

1. Background

I am a senior lecturer in law at the University of Adelaide. Additionally, I am practicing barrister. Also I am a member of the Law Council of Australia and am on business law committee and am on the subcommittee on the Competition and Consumer Act. I have written numerous articles, contributed over a dozen chapters in various books and have written six books. One of them was entitled *Remedies under the Trade Practices Act* (published by Oxford University Press). My last two books, I've just written the second edition of my last book which has a chapter on remedies under the Competition and Consumer Act, focus on remedies. A few years ago I spoke at the conference on the Trade Practices Act about unconscionable conduct under the TPA. My fellow speaker in this session was William Kovacic, the then chairman of the US Federal Trade Commission. Last year at another conference on the Act, a fellow speaker was his Honour Robert French, the current chief justice of the High Court. Finally, I'm the title editor of two volumes on Equity in the Laws of Australia, as well as co-editor of the Australian Succession and Trust Law Reports. From these positions I have valuable insights to successful reform the remedial provisions of the Competition and Consumer Act. I should stress that this submission is being written in my personal capacity.

2. Introduction

At present the ACL is doing a good job. But it could work better. Why? There is an enforcement gap. The ACL neglects to some degree a very important area-private enforcement of the consumer laws. It is of little use in having wonderful consumer laws, if they are not well enforced. Enforcement is a complex issue. In Australia the enforcement of the consumer laws is divided between

- a. Public enforcement (done by the Australian Competition and Consumer Commission), and
- b. Private enforcement

The ACL seems to be currently premised on the idea that public enforcement (deterrence) is achieved directly by the ACCC and very indirectly by the award of compensatory damages causing parties like the wrongdoer to think "the wrongdoer did X and had to pay compensatory damages, therefore I shouldn't do X". This is regulation by hope. This deterrence effect is extremely uncertain and could realistically be very small. This submission focuses on increasing

private enforcement of the consumer laws, meaning greater enforcement, which results in more effective consumer law.

The main form of enforcement is public enforcement. Traditionally, the ACCC have been more (rightly) concerned with cases that affect large numbers of people, which is where private litigation would help bring justice when smaller groups are affected.¹ Private enforcement is important because there are going to be failures in deterrence and compliance of consumer law and enhanced private enforcement can overcome these shortcomings. Further, private enforcement takes some of the pressure off the ACCC as effectively Australia's only enforcer of the consumer laws. This point is extremely important, as it reveals a real vulnerability with consumer protection. The ACCC is completely dependent on the government for funding. As the sad experience of ASIC shows, this can be a trap. It should be recognised that the public enforcement is completely resourced by the Commonwealth government. The ACCC is totally at the financial "mercy" of the government. Budgets of public bodies can be slashed. A good example of this reality is the financial regulator which is the equivalent of the ACCC, ASIC. The financial woes of ASIC following deep financial cuts compromises ASIC public enforcement role. If enforcement of the consumer laws is almost exclusively public, this reality of complete financial vulnerability of the ACCC is extremely frightening. If the ACCC falls from government favour funding can be cut. And there goes any real enforcement of consumer laws.

Private enforcement is an important part of the consumer laws. In numerous ways it adds to enforcement of consumer laws and removes pressure upon the ACCC to attempt to pursue all matters. The Commission does not have the resources to follow up all matters. But at the moment there is some private enforcement in Australia. It appears extremely robust and common. Private actions under ACL are numerous. There are lots and lots of cases. But appearances can be deceptive. And here they are very deceptive. Private actions and private enforcement, although obviously related, are two different concepts. Although private actions are numerous, private enforcement is small and ad hoc. Why? Private actions only compensates the injured party but that is all. Private actions can only produce damages based solely on compensation. But pure compensation lacks much real deterrence. This lack is the compounded

¹ Rod Sims, 'ACCC – Future Directions' (Speech delivered at the Law Council of Australia Competition and Consumer Workshop, Gold Coast, 27 August 2011).

by a few things, such as the time and expense of private action. Fundamentally, this means it is simply not worth it for potential plaintiffs to privately enforce the consumer law. As a consequence there is very little real private enforcement of the consumer law in Australia. Effectively Australia has little private enforcement of the consumer laws. Or to put it another way, Australia has a lot of private actions leading to compensation but very little private enforcement leading to deterrence. Further, private actions, although numerous, may only represent a small number of the possible actions. A prospective applicant for damages must weigh the probability of achieving compensatory damages of uncertain magnitude against costly litigation of uncertain length, the cost certain to be substantial even should the action be successful. Further, greater private enforcement also means greater efficiency as persons injured by this behaviour are truly compensated.

3. The Present Situation of Damages

Remedially, most private actions in the ACL revolve around one section. Section 236. It provides

236 Actions for damages

(1) If:

(a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

As the Act's damages provision is presently written exemplary damages is not available per *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251.

