BLACKSTONE’S GUIDE TO

The Consumer Rights
Act 2015

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INTRODUCTION

A. PURPOSE OF THE LEGISLATION

1. What the Act is Trying to Achieve

The Act does quite a large number of things at the same time. It is principally, but not exclusively, concerned with the relationships between businesses and consumers. It brings into UK law various European Directives, and relies to an extent on European law concepts, whilst simultaneously reforming and codifying existing UK consumer law. It codifies the law regarding digital content for the first time, makes the law about unfair contract terms clearer, and provides a new draft of enhanced measures for consumer regulators to use against rogue traders. It codifies the law for both goods and services, and sets out the powers for those involved in consumer law enforcement. It reforms the work of the Competition Appeal Tribunal in striking and potentially exciting ways. There are some reforms to the secondary ticketing market, the law regarding premium rate services, letting agents, and higher education providers. Most vitally of all, it amends the weights and measures regarding unwrapped bread.

It was described as a major part of the government’s reform of UK consumer law and is predicted to boost the economy by £4 billion over the next decade by streamlining complicated law from 8 pieces of legislation into one place. It was hoped that consumers would be better informed and protected.

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1 We are afraid that for reasons of space this book does not cover the law in Scotland.
3 Ch 3 of the Act.
4 Part 2 of the Act.
5 Ch 2 of the Act.
6 Ch 4 of the Act.
7 s. 77 and Sch. 5 of the Act.
8 Part 3 Ch 2 and Sch. 8 of the Act.
9 Ch 5 of the Act.
10 Department for Business, Innovation and Skills (‘BIS’) press release on Royal Assent.
1. Introduction

The objectives of the Act were set out in a rather pithy paragraph by Dr Vince Cable at Second Reading:

In conclusion, the Bill represents a radical and far-reaching set of reforms designed to streamline the law, making it clearer and more accessible. It will enhance consumer rights and deregulate for business. It will benefit consumers by reducing the time and cost of finding out how to deal with problems. It will protect consumers from the small print in contracts and increase the redress they get when things go wrong. It will benefit businesses by reducing the need for ongoing legal advice, and it will save legitimate businesses from losses from anti-competitive practices. The benefits are substantial. They will create more confident consumers, who in turn will be more likely to try new and innovative goods and services, which in turn will create a more responsive and vibrant UK economy.  

2. Structure of the Act

The structure of the Act is set out in the Explanatory Notes and summarized in Table 1.1.

Table 1.1 Structure of the Act

<table>
<thead>
<tr>
<th>Part 1</th>
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<tbody>
<tr>
<td>i. Sets out the standards that goods must meet.</td>
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<td>ii. Consolidates and aligns the currently inconsistent remedies available to consumers for goods supplied under different contract types, such as sale, work and materials, condition sale, or hire purchase.</td>
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<td>iii. Sets a time period of thirty days in which consumers can reject sub-standard goods and be entitled to a full refund.</td>
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<td>iv. Limits the number of repairs or replacements of sub-standard goods before traders must offer some money back.</td>
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<td>v. Sets limits on the extent to which traders may reduce the level of refund (where goods are not rejected initially) to take account of the use of the goods the consumer has had up to that point.</td>
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<td>vi. Introduces a new category of digital content.</td>
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<td>vii. Introduces tailored quality rights for digital content.</td>
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<td>viii. Introduces tailored remedies if the digital content rights are not met.</td>
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<td>ix. Introduces a new statutory right that if a trader provides information in relation to a service, and the consumer takes this information into account, the service must comply with that information.</td>
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<td>x. Introduces new statutory remedies when things go wrong with a service.</td>
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<td>xi. Makes it clear that consumers can always request these rights and remedies when a trader supplies a service to them.</td>
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<th>Part 2 including Schedules 2, 3, and 4</th>
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<tr>
<td>i. Consolidates the legislation governing unfair contract terms in relation to consumer contracts, which currently is found in two separate pieces of legislation, into one place, removes anomalies and overlapping provisions in relation to consumer contracts.</td>
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<tr>
<td>ii. Makes clearer the circumstances when the price or subject matter of the contract cannot be considered for fairness and in particular makes clear that, to avoid being considered for fairness, those terms must be transparent and prominent.</td>
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<td>iii. Clarifies the role and extends the indicative list of terms which may be regarded as unfair (the so-called ‘Grey List’).</td>
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Purposse of the Legislation

