Allens › ‹ Linklaters

PART A GENERAL

1 Overview

Allens welcomes the opportunity to provide a submission in response to the Australian Consumer Law Review Interim Report.

Although the ACL is generally functioning well, Allens considers that a number of provisions require amendment and clarification to ensure that the ACL meets its objectives. In particular, the ACL should provide appropriate protections to consumers and clear and certain guidance to business about accepted standards of commercial behaviour. Laws which are unclear, duplicative or overly prescriptive lead to unnecessary complexity in the law, increased compliance costs and ultimately, increased prices for consumers.

This submission outlines our further recommendations on four key issues discussed in the Interim Report:

- consumer guarantees;
- warranties against defects;
- unconscionable conduct and unfair trading; and
- enforcement.

Allens has a market-leading consumer law practice. We advise local and international clients on all aspects of the ACL, including compliance, regulatory investigations and enforcement.

2 Consumer Guarantees

2.1 Could the issues about the durability of goods be addressed through further guidance and information? (Question 10)

In Allens' experience, a key difficulty faced by suppliers in seeking to comply with the consumer guarantees is determining the length of time that particular goods are reasonably expected to last before the appearance of a fault amounts to a failure to comply with a guarantee. We are aware of a number of suppliers who would prefer to issue internal guidelines to staff about these timelines but are concerned that doing so might be viewed as seeking to limit consumers' rights under the ACL. In our view, it is critical that further guidance from the ACCC be provided to business on the following issues:

- the length of time that certain goods should reasonably be expected to last;
- the circumstances in which suppliers can offer express guarantees that their products will last for a particular period; and

- the processes suppliers can adopt to determine whether the 'rejection period' has ended (including confirmation that suppliers can consult with the manufacturer for their input on these issues).

We agree that principles-based regulation is preferable to prescriptive models.[1] However, appropriate regulatory guidance on the above issues above would not detract from this approach. For example, timelines for durability could be provided by category of good (for example, whitegoods, small household appliances) and by price bracket. Guidelines could also be limited to the categories of goods which are subject to the greatest number of queries or complaints to the ACCC and could be issued following further consultation with industry.

2.2 Are there circumstances that are inherently likely to involve, or point to, a 'major' failure? What are these circumstances, and should they be defined, or deemed, to be major failures? (Question 16)

Allens agrees that the distinction between major and minor failures in the ACL is intended to strike a balance between access to refunds (which is likely to be the remedy of choice for consumers) and the costs for traders.[2] However, Allens considers that the current definition of 'major failure'[3] does not strike that balance and effectively leaves no room to play for the provisions regarding non-major failures. The key issue is subsections 260(a) (for goods) and 268(b) (for services) which provide that a failure will be 'major' if the goods or services *would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure*. In Allens' experience, this aspect of the definition is problematic because it can readily be argued that no reasonable consumer would acquire a good (or service) knowing that it had a fault, no matter how minor. The result is that businesses are incurring increased costs in the form of higher rates of refunds or replacements than is proportionate to any detriment flowing from non-major failures. It should be remembered that consumers are still entitled to a remedy for non-major failures. It is simply that the supplier may elect the remedy that makes most commercial sense, whether that be a replacement, refund or repair. A supplier's entitlement to select a remedy in these circumstances is key to their ability to manage and control compliance costs.

Allens submits that subsections 260(a) and 268(a) should be amended so that it will be a major failure if the good or service would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure *and the good / service cannot, easily and within a reasonable time, be remedied by the supplier*. This amendment is consistent with subsections 260(d) and 268(d) which provide that it will be a major failure if the good / service is substantially unfit for a purpose for which goods / services of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose.

2.3 Other issues: partial refunds

Allens considers that suppliers of goods should be able to offer partial remedies for breach of the consumer guarantees in appropriate circumstances. This would bring these provisions into line with the

[1] Interim Report, p 48.

[2] Interim Report, p 51.

[3] See section 260 (goods) and section 268 (services), ACL.

corresponding provisions in respect of services[4] and is also consistent with numerous court decisions which have accounted for previous use and enjoyment in the context of awarding damages for faulty goods.[5]

Currently, if a consumer rejects goods for a major failure to comply with a guarantee (or where a non-major failure cannot be remedied), the consumer can receive a refund of *'any money paid'* or 'an amount…equal to the value of *any other consideration provided'* for the goods.[6] Accordingly, the current regime requires suppliers to grant full refunds to consumers for product defects, notwithstanding that consumers may have used and enjoyed the product for a period of time prior to the defect appearing. This issue is compounded by the broad definition of 'major failure' as discussed in section 2.2.

3 Warranties against defects

3.1 Is there a need to amend current requirements for the mandatory notice for warranties against defects? (Question 19)

Allens considers that the mandatory text about ACL rights should be removed because it does not accurately reflect the position under the consumer guarantees and there are already sufficient protections in the ACL to ensure that consumers are not misled about their rights. If the text is not removed, it should be shortened and drafted in such a way that it can be used on goods destined for global markets. Any changes to these provisions require an appropriate transitional period of at least two years.

4 Unconscionable conduct and unfair trading

4.1 Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise? (Question 37)

Allens agrees with CAANZ's view in the Interim Report that amendments to the unconscionable conduct provisions are not warranted and that the development of the unconscionable conduct law through the courts provides flexibility and allows the law to be developed and refined in response to changing societal values.[7]

In Allens' view, additional statutory guidance regarding the meaning of unconscionable conduct is not warranted and may only cause confusion and complexity. In particular, unconscionable conduct must necessarily be expressed at a level of generality and is not capable of precise rules. This is because it is concerned with the fairness and morality of conduct which depends on the circumstances in question.

