powers. These institutions are the infrastructure over which policy measures must travel. The design of a jurisdiction’s administrative infrastructure can have a decisive influence on the type and quality of policy outcomes that a competition system achieves. Both older and newer competition systems have come to realize that a body of competition laws is only as good as the institutions entrusted with their implementation.” See W Kovacic and D Eversley, ‘An assessment of institutional machinery: Methods used in competition agencies and what worked for them’ in Proceedings of the International Competition Policy Implementation working Subgroup 2 on the Experiences of Younger Agencies, May 2007.

⁴ See W Kovacic and M Trebilcock, ‘Designing Competition Law Institutions: Values, Structure, and Mandate’ (2010) 41(3) *Loyola Chicago Law Journal* 455.

⁵ J Jordana and D Levi-Faur, ‘Exploring Trends and Variations in Agency Scope’ (2010) 11(4) *Competition and Regulation in Network Industries* 342.

⁶ See ‘Benchmarking Competition Systems: A Global Survey of Major Institutional Characteristics’, George Washington University, Presentation to UNCTAD RRP Meeting, July 2013.

⁷ OFT, ‘Joining up Competition and Consumer Policy The OFT’s approach to building an integrated agency’, December 2009.

As explained below, this trend of policy and enforcement integration is not replicated, at least not to any significant degree, in the ASEAN community. It is difficult to generalise about the reasons for this. The factors affecting institutional structures and design in Member States, as elsewhere, are highly jurisdiction-specific. In broad terms, such factors are likely to include:

- **history** (which policy, competition or consumer protection, was developed first, as rarely have they been developed together)
- **politics** (which policy commands the strongest political constituency)
- **stage of economic development** (which policy has been seen as most important in contributing to economic development objectives)
- **administrative culture** (the way in which public administration generally is organised in the jurisdiction)
- **personalities** (of decision-makers in relevant government departments and of agency heads).

1.2 Case study participants and method

Given the subject of the case study, countries were selected from amongst those ASEAN Member States that have both competition and consumer protection laws and enforcement agencies, and have done so for some time. This excluded from consideration Cambodia, Lao People's Democratic Republic, Myanmar and Brunei Darussalam. Of the remaining countries, those selected for the case study were Viet Nam and Thailand

Viet Nam was selected as it is the only member state currently with an agency that has (and has had for some years) dual responsibility for competition and consumer protection enforcement (namely, the Viet Nam Competition Authority (VCA) under the Ministry of Industry and Trade).⁸ Thailand was selected as, in contrast to Viet Nam, it has separate agencies responsible for competition and consumer protection enforcement, established under separate ministries (the Office of the Trade Competition Commission, under the Ministry of Commerce; and the Office of the

⁸ Coordination appears to be contemplated in Laos: in 2010 Laos has set up the Division on Consumer Protection and Competition belonging to the Department of Domestic Trade, Ministry of Industry and Commerce. However, its competition law is still being drafted. Myanmar is also still drafting its competition law; however, it is also proposed that both the competition law and consumer protection laws be administered by a single agency — the Department of Commerce and Consumer Affairs of the Ministry of Commerce.

Consumer Protection Board, under the Office of the Prime Minister). Both proposed countries have had both competition and consumer protection laws in place for some time. Hence, the relevant agencies have had a degree of experience in performing the functions of advocacy, education and enforcement in each area, which is useful for this case study.

The case study is based on a review of the literature on institutional design in competition and consumer protection policy and enforcement, a review of publicly available records documenting the institutional structure and functions of the ASEAN Member States, and interviews with representatives from Viet Nam and Thailand. A list of interviewees is Annexure 1 to this report, and a running sheet of the topics canvassed in each interview is Annexure 2. Participants were provided a copy of the interview running sheet in advance of each interview. Generally, however, the conversations were free-flowing, and the running sheet was not closely followed. This gave participants the opportunity to direct the course of the conversation and provide relevant insights.

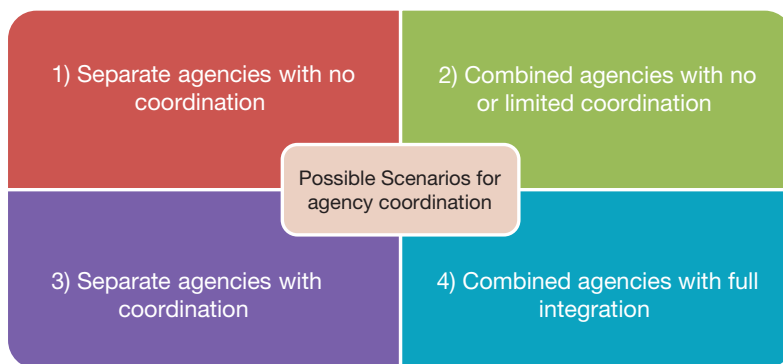
2. Institutional models— a framework

Much of the focus in the institutional literature has been on whether there should be separate agencies for competition and consumer protection, or a combined agency. However, an arguably more productive approach is to consider how policy-making, advocacy, education and enforcement can be most effectively coordinated, whether as between different agencies or within a single agency. This approach firmly rejects the idea of ‘one size fits all’ in the area of institutional design. It acknowledges that there are well-known problems with institutional transplants⁹ and recognises that, to be effective, institutional structures need to be sensitive to the political, legal and administrative traditions and cultures of individual jurisdictions.

Figure 1 below depicts a matrix that indicates four possible options or scenarios in relation to agency coordination.

⁹ See M Gal, ‘When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources are Scarce’ (2009) 41(3) *Loyola University Chicago Law Journal* 414.

Figure 1. Possible scenarios for agency coordination



The least optimal scenario in terms of coordination is quadrant 1—there are separate agencies and they do not or hardly coordinate. In this scenario, decision-makers and staff in the different organisations operate in professional, intellectual and bureaucratic silos. The results potentially include competition policy and/or decisions that have adverse consumer protection outcomes and/or the implementation of consumer protection measures that are counter productive for competition.¹⁰

Arguably, the most optimal scenario in terms of coordination is quadrant 4—there is a combined agency in which functions are coordinated to the greatest extent possible.¹¹ Coordination may be reflected in a number of ways; for example:

- the decision-making body of the agency has equal representation of persons with interests and expertise in competition and consumer protection
- the agency advises government on law reform and policy-making in a way that takes account of both competition and consumer protection considerations

¹⁰ See Policy Digest, 'Interface between Competition and Consumer Policies', ASEAN Consumer Protection and Case Studies: A Policy Guide (Vol 1), p81.

¹¹ As at 2012, countries in which there are combined agencies include Australia, Barbados, Canada, Columbia, Denmark, Dominican Republic, Ecuador, Fiji, Gambia, Guyana, Italy, Ireland, Jamaica, Kenya, Kirgizstan, Panama, Papua New Guinea, Seychelles, The Netherlands, United Kingdom, United States, Zambia and Zimbabwe. This list is drawn from information provided by the authors of the benchmarking study referred to in 6 above.

- case officers are trained in and work on both competition and consumer protection matters or are rotated or seconded between divisions
- the agency conducts research activities such as market studies that examine demand- and supply-side factors in diagnosing and formulating remedies for market failures.

Having a single agency with dual functions that are coordinated has several advantages. First, this institutional structure is likely to foster an agency culture that is driven by a philosophy of ‘making markets work’ through both supply-side (competition) and demand-side (consumer protection). Secondly it is likely to facilitate cross-fertilisation of knowledge, skills and experience between specialists in both areas. Thirdly, it is likely to produce operational efficiencies and avoid duplication in administration. Finally, a single agency with a substantial portfolio of responsibilities, and corresponding resources, may have more leverage within government as well as a stronger voice in the public arena than multiple smaller agencies, each with individual functions.

In between scenarios 1 and 4, there are two other options.

The scenario in **quadrant 2** involves a combined agency but one that is structured in such a way that means, in effect, there is no or very limited potential or capacity for coordination in competition and consumer protection-related work. For example:

- at the leadership level, where important planning, prioritisation and resourcing decisions are made, a functional approach is also taken — matters or decisions are considered as either competition- or consumer protection-related, without considering other aspects or dimensions
- there are separate competition and consumer protection functional units or enforcement teams with minimal, if any, sharing of information and expertise between them
- legal and economic specialists are assigned to each function rather than acting as a central unit servicing both areas
- supportive activities, such as research and development, and education and outreach activities are functionally oriented.

The scenario in **quadrant 3** denotes separate agencies but with mechanisms for coordination between them. For example:

- there is a separate commission or consultative committee on which senior representatives from each agency participate and which facilitates a dialogue and information sharing between agencies
- the agencies have a cooperation agreement or memorandum of understanding that clearly sets out criteria for, modes of and channels for consultation
- the agencies work together on joint projects (e.g. market studies)
- agency officers are rotated amongst, or seconded between, different agencies.

Assuming matters of politics, development context, administrative culture and personality allow, a strategy for coordinating competition and consumer protection policy-making and enforcement lies below the line, in either quadrant 3 or perhaps, ideally, quadrant 4.

3. Viet Nam

Viet Nam began to shift from a centralised and planned economy to a market economy in 1986. The shift gained momentum when the country joined the World Trade Organization (WTO) in 2006 — WTO accession was a key driver in Viet Nam's adoption of a competition law. The drafting process began in 2000 and the law was promulgated in 2004, taking effect in 2005.¹² Responsibility for the law was assigned to the Viet Nam Competition Administration Department, renamed the Viet Nam Competition Authority (VCA) in 2006, within the Ministry of Trade (now the Ministry of Industry and Trade).

The competition law contains some provisions relating to consumer protection under the rubric of unfair competition acts (for example, prohibitions on: issuing false or misleading information to consumers; carrying out fraudulent, dishonest or discriminatory sales promotions; and conducting illicit multi-level sales (pyramid schemes)).¹³ A dedicated comprehensive consumer protection law was passed in 2010, and took

¹² Competition Law, Law No. 27/2004/QH11.

¹³ See Article 45.

effect in 2011, six years after the introduction of the competition law.¹⁴ That law covers responsibilities of traders towards consumers, state management responsibilities for consumer protection, responsibilities of social organisations for consumer protection, and dispute resolution mechanisms, amongst other things.

Since its inception, the VCA has had responsibilities in the areas of both competition and consumer protection, as well as in the area of international trade remedies.¹⁵ Its roles in relation to competition and consumer protection enforcement are somewhat different, reflecting the differences in regulatory approach in these fields. For competition violations, its primary focus is on investigations (adjudication and sanctioning is carried out by an independent body, the Viet Nam Competition Council). For consumer protection violations, its main emphasis is on dispute resolution (when it works closely with provincial level people's committees and consumer associations, such as the Viet Nam Standards and Consumer Association and its local member associations).

The agency has input to and advises government on policies, laws and regulations relating to each of its areas of responsibility. It undertakes considerable activity towards advocacy and education of stakeholders – consumers, businesses and government agencies, including sectoral regulators. It conducts market studies that provide the basis for recommendations to government on competition policy issues.¹⁶ The VCA also engages in a range of bilateral and international cooperation activities, again across the three fields of competition, consumer protection and international trade, consistent with its broad portfolio of responsibilities.

The VCA is structured in a way that reflects the various focuses in its mandate. It has four principal administrative units, dealing with competition, consumer protection, trade remedies and international cooperation, respectively.¹⁷ Within the competition unit, there are three divisions that deal with competition policy, unfair competition investigation and antitrust

¹⁴ Law on Protection of Consumer Interests, Law No. 2010/QH12. However, there is a range of other laws that also bear on consumer protection; e.g., the Law on Standards and Technical Regulations (2006); the Product Quality Law (2007) and the Food Safety Law (2010).

¹⁵ In particular, it administers various laws dealing with import tariffs, domestic safeguard measures and anti-dumping.

¹⁶ The VCA has conducted market studies in relation to 30 sectors to date.

¹⁷ See the VCA Annual Report (2013), p10. The VCA's head office is Hanoi, and it has branch offices in Da Nang and Ho Chi Minh City.

investigation, respectively. Within the consumer protection unit, there are two divisions, one assigned to standard contracts work, and the other to all other aspects of consumer protection work. Within the trade remedies unit, there are separate divisions for investigation and compliance. The fourth unit is responsible for international cooperation. It also has two professional sub-units, dealing with data collection and analysis (Center for Competition and Information Data) and staff training (Center for Investigator Training).

One possible explanation for Viet Nam's integrated policy and enforcement apparatus is that, spurred by its aspiration to WTO status, Viet Nam enacted a comprehensive competition law before a comprehensive consumer protection law. According to the VCA officials interviewed for this case study, when the agency was established, the intention was to create a 'modern commercial authority', and in that context, competition and consumer protection were seen as 'two sides of the same coin'. Consideration was given to international best practice and the decision to create a combined agency was influenced by the models in countries such as Australia (which has a combined agency — the Australian Competition and Consumer Commission).

The key advantages of a combined agency were cited by VCA interviewees as: (1) effectiveness in the agency's approach to enforcement and market regulation (for example, the capacity to take a 'whole-of-market' approach in the context of merger review and to draw on consumer complaints to inform its antitrust investigation work); (2) public awareness and profile of the agency (for example, the capacity to leverage the profile of its activity in the consumer protection area to educate consumers and businesses about competition) and (3) efficiencies in administration.

Notwithstanding the functional separation of responsibilities between administrative units, the VCA is conscious of the value derived from integrating its knowledge and activities in relation to competition and consumer protection. For example, it trains its staff in relation to both areas and staff rotate between the different units. That said, there appears to be potential for even further integration. In particular, VCA officials explained that the agency's market study work focuses solely on market structures (that is, on the supply side of markets) and does not canvas demand-side (consumer behaviour) issues. Consistent with the practice in other jurisdictions where agencies conduct market studies, a more holistic approach to this important research and development activity

could enhance the agency's understanding of markets with benefits in turn for advocacy and investigatory functions across both the competition and consumer protection fields.¹⁸ Market studies provide valuable opportunities for increasing the integration of and highlighting the synergies between competition and consumer policies and enforcement programs.¹⁹

4. Thailand

Thailand has two separate central agencies, within separate ministries, responsible for consumer protection and competition policy, law and enforcement, respectively. The Office of the Consumer Protection Board (OCPB), within the Office of the Prime Minister, administers the Consumer Protection Act 1979, while the Office of Trade Competition Commission (OTCC), within the Department of Internal Trade of the Ministry of Commerce, administers the Competition Act 1999. Unlike in Viet Nam, a consumer protection law was enacted first in Thailand; indeed, 20 years prior to enactment of a competition law.

