

THE AUSTRALIAN CONSUMER LAW

Transitional Matters

- *The Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* passed in March 2010:
 - (a) Introduced the first stage of the Australian Consumer Law (ACL).
 - (b) On 15 April 2010 the ACCC and ASIC had an increased range of enforcement options.
 - (c) From 15 April 2010 provisions introduced setting out new civil pecuniary penalties.
 - (d) From 1 July 2010 provisions relating to unfair contract terms in consumer contracts.
- *The Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* – passed on 24 June 2010 – took effect from 1 January 2011 implemented the second part of the ACL reforms.
- The *Fair Trading Act 1987 (NSW)* (FTA) was amended, with effect from 1 January 2011, to enact the new National ACL.
- Transitional provisions of the FTA (Schedule 5 Clause 16) provides that the FTA as in force prior to 1 January 2011 continues to apply to acts or omissions occurring before, or contracts entered into before the commencement date (1 January 2011).
- The ACL that commenced on 1 January 2011 applies to conduct occurring after that date. Conduct occurring prior to 1 January 2011 will remain subject to the repealed provisions of the TPA. The repealed TPA continues to apply to proceedings which were commenced, but not concluded, before 1 January 2011.



- The ACL is Schedule 2 of the *Competition and Consumer Act 2010*. This Act has replaced the *Trade Practices Act 1974* (TPA).
- The ACL to be enforced by all Australian Courts and Tribunals, including the Courts and Tribunals of the States and Territories; A Guide to Provisions April 2010. Currently the District Court NSW cannot hear TPA actions.

Chapter 1 – Introduction

- **Section 7: Meaning of *manufacturer***

~ A *manufacturer* includes the following:

(a) a person who grows, extracts, produces, processes or assembles goods;

(b) a person who holds himself or herself out to the public as the manufacturer of goods;

...

(e) a person who imports goods into Australia if:

(i) the person is not the manufacturer of the goods; and

(ii) at the time of the importation, the manufacturer of the goods does not have a place of business in Australia ...

- **Section 13: Loss or damage to include injury**

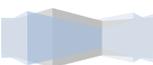
~ a reference to loss or damage, other than a reference to the amount of any loss or damages, includes a reference to injury

Chapter 2 – General Protections

- **Section 18: Misleading or deceptive conduct**

~ prohibits a person, in trade or commerce, from engaging in misleading and deceptive conduct

~ largely similar to section 52 TPA and similar provisions in State and Territory legislation (eg. Section 42 of the FTA)



– existing law remains applicable

- **Section 20-22: Unconscionable conduct**

~ prohibits unconscionable conduct in connection with the supply or acquisition of goods and services

~ largely similar to sections 51AA, 51AB and 51AC in Part IVA TPA and similar provisions in State and Territory legislation (eg. Section 43 of the FTA)

~ existing law remains applicable

~ section 21 sets out the matters the Court may have regard to, such as the relative strengths of the bargaining positions of the supplier and consumer

- **Section 23-28: Unfair contract terms**

~ Section 23 *Unfair terms of consumer contracts*

(1) *A term of a consumer contract is void if:*

(a) *the term is unfair; and*

(b) *the contract is a standard form contract.*

(2) *The contract continues to bind the parties if it is capable of operating without the unfair term.*

(3) *A **consumer contract** is a contract for:*

(a) *a supply of goods or services; or*

(b) *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.

~ Section 25 provides examples of unfair contract terms including a term that permits one party to vary the terms of a contract, or a term that limits one party's right to sue another party.

~ the court must take into account the extent to which the term is transparent and the contract as a whole

~ Section 15 of the *Insurance Contracts Act 1984* provides that a contract of insurance (as defined by that Act) is not capable of being made the subject of relief under any other Act. As a consequence of section 15 ICA, the unfair contract term provisions do not apply to insurance contracts regulated by that Act.



Chapter 3 – Specific Protections

- **Section 29: False or misleading representations about goods or services**

~ prohibits a person from making make false and misleading representations in connection with the supply, possible supply or promotion of goods or services

~ eg. a false or misleading representation that goods are of a particular standard, quality, value or grade;

~ largely reflects section 53 TPA and section 44 FTA

- **Sections 51-59: Guarantees relating to the supply of goods**

~ *Section 54 Guarantee as to acceptable quality*

(1) *If:*

(a) *a person supplies, in trade or commerce, goods to a consumer; and*

(b) *the supply does not occur by way of sale by auction;*

there is a guarantee that the goods are of acceptable quality.

(2) *Goods are of **acceptable quality** if they are as:*

(a) *fit for all the purposes for which goods of that kind are commonly 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 subsection (3).



(3) *The matters for the purposes of subsection (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.*

~ largely reflects sections 70 - 74 TPA except note “guarantee” rather than “warranty”

- **Sections 60-63: Guarantees relating to the supply of services**

~ section 60: guarantee that services will be rendered with due care and skill

~ section 61: guarantee that services supplied will be fit for the particular purpose acquired by the consumer

~ largely reflects section 74 TPA

- **Section 64: Guarantees not to be excluded etc by contract**

~ a party may not exclude by contract any of the guarantees provided for in the ACL

~ largely reflects section 68 TPA

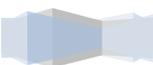
- **Sections 138-141: Actions against manufacturers for goods with safety defects**

~ *Section 138 Liability for loss or damage suffered by an injured individual*

(1) *A manufacturer of goods is liable to compensate an individual if:*

(a) *the manufacturer supplies the goods in trade or commerce; and*

(b) *the goods have a safety defect; and*



(c) the individual suffers injuries because of the safety defect.

