

THE AUSTRALIAN CONSUMER LAW 2010

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On 1 January 2011 the *Trade Practices Act 1974* (Cth) (**TPA**) was substantially amended to facilitate the commencement of the *Australian Consumer Law* (**ACL**).

Among the amendments was a renaming of the Act. No longer is there an Act known as the *Trade Practices Act*. From 1 January 2011 the Act is known as the *Competition and Consumer Act 2010* (Cth) (**CCA**).

With that renaming, the introduction of the ACL has seen substantial amendments to the consumer protection provisions of the Commonwealth Act and the enactment of the ACL as a law of each of the States and Territories.

The text of the ACL is now found in Schedule 2 to the CCA.

The ACL has its own section numbering commencing at section 1 through to section 287.

That has seen substantial amendments to the text of the *Trade Practices Act*. Those amendments include the repeal of the following provisions and their replacement by the identified sections of the ACL.

Subject Matter	TPA Reference	ACL Reference
Unconscionable conduct	Part IVA sections 51AA to 51AC	Sections 20 to 22
Misleading or deceptive conduct	Section 52	Section 18
Misrepresentations	Sections 53 to 55A	Sections 29 to 35
Pyramid selling	Section 65AAA to 65AAE	Sections 44 to 46
Implied terms in consumer transactions	Section 66 to 74	Consumer guarantees in sections 51 to 64
Manufacturers and importers liability	Sections 75AA to 75AS	Sections 138 to 150

However, in each of those cases the changes are largely only to the relevant statutory references. For example s18 of the ACL covers the same territory as s52 of the TPA had covered.

In this paper I address some of the more substantive changes made by the introduction of the ACL.

Application of Australian Consumer Law

The ACL is a uniform national law enacted pursuant to the *Inter-Governmental Agreement for the Australian Consumer Law* entered into by the Council of Australian Governments on 2 July 2009.

The ACL applies:

- (a) as a law of the Commonwealth within limits prescribed by the CCA; and
- (b) as a law of each of the States and Territories by reason of legislation applying the Consumer Law.

The application of the ACL as a law of the Commonwealth is dealt with in Part XI of the CCA.

Section 131 of the CCA operates so that the ACL applies as a law of the Commonwealth in much the same way as the consumer protection provisions of the *Trade Practices Act* have previously applied as a law of the Commonwealth to regulate:

- (a) the conduct of constitutional corporations;

- (b) to trade or commerce between Australia and places outside Australia, between the States, within a Territory or between a Territory and a State or by way of supply of goods or services to the Commonwealth (CCA s.6(2));
- (c) conduct which involves the use of postal, telegraphic or telephonic services (CCA s.6(3)).

The ACL is also applied as a law of each respective State and Territory by the following Acts.

Fair Trading Act 1987 (NSW) (Part 3)

Fair Trading Act 1999 (Vic) (Part 2)

Fair Trading Act 1989 (Qld) (Part 3)

Fair Trading Act 1987 (SA) (Part 3)

Fair Trading Act 2010 (WA)

Australian Consumer Law (Tasmania) Act 2010 (Tas)

Fair Trading (Australian Consumer Law) Act 1992 (ACT)

Consumer Affairs and Fair Trading Act (NT) (Part 4)

In each case the ACL applies to and in relation to:

- (a) persons carrying on business within the particular jurisdiction;
- (b) bodies corporate incorporated or registered under the law of a particular jurisdiction;
- (c) persons ordinarily resident in the particular jurisdiction; and
- (d) persons otherwise connected with the jurisdiction.

The ACL as applied by each jurisdiction extends to conduct, and other acts, matters and things occurring or existing outside or partly outside the particular jurisdiction. (NSW s.32; Queensland s.4A; Victoria s.13; SA s.18; WA s.24; Tasmania s.10; ACT s.11; and NT s.31).

As applied in each of the States and Territories the ACL is cited as “Australian Consumer Law” followed by the name of the relevant State or Territory in brackets. So, for

example, when applied as the law of NSW the ACL is known as the *Australian Consumer Law (NSW)*.