Each of the relevant government agencies performs a range of roles relating to their particular legislative mandate. They each receive complaints, carry out investigations, have input to policy-making and law reform, conduct educative and outreach activities and participate in bilateral and international forums. Power to adjudicate on breaches of the relevant Act lies with an associated body — in the case of consumer protection, with the Consumer Protection Board and ad hoc committees, and in the case of competition, with the Trade Competition Commission and an Appellate Committee, and ultimately the courts.

Each agency also cooperates with other government and non-government organisations relevant to their line of work. The OCPB organises its work in three main areas — labelling, advertising and consumer contracts — but

¹⁸ See T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexel (eds), *Competition Law as Regulation*, 2013, 2; OECD, *Market Studies*, OECD Policy Roundtables, 2008; ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009; ICN, *Market Studies Good Practices Handbook*, 2012.

¹⁹ See OECD, *Market Studies*, OECD Policy Roundtables, 2008, 7. See to similar effect, OFT, *Market Studies: Guidance on the OFT approach*, 2010, [2.16]. This is exemplified by the studies that have been undertaken by several competition authorities in relation to the professions: see e.g. Competition Bureau (Canada), *Self-regulated professions: Balancing competition and regulation*, 2007; OFT (UK), *Competition in professions*, 2000; European Commission, *Professional Services – Scope for More reform* (2005).

also works with a large number of other agencies across government that have consumer protection-related responsibilities in particular sectors.²⁰ In 2014, the Consumer Protection Board approved in principle the National Consumer Protection Master Plan 2015–2019 to include the National Consumer Protection Center with a view to systematically integrating and standardising consumer protection work across all sectors of the Thai economy. The process is now underway to be able to implement the Master Plan and the Center. The OCPB also works with consumer associations, the leading one of which is the Foundation for Consumers (FFC). The policy, advocacy and dispute resolution work of the FFC is supplemented by a network of local consumer organisations and groups, the umbrella body for which is the Confederation of Consumer Organisations. The OTCC cooperates with a range of other departments within the Ministry of Commerce (for example, departments that deal with international trade and intellectual property), with sectoral regulators and business representative groups.

There is minimal dialogue or coordination between the OCPB and the OTCC. At least to date, neither appears to have regarded the other's work as substantially intersecting with or bearing upon their own in any significant way. That said, officials interviewed for the case study expressed interest in learning more about the work of the other agency. Neither appears to have input into the policy-making or legislative process where it relates to matters outside of their particular mandate. The two agencies recruit and train their staff separately and staff interchange does not occur as a matter of policy. They do not appear to regard the skills or expertise of their staff as readily transferable and, in any event, staff movement between ministries in the Thai government service is not all that common. These two agencies do not have any formal arrangement or platform for information sharing; however, OCPB officials suggested that it may be useful to involve the OTCC in the proposed National Consumer Protection Center (referred to above). They do not regularly exchange data or intelligence (for example, complaint data), although there have been occasions on which the OCPB has referred consumer complaints to the OTCC. Nor do they engage in any joint research and development activity — like the VCA, the OTCC engages

²⁰ For example, the Food and Drug Administration and the Medical Council within the Ministry of Public Health, the Department of Business Development in the Ministry of Commerce and the Office of Insurance Commission, the Thai Industrial Standards Institute within the Ministry of Industry, and the Technology Crime Suppression Division, Economic Crime Division and Tourist Crime Division of the Royal Thai Police.

in market monitoring that is largely supply-side oriented. They also regard their educative and outreach activities as directed at separate stakeholders — consumers in the case of the OCPB, and businesses in the case of the OTCC.

5. Reflections and proposals

Across ASEAN, the prevailing institutional model is largely one of separate agencies each responsible for policy-making, enforcement, stakeholder education and associated activities in the fields of consumer protection and competition.²¹

It is not possible to generalise about the reasons for the separatist approach. However, it may reflect the fact that in many countries, the impetuses for and timing of the introduction of consumer protection and competition policies and laws have been different. At the stage of introduction of each, the interface and complementarities between the two fields have not been sufficiently recognised or possibly not to the extent required to commend or warrant the establishment of a combined agency.

In Thailand, consumer protection law was introduced two decades before the competition law and was motivated by social concerns (pressures from consumers and international non-governmental consumer organisations). By contrast, the introduction of competition law was economically driven. The difference in impetuses for policy adoption and legal reform is reflected in the fact that consumer protection responsibility is located with the Office of the Prime Minister, while competition law is within the province of the Ministry of Commerce.

Viet Nam has taken a different approach — the introduction of competition law preceded, by some years, the introduction of consumer protection law. The breadth of the VCA's mandate reflects recognition of the policy intersection between the two fields. It is also consistent with the increasing

²¹ For example, in Malaysia, consumer protection law is administered by the Ministry of Domestic Trade, Co-operatives and Consumerism, and competition law by the Malaysia Competition Commission. In the Philippines, consumer protection law is administered by the Bureau of Trade Regulation and Consumer Protection, and competition law by the Fair Competition Commission. In Indonesia, consumer protection law is administered by Ministry of Trade of The Republic Indonesia, and competition law by the Commission for the Supervision of Business Competition. In Singapore, consumer protection law is administered by the Ministry of Trade and Industry, and competition law by the Competition Commission.

practice internationally of assigning consumer protection enforcement responsibility to the competition authority, reflecting the view that consumer protection is as much an economic as a social concern.

Thus, in ASEAN it may seem that consumer protection, at least at its inception, has been underpinned to a large extent by a rights-based philosophy, that is, by recognising the importance of policies and laws that shore up the rights of consumers. However, as reflected in the ASEAN Economic Community Blueprint, consumer protection is also relevant to the objectives of promoting economic development and growth. Protected consumers are confident consumers whose confidence in engaging in consumerism will serve to activate competition between traders. Such competition in turn will promote the economic efficiency and prosperity that the ASEAN economic agenda seeks to achieve for the region.

The next phase in ASEAN's development is an opportunity for member states to consider whether any change to their institutional structure is required, to maximise the advantages of a coordinated approach to competition and consumer protection policy-making and enforcement. This is not to say that countries need necessarily dismantle their current frameworks and create single agencies with a dual mandate. Change on that scale may be difficult or unrealistic as a matter of bureaucratic culture or practice. As explained by the Office of the Consumer Protection Board, the promotion of administrative cost-savings may not be justifiable to amalgamating agencies, because the Thai public service is a major source of employment in the country.

Nevertheless, as set out in Section 2, there are still ways to promote coordination within a framework that has separate agencies. The principal advantages of coordination are:

- fostering a 'pro-market' culture across the functions of both competition and consumer protection
- facilitating dialogue and depth of analysis across common issues, thus ensuring that market failures are analysed holistically — through consideration of supply-side (competition) and demand-side (consumer) factors — and providing the skills and expertise to tailor responses accordingly
- ensuring small-to-medium sized business issues do not fall 'between the cracks', given that they may rely on either or both consumer

protection and unfair trading provisions (such as prohibitions on misleading and deceptive conduct and unconscionable conduct) and competition provisions (such as the prohibition on abuse of dominance) to protect them from unfair conduct by larger firms; the complementary combination of consumer, competition and small business expertise enables these issues to be dealt with efficiently and ensures small business does not get caught between regulatory regimes

- providing consistent information, guidance and education to both consumers and businesses about their rights and obligations in both fields
- to the extent relevant, enabling administrative savings and skill enhancement through the pooling of information, skills and expertise.

ASEAN has a potentially valuable role to play in helping member states understand the interplay between competition and consumer protection policies and the merits in their coordination at the levels of policy-making and enforcement. One way to do this would be to foster dialogue between members of the ASEAN Experts Group on Competition and the ASEAN Committee on Consumer Protection, and their corresponding networks. This would bring together experts, policy-makers and enforcement officials from both fields to promote mutual understanding and exchange insights and experience that would enhance policy coordination in each member state. This could be done through joint conferences and/or capacity-building exercises, and consulting on the development and revision of regional guidelines and handbooks. Each of these groups should also draw on the expertise of international organisations such as United Nations Conference on Trade and Development and competition and consumer protection agencies, both within and beyond the region, which have helpful experience to share in relation to the development and refinement of institutional structures.

Annexure 1: List of interviewees

Viet Nam

1. Mr. Trinh Anh Tuan – Deputy Director General, Viet Nam Competition Authority
2. Mr. Cao Xuan Quang, Director of Consumer Protection, Viet Nam Competition Authority
3. Mr. Phan The Thang, Deputy Director of Consumer Protection, Viet Nam Competition Authority
4. Mr. Ho Tung Bach, Official of Consumer Protection, Viet Nam Competition Authority
5. Ms. Phan Van Hang, Official of Competition Policy, Viet Nam Competition Authority
6. Mr. Tran Van Hoc, Viet Nam Standards and Consumers Association (VINASTAS)

Thailand

1. Mr. Phairoj Kanungsup, Director of Dissemination and Public Relations Division, Office of the Consumer Protection Board
2. Ms. Kuncharee Tanarak, Director, International Cooperation Section, Office of the Consumer Protection Board
3. Ms. Valeerant Puntuworn, Policy and Planning Analyst, Office of the Consumer Protection Board
4. Mr. Danupop PLansangket, Policy and Planning Analyst, Office of the Consumer Protection Board
5. Mr. Urajitt Chittasevi, Director of Foreign Affairs Unit, Office of the Trade Competition Commission
6. Mr. Nitirak Paokan, Trade Office, Office of the Trade Competition Commission
7. Ms. Saree Aongsomwang, Secretary General, Foundation for Consumers

Annexure 2: Interview running sheet

The interviews will canvas the following broad topics while allowing for additional topics to arise in the course of the interview and for the interviewee to bring issues and considerations to the interviewer's attention that may not have been anticipated in advance of the interview. The topics below are tailored to interviews with government officials and will be modified, as relevant, to other types of interviewees (eg from NGOs and academia).

1. Introduction

Introduce the research topic, the purpose of the research and the research process.

2. The interviewee's role and experience

The interviewee's role and experience in relation to the design and implementation of competition and consumer protection policies, education and enforcement in their country.

3. Background on competition and consumer protection policy and legal development

The reasons for and way in which competition and consumer protection policies and laws have developed in interviewee's country.

4. General information on the development, design and experience of competition and consumer protection agencies

The structure and scope of the interviewee's agency. Factors that have affected the way in which the agency has been designed (legal, administrative, political, other).

The agency's priorities, powers, skills and experience in carrying out education and enforcement in the area of competition/consumer protection.

Challenges faced by the agency in undertaking its functions.

Other agencies involved in competition and consumer protection policy advocacy and enforcement - governmental (other government departments; sectoral regulators) and non-governmental (consumer associations; trade associations; unions; business groups).

5. Coordination between competition and consumer protection policies

The extent to and ways in which the interviewee perceives there to be a relationship between competition and consumer protection policies generally and in their country specifically.

- E.g. examples of ways in which competition policy may benefit consumers and of ways in which consumer protection policy may benefit competition, and to the extent possible, examples from particular sectors (eg tourism, financial services, utilities, grocery retail).

Relative priority given to/standing of competition vs consumer protection.

6. Coordination in and/or between competition and consumer protection agencies

The extent to and ways in which the various agencies involved in competition and consumer protection education and enforcement in the interviewee's country consult and/or coordinate with each other.

- E.g. intra-agency consultative mechanisms; memoranda of understanding for information sharing; joint investigations; market/sector studies.

Factors that facilitate / inhibit this consultation and coordination.

Possible changes or reforms that would lead to greater consultation and coordination.

7. Anything else that may be relevant?

Case Study 4:

ASEAN consumer product safety law: national laws and free trade agreements



This policy digest was written by Professor Luke Nottage under the project *Supporting Research and Dialogue in Consumer Protection* supported by the Australian Government through the ASEAN-Australia Development Cooperation Program Phase II. The views, recommendations and proposals mentioned in this paper do not necessarily represent or are not necessarily endorsed by the relevant agencies in ASEAN Member States.

1. Overview

There have been significant developments in ASEAN consumer product safety law, especially over the last decade, including:

- higher regulatory standards and consumer expectations in markets for goods exported outside the region, and growing trade within and beyond ASEAN underpinned by a proliferation of free trade agreements (FTAs)
- enactment of laws providing compensation for harmed consumers based on strict liability for safety defects, rather than negligence-based liability, including now in 5 ASEAN Member States¹
- improvements in regulatory frameworks enhancing minimum safety standards for general consumer goods, not just for higher-risk products such as foodstuffs² or (to a lesser extent) cosmetics,³ albeit with some notable gaps (such as requirements to inform regulators about serious product-related accidents or risks).⁴

However, consumer product failures continue to occur across the ASEAN region.⁵ The breadth of products covered by consumer product safety law is extensive, and some products are subject to specific regimes (such as foodstuffs or cosmetics, analysed in previous Policy Digests). Space precludes further detailed treatment of such sectoral regimes, but this case study does note some actual or potential interaction with general consumer product safety law. This case study mainly focuses on how (i) direct public regulation of general consumer product safety by consumer affairs regulators, and (ii) indirect incentives for suppliers to provide safe products due to strict liability to provide compensation for product defects, can be further enhanced in an era of trade liberalisation and FTAs.

The case study was developed in consultation with the ASEAN Secretariat and the ASEAN Member State authorities. Following a review of primary and secondary literature (extending especially to Viet Nam, Malaysia and Singapore), field studies were conducted from 1-4 and 6 March 2015

¹ Digest 6.

