

# The Australian Consumer Law and its application by Tribunals

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consumer trader and tenancy tribunal

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# Scope of the Presentation

- ▶ Overview of the Consumer, Trader and Tenancy Tribunal (CTTT)
- ▶ Overview of the Australian Consumer Law (ACL)
- ▶ ACL provisions that CTTT most likely to administer
  - Case studies
- ▶ ACL provisions - New jurisdiction for CTTT
  - Unfair contract terms



# Jurisdiction

- ▶ The Tribunal's powers, functions and procedures are set out in the *Consumer, Trader and Tenancy Tribunal Act 2001* and the *Consumer, Trader and Tenancy Tribunal Regulation 2009*



# CTTT Divisions

- ▶ 15 Acts confer jurisdiction on the Tribunal which sits across 9 divisions:
  - Tenancy
  - General
  - Home Building
  - Residential Parks
  - Strata and Community Schemes
  - Motor Vehicles
  - Commercial
  - Retirement Villages
  - Social Housing



# General Division

- ▶ Legislation
  - *Consumer Claims Act 1998*
  
- ▶ Limits
  - \$30, 000 → *Consumer Claims Act*
  - Cause of action accrued no more than 3 years and the goods or services were supplied no more than 10 years before the date the application lodged
  
- ▶ Common disputes
  - Faulty goods or unsatisfactory services



# Motor Vehicles Division

## ▶ Legislation

- *Consumer Claims Act 1998*
- *Motor Vehicle Repairs Act 1980*
- *Motor Dealers Act 1974*

## ▶ Limits

- \$30, 000 → Unlimited, new cars used for private purposes
- Cause of action accrued no more than 3 years and the goods or services were supplied no more than 10 years before the date the application lodged

## ▶ Common disputes

- Car repairs
- Faults with new or used motor vehicles



# Home Building Division

## ▶ Legislation

- *Home Building Act 1989*

## ▶ Limits

- \$500, 000
- Goods or services → 3 years
- Insurance Claim → 10 years
- Breach of statutory warranty → 6 years for structural defects and 2 years in other cases

## ▶ Common disputes

- Residential building work – constructions, alterations
- Construction of new houses

# Overview of the ACL

## ▶ Australian Consumer Law

- Trade Practices Amendment (Australian Consumer Law) Act (No 1 ) 2010
- Trade Practices Amendment (Australian Consumer Law) Act (no 2) 2011
- renamed Trade Practices Act *Competition and Consumer Act 2010* – ACL provisions – Schedule 2
- applies as Commonwealth Law
- adopted by New South Wales and the other states and territories
- enforced by Courts and State Tribunals
- replaces the Consumer Protection and Fair Trading provisions in Trade Practices/NSW Fair Trading Acts with new provisions for:
  - Consumer Guarantees
  - Safety standards for consumer goods and product related services
  - Business practices
  - Unfair Contract Terms in Consumer Contracts
  - Sales Practices
  - Penalties
  - Damages





# ACL provisions that the CTTT is most likely to administer

## ▶ Business practices

### ACL prohibits:

- Section 18 (1)
- person in 'trade or commerce'
- from engaging in misleading conduct
- Right to sue for damages
- s29 ACL
  - Person in 'trade or commerce'
  - Prohibited from engaged false/misleading
  - In relation to the 'supply of goods and services.'
  - Right to sue for damages



# ACL provisions that the CTTT is most likely to administer

- ▶ CTTT – *Consumer Claims Act 2001*
  - **Supplier** ‘a person who, in the course of carrying on, or purporting to carry on, a business, supplies goods or services.’
  - Supply in NSW / the contract made in NSW
  - 3 year time limit in bringing consumer claims
    - \$30,000 monetary limit

