

## Regulatory Guide 7

### The Application of the Australian Consumer Law to Lawyers

Version 3, 16 September 2013

## About this guide

We have published this guide to help lawyers and users of legal services alike better understand how the Australian Consumer Law (the ACL) applies to lawyers and their provision of legal services, to help lawyers avoid complaints that their provision of legal services falls short of their obligations under the ACL and to set out the factors we take into account in dealing with related complaints.<sup>1</sup> You can use this guide to find out about the obligations the Australian Consumer Law (the ACL) places on lawyers and the rights it gives to consumers.<sup>2</sup>

## This guide covers

1. What is the Australian Consumer Law?
2. Does the Australian Consumer Law apply to lawyers?
3. How does the Australian Consumer Law relate to the *Legal Profession Act 2007* (Qld)?
4. What provisions of the Australian Consumer Law are relevant to lawyers?
5. Does a breach of the Australian Consumer Law come within the jurisdiction of the Legal Services Commission?
6. Who regulates the Australian Consumer Law as it applies to lawyers?
7. How the Australian Consumer Law applies to lawyers – in summary.

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<sup>1</sup> Please refer to *Regulatory Guides: An Overview* (the Overview) for further information about the regulatory guides and what we hope to achieve by publishing them. The Overview is published on the Regulatory Guides page of the Commission's website ([www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)). We note that we 'hope and intend that the guides will help lawyers avoid complaints, help promote adherence to high professional standards and help prevent non-compliance, especially inadvertent non-compliance by that vast majority of lawyers who want to do the right thing.' We hasten to add, however, that the guides 'are not, nor can they ever be binding.' We explain that 'the Commission is responsible for promoting, monitoring and enforcing appropriate standards of conduct in the provision of legal services, not for setting them. The standards are set in laws enacted by parliaments, in the judgments of the disciplinary bodies and the courts and in the conduct rules developed by the professional bodies.' We are very clear that the guides simply 'set out the factors we take into account in exercising our regulatory responsibilities in grey areas where it is uncertain how a lawyer's professional obligations apply.' This is no more than lawyers and users of legal services are entitled to expect of a transparent and accountable regulator. Nothing is set in stone, however. We recognise that the disciplinary bodies and the courts are constantly shedding new light on hitherto grey areas of professional responsibility, and similarly parliaments and the professional bodies through new and amended legislation and conduct rules. Clearly in those eventualities we will revise and update our guides accordingly.

<sup>2</sup> We have prepared the guide having regard to the submissions we received in response to the consultation draft of the guide we published with our E-Newsletter 3 of 2011 on 5 December 2011. The consultation draft and the submissions we received in response can also be accessed on the Consultations page of our website. We are very grateful to the practitioners and others who made submissions. The guide is a much better document for their contribution. We are especially grateful to Elizabeth Shearer for her invaluable assistance in helping prepare this shorter, "plain English" version of a much longer and more detailed legal advice, and to Simon Cleary, barrister, for his helpful comments on earlier versions and suggested improvements. The LSC accepts full responsibility however for any remaining errors or omissions.

The guide addresses how the ACL applies to the provision of legal services. There is a range of very helpful information about how the ACL applies to the provision of goods and services more generally which can be accessed on the ACL website ([www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)) or the website of the Queensland Office of Fair Trading ([www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au)).

## 1. What is the Australian Consumer Law (the ACL)?

The Australian Consumer Law (ACL) is consumer protection law that applies Australia-wide. The majority of provisions commenced on 1 January 2011. Before this, there were different consumer protection laws in each state and territory,<sup>3</sup> and the Commonwealth<sup>4</sup> also had consumer protection laws.

Many of the familiar consumer protections from the old laws have been retained, for example the law that bans “misleading or deceptive conduct”. There are also new protections, like the law against unfair terms in contracts.

## 2. Does the ACL apply to lawyers?

Although there has been some doubt in the past about whether consumer protection laws applied to professions, the ACL is clear that it covers “any business or professional activity”. In our view, this puts it beyond doubt that the ACL applies to lawyers.<sup>5</sup>

The ACL applies to barristers and solicitors, although some aspects will impact differently because of the different ways in which barristers and solicitors contract to provide services.

The ACL applies to all legal practices, whether they are:

- Incorporated Legal Practices
- Partnerships or
- Sole Practices.

The ACL applies to all stages of providing legal services, including:

- advertising, promotion and negotiations about providing legal services
- the client agreement or contract to provide legal services
- the actual provision of the services, and
- billing.