² See Digest 20.

³ See Digest 22.

⁴ See Digest 2.

⁵ See examples in Digest 6.

in Thailand (Bangkok), and 5 March 2015 in Myanmar (Nay Pyi Taw).⁶ These involved in-depth semi-structured interviews with consumer affairs and other officials as well as non-governmental organisation (NGO) representatives (in both Thailand and Myanmar), academics and lawyers, and an invited presentation to the consumer protection working group of the Thai Parliament.⁷

Overall, the literature review and field work confirmed that despite ongoing experiences and concerns about consumer product safety failures, these member states displayed considerable differences in formal complaints being filed and pursued.

Thailand has the most robust regime for the regulation and resolution of consumer product safety issues (e.g. for automobiles and foods), thanks mainly to:

- a longstanding and active consumer movement,⁸ reinforced nowadays by extensive penetration of social media⁹

⁶ The agreed preliminary scoping paper and schedule of subsequent interviews are available on request and will be incorporated into the final report documentation for this project. As explained also further below, Thailand is quite unique among ASEAN Member States (and even more developed countries in other parts of the world) in showing a quite significant impact in practice already from enactment of its 2008 Product Liability Act. Pressure from its enactment also came from Thailand's active engagement in negotiating FTAs. Myanmar provides an interesting contrast because it has a developing economy traditionally less open to international trade, but one that is increasingly liberalised. It also has a consumer law enacted in 2014 that partially regulates product safety but does not offer compensation for strict liability to victims harmed by defective products, as in other ASEAN Member States.

⁷ In addition, valuable information was obtained at a conference on 'Product Safety and Product Liability Laws in ASEAN', funded by Chulalongkorn University's ASEAN Studies Centre and hosted at Thai Ministry of Commerce facilities in Bangkok, 29-31 July 2015, at http://blogs.usyd.edu.au/japaneselaw/2015/04/asean_product_safety.html. Revised versions of 10 country reports (mainly from lawyers or academics) and other comparative materials are expected to be published or otherwise made public over the next 12 months, thus offering a further valuable resource in this field for national regulators and the ASEAN Secretariat. Useful additional information was obtained, and key points outlined in earlier drafts of this paper were discussed, at the preliminary validation workshop in Jakarta over 17-31 July for an UNCTAD-coordinated train-the-trainers project for the ASEAN Secretariat, as well as the author's subsequent workshops conducted for the ASEAN Secretariat in Manila over 5-7 October. The final version of that author's training materials on "Product Safety and Labelling" for that project, which is more applied and less policy-oriented than the present more forward-looking project, are forthcoming via <http://www.aseanconsumer.org>.

⁸ Munger, Frank, 'Revolution Imagined: Cause Advocacy Consumer Rights and the Evolving Role of NGOs in Thailand' (2014) *Asian Journal of Comparative Law*, at <http://ssrn.com/abstract=2439377>.

⁹ One OCPB officer is charged with monitoring social media reports of consumer problems, and sometimes contacts the person(s) concerned to find out more information or offer assistance in resolving a dispute. Comparing internet penetration rates and social media activity across ASEAN Member States, see e.g. 'Phones Dominate Thai Media Channel', *Bangkok Post* (26 September 2014) <http://www.bangkokpost.com/tech/local-news/434328/phones-dominate-thai-media-channel>; Internet Society 'Unleashing the Potential of the Internet for ASEAN Economies' (2015), via <http://www.internetsociety.org/doc/unleashing-potential-internet-asean-economies>; UBS Global Research, Q-series: 'ASEAN eCommerce' (13 June 2014) at <http://simontorring.com/wp-content/uploads/UBS-report-2014.pdf>, especially pp9-30 (with summary e.g. at <http://anzcham.com/ph-thailand-highest-e-commerce-growth-in-asean/>).

- a Consumer Protection Law dating back to 1979, plus strict product liability legislation enacted in 2008
- a well-established primary regulator: the Office of the Consumer Protection Board (OCPB), under the aegis of the Prime Minister's office.¹⁰

Myanmarlies at the other extreme, with:

- very few formal complaints – for example, one NGO is the Myanmar Consumers Union, but fieldwork interviews found it has only ever received formal complaints directly from consumers regarding five matters¹¹
- an overarching Consumer Protection Law that was only enacted on 14 March 2014, and a small Department of Commerce and Consumer Affairs that remains within the Ministry of Commerce.

Viet Namlies in between, with:

- the Viet Nam Standards and Consumers Association (Vinastas) NGO,¹² including staff formerly employed in governmental standard-setting activities
- a Consumer Protection Law enacted in 2010, which also includes strict product liability provisions, administered by the Consumer Protection Board within the Viet Nam Competition Authority (in turn part of the Ministry of Industry and Trade)¹³
- some media coverage of consumer product safety failures and dispute management, e.g. regarding vehicles spontaneously catching fire (over 2010–12) and beverages produced by Tan Hiep Phat (in 2015).

¹⁰ See generally Thanitcul, Sakda, 'Law and Legal Process of the Product Liability Act in Thailand' (2013) 20 (2-3) *Journal of International Cooperation Studies [Kobe University]* 27, at http://www.research.kobe-u.ac.jp/gsics-publication/jics/thanitcul_20-2&3.pdf.

¹¹ Namely certain foods, medicines, public transport services, education services and private medical clinics. Basic information on the MCU can be found e.g. at <https://www.facebook.com/MyanmarConsumerUnion>. Myanmar does not yet have any NGOs affiliated with Consumers International: see <http://www.consumersinternational.org/our-members/member-directory/>. Generally on NGOs in Myanmar, see e.g. <http://asiapacific.anu.edu.au/newmandala/2015/03/30/a-hopeful-moment-for-civil-society-in-myanmar/> and Morgan, Andrew, 'Introduction: A Remarkable Occurrence: Progress for Civil Society in an 'Open' Myanmar' (2014) 23 *Pacific Rim Law and Policy Journal* 495 via <https://digital.law.washington.edu/dspace-law/handle/1773.1/1372>.

¹² NGO has been affiliated with Consumers International since 1992: [http://www.consumersinternational.org/our-members/member-directory/Viet Nam%20Standards%20and%20Consumers%20Association](http://www.consumersinternational.org/our-members/member-directory/Viet%20Standards%20and%20Consumers%20Association).

¹³ <http://bvntd.vca.gov.vn/en/SitePages/Home.aspx>.

However, there are some significant gaps in the regimes in all three countries, which are also present to varying degrees across the other ASEAN Member States, as summarised in the Table in Appendix A. In terms of *private law regimes* (examined in Part 2), which facilitate claims for compensation of consumers harmed by defective goods and indirectly also can encourage manufacturers and others to ensure the safety of their products, strict liability statutes have not yet been enacted in Myanmar, Brunei, Laos and Singapore. Even when enacted, as for example in Viet Nam and even Thailand, there remain extremely few reported case filings or court judgments. Partly this reflects the lack of an effective class action regime,¹⁴ although during the fieldwork it was discovered that one was enacted in early 2015 by the Thai Parliament.

Turning next to Consumer Protection Laws or other legislation similarly providing for the exercise of *public regulators' powers* directly with respect to consumer product safety (discussed further in Part 3), a problem in almost all member states is that the general regulators for consumer affairs typically lack jurisdiction to set mandatory safety standards for specific types of products. Instead, those powers are reserved for other responsible government departments. Compared to countries like Malaysia, Japan or Australia, this limits the capacity of consumer regulators to take the lead or even act independently to set minimum standards, in urgent situations or where the consumer product safety issue arguably is not covered by more specific legislation and regulatory authorities.

In addition, such limited powers and engagement in standard-setting activities on the part of general consumer regulators can impede the effective functioning of regimes regulating cross-border trade in goods under agreements administered by the World Trade Organization (WTO) as well as proliferating bilateral and regional FTAs and other international arrangements for harmonising regulatory standards impacting on ASEAN Member States. This is particularly unfortunate given that some such bilateral and regional agreements already provide for respective governments to collaborate in sharing information about product safety incidents or concerns, as well as in capacity-building initiatives, as outlined in Part 4.

¹⁴ See Digest 16.

2. Strict product liability law

Strict product liability laws have emerged to ensure that manufacturers and others in the supply chain (especially importers) more fully internalise costs associated with goods supplied to consumers, thus creating an incentive to supply safer goods, and in order to more effectively compensate consumers if harm nonetheless arises.

2.1 Expansive legislative provisions

As in several other Asia-Pacific economies, the 1985 European Product Liability Directive has provided a model for legislation now enacted in 5 out of 10 ASEAN Member States: the Philippines (1992), Malaysia (1999), Cambodia (2007, but in force from 2011), Thailand (2008, after law reform discussions from 2000), and Viet Nam (2010). Indeed, compared to the European Union law, these statutes mostly expand the liability of manufacturers in various potentially significant ways.¹⁵

For example, in the statutes enacted in Thailand and the Philippines (as also in China and Taiwan), the consumer does not have the full burden of proving that the goods were unsafe because they had a defect. The supplier, which typically has much better access to relevant information, must instead prove goods were safe, to avoid liability. In Viet Nam, at least one commentator argues that the 2010 Consumer Protection Law should be interpreted so that traders have the burden of proving their products are not defective, once consumers prove product-related damages.¹⁶

In Thailand (similarly to Taiwan and China), additional ('punitive') damages may be awarded to plaintiffs in specified situations. In Cambodia (as in Japan, Taiwan and Korea), plaintiffs can claim for personal injury and *all forms* of consequential property loss. Malaysia instead follows the EU (and e.g. Australia) in its version of the 1985 European Directive: under ss68-69, plaintiffs can only be awarded damages for personal injury and losses to property (other than the defective product itself) that is ordinarily and actually intended for personal or household use. However, s51 also allows anyone to claim against the manufacturer for all types of consequential

¹⁵ See further details in Digest 6 and generally Kellam, Jocelyn (ed) *Product Liability in the Asia-Pacific* (Federation Press, 3rd ed 2009).

¹⁶ Anh, Pham Thi Phuong, 'Viet Namese Law on Consumer Protection', (June 2013) *Viet Nam Law & Legal Forum* 16 at p20.

damages caused by a lack of ‘acceptable quality’ (including safety: s32) in a consumer good (defined in s3 to mean a product ordinarily for personal use, and not for resupply or using up in a manufacturing process). In other words, in Cambodia and even (to a more limited extent) in Malaysia, other firms can sue under these strict product liability statutes for business losses caused by defective goods.

In addition, Thailand and the Philippines omit the ‘development risks’ defence, found in almost all EU member states (and e.g. Australia and Japan). This exempts manufacturers and importers from liability where the state of scientific or technical knowledge did not permit the defect to be discovered when the goods were put into circulation. The Philippines also extends strict liability for certain consumer services (as does Indonesia), as well as to intermediate suppliers (as under some US case law).

In Viet Nam, the 2008 Law on the Quality of Products and Goods, also dealing with defects in goods, remains in effect and has a ‘development risks’ defence that is more demanding (assessing scientific knowledge as at the time damage arises) than the 2010 Consumer Protection Law (assessing knowledge when the goods were put into circulation, as under the EU directive).¹⁷

However, more general laws in Brunei Darussalam, Lao PDR, Myanmar and Singapore retain a *negligence-based liability* regime for compensating consumers (and others) for injury and consequential property loss from defective goods. Proving lack of fault by manufacturers with respect to safety, let alone intermediaries in the supply chain, is more difficult for consumers compared to claiming under strict liability statutes.¹⁸ Challenges are compounded when courts are not well-resourced and judgments are

¹⁷ Ibid, p18. This commentator also remarks that under the 2008 Law, manufacturers and importers are not responsible for damages caused by defective goods when public notice of a recall has been issued before the products cause harm (Art 62.1(c)). However, doubts were raised about this interpretation, which would constitute an unusual extra defence compared to the EU model, during the Manila workshop over 5-7 October 2015 (mentioned at footnote 6 above).

¹⁸ See generally e.g. Kellam, Jocelyn and Nottage, Luke, ‘Europeanisation of Product Liability in the Asia-Pacific Region: A Preliminary Empirical Benchmark’ (2008) 31 *Journal of Consumer Policy* 217, with a longer manuscript version at <http://ssrn.com/abstract=986530>. However, Singapore (since 2003) and Brunei (since 2011) have enacted consumer protection laws establishing liability for various types of misleading statements and conduct. It is possible that such legislation might be invoked by consumers to claim a form of strict liability at least for ‘warning’ or ‘instruction’ defects (not one-off ‘manufacturing defects’ or generic ‘design defects’), although discussions in Jakarta and Manila (mentioned in footnote 6 above) and database searches reveal no example yet of court judgments on this point.

not widely publicised (as in Myanmar and Lao PDR).¹⁹

Indonesia's Consumer Protection Act of 1999 adopts a compromise approach. Article 19(1) is subject to Article 28, so the regime is fault-based rather than strict liability, but subject to reversed burden of proof compared to Indonesian Civil Code provisions on negligence.²⁰

2.2 Few lawsuits and court judgments

Even in more developed countries that have enacted strict liability statutes, there appear to be very few reported judgments applying them, let alone finding in favour of consumers. The most functional regime appears to be **Thailand**, where out-of-court settlements have been reached since 2008, thanks primarily to the active roles played by consumer organisations and the OCPB (including one instance where it publically committed to bring a representative action against the automobile manufacturer).²¹ Field work suggests that publicity through social media may also be leading to more settlements. Consequently, even the consumer protection working group within the Thai Parliament is not prioritising further reforms to its substantive law on product liability.

By contrast, in **Viet Nam** it is difficult to locate even media reports about product liability claim filings in court, and no representative suits have even been threatened. In researching for his PhD thesis focusing on the consumer protection law of 2010, Cuong Nguyen found that in the lead-up to enactment, the Supreme People's Court reported almost no lawsuits of any time brought by consumers before the court system. More generally, he notes:²²

¹⁹ See generally e.g. Cheesman, Nick, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (Cambridge University Press, 2015) via <http://www.cambridge.org/us/academic/subjects/law/socio-legal-studies/opposing-rule-law-how-myanmars-courts-make-law-and-order?format=HB>.

