



HERBERT
SMITH
FREEHILLS

DOING BUSINESS IN AUSTRALIA

CONSUMER PROTECTION AND PRODUCT
LIABILITY



Chapter 15

Consumer Protection and Product Liability

Australian law has a strong focus on consumer protection and there are numerous obligations that businesses must comply with when providing goods or services to consumers in Australia. These obligations are contained in the Australian Consumer Law (**ACL**). Found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), the ACL is the principal legislation in Australia governing consumer protection and liability of manufacturers, suppliers and distributors of consumer products for losses or injuries caused by products. The ACL is a single national law covering consumer protection and fair trading laws in Australia. It deals with consumer issues such as misleading and deceptive conduct, unfair contract terms, statutory consumer guarantees, unsolicited sales practices, lay-by agreements, product safety and manufacturer liability (among other things).

The ACL can also provide some protections in certain business-to-business contexts.

Conduct obligations

The ACL contains numerous obligations that regulate how companies can engage with consumers (including over the internet). The predominant focus of the **ACCC**'s enforcement activities recently has been on the prohibition of 'misleading and deceptive conduct' in trade or commerce. Businesses need to take particular care to ensure that they do not make misleading representations to consumers in Australia about their products and services or what remedies might be available under the ACL in relation to product or services claims.

The ACL also prohibits 'unconscionable conduct' in connection with the supply of goods or services. When considering whether conduct may be classified as unconscionable, consideration is given to factors such as the relative bargaining strengths of the business and the customer and whether the business used undue influence, pressure or unfair tactics.

The ACL similarly contains provisions prohibiting unfair contract terms contained in standard form contracts between a company and an individual consumer. Unfair contract terms are terms that would cause significant imbalance in the parties' rights and obligations under the contract, are not reasonably necessary to protect the legitimate interests of the advantaged

party, and would cause detriment (financial or otherwise) if relied on. A term found to be an unfair contract term is void. This unfair contract terms regime has been extended to certain business to business contracts where at least one of the parties is a small business and the upfront price payable under the contract is no more than A\$300,000 or A\$1 million if the contract is for more than 12 months.

Businesses must also have regard as to how they present prices. The ACL prohibits companies from stating the price for goods or services for consumers as a component of the total price, unless a single price is also prominently specified. The single price must include all quantifiable components including any taxes or charges imposed. There are some limited exemptions to this rule; for example, restaurants applying menu surcharges on specific days may be exempt from the component pricing requirements.

The ACL imposes consumer protection obligations on businesses undertaking unsolicited sales practices (including door-to-door selling and telephone sales) and entering into lay-by transactions with customers. There has been increased enforcement activity in this area in recent times.

The ACL also prohibits certain types of false representation, referral selling, undue harassment at a place of residence or business, supplying unsafe goods, sending unsolicited credit cards and requiring payment for the supply of unsolicited goods.

Defective goods

The ACL provides remedies for consumers where goods are not of acceptable quality or are defective and cause injury as discussed below.

Consumer guarantees

Consumer guarantees apply where there is a supply of goods or services to a consumer in trade or commerce. The consumer guarantees provisions contain a number of requirements, one of the most significant requiring goods to be fit for purpose. In recent years, the ACCC has been actively enforcing these provisions with regard to representations made by large retailers about express and extended warranties that may mislead consumers as to their rights under statutory consumer guarantees.

Liability for injury or loss

Suppliers, and not just manufacturers, are directly liable for damage or loss that the consumer suffers from goods which breach consumer guarantees. The ACL places mandatory reporting obligations upon companies who become aware that a consumer good they supply has caused

injury. The ACL also enables people who are injured or whose property is damaged as a result of goods being unsafe to seek compensation from the manufacturer without the need to show any negligence by the manufacturer, or a contractual relationship with the manufacturer.

Goods will be deemed to have a defect if their safety is not such as a person is generally entitled to expect. The ACL sets out a number of matters to be considered in determining whether goods are safe, including the way in which the goods are marketed, the packaging of the goods and the instructions or warnings that accompany the goods. The manufacturer of the goods has a number of statutory defences they may seek to rely on, including (among others) the absence of any defect when the goods were supplied or that the defect occurred because of compliance with a mandatory standard.

In addition to statutory protection for consumers, consumers in Australia may also rely on the common law and seek damages under principles of tort (negligence) or contract, following loss or damage from a defective product. Liability under the common law tort of negligence is fault-based, with the result that the plaintiff must show some wrongdoing on the part of the defendant (manufacturer or supplier). The plaintiff must establish that the manufacturer or supplier owed a duty of care to the plaintiff, that they breached that duty (by failing to perform according to the requisite standard of care) and that breach caused loss or injury to the plaintiff.

There may also be contractual remedies for consumers who are able to establish a contractual relationship with the supplier and breach of that contract.

Enforcement: penalties and powers

The ACL confers enforcement powers upon the ACCC in connection with the consumer protection provisions. The ACCC can issue substantiation notices, requiring a business to produce information or documents, and they can issue infringement notices imposing a financial penalty.

Where court proceedings are commenced, civil penalties for breach of the ACL by companies can be up to the greater of:

- A\$10 million;
- three times the value of the benefit received; or
- where the benefit cannot be calculated, 10% of annual turnover in the preceding 12 months.

For individuals, the penalty can be up to A\$500,000, for each contravention.

Civil penalties will be materially higher than the fines associated with an infringement notice. For example, in a Federal Court case in 2018 a company was ordered to pay a A\$10m penalty for engaging in unconscionable conduct in relation to dealings with customers in relation to their legal rights, including potential rights under statutory consumer guarantees, in relation to product complaints.

The ACCC can also require businesses to publish corrective advertising, implement compliance programs and disqualify individuals from management positions.

International product liability

Certain international contracts for the sale of products are subject to the United Nation's Convention on Contracts for the International Sale of Goods (**the Convention**). Australia ratified the Convention on 18 March 1988 and the Convention came into force in Australia on 1 April 1989. The Convention prevails over federal, state and territory laws to the extent of an inconsistency.

The Convention applies where the seller and purchaser have places of business in countries that are parties to the Convention, or where the rules of private international law lead to the application of the law of a country that is a party to the Convention.

The Convention does not apply to the sale of some products including products bought for personal, family or household use and financial products such as stocks, shares, investment securities or money.

The Convention provides that the seller must deliver products which are of the quantity, quality and description required by the contract, and which are contained or packaged in the manner required by the contract. Unless the parties have agreed otherwise, products supplied under the contract must be fit for their intended purpose (that is the usual purpose for such a product or the purpose expressly or impliedly made known to the seller at the time of the contract), have the qualities conforming to the sample or model used to sell the product, and be packaged in a manner adequate to preserve and protect the products.

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