For an action to receive damages under s236 of *ACL* it is essential to show loss or damage. In an action for a breach of the ACL the plaintiff must show that he or she is in fact "worse off" as a result of the contravention – simply showing a breach of the Act is not enough.² In *Marks v*

2 *Marks v GIO Australia Holdings Pty Ltd* (1998) 196 CLR 949. See the excellent case note on this decision by Davidson, "Marks v GIO Australia Ltd: Not Just Marking Time" (1999) 18 *Aust Bar Rev* 79.

GIO Australia Holdings Pty, despite GIO conceding a breach of s 52, the High Court held the appellants could not demonstrate that they were “worse off” as a result of the contravention.³ Therefore they could not recover under the Act. Section 236 is purely about compensation. *Marks* has not been attacked in the subsequent years. Basically for the ACL no loss, no private action and therefore no private enforcement. Making ACL damages purely about compensation has greatly limited the deterrence aspect of private actions.

4. The Example of Torts

Section 18 (previously s 52) has been recognised as having a strong resemblance to a tort. This is particularly true of *ACL* damages, it closely resembles tortious damages (as both varieties award reliance damages). Most damages in torts are about compensation. But not all. There appears to be a perfect equation between loss and tortious damages. It is frequently asserted that loss equals damages in torts. This is put as a generalisation but it is extremely dangerous. Largely thanks to the tort of negligence, loss is the dominant concept with damages in torts.⁴ But dominance does not mean exclusivity. Loss is not the exclusive concept with damages in torts.⁵ But with private actions for breach of the ACL, loss is the exclusive concept.

Some damages awarded in torts are not based on loss, for example punitive (or exemplary) damages, liquidated damages, contemptuous damages and nominal damages. Further, some torts are not based on loss at all. They are called torts actionable per se, in which tortious damages can be awarded although there may be no loss. This can be seen in Windeyer J’s judgment in *Uren v John Fairfax & Sons Pty Ltd*,⁶ a case involving defamation which is a tort actionable per se. His Honour held:⁷

He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to

³ Ibid at 515 per McHugh, Callinan and Hayne JJ.

⁴ Not all torts are being subsumed by the tort of negligence. The High Court seems very to stop this occurring and keen to maintain many different torts, for example see *Barclay v Penberthy* (2012) 86 ALJR 1206.

⁵ Tilbury has referred to this as “the false monopoly of compensation”, see “Reconstructing Damages” (2003) 27 *MULR* 697.

⁶ (1966) 117 CLR 118.

⁷ Ibid at 150.

him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

I would suggest that ACL damages be modelled along the lines of torts to include exemplary damages. Therefore I'll go into them in some detail.

5. Exemplary Damages in Torts

Exemplary damages are also called punitive damages.⁸ These damages are not designed to compensate the plaintiff. According to Knox CJ in *Whitfield v De Lauret & Co Ltd*⁹ exemplary (or punitive) damages are intended to punish the defendant for “conscious wrongdoing in contumelious disregard of another’s rights”. Other words describing the behaviour are “wilful”, “outrageous”, “high-handed”, “reprehensible”, “wanton”, “oppressive”, “insulting”, “cruel”, “malicious” and “reckless”. The operation of exemplary damages is well illustrated by *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd*.¹⁰ Essentially the case involved an act of commercial vandalism committed by a large company against a small trade competitor. The activity involved the introduction of impurities into the plaintiff’s petrol tanks. At trial, in addition to relatively small compensatory damages, the jury awarded \$400,000 exemplary damages. Both the Court of Appeal and the High Court agreed that exemplary damages should be reduced to \$150,000. Interestingly, in their dissenting judgments on this issue, both Murphy J¹¹ and Brennan J¹² shared the view that the original award was reasonable.

According to the High Court in *Lamb v Cotogno*¹³ actual malice by the defendant is not required to be established.

Very importantly, in *Uren v John Fairfax & Sons Pty Ltd*¹⁴ the High Court refused to follow the tight limitations placed upon the award of exemplary damages by the House of Lords in *Rookes v Barnard*.¹⁵

⁸ In Australia these damages are called exemplary, whilst in America they are called punitive.

⁹ (1920) 29 CLR 71 at 77.

¹⁰ (1985) 155 CLR 448.

¹¹ Ibid at 464–465.

¹² Ibid at 472.

¹³ (1987) 164 CLR 1 at 7–8.

¹⁴ (1966) 117 CLR 118I would argue.

¹⁵ [1964] AC 1129.

