

Commercial Law Course Notes

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Personal Property Securities Act

Personal Properties Securities Act 2009 (Cth) ('PPSA')

What does the PPSA apply to?

Applies to security interests in personal property. Personal property includes both tangible and intangible property

Defined at *s10*

- Includes stock, machinery, boats ect.
- Does not include land and certain statutory rights
 - Land includes all estates and interest in land, whether freehold, leasehold or chattel, but does not include fixtures *s10*

Property interests not covered by the PPSA listed under *s8*

What is a 'security interest'?

PPSA only applicable when a security interest relating to the personal property is identified

Security interested defined in *s10* by saying "definition in *s12*"

- 12(1) provides a simple definition which remaining subsections expand and modify.
- 12(1) – interest in personal property, provided by a transaction that secures payment or performance of an obligation
 - Two elements to be identified:
 - There is secured property (collateral)
 - There is secured moneys (obligation)

A PPSA security interest is deemed to exist when following elements are met:

- Interest relates to personal property
 - Guarantor being either owner or being in possession of the property
- Interest is the subject of a consensual transaction in which the debtor agrees to provide a security interest in favour of the secured party by means of an enforceable security agreements, and that the agreement must be in writing (*s20*)
- Agreement creates either a legal or equitable proprietary rights in favour of secured party
- The agreement in substance secures the payment of a debt or performance of an obligation

There are 12 types of transactions under *s12(2)*:

- (a) a fixed charge;
- (b) a floating charge;
- (c) a chattel mortgage;
- (d) a conditional sale agreement (including an agreement to sell subject to retention of title);
- (e) a hire purchase agreement;
- (f) a pledge;
- (g) a trust receipt;
- (h) a consignment (whether or not a commercial consignment);
- (i) a lease of goods (whether or not a PPS lease);
- (j) an assignment;
- (k) a transfer of title;
- (l) a flawed asset arrangement.

Essential element of a security interest given under *s12(3)*

- A transaction is a security interest if it secures payment, or secures the performance, of an obligation

The Australian Consumer Law

Australian Consumer Law (ACL)

Rationale and purpose for the ACL

Consumer protection drives efficient markets and safeguards consumer well-being

The goals of consumer policy is to overcome significant information failures that can hinder effective competition¹

It is the plain purpose of the Act to require truthful conduct in the market place and that competition be free and fair²

Intergovernmental Agreement for the Australian Consumer Law gave six policy reasons:

- a. Ensure consumers are sufficiently well informed to benefit from effective competition
- b. Ensure that goods and services are safe and fit for purpose they were sold for
- c. Prevent unfair practices
- d. Meet the needs of the most vulnerable consumers
- e. Provide accessible and timely redress when consumer has faces detriment
- f. Promote proportionate, risk based enforcement

Key provisions

Part 2-1 – misleading or deceptive conduct

Part 2-2 – unconscionable conduct

Part 2-3 – unfair contract terms

Part 3-1 – unfair practices:

- False/misleading representations re goods, services, land
- Bait advertising
- Misleading conduct re nature of goods and services
- Wrongly accepting payment
- Unsolicited cards, goods or services
- Unauthorised entries/advertisements
- Pyramid schemes
- Prohibited pricing practices
- Referral selling
- Harassment and coercion

Part 3-2 – consumer guarantees (goods and services)

Part 3-5 – liability of manufacturers for unsafe goods

Part 4-1 – specific offences

Part 4-6 – defences

Part 5-1 – enforcement

Part 5-2 – remedies

Part 5-4 – remedies relating to guarantees

¹ Productivity Commission

² Colgate-Palmolive Pty Ltd v Rexona Pty Ltd

Unfair Contract Terms

12.0: Introduction

Unfair contract terms regime under Part 2 -3 of the Australian Consumer Law
Contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth)

Unfair contract terms found in consumer contracts can now be declared void

12.1: Rationale for consumer protection

Many consumers do not take an interest in the contract creation

Often, they cannot negotiate the contract as they are standard form

Not about telling businesses what to put in contracts – Australian Securities and Investments and Commission Act 2001

12.2: Overview

Unfair contracts regime, found in ACL, Chap 2, Part 2 – 3, ss 23 to 28
Applicable to contracts after 1 July 2010

Can apply for only one part of the contract to be determined void. s250 ACL

Larger contract will still exist if it can operate without the unfair term

Some consumer contracts are outside the scope of unfair regime noted on s28(1) – (3):

- Marine salvage
- Carriage of goods by ship, co-operation constitutions, managed investment scheme
- Contracts for financial services
- Any insurance contracts regulated by Insurance Contracts Act

12.3: Operative Conditions

Primary operative conditions are s32(1) and (2)

To invoke the regime, must satisfy (using above sections):

