

## AUSTRALIAN CONSUMER LAW

### **1. Applicability**

---

#### **Original consumer**

The applicability of the ACL to the transaction will turn on whether [buyer] is a “consumer” under the ACL. Section 3(1) provides that a person who has acquired goods is a “consumer” if the goods:

- s 3(1)(a) have a purchase price of \$40,000 or less
- s 3(1)(b) were of a kind ordinarily acquired for personal, domestic or household use or consumption
  - o “Ordinarily acquired” refers to a matter of regular practice or occurrence in the ordinary course of events (*Nesbit v Porter*).
- s 3(1)(c) consisted of a vehicle or trailer acquired for use predominantly in the transport of goods on public roads.

In the present case, [buyer] bought a [good]:

- For a purchase price of [\$40,000 or less]
- That was of a kind that is ordinarily acquired for the personal, domestic or household use of [the use]. [The use] is a regular use of [the kind of good] in the ordinary course of events.
- That consisted of a vehicle or trailer that [as evinced by\_\_\_] was acquired for principal use of transporting goods on the public roads of [roads].

[Buyer] is therefore a consumer and the ACL will apply.

#### **Gift Recipient**

Section 266 provides that the gift recipient of a good from the original consumer acquires the same remedies as the original consumer under the ACL. [Original consumer] acquired [goods] from [supplier] and gifted them to [recipient]. [Recipient] therefore has the same rights as [original consumer].

#### **Affected person**

Under s 2 an “affected person” includes:

- (a) a consumer who acquires the goods OR
- (b) a person who acquires the goods from the consumer (other than for resupply)
- (c) a person who derives title to the goods through or under the consumer.

As made out above, [consumer] is a consumer who acquired the goods. Additionally, [other person] [acquired the goods/derived title to the good] from [consumer]. [Consumer] and [other] are both affected persons under the ACL.

### **2. Claims—Unfair terms**

---

[Consumer] will argue that [unfair term/s of the agreement] should be void on the grounds that they are unfair under s 23. Section 23(1) provides that a term of a consumer contract is void if (a) the term is unfair and (b) the contract is standard form.

#### ***Is there a consumer contract?***

A consumer contract is a contract for a supply of goods/services to an individual whose acquisition of the goods is wholly or predominantly for personal, domestic or household use (s23(3)).

[The consumer] purchased a [good] from [supplier] for the wholly [personal/domestic/household] use of [\_\_\_\_\_]. His transaction with [supplier] is therefore a “consumer contract”.

#### ***Is the contract standard form?***

[Consumer] will allege the contract is standard form, thus creating a presumption of a standard form contract under s 27(1). If rebutted, the determination of whether the contract is standard form will be guided by the factors listed under s 27(2). [Consumer] will argue that contract is standard form on the basis that:

- s 27(2)(a) [the supplier] had all or most of the bargaining power regarding the transaction, as [evinced by\_\_\_\_\_].
- s 27(2)(b) the contract was prepared by [supplier] before any pre-contractual negotiations commenced.
- s 27(2)(c) [consumer] was, in effect, required to either accept or reject the terms of the contract (other than terms defining main subject matter, upfront price payable, or require/permitted under state/Cth law) in the form presented to him/her, as evinced by [supplier’s] representation that [\_\_\_\_\_].

- s 27(2)(d) [consumer] was not given an effective opportunity to negotiate [the terms regarding \_\_\_\_\_] (other than regarding main subject matter, upfront price payable or require/ permitted under state/ Cth law).
- s 27(2)(e) the terms do not reflect the specific characteristics of [another party] or the [particular transaction] i.e. [\_\_\_\_\_].
- s 27(2)(f) any other matter prescribed by the regulations.

### ***Are there unfair terms?***

Section 24(1) provides that a term of a consumer contract is unfair if (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract, (b) it is not reasonably necessary for protecting the interests of the favoured party and (c) it would cause detriment to a party if performed. A determination of unfairness is guided by (a) the transparency of the term and (b) the contract as a whole (s 24(2)).

### ***Term x***

[The term] purports to [exclude supplier's liability/contract the parties out of the ACL]. First, [the term] represents an **imbalance in obligations** under the contract by [burdening consumer with \_\_\_\_/ exempting supplier from \_\_\_\_\_] in [supplier/ consumer's] favour. Second, the term is **not reasonably necessary for protecting** [favoured party's] **interests** as [favoured party's interests] are not in jeopardy and may be protected by [reasonable term]. Third, the term would cause [financial/ other] **detriment** to [consumer/ other party] if it were relied on.

