MinterEllison's submission to the Australian Consumer Law Review

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MinterEllison

Executive Summary

Review of the Australian Consumer Law (**ACL**) by Consumer Affairs Australia and New Zealand at this time is a welcome step in the development of the law, following its creation of a new national consumer policy framework on 1 January 2011.

MinterEllison appreciates the opportunity to make this submission, which advocates further steps that could be taken to simplify the approach to consumer protection.

We recommend consideration be given to:

- simplifying and streamlining the law to deal with key areas of consumer protection and otherwise removing complexity, duplication and rarely used provisions which, in practice, are not serving the interests of consumers;
- adopting a principles-based approach to the drafting of prohibitions; and
- simplifying terminology and clarifying the application of provisions, including removing criminal offence provisions and criminal remedies except where they are required to punish and deter particularly egregious conduct adverse to the interests of consumers.

MinterEllison is one of Australia's leading commercial law firms and recognised as a leader in competition law and practice. We would welcome the opportunity to expand on any of our submissions.

1. A simplified conceptual approach to consumer law

The objective of the national consumer policy framework is:

> '*to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly*'.[1]

This objective is consistent with section 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), which provides that the objective of the CCA is:

> '*to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection*'.

We consider the objective is best met through a consumer law which is clear and easy to interpret and apply by consumers and businesses alike.

The ACL reconciled 17 existing Commonwealth, State and Territory laws to create a single national consumer law framework. That was a significant step forward. But the ACL is, in our view, unnecessarily complex. The ACL specifies in detail many types of contravening conduct, rather than relying on broad principles-based prohibitions. This has resulted in unnecessary prolixity, overlap and duplication. Moreover, different categories of consumers and transactions are protected to differing degrees, with no clear policy basis for the distinction.

Consideration should be given to a further simplified conceptual approach so as to improve accessibility and understanding for consumers and business alike, while also reducing the compliance burden on business.

We envisage that this could be done by drafting principles-based prohibitions in key areas of protection required for consumers and, otherwise, redrafting the ACL to reduce complexity, duplication and to remove rarely used provisions which are not in practice enhancing the interests of consumers.

The key areas of consumer protection are likely to include:

- misleading or deceptive conduct;
- unconscionable conduct;
- unfair contract terms;
- consumer guarantees; and
- product safety and liability.

We suggest that other areas currently covered by the ACL (such as unfair pricing practices, pyramid schemes and unsolicited consumer agreements) be critically examined to determine whether they should remain in some form or, alternatively, whether they can be adequately addressed by broad, principles-based prohibitions in the above key areas.

To support simplification of the ACL, we suggest that:

- unnecessary machinery provisions which essentially duplicate broader principles-based prohibitions be removed;
- to the extent possible, all prohibitions should apply to a single concept of a 'consumer';
- there be clear, effective and streamlined civil remedies; and
- criminal offence provisions be removed, except where they are required to punish and deter particularly egregious conduct adverse to the interests of consumers.

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[1] Intergovernmental Agreement for the Australian Consumer Law (2 July 2009), paragraph C, page 3.

These recommendations are discussed in the following sections.

2. Clear, principles-based prohibitions

Adopting a simplified conceptual approach to the ACL envisages the use of broad principles-based drafting, where appropriate.

Principles-based drafting would ensure the ACL remains flexible as commercial behaviour changes over time and new issues emerge. The objective should be to prohibit detrimental conduct and impose obligations without being overly prescriptive as to particular conduct or context. Unless there is a good public policy reason in a particular context, principles-based drafting should be preferred over prescriptive drafting.

Following this approach, the courts are left to discharge their responsibility for interpreting and applying the law in specific cases. Consumers and business can also rely on the explanatory memorandum to relevant legislation and any guidance from the regulator.