Part 3 including Schedules 5, 6, 7, 8, 9, and 10

i. Consolidates and simplifies the investigatory powers of consumer law enforcers in relation to the listed legislation and sets them out in one place as a generic set.

ii. Clarifies the law so that trading standards are able to work across local authority boundaries as simply and efficiently as possible.

iii. Introduces new powers for public enforcers to seek, through applying to the civil courts:
   a) Redress for consumers who have been disadvantaged by breaches of consumer law;
   b) Remedies from traders who have breached consumer law to improve their compliance and reduce the likelihood of future breaches; and/or
   c) Remedies to give consumers more information so they can exercise greater choice and help improve the functioning of the market for consumers and other businesses.

iv. Includes a power for the Secretary of State to extend the use of the enhanced consumer measures to private designated enforcers providing certain conditions are met and subject to safeguards on their use.

v. Clarifies the maximum penalties that the regulator of premium rate services can impose on non-compliant and rogue operators.

It is obvious that the relationships between consumers and businesses are multifarious and often complex. It is our view that the success of this piece of legislation will depend to a very large extent on the access that consumers have to justice in order to exercise these rights. Whether and how it is in fact possible for consumers to fully exercise their consumer rights is essentially a political question. The aims are certainly laudable, but it may be that the legislation will fall into the trap identified by Jonathan Swift nearly 400 years ago: ‘Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through.’

3. History

The history of consumer law is a vast topic and plainly outside the scope of any such guide as this. It is, however, worth pointing out that the ideas contained in this Act have been several decades in gestation. Some of the more knotty problems that legislation in this field inevitably must deal with include:

1. The extent to which consumers are able to exercise the rights that they have;
2. The extent to which it is desirable for the state to interfere in the invisible hand of the market;
3. The extent to which the courts should be concerned with concepts of fairness in contract law;

12 And one that the authors of this work do not necessarily agree about!
14 For further reading on this interesting topic see G. Howells and S. Weatherill, Consumer Protection Law (UK: Ashgate Publishing, 2nd edn, 2005), and in particular Ch 1.
1. Introduction

(4) The extent to which consumers are able to absorb the information that they have been given.

1.07 The Act is also a combination of European law and UK law. With the former, the policy objectives are necessarily more explicit than has been traditional in the common law of contract.

4. EU Policy Objectives

1.08 By the 1970s there was a clear desire at EU level to grow the appeal of the Community away from economic affairs and into the social sphere. As much was made explicit in 1975 with the Council Resolution of the EEC for a consumer protection and information policy. The Annex to that document provided a list of five (very) basic rights:15

(1) The right to protection of health and safety;
(2) The right to protection of economic interests;
(3) The right to redress;
(4) The right to information and education;
(5) The right to representation (the right to be heard).

1.09 In 1985 there was a Commission Paper entitled ‘A New Impetus for Consumer Protection Policy’.16 It concluded that nothing like as much as was hoped had been achieved. It was suggested that an unfortunate argument had become popular that the promotion of consumer rights was an activity which should only be pursued in times of economic growth, and that the protection of consumer interests would represent a burden on business. The paper did not accept that argument. It would be fair to observe that this argument still has a fair number of supporters.