Importantly when construing the ACL, whether applied as a law of the Commonwealth or the States, regard is had first to the dictionary of terms found within the ACL (at s.2) and then to the Acts Interpretation Act 1901 (Cth) without regard to the relevant State Interpretation Act. Each of the State application laws has a provision to that effect.

The federal courts and the courts of the States and Territories will be bound to construe the ACL coherently as a single national law.¹

A single national law

Undoubtedly the most significant change introduced by the ACL is the uniformity of consumer regulation across the country. The same text applies whether as a law of the Commonwealth or of one or more States or Territories.

While in making decisions on forum for proceedings, and in pleadings, it will remain necessary to consider the basis of application of the ACL by the CCA and by the application laws of each of the States and Territories, the ultimate outcome of disputes cannot now be affected by differences in the substantive law as between Australian jurisdictions.

Unfair contracts

The ACL implements on a national basis the unfair contract provisions which came into force in the *Trade Practices Act* on 1 July 2010.²

The unfair contract provisions apply only to “standard form contracts”.

If a term is in a standard form contract it will be “unfair” if three conditions are satisfied:

- (a) that the contract term would cause a significant imbalance in the party’s rights and obligations arising under the contract; and
- (b) the contract term would cause detriment (whether financial or otherwise) to a party if it were applied or relied on; and
- (c) the contract term is not reasonably necessary in order to protect the legitimate interests of the party seeking to rely on it.

Where a term is unfair it is void.

¹ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492

² The same regime also applied from that date under the NSW and Victorian *Fair Trading Acts*.

Standard form contract

The party seeking to deny that a contract is a standard form contract carries the onus of so proving (ACL s.27(1)).

In deciding whether a contract is a standard form contract a Court may take into account such matters as it considers relevant but must take into account the following:

- (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
- (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- (c) whether another party was, in effect, required to either accept or reject the terms of the contract (other than terms relating to the main subject matter and up front price);
- (d) whether another party was given an effective opportunity to negotiate the terms of the contract (other than terms relating to the main subject matter and up front price);
- (e) whether the terms of the contract (other than those defining the main subject matter and up front price) take into account the specific characteristics of another party or the particular transaction.³

Whether a contract is a standard form contract will be a question to be decided case by case. It would be open to a Court to find that a template contract agreement used by a particular trader was a standard form contract in the circumstances of dealing with a consumer in one case, while it was not a standard form contract in circumstances of similar dealings with a different consumer, or a different set of dealings with the same consumer.

The unfair contract provisions apply only to *consumer contracts* being contracts for the supply of goods or services or the sale of interest in land to an individual whose acquisition of the goods, services or interest is solely or predominantly for personal, domestic or household use or consumption. That is, the test hinges on the subjective purpose of the acquirer. There is no monetary limit to be found in the definition of consumer contract.⁴

Unfair

A party alleging that a contract term is “unfair” must establish two matters:

³ Section 27(2).

⁴ ACL s.23(3).

- (d) that the contract term would cause a significant imbalance in the party's rights and obligations arising under the contract; and
- (e) the contract term would cause detriment (whether financial or otherwise) to a party if it were applied or relied on.

If each of those matters is established the particular contract term is “unfair” unless the party seeking to rely upon it proves that the term was reasonably necessary in order to protect the legitimate interests of that party.

In applying each of the three tests which are relevant to determining whether a term is unfair a Court may take into account such matters as is relevant and is obliged to take into account:

- (a) the extent to which the term is transparent (that is, expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term); and
- (b) the contract as a whole.⁵

Unfair terms are void

The remainder of the contract remains binding “if it is capable of operating” with the unfair term to be “bluelined”.⁶

Powers of Courts

Courts have power, under s.250 of the ACL, to declare a term of a consumer contract unfair and void. Proceedings for declarations can be brought by a party to the contract or by a regulator.⁷

Where the trader applies or relies on, or purports to apply or rely on a term which has been so declared to be unfair and void the Courts have power to make orders by way of injunctions⁸ or to compensate for, or prevent, loss or damage⁹.

The power to grant an injunction or to make a compensation order only arises on proof of conduct constituted by applying or relying on, or purporting to apply or rely on, the

⁵ ACL s.24(2).