Good examples of the workability of broad principles-based drafting include the long-standing general prohibition against misleading or deceptive conduct and the more recent evolution of the regulation of unconscionable conduct under the ACL. These provisions govern a minimum standard of fair dealing in business-to-consumer and business-to-business dealings. The final report of the Harper review last year recommended no changes to the unconscionable conduct provisions as they are working as intended.[2] The regulator and private parties have brought various cases to which the court has applied its judgment, guided in relation to unconscionable conduct by the matters to which it may have regard under section 22 of the ACL.

The prohibition of misleading or deceptive conduct under section 18 of the ACL currently overlaps with specific prohibitions under Part 3-1 of the ACL. We submit that this involves undue duplication, adding unnecessary complexity to the law - see Box 1 below.

Box 1: Misleading or deceptive conduct (section 18) and Part 3-1 of the ACL

Section 18(1) of the ACL provides that '[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

There is an extensive body of case law which gives meaning to the prohibition under section 18 of the ACL (formerly section 52 of the *Trade Practices Act 1974*). It has been enforced in an array of different business contexts.

Part 3-1 of the ACL contains specific prohibitions, which overlap with the intended coverage of section 18 of the ACL. For example, conduct which is specifically prohibited under section 29 of the ACL includes:

- false or misleading representations with respect to the price of goods or services
- false or misleading representations concerning the place of origin of goods
- false or misleading representations that goods are new

[2] *Competition Policy Review,* Final Report, March 2015, Sections 3.8 and 19.4.

Courts have found that there is no significant distinction in meaning between the terms 'false or misleading' and 'misleading or deceptive', such that misleading representations and like conduct could be covered by both section 18 and section 29.

Concise principles-based prohibitions can stand alone, as the prohibition of misleading or deceptive conduct did for many years. If it is considered necessary to explicitly refer to particular types of conduct intended to be covered by a general prohibition, this can be done in an explanatory memorandum or provisions which list examples of conduct covered by the prohibition akin to the examples of unfair terms under section 25(1) of the ACL.

At present, pecuniary penalties are available for breaches of the specific types of false or misleading representations in Part 3-1 of the ACL, but they are not available in respect of section 18. As noted in Box 1 above, there is no practical distinction between the level of wrongdoing or harm to consumers targeted by the prohibitions in sections 18 and 29 as currently drafted. Accordingly, the basis for applying different remedies is not clear. The use of differing language in those provisions ('false or misleading' versus 'misleading or deceptive') is not serving adequately to distinguish which conduct should or should not be penalised.

As the proliferation of cases in relation to misleading or deceptive conduct illustrates, the prohibition of such conduct has been applied in a wide range of circumstances, reflecting markedly different degrees of culpability on the part of the perpetrator of the conduct. We believe that it is generally accepted that not all misleading or deceptive conduct should be amenable to a penalty in addition to civil liability for resulting loss and damage. We therefore suggest that the ACL state the principles which determine whether misleading or deceptive conduct rises to the level of seriousness or culpability whereby a pecuniary penalty is warranted.

Beyond misleading or deceptive conduct, Chapter 3 should be reviewed to distinguish conduct which requires specific protections, for which more prescriptive drafting may be required, from conduct which is amenable to principles-based prohibitions.

We consider that the consumer guarantees enumerated in Division 1, Part 3-2 of the ACL are specific protections which should be retained. This regime appears to have been successful in driving better business behaviour and is a marked improvement on the regime of implied warranties which it replaced. Nevertheless, there is still room for greater simplification and clarity. An example is referred to in Box 2 below.

Box 2: Mandatory text for warranties against defects

Under section 102(2)(a) of the ACL, a person must not, in connection with the supply, in trade or commerce, of goods or services to a consumer, give the consumer a document that evidences a warranty against defects that does not comply with the requirements prescribed under the regulations.

Regulation 90 of the *Competition and Consumer Regulations 2010* sets out the requirements for any document that evidences a warranty against defects, as defined in section 102 of the ACL. Under regulations 90(1)(c) and (2), all warranties against defects must state, verbatim:

'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 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.'

