

LEGALWISE SEMINAR

## CONTRACTS CONFERENCE

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### CONSUMER V CORPORATION

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#### **Australian Consumer Law**

- 1 The Australian Consumer Law commenced on 1 January 2011. It established a national scheme of consumer laws to apply in all Australian jurisdictions.

#### **Application to matters within Commonwealth power**

- 2 The ACL is found in schedule 2 to the *Competition and Consumer Act 2010* (Cth). This Commonwealth statute is the renamed former *Trade Practices Act 1974* (TPA), which was re-named and substantially amended.
- 3 The ACL applies to the conduct of corporations: CCA s131(1). In addition it applies to natural persons, as if its provisions were confined in their operation to contracts for or relating to the use of postal, telegraphic and telephonic services or radio and television broadcasts: CCA s6(3A). It has the force it would have if references to trade and commerce were confined to trade or commerce between Australia and places outside Australia, among the States, within a Territory, between a State and a Territory or between two Territories, or by way of supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth: CCA s6(2).

## **State matters**

- 4 Each State has adopted the ACL as a law of the State for circumstances within State jurisdiction.
- 5 In Western Australia the ACL has been adopted as law of Western Australia by the *Fair Trading Act 2010* (WA), s19. In its application in Western Australia by the *FTA 2010* it is referred to as the Australian Consumer Law (WA).
- 6 By s24 of the *FTA 2010* the ACL (WA) applies to and in relation to:
  - 6.1 Persons carrying on business within the jurisdiction of Western Australia;
  - 6.2 Bodies corporate incorporated or registered under the law of Western Australia;
  - 6.3 Persons ordinarily resident in Western Australia; or
  - 6.4 Persons otherwise connected with Western Australia.
- 7 If any of those connecting factors exists then the ACL (WA) will extend to conduct and other acts, matters and things, occurring or existing outside or partly outside Western Australia (and whether within or outside Australia): *FTA 2010* s24(2).
- 8 The provisions of the ACL (WA) are to be construed by applying the *Acts Interpretation Act 1901* (Cth) rather than the *Interpretation Act 1984* (WA).
- 9 The *Sale of Goods Act 1895* (WA) remains in force.

## **Categories of conduct**

- 10 The ACL contains provisions addressing the following categories of conduct in transactions:
  - 10.1 Misleading or deceptive conduct: s18;
  - 10.2 Unconscionable conduct: ss20-22;
  - 10.3 Unfair contract terms: ss23-28;
  - 10.4 Unfair practices (including particular forms of false or misleading representations, unsolicited supplies, period schemes, pricing): ss29-50;

- 10.5 Consumer guarantees (including guarantees relating to the supply of goods or services, unsolicited consumer agreements and lay-by agreements): ss51-103;
  - 10.6 Safety of consumer goods and product related services: ss104-133;
  - 10.7 Liability of manufacturers for goods with safety defects: ss138-150.
- 11 The ACL does not apply as a law of the Commonwealth to the supply or possible supply of services that are financial services or are financial products, except to the extent that credit contracts are expressly referred to in Part 5-5 of the ACL: CCA s131A.

### **General protections**

- 12 Chapter 2 of the ACL provides general protections for misleading or deceptive conduct (Part 2-1 of Chapter 2), unconscionable conduct (Part 2-2 of Chapter 2) and unfair contract terms (Part 2-3 of Chapter 2). Specific protections are provided under Chapter 3.

#### *Misleading conduct – Part 2-1 of Chapter 2*

- 13 The prohibition against conduct that is likely to mislead is found in ACL s18. It provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. The focus of s52 of the TPA was on a “corporation” rather than a “person”.
- 14 The right to recover damages for a contravention of a provision of Chapter 2 (or Chapter 3) is found in s236. It differs slightly from s82 of the TPA. Section 236(1) provides that if a person (the claimant) suffers loss or damages because of the conduct of another person, and the conduct contravened a provision of Chapters 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. The expression “because of” (ACL s236) has replaced “by” (former TPA s82).