# ACL provisions that the CTTT is most likely to administer

## ▶ Consumer Guarantees

- replace implied warranties under the former Trade Practices/Fair Trading Act e.g. merchantable quality and fitness for purpose
- new set of rights and remedies for goods and services e.g. guarantees as to acceptable quality (s54), fitness for purpose (s55), compliance with description (s56), supply by way of sample or demonstration model (s57), repairs and spare parts (s58) are only imposed where the goods are supplied to a consumer in 'trade or commerce' (9)
- address 'services' – 'Due skill and care'
- apply where goods or services are supplied to 'consumers'
- apply to conduct occurring in trade or commerce
- contracting out is prohibited
- consumers have right to sue for damages
- additional to consumer's other rights e.g. *Home Building Act 1989* – implied statutory warranties
- overlap can occur e.g. supplier engages in misleading conduct with respect to the attributes of the goods and the goods are also not reasonably fit for the purpose
- do not apply to sales by auction



# ACL provisions that the CTTT is most likely to administer

## Consumer Guarantees

### ▶ ACL provisions

- 'consumer' i.e. goods or services not over \$40,000 or/ ordinarily used for domestic consumption
- 'consumer guarantees' gives rise to a civil liability

### ▶ Consumer Claims Act

- "supplier" - a person who, in the course of carrying on, or purporting to carry on, a business, supplies goods or services
- 'consumer' - a natural person/ firm/ small proprietary co/ incorporated and unincorporated associations/ company limited by guarantee
- supply – in NSW / the contract made in NSW
- 3 year time limit in bringing consumer claims
  - \$30,000 monetary limit

# Case Study 1 – Motor Vehicle Division



- ▶ Application
  - Second hand motor vehicle purchased for \$3000
  - Alleged defects      • Seek refund of purchase price
- ▶ ACL provisions
  - s54 – acceptable quality      • s259, s260 - failure to comply with guarantee / major failure
- ▶ *Motor Dealers Act 1974*
  - No warranty required – s27
- ▶ Findings
  - At time of sale - defects
  - *Motor Dealers Act* not preclude ACL
  - Not of acceptable quality – fact that vehicle second hand – relevant consideration
  - Defects not reasonably able to be detected at time of sale
  - Defects amounted to ‘major failure’ –
    - reasonable consumer not have acquired
    - consumer entitled to reject and did so in timely manner
    - supplier should have taken vehicle back
    - cost of repair 1/3 of purchase price
  - Consumer entitled to refund – discounted for use
  - Supplier to take possession of vehicle at own cost

# 'Unfair Terms' - examples



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19 +

## Three years for a dream only to be courting a potential lemon



STACEY-LEE Kirsch saved for three long years to buy her dream car — but claims she was sold a lemon.

The 25-year-old bought a new BMW 120i convertible for \$54,750 from Brookvale's Col Crawford Motors on September 28, 2011. After complaining to the dealership that the car was slow to crank and sometimes didn't start, she took it to BMW Sydney in Rushcutters Bay in January twice — but they could not find a fault.

### PUBLIC DEFENDER

John Rolfe & Rosemarie Lentini

Ms Kirsch said the problems persisted and took it back in February. An invoice shows a faulty battery was replaced.

She returned it to the Brookvale dealership on April 16 after claiming it repeatedly failed to start. She asked for a replacement or a refund under the

Australian Consumer Law. Col Crawford Motors maintained the car was fine.

BMW Australia spokesman Piers Scott said two independent dealers found no fault and parts were replaced as a precaution.

"(Testing) has included technicians driving the car extensively, with more than 50 starts of the car in various conditions all finding that the car was in perfect working order," he said.

Ms Kirsch is now taking her fight to the Consumer Trader

and Tenancy Tribunal, seeking redress under clause 259 of the new ACL for breaches of the consumer guarantee for minor and major problems.

She shared her story after reading our "observation" of Oliver Biady's ultimately successful battle against Lexus.

"I'm a solicitor, but I can't believe how my hands are tied in this," Ms Kirsch said.

The July 11 hearing of Ms Kirsch's case will test the effectiveness of the new legislation.