## 3. How does the ACL relate to the *Legal Profession Act 2007* (Qld)?

The ACL is ‘generic’ consumer protection legislation. The *Legal Profession Act 2007* (LPA) is specialist consumer protection legislation directed solely to the regulation of lawyers and the provision of legal services and related matters. The ACL complements and sits side by side with the LPA, both governing the conduct of lawyers.

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<sup>3</sup> In Queensland, general consumer protection laws are found in the *Fair Trading Act 1989* as amended to incorporate the ACL.

<sup>4</sup> The Commonwealth consumer protection laws were found in the *Trade Practices Act 1974*. This Act has now been renamed the *Competition and Consumer Act 2010*. Schedule 2 is known as the Australian Consumer Law.

<sup>5</sup> The definition of “trade or commerce” in section 2 of the Australian Consumer Law has been expanded from that contained in the Trade Practices Act and explicitly includes “any business or professional activity”. In our view this settles any residual doubt there may have been about the applicability of the Australian Consumer Law to the activities of lawyers. The Australian Competition and Consumer Commission (the ACCC) clearly believes this to be the case as is evident from its publication *Professions and the Competition and Consumer Act* which can be accessed on the Publications page of the ACCC website at [www.accc.gov.au](http://www.accc.gov.au)

The ACL applies as a law of Queensland and as a law of the Commonwealth of Australia. Where remedies are available under the LPA and the ACL it is necessary to think about whether the ACL applies as a law of Queensland or a law of the Commonwealth.

We discuss how the ACL and the LPA intersect in more detail under headings 5 and 6, below, but the following table summarises the situation for lawyers operating in Queensland:

	LPA applies	ACL applies as law of Queensland	ACL applies as law of Commonwealth
<b>Barristers</b>	Yes	Yes	Only in limited circumstances <sup>6</sup>
<b>Sole practitioners</b>	Yes	Yes	
<b>Partnerships</b>	Yes	Yes	
<b>Incorporated Legal Practices</b>	Yes	Yes	Yes

## 4. What provisions of the ACL are relevant to lawyers?

### 4.1 Consumer guarantees

The ACL contains consumer guarantees.<sup>7</sup> This means that lawyers guarantee to consumers (that is to say, either individuals who are acquiring the lawyers' services wholly or predominantly for personal, domestic or household use or consumption<sup>8</sup> or businesses that are purchasing services for a value of \$40,000 or less) that the legal services:

- are rendered with due care and skill
- are reasonably fit for their purpose, and of a quality that the client might reasonably expect will achieve the result they wished the services to achieve (having made that wish known to their lawyer)
- are supplied within a reasonable time.

These guarantees may form the basis of a consumer complaint about a lawyer's competence and diligence or quality of service.

### 4.2 Component Pricing

Section 48 of the ACL prohibits a person who makes a representation about the price of a good or service from representing a component of the price without also and at the same time prominently specifying the total, single figure price someone must pay to obtain the good or service (to the extent that the single figure price is quantifiable at the time the representation is made).

Section 48 is similar (but not identical) to section 53C of the former *Trade Practices Act*. It does not prohibit component pricing. Rather, it requires someone who advertises a component price of a good

<sup>6</sup> The application of the ACL as a law of the Commonwealth extends beyond corporations to individuals in some limited circumstances by virtue of section 6 *Competition and Consumer Act 2010* (CCA).

<sup>7</sup> Sections 60-62, ACL.

<sup>8</sup> The term "consumer" is defined at section 3 of the ACL.

or a service (such as the cost of his or her professional services) to clearly and unambiguously spell out the total price someone has to pay to buy the good or service.<sup>9</sup>

Thus lawyers who provide legal services to which the ACL applies must ensure that their advertising (on websites, for example) and any other representations they make about their costs include their single figure 'all up' GST-inclusive costs including any compulsory fees and charges. More information about the component pricing provisions under the ACL is available at [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au).

### 4.3 Misleading and deceptive conduct

Section 18 of the ACL is headed "Misleading or deceptive conduct" and says at subsection (1) that "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The section is the keystone of the ACL. It is similar to section 52 of the former *Trade Practices Act* but extends its application to include natural persons. It applies generally to lawyers at all stages of the lawyer-client relationship, whether or not the client fits the definition of "consumer".

