

# **Consumer Guarantees: The Sky's the Limit**

**- a paper presented by -**

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**- at -**

**Consumer Protections and Unfair Commercial Dealings: Knowing When to  
Toe the Line**

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# Consumer Protections and Unfair Commercial Dealings: Knowing When to Toe the Line

## Session 3: Consumer Guarantees: The Sky's the Limit

### A. What are the Australian consumer guarantees?

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“Under the *Australian Consumer Law*, when you buy products and services they come with automatic guarantees that they will work and do what you asked for. If you buy something that isn't right, you have consumer rights.”

- ACCC “Consumer Guarantees” website, opening words

1. The *Australian Consumer Law* (ACL) is found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). The CCA is not really a 2010 Act at all: on 1 January 2011 the *Trade Practices Act 1974* (Cth) was renamed the CCA and amended, amongst other changes, to include the ACL. Debate has raged for a decade about whether the renaming was to symbolise that consumers would now be put in their rightful place at the centre of national competition and consumer laws<sup>1</sup> or was just a confusing rebranding<sup>2</sup> resulting in a misnamed Act.<sup>3</sup> Such debate is beyond the scope of this paper.
2. Part XI CCA creates the ACL (Cth) whilst Pt XI AA allows for the ACL to be picked up by a State or Territory and applied as a law of such State or Territory. That has occurred in each of the States and in the Northern Territory and the Australian Capital Territory: *Fair Trading Act 1987* (NSW), ss 27 and 28; *Australian Consumer Law and Fair Trading Act 2012* (Vic), ss 7 and 8; *Fair Trading Act 1989* (Qld), ss 15 and 16; *Fair Trading Act 2010* (WA), ss 18 and 19; *Fair Trading Act 1987* (SA), ss 13 and 14; *Australian Consumer Law (Tasmania) Act 2010* (Tas), ss 5 and 6; *Consumer Affairs and Fair Trading Act 1990* (NT), ss 26 and 27; *Fair Trading (Australian Consumer Law) Act 1992* (ACT), ss 6 and 7.<sup>4</sup>
3. Thus, whilst there are nine Australian Consumer Laws in force in Australia, by virtue of each picking up the text contained in Sch 2 CCA and all regulations made under s 139G CCA, there largely exists a uniform consumer law, as was self-evidently the intention.<sup>5</sup> We refer to this as the ACL.

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<sup>1</sup> Rod Sims, *Reflections on the 10th anniversary of the Competition and Consumer Act 2010*, 3 March 2021 (ACCC website)

<sup>2</sup> Rares, Justice Steven --- "Competition, fairness and the courts" (FCA) [2014] FedJSchol 10

<sup>3</sup> Rares, Justice Steven --- "Introductory remarks for the 2012 Competition Law Conference" (FCA) [2012] FedJSchol 21

<sup>4</sup> *Southern Waste Resourceco Pty Ltd v Adelaide Hills Region Water Management Authority* [No 3] [2019] SASC 192 at [92] (Hinton J)

<sup>5</sup> *Southern Waste Resourceco Pty Ltd v Adelaide Hills Region Water Management Authority* [No 3] [2019] SASC 192 at [92] (Hinton J)

4. The ACL provides for a number of “consumer guarantees”. In summary,<sup>6</sup> Chapter 3, Part 3 2, Division 1, Subdivision A of the ACL sets out consumer guarantees that provide consumers with a statutory basis for seeking remedies when:
- goods are not of acceptable quality;
  - goods are not fit for a purpose that the consumer made known to the supplier or manufacturer;
  - goods are not fit for a purpose that the supplier told the consumer that they will meet;
  - goods do not match their description;
  - goods sold by reference to a sample or demonstration model do not correspond to the sample or demonstration model;
  - the consumer does not acquire proper title to the goods;
  - other people claim to have a right to the goods, for example, under a charge or a security agreement;
  - spare parts and facilities for repair of the goods are not available for a reasonable period; or
  - a person does not comply with an express warranty in relation to the goods.
5. Chapter 3, Part 3 2, Division 1, Subdivision B of the ACL sets out consumer guarantees that provide consumers with a statutory basis for seeking remedies when:
- services are not rendered with due care and skill;
  - services, and any product resulting from the services, are not fit for a purpose that the consumer made known to the supplier; or
  - services are not supplied within a reasonable time.

