

4. SALE OF GOODS – DOMESTIC

DOES GOODS ACT OR ACL APPLY?

- **Goods Act (Vic)**

→ VIC LAW ONLY → PARTIES CAN CONTRACT OUT OF TERMS IMPLIED BY GA

- **GA (Vic) applies unless ACL applies (s 109)**
 - If State & Cth law are inconsistent, the Cth law prevails and the State law is invalid to the extent of the inconsistency.
- Implied terms – For transactions >\$40k where it is a business, GA implies terms into a SoG transaction
- Risk allocation – GA helps us (subject to parties' intention) work out when the risk in goods passes from seller to buyer
- Retention of title – if manufacturer (M) sells to X, X normally has ownership over the goods, X goes bankrupt before he pays the manufacturer – M may have a term in the K saying that M retains title until payment.

- **Australian Consumer Law (ACL), Part 3-2**

→ FEDERAL AND STATE LAW → PARTIES CANNOT CONTRACT OUT OF ACL STATUTORY GUARANTEES

- Consumer guarantees provision is crucial (s 54).
- For goods <\$40K or goods for domestic/personal use

ACL

- The ACL applies to the conduct of–
 - Aus corps, and overseas corps carrying out business in Aus;
 - Aus citizens and persons ordinarily resident within Aus (s 131, CCA);
 - Conduct outside Aus by – NZ Crown corps/bodies corporate carrying on business within NZ/all persons ordinarily resident within NZ (s 6, CCA)
- **Extraterritorial application** – s 5 CCA applies the Act to conduct engaged in outside Aus by:
ACCC v Valve Corp (No 3) [2016] FCA 196?
 - body corporates/incorporated by carrying on business within Australia; or
 - Aus citizens; or
 - persons ordinarily resident in Aus.
- **DOUBLE JEOPARDY** – s 150H CCL
 - (1) If an act/omission is an offence against this Act AND also an offence against an application law; and the offender has been punished for the offence under the application law → offender NOT liable to be punished for the offence against this Act.
 - (2) If a person has been ordered to pay a pecuniary penalty under an application law, the person is not liable to a pecuniary penalty under this Act in respect of the same conduct.
- **JURISDICTION**
 - ▶ **Federal jurisdiction**
 - s 138 CCA confers jurisdiction over any civil matter regarding the ACL on the Fed Ct. Fed Ct has exclusive jurisdiction, except for jurisdiction granted to the Fed Mag Ct under s 138A (civil claims up to \$750K).
 - The State/Territory courts are vested with concurrent Fed jurisdiction under s 138B to deal with any matter under the ACL, other than–
 - proceedings initiated by the ACCC/Cth Minister;
 - matters in relation to manufacturer's liability/pyramid schemes.
 - ▶ **Vic State jurisdiction** – a 'court' (s 223, ACL&FT (Vic)) means the Supreme/County/Mag Courts and VCAT.
 - BUT VCAT CANNOT make the following orders otherwise permitted under the ACL:
 - accepting undertakings (s 218);
 - making pecuniary and non-punitive orders (s 224 & 246); and
 - making adverse publicity orders (s 247).

DOES THE ACL APPLY?

▶ **GOODS NOT COVERED BY ACL CONSUMER GUARANTEES ARE:**

- bought **before 1 Jan 2011**
- bought from **one-off sales by private sellers**,
- or **auctions**, where the auctioneer acts as agent for the owner
- **costing more than \$40,000**
- a person **buys to on-sell or re-supply**
- a person wants to use, **as part of a business**, to:
 - **manufacture or produce something else** – for example, as an ingredient
 - **repair** or otherwise use on other goods or fixtures.

► **SERVICES COVERED BY ACL CONSUMER GUARANTEES ARE:**

- Services supplied in trade or commerce, that:
 - cost up to \$40,000 → regardless of purpose or use
 - cost more than \$40,000 → AND are normally acquired for personal, domestic or household purposes

► **DEFINITION OF A CONSUMER (s 3)**

- (1) [person] is taken to have acquired particular goods as a **'CONSUMER'** under the ACL as:
- (a) the amount paid/payable for the goods did not exceed:
 - (i) \$40,000; or
 - (ii) if a greater amount is prescribed for the purposes of this para—that greater amount; or
 - (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
 - (c) the goods consisted of a **vehicle or trailer** acquired for use principally in the transport of goods on public roads.
- (2) **EXCEPTION**: subs (1) does NOT apply if [person] acquired the goods, or held him/herself out as acquiring the goods:
- (a) for the purpose of re-supply; or
 - (b) for the purpose of using them up or transforming them, *in trade or commerce*:
 - (i) in the course of a process of production or manufacture; or
 - (ii) in the course of repairing or treating other goods or fixtures on land.