# Case Study 2 – General Division



- ▶ Application
  - Purchase of speed boat
  - Money order - \$21,000 repairs and associated costs for defect
  - Misrepresentations – ‘immaculate condition’
  
- ▶ ACL provisions
  - ‘consumer’
  - s54 – acceptable quality
  - s18 – misleading conduct
  - s29 – misleading conduct - goods
  
- ▶ Findings
  - Parties entered into contract
  - Defects present at time of sale
  - No misleading conduct – consumer had obtained an inspection report
  - s54 (7) – no failure of acceptable quality
    - examination ought reasonably to have revealed
    - inspection report ‘consumer’

# Case Study 3 – General Division



## ▶ Background

- Consumer engaged dentist to 'supply and fit' new dentures
- Consumer alleges complete failure of consideration – seeks a full refund

## ▶ ACL provisions

- 'consumer'
- s55 – goods reasonably fit for disclosed purpose
- s60 – due skills and care

## ▶ Findings

- Parties entered into contract for the applicant to supply and install new dentures
- Consumer informed of process involved and to particular difficulties
- Consumer made an informed decision
- No evidence to substantiate that supplier failed to exercise due skill and care



# ACL – New Jurisdiction for CTTT



## ▶ Unfair Contract Terms

s24, 25 – meaning of unfair

- cause ‘a significant imbalance in the parties rights and obligations under the contract
- not reasonably necessary to protect suppliers legitimate interests
- cause detriment
- need to consider ‘transparency’

## ▶ apply to consumer contracts

- i.e. where at least one of the parties must be an individual acquiring the product/or service wholly or predominately for personal use

## ▶ contract in ‘standard form’

## ▶ unfair contract terms can be set aside

## ▶ Examples

- a term penalising only one party for a breach of termination



# 'Unfair Terms' - examples

## 1) Example – General Division

### ▶ Application

- Purchased furniture from respondent
- Under contract respondent to deliver goods
- Goods damaged

### ▶ ACL provisions

- s54 – acceptable quality
- s55 – fit for purpose
- s23 – void – 'unfair term' in consumer contract
- s25 – what constitutes 'unfair'

### ▶ Findings

- Applicant – 'consumer' – ACL
- ACL consumer guarantees apply – s54/55
- Consumers contract with respondent contained 2 unfair terms – on which first respondent relied to limit liability
  - not transparent – part of 13 page contract
  - structure of agreement confusing
  - inconsistent with other clauses
  - not necessary to protect respondent's interests
  - allow respondent to limit liability
  - allow respondent to determine if a 'breach'
  - limits consumers right to sue
- Relevant clauses void

# 'Unfair Terms' - examples



## 2) Example – General Division

### ▶ Background

- Consumer entered into a sale contract with the supplier after inspecting relevant goods
- Respondents obligation to deliver the goods to consumer
- Consumer alleged some goods were damaged on delivery
- Supplier relied on 'terms and conditions document'

### ▶ ACL provisions

- s23
- s24
- s26

### ▶ Consumer's submissions

- Contract standard form contract – relevant term, limit the consumers right to sue the supplier
- Terms and conditions not reasonably available to consumer at the time of entering into contract – not transparent
- Consumer not given adequate notice of terms and conditions
- Terms cause significant imbalance – prevent consumer from making a full claim for loss against supplier / not reasonably necessary to protect supplier's legitimate interests
- Terms cause consumer detriment – limit consumer's ability to sue supplier

# 'Unfair Terms' - examples



## 3) Example – General Division

### ▶ Background

- Consumer purchased 2 airline tickets from respondent airline carrier
- When unable to obtain travel insurance, attempted to cancel
- Respondent had no cancellation policy – forfeiture of fares
- Consumer sought orders for full refund price, arguing no cancellation clauses were unfair terms

### ▶ Findings

- Standard form contract
- Uneasy balance – non negotiable terms v being prominently / clearly expressed
- Non refundable terms
  - not predominantly displayed
  - not clearly or legibly expressed
  - not included in print terms – ‘transparency’ issue
  - imbalance in parties rights – notwithstanding air fares at lower cost