²⁰ See also e.g. <http://www.iclg.co.uk/practice-areas/product-liability/product-liability-2015/indonesia> and <http://www.hnrlawyers.com/files/hhr-oct04.pdf>.

²¹ Thanitcul, op cit. In the Bangkok conference over 28-29 July 2015 (mentioned at footnote 6 above), Professor Thanitcul provided statistics showing dozens of Product Liability Law court filings every year since it was implemented from 2009, but could find only two judgments from Thai courts.

²² Nguyen, Cuong, 'The Drafting of Viet Nam's Consumer Protection Law - An Analysis from Legal Transplantation Theories' (2011, PhD in Law thesis, University of Victoria) at <http://www.law.unimelb.edu.au/files/dmfile/CuongEnglish2.pdf>, pp137-8.

... a survey conducted in 2010 by Phan The Cong, a lecturer at the Hanoi University of Commerce, involving 583 randomly selected consumers in urban Hanoi. The survey found that 75% of consumers stated that, if their consumer rights were infringed upon, they would simply ignore the infringement and would not lodge complaints or file lawsuits against the perpetrators. The interviewees explained that they did not opt for filing lawsuits because they even did not know where to submit their petitions (37.24% of the interviewees) or they thought they were unlikely to get fair compensation (46.68% of the interviewees). Most of them felt helpless in initiating lawsuits against offending traders.

Nguyen also notes that although Vinastas is a type of NGO, it:²³

... was a product of initiatives of retired state officials. It operates as a member and under the auspices of the Viet Nam Union of Science and Technology Associations (Vusta) – a member of the Viet Nam Fatherland Front. ... Vinastas has a very limited budget of only \$19,000 [Canadian] per year although it is quite prominent in the media. One of the key tactics employed by Vinastas to advance its position is to mobilize support from the public media and to urge the public media to report consumers' concerns and voices, especially in scandals affecting many consumers, such as scandals involving poor quality milk, gas station operators cheating customers, and taxi drivers rigging meters in order to overcharge fares. Vinastas also frequently sends petitions to the state authorities urging them to carry out regular inspections and implement consumer protection provisions. Vinastas and its affiliated provincial consumer protection organizations also provide mediation services for consumers. However, these services are possible only when businesses or traders voluntarily cooperate.

Recent cases involving motorbikes catching fire (possibly from gasoline formulations) and allegedly defective beverages do not seem to have generated any lawsuits filed by consumers. Indeed, as of December 2011 only one complaint had been lodged with Vinastas,²⁴ and one consumer

²³ Ibid p144. At the Manila workshop (5-7 October 2015, mentioned at n 7 above), it was also noted that Vinastas cannot raise funds by way of membership fees (as in other main consumer organisations in ASEAN Member States and beyond) as this arguably would conflict with its mandate to represent the interests of all consumers in Viet Nam.

²⁴ See <http://VietNamnews.vn/opinion/219052/tighter-checks-needed-on-motorbike-safety.html>.

who claimed compensation from a major beverages manufacturer in 2015 was arrested for extortion.²⁵

In **Myanmar**, the 2014 Consumer Protection Law does not even provide for the possibility of representative suits, either by regulators or certified NGOs. Although the Consumer Settlement Body can order suppliers to pay compensation, under s19(c), this is only if they fail to comply with duties set out in s7(b) or prohibitions in s8. The former includes a supplier's duty to provide clear and correct information, which might create a 'warning defect' if not complied with, but it would not extend to a 'design defect' or one-off 'manufacturing defect' rendering the goods unsafe. The prohibitions under s8 include violations of safety standards that are specifically prescribed but do not include a general safety requirement (as mentioned in Part 3). Accordingly, the Consumer Settlement Body lacks the power to order compensation in favour of consumers otherwise harmed by unsafe goods, or to assist them (at least formally) in reaching a settlement. At present, there appears to be little awareness of this gap, in contrast to the possibility of representative actions found in some other member states such as Thailand and Viet Nam, nor any moves to introduce strict product liability legislation.

Experiences in Thailand, and indeed in countries like Japan that have strict liability regimes, suggest that there is unlikely to be a major increase in product liability litigation, although Japan has built up some significant case law since 1995 and settlements in favour of consumers appeared to have increased somewhat in both countries.²⁶ To make strict product liability statutes work better in practice, arguably *an opt-out class action needs to be introduced*, as in Australia (and some parts of Canada) based on the US approach. Under such an approach, all harmed consumers in a class benefit from any judgment or settlement approved by the court, unless they opt out after notification of the class action.

It will therefore be interesting to follow the impact from enacting such a regime in early 2015 in Thailand, after more than a decade of law reform

²⁵ See http://www.Viet_Nambreakingnews.com/2015/02/probe-investigates-soft-drink-producer/. See also <http://vneconomicstimes.vn/article/business/tan-hiep-phat-inspection-results-released>. In addition, at the Manila workshop (5-7 October 2015, mentioned at n 7 above), a lawsuit was mentioned as having been filed in a provincial court by a local consumer group regarding around 100 victims of contaminated cakes.

²⁶ Nottage, Luke, *Product Safety and Liability Law in Japan* (Routledge, 2004) especially ch4.

discussion,²⁷ although regulations to implement this new statute apparently have still to be finalised in conjunction with the Thai court administrators. Appropriate implementing legislation has impeded the development of product liability class actions in Indonesia.²⁸

Even when an opt-out class action system is fully implemented, the Australian experience shows that the impact remains far less extensive than in the US, which has a comparatively *unique civil justice and socio-economic system*. Accordingly, a functional product liability system for ASEAN Member States also needs to bolster other dispute resolution mechanisms. These include small claims courts or tribunals, or ‘fast-track’ procedures supporting consumer lawsuits generally (as in Thailand under the 2008 Consumer Case Procedure Act), which are especially useful for more isolated product-related accidents.²⁹

3. Consumer product safety regulation

Public regulation is a more direct way to ensure consumer product safety. It remains important especially if a country lacks strict product liability legislation, and/or effective representative action procedures for large-scale disputes, or small claims court or tribunal procedures for more isolated product accidents. This is true even in an era of trade liberalisation (as discussed further in Part 4). However, as indicated in Appendix A, there is considerable disparity among ASEAN Member States in terms of the timing for enactment of general consumer product laws as well as their scope with respect to key components of consumer product safety regulation. There are also widespread difficulties regarding enforcement.

For example, only one mandatory recall has been ordered by consumer regulators in **Malaysia** under the Consumer Protection Act 1999.³⁰ In addition, from a broader comparative perspective, no member state requires suppliers to notify the general consumer product safety regulator if

²⁷ Ratanachaichan, Chukiart (2006), ‘A Primer on the Thai Draft Law on Class Actions’, Paper presented at the 9th General Assembly of the ASEAN Law Association, <http://www.aseanlawassociation.org/9GAdocs/Thailand.pdf>.

²⁸ Cf e.g. Sundari, Elisabeth (2013), ‘The Cost Barrier of Consumers Class Action in Indonesia’, European Scientific Journal, 9 (31), <http://eujournal.org/index.php/esj/article/view/2050>.

²⁹ See Digest 16.

³⁰ See also the reform proposals at: <http://consumer.org.my/index.php/safety/household/514-an-effective-product-recall-mechanism-badly-needed>.

conducting a voluntary recall,³¹ let alone a broader notification requirement in the event of any serious product-related accident or health risk.³² The closest provision is part 22 of **Viet Nam's** 2010 legislation, which requires manufacturers and importers to announce and conduct a public recall of goods they find to be 'defective', and to notify local authorities about the results of the recall. The central regulator can then monitor this information, and has begun uploading such recall information on its website.

Thailand was one of the first member states to enact a general consumer law that included provisions regulating product safety. Under the Consumer Protection Act 1979, creating the OCPB as the general consumer affairs regulator, s10(3) allows the OCPB to publicise information about suppliers of products that may harm consumers — a power to issue warnings. Further, under s36, the OCPB can order a supplier to test goods if suspected of being harmful to consumers and then can order their modification, ban from future sale, or destruction (similar to a mandatory recall power) — all at the expense of the supplier. Non-compliance attracts criminal sanctions under s56. However, the OCPB interprets s36 as only allowing it to issue 'cease supply' instructions to the relevant supplier until the results of its tests (or otherwise the OCPB's own tests) have been completed. Only after that period, which may be quite lengthy, will the OCPB publically announce a ban. By contrast, for example, Singaporean regulators have greater access to their own testing facilities, and so can quickly conduct tests if concerned about safety, and then promptly take public measures including product bans.

3.1 Limited standard-setting powers for general regulators

In **Thailand**, the OCPB's powers to set minimum safety standards before goods are allowed into market circulation are limited. Nonetheless, under s30, its Committee on Labels can declare goods to be 'label-controlled' if the labelling may cause physical or mental harm to consumers. Prescribed labels must then include only true and non-misleading statements (s31), but the supplier need not make disclosures unless needed for consumer

³¹ The closest requirement is in Viet Nam, as outlined below. For the possibility of developing 'ASEAN Recall Guidelines', see Digest 23.

³² See further Digest 2. However, there may exist a notification for some types of higher-risk goods, such as health products under Singaporean law: see http://www.hsa.gov.sg/content/hsa/en/Health_Products_Regulation/Safety_Information_and_Product_Recalls/Guidelines_on_Product_Defect_Reporting_and_Recall_Procedures.html.

safety (s32). If these labels are not affixed, the OCPB may order the supplier to cease circulation or rectify the goods (s 33). Non-compliance attracts criminal sanctions under ss52-3. In effect, this allows Thailand's general consumer affairs regulator at least to set *mandatory 'information standards'* relating to the safety of general goods. However, even these powers are excluded for certain products covered by sector regulators, such as foods.

In addition, the OCPB has no powers under the Act to set other types of safety standards, such as prohibitions or limits on types of ingredients or components used to ensure the safety of the products. Nor is there any general safety provision (GSP), requiring suppliers only to provide safe goods, which could then be enforced by this regulator. However, the OCPB occasionally may be invited by other sectoral regulators to join standard-setting activities on an informal basis, because those regulators know that if the safety problem persists the OCPB may intervene to exercise its post-market controls (banning or recalling demonstrably unsafe products).

Until recently, **Malaysia** was the only ASEAN member state to expressly set out a GSP, found also under EU law, especially under s21 of its Consumer Protection Act 1999 as follows (emphasis added):

no person shall supply, or offer to or advertise for supply, any goods which are not reasonably safe having regard to all the circumstances, including—

- (a) the manner in which, and the purposes for which, the goods are being or will be marketed;
- (b) the get-up of the goods;
- (c) the use of any mark in relation to the goods; and
- (d) instructions or warnings in respect of the keeping, use or consumption of the goods.

In addition, s19(4) provides that a supplier 'shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods or services concerned'.

This duty applies even if the general safety regulator has not set any specific minimum safety standard, as provided separately as follows:

19. (1) The Minister may by regulations prescribe the safety standards in respect of—
- (a) any goods or class of goods; and
 - (b) any services or class of services,
- and may prescribe different safety standards for different goods or services, or classes of goods or services.
- (2) The safety standard in relation to goods may relate to any or all of the following matters:
- (a) the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods;
 - (b) the testing of the goods during or after manufacture or processing;
 - (c) the form and content of markings, warnings or instructions to accompany the goods.
- (3) For the purposes of subsection (1), the Minister may, on the recommendation of the Controller and with consultation with the competent agency—
- (a) adopt in whole or in part the safety standard used by the competent agency; or
 - (b) obtain advice from experts in the relevant field.

‘Competent agency’ means another regulator that ‘has determined or has the expertise to determine safety standards for any goods or services’ (s19(5)). This part of the Act on standard-setting does not apply to ‘healthcare products’ or foods (ss 19(6)–(7)), whereas the GSP under s21 extends to all consumer goods. The supply or advertising of products not meeting s19 standards, set for specific products, is prohibited (s20). Violations of ss 19 and 20 are offences (s25) but subject to certain defences, especially for non-manufacturers (s22).

With effect from 1 April 2011, **Singapore** has achieved something close to a GSP, by issuing the Consumer Protection (Consumer Goods Safety Requirements) Regulations 2011³³ under s11 of the Consumer Protection (Trade Descriptions and Safety Requirements) Act (originally enacted in 1975), which allows the Minister to declare safety standards for specified

³³ At <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=5d81b3b4-5d82-4c8b-beb7-81717eea014d;page=0;query=id%3A%22ec858afc-bdf6-41c6-9b81-c1a575675e97%22%20Status%3Ainforce;rec=0#legis>.

classes of goods. Essentially, these Regulations now require all goods supplied to comply with (ii) standards set by four specified international bodies (e.g. ISO, plus any further standards set by the general regulator, SPRING), or otherwise (ii) standards ‘formulated or adopted and published by any regional or national standards body’. It is possible that there exist some general consumer goods that fall outside these two categories, but they will be very few, so these Regulations are very close to a GSP as in Malaysia and the EU – provided of course that the standards issued (eg by ISO) in fact achieve reasonable safety for consumers.

In addition, the Regulations give the general consumer regulator certain post-market powers (such as bans) over these goods, subject to exceptions for various products as summarised below:

‘SPRING Singapore has the power to stop the supply of consumer goods that do not meet applicable safety standards. SPRING is also able to direct suppliers to inform users of the potential dangers of such goods. The penalty for not complying is a fine and/or imprisonment.

The following consumer goods are under the purview of other regulations or regulatory agencies in Singapore, and do not come under the CGSR.

