

# ***BUSINESS LAW GUIDEBOOK***

## ***SECOND EDITION***

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### **CHAPTER 5: CONSUMER PROTECTION LAW**

#### **TEST YOUR KNOWLEDGE**

##### **1. What is the Australian Consumer Law (ACL)? Why was it enacted?**

#### **ANSWER**

The ACL which is set out in Schedule 2 of the *Competition and Consumer Act (CCA)* mirrors the former consumer protection provisions of the Trade Practices Act and State and Territory Fair Trading Acts, and has become the uniform consumer protection law that applies throughout Australia. It was drafted in plain English making it accessible, clearer and user friendly, reflecting thereby the drafting conventions applied in the original TPA. The ACL is Schedule 2 of the CCA.

The ACL was enacted to signal the Commonwealth Government's desire to take an increasingly active role in the area of consumer protection. This legislation, in general terms, is concerned with providing protection to consumers against unconscionable conduct, false representations and other unfair practices in connection with the supply of goods and services. It is a single national framework for the protection of consumers against unfair business conduct and practices and is a national product safety regime.

## 2. What is the 'regulator' of the ACL?

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### ANSWER

The Australian Competition and Consumer Commission (ACCC) is the 'regulator' and continues with its administration and enforcement role in respect of its responsibilities under the ACL as it did under the TPA.

## 3. The concept of a consumer is central to the provisions of the ACL. How is a consumer defined?

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### ANSWER

Under the ACL, a person is a 'consumer' if the goods or services are of a kind ordinarily acquired for 'personal, domestic or household use or consumption' or are a 'vehicle or trailer acquired for use mainly in the 'transport of goods on public roads' (s 3 (1)), and, in the case of goods, they are not acquired for re-supply, or for being used up or transformed 'in the course of a process of production or manufacture' (s 3(2)).

## 4. What is the consumer guarantee of acceptable quality?

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### ANSWER

Under ACL s 54, suppliers must guarantee that goods are of acceptable quality. Goods are of acceptable quality if they are fit for the purposes for which goods of that kind are commonly supplied; acceptable in appearance and finish; free from defects; safe; and durable. An example of defective goods being not of acceptable quality would be *David Jones Ltd v Willis* (1939) 52 CLR 110 concerning a pair of 'defective walking shoes'.

## 5. When will the consumer guarantee of acceptable quality not apply to defective goods?

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### ANSWER

This consumer guarantee does not apply to minor defects or flaws in goods. It will also not apply if the goods only became of unacceptable quality after they are bought from the manufacturer, or if the defects are drawn to the notice of the consumer before the sale. Also goods do not fail to be of acceptable quality if the consumer has examined them before purchase, and the examination has not revealed any defects.

## 6. What is the consumer guarantee that goods must be fit for their disclosed purpose?

### ANSWER

Under ACL s 55, suppliers must supply goods to consumers which are fit for their disclosed purpose. Where the consumer makes known to the supplier the purpose for which the goods are wanted, there is a consumer guarantee that the goods will be reasonably fit for that disclosed purpose. An example would be a consumer asking for 'a pair of woollen underwear' which was not fit for a disclosed purpose: *Grant v Australian Knitting Mills* [1939] AC 85.

## 7. When is the consumer guarantee of fitness for purpose not applicable to goods bought by a consumer?

### ANSWER

This consumer guarantee is not applicable when it can be demonstrated that the consumer has not made known to the supplier the disclosed purpose for which the goods were required; and the consumer has not relied on, or it was unreasonable for the consumer to rely on, the seller's skill or judgment.

## 8. What is the consumer guarantee that the goods must match their description?

### ANSWER

Under ACL s 56, suppliers to consumers must make sure that goods match, or correspond with their description. This applies even if the consumer has selected the goods. What this means is that the supplier cannot supply goods that are different to their description because the consumer has inspected the goods before agreeing to buy them. An example of goods complying with the s 56 guarantee that goods fit their description is *Ashington Piggeries Ltd v Christopher Hill* [1972] AC 441.

## 9. Discuss in some detail what is meant by consumer guarantees in relation to the supply of goods by sample or by demonstration model.

### ANSWER

ACL s 57 is a statutory guarantee that applies only in relation to goods supplied to consumers. It provides that where goods are sold by reference to a sample or demonstration model, there is a guarantee that the goods correspond with (match) the sample or demonstration model in quality, state or condition. There is a requirement here that a defect must be apparent on an ordinary examination (s 57 (1) (e)).

The consumer must have a reasonable opportunity to compare the goods with the sample or the demonstration model. The goods must comply with the sample or demonstration model, and they must also be of acceptable quality unless the defect could have been discovered by reasonable examination of the sample, whether or not there has been any actual examination (s 57 (1) (e)).

The supply by sample contracts includes those for the supply of say, rice, nuts, wheat or cloth by reference to a sample. In the case of a vehicle, it may be sold on the basis of a test drive in a demonstrator. However, the fact that a sample was shown will not convert a sale into a sale by sample unless the parties had agreed that this is so.

In saying that the goods shall correspond with the sample, it should be noted that if the differences are only of a minor nature, and the quality of the goods is still the same, s 57 will not be breached. The buyer shall have, as alluded to earlier, a reasonable opportunity and time to compare the goods with the sample or demonstration model, and once this is done, acceptance of the goods will take place.

## 10. What are the consumer guarantees in contracts for the provision of services?

### ANSWER

The ACL embodies a statutory consumer guarantee under s 60 which provides 'if a person (which includes a corporation) supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill', and any materials supplied in connection with those services will be rendered fit for the purpose for which they are supplied. However, this guarantee does not apply where the circumstances show that the consumer does not rely, or that it is unreasonable for the consumer to rely on the corporation's skill or judgment: *Dillon Baltic Shipping Co v Dillon 'Mikhail Lermontov'* (1990) ATPR 40-992.

**11. Does s 18 of the ACL act as a catch-all provision requiring that misleading or deceptive conduct be deliberate?**

ANSWER

No, for an applicant to succeed in a claim under s 18 of the ACL it is not necessary to establish that the misleading and deceptive conduct on the part of the corporation be deliberate or intentional. For this reason, the liability for damage involved in a breach of s18 is said to be strict in that there is no need to prove intention or even negligence or fault.

**12. It is said that s 29 of the ACL prohibits certain types of false representations as opposed to the broader concept of misleading or deceptive conduct. Explain.**

ANSWER

Section 29 of the ACL prohibits a range of specific forms of false representations to protect consumers. Unlike s 18, s 29 applies where there has been a representation as opposed to the wider concept of 'conduct' in s18. A 'false' representation is one that is contrary to fact. Unlike s 18, the terms of s 29 are sufficiently specific to impose criminal liability. The representations referred to in s 29 are of a type that is likely to impress consumers and lead them to enter into a transaction. If the representations are untrue, the consumer has been deceived. A consumer can be misled where the qualities of goods and services being provided are falsely stated. See, for example, *Hartnell v Sharp Corp of Australia Pty Ltd* (1975) 5 ALR 439.

**13. Is it possible for the consumer guarantees of the ACL to be excluded?**

ANSWER

The application of the consumer guarantees cannot be excluded, restricted or modified. A contract which purports to exclude these terms will be void.