

SUBMISSION TO THE AUSTRALIAN CONSUMER LAW REVIEW

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My submission concerns four areas:

1. Consumer education about consumer guarantees.
2. The definition of consumer in section 3.
3. Contributory fault in misleading conduct cases.
4. Ensuring governments are bound by the ACL, particularly section 18.

CONSUMER EDUCATION AND CONSUMER GUARANTEES

At the time when the 2010 legislation was being considered a study was undertaken (The National Education and Information Advisory Taskforce *National Baseline Study on Warranties and Refunds* (Research Paper No 2 October 2009)) to find out whether consumers and suppliers were aware of their rights and liabilities under the *Trade Practices Act*. The findings were that consumers were very largely ignorant of their rights stemming from the non-excludable implied terms of merchantability and fitness for purpose under the *Trade Practices Act* Part V Div 2. The findings also showed that merchants were also ignorant of their responsibilities under these provisions and it was very common for merchants to use the 12-month warranty to avoid their responsibilities.

At that time, the ACCC was armed with effective measures to deal with merchants who misled consumers about their rights (sections 53(g) and 75AZC(1)(k)) in the form of a \$1.1 million fine. It was misleading for merchants to rely on expiry of the 12-month warranty to resist a claim when goods were defective. However, there were almost no cases where merchants were prosecuted.

After the enactment of the *Competition and Consumer Act 2010* (Cth) and complementary State and Territory enactment of the ACL, the consumer guarantee regime was very considerably improved. Further, the ACCC has been vigorously pursuing merchants who mislead consumers about their rights under the new consumer guarantees.

Under the ACL section 66 it is possible to mandate the display of notices informing consumers of their rights at every check-out in the country. When I saw this provision I thought that it would be the most effective measure to address the findings of consumer and merchant ignorance made by the Baseline Study. As far as I am aware, this measure has not been implemented. I see no such notices in the shops.

My submission is to implement section 66. The number of cases at present pursued by the ACCC demonstrates that there is still ignorance in the market about the rights of consumers and the responsibilities of merchants under the consumer guarantees. Ubiquitous notices

would educate both consumers and merchants and would probably lessen the ACCC's case load in this area.

THE DEFINITION OF CONSUMER IN SECTION 3

Both under the *Trade Practices Act* and under the ACL, the \$40000 threshold has never been clear, particularly in the case of purchase of goods. Does it apply to *each item* purchased? The importance of this is that the \$40000 threshold in effect extends the consumer guarantees to business purchases. If a company purchases computers each of which costs \$2000 and it purchases 30 of them in one contract, are the computers covered by the consumer guarantees?

A close examination of section 3 does not provide a clear answer. Part of the difficulty stems from the word "goods" which tends to point to a meaning that does not embrace a *per item* interpretation.

The section deals with *mixed supply* but it is not clear from the various references to mixed supply that section 3 applies to the above example of 30 items that are all the same. If the company purchased 30 computers and 30 desks, that would be a mixed supply (see section 3(11) which speaks of "other" property or services). As far as I can ascertain, there is no case that has tackled this problem. Miller's (*Annotated Competition and Consumer Act*) commentary on section 3 seems to treat the price as being per item but this is not absolutely clear.

My submission is that it should be made clear that the \$40000 threshold applies, in the case of goods, to each item. There is no principled justification for the protection supplied by the consumer guarantees to apply in the above example to a purchase of 20 computers but not to 21 computers.

CONTRIBUTORY FAULT IN MISLEADING CONDUCT CASES

This part of my submission is more elaborately discussed in a published article.¹

The policy behind the implementation of the Australian Consumer Law was to have a single, uniform law. This has not occurred with respect to the availability of a defence of contributory fault in a misleading conduct claim, such defence being available under the Commonwealth version of the Law but not under the State and Territory versions. The

¹ Seddon and Fridman "Misleading Conduct and Contributory Fault: Inconsistency under the Uniform Australian Consumer Law" (2012) 20 *AJCL* 87.

consequence is that the defence can be avoided by a plaintiff suing under a State or Territory version.²

Under the ACL, it is possible for a defendant to argue, in response to a misleading conduct claim, that the plaintiff was at fault with the consequence that damages may be reduced. However, the way in which this has been implemented is flawed.

The basic prohibition of misleading conduct is s 18 of the ACL. At Commonwealth level the contributory fault defence is provided by s 137B of the CCA. It is not in the ACL itself.

When the States and Territories implemented the ACL, the legislation adopted the text of the ACL as set out in schedule 2 to the CCA. That text does not include any provision providing for the defence of contributory fault. So, unless State or Territory legislation provides independently for contributory fault in response to misleading conduct claims,³ the defence is not available at State or Territory level. This is because of the decision of the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*⁴ where it was held that there is no scope for arguing contributory fault to reduce damages unless the legislation so provides. The enactment of a contributory fault provision under the *Trade Practices Act* section 82(1B) was to reverse the effect of this decision. Now, under the 2010 legislation, the High Court's decision continues to apply at State and Territory level but has been abrogated at Commonwealth level.

The solution is to transfer section 137B of the CCA into the ACL as a new section 236A following section 236 which deals with damages. The State and Territory Acts which implemented the ACL allow for automatic adoption of changes made to the text of the ACL.

ENSURING GOVERNMENTS ARE BOUND BY THE ACL, PARTICULARLY SECTION 18

This part of my submission is more elaborately discussed in three published articles.⁵

There has been a long-standing anomaly in the way in which competition and consumer legislation applies to government. This arises from the sections that deal with how the legislation binds government. The sections only apply to government in so far as the government "carries on a business". Case law has established that government does not carry on a business when engaged in procurement for government purposes. The result is

² *Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq)* [2011] NSWCA 367 decided under the *Trade Practices Act* and the then *NSW Fair Trading Act*. The plaintiff was able to evade the defence of contributory fault by relying on the *Fair Trading Act*.

³ Seddon and Fridman argue at 20 *AJCL* 87-88 that the State and Territory contributory fault legislation does not so provide.

⁴ (2002) 210 CLR 109; (2002) 192 ALR 1; [2002] HCA 41.

⁵ N Seddon, "Holes in Hilmer! How the Trade Practices and Fair Trading Legislation Does Not Apply to Government Procurement" (1994) 2 *TPLJ* 207; N Seddon, "Holes in Hilmer Re-visited: Government Exemption from the Australian Competition and Consumer Law" (2012) 20 *AJCL* 239; N Seddon, "Government Exemption for the competition and consumer law; Has Harper patched the hole?" (2015) 23(3) *AJCL* 181.

that governments are very substantially exempt from competition and consumer law. In terms of commercial activity, there is very little else that governments do other than procurement.

The Harper Review of competition law has now recommended (recommendation 24) that this should be changed so that government is bound in so far as it engages in trade or commerce. In my view, if implemented, this would fix the anomaly in that there is little doubt that government procurement is in trade or commerce. The terms of reference of the Harper Review did not cover the ACL. So the recommendation only extended to competition law.

It would be bizarre for the legislation to be changed so that competition law applied to government but the ACL remained not binding on government procurement. Most of the cases testing the meaning of "carries on a business" were misleading conduct cases.

My submission is that the current review of the ACL should complete the job started by recommendation 24 of the Harper Review. Making the requisite changes is potentially complicated (possibly 19 sections across Australia would have to be amended). It is suggested in the 2015 article at 184 that a simpler solution could be implemented: change the definition of "business" in the Commonwealth version of the ACL so that it covers government procurement or, alternatively, applies to "trade or commerce" engaged in by government. This one amendment would then flow through to the State and Territory ACLs.