

The New Australian Consumer Law: An Overview of Key Changes

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Overview

- The new regime
 - Application of the Australian Consumer Law
 - Structure of the Competition and Consumer Act 2010
 - Structure of the Australian Consumer Law
- Changes to well-known consumer protection provisions
- The new 'unfair contracts' regime
- The 'consumer guarantees' regime
- Enforcement
 - Regulator
 - Civil claims
- Transitional provisions

The new regime

- Introduction of the Competition and Consumer Act 2010
 - *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (passed on 17 March 2010)
 - Introduced new civil pecuniary penalties for contravention of certain consumer protection provisions
 - Prohibited unfair contract terms in standard form contracts
 - Introduced new enforcement powers
 - *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (passed on 24 June 2010)
 - Introduced new statutory consumer guarantees
 - Introduced new standard consumer product safety law
 - Law dealing with unsolicited sale
 - Rules for lay-by transactions

Application of the ACL

- Background
 - Constitutional limitations of the TPA (reliance on the Commonwealth's corporations power)
 - Attempts made at uniformity among jurisdictions, but not uniform legislation
 - August 2009 - Ministerial Council on Consumer Affairs announced a national approach to consumer protection.
- Application
 - Part XI of the CCA provides that the ACL applies as a law of the Commonwealth to the conduct of corporations (other than in relation to financial services)
 - Part XI also contemplates the application of the ACL to be extended by State and Territory legislation
 - Part 3, *Fair Trading Act 1987* (NSW)

Structure of the CCA

- Renamed the *Trade Practices Act 1974* to the *Competition and Consumer Act 2010*
- Repealed the TPA consumer protection provisions:
 - Part IVA (unconscionable conduct)
 - Part V (consumer protection)
 - Part VA (liability of manufacturers and importers for defective goods)
 - Part VC (offences)
- Re-enacted the consumer protection provisions in Schedule 2 of the CCA (the Australian Consumer Law)

Overview of the ACL

- **Chapter 1: Definitions**
- **Chapter 2: General protections**
 - Misleading or deceptive conduct
 - Unconscionable conduct
 - Unfair contract terms
- **Chapter 3: Specific protections**
 - Unfair practices
 - Consumer guarantees
 - Unsolicited consumer agreements
 - Lay-by agreements
 - Product safety
- **Chapter 4: Offences**
- **Chapter 5: Enforcement and remedies**

The fate of some well-known provisions

TPA section	Title	CCA section
Section 51AA	Unconscionable conduct within the meaning of the unwritten law	Section 20
Section 51AB	Unconscionable conduct	Section 21
Section 51AC	Unconscionable conduct in business transactions	Section 22
Section 52	Misleading or deceptive conduct	Section 18
Section 53	False or misleading representations	Section 29

These sections are now drafted to apply to all persons in addition to corporations.

The fate of some well-known provisions (2)

Trade Practices Act

52 Misleading or deceptive conduct

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

Fair Trading Act

42 Misleading or deceptive conduct

(1)A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

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18 Misleading or deceptive conduct

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

Trade Practices Act

51AA Unconscionable conduct within the meaning of the unwritten law of the States and Territories

(1)A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

Fair Trading Act

43 Unconscionable conduct

(1)A supplier shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a consumer, engage in conduct that is, in all the circumstances, unconscionable.

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20 Unconscionable conduct within the meaning of the unwritten law

(1)A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time

Unfair contracts

- Part 2-3 of the ACL inserts a new ‘unfair contract’ regime into Australian consumer law.
- Prior to the passage of the Competition and Consumer Act, Victoria introduced an unfair contract terms provision in its Fair Trading Act 1999 (Vic).
- A term will be void if:
 - It is contained in a consumer contract
 - The consumer contract is a standard form contract; and
 - The term is unfair

Unfair contracts (2)

- Consumer contract
 - Defined in s. 23(3) of the ACL as a contract for the supply of goods or services or a 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.
- Standard form contract
 - Rebuttable presumption in favour of a standard form contract
 - Mandatory considerations:
 - Bargaining power relating to the transaction;
 - Preparation of contract and discussions between the parties;
 - Ability to negotiate terms (or presented on a 'take it or leave it' basis)
 - Contract generic, or tailored to specific characteristics of another party of the particular transaction

Unfairness

- Section 24(1) of the ACL provides that a term is unfair if:
 - it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- Mandatory considerations
 - the extent to which the term is transparent (ie. the use of plain language, legibility, clear presentation, availability); and
 - the contract as a whole

Exceptions

- Regime does not apply to a term that:
 - defines the main subject matter of the contract;
 - sets the upfront price payable under the contract; or
 - is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.

Consumer guarantees

- Replaces the statutory implied conditions and warranties under the TPA
- Difference between a guarantee and a warranty is that a guarantee is a legislative obligation, whereas a warranties under the TPA were implied into contracts between consumers and suppliers.
- Consumer guarantees regime is found in Part 3-2 of the ACL.