15 Specific protections under Chapter 3 include prohibitions against:

*False or misleading representations etc – Division 1 of Part 3-1*

- 15.1 False or misleading misrepresentations about goods or services: ACL s29;
- 15.2 False or misleading misrepresentations in connection with the sale or grant of an interest in land: ACL s30;
- 15.3 Misleading conduct relating to employment: ACL s31;
- 15.4 Offering a rebate, gift, prize or other free item with the intention of not providing it as offered: ACL s32;
- 15.5 Misleading conduct as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of goods: ACL s33;
- 15.6 Misleading conduct as to the nature, characteristics, suitability for purpose or quantity of any services: ACL s34;
- 15.7 Bait advertising: ACL s35;
- 15.8 Accepting consideration for goods or services when intending not to supply them: ACL s36;
- 15.9 False or misleading representations concerning a business that can, or to a considerable extent can, be carried on from a person's residence: ACL s37;

*Unsolicited supplies – Division 2 of Part 3-1*

- 15.10 Unsolicited debit or credit cards: ACL s39;
- 15.11 Asserting a right to payment for unsolicited goods: ACL s40;
- 15.12 Asserting a right to payment for unauthorised entries in a publication or advertisements: ACL s43;

*Pyramid schemes – Division 3 of Part 3-1*

- 15.13 Participation in a pyramid scheme: ACL s44;

*Pricing – Division 4 of Part 3-1*

15.14 Multiple pricing: ACL s47;

15.15 Representation about part of the consideration for the supply of goods or services without specifying a single figure: ACL s48;

*Other unfair practices – Division 4 of Part 3-1*

15.16 Referral selling: ACL s49; and

15.17 Harassment and coercion: ACL s50.

16 Many of these contraventions also constitute an offence under Chapter 4 of the ACL.

**Unfair contract terms**

17 The unfair contract terms provisions of Chapter 2 Part 2-3 are new to Western Australia.

*Void term of standard form consumer contract*

18 ACL s23 provides that a term of a consumer contract is void if the term is unfair and the contract is a standard form contract.

19 A consumer contract is a contract for supply of goods or services or sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

20 In a proceeding if a contract is alleged to be a standard form contract then it is presumed to be a standard form contract unless the other party proves otherwise.

21 In determining whether a contract is a standard form contract the court may take into account such matters as it thinks relevant but must take into account:

21.1 Whether one of the parties has all or most of the bargaining power relating to the transaction;

21.2 Whether the contract was prepared by one party before any discussion occurred between the parties;

- 21.3 Whether a party was in effect required either to accept or reject the terms of the contract in the form in which they were presented;
  - 21.4 Whether a party was given an effective opportunity to negotiate the terms of the contract;
  - 21.5 Whether the terms of the contract take into account the specific characteristics of a party or the particular transaction: s27.
- 22 The unfair contract terms provisions do not apply to contracts of marine salvage or towing, charterparties or for carriage of goods by ship: s28(1). They do not apply to provisions in the constitution of a company, managed investment scheme, or other kind of body: s28(3).

*Unfair term*

- 23 A term of a consumer contract is unfair if:
- 23.1 It would cause a significant imbalance in the parties' rights and obligations arising under the contract;
  - 23.2 It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - 23.3 It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on:
- ACL s24(1).
- 24 A term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term unless that party proves otherwise: s24(4).
- 25 In determining whether a term of a consumer contract is unfair a court may take into account such matters as it thinks relevant but must take into account:
- 25.1 The extent to which the term is transparent; and

25.2 The contract as a whole:

s24(2).

- 26 Section 25 lists examples of the kinds of terms of a consumer contract that may be unfair. One example is a term that permits one party but not the other party to avoid or limit performance of the contract.

### *Remedy*

- 27 Under ACL s250 on the application of a party to a consumer contract or on the application of the regulator a court may declare that a term of the contract is an unfair term. The court may grant an injunction against a person who does or purports to apply or rely on a term of a consumer contract that has been declared void: s232(3). In addition the court can make an order compensating the injured person in whole or in part for loss or damage caused or to prevent or reduce loss or damage: s238.
- 28 The contract continues to bind the parties if it is capable of operating without the unfair term: s23(2).