⁶ ACL s 23(1) and (2) giving effect to *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516

⁷ In the case of the ACL as applied by the CCA, the ACCC; otherwise by the relevant State fair trading office.

⁸ ACL s.232(3).

⁹ ACL s.238(1).

particular unfair term. It is not sufficient that there be an attempt to apply or rely on the term, or a threat to do so.

The relevant provisions are ambiguous as to whether remedies are available only when there is proved an application or reliance on the relevant contract term occurring after the Court had declared the term unfair; or whether any application or reliance on a term which is later found to be unfair is sufficient to ground an injunction or a compensatory order, provided the Court (in the same proceeding) has declared the term unfair.

In any event, the provisions are available to plead as a Defence to any claim in which the term claimed to be unfair is relied on by the plaintiff.

While the unfair contract terms have been in force since 1 July 2010 there are no reported decisions applying those provisions. Nor are the provisions based on legislation in like terms. While Courts will no doubt be assisted by the jurisprudence in other statutory jurisdictions for the review of contracts for their fairness, the jurisprudence developed under different statutory regimes will be approached with great caution in giving effect to the new provisions.¹⁰

Misrepresentations etc

The demise of s52

Undoubtedly the change which will be noticed most immediately by the current generation of lawyers is that s.52 of the *Trade Practices Act 1974* is no longer in force.

However, that change is of little practical significance. Section 18 of the ACL provides:

“A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

To the extent that s.18 is applied as a law of the Commonwealth it is to be read as meaning precisely as s.52(1) of the *Trade Practices Act 1974* used to read:

“A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

Comprehensive proscription of misrepresentations in trade or commerce

On the other hand changes of substance have been made with the replacement of the specific prohibitions against false representations previously found in s.53 of the *Trade Practices Act 1974* with s.29 of the ACL.

¹⁰ See for example decisions under s.32W of the *Fair Trading Act 1999* (Vic), various decisions of the Federal Magistrates Court under the *Independent Contractors Act 2006* (Cth) and the jurisprudence under the *Industrial Relations Act 1996* (NSW) s.106.

Previously s.53 had prohibited some representations which were “false” and others which were “false or misleading”.

The new s.29 of the ACL contains a substantially more comprehensive list of representations which if they are “false or misleading” constitute a contravention of the section.

Criminal liability

Sections 30 to 50 in Chapter 3 of the ACL largely reproduce and replace the other unfair practice provisions previously found in Part V of the *Trade Practices Act 1974*.

However conduct which previously constituted contraventions of those specific provisions of Part V now also constitutes a criminal offence under Chapter 4 of the ACL.

The scheme of the ACL is to impose civil liability by provisions found in Chapter 3, and criminal liability in respect of the same conduct by a separate provision found in Chapter 4. The relevant sections are listed below.

Conduct	Civil Liability (Chapter 3)	Criminal Liability (Chapter 4)
False or misleading representations about goods or services	29	151
False or misleading representations about the sale of land	30	152
False or misleading conduct relating to employment	31	153
Falsely offering rebates, gifts, prizes	32	154
Misleading the public as to the nature of goods	33	155
Misleading the public as to the nature of services	34	156
Bait advertising	35	157
Wrongly accepting payment for goods or services	36	158
False or misleading representations about home businesses	37	159
Unsolicited credit or debit cards	39	161
Asserting a right to payment for unsolicited goods or services	40	162

Conduct	Civil Liability (Chapter 3)	Criminal Liability (Chapter 4)
Asserting a right to payment for unauthorized directory entries or advertisements	43	163
Participating in a pyramid selling scheme	44	164
Referral selling	49	167
Harassment and coercion	50	168

Pricing

The ACL contains new provisions regulating the pricing of goods or services.

If goods are displayed with two or more prices, they must not be supplied except for the lower or lowest of those displayed prices. (Civil liability s.47, Criminal liability s.165)

In respect of the supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, there must be a single price. That is, component pricing cannot be disclosed, unless there is specified in a prominent way the single price payable for the supply of the relevant goods or services, other than delivery charges which can be dealt with separately. (Civil liability s.48, Criminal liability s.165)

Consumer Guarantees

The *Trade Practices Act 1974* contained provisions implying into consumer contracts certain warranties and conditions.