Consumer guarantees – goods

Guarantee	ACL section	TPA section
Title to goods	Section 51	Section 69
Undisturbed possession	Section 52	Section 69
No undisclosed securities	Section 53	Section 69
Acceptable quality	Section 54	Section 71
Fir for disclosed purpose	Section 55	Section 71
Goods match description	Section 56	Section 70
Goods match sample	Section 57	Section 72
Repair and spares available	Section 58	Section 74F
Manufacturer's express warranties	Section 59	Section 74G

Key issues:

- Definition of consumer (s. 3 of ACL)
- 'acceptable quality' v 'merchantable quality'

Consumer guarantees (3)

- What is 'acceptable quality'?
 - Fit for all the purposes for which goods of that kind are commonly supplied
 - Acceptable in appearance and finish
 - Free from defects
 - Safe
 - Durable
- What is the test?
 - Standard that a reasonable consumer would require
 - In determining reasonableness:
 - Nature of the goods
 - Price of the goods
 - Statements on label/package
 - Representations of supplier/manufacture
- Potentially broader than the warranty in TPA of 'merchantable quality'

Consumer guarantees – services

Guarantee	ACL section	TPA section
Guarantee as to due care and skill	Section 60	Section 74
Guarantee as to fitness for a particular purpose	Section 61	Section 74
Guarantee as to reasonable time for supply	Section 62	-

Major failures

- Entitlement to a remedy depends on whether the failure to comply with a guarantee is a 'major failure'
 - Goods/services would not have been acquired by a reasonable consumer acquainted with the failure
 - Goods depart from description/sample/demonstration model in a significant respect
 - Goods/services substantially unfit for purpose and cannot within a reasonable period of time be made fit for purpose
 - Goods/services unfit for a disclosed purpose and cannot within a reasonable period of time be made fit for that purpose.
 - Goods/services not of an acceptable quality because they are unsafe
- See s. 260 of the ACL in relation to goods, and s. 268 of the ACL in relation to services.

Remedies if a guarantee is not complied with

- If the failure to comply is a ‘major failure’ or the failure to comply cannot be remedied:
 - Consumer may reject goods, or
 - Recover compensation for any reduction in value.
- If the failure to comply is not a ‘major failure’ and the failure to comply can be remedied:
 - Supplier to remedy failure (otherwise consumer may reject goods / recover compensation)
- In either case, consumer is also entitled to damages
- See s. 259 of the ACL in relation to goods, s. 267 of the ACL for services

Other specific protections

- **Product safety law and enforcement:** Part 3-3 of the ACL
- **Unsolicited consumer agreements:** Part 3-2, Division 2
- **Lay-bys:** Part 3-2, Division 3

Enforcement

The regulator

- The ACL confers regulatory functions on the ‘regulator’
 - For the purposes of the application of the ACL as a law of the Commonwealth – The ACCC
 - 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
 - NT Consumer Affairs

Civil pecuniary penalties

- Engaging in unconscionable conduct
- Engaging in unfair practices (other than misleading or deceptive conduct)
- Pyramid selling
- Contravening the prohibition on the supply of certain goods
- Failing to respond to a substantiation notice
- Providing false or misleading information in response to a substantiation notice
- Breach of certain product safety and product information provisions

Disqualification orders

- Engaging in unconscionable conduct
- Engaging in unfair practices (other than misleading or deceptive conduct)
- Pyramid selling
- Contravening the prohibition on the supply of certain goods
- Breach of certain product safety and product information provisions

Substantiation notices

- ACCC can issue notices requiring a person to substantiate a claim without having reason to believe that a contravention of the ACL has occurred.
- Notices must be in writing and may require persons to give information and/or produce documents that support that claim.

Infringement notices

- Issued for suspected contraventions of certain civil pecuniary provisions
 - Engaging in unconscionable conduct
 - Engaging in certain unfair practices
 - Pyramid selling
 - Use of prohibited unfair contract terms
 - Certain product safety and product information provisions
 - Failing to respond to a substantiation notice
 - Providing false or misleading information in response to a substantiation notice.
- If a notice is complied with, the regulator may not take further action
- Compliance is not an admission of liability

Public warning notices

- ACCC may issue a public warning notice if:
 - It has reasonable grounds to believe that a corporation is in breach of the CCA;
 - The corporation does not respond to a substantiation notice;
 - It is satisfied that a person is likely to suffer detriment as a result of the conduct; and
 - It is in the public interest to issue a warning notice.

Civil claims

- 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 available under s. 232 of the ACL
 - Actions for damages in respect of damage caused by conduct in contravention of consumer protection laws are available under s.236 of the ACL
 - Sections 237 and 238 grant a wide power to make orders compensating for, or seeking to prevent, loss or damage caused by contravention of the ACL
 - 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.

Transitional provisions

- The transitional provisions are found in Schedule 7 to the Trade Practices Amendment Act (Australian Consumer Law Act) No. 2 2010
 - The TPA applies to acts or omissions that occurred immediately prior to 1 January 2011
 - The TPA applies to any proceedings commenced prior to 1 January 2011 (although if the proceedings are for an injunction under s. 80 of the TPA, they are taken to be proceedings under s. 232 of the ACL)
 - The Unfair Contract regime applies to a contract entered into on or after 1 July 2010
 - The Unfair Contract regime does not apply to a contract entered into before 1 July 2010, unless:
 - The contract was renewed after 1 July 2010
 - Or a term of the contract is varied (however, the ACL will only apply to that varied term)