Product Type	Regulator
Food product and products / Contacting food or beverages	Agri-food and Veterinary Authority of Singapore (AVA)
Cosmetics, medical devices, pharmaceuticals and Chinese proprietary medicines	Health Sciences Authority (HSA)
Motor vehicles	Land Transport Authority (LTA)
Motorcycle helmets and children car seats	Traffic Police (TP)
45 categories of household electrical, electronic and gas products (Controlled Goods)	SPRING Singapore
Hazardous substances (those not covered under HSA)	National Environment Agency (NEA)
Pesticides and vector repellents	National Environment Agency (NEA)

The following are also not under the purview of CGSR:

- Used or second-hand goods
- Goods produced solely for export or imported solely for re-export
- Installation works
- Fixtures and fittings
- Products for commercial or industrial use
- The long-term health effects of consumer products.³⁴

By contrast, in **Viet Nam**, Art 5(1) of the 2008 Law on Quality of Products and Goods only envisages safety standards set separately by other regulators, because it refers simply to ‘announced applicable standards and relevant technical regulations’. This means the general consumer affairs regulator cannot set even information/labelling standards (as the OCPB can arguably do in Thailand, at least for products other than foods that are exclusively regulated by other government departments) or other types of minimum safety standards (as under s19 of Malaysia’s 1999 Act, except for foods and healthcare products). Viet Nam’s legislation limits powers to banning unsafe goods, for example, under Art 8(1).

Viet Nam’s Consumer Protection Law 2010 does not add any further powers in respect of mandatory minimum safety-setting, although other specific legislation and/or informal inter-agency collaboration may allow involvement of the Viet Nam Competition Authority. Leaving standard-setting activity exclusively or predominantly to other government bodies in this manner is particularly problematic if consumer NGOs involved in safety-setting (such as Vinastas) lack resources and capacity. However, as mentioned briefly above, Art 22 does require manufacturers and importers to recall any ‘defective product’ (defined in Art 3(3)) that threatens harm to health or property, by specified public media announcements, and after completion to report to relevant local consumer regulators.³⁵ Under Decree 80 of 2013, goods subject to such recall include goods that are unsafe for

³⁴ At <http://www.spring.gov.sg/Building-Trust/Raising-Confidence/Consumer-Product-Safety/CGSR-Regulations/Pages/cgsr-regulations.aspx>.

³⁵ There still appear to be some difficulties with enforcement. For example, Canon initially conducted a recall of its Powershot SX50 HS camera (with a viewfinder which could cause allergic reactions) instead only via its own website, until the regulator queried this and Canon announced a recall via the public media specified in the 2010 Law. Once recalls are notified in this way or after completion, the regulator generally announces them also via its own website.

consumers (generally), as well as those whose quality does not conform with certified standards or applicable technical regulations.³⁶

A similar gap regarding minimum safety standard-setting arises in **Myanmar** under the Consumer Protection Act 2014. Fieldwork found that this legislation was developed by consumer affairs officials within the Ministry of Commerce from 2008, based primarily on similar statutes in Thailand, Malaysia and Indonesia as well as the (then 1985) UN Guidelines.³⁷ A working committee included representatives from other government departments, the private sector, etc. After forums and workshops, consumer affairs officials provided a draft Bill to the Attorney-General's Office in 2010, which was amended by a committee and submitted to the Cabinet Office in 2012. A Bill was submitted to parliament in 2013 (when the Consumer Affairs Division was created), and further amended before enactment on 14 March 2014.

Under this new law, the Consumer Dispute Settlement Body (being gradually established at regional and local levels) can take enforcement action against non-compliant suppliers if a central committee sets out such duties (s17(d)), presumably especially with respect to prohibitions on suppliers intentionally misleading consumers (s9) or otherwise deceiving them (e.g. by concealing defects or selling adulterated goods: s10). Violation of s9 — but not, seemingly, s10 — attracts criminal sanctions (s23, which also allows consumers to bring separate civil actions before the courts). Alternatively, if faced with a 'consumer dispute', the Consumer Dispute Settlement Body can take various actions if the supplier violates prohibitions under s8 (s18(f)), or (under s19) take the following actions for violations of that s8 or duties on suppliers set out in s7(b): issuing warnings, compensation orders, bans or mandatory recalls.

However, under s8(f) and (h), the prohibitions are only with respect to the supply of goods that do not conform with recommendations of local or foreign recognised departments and organisations or prescribed norms, or prescribed standard specifications. In addition, field work confirmed that if the Consumer Dispute Settlement Body issues a ban or recall of unsafe goods (say, under s7(b), which provides for warranties where set

³⁶ Other goods subject to such recalls are those violating labelling laws and certain barcodes. See Decree 80/2013/ND-CP of the Government dated 19 July 2013 on Administrative Sanctions against Violations in Standards, Measurements, and Quality of Products and Goods, Arts 18.5, 19.7, 25.3, 26.7 and 27.4.

³⁷ Comparing these guidelines, see Digest 21.

by prescribed specifications as well as a general requirement to provide correct information about goods), this only applies to the specific goods and the supplier involved in the consumer dispute. A broader ban on that type of product, or the setting of minimum safety standards for future supplies, would be the responsibility of any sectoral regulator. The Consumer Protection Act therefore does not presently allow for Myanmar's general consumer affairs regulatory bodies to set minimum standards (as in Malaysia, except for foods or healthcare products) or ban entire categories of unsafe consumer goods that cause harm to consumers (as in Malaysia or Thailand).

3.2 Possible improvements

ASEAN Member States like Myanmar, Viet Nam, Thailand (especially with respect to standards other than information or warning standards) and others with similar regimes as indicated in Appendix A (such as Cambodia and Laos) should therefore consider *expanding powers for general consumer regulators to be involved in standard-setting activities*. As under s19 of Malaysia's 1999 Act, they should be able to take the lead, even while drawing on the expertise of more specialist government authorities, in case those cannot act quickly enough to address pressing consumer safety concerns or lack jurisdiction under their own specific laws. If necessary (e.g. a lack of resources and technical capacity on the part of the general consumer product safety regulator), exclusions can be made for specific products such as foods and healthcare products. Even for such products, as under s21 of Malaysia's Act, ASEAN Member States should also consider imposing a GSP enforced by the general consumer regulator, requiring all consumer goods supplied to be reasonably safe.³⁸

Interestingly, under the Australian Consumer Law 2010 (and the preceding Trade Practices Act 1974), the Australian Competition and Consumer Commission has jurisdiction over all consumer goods, even though in practice it largely defers to the standard-setting activities of the regulators

³⁸ At the Manila workshop (mentioned in footnote 7 above), there was discussion for example about art 6 of Cambodia's Law on the Management of Quality and Safety of Products and Services (2000), which requires suppliers to obtain prior authorisation from relevant authorities before putting into circulation products that may harm consumers. However, this may not be the general consumer regulator and anyway, if the product is pre-approved, it may not be possible or appropriate to hold the supplier liable for circulating an unsafe product (as under s21 of Malaysia's Act, which does not require prior approval, only that all consumer goods be reasonably safe). Anyway, the Cambodian government is presently revising this 2000 Law, planning to substitute provisions with a Food Law and new Consumer Protection Law, due to come into effect from next year.

for foodstuffs. On this basis, the Commission was able to take the lead in banning konnyaku jelly snacks imported from Asia a decade ago, as they created a choking hazard.³⁹ By contrast, such products fell into a regulatory vacuum at that time in Japan: they were not contaminated, so not regulated by the health ministry under the Food Sanitation Act, nor were they covered by Japan Agricultural Standards legislation enforced by the Ministry of Agriculture. Partly due to this sort of problem, in 2009 a new independent Consumer Affairs Agency was established. It can take the lead in coordinating responses to unsafe goods such as bans of existing products and minimum safety standards for future supplies.⁴⁰

Greater involvement by general consumer regulators in safety-setting and enforcement activities, even in specialist fields such as foodstuffs or medicines, is important to ensure the consumer voice is heard, especially since such regulators also increasingly have powers to support consumer NGOs.⁴¹ This is particularly important in an era of growing cross-border liberalisation of goods and services, as outlined next.

4. International agreements balancing free trade with consumer protection

Already there exists considerable cooperation and harmonisation encouraged or required by international trade liberalisation treaties at multilateral, regional and bilateral levels, which consumer affairs officials and other stakeholders in ASEAN Member States should be aware of.

³⁹ See <https://www.productsafety.gov.au/content/index.phtml/itemId/971322>. Indeed, the Commission issued a tailored ban, only for jelly snacks smaller than 45mm, which is identical in effect to setting a minimum safety standard because larger snacks can still be supplied. Such tailored bans, targeting only certain sub-types of products, are not problematic in Australia because the Commission has regulatory powers to set minimum safety standards. By contrast, discussions in the Jakarta and Manila workshops (mentioned in footnote 7 above) confirmed that such tailored bans are not permissible in ASEAN Member States (such as Thailand) where the general consumer regulator has no power to set minimum safety standards.

⁴⁰ See Matsuo, Makiko, 'Restructuring Japanese Food Safety Governance' (4-2013) *European Food and Feed Law Review* 250.

⁴¹ However, fieldwork found that in Myanmar, none have yet been certified by the Central Committee under the 2014 Act – even the MCU. The latter has developed a more collaborative relationship with the government, compared to the Consumer Protection Association (see e.g. <http://www.mmmtimes.com/index.php/national-news/13868-food-and-drug-admin-shuns-consumer-protection-association.html>).

4.1 Multilateral, regional and bilateral treaty background

The starting point is the multilateral WTO system established in 1994,⁴² and in force for all member states.⁴³ Its General Agreement on Tariffs and Trade (originally agreed in 1947) provides for national treatment or non-discrimination between local and imported goods (Art III.4). This is subject to the importing state's capacity to introduce consumer protection measures 'necessary' to preserve human health, as long as these are not a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade (Art XX(b)) aimed instead at protecting local producers.

The WTO's more specific Agreement on the Application of *Sanitary and Phytosanitary* (SPS) Measures, added in 1994, provides further guidance.⁴⁴ The SPS Agreement *encourages harmonisation of food, animal and plant safety standards, especially by presuming that national measures on imports are compliant if they conform with specified international standards* (notably, the UN's Codex Alimentarius for foods: Art 3.2). The importing state can impose more stringent measures if it can show they are justified scientifically (Art 2.2), after a risk assessment (Art 5.1) based on scientific evidence (Art 5.2). The importing state can then set an appropriate level of protection (i.e. undertake risk management: Art 5.3), including discriminating against imported products as long as this is not more trade restrictive than necessary. An importing state must accept other members' SPS measures as equivalent, even if differing from their own or other states' measures trading in the same product, but only if the exporting state 'objectively demonstrates' that its measures achieve the importing state's appropriately-set level of SPS protection (Art 4). Similar provisions apply for non-SPS measures imposed by import states (e.g. on manufactured goods) under the WTO's Technical Barriers to Trade (TBT)

⁴² For a succinct summary, see Epps, Tracey and Trebilcock, Michael, 'Import Safety Regulation and International Trade', in Cary Coglianese, Adam M. Finkel, and David Zaring (eds.), *Import Safety: Regulatory Governance in the Global Economy* (University of Pennsylvania Press, Philadelphia, 2009) 69 at pp70-73.

⁴³ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Laos became a member from 2 February 2013).

⁴⁴ It is to be applied before assessments of measures under GATT, if violations of both Agreements are alleged in the WTO's inter-state dispute settlement procedure.

Agreement, but there is no presumption of conformity from adhering to standards set by specified bodies.⁴⁵

In terms of regional arrangements, harmonisation of regulatory standards is more developed within the EU. Since the European Court of Justice's decision in the *Cassis de Dijon* case in 1979, the 1958 Treaty of Rome was interpreted as requiring any EU member state to allow access for any imported product that complies with regulatory standards set by the exporting state. In other words, national standards were deemed equivalent, and the starting point is 'mutual recognition' of standards (or 'negative harmonisation'). However, there is an exception when the importing state can justify higher regulatory standards under a mandatory requirement (such as consumer protection) and apply them under the proportionality principle, without discrimination. This has led, in parallel, to an active program of 'positive harmonisation' establishing joint minimum regulatory standards for general and specific types of consumer goods, ranging from foodstuffs through to manufactured and other goods covered by 'horizontal' measures such as the GPSD.⁴⁶

Despite Art 4 of the SPS Agreement providing for WTO member states to conclude further bilateral or regional agreements actively acknowledging equivalence in national standards and therefore mutual recognition, until recently this has happened only rarely.⁴⁷ One view was that such agreements can really only be expected among developed countries.⁴⁸ However, as FTAs have begun to proliferate (especially from the late 1990s), we are starting to see more treaty provisions that promote such mutual recognition arrangements, as well as other technical and institutional cooperation measures related to human health and safety, including:

⁴⁵ Arguably this refers to more scope for divergent national interests with respect to regulation of goods other than foodstuffs and agricultural products, where WTO members are often both exporters and importers. The Codex standard-setting process has also been relatively depoliticised, and dominated by scientists and other food experts, although this has been evolving. See Braithwaite, John and Drahos, Peter, *Global Business Regulation* (Cambridge University Press, Cambridge, 2000) pp400-3

⁴⁶ See further Nottage, Luke, 'Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era' (2011) *Sydney Law School Research Paper* 09/125, <http://ssrn.com/abstract=1509810>.

⁴⁷ See e.g. Epps, Tracey, *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement* (Elgar, 2008) p125, noting that only (i) Brazil reported in 2005 that it and three other South American states had established from 1996 a committee that had generated a single health certificate for fisheries products traded among themselves, and (ii) Egypt in 2006 reported contacting some trading partners to establish quarantine offices for more efficiently testing and inspecting products.

⁴⁸ Swinburn, A, 'The Role of the WTO and the International Agencies in SPS Standard Setting' (1999) 15(3) *Agribusiness* 323.

- product control, inspection and approval procedures
- enhanced transparency around SPS measures
- identification and early resolution of SPS-related problems among treaty partners
- recognition of pest- or disease-free areas
- encouragement of bilateral coordination on SPS issues discussed in multilateral forums (e.g. the Codex)
- exchange of information and personnel or capacity building for regulators.

