Australian Competition & Consumer Commission

The Law Society of New South Wales, Corporate Lawyers' Committee: General Counsel Group

Australian Consumer Law – Reflections on First Anniversary of the ACL

Rod Sims, Chairman
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Thank you for this opportunity to speak to you this evening.

As the corporate counsel in Australia's top companies it is vital that there is close and continuous communication between you and the ACCC.

In the short time I have been in this role, which is since August last year, I have been asked several times how I see the job of chairing the ACCC.

I know some think the complete answer to that question should be:

> 'To enforce compliance with the *Competition and Consumer Act*.'

I see the role as being to protect the long-term interests of consumers, and to enhance competition within the framework of a market economy.

Only with such an answer can I convey the enthusiasm I feel for the role.

The answer also reflects the energy that I think Australians and the Parliament would expect me to bring to the job.

I see no contradiction between my description of the role and the description that others might give to it.

In addition to being committed to competition and consumer interests, I am equally committed to respecting the role of Parliament and the courts.

We perform a large part of our role by bringing actions in the Federal Court. And, notwithstanding our right to appeal where we think that is the right thing to do, we completely accept the findings of the Court.

Before bringing actions we must have reasonable grounds for believing there has been a breach of the Act. And, again, we work – happily - within the statute.

There are two points that I often make about the public role of the ACCC, and I think they are worth repeating here:

- First, we will take on cases where the outcome before the courts is less certain; and

- Second, if we see a need for the law to be changed we will say so, publicly, so everyone can engage in the debate.

As you will know, the ACCC enforces compliance with both competition and consumer law.

It is in competition law, where the law is especially complex, where we will most likely take on cases where the outcome is less certain and where we may advocate policy change.

Further, it is this role – in competition - that grabs the majority of the headlines for the ACCC.

Our work in consumer law has a less obvious public profile, but it is equally important.

Consumer law in Australia has been significantly enhanced, and it is this I want to discuss today.

This is, approximately anyway, the first anniversary of the effective date of the *Australian Consumer Law* (ACL).[1]

There are four specific aspects of consumer law I will cover, namely:

- The genesis of the ACL

- The extent of change represented by the ACL

- The ACCC's experience of the ACL over the last year or so

- And, finally I will describe what else the ACCC needs to do in order to ensure we give full effect to the spirit and letter of the ACL.

I will conclude by outlining some of the ACCC's other priorities for 2012.

[1] ACL effective from 1 January 2011

Part 1 – Genesis of the *Australian Consumer Law*

I recognise that Australia has a long history of consumer protection law – both statutory and common law - but for today's purposes I'll begin in 1974 because it marks a significant turning point.

It is the year the *Trade Practices Act* took effect, including the first national consumer provisions, which prohibited unfair practices, and misleading and deceptive conduct.

The Trade Practices Commission, the forerunner to the ACCC, was the responsible Commonwealth agency.

The provisions of the *Trade Practices Act* were extended, in the 1980s, to prohibit unconscionable conduct in dealings between businesses and consumers.

The new provisions partly reflected the outcome of a decision in the High Court in 1983, which had set the common law principles on the subject in Australia, and also to strengthen the rights of small businesses in their dealings with much larger ones.[2]

Through the 1980s, most Australian governments recognised the need for more uniform consumer law across Australia. Thus, through to about 1992 the States and Territories were amending their respective fair trading acts to reflect the consumer law provisions in the *Trade Practices Act.*

This was all very well, at least as far as it went. Across the States and Territories we eventually arrived at a broadly consistent legislated core covering three areas, namely misleading and deceptive conduct, statutory warranties, and product safety.

This marked progress for both business and consumers.

But the impetus for one law remained. There were a number of variations between the respective States and Territories – what has been called the tyranny of small differences.

Further, the scope remained for all jurisdictions to introduce dramatic reform unilaterally. For example, in 2003 Victoria introduced unfair contract terms provisions, well ahead of her State and Territory counterparts.

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[2] Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447.

And there were other forces at work as well. In 2004, the Productivity Commission had reported on the potential for improvements from closer integration of consumer law between Australia and New Zealand. The Productivity Commission report recognised the high ratio of trade across the Tasman and the number of businesses that conduct trade in both countries.

Four years later, in April 2008 the Productivity Commission published a landmark report on consumer policy.

