

Australia's consumer protection law – a potent weapon in construction law disputes

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Since 1974, Australia has had one of the most far-reaching 'consumer' laws in the world. The ambit of the Trade Practices Act 1974 (Cth) (TPA) – now, the Competition and Consumer Act 2010 (Cth) (CCA) – is very broad, encompassing, among other things, operations of the Australian Competition and Consumer Commission and other statutory bodies that promote and monitor competition, restrictive trade practices, unconscionable conduct, consumer protection, liability for defective goods, international liner cargo shipping, a competition code and the telecommunications industry.

Arguably, the most significant of its many impacts is that the TPA/CCA sets norms for acceptable behaviour that have an impact on every aspect of commercial transactions, including the negotiations that culminate in a contract. Although originally based on American legislation, the Australian TPA/CCA has no direct counterpart in the common law world in terms of the extent to which it potentially affects contractual relationships.

For many purposes under this Commonwealth legislation (and equivalent state and territory legislation), 'consumers' include commercial entities of all kinds and sizes. Accordingly, some aspects of the TPA/CCA are of seminal importance to the practice of construction law. Perhaps most significantly, the TPA/CCA may provide a statutory cause of action for a wrong that does not exist under the

common law, or remedies otherwise unavailable under contract or tort law for damage suffered 'because of' ('by' under the TPA) misleading or deceptive conduct.

Knowledge of the ambit and power of the TPA/CCA is, therefore, fundamental to an understanding of the practice of construction law within Australia. Moreover, it has significant extraterritorial reach: by virtue of section 5 of the CCA, it extends to certain 'conduct' in breach of the prohibitions on restrictive trade practices or in breach of the Australian Consumer Law (discussed below) outside Australia. Commercial entities incorporated or carrying on business within Australia, and Australian citizens and persons ordinarily resident within Australia are subject to the Australian Consumer Law, even outside Australia. Thus, the CCA may provide a remedy under Australian law to a foreign entity who has suffered loss 'because of' infringing conduct engaged in by an Australian company or resident outside Australia.

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The CCA is also of interest to construction lawyers from other jurisdictions as an example of convergence, achieved via statute, between the common law and civil law. In many ways, the CCA is a legislative code that defines in considerable detail the way in which many types of commercial practice may be legally carried out. As judges have made clear in many judgments, the provisions of the TPA/CCA are not necessarily to be construed by reference to the common law; rather the specific

legislative intent needs to be discerned from the words and meaning of the Act. The TPA/CCA thus operates in parallel to the common law, providing remedies for damage caused ‘because of’ infringing conduct that may, or may not, parallel or overlap the established remedies for breach of contract or negligence.

Recent legislative changes

From 1 January 2011, the ‘consumer’ provisions of the TPA and the equivalent state and territory legislation of relevance to the practice of construction law have been subsumed into the Australian Consumer Law (ACL). It takes the form of a Schedule to the amended and renamed TPA (now CCA), with the result that the familiar TPA section numbers are different to the new ACL section numbers.

Nevertheless, as the substantive changes made in the transition to the ACL are relatively few, most of the extensive jurisprudence on the TPA is expected to remain relevant. The importance and extent of that jurisprudence can be gauged from the fact that a widely used text on the TPA/CCA, *Miller’s Australian Competition and Consumer Law Annotated*, is now in its 33rd edition and has in excess of 2,000 pages.

As a result, in a welcome change for construction (and other) law practitioners in Australia, and notwithstanding the significant hurdles consequent on Australia’s federal structure and constitution, there is now a single consumer law in Australia. The ACL is a single, national law concerning consumer protection and fair trading, which applies in the same way nationally and in each state and territory.

For the first time, therefore, ‘consumers’ have the same protections and expectations about business conduct wherever they are in Australia. Similarly, businesses of all types have the same obligations and responsibilities wherever they operate in Australia. Further, the ACL has an extraterritorial reach, as it extends to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia, Australian citizens or persons ordinarily resident within Australia.

