

Spier Consulting - Legal

Submission to the Australian Consumer Law Review- Interim Report.

Overall position

I am of the view that the ACL generally works well as a nationwide legislative regime and a great model in a federation. However, I do have some concerns about access to private redress.

I make the following comments on relevant Questions set out in the Interim Report.

1.2.3 Fund raising activities and the ACL.

I do not favour any exemptions, even charities. There may be some jurisdictional issues but I think these can be overcome. ACL need not be confined to "trade and commerce" matters. The States and Territories can fill any constitutional gap.

1.2.4 Who is protected under the ACL?

I am strongly of the view that small business transaction should be protected and would support an increase from \$40,000.00 to \$100,000.00 but would add that in some cases the \$100,000.00 is still low, for instance, trucks and owner drivers and agricultural equipment and farmers.

There is a good case to have no limit as all business is entitled to expect that supplier stand behind their product.

The other issue is the exclusion of goods that are resold or to be used up. That exclusion is no longer appropriate.

Generally all purchasers should be protected.

I was involved in the 1977 Amendments flowing from the Swanson Committee Report where some business transactions were to be covered by consumer guarantees. Those changes were a great innovation but some aspects were based on some old thinking even then, such as excluding goods to be used up or resold. That exclusion is now an anomaly.

The other issue I want to raise is the limitation on liability in cases where b2b transactions are covered subject to a fairness test. That limitation was known as the “IBM” clause as IBM lobbied successfully for the limitation. That limitation is again an anomaly.

1.2.6- Interaction between the ACL and the ASIC Act

I am of the view that the inclusion in the ASIC Act of the specific consumer protection protections is warranted.

I would add that in my view there should not be a carve out in the ACL for financial products. That carve out was misconceived. I would suggest concurrent jurisdiction as recommended by the Wallis Inquiry into the Financial Services sector.

2.3.2 Unconscionable conduct and publicly listed companies.

I am of the view that publicly listed companies should not be excluded. There should at this period in time be no exemption or exclusions.

That exclusion was politically expedient at the time but not now.

2.4 Unfair contracts in business dealings

I am of the view that the UCT law needs time to settle down but have one issue of concern.

The B2B UCT was cobbled on to the consumer UCT and as a result there are anomalies. Most of these can be reviewed later but there is one of real concern re small business. That is the fact that the upfront price is excluded, whilst that is understandable in the initial contract there is a problem when contracts are renewed or rolled over. Small businesses are then in a captive situation and the “up front price” exclusion should not apply.

2.4.6- Monetary penalties

The UCT laws should be able to be enforced the same way as any of the ACL provisions.

2.4.7 Representative action by regulators

I agree that the regulators should have the powers to compel evidence in representative actions.

3.1.4- Access to remedies

I would support any move to make access to remedies more effective including improving the so called “follow on” or “coat tails” regime. The Harper Committee made some recommendations and these have been accepted by the Government but more is needed.

A Court decision that someone has been in breach should be accepted by any other Court and then the issue is simply causal link and quantum of damages. Simply accepting admissions is not enough as these are usually very narrow and qualified.

I am also of the view that there needs to be a simple cheap regime to handle ACL type disputes. Much is said about EDR in financial services yet little in the wider economy. Public bodies such as ACCC are not suitable for this role. I suggest that trade associations step up to this role and that there is joint funding of that by industry and government. Such bodies can seek to mediate disputes and if that fails then Courts and Tribunals or regulators may need to get involved. In my experience most disputes will go away as many are based on misunderstandings or can be resolved through some compromise.

4.1.6 Application of consumer guarantees to the online environment

I am of the view that the auction exemption in consumer guarantees should be removed altogether and especially where the consumer cannot properly inspect the goods.

I am also of the view that the linked credit provider provision should be utilised to make payment system operators jointly liable when it comes to international purchases.

I would be happy to elaborate on the above.

A handwritten signature in black ink, appearing to read "Hank Spier". The signature is written in a cursive, flowing style.

Hank Spier