The consumer guarantees contained in the ACL are a major change from the *Trade Practices Act* provisions.

The consumer guarantees are statutory guarantees the breach of which gives rise to statutory rights and statutory causes of action. Those rights and causes of action do not depend on, and except in narrow circumstances, cannot be affected by contract.

The statutory consumer guarantees regime is based on the *Consumer Guarantees Act 1993* of New Zealand.

A key aspect of the consumer guarantees provisions of the ACL is to provide a high degree of certainty as to consumer's rights. In so doing the law seeks to provide a basis for significant enhancements in the provision of comparatively simple information to both traders and consumers. Taking advantage of these features of the law the Victorian Government has recently published a free iPhone app entitled "MyShopRights".

For lawyers, the provisions nevertheless raise some complexity.

Supply to a Consumer

The application of each of the statutory consumer guarantees is limited to the supply, of goods or services:

- (a) in trade or commerce; and
- (b) to a consumer.

For those purposes “consumer” is defined by s.3 of the ACL.

That definition does not operate by reference to any characteristic of the person claimed to be a “consumer.”

Rather, the definition focuses on the characteristics of the particular transaction for the supply and acquisition of the goods or services.

A person is taken to have acquired goods as a consumer, and the supply of those goods to that person is taken to be the supply to a consumer, if one of three alternative conditions is met:

- (a) the amount paid or payable for the goods does not exceed \$40,000; or
- (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

Each of those alternatives is an objective test of a characteristic of the goods the subject of the transaction.

However excluded from the scope of transactions which are regarded as acquisitions as a consumer are acquisitions of goods:

- (a) for the purpose of re-supply; or
- (b) for the purpose of using them up or transforming them in trade or commerce through a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land.

Each of those exclusionary criteria focus on the subjective purpose of the acquirer. The mere fact that the acquisition is for a business purpose does not take it outside the scope of the consumer guarantees.

Services are taken to be acquired as a consumer (and therefore to have been supplied to a consumer) if either:

- (a) the amount paid or payable for the services does not exceed \$40,000; or
- (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Nothing in the definition restricts a “consumer” to natural persons. A corporation can be a consumer.

If a transaction for the supply of goods or services has a price not more than \$40,000 that is sufficient to satisfy the definition of “consumer”. It is immaterial what the subject matter of the transaction might be. The acquisition by a corporation of a large, commercial grade photocopying machine intended to be used by it in the conduct of its business for a price not exceeding \$40,000 meets the definition of supply to a consumer. So too, the purchase by a corporation of business advice services for a price not exceeding \$40,000.

Further, a transaction for the supply of goods or services is a consumer transaction where the goods or services are of a kind *ordinarily acquired for personal, domestic or household use or consumption*.

In applying that test the New Zealand Court of Appeal has held that “ordinarily” is used in the sense of “*as a matter of regular practice or occurrence*” or “*in the ordinary or usual course of events or things*”. The Court held that a Nissan Navara was goods of a kind ordinarily acquired for personal, domestic or household use or consumption, even though of the total sales of Nissan Navaras in New Zealand, 80% were for commercial purposes and 20% were for private purposes. It was beside the point that Nissan Navaras were also goods of a kind ordinarily acquired for commercial purposes.¹¹ On the other hand the acquisition of quantity surveyor services, even by an individual, in respect of a commercial development could not fall within the provision because such services are not ordinarily acquired for personal, domestic or household use.¹²

The fact that an acquisition is for the purpose of use of goods or services in a business does not take the transaction outside the bounds of a consumer transaction. The exclusionary criteria are substantially narrower than that. Acquisition of goods for the purposes of re-supply are outside the definition, at least when the resupply is in the course of business¹³. (ACL s.3(2)(a)) So too is the acquisition of goods for the purpose of using them up or transforming them through a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land. (ACL s.3(2)(b))

¹¹ *Nesbit v Porter* [2000] 2 NZLR 465 at [29].