The following changes have been implemented in the ACL:

- The ACL is drafted in plain English, and accordingly the wording is different to that in the TPA.
- Existing TPA provisions included in the ACL have, in most cases, been modified and reordered to make the law clearer and also to reflect changes in drafting conventions since they were initially inserted into the TPA.
- With the exception of those areas where there have been policy changes, these drafting changes are not intended to alter the legal effect of these provisions.
- The ACL also includes new provisions that address the use of unfair contract terms in standard form consumer contracts (each as defined), generally resulting in such terms being rendered void.
- The provisions on unfair contract terms may be expected to have relevance in the residential building market; however, their broader applicability in construction contracting remains to be seen.

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Misleading or deceptive conduct

The most widely used provision in the ACL is the prohibition on misleading or deceptive conduct in section 18(1) (based on section 52 of the TPA): ‘A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’

‘Engaging in conduct’ is widely defined and includes conduct in relation to a contract or arrangement, and importantly can include making a statement that is misleading or deceptive or likely to mislead or deceive.

Contravention of section 18 generally does not depend on the person’s intention or belief concerning a statement of fact. Further, a statement of opinion may contravene the section if the evidence shows that the opinion was not in fact held, that it lacked any or any adequate foundation, or was not based on the exercise of reasonable skill and care (particularly if the opinion was expressed as an expert). The effect of the wide definition of ‘conduct’ is to make warranties contained in contracts ‘conduct’ for the purposes of the Act, with the consequent effect that, if false or misleading,

the warranties will breach section 18. Significantly, there is nothing in section 18 that confines it to conduct engaged in as a result of a failure to take reasonable care: its reach can extend well beyond the traditional boundaries of professional negligence.

There are certain evidentiary provisions in the ACL intended to simplify proving breach of section 18, for example section 4 dealing with misleading representations with respect to future matters (derived from section 51 of the TPA). In addition to the general prohibition on misleading or deceptive conduct in section 18, there are other sections of interest to construction lawyers, such as section 29 in relation to false or misleading representations about goods or services (section 53 of the TPA).

'Consumer' transactions relevant to construction law

Some commercial transactions in the construction industry may, by virtue of the meaning of 'consumer' in section 3 of the CCA (section 4B of the TPA), be characterised as consumer transactions and thereby subject to:

- section 60 (guarantee as to due care and skill (section 74 of the TPA));
- section 61 (guarantees as to fitness for a particular purpose, etc (section 74 of the TPA)) – this section does not, however, apply to a supply of services of a professional nature by a qualified architect or engineer;
- section 62 (guarantee as to reasonable time for supply);
- section 64 (guarantees not to be excluded, etc, by contract (section 68 of the TPA));
- section 64A (limitation of liability for failures to comply with guarantees (section 68A of the TPA)).

Remedies

The power of the ACL as remedial legislation is apparent in the remedies available for breach of the protections provided by the Act. Section 236 (actions for damages – section 82 of the TPA) provides that, if a person (which, for these purposes, includes corporations) suffers loss or damage because of the conduct of another person that contravened a provision of the Act, that person may recover the amount

of the loss or damage by action against that other person, 'or against any person *involved* in the contravention' [Emphasis added].

Such an action may be commenced at any time within six years after the day on which the cause of action that relates to the conduct accrued. A person is involved in a contravention or in conduct that constitutes such a contravention, if the person, among other things, has aided, abetted, counselled or procured the contravention; or has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention. This extensive reach of the ACL can be extremely useful in situations where a remedy against the entity that actually committed the breach would be ineffective (eg a company with no assets).

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The remedy of damages under section 236, although governed by judicial construction of the meaning of the statutory provision, is not dissimilar to damages for the tort of negligence. However, remedies available under the ACL go much further than damages, and can cut across existing contractual arrangements. Under section 243, the kinds of orders that may be made include:

- an order declaring the whole or any part of a contract made between the respondent and the injured person, or of a collateral arrangement relating to such a contract, to be void or to have been void ab initio, or void at all times on and after such date as is specified in the order;
- an order varying such a contract or arrangement; or
- an order refusing to enforce any or all of the provisions of such a contract or arrangement.

