

27 February 2015

By email: freedoms@alrc.gov.au

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Sir/Madam

Traditional Rights and Freedoms Inquiry

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on Australian Law Reform Commission's (**ALRC**) Issues Paper 46 Traditional Rights and Freedoms—Encroachments by Commonwealth Laws.

This submission recommends that when considering reasonable encroachments on traditional rights and freedoms, the ALRC make specific reference to countervailing rights recognised by our modern society, including consumer rights. The submission makes particular comment in relation to strict and absolute liability, and reversals of the burden of proof, which are necessary parts of effective regulatory regimes.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Terms of reference

The terms of reference for this inquiry appear to prioritise some rights above others, merely because they are older, or founded in common law. We note that more modern rights have been developed, either in local laws or through international legal documents, to reflect the modern world.

Society has moved away from an economy based on individual bargaining when many of the traditional rights and freedoms were first invoked. Today's modern industrial society is marked by

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mass marketing, production and consumption. In response to this, legal oversight of commerce has developed, and new rights enshrined. In the area of consumer law and corporate accountability, consumer rights have developed both at an international level and in local laws.

In international law, eight consumer rights have been developed.ⁱ These are:

- The right to satisfaction of basic needs: to have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water and sanitation.
- The right to safety: to be protected against products, production processes and services that are hazardous to health or life.
- The right to be informed: to be given the facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labelling.
- The right to choose: to be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality.
- The right to be heard: to have consumer interests represented in the making and execution of government policy, and in the development of products and services.
- The right to redress: to receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services.
- The right to consumer education: To acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.
- The right to a healthy environment: To live and work in an environment that is non-threatening to the well-being of present and future generations.

In domestic law, the Australian consumer law provides consumers with important rights, including the right not to be misled, consumer guarantee rights around the quality of goods and services, and rights relating to fair contract terms.ⁱⁱ

We do not mean to say that traditional rights and freedoms do not remain important. They do. However, they need to be balanced with other rights that have come to exist in the modern economy. We would encourage the ALRC, as it considers reasonable encroachments on traditional rights and freedoms, to specifically examine the existence of countervailing rights recognised by law, including consumer rights.

Strict and Absolute Liability

There are a number of reasons why the use of strict and absolute liability is appropriate in the context of regulatory regimes, particularly those that relate to corporations. These reasons include:

- greater efficacy in the supervision of regulatory schemes;
- difficulties faced by regulators in enforcing fault provisions; and
- strict liability can ensure more optimum use of limited resources.

It is crucial for corporate and consumer regulators to have effective enforcement regimes. A regulatory scheme with well-designed rules will be ineffective in addressing industry or market problems if it can only be enforced by individuals in the marketplace. This is because the less well-resourced actors will have more limited capacity to exercise rights and ensure legal

compliance. In mass consumer markets, this issue becomes clear—any losses due to corporate misconduct may be experienced by thousands or even millions of consumers. Individually, these losses may not be of significance and may mean that action is not taken. Added together, however, the losses may be significant. Without a regulator to take action and ensure compliance and/or compensation, the relevant business gains a windfall gain, and an anti-competitive advantage over other businesses that comply with their obligations.

Many regulatory frameworks, particularly as they relate to corporate conduct, impose strict or absolute liability on individuals involved in the conduct. These include company directors, superannuation trustees and financial advisers. The liability recognises that these parties should not just refrain from wrongdoing, but should take active steps to fulfil their obligations under the law. Put another way, such liability is justified where a person actively *agrees* to a position (for example, a directorship or a particular licence).

Many corporate offences could not be effectively prosecuted without strict liability. For example, where the regulation that is breached involves a *failure to act*, it can be difficult to establish evidence of intention or of recklessness. As such, strict liability is appropriate for many regulatory offences such as the failure to lodge documents or provide documentary information.

Strict liability also allows matters to be dealt with expeditiously where this is necessary to ensure public confidence in the regulatory regime. It is a fact that a regulator will be unable to investigate all matters which come to its attention. It is thus necessary to balance the resources needed to investigate a complaint with the likely regulatory outcome. Given this, it is likely that a regulator will consider an action unjustified where the maximum penalty is low and evidence of fault is required—it would simply be too expensive to ensure compliance. In these instances, strict liability would be more appropriate so that compliance is achieved. Strict liability in the form of infringement notices may also be an alternative to court prosecutions, and can save time and money.

It may be claimed that strict liability is unfair for the individual being prosecuted. However, this fails to understand the nature of regulatory investigations. In many cases, regulators will have taken significant inquiries, including providing the opportunity for the actor to take steps to comply, before court action against individuals. Further, the defence of honest and reasonable mistake of fact applies to strict liability offences. This allows an accused to point to an honest and reasonable belief in a state of affairs which, if they existed, would render their act innocent. These factors should address any concerns about the fairness of strict liability.

Burden of Proof

Many of the comments above in relation to strict liability are relevant for considering any encroachment or reversal of burdens of proof. We agree with the Issues Paper where it states that an evidentiary burden will necessarily shift depending on which party has the requisite knowledge and evidence to adduce the truth in proceedings. In corporate misconduct matters, this knowledge and evidence invariably exists within the corporate entity, so therefore it is appropriate that any burden of proof be reversed to that party.

Where burdens of proof lay with the regulator, it is also important that the burden not be so onerous so as to inhibit decisive action. In licensed sectors which involve significant risk to the

community, such as the licensing of financial services providers, there is a need for regulators to apply tests that enable it to take action when risks arise. Recent reforms involving the Australian Securities & Investments Commission's (ASIC) licensing powers have changed the licensing threshold so that ASIC can refuse or cancel/suspend a financial services licence where a person is likely to contravene (rather than *will* breach) its obligations. This was introduced as part of the Future of Financial Advice reforms, recognising that there was a public expectation that the regulator would exclude "bad apples" from the industry. As stated in the explanatory memorandum accompanying this change, "in the 10 years since the introduction of the Financial Services Reform Act, interpretation of this provision has tended to a view that ASIC is required to believe, as a matter of certainty, that the person will contravene the obligations in future. Such a standard would be so onerous that it could result, in practice, in ASIC never being able to refuse a licence using this part of the test. This new formulation is designed to ensure that ASIC can more appropriately account for the likelihood or probability of a future contravention".ⁱⁱⁱ

The Financial System Inquiry also recently recommended that ASIC should have an enhanced power to ban individuals from management.^{iv} While it was silent on the nature of this power, an enhanced power would necessarily involve considering the appropriate level of evidence required. The inquiry said that an enhanced banning power was required to change "the culture and conduct of financial firms' management, which needs to focus on consumer interests and outcomes". To be effective, any burden of proof associated with this power must be drawn so that it enables the regulator to ban individuals when appropriate.

Please contact me on 03 9670 5088 or at gerard@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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ⁱ United Nations Guidelines for Consumer Protection enunciate 8 consumer rights:

http://www.un.org/esa/sustdev/publications/consumption_en.pdf

ⁱⁱ Australian Consumer Law, Sch 2, *Competition & Consumer Act 2010* (Cth)

ⁱⁱⁱ *Corporations Amendment (Future of Financial Advice) Bill 2011* Replacement Explanatory Memorandum, para 2.22, available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4689_ems_28e3cadf-6bf9-49e4-af60-5773bbf35af7/upload_pdf/366353.pdf;fileType=application%2Fpdf ; *Corporations Act 2001* (Cth) s 913B(1)(b).

^{iv} Financial System Inquiry, *Final Report*, November 2014, available at:

http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf, recommendation 24.