Such avenues typically are to be pursued through a (sub-)committee comprising officials from the treaty partners, meeting at least once a year and reporting to a higher-level committee that includes relevant ministers.⁴⁹

Similar provisions for regulatory cooperation are also now being included in TBT chapters of FTAs, in conjunction with or resulting in some specific arrangements (notably, electrical equipment conformity assessment).⁵⁰ Regionally, albeit on a non-treaty voluntary basis, the Asia-Pacific Economic Forum (APEC) also promotes a scheme for conformity assessment of regulated electrical equipment, although only Australia, Brunei, New Zealand and Singapore so far go beyond the 'information exchange' aspect to cooperate on mutual recognition of test reports and certification.⁵¹ Most ASEAN member states and ASEAN itself also participate in APEC mutual recognition schemes for telecom products with respect not only to conformity assessment (since 1999) but also equivalence of technical standards (since 2010).⁵² The Australia-Singapore Mutual Recognition Agreement on Conformity Assessment, in effect from 2001, also enables

⁴⁹ Epps T, 'Regulatory Cooperation and Free Trade Agreements', in Susy Frankel and Meredith Kolsky Lewis (eds) *Trade Agreements at the Crossroads* (London: Routledge, 2014) 141 at pp152-5 (referring to the Canada-Costa Rica FTA signed in 2001, and the Chile-Mexico FTA signed in 1998, and the US-Chile FTA signed in 2004).

⁵⁰ Ibid, p155 (outlining provisions in the NZ-China FTA signed in 2008, requiring e.g. work programmes on exchange of information, including product bans and recalls); Nottage (2014), above n 3 at p130 (noting that FTA's Annex 14 on electrical goods, requiring CCC results in China to be recognised in NZ and allowing NZ certification bodies to be accredited in China; as well as the broader EU-NZ Mutual Recognition Agreement allowing NZ exporters to apply CE marks since 1999).

⁵¹ See http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Sub-Committee-on-Standards-and-Conformance/apec_eemra.aspx.

⁵² See http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Telecommunications-and-Information/APEC_TEL-MRA.aspx.

‘conformity assessment (testing, inspection and certification) of products and of manufacturers of products intended for export to the other party’s territory to be undertaken in the country of export, thereby reducing non-tariff (technical and regulatory) barriers to trade between the countries’.⁵³

In terms of bilateral FTAs involving ASEAN Member States, one of the first FTAs signed by Singapore (in 2003) was also the first-ever treaty concluded by Australia, involving extensive provisions related to both TBT and SPS measures. In particular, Chapter 5 (on Technical Regulations and SPS Measures) requires both states to, for example:

- ‘endeavour to work towards harmonisation of their respective mandatory requirements’ (Art 4)
- ‘give favourable consideration to accepting [their] equivalence’ (Art 5.1)
- ‘accept the equivalence of the mandatory requirements, and/or the results of conformity assessment and approval procedures, of the other party in accordance with the respective sectoral annex’ (Art 5.2)
- ‘endeavour to develop a work programme and mechanisms for co-operative activities in the areas of technical assistance and capacity building to address plant, animal and public health and food safety issues of mutual interest’ (Art 6.1).

Further details on sectoral annexes are provided in Art 5.3 and Art 10, including a safeguard provision for suspending such arrangements if ‘urgent problems of safety, health, consumer or environmental protection or national security arise or threaten to arise’ (Art 10.4). However, although a Sectoral Annex on Food Products was agreed in 2005, determining equivalence for mutual recognition is similar to the WTO’s SPS Agreement, so its main benefit appears to be in enhancing informationsharing between the designated national regulators, especially regarding joint standard-setting.⁵⁴

⁵³ At <http://www.industry.gov.au/industry/IndustryInitiatives/TradePolicies/TechnicalBarrierstoTrade/Pages/Australia-SingaporeMutualRecognitionAgreementonConformityAssessment.aspx> (as well as electrical and telecom products, it ‘also covers the manufacturing process for products in the medicinal products sector, rather than the products themselves, known as Good Manufacturing Practice ...’). For other mutual recognition arrangements involving Australia, see e.g. <http://www.acma.gov.au/Industry/Suppliers/Supplier-resources/Mutual-Recognition-Agreements/mutual-recognition-arrangements-equipment-regulation-i-acma>.

⁵⁴ Documents available at <http://www.dfat.gov.au/trade/agreements/safta/Pages/singapore-australia-fta.aspx>; compare e.g. the Annex’s Art 3.1.1 with SPS Agreement Art 4 (the applicant state must still ‘objectively demonstrate’ equivalence of its regulations with the other state’s regulations).

Similar provisions can be found, for example, in the Australia-Thailand FTA (signed in 2005),⁵⁵ namely:

- ‘endeavouring’ to harmonise SPS and other food or agricultural standards (Art 605)
- mutual recognition of equivalent national regulations, albeit but following WTO and international institutional procedures (Art 606)
- enhancing broader information exchange and cooperation among respective regulators (Art 609), including by means of a joint ‘expert group’ meeting at least annually (Art 609).

Chapter 5 of the ASEAN-Australia-NZ FTA (signed 2009)⁵⁶ is generally similar, although it does not require at least annual meetings of a joint ‘SPS Sub-Committee’ (Art 10). However, it adds procedures facilitating early resolution of SPS disputes among states (Art 9), as well as providing that a state ‘shall upon request enter into negotiations with the aim of achieving bilateral recognition arrangements of the equivalence’ of specified SPS measures (Art 5). The impact of such a requirement, however, is lessened because the entire SPS chapter is not subject to the enforceable inter-state dispute settlement provisions of this FTA (Art 610). This is also a feature of other SPS chapters in FTAs concluded by ASEAN or by its member states with third countries, including Australia.⁵⁷

As member states’ regulators become familiar with such treaty provisions, and begin collaborating more regularly and closely with counterparts within and beyond ASEAN, a *supranational food safety standard-setting body may become feasible*—at least in some fields. This body could draw on international standard-setting activities through the Codex Alimentarius and a growing set of other international institutions, including within the Asian region.⁵⁸

An interesting reference point for future cooperation among ASEAN Member States is the trans-Tasman standard-setting agency for foodstuffs,

⁵⁵ <http://dfat.gov.au/trade/agreements/tafta/Pages/thailand-australia-fta.aspx#documents>.

⁵⁶ <http://www.dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/official-documents.aspx>.

⁵⁷ See also the Malaysia-Australia FTA (signed 2012), at <http://www.dfat.gov.au/trade/agreements/mafta/Pages/malaysia-australia-fta.aspx#documents>.

⁵⁸ See Digest 20.

now known as Food Standards Australia New Zealand (FSANZ).⁵⁹ The latter develops standards for composition, labelling and contaminants for foodstuffs produced or imported for sale in Australia and New Zealand. However, FSANZ sets bi-national standards (through a Food Standards Code) primarily regarding labelling and composition of foods; it only deals with specified chemical and microbiological standards and pre-market assessments with respect to novel foods (such as genetically modified or irradiated foods). Otherwise, there remains national development and implementation of food regulations for food safety, primary production and maximum residue levels for agricultural and veterinary chemicals, in the shadow of international obligations under the WTO and any relevant FTAs. Each country also separately regulates the import and export of food, manages food emergencies, and implements the code.

4.2 Non-treaty harmonisation mechanisms

In addition, even without formal treaty commitments and implementation through FTAs or other international agreements, individual ASEAN Member States with increasing close trade and political ties may consider another approach to harmonisation: parallel legislation enacted in each member state. On this basis, Australia and New Zealand have a (non-treaty) Trans-Tasman Mutual Recognition Arrangement, now applicable to most consumer goods.⁶⁰ Interestingly, moreover, ASEAN has already gone one step further down this path in the area of cosmetics regulation. In 2003, member states signed the 'Agreement on the ASEAN Harmonized Cosmetics Regulatory Scheme'. This set up a framework for mutual recognition agreements, but this was envisaged as a temporary step towards implementing a harmonised 'ASEAN Cosmetics Directive' regime by 2008. The directive, based on the EU's 1976 Cosmetic Directive (including its listing of permitted and prohibited ingredients for cosmetics) but allowing for some variations, has been enacted in all ASEAN member states since 2013, including developing countries like Myanmar.⁶¹

There is considerable scope to expand 'positive harmonisation' initiatives such as the ASEAN Cosmetics Directive into other areas, such as toy

⁵⁹ See <http://www.foodstandards.gov.au/about/Pages/default.aspx>; and Nottage (2011) op cit. FSANZ evolved out of Australian legislation and a small national body in 1991, and then the bilateral Agreement Concerning a Joint Food Standards System concluded in 1995 (and amended in 2002).

⁶⁰ Nottage (2011) op cit.

⁶¹ See Digest 22.

safety regulation, especially where the EU or other bodies have well-established harmonised schemes. Mutual recognition agreements (or ‘negative harmonisation’), subject to incident information sharing and safeguard mechanisms if imported products should turn out to cause or risk serious harm to consumers, should be more actively pursued, especially in developing country ASEAN Member States dependent on imports from other member states that already have high-quality regulatory regimes. Regulatory authorities can already take advantage of possibilities that exist under multilateral, regional and bilateral arrangements, like those outlined above.

However, even if such arrangements are sector-specific and primarily involve particular national regulators and peak associations (as with foods or cosmetics), *it is important for the general consumer affairs regulators to be involved in standard-setting and other implementation activities*. This is primarily because:

- general consumer affairs regulators in ASEAN Member States, even if they typically lack jurisdiction to set safety standards in particular areas, have powers or shared responsibilities to ban or recall unsafe products that do or may cause harm to consumers⁶²
- they may have powers to bring representative actions (e.g. under strict product liability laws in Thailand) or can help mediate disputes (as in Myanmar) for individual consumers that suffer harm even from products subject to standard-setting by other specific regulators.

Accordingly, consumer affairs regulators need to (and often do already) develop technical capacity in such fields. They can also help ensure that consumer concerns are adequately reflected in safety-setting activities, especially as experts in consumer behaviour (including e.g. how consumers react to labelling instructions or warnings). Such involvement is increasingly important given that international treaties and arrangements have an (understandable) emphasis on minimising barriers to cross-border trade. However, some consumer groups are increasingly worried that new-generation treaties (such as the expanded Trans-Pacific Partnership FTA) will undermine consumer protection.⁶³

⁶² They also are the main contact points for implementing the ASEAN Products Alerts website portal for voluntary and mandatory recalls, which include reports of products (such as automobiles or cosmetics) covered mainly by sector-specific regimes: see <http://www.aseanconsumer.org/alerts/>.

⁶³ See e.g. <https://www.choice.com.au/consumer-advocacy/campaigns/trans-pacific-partnership>.

Nonetheless, field work for this case study found that the general consumer affairs regulators in Myanmar and even in Thailand (OCPB) were not yet well-informed — let alone involved — with respect to standard-setting or broader work program meetings under SPS or TBT chapters of relevant bilateral or regional (intra-ASEAN and ‘ASEAN+’) FTAs.

5. Conclusions

Product liability law, outlined in Part 2, offers an indirect but important means of incentivising manufacturers and others to supply safe products to consumers. All ASEAN Member States should consider enacting strict liability regimes, drawing on the EU model, considering additional innovations (such as a reversed burden of proof for determining a safety defect) as found in the legislation enacted in the existing five member states. However, for such legislation to work effectively, procedural mechanisms must also be implemented. Provisions for representative actions by regulators or certified consumer NGOs are a useful first step, but very few such lawsuits have been filed in member states. Consideration should be given to opt-out class action procedures as well as special support for proceeding with consumer lawsuits either in general courts or specialist small claims courts or tribunals.⁶⁴

As for national consumer product safety legislation, outlined in Part 3, a possible area for reform involves ensuring that general consumer affairs regulators have at least back-up or coordinating powers to set minimum product safety standards for specific products.⁶⁵ Such powers can be supported by a GSP, requiring all goods supplied on the market to be reasonably safe as in Malaysia, following the EU approach. Since 2011, Singapore has had regulations similar to a GSP, in that general consumer products must comply with major international standards (plus any further

⁶⁴ Thailand’s experience shows that representative actions can make an impact, but they remain very rare in other member states (such as Indonesia and Viet Nam). Thailand has also added procedures facilitating consumer claims in regular courts, and recently an opt-out class action procedure aimed at collective redress, whereas other member states (such as Malaysia) still rely primarily on small claims courts or tribunals to adjudicate consumer disputes.

⁶⁵ For example, there are such powers in Thailand only for information or labelling standards (and even then not for certain categories of goods, notably foods). Viet Nam and Myanmar lack these powers altogether, leaving standard-setting to other bodies. A further problem is that Myanmar seems to envisage leaving bans over categories of goods (as opposed to bans or recalls of unsafe goods from a particular supplier subject to a consumer complaint or dispute) to specialist regulators. By contrast, Malaysia’s Consumer Protection Act allows for the general regulator to be involved not only in banning or recalling types of consumer goods, but also in taking the lead in setting minimum safety standards (except for foods and healthcare products).

requirements set by the general consumer regulator) or else national or regional standards. However, there are exceptions for types of products subject to sectoral regulators (such as foods, healthcare products and vehicles). Australia and, more recently, Japan go a step further in leaving consumer affairs authorities with coordinating roles, even in areas where specialist regulators exist, to allow for more rapid responses or to deal with possible gaps in specific laws.

The analysis in Part 4 shows that international treaties and other arrangements to promote cross-border trade in goods and services are increasingly important globally and for Southeast Asia. However, there is again scope for greater involvement by general consumer regulators in:

- negotiation of these arrangements, especially in the current generation of more expansive FTAs, to ensure that the consumer voice is well-reflected in their design (e.g. by encouraging or requiring safety incident information sharing among the regulators in each partner country)
- implementation of these arrangements, including not only when coordinating bans or recalls that may impact on imported products that cause health risks, but also in setting in advance appropriate minimum safety standards – even if there exists a specialist national regime or regulator in the member state with sole or primary jurisdiction for standard-setting for particular product types.

