

Consumer Protection and the Australian Consumer Law (continued)

Unfair Contract Terms, Specific false
reps and Unfair Practices and
Consumer Guarantees Chapter 13

Unfair contract terms: CACL 13.290

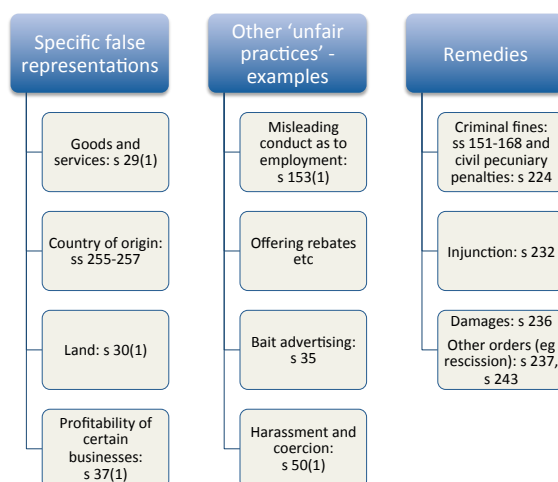
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- An **unfair term in a standard form consumer contract** is **void**: s23(1)
 - If contract can operate *without* the unfair term c. will not be void: s23(2)
- Meaning of '**consumer**' contract: s.23(3)
 - Contract for **supply of goods and services or sale of land** to **person who acquires them wholly or predominantly for personal or household use**
- Meaning of '**unfair**': s24(1)
 - Three elements (CACL 13.300). The term:
 - causes a significant imbalance in the parties rights and obligations
 - is not reasonably necessary to protect legitimate interests of stronger party
 - causes detriment to other

- Applying s24(1) the court must consider:
 - The extent to which the term is "transparent"
 - The contract as a whole
 - Legislative examples: s25 (CACL 13.310)
- Meaning of 'standard form' contract: s27(2)
 - See 6 relevant factors: s27(2)(a)-(f)
- Case examples:
 - **ACCC v Chrisco Hampers** (CACL 13.315)
 - 'after final instalment paid, customer's bank account would continue to be debited in anticipation of a future order'...
 - **NRM v ACCC** (CACL 13.317)
 - 'customer required to give 30 days written notice in order to terminate the contract and, then, became liable to pay a termination fee'
 - **OFT v Ashbourne** (CACL 13.316) – UK case – similar provision
 - 'fixed membership for one year plus termination fee. Gym could terminate at will'
- **the "small business" amendments came into effect in Nov 2016**
 - "small bus contract" = one (or more) parties to the contract is a business that employs fewer than 20 persons **and** the upfront price of the contract does not exceed \$300,000 (for contracts lasting up to one year) or \$1 million (for contracts lasting more than one year).

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Figure 13.6 Specific false or misleading representations/unfair practices



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Specific false/misleading representations

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- **Specific false or misleading reps:**
 - See **threshold requirements** (CACL 13.340)
 - Then see s29(1)(a)-(n)
- See **case examples:**
 - *ACCC v Dell Computer* (CACL 13.350) – s29(1)(i) – price
 - *Nationwide News v ACCC* (CACL 13.370) – s29(1)(m) – “free” but subject to conditions
 - *Ascot Four v ACCC* (CACL 13.370) – s29(1)(i) – price
 - *ACCC v Gordon Superstore* (CACL 13.375) – s29(1)(m)
 - Also see *Turi/Luv A Duk/Coles/Basfoods*
 - **Belle Gibson** case (see Moodle entry)
- Note ‘**country of origin**’ false reps: s29(1)(a) or (k) and ss255-257: CACL 13.390 (when can you say ‘made in Australia’?)
 - See next slide for recent amendments

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New country of origin test: March 2017

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- the only test now is *whether the goods were ‘substantially transformed’ in the claimed country of origin.*
- Under the amendments, goods will be ‘substantially transformed’ if, as a result of one or more processes undertaken in that country, the goods are *‘fundamentally different in identity, nature or essential character from all of its ingredients or components’.*
- The amendments aim to clarify that minor processes such as packaging and assembly, which simply alter form or appearance, will not be sufficient to satisfy the test.