### ***Transparency***

Additionally, [the term] [is/ is not] transparent under s 24(3) as it is [expressed in plain language/legible/presented clearly/readily available to affected party] as evidenced by [\_\_\_\_\_].

### ***Contract as a whole***

However, when looking to the contract as a whole the term [is unfair/not unfair] as [the term's putatively detrimental effect] is tempered by [other term].

### ***Examples of unfair terms***

[The term] conforms with the example of an unfair term under s 25(1), that is, it is:

- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effects of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
- (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
- (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

## Consumer guarantees

### ***Contract-out clause***

In his action against [supplier], [consumer] will seek to enforce s 64(1), which provides that a term of contract “is void to the extent that it purports to exclude, restrict or modify” the rights and liabilities. A term will only be void under sub-s (1) if it does the above expressly or is inconsistent with the provision.

If term limits liability for goods NOT ordinarily acquired for personal, domestic or household use or consumption AND less than \$40k.

On the present facts, the [term] purports to expressly [exclude/restrict/modify] [consumer’s] rights to [outline content of guarantee]. [The term] is therefore void to the extent of contracting [the parties] out of the above provisions; ACL consumer guarantees will apply to the transaction.

### ***Acceptable quality***

[Consumer] will seek to enforce the guarantee that supplied goods are of acceptable quality against [supplier] under s 54(1). “Supplied” is defined under s 3 as meaning “supply...by way of [sale/exchange/lease/hire/hire-purchase]”. [Supplier] sold the [good] to [consumer] and therefore supplied a good to a consumer. The guarantee applies to the ring.

Section 54(2) provides that a good is of “acceptable quality” if it is:

- (a) fit for all 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 aware of the true state and condition of the good would regard as acceptable with reference to the factors listed under s 54(3). On the present facts, [the good ... describe defect]. A reasonable consumer aware of the [good’s] [defects], and in combination with:

- s 54(3)(a) its nature as a [describe specific nature of good]
- s 54(3)(b) its [high/low price]
- s 54(3)(c) the statement made on its packaging that [the good] [outline statement]
- s 54(3)(d) [supplier/manufacture’s] representation made to [representee] that the good is [outline representation]
- s 54(3)(e) [describe other circumstance]

... would not regard the [good] as being of acceptable quality. The good does not comply with [describe clauses] and is therefore not of acceptable quality under s 54(2). The guarantee has been breached by [supplier/manufacture].

### **Exceptions (universal)**

#### ***If defects brought to consumer’s attention before transaction***

However, as [supplier] alerted [consumer] to [the defects] of the good before [consumer] agreed to the supply, and [the defects] are the only grounds for [the good] not being of acceptable quality, under s 54(4) [the good] is to be regarded as being of acceptable quality. The guarantee has not been breached by [supplier].

#### ***If defects disclosed on a written notice displayed with goods***

However, as [the defects] were disclosed on a written notice displayed with the goods (s 54(5)), under s 54(4) [the good] is to be regarded as being of acceptable quality. The guarantee has not been breached by [supplier].

### **Exceptions (must be only cause of it not being of acceptable quality)**

#### ***Consumer caused/failed to prevent defects***

However, as the [consumer] [caused/failed to take reasonable steps to prevent] [the defects] in the goods, under s 54(6)(a) the goods do not fail to be of acceptable quality. The guarantee has not been breached by [supplier].

#### ***Abnormal use***

However, as the [goods] were damaged by [the consumer’s] abnormal use of the good to [describe use], under s 54(6)(b) the goods do not fail to be of acceptable quality. The guarantee has not been breached

## PPSA SCAFFOLD

### 1. Does the PPSA apply (s8)?

#### Interests excluded by the PPSA (s8)

Section 8 outlines interests that won't be included in the PPSA

- Interest of a seller who has shipped goods to a buyer under a negotiable bill of lading
- A lien, charge or other interest that is created by law of the Cth, state or territory
- A lien, charge or other interest that is created by the operation of the general law
- Any right of set-off or right of combination of account - moneys owing back and forth between two parties, use those to cancel out.
- Any rights under approved netting arrangements
- Creation of transfer or interest in land
- Certain interests under Bankruptcy Act
- An interest in a fixture
- A statutory right/ statutory created license

### 2. Is there a security interest?

Under s12 of PPSA, a security interest refers to an interest in personal property provided for via a consensual dealing (*Dura*) that secures the payment or performance of an obligation under a transaction. Personal property is defined under s10 as any property including a license that is not land. On the present facts, [collateral] is a [chase in action/ chase in possession] and is thus personal property under the Act.