The prohibition has wide impact, and the term "misleading or deceptive" is given its ordinary meaning. Conduct is misleading or deceptive if it leads, or is capable of leading, a person into error.<sup>10</sup>

It is irrelevant whether there was an intention to mislead or deceive. Section 18 is not limited to misrepresentations. Other conduct (including silence) may amount to misleading or deceptive conduct.<sup>11</sup>

The application of section 18 to lawyers is potentially very wide:

- advertising or promotion of a lawyer's services can be misleading or deceptive<sup>12</sup>
- it applies not just to dealings between lawyers and their clients, but to dealings between lawyers and other people<sup>13</sup>
- a lawyer need not be directly responsible for the misleading or deceptive conduct, but may also be exposed to a claim if he or she was a "person involved in the contravention"<sup>14</sup>
- it applies to a lawyer's pro bono activity because of the extension of the definition of "trade or commerce" to "business or professional activity (whether or not carried on for profit)".<sup>15</sup>

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<sup>9</sup> Section 48(7) provides that the single price is the "minimum quantifiable consideration for the supply of...services at the time of the representation" and includes (wherever it is quantifiable) "a charge of any description payable to the person making the representation by another person (other than a charge payable at the option of the other person)."

<sup>10</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

<sup>11</sup> *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357.

<sup>12</sup> See *Nixon v Slater & Gordon* (2000) 175 ALR 15.

<sup>13</sup> See *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112. Similarly, a lawyer who endorsed a client's representation knowing it to be false would likely be in contravention of s18: see *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40-940 and *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [336].

<sup>14</sup> Section 236 ACL. A person "involved in a contravention" includes a person who has "aided, abetted, counselled or procured the contravention" or "has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention" (s75B CCA): see *Yorke v Lucas* (1985) 158 CLR 661.

<sup>15</sup> However it is not clear if it applies to government, legal aid, or community legal centre lawyers who, pursuant to those particular legal practices, never charge clients for their legal services.

The courts have rarely had cause to consider whether conduct by a lawyer amounts to misleading or deceptive conduct but, notably, a solicitor was found in one recent matter to have made misleading or deceptive representations in four debt collection letters and notices.<sup>16</sup>

There is a wide range of other conduct however that could form that basis of an action under section 18 including:

- misrepresentations to a client about the nature or effect of the contract between the lawyer and the client
- misrepresentations by a lawyer about his or her experience or expertise
- misrepresentations about fees payable (in Disclosure Notices or otherwise), and in what circumstances those fees are payable
- misleading advertising about costs
- deliberate or reckless overcharging<sup>17</sup>
- charging more than one client for the same work<sup>18</sup>
- misrepresentations about a client's rights in a billing dispute, including the complaint processes.<sup>19</sup>

#### 4.4 Unconscionable conduct

Part 2-2 of the ACL deals with unconscionable conduct. The term "unconscionable conduct" is not defined in the ACL, but the term has been considered in a number of cases. Based on the case law,<sup>20</sup> the type of conduct by lawyers that would be caught by this part of the ACL is "something clearly unfair or unreasonable" or that is "irreconcilable with what is right or reasonable".

The relationship between lawyer and client is a fiduciary one, which means that a lawyer has a higher duty to protect a client's interests than in an ordinary contract for services. A lawyer who acts unconscionably will also likely be in breach of his or her fiduciary duties to the client.

There is also an overlap with section 328(2) of the LPA which provides that a costs agreement between a lawyer and a client can be set aside if it is not "fair and reasonable". The matters set out in s328(2) are similar to those a court would look at when deciding if a fee agreement could be set aside for unconscionable conduct.

#### 4.5 Unfair terms

Sections 23 to 28 of the ACL provide consumers with new protections against unfair terms in standard form contracts. Previously the focus was on the process for entering into the contract. The new unfair terms law looks at whether the substance of the contract is unfair.

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<sup>16</sup> *ACCC v Sampson* [2011] FCA 1165. See also *Liu v Barakat* (unreported, District Court of NSW, Curtis J, 8/11/11); *Baker Johnson Lawyers v Narelle Karen Jorgensen* [2002] QDC 205. McGill DCJ noted at [24] in that matter, in reference to the term "no win - no fee", that "If the appellant's true intention was that the retainer be on the terms of the Authority to Act, to describe that as a retainer on a "no win - no fee" basis was misleading and deceptive ...".

<sup>17</sup> *Council of Queensland Law Society v Roche* [2004] 2 Qd R 574.

<sup>18</sup> *Bechara v Legal Services Commissioner* [2010] NSWCA 369.

<sup>19</sup> See also s29(1)(m) ACL which prohibits the making of a false or misleading representation concerning the existence, exclusion, or effect or any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2).