**The statutory guarantees are statutory guarantees**

6. Statutory provisions governing, codifying or stipulating rights and remedies for purchasers of goods and services have a long history and nearly an equally long history of criticism which it is neither necessary or possible to address comprehensively. However any such analysis would begin with the *Sale of Goods Act 1893* (UK), which was the model on which many former colonies based their own Sale of Goods legislation, including the various state Acts in Australia. From here we could trace a 100-plus year path of tinkering and reform, through to the *Trade Practices Act* and state *Fair Trading Acts*.

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<sup>6</sup> This paragraph, and the one that follows, are taken from the summary of new law in the Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (Cth).

7. Working backwards, the consumer guarantees in the ACL are based on the *New Zealand Consumer Guarantees Act 1993* (NZ), which is in turn based on the *Canadian Consumer Protection Act* and the *English Sale of Goods Act 1979* (UK).<sup>7</sup>
8. A critical feature of the ACL is that it provides protection to consumers by means of **statutory guarantees**, rather than by implying statutory warranties into contracts between corporations and consumers (being the method previously used by the *Trade Practices Act* and State and Territory *Fair Trading Acts* and related Acts).
9. The consumer guarantee provisions are therefore capable of application **whether or not there is a contract**. It is unnecessary to consider, for example, whether terms are too uncertain to constitute a contract, in determining whether the guarantees apply.<sup>8</sup>
10. The second reading speech accompanying the ACL stated that the reforms were based on a “comprehensive analysis” by the Commonwealth Consumer Affairs Advisory Council (**Consumer Council**). The immediate background to their implementation has been explained by Sackville AJA as follows:<sup>9</sup>

The Consumer Council published its Final Report on Consumer Rights in October 2009. It identified a number of problems with the existing law relating to implied terms. The difficulties included the complexity of the law, the lack of awareness by consumers of their statutory rights and the inappropriateness of using a nineteenth century model of implied terms as a basis for a broader consumer protection regime. The Consumer Council noted that:

“Since the legislation relies on the common law of contract, it assumes that all consumer sales are of a contractual nature, which [Consumer Affairs Victoria research paper] contrasts with an understanding of consumer purchases as simple ‘exchanges of money for a product that do not involve an offer, acceptance, consideration, express terms etc’. The existing consumer legislation is based on the law of contract. It does not explicitly set out all the rights and remedies that flow from a breach of an implied term.”

The Final Report of the Consumer Council analysed the New Zealand legislation in some detail and concluded that it had operated well with high levels of consumer awareness and satisfaction since its introduction in 1993. The chief advantages were said to be that it “achieves greater clarity in consumer rights and greater certainty in available remedies”. The Consumer Council accordingly recommended the introduction of similar statutory guarantees in Australia. The ACL implemented the recommendation.

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<sup>7</sup> Jeannie Marie Paterson, *The new consumer guarantee law and the reasons for replacing the regime of statutory implied terms in consumer transactions*, [2011] MelbULawRw 8; (2011)

<sup>8</sup> *Valve Corporation v ACCC* [2017] FCAFC 224 at [106]

<sup>9</sup> *Scenic Tours Pty Ltd v Moore* (2018) 361 ALR 456 at [161] – [163], footnotes omitted; see also *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263 at [101] – [103].

11. Despite the clear statutory change to a guarantee rather than implied terms, it is still not unusual (but it is wrong) to see consumer guarantees under the ACL being pleaded as implied terms. This can have adverse consequences for the consumer. Some are considered further below.