Other provisions relevant to construction law

Other provisions of the ACL that may be of interest to construction lawyers include the provisions on unconscionable conduct (sections 20–22), and unfair contract terms (sections 23–28). The new provisions that address the use of unfair contract terms in standard form consumer contracts generally result in such terms being rendered void. The relevant definitions are framed in terms that

will be familiar to those who have had dealings with, for example, the UK Unfair Contract Terms Act 1977.

The unfair contract terms provisions may certainly be expected to have relevance in the residential building market; however, their broader applicability in construction contracting remains to be seen. It is currently a matter of some anxiety in the industry. The uncertainty is generated by the definition of ‘consumer’: while its effect is that, generally, transactions over A\$40,000 are exempted, if the relevant goods or services are ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’ then that cap does not apply.

The availability of remedies for breach of the ACL independent of remedies for breach of contract and negligence undoubtedly leads to additional complexity in pleading. As well as the additional facts required to prove misleading or deceptive conduct under the ACL, there may be distinct differences in the available remedies to be separately pleaded. Furthermore, in some jurisdictions such as Victoria, the application of proportionate liability legislation may be different under the ACL to that under the relevant state legislation for causes of action arising from a failure to take reasonable care. And, in a further element of complexity, the introduction of the ACL involves complex transitional provisions that currently may require pleading, in the alternative, breaches and remedies under the former TPA, as well as under the ACL.

Examples of the application of the TPA/ACL by the courts

The following cases illustrate the application and significance of the ACL in the practice of construction law in Australia:

- An architect who was retained to plan a residence to a price specified by the client stated that the house could be built for the price in accordance with the plans drawn up was found to have engaged in misleading and deceptive conduct and made a false representation (*Coleman v Gordon M Jenkins & Associates Pty Ltd* (1989) ATPR 40-960).
- Directors of a building company that undertook work defectively were found personally liable as accessories for misleading statements made about the way in which the building company approached its work. Their resulting liability caused ‘by’ their misleading conduct was the same as the

liability for breach of the building contract by the builder, which was in liquidation (*Kavanagh v Blissett* [2001] NSWSCA 79).

- An environmental consultant who prepared a contamination report on sites to be sold by its client was held liable to the buyer of the site report when the report was found to be incorrect in stating that the remediated land was suitable for any land use. Damages awarded included the diminution of building value and additional capital costs caused ‘by’ the contamination (*Charben Haulage Pty Ltd v Environmental & Earth Sciences Pty Ltd* [2004] FCA 403).
- A contractor entered into a fixed lump sum contract to construct a dam spillway, based on tender information that the employer had no plans of an outlet pipe in the vicinity. In fact, the employer did have a plan of the outlet pipe, which indicated a greater extent of rock excavation than the contractor allowed for in its tender. In an action for damages under the TPA, the NSW Court of Appeal held that the incorrect representation constituted misleading and deceptive conduct, and awarded the contractor damages for the discrete loss it incurred in undertaking additional rock excavation caused ‘by’ the misleading and deceptive conduct. Illustrating the power of the TPA/CCA to create new grounds for remedy, because the contractor accepted the risk of the actual rock level in its tender, it had no contractual basis to recover the cost of the unforeseen additional rock excavation (*Abigroup Contractors Pty Limited v Sydney Catchment Authority (No 3)* (2006) 67 NSWLR 341).

Conclusion

In the 37 years since the TPA was first promulgated, it has had a far-reaching impact on commercial conduct in Australia, probably much greater than its authors ever envisaged. It has provided plaintiffs with redress for wrongs in circumstances where there was no other legal remedy, and has redefined what types of commercial conduct are acceptable in Australia and by Australian entities when doing business at home and abroad.

The ‘new’ ACL is founded on and extends the TPA’s success, in a legal environment that is consistent throughout the country. Such uniform legislation will be welcomed by construction law practitioners, particularly those who practise in different Australian jurisdictions.

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