¹² *Te Mata Properties Ltd and anor v Hastings District Council and others* [2009] 1 NZLR 460 at [106]

¹³ *Kerry Stone Ltd and Anor v Knowles* (2006) 11 TCLR 768 at [24]

However there is a distinction between “using goods up” and “using goods”. So, for example, the purchase of a sofa by a business for use in its reception area constitutes a consumer transaction for the purposes of the definition.¹⁴

Who is entitled to the benefit of the Statutory Consumer Guarantees?

The consumer, being the person who acquires the goods or services is entitled to the benefit of the statutory consumer guarantees.

So too is any person to whom the consumer gives the goods acquired by the consumer as a gift. (ACL s.266)

Against whom are the Statutory Consumer Guarantees Enforceable?

Each of the guarantees is enforceable against any person who supplies the relevant goods or services to the consumer. (ACL s.259)

Goods are supplied by a person who supplies by way of sale, exchange, lease, hire or hire-purchase. Services are supplied by a person who provides them, or in the case of services constituted by the conferring of a right, grants or confers the right. (ACL s.2)¹⁵

When the acquisition of goods or services has been financed by a credit provider introduced to the customer by the supplier the linked credit provider is jointly and severally liable with the supplier for any failure to meet the statutory consumer guarantees concerned with the quality of the goods or services. (ACL s.278) However the credit provider’s liability is capped by reference to the amount of any loan (with interest). (ACL s.281)

Claims for failure to meet the statutory consumer guarantees concerned with the quality of goods, can also be made against the manufacturer.

For those purposes manufacturer is expansively defined to include:

- (a) the manufacturer;
- (b) the business which causes or permits its brand or mark to be applied to the goods in question; and
- (c) in the case of goods manufactured outside Australia where the manufacturer does not have a place of business in Australia, the importer. (ACL s.7)

¹⁴ *Nesbit v Porter* at [26].

¹⁵ The ACL does not apply the more expansive definitions of supplier used in the New Zealand legislation – see *Walters and anor v Taylor Marine Ltd and ors* [2010] 2 NZLR 656

Further, where claims are made against the supplier of goods in respect of a statutory consumer guarantee concerned with the quality of those goods, the supplier is entitled to an indemnity from the manufacturer. (ACL s.274)

What are the Guarantees?

Sections 51, 52 and 53 contain guarantees as to title – that the supplier has the right to sell the goods, the consumer will have undisturbed possession of the goods and that the goods are free from any undisclosed security.

Sections 54, 55, 56 and 57 contain guarantees as to the quality of goods – that they are of “acceptable quality”; are fit for a particular purpose made known to the supplier by the consumer; where goods are sold by description they will comply with that description; and where goods are sold by sample or demonstration that the goods comply with that sample or demonstrated model.

Section 58 is a guarantee that the manufacturer will take reasonable action to ensure that facilities for repair of the goods are reasonably available.

Section 59 provides a statutory guarantee that the manufacturer or supplier will comply with any express warranty provided.

Importantly, gas, electricity and computer software are treated by the ACL as “goods”. (ACL s2 definition of “goods”) Unlike under the Trade Practices Act their supply is a supply of “goods”, not “services.”

Section 60, 61 and 62 provide guarantees as to services – that they will be rendered with due care and skill, that they will be fit for a particular purpose made known to the supplier and that they will be delivered within a reasonable time.

Acceptable quality

The guarantee in s.54 – that goods are of acceptable quality is worthy of particular mention. Section 54 provides:

“2. *The goods are of acceptable quality if they are as:*

- (a) *fit for all the purposes for which goods of that kind are supplied;*
and
- (b) *acceptable in appearance and finish; and*
- (c) *free from defects; and*
- (d) *safe; and*
- (e) *durable*

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

3. *The matters for the purposes of sub-section (2) are:*
- (a) the nature of the goods; and*
 - (b) the price of the goods (if relevant); and*
 - (c) any statements made about the goods on any packaging or label on the goods; and*
 - (d) any representation made about the goods by the supplier or manufacturer of the goods; and*
 - (e) any other relevant circumstances relating to the supply of the goods.”*