1.10 One of the counter arguments put forward was that reliable and safe goods for consumers assisted in maintaining the Community’s share of trade against competing external producers.17 Stephen Weatherill suggests that there was then a certain amount of competence creep in the consumer law area by the EU institutions. The breakthrough arrived in the Maastricht Treaty that created a separate title on Consumer Protection, now article 169:

In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health safety and economic interests of consumers, as well as to promoting their right to education and to organize themselves in order to safeguard their interests.18

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16 COM (85) 314 para. 5.
17 EU Consumer Law and Policy, Ch 1 para. 16.
18 Treaty on the Functioning of the European Union (‘TFEU’) art. 169 (ex art. 153 TEC).
There is no doubt about the importance of EU law in the context of consumer law. In *OFT v Purely Creative* the High Court explained the approach that must be taken:

Domestic regulations designed to implement EU directives, and in particular maximum harmonisation directives, must be construed as far as possible so as to implement the purposes and provisions of the directive. The interpretation of words and phrases is neither a matter of grammars nor dictionaries, nor even a matter of the use of those phrases (or of the underlying concepts) in national law. If similar words and phrases are used in the directive itself, then they must be interpreted both in the directive and in the implementing regulations by means of a process of interpretation which is independent of the member state’s national law and, for that matter, independent of any other member state’s national law. For that purpose the primary recourse of the national court is to the jurisprudence of the ECJ.  

The current policy report from the Commission on EU Consumer Policy dates from 2014. There are behavioural studies into the conduct of consumers in a number of different areas, including the extent to which consumers can make an informed choice under a proposed Common European Sales Law. It is also proposed to study consumer attitudes to reading, understanding, and accepting terms and conditions. It is plain that the Commission has concerns that have remained since the *Oceano Grupo* case in 2000:

The system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.

How this sits with what is sometimes described as the classical law of contract is a nice point. However, the position of the government in passing the Act was clear, and closer to the thinking of the Commission than the tradition described below.

5. **Common Law Contractual Tradition**

The high water-mark was the observation of Sir George Jessel in 1875 that:

If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.

Similarly, in the competition area, the influential Chicago school has been very critical of interventionist policies, particularly when they have come from the government as distinct from the courts.

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19 *OFT v Purely Creative* [2011] EWHC 106 (Ch) per Mr Justice Briggs para. 40.
21 [2002] 1 CMLR 43.
24 See discussion in Howells and Weatherill, *Consumer Protection Law*, p. 79.
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1.16 Hugh Collins has described the tension between the common law contractual tradition and the way in which contract law has developed:

This traditional conception of contract law persists in part because of the need to preserve the integrity and, hence, the legitimacy of this closed doctrinal system of thought. Its doctrinal integrity helps to achieve legitimacy, because the law can be presented as objective and neutral, not as a matter of politics or preference, but a settled body of rules and principles, legitimated by tradition and routine observance, and applied impartially and fairly to all citizens.  

1.17 The common law has moved on quite a lot since the 1980s. The courts are now concerned with concepts of fairness. As Lord Steyn observed (in the context of the unfair contract terms), the purpose of the European law was ‘to enforce community standards of decency, fairness and reasonableness in commercial transactions’.  

1.18 Regulation does not come without a cost, as Lord Diplock said in *Tesco v Nattrass*; the price to the public of the protection afforded to a minority of consumers might well be an increase in the costs of goods and services to consumers generally.

6. Sources and Consultations

1.19 The Act has had a long gestation. There have been a large number of consultations which have informed the way in which it has been drafted. The main consultation documents are listed in Table 1.2. There were a number of pieces of domestic law that have been amended. There are a number of Directives and Regulations that have been implemented in part or in full.

Table 1.2 List of main consultation documents

| PART 1 | Davidson Report HM Treasury 2006.  
| | Law Commission No. 317.  
| | Consolidation and simplification of UK consumer law, BIS 2010.  


27 [1971] 2 All ER 127, 151h.

28 See Explanatory Notes para. 8 and following, which has a very helpful summary of the assorted amendments.
By the time the Act had its second reading, the Secretary of State had two principal objectives to meet two broad problems. In competition law, the problem was that businesses believed that the current regime for private actions was too slow and costly; as a result, consumers did not obtain redress when they had been harmed by anti-competitive behaviour. In respect of consumers, they could not be expected to be confident when they did not understand their rights or entitlements if something were to go wrong. There is no doubt that the government took a fairly paternalistic view of the consumer, consistent with the direction of travel in EU law.

