

Competition and Consumer Law Notes

LAW1033

Australian Consumer Law

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- Misleading and deceptive conduct
- Unconscionable conduct especially the statutory provisions
- Unfair contract terms

Protection against consumer detriment

- Consumer detriment refers to the loss in economic welfare consumers incur "...if they are misled into making purchases of goods and services which they would not otherwise have made or if they pay more for purchases that they would if they had been better informed" (OECD Consumer Policy Toolkit)
- Consumer detriment may be subdivided into structural detriment and personal detriment
- Structural detriment is the principal concern of competition policy and personal detriment is the principal concern of consumer policy
- Competition policy
 - Principally concerned with structural deficits
 - Supply side
 - Structural
 - Competition policy
 - Market failures arising from market structures e.g. monopolies oligopolies and how they limit choice and increase prices
 - Focus on market and the firms that participate in it - protect against structural detriments
- Consumer policy
 - Principally concerned with personal welfare
 - Demand side
 - Consumer policy
 - Market failures arising from transaction costs, inequality of information, bargaining power, litigious power etc. and how they impact consumers
 - Focus on individual experiences of consumers - protect against personal detriment

The importance of integrating supply and demand policies is widely accepted

- Competition involves the interaction of supply and demand....competition policy is concerned mainly with the supply-side of markets...
- Even when markets are structurally sound on the supply side, however, there can still be adverse consequences for consumers and therefore a misallocation of resources...
- It is the behaviour of consumers that activates competition, and that behaviour can be shaped in part by public policy. Public policy, therefore is concerned with the demand-side as well as the supply side of markets, to ensure as a basic condition that consumers are well-informed. Even well-informed consumers exhibit consistent patterns of behaviour that can lead them away from making decisions that satisfy their preferences...
 - OECD, Roundtable on Demand-side economics for Consumer policy, summary report (20 April 2006, OECD, Paris) at [8]

The Australian Consumer Law

- The ACL came into operation on 1 January 2011 and applies only to conduct occurring on or after that date
- Before this time, the main source of consumer protection law was the Trade Practices Act 1974 (Cth), as well as the laws of the various States and Territories
- Each state and territory has separately legislated to make the ACL a law of their respective jurisdictions - **however, they haven't all taken the same approach - so take care using examples from other states**
- Part XIAA of the CCA facilitates the application of the ACL by the states and territories. The states have a general power to make laws in respect to consumer protection matters, as do the territories within the scope of the territories power (s.122 Constitution). The states and territories receive partnership payments from the Commonwealth consisting of facilitation payments to compensate them for set up costs, and reward payments if they achieve key milestones under COAG's National Partnership Agreement to Deliver a Seamless National Economy (NPA)
- Each of the states and territories have reserved the right to exclude any future modification to the ACL as at 1 January 2011 in their respective jurisdictions

Australian Consumer Law - Victoria

- The Australian Consumer Law and Fair Trading Act 2012 (Vic) defines the Australian Consumer Law text as Schedule 2 to the CCA and the regulations under s.139G of the CCA. It states (s.8) that the ACL text, as in force from time to time:
 - Applies as a law of Victoria; and
 - As so applying may be referred to as the Australian Consumer Law (Victoria); and
 - As so applying is part of the Australian Consumer Law and Fair Trading Act 2012 (Vic)
 - s.9 of the ACLFTA (Vic) allows for Victoria to "opt out" of adopting any changes
 - No double jeopardy:
 - Because the same conduct may be actionable under the ACL and also under the state and territory ACL Acts, and because the same conduct may be the subject of a pecuniary penalty for a consumer protection breach as well as criminal action, the CCA/ACL contain a number of provisions designed to prevent the doubling up of liabilities
- *can't litigate in Supreme Court then go to federal court hoping for different result*

What is consumer protection?

- The ACL aims to prevent businesses from harming consumers and promotes fair competition

How does the ACL define a consumer?

- A person (or business) will be a consumer if they acquire goods or services for:
 - Up to \$40,000
 - Over \$40,000 --> goods or services that are normally used for personal, domestic or household use or consumption
 - Regardless of cost - vehicles or trailers used mainly to transport goods on public roads
 - (see section 3)
- People who purchase goods for resupply or for use in the manufacturing or repair of other items are not consumers even if they meet the criteria outlined above

The role of the ACL regulators & the courts

- The ACL is enforced by all Australian (including state & Territory) courts and tribunals; policed by ACCC, and by each state & territory consumer protection agency. Together with SAIC, these bodies are known as ACL regulators

- ACL regulators educate businesses and the public about their legal rights & obligations, investigate possible breaches of the law and take enforcement action against persons who breach the law
- ACL regulators may take action to:
 - Stop unlawful conduct
 - Deter future offending conduct
 - Obtain remedies that will undo harm caused by illegal conduct (e.g. by corrective advertising)
 - Encourage effective use of compliance systems
 - Take action in courts to obtain orders which punish wrongdoer by imposing penalties or fines and deterring others from breaching ACL
- Each ACL regulator works on matters occurring in their own state or territory, with ACCC having federal jurisdiction. ACCC pursues matters based on its Compliance Enforcement Policy, which is available on its website

Forms of consumer protection

- Most provisions of the ACL either forbid a particular form of conduct or directs a business to act in a certain way. Many of these provisions overlap. Accordingly, in some circumstances a business that engages in one form of illegal conduct may also be at risk of breaching other provisions of the ACL
- Going forward we'll look in more depth at some important areas of consumer protection:
 - False or misleading advertising practices
 - Unfair selling practices
 - Consumer guarantees
 - Product safety and liability