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Other specific prohibitions (CACL 13.390 – 13.640)

- Land: s30 – see *Given v Pryor* (CACL 13.410)
- Profitability of certain business activities: s37(1) – see *Ducret v Colourshot* (CACL 13.440)

Other unfair practices (CACL 13.460-13.640)

- As to employment: s153(1)
- Nature of manufacturing process: s155(1)
- Services: s34
- Bait advertising: s35
- Harassment and coercion: s50

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Remedies

■ Pecuniary penalties: s224 (CACL 13.710)

- Corp \$1.1 m /individual \$220,000 per offence
 - Specific false reps and other unfair practices and unconscionable conduct
 - **NB** does not apply to misleading or deceptive conduct or unfair contract terms
 - Corp'n responsible for conduct of its emp'ees: s139B(2) (CACL 13.670)
 - Defences – (CACL 13.680)

■ Cases:

- *ACCC v Harvey Norman* (CACL 13.711)
- *Singtel Optus v ACCC* (CACL 13.712)
- *ACCC v Apple* (CACL 13.713)

■ Injunction: s233 (CACL 13.720)

- *Belle Gibson case*

■ Damages: s236 (CACL 13.790)

- **NB** Liability of persons 'involved in' the contravention: s2(1) makes employees etc personally liable in damages: *Yorke v Lucas*

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- **Other orders: s237** – relating to a contract that has been made as a result of a breach of ACL – inc m or d conduct. (CACL 13.900)
 - Declaring contract or part of it void
 - Varying the terms of the contract
 - Refusing to enforce any or all of the terms of the contract
 - Directing a refund
 - Directing a person to repair etc

- **Other enforcement provisions (CACL 13.930):**
 - Undertakings
 - Substantiation notice
 - Adverse publicity order – *Belle Gibson* case
 - Disqualification orders for directors: *ACCC v Halkalia* (CACL 13.995)

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Consumer Guarantees (CACL fig 13.7)

- ACL provides for **statutory guarantees** in **contracts** for the **supply of goods and services to consumers**. These are guarantees imposed by the legislation – and remedies for breach are to be found in the ACL (not private remedies).

- There are nine guarantees re supply of **goods: ss51-59** (see CACL 13.1002) **–(def'n of goods in s2(1))**. We focus on:
 - Guarantee as to acceptable quality: **s54**
 - Guarantee as to fitness for any disclosed purpose: **s55**

- Consumer guarantees re **services: ss60-64** (CACL 13.1140) – see slide 15

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- **'Supply':** s2(1)
- **'Consumer':** s3(1)
 - Amount of goods/services is <\$40,000 (i.e. *any g/s under \$40,000*) or
 - Goods/services are of a kind *ordinarily* acquired for p, d or h use or consumption OR
 - Goods –
 - Vehicle acquired for use on public roads: s3(1) AND
 - NOT acquired for re-supply, using up in production or in the repair of other goods: s3(2)
 - E.g.:
 - Laws v GWS Machinery (CACL13.1020)
 - Airplane <\$40,000
 - Mercedes Benz >\$40,000
 - IT service contractor >\$40,000
 - Carpet >\$40,000

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Contracts for Supply of Goods

- **Title: s51(1)**
 - Guarantee that S has right to dispose of goods
- **Acceptable quality: s54(1)** – S 'supplies' goods to a 'consumer' in t or c there is a guarantee that the goods are of 'acceptable quality'
 - Goods are of acceptable quality if they are:
 - *Fit for all purposes* for which goods are *commonly supplied*
 - *Acceptable in appearance and finish, Free from defects, Safe, Durable*
 - As a *reasonable consumer*, fully acquainted with the state and condition of the goods would regard as acceptable *having regards to*
 - The *nature* of the goods
 - *Price*
 - *Statements on labels* or packaging
 - *Representations by supplier or manufacturer*
 - *Any other relevant circumstances*

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■ Fitness for Disclosed Purpose: s55(1)

- Guarantee that goods are reasonably fit for a disclosed purpose and for any purpose for which the supplier represents that they are reasonably fit
 - *Merke, Sharpe & Dohme v Peterson* (CACL 13.1075)
- What is a 'disclosed purpose':
 - Particular purpose made known to supplier by consumer, expressly or by implication in pre-contractual negotiations
 - Particular purpose made known to manufacturer directly or by supplier in pre-contractual negotiations
 - Where consumer shows it relied on supplier's skill and judgment: s55(3)

