



Rights of the Child Consumer Conference

Scope for application of Australian Consumer Law to protect children's interests

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Introduction

Safeguarding the rights of children is a big issue for consumer protection agencies around the world. Our counterparts at the US Fair Trade Commission have made protecting the privacy of children a priority. The European Commission has taken steps to protect children when playing games online. The International Consumer Protection and Enforcement Network, which involves consumer protection authorities from over 50 countries, recently focused on disclosures around in-app purchases. In all these activities, there is a common recognition that children are vulnerable consumers.

In preparing for today's session I started thinking about whether the Australian Consumer Law contains any protections that are specifically for children as consumers, as opposed to protections designed to protect the wellbeing of children more generally. I think, perhaps with one exception, that it does not, and that the protections for children as consumers are the same as those that exist for adults.

The follow-up question to that observation is 'does that matter?' – are there any gaps in the protections offered by the Australian Consumer Law for young consumers. I will return to this at the end of my remarks.

Most of what I want to speak about today are the protections the Australian Consumer Law offers young consumers, and young people and children more broadly.

The Australian Consumer Law: An Overview

The ACL is a single, national law involving multiple regulators. The ACCC and state and territory fair trading agencies enforce the ACL and the Australian Securities & Investment Commission (ASIC) has a role when financial services are involved. This model works well. For the most part, the ACCC is responsible for matters that have a national dimension.

A common consumer predicament facing young people

One of the most common consumer experiences for young person is their interaction with mobile phone companies. As a mother of four, including two teenagers, I now have first-hand experience of dealing with phone companies and the concept of 'bill shock'.

And just thinking about the purchase of a mobile phone or signing up to a mobile phone plan, a myriad of potential consumer issues arise. For example:

- What representations are made about the handset? Are they true?
- Is the handset locked to a particular carrier? Was this disclosed?
- Is the handset included in the mobile phone plan? What else is included? How long am I locked into this plan for? What are my exit fees? How do I compare plans?
- How are the charges calculated? Do I have to pay extra if I exceed my plan?
- Am I really supposed to read and understand several hundred pages of contractual fine-print before I sign up to the plan?
- If my handset fails what are my consumer guarantee rights? How long should a handset last anyway?
- What are all these charges on my bill? I thought I had a phone plan with \$500 of included value.

And the list goes on.

The ACL provisions provide important protections in some of these common circumstances. For example:

Misleading & deceptive conduct

The Australian Consumer Law prohibits misleading or deceptive conduct, and making false or misleading claims. Put simply, the ACL demands truth in advertising. Over the years, we've applied this rule to protect young consumers as well as parents and carers. In the case of mobile phones for example, we have taken Court actions involving price misrepresentations, premium charging for downloading ring tones, 'Max Cap' advertising, bundling of services and many others.

Unconscionable conduct

The ACL also prohibits unconscionable conduct—which is what it sounds like—particularly harsh or oppressive behaviour that goes against conscience as judged against business and social norms and standards. This is an area that may offer some increased protection for young consumers which I will return to shortly.

Unfair contract terms

A reasonably new protection provided by the ACL is against unfair contract terms. You've probably come across a standard form contract in joining a gym, hiring a car or even signing the kids up to a music class or swimming lessons. Businesses offer these types of contracts on 'a take it or leave it basis', which can leave consumers vulnerable to unfair terms.

To provide some balance, the ACL provides the court with the powers to void unfair terms in standard form contracts. In weighing up whether a term is unfair the Court has to consider whether the term causes a significant imbalance between the consumers' rights and those of the business.

Consumer guarantees

Finally, when you buy products and services they come with automatic guarantees that they will work and do what you asked for. If you buy something that isn't right, you have rights. We take a combined enforcement and education approach in raising awareness about consumer guarantees. For example, with something like 89 per cent of teenagers owning or using a mobile phone and 69 per cent of this group

using a smartphone¹, we recently worked with other agencies to develop multimedia classroom activities to help teenagers be more savvy about the costs.² One of the modules helps teenagers understand that they have rights if a phone handset has a problem.