1. Contract is a consumer contract
2. Is in the standard form contract
3. Contract contains an unfair term

12.3.1 Consumer Contract

First and most important requirement

Shown to be a consumer contract defined in s 23(3):

Mainly for:

- (a) Supply of goods or services
- (b) A sale or grant of an interest in land

Corporations cannot use the unfair terms regime as the term individual is a natural person under Acts Interpretation Act 1901 (Cth)

Only applies to traders or businesses to consumers and sole traders

Because most businesses tend to have bargaining power

23(3) adopts a subjective approach and defines the contract by reference to its purpose

Focus on the reasons of the individual who acquired the goods or services

Does not matter if they are not acquired for an ordinary use

Misleading and deceptive conduct

Trade or commerce = TOC

Introduction

Competition and Consumer Act 2010 (Cth) s 18(1).

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- Person does include corporations and individuals

Two parts to s18: conduct related to trade / commerce and if conduct is misleading or deceptive or likely to mislead or deceive

S 52 TPA (Repealed) – much case law on this and will apply to above

Objective of s 18

Render a particular type of conduct unlawful

Should be a ‘norm of conduct’ ***Brown v Jam Factory Pty Ltd (1981)***

‘engaging in conduct’ means ‘doing or refusing to do any act’ ***s2(2) ACL***

Misleading and deceptive conduct can be seen as common law doctrine of misrepresentation. Some cases, will be clear and blatant.

Example: ***Australian Competition and Consumer Commission v P & N Pty [2014]:***

- D placed false testimonies in advertisements

Example: ***Australian Competition and Consumer Commission v Avitalb Pty Ltd [2014]:***

- Inaccurate statements about warranty were misleading or deceptive

Is not always about representations of a company ***Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1) (1998)***

- Representation is not a universal requirement ***State Government Insurance Corporation v Government Insurance Office of NSW (1991)***

Central question: does the act have ‘the tendency to lead members of the public into error’ ***ibid***

- Does not need to deliberately set out to deceive others into error ***CI JI Family Pty Ltd v National Australian Nappies [2014]***
 - Can be acting honestly

Liability will be imposed on the maker of the misrepresentation, not on the intermediary (middle man) who facilitates the advertisement ***Google Inc v Australian Competition and Consumer Commission [2013]***

Conduct in trade or commerce

First issue to consider: is it a part of trade or commerce. Essential to prove before moving on

‘in trade or commerce’ defined as must take place in Australia, or be between Australian entities and entities outside ***ACL s 2***

Not all functions of corporation can be defined as having a nature of trade

Electronic Commerce

What is e-commerce?

Described as commercial transactions, especially the trade of products and services, occurring through electronic technologies (particularly computers)

Growth of the internet is principally responsible for e-commerce activity

Has given rise to the development of entirely electronic business models (no physical presence) eg Amazon, ebay, FaceBook

Regulation

How do you regulate something you can't see or control – the internet
The internet is borderless and paperless

Commonwealth level: *Electronic Transactions Act 1999 (Cth)*

All states have equivalent ETA or with similar provisions

SA level: *Electronic Communications Act 2000 (SA)*

ETA's introduced based on a *UN Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996*

- Model Law designed to remove obstacles and ensure validity of electronic transactions

Since ETA's have been introduced, Model Law has been supplemented by the *United Nations Convention on the Use of Electronic Communications in International Contracts 2005*

- Convention facilitates electronic transactions between parties located in different countries, clarifies some legal uncertainties, and fills numerous gaps in the Model Law regime

Major Statutory Provisions

Validity of electronic transactions

Transaction not invalid because it took place electronically *ETA (Cth) s 8; ECA (SA) s 7*

Eliminates doubt as to the validity of transactions which occur via electronic technologies. 'Transaction' defined broadly *ETA (Cth) s 5; ECA (SA) s 5*

Writing requirements

Writing requirement satisfied if given electronically provided recipient consents and the info is reasonably accessible for future usage *ETA (Cth) s 9; ECA (SA) s 8*

Where a law requires a person's signature, electronic signature will suffice provided an appropriately reliable method (in the circumstances) has been used both to identify the person and to indicate their intentions regarding the information communicated *ETA (Cth) s 10; ECA (SA) s 9*

Signature requirements

Clicking 'I agree/accept' after a list of standard terms on a website has been regarded as synonymous with traditional signature *eBay International AG v Creative Festival Entertainment (2006) 170 FCR 450*

...As has an email footer with personal signature and details included (for the purposes of a signature requirement under s 59 of the *Property Law Act 1974* (Qld) relating to contracts for the sale etc. of land) could theoretically count as a signature *Luxottica Retail Australia Pty Ltd v 136 Queen St Pty Ltd [2011] QSC 162*