

Australian Consumer Laws



Practical Advice - Commercial Outcomes

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- Effective 1 January 2011
- Covers general protections
 - ➔ Misleading and deceptive conduct
 - ➔ Unconscionable conduct
 - ➔ Unfair contract terms
- Covers specific protections
 - ➔ Consumer guarantees and warranties
 - ➔ Unsolicited consumer agreements



- Section 3 of the ACL defines consumer:
 - ➔ A person is a consumer if they acquire goods or services that are less than \$40,000 or if higher than \$40,000, must be a type of good that would be used for personal, domestic or household use.
 - ➔ A person who acquires a vehicle for use in the transport of goods on public roads, irrespective of price, is also a consumer under the ACL.

Misleading and Deceptive Conduct

- s.52 of the TPA now s.18 of the ACL's.
 - ➔ Essentially same effect
 - ➔ Key change is from “corporation” to “person”
- Bait Advertising
 - ➔ The ACL's prohibit a person from advertising goods/services if the person will not be able to offer reasonable quantities of the good/service
- Offering Gifts/Prizes
 - ➔ The ACL's apply in the same way to rebates, gifts, prizes and other free items
 - ◆ If there is an intention of not providing them
 - ◆ Not providing within a reasonable time

Misleading and Deceptive Conduct

Wrongly Accepting Payment

- s.36 of the ACL prohibits a person from accepting payment or other consideration for goods or services where the person:
 - ➔ intends not to supply the goods or services;
 - ➔ intends to supply materially different goods or services; or
 - ➔ there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing the person will not be able to supply the goods in the time specified, or, if no time is specified, within a reasonable time.

Misleading and Deceptive Conduct

Defences

- If failure is beyond the suppliers control and all due diligence was exercised, there is no liability.

Other Prohibitions

- s.41 of the ACL provides that a person is not liable to pay for unsolicited goods supplied to them.
- s.42 of the ACL provides that a person is not liable to pay for unsolicited services.

False and Misleading Representations

ACL's provide that a person is prohibited from making false and misleading representations about goods/services

- ➔ Goods are of a particular standard, style model
- ➔ Services are of a particular standard, value
- ➔ Testimonials by persons as to goods/services
- ➔ Price of goods/services
- ➔ As to any sponsorship, approval, affiliation

False and Misleading Representations

A business cannot make false/misleading representations about:

- ➔ Standard, value or grade of good/service;
- ➔ Previous history or use of good;
- ➔ Whether good is new;
- ➔ Price;
- ➔ Place of origin;
- ➔ Any guarantee or warranty on the good/service.

A business must not act unconscionably in trade or commerce when:

- ➔ selling/supplying goods/services to a consumer; or
- ➔ supplying/acquiring goods/services to/from a business.

Unconscionable Conduct

Examples of unconscionable conduct

- ✘ Not properly explaining a contract to consumer who may not speak good English
- ✘ Not allowing sufficient time to read agreement/ask questions/get advice
- ✘ Use friend/relative of the customer to influence the customer
- ✘ Having the consumer sign a blank or one sided contract
- ✘ Failing to disclose key contractual terms
- ✘ Using pressure tactics



Unfair Contract Terms

- ➔ Introduced 1 July 2010
- ➔ Applies to standard form consumer contracts – contracts offered on a take it or leave it basis
- ➔ No definition of a “*standard form contract*” but does not apply B2B only B2C

Typical industries who use SFC's:

- ➔ Telco's
- ➔ Finance
- ➔ Domestic builders
- ➔ Fitness centres
- ➔ Travel
- ➔ Motor Vehicles



Unfair Contract Terms

Court will look at:

- ➔ Whether one party has the most bargaining power;
- ➔ Whether the contract was pre-prepared;
- ➔ Whether other party was given any real opportunity to negotiate;
- ➔ Whether contract was tailored to the specific deal.

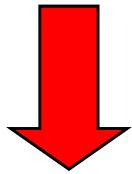


If a term of “contract” is found to be unfair, it will be void.

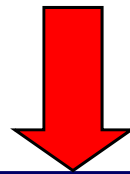
If contract can operate without the unfair term, it will continue to apply between the parties.

Unfairness Test

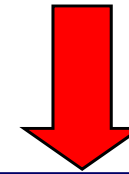
- A term of a consumer contract is unfair if:



The term is not reasonably necessary to protect legitimate interest of the party asking for the term



It would cause financial or other detriment if relied on



It will cause an imbalance of the parties rights/obligations

- All 3 above limbs must be proven for term to be unfair.

Consumer Guarantees

- ➔ A supplier and manufacturer guarantees that a good:
 - ✓ Has clear title;
 - ✓ Has no undisclosed securities;
 - ✓ Is fit for disclosed purpose;
 - ✓ Includes a right to undisturbed possession;
 - ✓ Matches their sample/model or description;
 - ✓ Is of an acceptable quality (but what does acceptable quality mean?).