To manage this involvement, work program meetings required under proliferating FTAs should be sequenced efficiently. For example, meetings of SPS and TBT committees, including representatives from the general consumer affairs regulator in Thailand (OCPB), could take place on one day for the ASEAN Trade in Goods Agreement, the next day for at least some ‘ASEAN+’ FTAs (e.g. those with Australia/New Zealand, and with Japan), then most briefly on a third day with bilateral FTAs (e.g. the Thailand-Australia and Thailand-Japan FTAs). Such meetings can also then be used to support the development of accident information-sharing platforms, such as the ASEAN Product Alerts website.

Appendix A: General consumer product safety regulation – ASEAN Member States compared

All abbreviations are listed below. This only covers legislation dealing with the safety of general consumer products, as opposed to sector- or product-specific consumer product legislation. Most such ASEAN member state legislation is available also now in English at the 'Resource Database Section for ASEAN Countries' via <http://www.aseanconsumer.org/downloads/>.)

Feature	US	EU	Australia	Japan	China
Legislation	CPSA ('72)	GPSD ('01)	ACL ('10) (ex-TPA, '74)	CPSL ('73)	GPCL ('86), PQL ('93), PCRI ('93), SL ('88), RISL ('90), SSMSF ('07)
Main consumer protection regulator	CPSC	EC/states	Treasury/ACCC	CAA (ex-METI)	SAIC
General safety provision	-	'92	-	-	-
Specific safety standards	'72	'92	'74	'73	SL, RISL
Bans	'72	'92	'74	'73	PQL Art 29 ⁶⁶

⁶⁶ No producer may produce any product that has been eliminated by State orders.

Feature	US	EU	Australia	Japan	China
<i>Warnings</i>	'72	'92	'74	-	PQL Art 17 ⁶⁷
<i>Mandatory recalls</i>	'72	'92 (& 2001)	'86	'73	[Various laws]
<i>Voluntary recalls – disclosure</i>	-	-	'86	-	[See immediately below]
<i>Accident disclosure</i>	'72 (& '90 & 2008)	'01	2010	'96	SSMSF Art 9 ⁶⁸ (re food and other products)
<i>[cf strict product liability]</i>	'65 (but '98)	'85	'92 (& '86)	'94	'93 (elaborated in '09 ⁶⁹)

⁶⁷ Where the quality of a product is proved to be not up to standard after random checking is conducted in accordance with the provisions of this Law, the department for supervision over product quality that has conducted random checking shall order the producer and/or seller to improve it within a time limit. If the producer and/or seller fails to do so at the expiration of the time limit, the matter shall be announced by the department for supervision over product quality under the people's government at or above the provincial level; if the product quality fails to pass re-inspection conducted after the announcement, the producer shall be ordered to discontinue production and/or business operation for overhaul within a time limit; if again fails to pass another re-inspection conducted at the expiration of the time limit, the producer's and/or seller's business license shall be revoked. ...

⁶⁸ A production enterprise that finds any hidden safety risk in its produced products likely to cause damages to the human health and life safety shall make available to the public the relevant information, notify the sellers of cessation of sales, notify the consumers of cessation of use, and report on it to the relevant regulatory authorities; and the sellers shall immediately cease the sales of such products. A seller that finds any hidden safety risk in its sold products likely to cause damages to the human health and life safety shall immediately cease the sales of such products, notify the production enterprise or supplier, and report on it to the relevant regulatory authorities. ...

⁶⁹ See e.g. <http://www.chinabusinessreview.com/chinas-new-tort-law-dawn-of-the-product-liability-era/>.

Feature	Brunei	Cambodia	Indonesia	Laos	Malaysia
Legislation	[[n/a]]	LMQSPS ('00), CSL ('07), CC ('07)	CPL ('99), NSR (‘00)	LCP ('10)	CPA ('99), SMA (‘96)
Main consumer protection regulator	[[n/a]]	CCIQSPS	BPKN, BSN	CPCD	MDTCC, SIRIM
General safety provision	[[n/a]]	-	-	-	CPA s 19(4) ⁷⁰ and especially s 21 ⁷¹
Specific standards	[[n/a]]	cf LMQSPS Arts 3, 6 and 23 ⁷²	CPL Art 8(1) ⁷³	LCP Arts 12 ⁷⁴ , 13, ⁷⁵ 23 ⁷⁶	CPA s 19(1) ⁷⁷

⁷⁰ If no specific safety standard has been prescribed, a person who supplies or offers to supply the goods shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods concerned.

⁷¹ No person shall supply, or offer to or advertise for supply any goods which are not reasonably safe having regard to all the circumstances, including: the manner in which, and the purpose for which, the goods are being or will be marketed; the get-up of the goods; the use of any mark in relation to the goods; and the instructions or warnings in respect of the keeping, use or consumption of the goods.

⁷² Art 3 only requires suppliers to *display* on their products labels and other requirements to promote safety of consumers, before supply, while Art 23 allows competent ministries to force suppliers to modify their goods to ensure compliance with such labelling requirements. Art 6 only requires prior submission and authorisation from competent ministries if products or services ‘could harm the health or safety of consumers’.

⁷³ (1) The entrepreneurs are not allowed to produce and/or trade goods and/or services which: a. do not meet or accord with *the required standard and provisions of the law...*

⁷⁴ Production of goods must conduct *in accordance with the criteria, standards and principles strictly as define by the relevant sectors* in order to avoid the contamination, danger of the improperly production of goods, aims at ensuring of safety of the life, health, property, rights, benefits of the consumers and environment.

⁷⁵ Import, selling, and distribution of goods and rendering of services must comply with the *requirements, standards and approval by the relevant sectors in accordance with the laws* strictly in order to ensure the quality, safety, quickness, reasonable price and without unfair treatment to consumers.

⁷⁶ In the course of implementing the consumer protection activities, the industry and commerce sector has the central leading role to coordinate *with the relevant sectors* and has *responsibility focusing on the industrial and commercial fields* related to the manufacturing, marketing, price and services including but not limited to other fields that are under responsibilities of other sectors.

⁷⁷ (1) **The Minister may by regulations prescribe the safety standards** in respect of— (a) any goods or class of goods; and (b) any services or class of services, and may prescribe different safety standards for different goods or services, or classes of goods or services.

Feature	Brunei	Cambodia	Indonesia	Laos	Malaysia
<i>Bans</i>	[[n/a]]	LMQSPS Art 22 ⁷⁸	CPL Art 8(4) ⁷⁹	LCP Art 27(6) ⁸⁰	CPA s 23 ⁸¹
<i>Warnings</i>	[[n/a]]	cf LMQSPS Art 23 ⁸²	-	-	-
<i>Mandatory recalls</i>	[[n/a]]	LMQSPS Arts 22, 23	CPL Art 8(4) ⁸³	cf LCP Art 27(6) ⁸⁴	CPA s 23
<i>Voluntary recalls – disclosure</i>	[[n/a]]	-	-	-	-

⁷⁸ For manufacturing, processing, and commercialization of products, goods, and services which can cause grave or imminent danger to consumers' health or safety, the competent ministries can take the following orders: temporarily or permanently banning the sale of the product...

⁷⁹ Entrepreneurs who violate [Art 8] Section 1 [goods violating standards etc] and Section 2 [defective or tainted goods] above are prohibited from trading the said products.

⁸⁰ [Implementer organisations have powers] To seize or freeze goods, vessels or packages of goods, label or other incorrect documents, and make the records as evidence for further legal proceeding.

⁸¹ The Minister may, on the recommendation of the Controller, by order published in the Gazette, declare any goods or any class of goods to be prohibited goods where the goods or goods of that class have caused or are likely to cause injury to any person or property or is otherwise unsafe.

⁸² The competent ministries can issue a Prakas ordering legal and physical entities stipulated under Article 1 of this law to make the necessary modifications to meet the quality and safety requirements as stipulated under Article 3 of this law [but only re labelling: see above]. The expenses incurred in the publication of warnings or precautionary usage measures as well as the recall of defective products for modification or the partial or total refund of the purchase price shall be borne by the entities in the above paragraph.

⁸³ Art 8: (1) The entrepreneurs are not allowed to produce and/or trade goods and/or services which: a. do not meet or accord with the required standard and provisions of the law ... (2) Entrepreneurs are prohibited from trading damaged, defective or used and tainted goods without providing complete and correct information ... (4) Entrepreneurs who violate Section 1 and Section 2 above are prohibited from trading the said products and/or services and must pull the products from the circulation.

⁸⁴ [Implementer organisations have powers] To seize or freeze goods, vessels or packages of goods, label or other incorrect documents, and make the records as evidence for further legal proceeding.

Feature	Brunei	Cambodia	Indonesia	Laos	Malaysia
<i>Accident disclosure</i>	[[n/a]]	-	-		-
<i>[cf strict product liability]</i>	[[n/a]]	CC Art 75 ⁸⁵	CPL Art 19(1) ⁸⁶ but subject to Art 28 ⁸⁷ [so <i>fault-based liability</i> , subject to reversed burden of proof compared to Indonesian Civil Code provisions ⁸⁸ on negligence ⁸⁸		CPA ss 68 ⁸⁹

⁸⁵ Where an unreasonably dangerous defect exists in a manufactured movable and harm results to another due to such defect, the manufacturer of the movable is liable for damages. However, this shall not apply where the defect could not have been discovered based on the scientific standards existing at the time of manufacture.

⁸⁶ Entrepreneurs are obligated to give compensation for the damage, taint and/or losses the consumers suffer as a result of using or consuming the goods and/or services produced or traded by the entrepreneurs.

⁸⁷ The giving of evidence of faults in the compensation claims as referred to by Articles 19, 22 and 23 shall be the burden and responsibility of the entrepreneurs.

⁸⁸ See e.g. <http://www.iclg.co.uk/practice-areas/product-liability/product-liability-2015/indonesia> and <http://www.hnrlawyers.com/files/hhr-oct04.pdf>.

⁸⁹ (1) Where any damage is caused wholly or partly by a defect in a product, the following persons shall be liable for the damage:

- (a) the producer of the product;
- (b) the person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product; and
- (c) the person who has, in the course of his business, imported the product into Malaysia in order to supply it to another person. ...

Feature	Myanmar	Philippines	Singapore	Thailand	Viet Nam
Legislation	CPL ('14)	CA ('92)	SOGA ('93), CPTDSRA ('75), CPSRR ('02), CPCGSRR ('11)	CPA ('79), PLA ('08), CCPA ('08), IPSA ('68), NSA ('08)	LQPG ('08), LPCR ('10)
Main consumer protection regulator	CPCC (chaired by Minister of Commerce)	DTI	SPRING	OCPB	VCA
Main consumer protection regulator	CPCC (chaired by Minister of Commerce)	DTI	SPRING	OCPB	VCA
General safety provision	-	-	- (but CPCGSRR is very close: see Part 3.1 above)	-	-
Specific safety standards	CPL Art 8(h) ⁹⁰	CA Art 7 ⁹¹	CPTDSRA s11 ⁹² , CPCGSRR reg 4 ⁹³	CPA '79 Arts 30-33 ⁹⁴	LQPG Art 5(1) ⁹⁵

⁹⁰ The entrepreneur shall not carry out the production, trade of the followings: ... (h) goods that are not in conformity with the prescribed standards and norms.

⁹¹ The concerned department shall establish consumer product quality and safety standards which shall consist of one or more of the following:

- a) requirements to performance, composition, contents, design, construction, finish, packaging of a consumer product; b) requirements as to kind, class, grade, dimensions, weights, material; c) requirements as to the methods of sampling, tests and codes used to check the quality of the products; d) requirements as to precautions in storage, transporting and packaging; e) requirements that a consumer product be marked with or accompanied by clear and adequate safety warnings or instructions, or requirements respecting the form of warnings or instructions.

⁹² 11.—(1) The Minister may, if he considers it necessary or expedient for the purpose of protecting the safety of consumers, by regulations impose with respect to any prescribed class or description of goods —

- (a) requirements for securing that goods of that class or description should comply with those requirements whether as to composition or contents, design, construction, finish or packing as the Minister thinks fit; and
 - (b) requirements for securing that goods of that class or description should be marked with or accompanied by any information, warning or instruction, and control or prohibit the supply of goods with respect to which those requirements are not complied with.
- (2) Subject to the provisions of this Act, where regulations made under this section are in force with respect to any class or description of goods, any person who, in the course of any trade or business, supplies such goods in contravention of those regulations shall be guilty of an offence.
- (3) A contravention of the regulations made under this section by a person referred to in subsection (2) shall be deemed to be a breach of a statutory duty for which action may be brought by any other person who may be affected by the contravention.

⁹³ 4. For the purposes of regulation 3, the requirements shall be as follows:

- (a) Category 1 goods shall conform to —
 - (i) safety standards for such goods formulated or adopted and published by —
 - (A) ISO and IEC, respectively;
 - (B) the European Committee for Standardisation; or
 - (C) ASTM International; and
 - (ii) the safety standards and requirements for such goods specified by the Safety Authority and published in its Consumer Protection (Consumer Goods Safety requirements) Information Booklet;
- (b) Category 2 goods shall conform to the safety standards for such goods that have been formulated or adopted and published by any regional or national standards body.

⁹⁴ Under Art 30, the OCPB's Committee on Labels can goods to be 'label-controlled' if the labelling may cause physical or mental harm to consumers. Prescribed labels must then include only true and non-misleading statements (Art 31), but the supplier need not make disclosures unless needed for consumer safety (Art 32). If these labels are not affixed, the OCPB may order the supplier to cease circulation or rectify the goods (Art 33). This means the OCPB can set mandatory information or warning standards, but has no powers under the CPA to set other types of safety standards (e.g. re performance). Cf also e.g. IPSCA s 13: The Minister has the power to appoint qualified persons whom the Council submits under section 8 (5) members of one or several Technical Committees. The Technical Committee has the duty to prepare a draft standard and carry out other technical matters concerning the standard and submit to the Council. s.

⁹⁵ Product and goods quality shall be controlled on the basis of *announced applicable standards and relevant technical regulations*.