The standard prescribed can be no lower than that which was contained in s.74D of the *Trade Practices Act 1974*. It calls for the fitness for each purpose for which the goods are commonly supplied to be measured against what it was reasonable to expect in that regard at the time of supply of the goods to the consumer in all the relevant circumstances. Those circumstances include the description applied to the goods by the manufacturer and the price received. What it would be reasonable to expect in terms of fitness for purpose of an inexpensive product might be quite different from what it might be reasonable to expect of an expensive product of the same kind. Whether the goods meet that standard is to be assessed by reference to all that is known about the goods at the time of trial.¹⁶

It is probably the case that the standard is higher than that in the old s.74D – because the fitness for purpose is not limited to purposes for which the goods are commonly supplied. It is measured against every purpose for which goods of that kind are supplied.¹⁷

Consequently it may well be that goods are of merchantable quality, as that term was understood at common law and under some of the sale of goods laws of Australia, but where those same goods will nevertheless fail to be of “acceptable quality”.¹⁸

In New Zealand much of the jurisprudence on “acceptable quality” has been developed in disputes about used cars. While the cases are richly fact specific (and there are many hundreds of them), some clear principles emerge:

- (a) The existence of a defect that has arisen from use of the goods and which was clearly disclosed to the purchaser before purchase will not render second hand goods not of acceptable quality;

¹⁶ *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at [64] and [70].

¹⁷ *Nesbit v Porter* at [52]

¹⁸ *Nesbit v Porter* at [52].

- (b) The mere fact that an undisclosed latent defect is due to normal wear and tear may not be sufficient to render the quality acceptable. For example a vehicle whose differential ceases to work shortly after purchase was not “durable” at the time of purchase. Unless there is something in the pricing or disclosures made that would have lead a reasonable consumer to have made the purchase knowing that the differential would fail at about the point when it in fact failed, the vehicle was not of acceptable quality.

Contracting out

It is impossible by contract to exclude, restrict or modify any of the statutory consumer guarantees except in one respect.

In the case of the transactions for the supply of goods or services which are not of a kind ordinarily acquired for personal, domestic or household use or consumption the supplier may by contract limit its liability to the following:

- (a) the replacement of the goods or the supply of equivalent goods;
- (b) the repair of the goods;
- (c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
and
- (d) the payment of the cost of having goods repaired; or
- (e) the re-supply of the services; and
- (f) the payment of the cost of re-supply of the services.

In this respect the ACL departs from the approach of the New Zealand legislation and the Australian tradition in consumer credit legislation – which permits exclusion in cases where the parties agree that the subjective purpose of the acquisition is business and not consumer related. Under the ACL the fact that an acquisition is for a purely business purpose is of no direct relevance.

State professional standards legislation can apply to permit a limitation of liability for breach of the guarantees of service quality. (ACL s275)

Remedies

The remedies available for breach of the statutory consumer guarantees depend upon whether the failure to meet the guarantee is major or not.

A failure to meet a guarantee is major if any one of five conditions exists:

- (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- (b) the goods depart in one or more significant respects from the description by which they were supplied or from the sample or demonstration by reference to which they are supplied;
- (c) the goods are substantially unfit for any purpose for which goods of that kind are commonly supplied;
- (d) the goods are unfit for a purpose disclosed to the supplier; or
- (e) the goods are not of acceptable quality because they are unsafe.

If any one of the five criteria applies which renders a failure with respect to goods major, or if any failure to comply with a guarantee cannot be remedied, the consumer is entitled to reject the goods by notifying the supplier of that fact and the supplier is obliged, in accordance with an election made by the consumer to either refund monies paid by the consumer or replace the rejected goods. (ACL ss.259(3), 260 and 263)

On the other hand if the failure to comply with the guarantee can both be remedied and is not major a consumer who wishes to pursue a remedy must first give the supplier the opportunity to remedy the failure and only if and when the supplier refuses or fails to so remedy the failure can the consumer reject the goods.¹⁹ (ACL s.259(2))

Whether any failure is major or not, and can be remedied or not, the consumer is also entitled to recover from the supplier loss or damage suffered by the consumer because of the failure if it was reasonably foreseeable that the consumer would suffer such loss or damage. This provision for consequential loss has the potential to replace tort and contract law approaches to damages in a great many “consumer” transactions.