Key consumer issues for children

Consumer Product safety

One of the principle ways the ACL protects children is through a national product safety law and regulatory framework for consumer products and services. Parliament has designed many of our consumer product regulations with the safety of young children in mind. Preventing avoidable injuries enhances the health and wellbeing of children. Indeed, consumer product safety is one of the ACCC's enduring priorities and many of our activities are about ensuring safe children's products and informing parent and carers about possible dangers.

The ACL covers bans on consumer products such as novelty cigarette lighters and baby dummies with 'bling'. It also includes mandatory safety standards for products such as cots, children's nightwear and prams. There are also standards to protect children from hazards such as blinds cords and beanbag filling. The consumer product safety regime also covers product recalls.

Some of the issues or hazards we are dealing with include:

- **Button batteries** - when ingested, saliva triggers the batteries to generate a chemical reaction called 'hydrolysis', leading to major internal injuries and in some cases causing death. Based on the best available figures, an estimated 20 children per week present to an emergency department because they have swallowed or inserted a button battery. Five out of 20 will be injured as a result.

¹ ACMA <http://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Aussie-teens-online>

² <http://www.accc.gov.au/about-us/tools-resources/helping-students-be-mobile-savvy>

- **Quad Bikes** - Children must never ride quad bikes intended for adults – either as drivers or passengers. Tragically, in 2014, there were 14 quad bike related deaths reported in Australia and three of these fatalities were children under 14.
- **Toppling furniture** – Small children tend to climb on furniture such as freestanding bookcases, drawers, wardrobes and sideboards, and if the furniture is unsecured the child's weight can cause it to topple. Falling furniture can not only strike a child but can trap and crush them underneath, causing the child to suffocate. At least 14 children under nine years old died in Australia during 2000-2015 after domestic furniture fell on them. The ACCC is urging parents to attach, mount, bolt or otherwise secure furniture to walls and floors.

Misleading claims that impact children

Misleading claims and advertising, while not targeted at children consumers specifically, can have significant impacts on children.

Health

For example, in the area of children's health, one of our recent cases involved a company that was promoting homeopathy therapies as an alternative to the whooping cough vaccine – and in the course of various promotions and on the company's website stated that:

- the whooping cough vaccine is short lived, unreliable and no longer effective;
- the vaccine may not be the best solution for, of limited effect, and is unreliable at best, in protecting against whooping cough; and
- the vaccine is largely ineffective in protecting against whooping cough.

This was in circumstances where, in the local area of these promotions, there had been several whooping cough cases.

Whooping cough is of course a serious disease for young people, particularly babies, and can be fatal.

While it is not the role of the ACCC to determine which medical products or services are better than others, we were concerned that scientific evidence did not support these claims, and there was the potential for real harm if parents of young babies relied on these sorts of statements.

The Federal Court agreed and ordered both the firm, Homeopathy Plus! Pty Ltd, and its director, to pay penalties of \$115,000 and \$23,000 respectively, for publishing these false and misleading statements.

Computer games

In another recent matter with particular relevance for young consumers, the ACCC has recently taken on some large international on-line gaming distributors, after complaints from consumers, including young people, about being denied their consumer guarantee rights.

These companies are very large international companies based in the United States. The complaints that we received were to the effect that consumers were signing up for on-line games, and that put simply the games were not working or functioning as they should. The companies were refusing refunds and remedies.

In the first matter we accepted a Court enforceable undertaking from Electronic Arts in which it undertook to implement a consumer redress program for concerned consumers.

In the other the ACCC instituted proceedings in relation to alleged misrepresentations made by Valve, an international online computer game distributor. The game platform, known as 'Steam', it has over 65 million users worldwide. Valve sells computer games through Steam to Australian consumers, but does not have a physical presence in Australia.

This action alleges Valve made false or misleading representations to Australian customers of Steam, many of whom are young consumers, that they had no entitlement to a refund for any games sold by Valve in any circumstances, and that the Australian consumer guarantee regime did not apply. That case continues.

Technology and marketing to young consumers

You will probably hear a lot today about technology and marketing to young consumers. As I alluded to in my introduction, it is an area of interest for many of our international consumer protection counterparts.

