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Misleading conduct and contributory fault: Inconsistency under the uniform Australian Consumer Law – Nick Seddon and Saul Fridman

The policy behind the implementation of the Australian Consumer Law was to have a single, uniform law. This has not occurred with respect to the availability of a defence of contributory fault in a misleading conduct claim, such defence being available under the Commonwealth law but not under the State and Territory versions. The consequence is that the defence can be avoided by suing under a State or Territory version. Yet it is not possible to avoid the defence by suing under a different section of the same legislation. Having two versions of the law raises the possibility of inconsistency under s 109 of the Constitution. This probably does not arise because of express sections preserving the operation of State and Territory legislation. Nevertheless, the current state of the law is unsatisfactory. This can be remedied by amending the Australian Consumer Law. 87

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