A consumer is not able to recover the costs of repair or replacement of the goods or services in question as consequential loss.²⁰

Enforcement and remedies

National regulator

The ACL confers regulatory functions on the “regulator”.

¹⁹ A failure to give the supplier the opportunity to remedy a non major fault is fatal to the consumer’s claim for repair costs – *Acquired Holdings Ltd v Turvey* (2008) 8 NZBLC 102,107. However whether an opportunity has been provided is a question of fact and there are no formal requirements – *Chambers v Disputes Tribunal and anor NZHC CIV 2006-409-000832*

²⁰ *Acquired Holdings Ltd v Turvey*

For those purposes regulator means:

- (a) for the purposes of the application of the ACL as a law of the Commonwealth – the ACCC; and
- (b) for the purposes of the application of the ACL as a law of each jurisdiction:
 - New South Wales Fair Trading;
 - Consumer Affairs Victoria;
 - Queensland Office of Fair Trading;
 - WA Department of Commerce – Consumer Protection;
 - South Australian Office of Consumer & Business Affairs;
 - Consumer Affairs & Fair Trading Tasmania;
 - ACT Office of Regulatory Services; and
 - NT Consumer Affairs.

Criminal offences

Part 4 of the ACL creates a lengthy list of criminal offences²¹ for contraventions of the ACL.

In each case those offences are offences against the law of the Commonwealth insofar as the ACL applies as a law of the Commonwealth; and are offences against the law of the States and Territories insofar as the ACL applies as a law of the States and Territories.

However there can be no double conviction under the ACL as applied by the different jurisdictions for the one act or omission. (CCA s.131C(3))

The administrative decision to commence criminal prosecutions will be a matter for the respective Directors of Public Prosecutions rather than the regulator in the relevant jurisdiction. Presumably the regulator in each relevant jurisdiction would ordinarily be the informant to the DPP.

Pecuniary penalties

The regulator in each jurisdiction can apply itself to a Court for an order that pecuniary penalties be imposed for contravention of the civil liability provisions of the ACL which in large part correspond with the offence provisions. (ACL s.224)

Pecuniary penalty proceedings cannot be taken in respect of conduct which has resulted in a conviction for an offence under the ACL. However criminal proceedings can be commenced in respect of conduct which has resulted in the imposition of a pecuniary penalty. (ACL s.225)

²¹ See the list at page 8

Civil remedies

The civil remedies of injunctions and damages continue without substantive change. However the legislative provisions under which they are granted are changed.

Injunctions in respect of contraventions of consumer protection provisions are no longer available under s.80 of the CCA. Rather they are available under s.232 of the ACL, which is in terms not relevantly different from s.80.

Actions for damages in respect of damage caused by conduct in contravention of consumer protection laws are no longer available under s.82 of the CCA, but are rather available under s.236 of the ACL.

In that change of legislative provision there has been a change of wording which may ultimately have some significance. Section 82 of the *Trade Practices Act 1974* provided for recovery of damages where a person suffered loss or damage by conduct of another person. That reference to “by” in s.82 has been relied on to import into s.82 the common law’s approach in contract and tort to limiting damages by reference to concepts such as remoteness. (*Wardley Australia Limited v Western Australia* (1992) 175 CLR 514 per Mason CJ at 525; *Henville v Walker* (2001) 206 CLR 459 per McHugh J at [136])

Section 236 of the ACL on the other hand refers to a person who suffers loss or damage because of the conduct.

The argument is open that s.236 thereby expands the scope of damages which may be recoverable beyond the common law’s limitation of damages – to encompass any loss or damage which meets a “but for” test and can therefore be said to be “because of” the conduct. On the other hand, it arguably does no violence to the new language to read into “because of” the law’s general tests of causation and remoteness.