In substance, [secured party's] property rights to [interest] in [secured property] secures the performance of [grantor's] [obligation to \_\_\_ / payment] of [transaction], and resembles a:

#### What is a security interest?

- The general definition is found in s12(1), which is an **in substance security interest**:  
"A **security interest** means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)."
- Section 12(2) then provides **examples of security interests**, provided that they secure payment or performance of an obligation. These include:
  - (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); (**Finance lease**)
  - (j) an assignment;
  - (k) a transfer of title;
  - (l) a flawed asset arrangement.
- Section 12(3) then provides '**deemed security interests**', which will be security interests whether or not the transaction secures payment or performance of an obligation:
  - (a) the interest of a transferee under a transfer of an account or chattel paper;
  - (b) the interest of a consignor who delivers goods to a consignee under a commercial consignment;
  - (c) the interest of a lessor or bailor of goods under a PPS lease.

- a. **Chattel Paper (s10):** writing that evidence both a monetary obligation and either a security interest in specific goods OR a security interest in specific intellectual property/license for IP.
- b. **Commercial Assignment (s10):** consignor retains interest in the goods it delivers to the consignee, and consignor delivers goods to consignee for the purpose of sale, lease or other

disposal, and consignor and consignee are both in the business of the dealing goods of that kind.

c. **PPS lease (s13):** A lease or bailment of goods (s 13(1)):

- (a) For a term of more than 2 years
- (b) For a term of up to 2 years that is automatically renewable, or is renewable at the option of one party if the total of all terms might exceed 2 years
- (c) For a term of up to 2 years, or a lease for an indefinite term, in a case in which the lessee or bailee, with consent of lessor/bailor, retains uninterrupted possession of leased/bailed property for period of 2+ years after day lessor/bailor first acquired possession of property.

(...PPS doesn't include: (s 13(2))

- (a) A lease by a lessor who is not regularly engaged in business of leasing goods
- (b) A bailment by a bailor who is not regularly engaged in business of bailing goods
- (c) A lease of consumer property as part of a lease of land where the property is incidental to use and enjoyment of land
- (d) A lease of bailment of personal property prescribed by regulation)

...and is a bailment for which the bailee provides value (s 13(3)).

On the present facts, [secured party][obtained an interest in/ consigned/ leased] [property] and as evidenced by \_\_\_\_ is a deemed security interest under s12(3)(\_\_\_\_).

**Finance Lease** (s 12(1)): Lessor is the owner, but the lessee expects to acquire ownership at the end of the lease.

**True/Operating Lease** (s 13 - if over 2 years): Lessor is the owner and expects the good to be returned at the termination of the lease.

**PMSI:** A PMSI (a purchase money security interest) is finance to buy a specific product, rather than a loan for general, unspecified use. In other words, a PMSI is created when a secured party provides finance to the grantor (person who is granting the secured party a security interest) to **acquire the collateral**. The PMSI may secure all or part of the collateral purchase price (s 14(1)(a)).

See the s 14(1) definition below for a list of what can be registered as a PMSI.

It includes:

- Retention of title arrangements
- Certain leases
- Certain bailments and commercial consignments of goods.

It is not sale and lease back agreements (section 14(2), *PPSA*).

The most significant advantage to classifying a security interest as a PMSI is its special, so called 'super' priority (see Conceptual Question 2). This means a PMSI will take priority over all general, non-PMSI security interests, EXCEPT for security interests perfected by control.

The order of priority of security interests is:

1. Security interests perfected by control
2. PMSIs
3. General security interests

### **PERFECTION OF A SECURITY INTEREST:**

- Attachment (s 19)
- Enforceability against third parties (s 20)
- Perfection by registration, possession or control (s 21)

### **3. Has the security interest attached to the collateral?**

---

Under s 19(1) a security interest in collateral is only enforceable against a grantor if it has attached to the collateral (pledge as a security for repayment of loan).