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example

- Ed intends to go trekking in New Zealand during the winter. He visits the Kathmandu Adventure Store and asks for advice from the Tenzin, the expert on trekking, on an appropriate tent, sleeping bag and hiking boots. After discussing the conditions he was likely to encounter in NZ (-20 degrees centigrade with risks of blizzard) Tenzin advised Ed who took his advice and purchased the recommended equipment. The tent was not appropriate in blizzards, the sleeping bag was not warm enough and the boots fell apart in the wet snow.

Advise Ed whether KAS has breached any of the consumer guarantees and what remedy he may have.

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- **Correspondence with description: s56(2)**
 - Goods must be the same as those *described* on packaging or in print
- **Goods must comply with sample or demo model: s57(1)**
- **Repair and spare parts: s58(2)**
- **Express warranties must be complied with: s59(1)**
- **Auction sales – excluded from g'tees**

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Guarantees and supply of services

- Contracts for provision of **'services'**
 - See **definition of services: s2(1)** – **see fn 7, CACI 13.340**
 - Contract for work inc professional work
 - Contract for amusement entertainment recreation or instruction
 - Insurance contract
 - Contract between banker and customer
 - Loan contracts
- **Same definition of 'consumer': s3(1)**
- **The guarantees:**
 - Services must be rendered with **due care and skill: s60**
 - Where consumer makes known the result he or she wishes to achieve, guarantee that the services will be **reasonably fit for that purpose: s61(1)**
 - And will be of such a nature and quality, state or condition that they might reasonably be expected to *achieve that result: s61(2)*
 - Guarantee does **not apply** where consumer does **not** rely or it is **unreasonable to rely** on S's skill and judgment: **s61(3)**
 - Guarantee as to reasonable time for supply: **s62**

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Limitation of liability re Cons G'tees

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- **General rule** – cannot exclude the guarantees or limit liability for 'consequential losses' in contracts for supply of goods and services: s64(1). Two exceptions:
 1. Where goods are **not** of a kind 'ordinarily acquired for personal, domestic or household use', S can limit its liability as follows:
 - contract for goods – supplier can limit liability to 'replacement or repair cost'
 - contracts for services – supplier can limit liability to 'supplying the services again'
 - provided that it is 'fair and reasonable': s64(3) – see factors:
 - Relative strength of the bargaining positions
 - Were there alternative sources that did not have the term
 - Did B know of the term?
 - Special order of the Buyer
 2. **Recreational Services exception**: CCA s139A(1),(3) – recreational activities – supplier can limit liability for death or injury.
 - Sporting activity or leisure time pursuit
 - Any other activity that involves a 'significant degree of physical exertion or physical risk'

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ACL Part 5-4: Remedies for breach of C G'tees

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- Broadly similar for **goods (s259) and services (s267-8)**
- Distinguish **major and minor** failures
- **'Major failure' – s.260.** see criteria (CACL 13.1160)
 - Goods **not have been acquired** if B knew of the failure
 - Goods don't match the **description**
 - Goods substantially **unfit for a purpose – either common or disclosed** and can't easily be remedied to fit that purpose
 - Goods not of **acceptable quality** because they are unsafe
- **Not major** – consumer may require S to **remedy** the failure within a reasonable time or, if S doesn't, then B can **reject** the goods or recover reasonable costs: **s259(1)(2)** (e.g. chain saw doesn't work)

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- If **'major failure'** consumer can:
 - **Reject** the goods (provided within reasonable time) or **recover compensation** for any reduction in value: **s259(3)**
 - **Recover damages** for reasonably foreseeable loss or damage: **s259(4)** unless failure caused by problem after goods left S
- What if the goods are a **gift**? Same rights as buyer: **s266**
- B to return goods (or if significant cost, S must collect the goods): **s263(2)-(3)**. S must refund the money or replace the goods: **s263(4)**.
- Broadly same remedies re failure to comply with guarantees in relation to **services**: **ss267-8**