Jessica Rich, a consumer expert and senior director at US Federal Trade Commission recently said: *“We’re living in an era where the line between advertising and objective content is increasingly blurry and confusing.”*³

Speaking anecdotally, and from my own observations of teenage purchasing, young people are likely to be particularly susceptible to this kind of advertising.

For example, take the area of online reviews and testimonials.

The Sensis Social Media Report⁴ found that blogs and reviews continue to influence the buying decisions of adult consumers, with over half of social media users (55 per cent) reading online reviews before making a purchase.

Online reviews of products or services are made by ordinary consumers or people that have used the product or service. The review can be on a business’ web page (as a testimonial) or on a third party review platform.

Online reviews can provide a low cost means for consumers to make informed purchasing decisions, by allowing them to learn from the experiences of other consumers. This is a positive development that reduces consumer reliance on business controlled advertising.

However, reliance on online reviews is only beneficial to the extent that the review is accurate. The importance of positive reviews means that there can be an incentive for unscrupulous businesses to seek to manipulate the review process, either through fake positive reviews for their businesses or fake negative reviews for competitors.

We consider that businesses that post fake reviews are engaging in misleading or deceptive conduct.

³ https://www.ftc.gov/system/files/documents/public_statements/811281/151006wommaremarks.pdf

⁴ https://www.sensis.com.au/assets/PDFdirectory/Sensis_Social_Media_Report_2015.pdf

Similarly, consumers rely on testimonials from other consumers and many businesses use testimonials on their websites as a means of attracting new customers. Disturbingly, some businesses seek to manipulate consumers through the use of fake testimonials that the business has created itself.

In a recent example of this conduct, a removal company, paid an infringement notice after we identified that it was using fake testimonials. Citymove Pty Ltd admitted that it had used contractors to post fake reviews on its website, purporting to be from consumers.

Unconscionable conduct

As I mentioned earlier, one part of the Australian Consumer Law that may offer some additional protections for children consumers are the unconscionable conduct provisions. There have been some exciting recent developments in the case law in this area.

The ACCC has sought to enforce and extend the protection offered by the unconscionable conduct provisions by taking cases in both the consumer and small business areas over many years.

However, the development of the law in both areas has rapidly expanded in the past year or two as the result of some significant court judgments. This includes the Full Federal Court decision in ACCC v Lux Distributors Pty Ltd.

The ACCC alleged that Lux subjected several older women to unfair sales tactics in their homes, pressuring them into purchasing a vacuum cleaner.

How is this decision relevant to today's conference? On appeal, the Full Federal Court handed down a judgment that put beyond doubt the Court's disapproval of the conduct in question, and set an important precedent for the law of business-to-consumer unconscionable conduct.

In deciding whether Lux's conduct was unconscionable, the Full Court said that the consumer protection laws "reinforce recognised societal values and expectations that consumers faced with direct salespersons will be dealt with honestly, fairly and without deception or unfair pressure."

The Court's recognition of society's values and expectations has important implications for other unconscionable conduct cases. The Lux judgment marked a major turning point in providing clarity around the scope and operation of the unconscionable conduct laws. It means, among other factors, the courts will weigh up the standards of today's society in making a value judgment.

Closing remarks

In closing, I want to make you aware that there will shortly be a review of the Australian Consumer Law (ACL). In the 2011, the ACL harmonised Australia's consumer protection laws into a 'one law, multiple regulators' model. As part of the process in developing the new law, governments planned an implementation review. The time has now come. In 2016, Consumer Affairs Australia and New Zealand will conduct this review with a final report expected in March 2017.

There are a number of consumer groups spending considerable time in the lead-up to the review thinking about whether the ACL contains sufficient protections for consumers. Given the issues being discussed at this conference, it is important to contemplate whether there are any gaps in the current protections that may particularly expose young consumers.

For our part, we believe the review gives us a chance both to reaffirm the benefits of what we have, and to make the law even better. I'd encourage you to put your views forward if you have suggestions on how our laws can better protect young consumers.

Thank you.