<sup>20</sup> A useful summary of the nature of the conduct likely to be regarded as unconscionable is found in *Hurley v McDonald's Australia Ltd* (2000) 22 ATPR 41-741.

The unfair contract law applies to the contract between the lawyer and a client, including the costs agreement, if:

- it is a consumer contract, and
- the contract is a standard form contract.

Whether a contract is a consumer contract will depend on the particular circumstances. A consumer contract “is a contract for goods or services... to an individual... wholly or predominantly for personal, domestic or household use or consumption”.<sup>21</sup>

Our view is that the following legal services provided to an individual client are likely to be regarded as consumer contracts:

- personal injury matters
- family law matters
- criminal law matters
- conveyances in relation to the family home
- wills and the administration of estates.

This list is not intended to be complete, and contracts for other types of legal services may also be consumer contracts.

When a solicitor engages a barrister, this is unlikely to be regarded as a consumer contract. However if an individual client engages a barrister directly for personal matters, then this is likely to be a consumer contract.

Having established that there is a consumer contract, the second question is whether it is a standard form contract.<sup>22</sup> This will depend on the circumstances. A lawyer might draft a fresh costs agreement for each new client, tailoring the agreement to the specific needs of the client after discussing and negotiating each of the terms of the contract with the client. In that case, the costs agreement is unlikely to be a standard form contract.

However, many lawyers use a standard form costs agreement that is only changed by adding the name of the client, the legal services to be provided to and the cost of those services to a template form. Such a costs agreement is likely to be regarded as a standard form contract.

If there is a standard consumer contract, the question must then be asked “is this term unfair for the purposes of the ACL?”<sup>23</sup> A contract term is unfair if it:

- causes a significant imbalance in the rights and obligations between the lawyer and the client
- is not reasonably necessary in order to protect the proper interests of the lawyer, and
- would cause detriment (whether financial or otherwise) to the client if it were relied upon.

It is unclear how this will operate in practice.<sup>24</sup> The precise words and effect of any term will require careful consideration.

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<sup>21</sup> Section 23 ACL

<sup>22</sup> Section 27(2) of the ACL sets out matters a court must take into account in deciding whether a particular contract is a standard form contract for the purposes of Part 2-3.

<sup>23</sup> See sections 24-26 ACL

<sup>24</sup> It is difficult given the limited number of decided cases under the similar Victorian and UK legislation to predict with any great certainty how courts will approach the application of these provisions. The ACCC says the following in its “Guide to the Unfair Contract Terms Law”: “This limb requires that the party advantaged by the term provide evidence to the court to demonstrate why it is necessary for the contract to include the term.”

However, it may be that the unfair contracts laws could be used to challenge terms that:

- allow the lawyer to end the contract without good reason before the work is complete<sup>25</sup>
- allow the lawyer to claim a lien over the client’s file or any money or property the lawyer holds for the client, where that lien is not otherwise justified at law
- allow the lawyer to take a security over the client’s assets or property where that goes beyond what is reasonable<sup>26</sup>
- allow the lawyer to change the contract, but do not give the client the same right
- allow the lawyer to issue a lump sum bill with a “reservation of rights” to issue a bill for a higher amount if the client requests an itemised bill.<sup>27</sup>

This list is not intended to be complete and other terms may potentially be subject to challenge. When considering whether a term is unfair, the court can look at how transparent and easy to understand the terms of the contract are, and can look at the contract as a whole.<sup>28</sup> A contract will be less likely to be transparent if it:

- uses legal jargon rather than plain English, or
- is poorly organised, so that a client cannot easily understand how the terms relate to each other.

The price for the services is not covered by unfair terms.<sup>29</sup> However this relates only to the upfront price,<sup>30</sup> so other charges like administrative fees or penalty like fees may be subject to a claim that they are unfair. This is separate from any remedy a client may have under the LPA, to set aside a

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Such evidence might include material relating to the business’s costs and business structure, the need for the mitigation of the risks or particular industry practices to the extent that such material is relevant.” In light of the reference to “particular industry practices”, it is our view that a term in a retainer that is an industry “outlier” in the sense that it is significantly at odds with common practice, will be more at risk of being struck down under Part 2-3.

<sup>25</sup> See the recent discussion of termination of retainer in *Ireland v Trilby Misso Lawyers* [2011] QSC 127.

<sup>26</sup> Note section 320 LPA that provides that a lawyer may take “reasonable” security for costs.