### **Consumer Guarantees**

- 29 The statutory warranties and conditions that were implied into consumer contracts by the TPA and the *Fair Trading Act 1987* (WA) have been replaced by consumer guarantees found in Chapter 3 Division 1. They apply where there is supply to a consumer.

### *The guarantees*

#### Goods

- 30 The guarantees relating to the supply of goods are:
- 30.1 The supplier will have a right to dispose of the property and the goods when property is to pass: ACL s51;
- 30.2 The consumer has the right to undisturbed possession of the goods: ACL s52;

- 30.3 If the supplier is not a supplier of a limited title, that the goods are free from any security, charge or encumbrance that was not disclosed to the consumer or not created with the express consent of the consumer and will remain free from the security, charge or encumbrance until property in the goods passes to the consumer: ACL s53;
- 30.4 That the goods are of acceptable quality: ACL s54;
- 30.5 The goods are reasonably fit for any disclosed purpose and for any purpose for which the supplier represents they are reasonably fit: ACL s55;
- 30.6 If the goods were supplied by description that the goods correspond with that description: ACL s56;
- 30.7 If the goods were supplied by reference to a sample or demonstration model that the goods correspond with the sample or demonstration model in quality, state or condition, the consumer will have a reasonable opportunity to compare the goods with the sample, and the goods are free from any defect that will not be apparent on reasonable examination of the sample or demonstration model and would cause the goods not to be of acceptable quality: ACL s57;
- 30.8 The manufacturer will take reasonable action to ensure that facilities for the repair of the goods and parts for the goods are reasonably available for a reasonable period after the goods are supplied: ACL s58;
- 30.9 The manufacturer of the goods will comply with any express warranty given or made by the manufacturer in relation to the goods: ACL s59.
- 31 The guarantee of acceptable quality may be a departure from the previous concept of merchantable quality. Under s54(2) goods are defined to be of “acceptable quality” if they are as:
- 31.1 Fit for all the purposes for which goods of that kind are commonly supplied;



31.2 Acceptable in appearance and finish;

31.3 Free from defects;

31.4 Safe; and

31.5 Durable

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects in the goods) would regard as acceptable having regard to the matters in subsection (3): s54(2).

32 By s54(3) the matters for the purposes of subsection (2) are:

32.1 The nature of the goods;

32.2 The price of the goods (if relevant);

32.3 Any statements made about the goods on any packaging or label on the goods;

32.4 Any representation made about the goods by the supplier or manufacturer of the goods; and

32.5 Any other relevant circumstances relating to the supply of the goods.

### Services

33 The guarantees relating to the supply of services are:

33.1 That the services will be rendered with due care and skill: ACL s60;

33.2 If the consumer made known to the supplier any particular purpose for which the services were being acquired by the consumer the services and any product resulting from the services will be reasonably fit for the particular purpose for which the services are being acquired: ACL s61;

33.3 The services will be supplied within a reasonable time: ACL s62.

### *Modifying the guarantees*

34 For the most part the consumer guarantee terms cannot be excluded, restricted or modified by a contract: s64.

35 There are limited exceptions for contracts for the supply of goods or services other than of a kind ordinarily acquired for personal, domestic or household use or consumption. A term is not void under s54 merely because it limits liability for failure to comply with a guarantee to one or more of:

35.1 Replacement of or supply of equivalent goods;

35.2 Repair of the goods;

35.3 Payment of the cost of replacing the goods or of acquiring equivalent goods;

35.4 Payment of the cost of having the goods repaired;

35.5 Supplying the services again or payment of the cost of having the services supplied again: s64A(1) and (2).

*Potential litigants*

36 The remedy for non-compliance with a consumer guarantee is against a supplier: ACL s259. The term “supply” when used as a verb includes in relation to goods supply (including resupply) by way of sale, exchange, lease, hire or hire-purchase, and in relation to services includes provide, grant or confer. When used as a noun “supplier” has corresponding meanings: ACL s2(1).

37 In some instances there may be a remedy against a credit provider or a manufacturer.

38 An affected person may recover damages from the manufacturer of goods for failure to comply with the guarantee under s54 (acceptable quality), s56 (supply by description), or s58 or 59(1) (repairs and spare parts and express manufacturer’s warranty). The term “manufacturer” extends to a person who holds himself or herself out to the public as manufacturer, or permits his or her name, brand or mark to be applied to the goods: ACL s7.