► **NOTE ALSO**

- **'in trade of commerce'** usually normal commercial sales, but NOT eg. private goods like garage sales
 - Includes any business/professional activity (whether or not carried on for profit).
- **'sale by auction'** (s 2) in relation to the supply of goods by a person, means a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means)
- **Presumption that plaintiff is a consumer – s 3(10)**
 - If it is alleged in any proceeding re a matter arising under ACL that a person was a consumer re particular goods/services presumed, unless the contrary is established, that the person was a consumer re the goods/services.
- **Different definition of 'consumer' for unfair terms**
 - Re unfair terms, s 23(3) a **consumer contract** is a K for supply of goods/services to an **individual** whose acquisition of the goods/services is wholly/predominantly personal, domestic or household use or consumption.

CONSUMER GUARANTEES – Sch 2 CCA

- (?) s 18(1) ACL now provides that a **person** must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- When a consumer buys goods/services, the ACL provides that they have guaranteed rights that:
 - **GOODS**
 - the supplier has the **right to sell** the goods (s 53);
 - the goods are of **acceptable quality** (s 54);
 - the goods **match their description** (s 56);
 - the goods are **fit for any purpose** that the consumer makes known to the supplier (s 55);
 - the **repairs and spare parts** are reasonably available (s 58);
 - **SERVICES**
 - the services are carried out with **reasonable care and skill** (s 60); and
 - the services are completed within a **reasonable time** (s 62).

► **GUARANTEE AS TO UNDISCLOSED SECURITIES (s 53)**

- (1) IF:
- (a) a person [supplier] supplies goods to [consumer]; and
 - (b) the supply is not a supply of limited title, there is a guarantee that–
 - (c) the goods are **free from any security, charge or encumbrance**:
 - (1) that was **not disclosed to [consumer], in writing**, before s/he agreed to the supply; or
 - (2) that was **not created by/with the express consent of [consumer]**; and
 - (d) the goods will remain free from such a security/charge/encumbrance until property in the goods passes to [consumer].
- (2) A supplier does NOT fail to comply with the guarantee ONLY because of the **existence of a floating charge** over the supplier's assets unless and until the charge becomes fixed/enforceable by the person to whom the charge is given (NB: s 339 PPSA affects the meaning floating/fixed charge).

► **GUARANTEE OF ACCEPTABLE QUALITY (s 54)**

****s 54 applies where there is a 'supply' regardless of whether there is a contract b/w the parties (refers to a 'supply' but not a SoG contract). Under operation of s 64, the parties to that supply arrangement CANNOT exclude or modify that guarantee.**

- (1) There is a **guarantee that the goods are of 'acceptable quality'** if:
- (a) [person] **supplies, in trade or commerce, goods** to [consumer]; and
 - (b) the supply does NOT occur by way of **sale by auction**.
- (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/condition** of the goods (incl. any hidden defects of the goods), **would regard as acceptable** having regard to the matters in **subs (3)**–

- (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.

► **If goods are NOT of acceptable quality they will be DEEMED to be of acceptable quality if:**

- The only reason(s) goods were of unacceptable quality were **specifically drawn to consumer's attention (s 54(4))**.
- Goods displayed for sale/hire – taken to have been drawn to C's attention under (4) **if reasons were disclosed on a written notice that was displayed with goods and that was transparent (s 54(5))**.

► **Goods do NOT fail to be of acceptable quality if:**

- **C causes them to become unacceptable/fails to take reasonable steps to prevent** them from becoming unacceptable and goods are damaged by abnormal use (s 54(6)).
- C examines goods before agrees to supply **and examination ought reasonably to have revealed they were not of acceptable quality (s 54(7))**.

GOODS ACT 1958 (Vic)

- **No doubling-up of liabilities – s 21(1) ACL&FT Vic**

If an act/omission is an offence against ACL (Vic) and also an offence against an application law of another participating jurisdiction; and the offender has been punished for the offence under the application law of the other jurisdiction, then the offender is NOT liable to be punished for the offence against ACL (Vic).

WHAT IS A SALE OF GOODS?

Definitions (s 3)

- **'contract of sale'** where seller transfers/agrees to transfer property in goods to buyer for **money consideration** (ie 'price')
 - includes an **agreement to sell** as well as a **sale**;
 - **sale of goods** → an **executed** contract – a finished/complete K where property in the goods has been transferred (s 6(3)).
 - **DOES NOT INCLUDE** bartering; bailment; sale of real property; hire purchase agreements.
 - **agreement to sell** → an **executory** contract – transfer of property is to take place at a future time or subject to some condition to be fulfilled eg. delivery (s 6(3))
 - (1A) There may be a contract of sale b/w one part owner and another ie. not limited to a buyer wholly owning the goods;
 - Ordinary rules of contract (eg. offer and acceptance apply).
- **'goods'** includes **all chattels personal** (other than choses in action) and **money**. The term includes emblements (crops grown on land by tenant) and things attached to/forming part of the land which are agreed to be severed before sale/under K of sale (**Symes**).
- **'buyer'** = person who buys/agrees to buy goods
- **'seller'** = person who sells/agrees to sell goods