**B. IS THE ACT GOING TO BE EFFECTIVE?**

1. **Access to Justice**

One of the central problems in the area of consumer law is the extent to which the individual consumer can access any of the various rights which are contained in the Act. Most consumer claims are for sums of money that are generally too small to be worth litigating. It is not to be unduly cynical to observe that there are businesses
in the UK that are aware of that reality. In 2012, Consumer Focus estimated that out of 6.4 million consumer complaints made to businesses, 2 million were unresolved.\footnote{‘Consumer Detriment 2012’ available at <http://www.consumerfocus.org.uk/publications/consumer-detrimen-2012>.} It remains to be seen what steps will be taken to make consumers aware of and confident in their consumer rights.

1.22 The Act provides and codifies consumer rights, and then codifies and enhances enforcement of those rights. Part 1 of the Act provides various consumer rights in respect of goods (Chapter 2), digital content (Chapter 3), and services (Chapter 4). In Parts 2 and 3 the Act aspires to deal with enforcement.

1.23 Part 2 and Schedule 2 codify the law regarding unfair terms. They set out the circumstances in which the fairness of contractual terms can be considered by the courts. Schedule 3 provides the ways in which enforcers can regulate unfair terms. That works on both the individual level, in that a consumer can cite the Schedule to demonstrate that the relevant contractual term may be regarded as unfair, and at the enforcement level, in that the relevant regulators may consider complaints about terms or notices said to be unfair.

1.24 Part 3 then deals with other kinds of consumer protection for larger groups of consumers. Section 79 and Schedule 7 provide enhanced consumer measures so that breaches of consumer law can be dealt with more effectively by enforcers. This involves amendments to Part VIII of the Enterprise Act 2002, which provided orders for infringing breaches of EU or domestic law behaviour which could be sought by enforcement bodies. The remedies available have been ‘enhanced’: including redress; compliance; and choice measures.

1.25 Section 81 and Schedule 8 are designed to widen the types of competition cases that the Competition Appeal Tribunal (‘CAT’) is able to deal with, to provide for opt-in collective action and opt-out collective settlements, and to provide a voluntary redress scheme in respect of competition cases.\footnote{See Ch 8.}

2. Alternative Dispute Resolution

1.26 The government is hopeful that the changes to alternative dispute resolution (‘ADR’) will provide remedies for the missing consumers who do not pursue their rights.\footnote{See Ch 9.} A consultation was published in November 2014\footnote{See the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542), large parts of which are in force, and some of which are likely to be in force in October 2015.} in which it was proposed that the Trading Standards Institute will act as a competent authority to ensure that ADR schemes in the non-regulated sectors function properly. The start-up costs will be funded, and then the operation costs will be covered by fees charged to the certified ADR providers. Effectively, it is hoped that the costs of investigating such

\footnotesize{\textsuperscript{29} ‘Consumer Detriment 2012’ available at <http://www.consumerfocus.org.uk/publications/consumer-detrimen-2012>.} 
\footnotesize{\textsuperscript{30} See Ch 8.} 
\footnotesize{\textsuperscript{31} See Ch 9.} 
\footnotesize{\textsuperscript{32} See the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542), large parts of which are in force, and some of which are likely to be in force in October 2015.} 
Simultaneous Changes to Consumer Law

disputes will not be the responsibility of hard-pressed trading standards officers (and the ratepayers who pay for them) but those who are involved in individual disputes. This could be described as a form of privatization of the problem. There are echoes of this approach in the reforms to competition law as well: the state agencies sharing enforcement with individual consumers or their representatives.

However, simultaneously there have been substantial cutbacks to trading standards departments throughout the country. A survey carried out by National Trading Standards and the Trading Standard Institute concluded that most trading standards departments have been cut by an average of 40 per cent since 2010. There is also a chronic problem with regional differences. The number of trading standards officers per service varied from 0.5 to 48, with apparently little reference to the size of the areas they serve or the number of businesses.