39 The notion of “consumer” extends beyond that of a householder. The determining questions relate to price or nature of the goods or services. A person is taken to have acquired particular goods as a consumer if, and only if:

39.1 The amount paid or payable for the goods did not exceed \$40,000;

39.2 The goods are of a kind ordinarily acquired for personal, domestic or household use or consumption; or

39.3 The goods consist of a vehicle or trailer acquired for use, principally in the transport of goods on public roads; and

39.4 The goods were not acquired for the purpose of resupply or for the purpose of using them up or transforming them in trade or commerce in the course of a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land:

ACL s3(1) & (2).

40 A person is taken to have acquired particular services as a consumer if, and only if:

40.1 The amount paid or payable for the services did not exceed \$40,000; or

40.2 The services were of a kind ordinarily acquired for personal, domestic or household use or consumption:

ACL s3(3).

41 Accordingly a “consumer” is not confined to a natural person, let alone a householder.

42 The consumer’s remedies are also available to a person to whom goods have been given as a gift: ACL s266.

### *Remedies*

#### Goods

43 The available remedy for failure to comply with a consumer guarantee for the supply of goods depends on whether the failure was a major failure. If the failure was major the

consumer can reject the goods or recover compensation for reduction in value as well as damages for loss that was reasonably foreseeable: ACL s259(2), (3) & (4). There is a major failure where a reasonable consumer would not have acquired the goods if fully acquainted with the nature and extent of the failure, the goods depart in a significant respect from the description or supplied sample, the goods are substantially unfit for purpose or unfit for a disclosed purpose or are not of acceptable quality because they are unsafe: ACL s260.

- 44 Section 259(3) provides that if the failure to comply with the guarantee cannot be remedied or is a major failure the consumer may, subject to s262, notify the supplier that the consumer rejects the goods and the ground or grounds for the rejection or by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.
- 45 If the failure to comply with the guarantee can be remedied and is not a major failure the consumer may require the supplier to remedy the failure within a reasonable time or, if such a requirement is made, but the supplier refuses or fails to comply within a reasonable time, the consumer may otherwise have the failure remedied and by action against the supplier recover all reasonable costs incurred in having the failure remedied or notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection: s259(2).
- 46 Where a consumer notifies a supplier that the consumer rejects the goods the consumer must return the goods to the supplier unless they have already been returned to or retrieved by the supplier or cannot be returned without significant cost because of the nature of the failure to comply with the guarantee or the size, height or method of attachment of the goods: s263(1) and (2). The supplier must then refund any amount paid by the consumer for the goods and an amount equal to the value of any other

consideration provided by the consumer for the goods or replace the rejected goods with goods of the same type and of similar value if such goods are reasonably available to the supplier: s263(4). The consumer may elect for refund or replacement.

- 47 Where there is a linked credit contract associated with the contract of supply of the goods or services the linked credit provider may be liable jointly and severally with the supplier for any loss or damages suffered by the consumer as a result of failure to comply with the consumer guarantee: ACL s278. The credit provider's liability is limited to the amount financed under the credit contract, plus any interest or damages in the nature of interest and costs awarded against the credit provider or supplier or both: ACL s281.
- 48 The right to claim against the linked credit provider does not extend to the guarantee as to repairs in parts (ACL s58) or the guarantee as to express warranties (ACL s59).

### Services

- 49 An action against a supplier of services may be taken by a consumer under s267.
- 50 If the failure to render the services with due care and skill is not a major failure and can be remedied the consumer can require the supplier to remedy the failure within a reasonable time: s267(2)(a). If the supplier does not remedy the failure within a reasonable time the consumer may have the failure remedied and by action against the supplier recover all reasonable costs incurred or terminate the contract for supply of services: s267(2). The consumer may also recover damages for reasonably foreseeable loss or damage: s267(4).
- 51 If the failure cannot be remedied or is a major failure the consumer can recover compensation for any reduction in the value of the services below the price paid or payable or terminate the contract for the supply or services: s267(3). The consumer may also recover reasonably foreseeable loss or damage: s267(4)

52 A failure to comply with a guarantee that applies to a supply of services is major failure if the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure, the services are substantially unfit for purpose, or create an unsafe situation: s268.