The terms of reference leading to the report were provided by the Treasurer of the time, Hon Peter Costello, and the then newly-appointed Minister for Competition Policy and Consumer Affairs, Hon Chris Bowen, embraced the report following the federal election.

I think this demonstrates the bipartisan support for the reforms, and the impetus for them, both in terms of micro-economic reform and in improving consumer rights.

In its report, the Productivity Commission recommended a complete overhaul of consumer law, using the *Trade Practices Act* as the stepping-off point.

Consumer law was already on COAG's agenda when the Productivity Commission reported.

Nonetheless, COAG expedited - through the respective State and Territory consumer affairs ministers - what has become a substantial reform, embracing the comprehensive recommendations of the Productivity Commission.

I also acknowledge the contribution of some dedicated State and Territory officials who hammered out the details.

What happened next reveals one of the success stories from COAG (Council of Australian Governments). Also it is a tribute to the work of the Productivity Commission.

Within a little over a year of the Productivity Commission's report, the first round of changes that would become the *Australian Consumer Law* was in its second reading in the Parliament.

As an example of policy-making and law-making, the *Australian Consumer Law* presents an example of some very smart cherry-picking by legislators and officials.

The unfair contract term provisions reflect the ones that prevailed in Victoria, based, in turn, on an English-Welsh model, and which were acknowledged as a success.

The new statutory consumer guarantees resemble the ones that were enacted in New Zealand, in the mid-1990s, and which had been proven there.

The mandatory reporting arrangements, for product safety, draw on similar provisions in Canada and the United States.

I should also note that the *Australian Consumer Law* was only one of the outcomes of the momentum that gathered around this time.

The consumer credit laws were also overhauled. ASIC was given new powers, including introducing a national licensing regime, from 2010, for consumer credit providers where previously there wasn't one other than in Western Australia.

Overall, the *Australian Consumer Law* took Australia from the middle ranks of legal protection for consumers to the upper ranks.

Part 2 – Major changes that came with *Australian Consumer Law*

It is useful to remind ourselves of the major changes that the *Australian Consumer Law* has brought as it has been phased in.

They are:

- One law, multiple regulators. There were 13 generic consumer codes in Australia in 2008. Now there is one, and it is enforced jointly by the ACCC and the State and Territory fair trading authorities (or the ACCC where a Territory delegates that authority to the Commission)

- New powers to expedite investigation. The regulators, including the ACCC and the State and Territory authorities, were granted power to use substantiation notices under which we can require a trader to provide information in response to allegations about misleading or false representations. Overall, this provides a quick means for the ACCC or other regulator to get to the bottom of an issue

- New penalties and new infringement notices. The civil pecuniary penalties regime – which provides penalties up to $1.1 million (one-point-one million dollars) for corporations and $220,000 (two-hundred and twenty thousand dollars) for individuals – effectively recognises that consumer cases are not necessarily criminal ones and that civil pecuniary penalties may be the right remedy. And infringement notices are a means for the regulator to deal with minor breaches of the law, by way of financial penalty, without the need to go to court

- Consumer guarantees now have status in statute. Previously, in order to enforce a breach of a consumer guarantee, the customer or regulator had to take a breach of contract action. The *Australian Consumer Law* effectively recognises that consumer guarantees must be easier to enforce than this if they are to be effective and within reach of individual consumers to enforce

- A statutory test for unfair contract terms in standard form consumer contracts. These provisions are important because they allow regulators to stop unfair terms being imposed across an entire industry which is effectively a reduction in the choice enjoyed by consumers

- A fully-harmonised product safety regime that replaces the previous patchwork approach to product safety standards and laws. Among other things, the new regime introduces mandatory reporting by suppliers of serious injury or illness linked to consumer goods. These provisions also include a means to effect swift national recalls where that is required

Part 3 – what has been our experience of the new Law?

In reflecting upon the effectiveness of the *Australian Consumer Law*, there are three main questions to address.

- How many cases have we taken, with successful outcomes benefitting consumers, under the new provisions and what do those cases show about whether business and consumers are adjusting to the new Law?

- To what degree have the courts embraced the new provisions in the Law?

- And how many cases have we not had to take, or how many examples are there where we have reached negotiated or voluntary outcomes, because that often shows that firms recognise their obligations under the Law?

Beginning with the pecuniary penalties, which are new, the evidence suggests the courts have fully embraced this form of penalty.

More than $11.2 million (eleven-point-two million dollars) in penalties have been awarded by the Federal Court since July 2010. I should however point out that two of these outcomes are subject to appeal.