The more restrictive approach is consistent with the Explanatory Memorandum of the *Consumer Law Bill (No. 2) 2010* which stated:²²

“The damages provision in the ACL replaces s.82 of the Trade Practices Act and existing jurisprudence should continue to apply.”

Compensation and loss prevention orders

Section 87 of the *Trade Practices Act 1974* provided broad power for the Court to make orders as it considered appropriate directed either to compensating persons who had suffered loss or damage or preventing or reducing any such loss or damage.

That section, now s.87 of the CCA, extends to circumstances in which there has been a contravention of the ACL. Sections 227 and 238 of the ACL provide a similar power,

²² At clause 15.14.

pursuant to the ACL, for Courts to make orders compensating for, or seeking to prevent, loss or damage caused by contravention of the ACL.

Section 239 of the ACL reverses the decision in *Medibank Private Limited v Cassidy*²³ that prevented the ACCC from taking consumer protection proceedings on behalf of a class of consumers except to the extent that each individual consumer had, prior to commencement of proceedings, consented to the ACCC so taking the proceeding.

Section 239 authorises the regulator to take proceedings in respect of conduct causing loss or damage or likely to cause loss or damage to a class of consumers. After the result of the proceedings is known individual consumers will then be entitled to elect to take advantage of the orders of the Court, and thereby become bound by the outcome of those proceedings. (ACL s.241) If there are no consumers attracted to the orders of the Court it seems it will be of no utility. As a result, there will be an argument that a proceeding of that kind in the Federal jurisdiction cannot constitute a “matter” and therefore the provision cannot validly apply as part of the law of the Commonwealth. Even if that argument were accepted it would not affect the operation of s239 as a law of the States.

Enhanced administrative powers for the regulator

The ACL and CCA amendments confer three substantial new administrative powers on the ACCC as the national regulator. The same powers are conferred on each of the State and Territory regulators by the ACL and the application law of the States and Territories.

The powers are:

- (a) Substantiation notices;
- (b) Public warning notices; and
- (c) Infringement notices.

Substantiation notices

The power to issue substantiation notices is conferred on the ACCC in addition to its powers to obtain information and documents and to compel the answering of questions under s.155 of the CCA.

The regulator has power to issue a substantiation notice where a person has, in trade or commerce made a claim or representation promoting, or apparently intended to promote:

- (a) a supply or possible supply of goods or services; or
- (b) the sale or grant, or possible sale or grant, of an interest in land; or

²³ [2002] ATPR 41-895.

(c) employment that is to be, or may be, offered.

There is no need for the regulator to form any opinion as to whether any such claim is or may be misleading or deceptive.

Where any such claim has been made the regulator may issue a notice to the person who made it. That person is then obliged to give information and/or to produce documents to the regulator, including information or documents of a kind specified in the notice, capable of substantiating or supporting the claim or representation. (ACL s.219)

Public warning notices

Where the regulator has reasonable grounds to suspect that the conduct of a person may constitute a contravention of either the civil or criminal liability provisions of the ACL and the regulator is satisfied that one or more persons has suffered or is likely to suffer detriment as a result of the conduct, the regulator may, if satisfied that it is in the public interest to do so, issue a public warning notice about the person's conduct. It would not be necessary for the regulator to wait for the Court to determine whether it would make a declaration of contravention before issuing such a warning notice.

Similarly the regulator is empowered to issue a public warning notice in circumstances where a trader fails to respond to a substantiation notice within the period prescribed in the notice. (ACL s.223)

Infringement notices

Since 1 July 2010 the ACCC has had, and exercised, the power to issue "Infringement Notices" in respect of any alleged contravention.

The consequence of the issue of an infringement notice is that the recipient of the notice can elect to pay the penalty specified in it and thereby avoid Court proceedings.

On the first day of the application of the infringement notice provisions the ACCC issued its first notices, in respect of alleged failures by certain restaurants to comply with component pricing laws. The restaurants had menus which allegedly listed a standard set of prices and provided for a surcharge to be imposed on public holidays, without stating what the prices would be on those surcharge days.

The infringement notice provisions are found in the CCA, rather than the ACL.²⁴

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²⁴ CCA ss. 134 and 134F.