~ largely reflects section 75AD TPA

- **Section 142: Defences to defective goods actions**

~ Defences include:

(a) the safety defect in the goods that is alleged to have caused the loss or damage did not exist at the time when the goods were supplied by their actual manufacturer;

(b) the goods had that safety defect only because there was compliance with a mandatory standard;

(c) the state of scientific or technical knowledge at the time when the goods were supplied by their manufacturer was not such as to enable that safety defect to be discovered;

~ largely reflects section 75AK TPA

- **Sections 143-149: Defective goods actions**

~ *Section 143 Time for commencing defective goods actions*

*(1) Subject to subsection (2), a person may commence a defective goods action at any time within **3 years** after the time the person became aware, or ought reasonably to have become aware, of all of the following:*

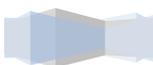
(a) the alleged loss or damage;

(b) the safety defect of the goods;

(c) the identity of the person who manufactured the goods.

(2) A defective goods action must be commenced within 10 years of the supply by the manufacturer of the goods to which the action relates.

~ Section 147: if the manufacturer cannot be identified, a plaintiff can request suppliers of the good to provide information to assist in identifying the manufacturer.



If the supplier does not comply with the request within 30 days, the supplier is taken to be the manufacturer of the goods.

Chapter 4 – Offences

- some contraventions of the ACL may be criminal offences
- fines of up to \$220,000 for an individual and \$1.1million for a body corporate for certain offences
- defences outlined in sections 207-211 and include reasonable mistake of fact and act or default of another person
- Section 212: prosecution to be commenced within 3 years after the commission of the offence

Chapter 5 – Enforcement and remedies

~ *examples of orders that the Court can make are set out in section 243 and include an order declaring a contract to be void, and an order directing the respondent to pay the injured person the amount of the loss or damage*

- **Section 236: Actions for damages – limitation period**

~ *Section 236 Actions for damages*

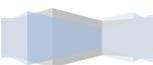
(1) If:

*(a) a person (the **claimant**) suffers loss or damage because of the conduct of another person; and*

(b) the conduct contravened a provision of Chapter 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.

*(2) An action under subsection (1) may be commenced at any time within **6 years** after the day on which the cause of action that relates to the conduct accrued.*



~ however, compare section 143 ACL and note conflict between section 236 ACL and sections 87F-K of the *Competition & Consumer Act 2010* which provides for a 3-year limitation period from the date of discoverability and a 12-year long stop period. The Court may take the view that Parliament intended sections 87F-K to apply to cases within the definition of “personal injury damages” and that section 236 ACL applies to other cases not covered by Chapter 3 but it seems that it is possible to argue to the contrary.

With respect to personal injury Part VIB of the *Competition & Consumer Act 2010* applies. The definition of date of discoverability is the same as s.50D of the *Limitation Act 1969 NSW* except for (b). The differentiation is as follows:

Limitation Act NSW:

Injury or death caused by fault of defendant

Competition and Consumer Act: attributable to a contravention of this Act.

Section 87M of the *Competition and Consumer Act* fixes the maximum personal injury damages for non-economic loss at \$250,000 during the year in which the Part commences i.e. 2011. Given that the *Civil Liability Act* non-economic loss damages maximum is now \$500,750, we would not expect plaintiffs’ lawyers to bring personal injury actions with the *Competition and Consumer Act*, where they can avoid it.

~ section 236 ACL is stated to be the re-written section 82 TPA. But under s.82TPA the limitation period was 3 years.

- **Section 252: Defences – supplying consumer goods for the purpose of re-supply**

~ defence to proceedings in relation to contravention of Part 2-1 or 2-2 or Chapter 3 re supply of consumer goods that did not comply with a safety standard if:

(a) *the consumer goods were acquired by the defendant for the purpose of re-supply; and*

(b) *the consumer goods were so acquired from a person who carried on in Australia a business of supplying such goods otherwise than as the agent of a person outside Australia; and*

(c) *either:*

(i) *the defendant did not know, and could not with reasonable diligence have ascertained, that the consumer goods did not comply with that safety standard, or that the defendant had not complied with that information standard, as the case may be; or*



(ii) the defendant relied in good faith on a representation by the person from whom the defendant acquired the goods that there was no safety standard or information standard, as the case may be, for such consumer goods.

- **Section 259: Action against suppliers of goods**

~ a consumer may recover damages from a supplier of goods for a failure to comply with guarantees under the ACL

- **Section 267: Action against suppliers of services**

~ a consumer may recover damages from a supplier of services for a failure to comply with guarantees under the ACL

- **Sections 271 – 273: Action for damages against manufacturers of goods**

~ a consumer may recover damages from a manufacturer of goods for a failure to comply with guarantees under the ACL

~ allows for circumstances where a consumer cannot recover damages from a supplier, such as where a supplier has become insolvent, is no longer in business or refuses to provide a remedy

~ largely reflects section 74J TPA

- **Section 274: Indemnification of suppliers by manufacturers**

~ suppliers are entitled to be indemnified by manufacturers

~ supplier must commence the action within the earlier of 3 years after proceedings commenced by consumer against supplier or payment by supplier in discharge of liability

~ largely reflects section 74H TPA

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