<sup>27</sup> We have published a regulatory guide dealing with this issue on our website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au) on the Publications page.

<sup>28</sup> A court may have regard to the transparency or otherwise of the term (s24(2)(a)) ACL and the contract as a whole (s24(2)(b)). Section 24(3) sets out matters that give guidance as to whether the term being considered is transparent.

<sup>29</sup> The Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 Explanatory Memorandum notes the following about s26(2): “Consideration includes any amount or thing provided as consideration for the supply of a ... service ... The exclusion of upfront price means that a term concerning the upfront price cannot be challenged on the basis that it is unfair. Having agreed to provide a particular amount of consideration when the contract was made, which was disclosed at or before the time the contract was entered into, a person cannot then argue that that consideration is unfair at a later time. The upfront price is a matter about which the person has a choice and, in many cases, may negotiate. The upfront price covers the cash price payable for a ... service ... at the time the contract is made. It also covers a future payment or a series of future payments.”

<sup>30</sup> The upfront price “does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.” The Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 Explanatory Memorandum notes that “Terms that require further payments levied as a consequence of something happening or not happening at some point in the duration of the contract are covered ... Such payments are additional to the upfront price, and are not necessary for the provision of the basic supply, sale or grant under the contract.”

costs agreement that is not “fair and reasonable”.<sup>31</sup> Charging excessive legal costs may also amount to unsatisfactory professional conduct or professional misconduct.<sup>32</sup>

## 4.6 Undue harassment and coercion

Section 50 ACL provides that a person must not use physical force or undue harassment or coercion in relation to the supply of goods or services, or the payment for goods and services. This applies to actions by lawyers to collect outstanding fees.<sup>33</sup> It may also have a wider application for clients (such as litigants) who complain about being “forced” – or coerced – to take a step in a dispute (such as settling litigation) upon pressure from their lawyer.

## 4.7 The impact on bills

The ACL includes a number of provisions relating to invoices and bills. The effect of section 100 is that a lawyer must provide his or her client with a proof of transaction. A tax invoice will satisfy this requirement.

The ACL, like the LPA deals with itemised bills. Both laws require a legal practice to issue an itemised bill if the client requests it. However the time allowed for issuing a bill is different.

- Section 332 of the LPA allows for 28 days
- Section 101 of the ACL allows only 7 days.

It is important to note that the LPA applies to all lawyers’ bills. The ACL only applies to bills for clients who fit the definition of “consumer”.<sup>34</sup>

The inconsistency in relation to consumer bills is partly resolved by section 55 of the *Fair Trading Act* 1989 (Qld). This confirms that a legal practice has 28 days to provide an itemised bill. However, this applies only to legal practices that are subject to the operation of the ACL as a law of Queensland, and not as a law of the Commonwealth.

For legal practices that are subject to the ACL as a law of the Commonwealth, section 55 of the *Fair Trading Act* has no effect and the inconsistency remains. Under section 109 of the Australian Constitution, laws of the Commonwealth prevail over laws of the States. This means that incorporated law practices, and others covered by the extended operation of the ACL as a law of the Commonwealth, are required to provide an itemised bill to consumers within 7 days of request. The inconsistency in the treatment of incorporated as opposed to unincorporated legal practices in this respect is anomalous and arguably requires rectification.

The question arises then of how the LSC proposes to deal with incorporated legal practices which fail to comply with their obligation under the ACL to provide an itemised bill on request within 7 days. It is important to remember in this context that the LSC is responsible for monitoring and enforcing lawyers’ obligations under the LPA, not the ACL. Generally they overlap (see headings 5 and 6, below) but in this case they don’t. The usual considerations under the LSC’s Discipline Application Guidelines<sup>35</sup> apply but it is difficult to imagine the LSC initiating disciplinary proceedings against lawyers in these circumstances.

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<sup>31</sup> LPA section 328.

<sup>32</sup> LPA section 420(b). See also *Council of the Queensland Law Society v Roche* [2004] 2 Qd R 574.

<sup>33</sup> The prohibition has received some, though not extensive, judicial attention. See *ACCC v Maritime Union of Australia* (2001) 114 FCR 472, per Hill J at 485 and 486.

<sup>34</sup> As defined in the ACL, that is, where the amount of the service is less than \$40,000 or is for personal, domestic or household purposes.

<sup>35</sup> The Guidelines are published on the Policies and Guidelines page at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)

This does not mean however that the agencies responsible for monitoring and enforcing the ACL (such as the Australian Competition and Consumer Commission - the ACCC) will not take enforcement action. That is a matter for them.