The high-profile cases – Optus at $5.26 million in penalties, Harvey Norman Holdings at $1.25 million, and Yellow Pages Marketing/Yellow Pages Publishing at $2.7 million – have all been for misleading claims in advertising or sales pitches. [3]

Many of the infringement notices, newly provided for in the Law, were also for misleading conduct. We have issued 75 infringement notices since the Law took effect; and more than $450,000 (four-hundred and fifty thousand dollars) in penalties have been paid.

[3] Optus is among the cases subject to appeal

These results suggest to me that some businesses are only slowly recognising the need for accuracy and honesty in advertising and claims they make to consumers or customers.

Too many businesses still have a long way to go before they meet legal and public expectations regarding accuracy and honesty in dealing with consumers.

Enforcing the misleading and deceptive conduct provisions of the Act is a core role of the ACCC. Indeed, ensuring that businesses don't engage in misleading and deceptive conduct goes to the heart of a market economy where consumers can make more informed choices.

The ACCC remains vigilant over misleading and deceptive conduct.

On unfair contract terms in standard form contracts, the aim of the ACCC, and the other regulators, has been to raise awareness among businesses, and negotiate changes to standard contract terms in specific sectors.

We've undertaken proactive reviews in areas where complaint numbers are high, including domestic aviation, vehicle rentals, and telecommunications.

Generally, we enjoyed cooperation from businesses in these reviews, which indicates businesses recognise the need for change.

Product safety is an area in which the ACCC, and other regulators, have used the new powers in the Law extensively.

The mandatory reporting regime has led to 59 product recalls over what might have been expected under the previous arrangements.

Much of the ACCC's work in this area gets us into bread-and-butter issues. Sometimes we are testing whole ranges of products in labs for compliance.

But these are things that make a real difference to people who buy everyday products for themselves and their kids.

In one case we tested dozens of bicycles. The result was a distributor who recalled eight models because they didn't have chain guards, which are a mandatory safety device.

In another case, which has received a lot of publicity, we negotiated the recall of several teeth-whitening products that were being sold for home use, because of the quantities of peroxide.

The Parliamentary Secretary to the Treasurer, Hon David Bradbury, has subsequently issued a mandatory recall of the remaining unsafe teeth-whitening products.

In another case, the courts imposed a $400,000 penalty on a retailer for supplying children's dressing gowns which failed to comply with the mandatory standard for fire labelling.

The list of cases I've just been through could sound like a rollcall of bad news.

It's not intended that way.

There have been some notable instances where I can say firms have fully-recognised their obligations under the Law, without any need for the ACCC to intervene.

These are the cases that didn't occur and which reveal the extent to which businesses have embraced both the spirit and the detail of the Law.

There are many examples. Indeed, for the vast majority of Australian businesses, compliance is an everyday occurrence.

I will give an instance where a firm has recognised its obligations: Qantas earns good marks for the way in which it quickly acknowledged its obligations, when alerted to them by the ACCC, to travellers who had paid for fares when the airline was grounded in October.

Part 4 – Assessment – what needs extra or sustained attention?

I want to turn now to area of the law that require extra or sustained attention in future.

One of the major improvements in the Law is provisions that set out statutory consumer guarantees.

This requires millions of Australians to understand that they have a new set of statutory rights, some of which are probably not easily understood by many people, and some of which are, as yet, untested.

Indeed, research undertaken for the ACCC last year showed that nine out of ten (90%) respondents said that they had a good understanding of consumer protection laws. But, upon further questioning, few of them understood their rights in detail.

A couple of the more sobering findings were that:

- Only one in ten of the respondents (10%) understood their right to a refund or exchange on faulty products

- Only 4% of respondents understood goods or services must be supplied and perform as intended. And only 3% understood warranties and implied statutory guarantees.

This week the ACCC launched an awareness campaign – backed by advertising - which is aimed at raising understanding among consumers of their entitlements under the consumer guarantee provisions.

When people understand what they are entitled to, agencies like the ACCC are less likely to have to intervene.

I anticipate we will run other campaigns like this, regarding other aspects of the Law, to ensure consumers understand what the Law means for them. Consumer education remains high on our agenda.

Equally important is that businesses must understand their obligations under the statutory consumer guarantees provisions.

The evidence before the ACCC indicates that some businesses – including some high-profile ones - don't recognise their obligations or, if they do, breach them.