The definition of a 'warranty against defects' in section 102(3) of the ACL specifically covers both goods and services. However, the prescribed text is inconsistent with a warranty relating to services. It is limited only to 'our goods', refers to remedies against a supplier that are only available for a failure to comply with the consumer guarantees on goods (such as replacement), and refers to the 'acceptable quality' guarantee, which applies only to goods (section 54 of the ACL).

The result is that the mandatory text, which must be included in any document evidencing a warranty against defects - including on services, potentially misrepresents the remedies available. Neither the ACL, nor the Regulations, allow any flexibility – for example, suppliers cannot state words 'to the effect of' the prescribed text.

Further, there is a real risk that compliance with the mandatory text may be inconsistent with the prohibition against misrepresentations regarding the existence, exclusion or effect of consumer guarantee rights (section 29(1)(m) of the ACL).

Whether other specific protections such as the prohibitions on pyramid schemes (Division 3, Part 3-1 of the ACL), pricing unfair practices (Division 4, Part 3-1 of the ACL) and unsolicited consumer agreements (Division 2, Part 3-2 of the ACL) should be retained is open to debate. We suggest that these prohibitions (and the experience of enforcement of them) be critically examined to determine whether they should remain in some form or, alternatively, whether the conduct at which they are aimed can be adequately addressed by broad, principles-based prohibitions in key areas.

3. Simplifying terminology and application of the law

The review should consider a simplified approach to defining the concept of a 'consumer' to whom protection is afforded under the ACL and removing inconsistency and unnecessary complexity in defined terms.

There are multiple definitions of 'consumer' - see Box 3 below.

Box 3: When is a 'consumer' not a 'consumer'?

Section 3 of the ACL explains where a person is taken to have acquired particular goods or services as a 'consumer'. This definition applies in various provisions of the ACL, particularly the consumer guarantees and unsolicited consumer agreements regimes. The definition is based on a monetary threshold (that is, the amount paid does not exceed $40,000), or where the goods are of a kind **ordinarily acquired** for personal, domestic or household use or consumption, or the goods comprise a vehicle or trailer acquired for use principally in the transport of goods on public roads. There are exceptions.

Section 23(3) of the ACL provides that a 'consumer contract' in the context of the unfair contract terms regime is one for a supply of goods or services or sale or grant of an interest in land, to an **individual** whose acquisition of the goods, services or interest is **wholly or predominantly** for personal, domestic or household use or consumption. The regime has been extended effective later this year to **small businesses**.

Section 2 of the ACL defines 'consumer goods', a term used in the context of the product safety regime, as those which are **intended to be used**, or are of a kind **likely to be used**, for personal, domestic or household use or consumption (and includes any such goods that have become fixtures since the time they were supplied in certain specified circumstances).

The use of different definitions creates unnecessary complexity. To a business or consumer attempting to understand their rights and obligations under the law, the differences in definitions and coverage is potentially confusing. We suggest that the review consider how best to achieve greater clarity in the application of the ACL to the persons it is intended to protect.

Further, the ACL should not overlap with any industry-based laws or regulations. Where there is a specific regime in place which affords appropriate protection to consumers and governs particular industry practice, there is no need for the ACL to apply. This is the case, for example, with respect to the unfair contracts regime and contracts in the insurance industry which are covered by the *Insurance Contracts Act 1984* (Cth).

Another unduly complex aspect of the ACL is the duplication between civil contraventions and criminal offences. Many provisions in Chapter 4 of the ACL mirror provisions in Chapter 3, such that the same conduct in relation to unfair practices is amenable to a civil pecuniary penalty and to criminal penalties. Generally speaking, the amount of civil penalties and criminal fines for particular conduct is the same.

Prosecutions under Chapter 4 are rare. In the main, it is preferable for the regulator to bring a civil proceeding, not the least because the standard of proof required is only the balance of probabilities, as opposed to the criminal standard of beyond reasonable doubt.

The criminal law already deals with fraud and like conduct. If that regime needs to be adapted to ensure that criminal fines and jail terms are available to punish and deter particularly egregious conduct adverse to the interests of consumers, (perhaps perpetrated knowingly or with wilful disregard to its wrongfulness), then we suggest that be done. We believe that approach to be preferable to the current extensive duplication of civil contraventions and criminal offences in the ACL.