## 5. Does a breach of the ACL come within the jurisdiction of the Legal Services Commission?

The ACL is 'generic' consumer protection legislation that applies to the provision of goods and services generally. The LPA is 'specialist' legislation that applies specifically to the provision of legal services. The two pieces of legislation sit side by side and overlap.

The ACL uses different language, and brings a lawyer's 'customer service' obligations into sharper focus, but in our view imposes few if any new or additional professional or service obligations on lawyers. It has never been acceptable, for example, for lawyers to engage in misleading, deceptive or unconscionable conduct, or to enter into unfair contracts with their clients or to use undue harassment or coercion in recovery of their fees.

It follows that the LSC has jurisdiction to deal with complaints about lawyers which involve alleged contraventions of the ACL, not because the LSC has jurisdiction to deal with complaints under the ACL – it doesn't – but because the conduct of a lawyer which contravenes the ACL will more often than not also contravene his or her professional or service obligations under the LPA. The very same conduct that gives rise to a complaint under the ACL will typically involve either a disciplinary issue or a 'consumer dispute' under the LPA and can be dealt with accordingly.

## 6. Who regulates the ACL as it applies to lawyers?

The Australian Competition and Consumer Commission (ACCC) and the Queensland Office of Fair Trading (OFT), as marketplace regulators, are responsible for monitoring and enforcing the ACL including receiving and dealing with complaints.<sup>36</sup> The LSC is responsible for monitoring and enforcing the professional and service standards of lawyers under the LPA including receiving and dealing with complaints. All of us as regulators have an interest in:

- the application of the ACL to the practice of lawyers
- any practical problems faced by lawyers in complying with the ACL
- the extent of compliance by lawyers with the ACL, and
- enforcement of the ACL against lawyers.

Importantly, the LSC and the OFT have entered into a memorandum of understanding (MOU) about our respective roles.<sup>37</sup> We have agreed (subject to our respective statutory obligations in relation to privacy and non-disclosure) that:

- the OFT will refer any inquiries and complaints about lawyers and the provision of legal services to the LSC for mediation and / or investigation and enforcement under the LPA as appropriate
- the OFT will share with the LSC any information it obtains about lawyers during OFT investigations and enforcement action

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<sup>36</sup> The Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investment Commission (ASIC) and the state and territory fair trading agencies entered into a memorandum of understanding (MOU) which sets out how they work together to administer the ACL: [www.consumerlaw.gov.au/content/Content.aspx?doc=the\\_acl/enforcement.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/enforcement.htm)

<sup>37</sup> The MOU is published on the Commission's website, under Publications.

- the LSC will share with the OFT information about any matters which the OFT refers to the LSC for investigation under the LPA and any other matters which arise in the exercise of the LSC's responsibilities under the LPA which:
  - o appear to involve a contravention of the ACL and cannot be satisfactorily resolved under the LPA
  - o appear to raise issues of a 'test case' nature about the application of the ACL to lawyers and the provision of legal services, or
  - o demonstrate systemic conduct by lawyers which appears to contravene the ACL.

## 7. How the ACL applies to lawyers - in summary

	Stage	Activity	Possible Complaint Problem	Relevance of ACL
1	Pre-contractual negotiations	Advertising Initial discussions with client Disclosure of costs Component pricing	false advertising false representation re accreditation false representation of expertise, skill, or experience estimate of costs inaccurate	Prohibition on misleading or deceptive conduct (s18) Other specific false or misleading representations (ss29, 34) Single price provisions (s48)
2	Contract	Enter into retainer Enter into costs agreement Cancellation fees Reservation of rights	Terms are onerous or unfair Costs set out in the agreement are too high	Prohibition on unconscionable conduct (ss20-22) Unfair terms provisions (Part 2-3)
3	Provision of service	Advice to client Acting on behalf of client with third parties Conduct of litigation Pro bono activity	Too slow Didn't do what had been promised Poor advice Not skilled	Prohibition on misleading or deceptive conduct, towards client or third parties (s18) Consumer guarantees (ss60-62)
4	Billing for service	Interim bills Lump sum bills Itemised bills Debt collection activity	Bills padded Charged at rate higher than agreed Charged for things not done Charged for things didn't want/need done	Misleading or deceptive conduct (s18) Prohibition against use of physical force, undue harassment or coercion (s50) Consumer guarantees (ss60-62) Invoices (ss100, 101)

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