This is an area where you should anticipate sustained enforcement action from us.

Having achieved a set of statutory guarantees, we have to ensure they are observed.

We acknowledge though that there are some aspects of the legislation which will need time and experience to settle – for example, what is a reasonable expectation of how long a fridge should last? And what are the parameters of unfair contract terms?

In another area, the relationship between the ACCC and the State and Territory fair trading agencies has enjoyed new life since the Law took effect.

Co-operation and co-ordination between the respective agencies is high.

This was evident during the Qantas grounding, and during the 2011 floods in Queensland and Victoria, during which there was extensive cooperation between the ACCC and the respective State agencies.

Building on this cooperation – which brings benefits for businesses that can now deal, effectively, with a single core of consumer regulators – is a very high priority for the ACCC.

In another area of cooperation, the New Zealand Parliament has before it a consumer law reform bill.

One of the stated purposes of the bill is to provide harmonisation with the Australian Consumer Law in line with the joint objectives of the Australian and New Zealand Governments to further the single trans-Tasman market.

For business, that is good news, given the number of firms that operate on both sides of the Tasman.

Operationally, cooperation between the ACCC and our New Zealand counterpart, the New Zealand Commerce Commission, is very high.

An ACCC Commissioner, Dr Jill Walker, is an associate member of the NZCC. Dr Mark Berry is the chairman of the NZCC and he is an associate member of the ACCC.

Trans-Tasman information-sharing and cooperation on enforcement is also high. This is a relationship that will only grow and deepen.

Part 5 – ACCC's 2012 agenda

As a regulator, the ACCC has to prioritise areas of attention. We can't provide comprehensive coverage all the time and everywhere.

We've prioritised areas of action for 2012 and I will be providing detail on the ACCC's revised enforcement priorities publicly in the next couple of weeks.

In the meantime I can reiterate some areas that we have already named publicly, in consumer law, and in other areas, where we are paying close attention.

- First, raising understanding among consumers as to what they are entitled to. As a regulator, we mostly get involved in consumer matters when things have gone wrong. Educating consumers prevents that from happening. Hence the consumer guarantees advertising campaign I have just mentioned

- Second, unconscionable conduct, which, under the Act, applies to both consumer-to-business transactions and many business-to-business transactions, is high on our list. Unconscionable conduct has to be more than unfair. It has to be conduct that is irreconcilable with what is right or reasonable and it must show no regard for conscience. That is a high legal standard to meet in litigation and, generally, they are hard cases to investigate and act upon. Nonetheless, I have said that I am interested in the ACCC exploring the potential application of the provisions, including in areas such as door-to-door energy sales, and perhaps in the dealings of some major businesses with their suppliers

- Third, section 46 of the Act, which prohibits the misuse of market power, by firms which have substantial power, in order to substantially damage or eliminate their competitors. Again, these are hard cases to take and there have been a relatively small number of successful ones. But I have said that the ACCC will be willing to take these cases whenever we can see good cause

- Fourth, I have identified vulnerable consumers as a priority. These are often consumers with low financial or language literacy, people in remote locations, and with restricted access to advice or services. Often they are Indigenous people. The ACCC has taken several cases against businesses that engaged in unconscionable conduct, or misleading and deceptive conduct, where Indigenous people were the victims.

- Fifth, misleading and deceptive conduct generally, but in 2012 particularly, ensuring that any claims, made by businesses or traders, that price rises flowing from the new carbon-pricing regime do not mislead consumers

- Finally, the online economy provides many opportunities, but brings with it many risks. I still sometimes find businesses that think consumer law does not apply if you are trading online. On the other hand, some 'bricks and mortar' businesses seem to think anything goes when it comes to preventing competition from new online players

Closing

A single national consumer law is one of the most notable outcomes of the program to modernise the Australian economy. It marks a considerable bipartisan achievement by the Federal, State, and Territory Governments.

For consumers, the *Australian Consumer Law* brings benefits in clearly stated consumer guarantees rights.

For businesses, it lowers the regulatory costs of operating nationally in Australia.

In the last year, we've made substantial progress in implementing the Law.

But it is still early on and there are areas that require the sustained attention of regulators and business.

As senior legal practitioners working in firms which are the cream of Australia's listed companies, you have a critical role to play in ensuring that the Law fulfils its potential to benefit both business and Australian consumers.

Thank you.