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[4] See subsections 269(3) and 265(3), ACL.

[5] See e.g. *Peters v Panasonic Australia Pty Ltd (Civil Claims)* [2014] VCAT 1038 where the Tribunal reduced the applicant damages for a faulty television to take into account the benefit the applicant had received from the television for the years that it was in working condition.

[6] See subsection 263(4), ACL.

[7] Interim Report, p 109.

Allens notes the recent decision of Yates J in *ACCC v Woolworths,* in which his Honour stated, in relation to unconscionable dealings between business, that:[8]

> …the characterisation of conduct, in trade or commerce, as "unconscionable" **is not arrived at by a process of personal intuitive assertions or idiosyncratic notions of commercial morality**. The characterisation of the conduct in issue is plainly informed by fact-finding concerning **the nature of the relationships involved, by which the relevant norms are to be identified**.

4.2 Should the unconscionable conduct provisions be extended to publicly listed companies? (Question 40)

The protections against unconscionable conduct should not be extended to publicly listed companies. The exclusion of publicly listed companies from these protections is not arbitrary. It reflects Parliament's view that smaller businesses may be disadvantaged in a similar way to consumers when dealing with larger companies. Listed public companies were excluded because they are not vulnerable and do not lack bargaining power. There is no reason to now depart from this approach which also conforms with the operational objectives of the ACL to protect consumers who are most vulnerable and who are at the greatest disadvantage. While listed companies may from time to time be subject to unfair dealings, they have the resources to respond to that conduct and protect their own interests. Extending the unconscionable conduct provisions to publicly listed companies is likely to encourage opportunistic litigation.

4.3 Are there any benefits and disadvantages to a general unfair trading prohibition that should be considered? (Question 41)

In Allens' view, a new general prohibition against unfair practices is unnecessary and should not be introduced. While there are international examples of general prohibitions against unfair trading, there is no clear case for their introduction in Australia. First, the ACL already provides broad and flexible protections directed at a large range of unfair commercial practices, including the prohibitions against misleading or deceptive conduct, false or misleading representations and unconscionable conduct and the provisions dealing with unfair contract terms and consumer guarantees. Allens agrees with the view of CAANZ that a new general prohibition would substantially overlap with these existing protections.[9]

Second, Allens is strongly of the view that new provisions should only be introduced following the identification of a specific harm which the current provisions cannot adequately address. Legislative provisions which overlap are not only unnecessary – they increase compliance costs, create uncertainty and increase the complexity of law. This is particularly undesirable in the case of the ACL which should be as simple and streamlined as possible so that it is accessible to consumers.

4.4 Should the use of terms previously declared 'unfair' by a court be prohibited? (Question 44)

Allens does not consider that the use of a term that has been declared void should be prohibited and subject to a penalty under the ACL. In our view, the existing remedies and consequences already provide

[8] *ACCC v Woolworths* [2016] FCA 1472, [142].

[9] Inquiry Report, p 116.

a strong incentive to business to ensure that their standard form contracts comply with the ACL and to remove any terms that are declared unfair by a court. For example:

- once a term has been declared unfair, it is void and cannot be relied upon or enforced. The commercial consequences of being unable to enforce clauses such as a limitation of liability or a price review are significant. In the event that such a term was declared unfair and void, companies have a very strong incentive to promptly remove those clauses from their standard form contracts and insert new clauses which do comply with the ACL;
- if a company seeks to rely on a term which has been declared unfair and a consumer or small business has suffered loss, it could face claims for compensation by a private litigant or the ACCC. Moreover, asserting that the term is legitimate after it has been declared unfair could expose the company to an action for misleading conduct or false or misleading representations as to the true effect of the term;[10] and
- seeking to rely on a term which has been declared unfair would give rise to significant reputational damage and loss of customer trust.

If relying on a declared unfair term were prohibited and subject to a penalty, it is critical that the prohibition only apply in circumstances where the same party (or an assignee) sought to rely on an identical term in an identical contract. To prohibit the use of identical or substantially similar clauses more broadly would be unwarranted and a substantial erosion of freedom of contract. Whether a term is unfair depends on the circumstances of the parties to the contract and the terms of the contract as a whole. A term which has been declared unfair in one context may not be unfair when viewed in the context of another contract or another party's legitimate business interests.

5 Enforcement

5.1 Are the current maximum financial penalties adequate to deter future breaches of the ACL? (Question 64)

Allens considers that the current maximum penalties for contraventions of the ACL are adequate and do act as a strong deterrent to future breaches of the ACL. Moreover, the possibility of pecuniary penalties combined with other consequences such as non-punitive orders, disqualification of management and adverse reputational impacts creates a powerful incentive for companies to develop robust compliance systems and a strong culture of compliance to prevent future breaches. In our view, it is also appropriate that the largest penalties in the CCA be reserved for the most egregious conduct in Part IV.

5.2 Other issues: no penalties for conduct prohibited by section 18

Allens agrees with the view of CAANZ that a clear case has not been made for attaching financial penalties to the prohibition against misleading or deceptive conduct in section 18 of the ACL.[11]

In our view, section 18 is too broad and general in scope to be properly the subject of penalties. Prohibitions which carry a penalty should be identified in specific terms to enable individuals and

[10] See section 29(1)(m), ACL.

[11] Interim Report, p 185.

corporations to know with certainty what conduct will expose them to a financial penalty. If there is a concern that particular forms of misleading conduct should attract pecuniary penalties, this can be addressed through bespoke expansion of the specific prohibitions in sections 29 and 151 of the ACL.

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