- ➔ Goods/services must have been acquired after 1 January 2011:
- ➔ Eligible goods bought before 1 January 2011 are covered by the implied warranties and conditions in State and Territory fair trading law and the TPA.

Criteria

- ➔ Goods/services must be \$40,000 or less; or
- ➔ If more than \$40,000, the good/service must be ordinarily used for personal/domestic use.

Suppliers/manufacturers cannot:

- ✘ Limit or exclude the guarantees.
- ✘ Avoid their ACL obligations by saying in their contract that the law of another country applies.
- ✘ Tell a consumer that the consumer is required to pay for their statutory consumer guarantee rights.
- ✘ Have a consumer sign away their rights.

Remedies - Consumer Guarantees

Minor defects

- ➔ Supplier can repair the good or offer a refund/replacement

Major defects

- ➔ Consumer can reject good/service and receive a refund/replacement; or
- ➔ Ask for compensation for any drop in value of the good
- ➔ Even after repaired, the good can still be rejected by the consumer

Only the consumer can elect which option ie: refund or replacement

Consumer guarantees applying to services:

- ➔ Supplier must use an acceptable level of skill/knowledge
- ➔ Must achieve the consumer's stated purpose
- ➔ Provide the service within a reasonable time

Unsolicited Consumer Agreements

4 elements – s.69(1) of ACLs

- ➔ Must be for supply of goods/services to a consumer
- ➔ Agreement must have arisen from negotiations between a dealer and consumer in person or by telephone
- ➔ Consumer must not have invited dealer to enter into negotiations
- ➔ Contract price must be over \$100 or not capable of being determined at time agreement is made



Unsolicited Consumer Agreements

s.74 and Regulation 82 and 93(2) of ACL's

- ➔ Dealer must advise purpose of calling and give information as to their identity, and name and address of the supplier
- ➔ Consumer must receive a signed copy of the agreement, if agreement reached in person
- ➔ If agreement reached over the phone, copy must be sent to consumer within 5 days
- ➔ Agreement must contain a 10 business days cooling off period

The product safety laws apply to consumer goods and product-related services.

Consumer goods are those intended for personal, domestic or household use or consumption, or likely to be used for the personal, domestic or household use or consumption.

Product-related services are services for or relating to:

- ➔ Installation of consumer goods
- ➔ Maintenance, repair or cleaning of consumer goods
- ➔ Assembly of consumer goods, or delivery of consumer goods

Product Safety Laws

- All parties in the supply chain must keep up to date with the laws and comply with any standards or bans.
- A ban on consumer goods makes it unlawful for anyone, in trade or commerce to:
 - ➔ Supply it;
 - ➔ Offer to supply it;
 - ➔ Manufacture it;
 - ➔ Possess it or have control of it.

Mandatory Safety Standards

- A mandatory safety standard for a consumer good can set requirements including:
 - ➔ The way the good is made
 - ➔ What it contains
 - ➔ How it works
 - ➔ What test it needs to pass or whether any warnings or instructions need to accompany goods
- A mandatory safety standard for a product-related service can specify:
 - ➔ How the services are supplied;
 - ➔ The skills or qualifications of a person supplying the service;
 - ➔ The material used in supplying the services;
 - ➔ The tests the services must pass.

Recall of Consumer Goods

- Suppliers:
 - ➔ should recall consumer goods as soon as they realise the goods may cause injury, do not comply with a safety standard, or are banned.
 - ➔ must notify the Commonwealth Minister within **48 hours** of becoming aware of an issue concerning a consumer goods or product-related service.



- Consumers:

- ➔ can seek compensation from a manufacturer who has supplied defective goods.
- ➔ Must take action **within 3 years** of becoming aware of the alleged loss, damage or safety defect.

OR

- ➔ Within **10 years** from when good was first supplied.

Offences and Enforcement

- Penalties per offence for false and misleading representations are:
 - ➔ Body corporate - \$1,100,000;
 - ➔ Individual - \$220,000.
- A notice can be issued requiring a person to substantiate their representation. A regulator may also issue to the public a written notice containing a warning about the conduct of the person, if the regulator has reasonable grounds to suspect that the conduct may constitute a breach of the ACL and if the regulator has satisfied that there may be a loss suffered as a result of the conduct.

Offences and Enforcement

Injunctions

- A Court has the ability to grant an injunction if it is satisfied that:
 - ➔ a person has engaged in or is proposing to engage in a contravention of the ACL's; or
 - ➔ is attempting to contravene or is aiding or abetting a contravention; or
 - ➔ is inducing a person to contravene. The Court may grant the injunction not only on the application by the regulator but on application by any other person.
- When granting the injunction the court may require a person to:
 - ➔ Refund money
 - ➔ Transfer a property
 - ➔ Honour a promise
 - ➔ Destroy or dispose of goods