As noted previously, the primary purpose of exemplary damages is to punish the defendant. But other purposes can be served. According to Owen J such damages can be awarded to demonstrate the court's disapproval of the conduct and to deter the defendant and others from similar behaviour.¹⁶

According to Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd*¹⁷ exemplary damages are calculated to punish the defendant, to cause him or her to "smart".¹⁸ But Gibbs CJ in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd*¹⁹ stressed that restraint should be exercised by juries and they need to be wary of imposing a greater penalty than would be incurred if the conduct were criminal. Accordingly, any criminal penalties imposed in consequence of proceedings stemming from the same wrongful act must be fully taken into account. In *Blackwell v AAA*²⁰ the trial judge failed to properly warn the jury about the danger of an excessive award of compensatory plus exemplary damages. The Court of Appeal substantially reduced the damages and stressed that, for the purpose of fixing exemplary damages, both the nature of the non-exemplary damages awarded and the capacity of the defendant to pay are important considerations.

It should be noted that the High Court in *Carson v John Fairfax & Sons Ltd*²¹ held that an appellate court, testing the reasonableness of a defamation jury verdict, may properly compare that award against personal injury awards in order to maintain a rational scale of values.

Another factor that may prevent the award of punitive damages is a successful criminal prosecution relating to the same conduct. In *Gray v Motor Accident Commission*²² the High Court would not permit the award of punitive damages following criminal punishment of the defendant.

¹⁶ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 158.

¹⁷ (1985) 155 CLR 448 at 472.

¹⁸ See also *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702.

¹⁹ (1985) 155 CLR 448 at 463.

²⁰ [1997] 1 VR 182.

²¹ (1993) 178 CLR 44.

²² (1998) 196 CLR 1.

Exemplary damages may be recovered in a wide range of torts, covering most torts. such damages are recoverable in practice in a wide variety of actions, including: trespass to the person; trespass to land; trespass to chattels; malicious prosecution; abuse of process; conspiracy; inducing breach of contract; interference with trade or business by unlawful means; detinue; conversion; deceit; breach of confidence; nuisance; and negligence (except for personal injuries in the Northern Territory, New South Wales and Queensland).

However, exemplary damages cannot be awarded for certain tortious conduct. So in motor vehicle, work-related and general personal injury claims, legislation commonly bars exemplary awards.²³ However such damages are available for “mere” negligence.²⁴

Following *Midalco Pty Ltd* it can no longer be said that exemplary damages are simply not available for the tort of negligence. In *Coloca v BP Australia Ltd*²⁵ the plaintiffs (who were employees of the defendant) claimed that they had suffered personal injuries as a result of their employer’s negligence. O’Byrne J recognised that exemplary damages can be claimed for mere negligence. His Honour held that it would be illogical to distinguish between tortious liability founded in trespass or intentional wrongdoing and tortious liability founded in negligence, where the conduct of the defendant equally merited punishment.

Exemplary damages can also be useful even where the wrong doers do not pay these damages. In a case involving trespassing police officers it was argued that those officers wouldn’t be paying the exemplary damages. The entire High Court rejected this argument, by holding “The amount should also be such as to bring home to those officials of the State who are responsible

²³ *Civil Liability Act 2002* (NSW) s 21; *Motor Accidents Act 1988* (NSW) s 81A; *Motor Accidents Compensation Act 1999* (NSW) s 144; *Workers Compensation Act 1987* (NSW) s 151R; *Civil Liability Act 2003* (Qld) s 52, but see *Motor Accident Insurance Act 1994* (Qld) s 55; *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 309 (exemplary damages only barred against WorkCover, not against an employer); *Motor Vehicles Act 1959* (SA) s 113A (insurer not liable for exemplary damages); *Victims of Crime Assistance Act 1976* (Tas) s 6(1)(b); *Workers' Compensation and Injury Management Act 1981* (WA) s 93B(3)(b); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19.

²⁴ For example *Midalco Pty Ltd v Rabenalt* [1989] VR 461.

²⁵ [1992] 2 VR 441.

for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen”.²⁶

6. Exemplary Damages In the ACL

It wouldn't be hard to include exemplary damages in the ACL and it would permit private enforcement of the ACL meaning deterrence. This would greatly enhance the consumer protection of the Act. Importantly the courts are very familiar with the exceptional use of these damages.

There is one potential problem. Exemplary damages are normally parasitic on compensatory damages and are, therefore, aimed at punishing and deterring conduct which is also the subject of compensatory damages, from which the exemplary award ought to be separated. In other words, it could be argued that exemplary damages in the ACL should only be available when compensatory damages are awarded. But this superficially attractive limitation on exemplary damages does not hold to closer attention. As has been noted in cases, there does not appear to be any reason in principle why an award of exemplary damages should not stand on its own.²⁷

The award of exemplary damages in the ACL would allow this enforcement gap to be surmounted. Therefore, I would suggest after s 236 a new provision simply allowing the award of exemplary damages be added to the Act.

²⁶ *New South Wales v Ibbett* (2006) 229 CLR 638, at [51].

²⁷ See *Donselaar v Donselaar* [1982] 1 NZLR 97; *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678; (2004) Aust Torts Reports 81-746 at [74] per Giles JA.