Feature	Myanmar	Philippines	Singapore	Thailand	Viet Nam
Bans	cf CPL Art 5(i) ⁹⁶	CA Art 10 ⁹⁷	cfCPTDSRA s11, ⁹⁸ CPSRR reg 18 ⁹⁹ , CPCGSRReg 3(1) (b)(i) ¹⁰⁰	CPA '79 Art 36 ¹⁰¹	LQPG Art 8(1) ¹⁰²

⁹⁶ But only 'informing the relevant departments and organizations to prohibit in respect of goods which are hazardous and not fit for consumption' (under separate legislation?). With regards to a specific dispute and supplier, however, Art 19(d) allows the Consumer Dispute Settlement Body to prohibit the sale and distribution of the disputed goods for a specified period.

⁹⁷ Whenever the departments find, by their own initiative or by petition of a consumer, that a consumer product is found to be injurious, unsafe or dangerous, it shall, after due notice and hearing, make the appropriate order for its recall, prohibition or seizure from public sale or distribution: Provided, That, in the sound discretion of the department it may declare a consumer product to be imminently injurious, unsafe or dangerous, and order is immediate recall, ban or seizure from public sale or distribution, in which case, the seller, distributor, manufacturer or producer thereof shall be afforded a hearing within forty-eight (48) hours from such order.

The ban on the sale and distribution of a consumer product adjudged injurious, unsafe or dangerous, or imminently injurious, unsafe or dangerous under the preceding paragraph shall stay in force until such time that its safety can be assured or measures to ensure its safety have been established.

⁹⁸ The minister may... control or prohibit the supply of goods with respect to which those requirements are not complied with.

⁹⁹ 18. — (1) The Safety Authority may suspend or prohibit the supply of any registered controlled goods —

(a) where the registered controlled goods do not or no longer conform to the safety requirements of the Safety Authority;

(b) where the registration of the registered controlled goods was obtained by the Registered Supplier in contravention of regulation 7(7);

(c) where the Registered Supplier has contravened, is contravening or is likely to contravene any condition imposed by the Safety Authority on the registration of the registered controlled goods;

(d) where the Registered Supplier has contravened, is contravening or is likely to contravene any provision in Part III or IV; or

(e) where the Safety Authority is entitled to do so under regulation 21 or 22.

¹⁰⁰ SPRING may direct any non-complying supplier to 'control or cease the supply by that person of such goods in Singapore'.

¹⁰¹ CPA Art 36 states:

When there is a reasonable cause to suspect that any goods may be harmful to the consumers, the Board may order the businessman to have such goods tested or verified. If the businessman does not proceed to test or verify the goods or delays in so doing without justification, the Board may arrange for the verification at the expenses of the businessman.

Feature	Myanmar	Philippines	Singapore	Thailand	Viet Nam
Warnings	cCPL Art 5(e)	-	CPCGSRR reg 3(1) (a) ¹⁰⁴	CPA '79 Art 10(3) ¹⁰⁵	-
Mandatory recalls	- ¹⁰⁶	CA Art 10	CPSRR regs 4 ¹⁰⁷ , 24 ¹⁰⁸ , CPCGSRR reg 3 ¹⁰⁹	CPA '79 Art 36	LQPG Arts 10(8) ¹¹⁰ , 10(9) ¹¹¹

¹⁰² If the result of the test or verification appears to be that the goods may be harmful to consumers and the harm which may be caused by the goods cannot be prevented by means of the requirement of the label under section 30 or under any other law, the Board shall have the power to prohibit the sale of such goods and, if it thinks fit, may order the businessman to modify the goods in accordance with the conditions prescribed by the Board. In the case where the goods cannot be modified or it is doubtful as to whether the businessman would keep the goods for sale, the Board shall have the power to order the businessman to destroy the goods or arrange for the destruction thereof at the expenses of the businessman.

¹⁰³ In case of necessity and urgency, if the Board has reason to believe that any goods may be harmful to the consumers, the Board shall have the power to prohibit the sale of such goods for the time being until the test or verification under paragraph one of paragraph two has been carried out. ...

¹⁰⁴ In addition, in specific disputes under CCPA Art 43:

In a consumer case, when the court adjudicates the case or strikes the case out of the case list, if the facts appear to the court that there are goods sold or remaining in the

¹⁰⁷ 4. — (1) No person shall, in the course of any trade or business, supply or advertise for the purpose of supply any controlled goods after the effective date specified in the First Schedule unless —

- (a) such controlled goods are registered controlled goods conforming to the safety requirements specified by the Safety Authority for those goods; and
 - (b) such controlled goods have affixed to them the Safety Mark in accordance with Part III.
- (2) Where any person contravenes paragraph (1), he shall be guilty of an offence under section 11(2) of the Act, and the Safety Authority may —
- (a) require such person to effect a recall of the controlled goods and keep the Safety Authority informed of the progress of such recall; and
 - (b) take such steps as may be necessary to inform users of the controlled goods of the potential danger of such goods.
- (3) Any person who fails or neglects to effect a recall of the controlled goods required by the Safety Authority under paragraph (2)(a) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 12 months or to both.
- (4) For the purposes of this regulation, 'registered controlled goods' does not include controlled goods whose registration is deemed to be suspended or withdrawn under regulation 24.

¹⁰⁹ 24. — (1) Where the supply of any registered controlled goods is suspended, the registration of those controlled goods shall be deemed to be suspended.

(2) Where the supply of any registered controlled goods is prohibited —

(a) the registration of those controlled goods shall be deemed to be withdrawn; and

(b) the Safety Authority may —

(i) require the Registered Supplier to effect a recall of the registered controlled goods and keep the Safety Authority informed of the progress of such recall; and

(ii) take such steps as may be necessary to inform users of the registered controlled goods of the potential danger of such goods.

(3) Where the supply of any registered controlled goods is suspended or prohibited —

(a) those controlled goods shall, for the period of the suspension or from the date of the prohibition (as the case may be), be dealt with under the Act or these Regulations in the same manner as unregistered controlled goods; and

(b) the Registered Supplier shall notify all suppliers who obtained those controlled goods from him, directly or indirectly, of the suspension or prohibition.

(4) A Registered Supplier who —

(a) fails or neglects to effect a recall of the registered controlled goods required by the Safety Authority under paragraph (2)(b)(i); or

(b) fails to comply with paragraph (3)(b), shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 12 months or to both.

¹⁰⁹ 3. — (1) If any consumer goods do not conform to the requirements of regulation 4, the Safety Authority may do any or all of the following:

(a) issue a public notice declaring such goods to be unsafe;

(b) direct any person who has, in the course of trade or business, supplied such goods in Singapore on or after 1st April 2011 to take such steps as may be necessary to —

(i) control or cease the supply by that person of such goods in Singapore; and

(ii) inform users of such goods supplied by that person of the potential danger of the goods.

(2) A public notice referred to in paragraph (1)(a) shall be issued by publishing it in at least 4 daily newspapers circulating in Singapore, one each published in the English, Malay, Chinese and Tamil languages.

(3) Any person who —

(a) on or after the day following the issue of a public notice declaring any consumer goods to be unsafe pursuant to paragraph (1)(a), supplies such goods in Singapore in the course of trade or business; or

(b) fails to comply with a direction under paragraph (1)(b), shall be guilty of an offence and shall be liable on conviction —

(i) to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 12 months or to both; and

(ii) in the case of a second or subsequent offence, to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 2 years or to both

¹¹⁰ To promptly stop production, notify such to concerned parties and take remedies when detecting that products or goods cause unsafety or fail to conform to announced applicable standards or relevant technical regulations.

¹¹¹ To withdraw and handle products and goods of poor quality. If the goods must be destroyed, to bear all costs of goods destruction and be liable for its consequences in accordance with law.

Feature	Myanmar	Philippines	Singapore	Thailand	Viet Nam
<i>Voluntary recalls – disclosure</i>	-	-	-	-	cfLQPG Arts 10(8); and LPCR Art 22 ¹¹²
<i>Accident disclosure (to regulator)</i>	-	-	-	-	-
<i>[cf strict product liability]</i>	-	CA Art 97 ¹¹³	-	PLA Arts 4 (liability if unsafe product) ¹¹⁴ and 5 (joint liability of suppliers) ¹¹⁵	LPCR Art 23(1) ¹¹⁶

¹¹² Responsibility for recalling defective goods

Upon detection of defective goods, organizations or individuals manufacturing or importing the goods shall:

1. Promptly take all necessary measures to stop the supply of defective goods in the market;
2. Inform publicly about the defective goods and the recovery of the goods by at least 05 consecutive issues of daily newspaper or 05 consecutive days through the radio or television in area where such goods are circulated with the following details:
 - a) Description of the goods to be recovered;
 - b) Reasons for recovery of the goods and warning on the risk of damage caused by the defects of the goods;
 - c) Time, place and way of recovery of the goods;
 - d) Time and mode of overcoming the defects of the goods;
 - e) The measures necessary to protect the interests of consumers in the course of recovery of the goods;
3. Implementation of the recovery of the defective goods in line with the publicly-informed content and bear the expenses incurred in the recalling process;
4. Reporting the results to the provincial state management agency for the protection of consumers' interests where the recovery of the defective goods take place after

¹¹³ Article 97. Liability for the Defective Products

– Any Filipino or foreign manufacturer, producer, and any importer, shall be liable for redress, independently of fault, for damages caused to consumers by defects resulting from design, manufacture, construction, assembly and erection, formulas and handling and making up, presentation or packing of their products, as well as for the insufficient or inadequate information on the use and hazards thereof.

A product is defective when it does not offer the safety rightfully expected of it, taking relevant circumstances into consideration, including but not limited to:

- a) presentation of product;
- b) use and hazards reasonably expected of it;
- c) the time it was put into circulation. A product is not considered defective because another better quality product has been placed in the market. The manufacturer, builder, producer or importer shall not be held liable when it evidences:
 - that it did not place the product on the market;
 - that although it did place the product on the market such product has no defect;
 - that the consumer or a third party is solely at fault.

¹¹⁴ ...

‘Unsafe product’ means products that cause or may cause damage, regardless of whether it was caused by negligence during the production process or the design process.

¹¹⁵

All entrepreneurs shall be jointly liable for damages occurring to the damaged party from an unsafe product sold to the consumer. This shall apply to intentional damages or damages arising from the negligence of the entrepreneurs.

¹¹⁶

Business individual, organization has the obligation to compensate damages caused by their defective product with regard to lives, health, and assets of consumers, even in case traders do not know or have no fault in causing defect ...

Abbreviation	State	Law
ACL	Australia	Australian Consumer Law 2010
CA	Philippines	Consumer Act 1992 (Republic Act No. 7394)
CC	Cambodia	Civil Code 2007
CCPA	Thailand	Consumer Case Procedure Act 2008
CPA	Malaysia	Consumer Protection Act 1999
CPA '79	Thailand	Consumer Protection Act 1979 (BE 2522)
CPCGSRR	Singapore	Consumer Protection (Consumers Goods Safety Requirements) Regulations 2011
CPL	Indonesia	Consumer Protection Law (Law No 8/1999)
CPL	Myanmar	Consumer Protection Law (Law No 10/2014)
CPSA	United States	Consumer Product Safety Act 1972
CPSL	Japan	Consumer Product Safety Law (No 31, 1973)
CPSRR	Singapore	Consumer Protection (Safety Requirements) Regulations 2002
CPTDSRA	Singapore	Consumer Protection (Trade Descriptions And Safety Requirements) Act 1975
CSL	Cambodia	Cambodian Standards Law 2007
GPCL	China	General Principles of the Civil Law 1986
GPSD	European Union	General Product Safety Directive (2001/95/EC)

Abbreviation	State	Law
IPSA	Thailand	Industrial Product Standards Act BE 2511 (1968)
LCP	Laos	Law on Consumer Protection (No. 02/NA)
LMQSPS	Cambodia	Law on the Management of Quality and Safety of Products and Services 2000
LPCR	Viet Nam	Law on Protection of Consumers' Rights 2010
LQPG	Viet Nam	Law on Quality of Products and Goods, No 05/2007/QH12 (2007)
NSA	Thailand	National Standardisation Act BE 2551 (2008)
NSR	Indonesia	National Standardization Regulation (Reg No 102/2000)
PCRI	China	Law on Protection of Consumer Rights and Interests 1993
PLA	Thailand	Product Liability Act 2008
PQL	China	Product Quality Law 1993
RISL	China	Regulations for the Implementation of the Standardization Law 1990
SL	China	Standardization Law 1988
SMA	Malaysia	Standards of Malaysia Act 1996
SOGA	Singapore	Sale of Goods Act 1993
SSMSF	China	The Special Rules of the State Council on Strengthening the Supervision and Management of the Safety of Food and Other Products 2007
TPA	Australia	Trade Practices Act 1974

Abbreviation	State	Regulator
ACCC	Australia	Australian Competition and Consumer Commission
BPKN	Indonesia	National Agency for Consumers' Protection
BSN	Indonesia	National Standardization Agency
CAA	Japan	Consumer Affairs Agency
CPCD	Laos	Consumer Protection & Competition Division (Ministry of Industry and Commerce)
CCIQSPS	Cambodia	Inter-ministerial Committee for Coordinating the Inspection of Quality and Safety of Products and Service
CPCC	Myanmar	Consumer Protection Central Committee
CPSC	US	Consumer Product Safety Commission
DTI	Philippines	Department of Trade & Industry
EC	EU	European Commission
MDTCC	Malaysia	Ministry of Domestic Trade, Co-operatives & Consumerism
METI	Japan	Ministry of Economy, Trade and Industry
NSC	Thailand	National Standardization Council
OCPB	Thailand	Office of the Consumer Protection Board
SAIC	China	State Administration for Industry & Commerce
SIRIM	Malaysia	Standards and Industrial Research Institute of Malaysia
SPRING	Singapore	Standards, Productivity and Innovation Board
VCA	Viet Nam	Viet Nam Competition and Consumer Agency



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