C. SIMULTANEOUS CHANGES TO CONSUMER LAW

1. The Practical Problem

The Explanatory Notes are explicit about the purpose of the Act: There is general agreement across business and consumer groups that the existing UK consumer law is unnecessarily complex. It is fragmented, and in places unclear, for example where the law has not kept up with technological change or lacks precision or where it is couched in legalistic language. There are also overlaps and inconsistencies between changes made by virtue of implementing European Union ('EU') legislation alongside unamended pre-existing UK legislation.

To be blunt, that position will remain the same. The Act has not consolidated all of the relevant legislation into one place. What might be regarded as ‘consumer law’ more broadly includes the law on product and service liability and consumer safety, as well as the law on consumer credit. They all remain distinct areas with their own (at times pointlessly complex) legislative regimes. To that extent, the Act represents rather a wasted opportunity.

An example of the various types of consumer law legislation can be seen in the Statutory Instruments that accompany the changes to Part VIII of the Enterprise Act 2002.

The Act is also part of various other wider reforms to the consumer legislation framework. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and the Consumer Rights (Payment Surcharges) Regulations 2012 have implemented the Consumer Rights Directive. In the competition sphere, the replacement of the Office of Fair Trading ('OFT') by the Competition and Markets

34 See e.g. <http://www.tradingstandards.uk/extra/news-item.cfm/newsid/1464>.
35 Explanatory Notes para. 5.
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Authority (‘CMA’) is likely to have a growing impact. The criminal law on cartels has been substantially reformed.\(^{37}\)

1.32 In particular, the Consumer Protection from Unfair Trading Regulations 2008\(^{38}\) (which are now the primary vehicle for the prosecution of consumer offences) were also amended\(^{39}\) and Part 4A came into force in October 2014.\(^{40}\) They provide for a right of redress in circumstances where a trader is involved in a misleading action or an aggressive practice. In those circumstances, the consumer can unwind the contract, apply for damages and have a discount. It is difficult to see why these Regulations could not, for example, have been incorporated into a more cohesive set of enhanced consumer measures (see Chapter 8).

D. POLICY CHOICES

1. Choices Made by Consumers

1.33 A focus on the rights of consumers is to an extent predicated on a particular model of an economic system:

Producers have to sell their goods to consumers in order to survive. They will only be able to sell to consumers what consumers want to buy. Consumer preference will dictate what is made available. Producers compete. Consumers choose. The ‘invisible hand’ of producers behaving in response to consumer preference organises the market. The survival instinct among producers which is instilled by the mechanism of competition will ensure an efficient allocation of resources. Given the stimulus of competition, resources will not be wasted.\(^{41}\)

1.34 As the authors of that quotation recognize, that system is as alluring as it is unrealistic. In particular, it is very doubtful whether or not consumers know as much as they should about the goods, services, and digital content that they are purchasing. Recent work in cognitive and social psychology has shown the extent to which risks are over- or under-estimated by consumers, and of course that effects the extent to which consumers can make choices which are not particularly rational.\(^{42}\) As J. Hanson and D. Kysar wrote in 1999:

Our central contention is that the presence of unyielding cognitive biases makes individual decision makers susceptible to manipulation by those able to influence the context in which decisions are made. More particularly, we believe that market outcomes will be heavily influenced, if not determined, by the ability of one actor to control the format of information, the presentation of choices, and, in general, the setting within which market transactions occur. Once one


\(^{39}\) SI 2014/870.

\(^{40}\) The details are outside the scope of this work.


accepts that individuals systematically behave in non-rational ways, it follows from an economic perspective that others will exploit those tendencies for gain.$^{43}$

In conclusion, it is perhaps worth considering whether a focus on consumer rights should be a priority at the present time at all:

A sober look at our world shows that the degree of human intervention, often in the service of business interests and consumerism, is actually making our earth less rich and beautiful, ever more limited and grey, even as technological advances and consumer goods continue to abound limitlessly.$^{44}$

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$^{44}$ Pope Francis, ‘Laudato Si’ (2015) para. 34.