

CONSUMER CONTRACTS

Australian Consumer Law

- Found in Schedule 2 of the *Competition and Consumer Law Act 2010* (Cth)
 - *CCLA* applies to corporations, not persons
- *ACL* applies to:
 - Consumer contracts (though not contracts for financial products/services)
 - Contracts entered into after to *ACL* came into affect
- Important here is:
 - Unfair terms (Part 2-3 *ACL*)
 - Consumer guarantees (Part 3-2 *ACL*)
 - NB: Each section has a different definition of “consumer contract”

Unfair terms

- S. 23 *ACL*: An unfair term in a consumer contract, which is a standard form contract, is void
 - Invoked by consumer, where provider seeks to enforce terms of a particular contract the consumer has entered into. Consumer may argue the term is void per S. 23.

Test for unfair terms

1. Is the contract a consumer contract?

- A consumer contract is (S. 23(3) *ACL*):
 - (a) A contract for a supply of goods or services
 - (b) A contract for sale or grant of interest in land
- The contract is with a person whose acquisition of the goods/services is for personal, domestic, or household use (i.e. consumer purposes)
- NB: It is the *actual* purpose that matters, not the common use
- Not limited to goods of personal or domestic nature; purchase of industrial equipment could apply if it were being used for personal or domestic purposes

2. Is the contract a standard form contract?

- S. 27(2) lists matters the court must consider in deciding whether the contract is standard form:
 - (a) Whether one party (i.e. the retailer) has all/most of the bargaining power in the transaction
 - (b) Whether one party (i.e. the retailer) prepared the contract
 - (c) Whether another party (i.e. the consumer) was required to accept/reject the terms in the form which they were presented
 - (d) Whether another party (i.e. the consumer) was given opportunity to negotiate terms

3. Is the term unfair?

- S. 24(1) definition:
 - A term which would cause **significant imbalance** in the parties' rights and obligations under the contract; and
 - The term is **not reasonably necessary** to protect the interests of the party being advantaged by the term; and
 - The term would **cause detriment** to a party if it were applied or relied upon
- In deciding if a term is unfair, a court may consider (S. 24(2)):

- Is the term transparent? (i.e. readily available, easily understood)
 - The contract as a whole
- S. 25 non-exhaustive list of unfair terms:
 - A term that permits one party but not the other to terminate a contract;
 - A term that penalises one party for breach or termination
 - E.g. Fees for early gym membership termination
 - A term that limits one party's right to sue the other
- If the term is unfair, the contract operates without it

Consumer guarantees

- *ACL* implies mandatory terms ("guarantees") into contracts for supply of goods/services to consumers
- Typically invoked by consumers when good/service is unsatisfactory and the provider denies liability
- Check-list before guarantee can be implied into the contract:
- What type of contract is it?
 - Is it a contract involving a consumer acquiring goods?
 - Consumer defined in S. 3(1)
 - Is it a contract involving a consumer acquiring services?
 - Consumer defined in S. 3(3)
 - Is it a contract between a consumer and:
 - A supplier in trade or commerce (most guarantees will be implied); or
 - A supplier not in trade or commerce (e.g. private sale) (significantly less likely that guarantees will be implied)
 - Is the contract excluded from the *ACL*?
 - Service guarantees are not implied into insurance contracts, or transportation/storage of goods contracts for the purposes of a business, trade, or profession (s 63)
- Is the contract with a "consumer"?
 - For contracts for the supply of **goods**, the person acquiring them is taken to be a consumer if (S. 3(1)):
 - Cost of goods does not exceed \$40,000 (or a greater amount that may be prescribed by law); or
 - The goods were of a kind ordinarily acquired for personal, domestic or household use or consumption (e.g. a \$50,000 home theatre system or a \$70,000 car):
 - "Ordinarily" means "regularly", not "principally" or "predominantly" (*Bunnings Group*); or
 - The goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads;
 - But none of the above will allow a person to claim to be a consumer if the person acquired the goods for the purpose of re-supply or for using them in trade or commerce.
 - For contracts for the supply of **services**, the person acquiring them is taken to be a consumer if (see s 3(3)):
 - Cost of services does not exceed \$40,000 (or a greater amount that may be prescribed by law); or
 - The services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

- If the contract is with a consumer, what guarantees can be implied?
 - In all contracts for supplies of **goods** to consumers:
 - A guarantee as to title (i.e. the supplier has the right to dispose of the goods) (s 51);
 - A guarantee to undisturbed possession (e.g. in a leasing arrangement, the supplier will not interfere with the leased equipment, even though they may own it);
 - Guarantee of freedom from securities, charges, etc. (s 53)
 - In contracts for the supply of goods to consumers in trade or commerce, other than by auction:
 - A guarantee that the goods are of acceptable quality (s 54);
 - A guarantee that the goods are fit for any disclosed purpose (s 55);
 - A guarantee that the goods correspond with their description (s 56);
 - A guarantee that goods correspond with sample; reasonable opportunity to compare goods with sample; goods free from defects not apparent on examination in sample (s 57);
 - A guarantee that repair facilities and spare parts are available (s 58);
 - A guarantee that supplier will comply with any express warranty given (s 59)
 - In contracts for supply of **services** to consumer in trade or commerce:
 - A guarantee that services will be rendered with due care and skill (S. 60)
 - A guarantee that services will be fit for disclosed purpose (S. 61)

NB: Contractual clauses that purport to exclude, restrict, or modify a guarantee that would be implied are void (S. 64)