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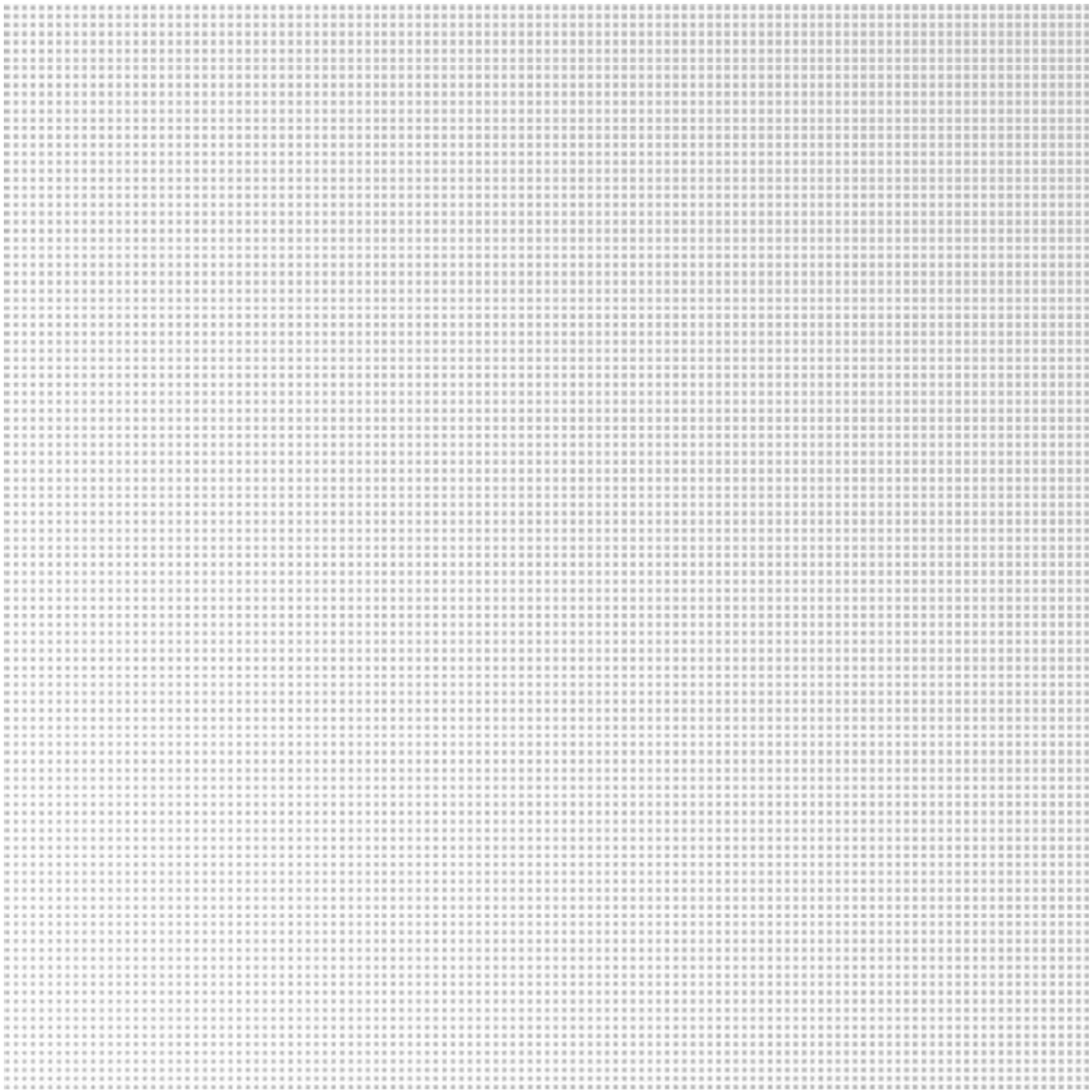

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