### **Sale of Goods Act 1895 (WA)**

53 The *Sale of Goods Act 1895* (WA) remains in force. Subject to contrary agreement between the parties, this Act it may imply into a contract for the sale of goods terms as to correspondence with description under a sale by description (s13), fitness or quality (s14) or compliance with sample under a sale by sample (s15). Its provisions are not confined to contracts that have a “consumer” element.

54 Where a provision of the ACL is inconsistent with a provision of the *Sale of Goods Act* the ACL provision prevails and the *Sale of Goods Act* provision is inoperative to the extent of the inconsistency: ACL s35.

### ***Miller & Associates Insurance Broking v BMW Australia Finance***

55 The case confirms that in determining whether there has been a contravention of s18 of the ACL (then s52 of the TPA) it is necessary to determine whether, in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive. For conduct to be misleading or likely to mislead it is not necessary that it conveys an express or implied representation. It suffices that it leads or is likely to lead into error: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31 [14], [15], (2010) 210 CLR 241.

### **Pleading breach of contract and misleading conduct**

56 In my view the better approach to pleading is to set out allegations of material fact, and conclusions from them, in the following order:

- 56.1 In time sequence the material facts of the conduct alleged to be misleading (including what was not said [ie silence], if relevant), the conduct constituting the contract, and any facts supporting the allegation of a consumer guarantee;
- 56.2 The allegation that the previously pleaded facts amount to a contract;
- 56.3 Any relevant express or implied term;
- 56.4 Any consumer guarantee;
- 56.5 Any express or implied representation;
- 56.6 Facts amounting to contravening conduct, breach of contract, or failure to comply with a consumer guarantee;
- 56.7 Conclusory allegations that there was contravening conduct, breach of contract, or failure to comply with a consumer guarantee;
- 56.8 Facts of loss and damage suffered by the plaintiff and any facts necessary to show a link between loss or damage and contravening conduct, breach of contract, or failure to comply with a consumer guarantee;
- 56.9 Conclusory allegations that the loss and damage were caused by contravening conduct, breach of contract, or failure to comply with a consumer guarantee.

### **Assessment of damages**

#### *Negligence*

- 57 The basic compensatory principle for assessing damages in tort was enunciated by Lord Blackburn in *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25, 39. The plaintiff is to be awarded “that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

58 This rule is well established and has been accepted and repeated numerous times by the High Court: eg. *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185, 191; *Haines v Bendall* (1991) 172 CLR 60; *Manser v Spry* (1994) 181 CLR 428.

*Contract*

59 In contract “where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”: *Robinson v Harman* (1848) 1 Ex 840, 855; *Haines v Bendall* (1991) 172 CLR 60, 63; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

60 The compensatory principles for contract and tort were expressed in a compendious formulation by the High Court in *Haines v Bendall* - the plaintiff is entitled to an award of damages that, so far as money can do, will put the plaintiff in the position it would have been in if the contract had been performed or the tort had not been committed.

*Damages for misleading conduct*

61 A person who suffers loss because of the conduct of another person in contravention of s18 of the ACL may recover the amount of that loss or damage from the other person or against any other person involved in the contravention: s236.

62 Where misleading conduct consists of false representations in most if not all cases the appropriate measure of damages is the measure in tort: *Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1, 14. However for claims for misleading conduct the statutory test for assessment of damages is not limited to analogies from the common law or equity: *Marks v GIO Australia Holdings* [1998] HCA 69, (1998) 196 CLR 494, 510 [38]. See also *Murphy v Overton Investments Pty Ltd* [2004] HCA 3, (2004) 216 CLR 388.



63 The statutory question to be answered (under TPA s82) was whether the plaintiff suffered loss by the contravening conduct of the defendant. It is now (ACL s236) whether the plaintiff suffered loss because of the contravening conduct of the defendant.

*Consumer guarantees*

64 Recoverable damages might be assessed according to contract principles, although the “guarantees” are statutory and not implied terms of the supply contract.

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