### **There is no contracting out**

12. Chapter 3, Part 3 2, Division 1, Subdivision C of the ACL provides that consumer guarantees cannot be excluded by contract. This ensures that a supplier or manufacturer cannot avoid obligations under consumer guarantees by reaching an agreement with a consumer to the effect that consumer guarantees do not apply. Section 64 of the ACL also provides that it is not possible for a contract to displace consumer guarantees by specifying that some other law, such as the law of the country where the supplier resides, applies to the contract.<sup>10</sup>
13. The evident purpose of s 64 is to ensure that parties cannot ‘contract out’ of the consumer guarantees. If, for example, parties to a contract for the supply of goods purport to agree that one or more of the consumer guarantees will not apply, that term of the contract would be void by force of s 64.<sup>11</sup>
14. However see limited abilities to restrict claims dealt with below.

### **Remedies**

15. Part 5 4 of the ACL sets out the remedies that are available when consumer guarantees are not complied with. In general terms, consumers are entitled to have a supplier offer a refund, replacement or repairs if the standards required by a guarantee are not met. The applicable remedy depends on which guarantee has not been complied with and the nature of the failure to comply. There is an entitlement to damages.
16. Consumers will be able to seek damages from a manufacturer if goods are not of acceptable quality, do not match their description or if spare parts and repair facilities are not made available for a reasonable period. Manufacturers are required to indemnify suppliers in respect of the costs of complying with the guarantee obligations related to acceptable quality, descriptions applied to goods by manufacturers and fitness for a purpose that a consumer makes known to a manufacturer.
17. Part 5 4 of the ACL also provides that suppliers of goods and services must provide remedies to consumers within a reasonable time. If a remedy is not provided within a reasonable time a consumer may have the failure remedied elsewhere and have the supplier pay for the remedy.
18. Consumers have the right to reject goods that are subject to a major failure, if a supplier refuses to provide a remedy and when a remedy is not provided within a reasonable time. If goods are rejected, the consumer has the right to choose whether a refund or replacement should be provided.<sup>12</sup>

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<sup>10</sup> Explanatory Memorandum

<sup>11</sup> *Valve Corporation v ACCC* [2017] FCAFC 224 at [107]

<sup>12</sup> Explanatory Memorandum

**B. Consumer guarantees and goods – when can a consumer obtain a remedy?**

19. A consumer can obtain a remedy when there is a breach of a consumer guarantee.
20. Whether this is so is a question of statutory interpretation (the law is highly prescriptive), factual analysis, some research and common sense (what is objectively reasonable).
21. This is best stepped-through as an example. The “simple” terms of s 54(1) can be analysed as follows:

S 54(1)	Commentary / analysis
If a	
person	<p>This is not defined in the ACL. Generally includes a corporation (as a law of the Commonwealth) and a natural person (as a state ACL).</p> <p>s 131 CCA says the ACL applies as a law of the Commonwealth to the conduct of corporations, and AIA s 2C(1) says expressions used to denote persons (such as "person") include a body politic or corporate.</p> <p>Natural persons may be subject to the ACL as a law of the Commonwealth rather than as a state law under extended provisions: s 5 CCA: extends ACL to Australian citizens or residents engaging in conduct outside Australia. And see s 6 CCA.</p>
supplies	<p>Section 2 ACL:</p> <p>“supply” , when used as a verb, includes:</p> <p>(a) in relation to goods--supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and</p> <p>[...]</p> <p>and, when used as a noun, has a corresponding meaning, and supplied and supplier have corresponding meanings.</p> <p>S 8 ACL: goods are taken to be supplied to a consumer even if they are affixed to land or premises at the time of the supply.</p> <p>Section 5(1)(a) ACL: a donation of goods or services is not treated as a supply of the goods or services unless the donation is for promotional purposes.</p>
in	<p><i>Concrete Constructions (NSW) Pty Ltd v Nelson</i> (1990) 169 CLR 594</p> <p>construing “in trade or commerce”: refers to:</p>

	<p>- conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character (see Mason CJ, Deane, Dawson and Gaudron JJ)</p> <p>- conduct as part of trade or commerce rather than merely in connection with or in relation to it (see Toohey J)</p> <p>One off transactions eg sale at garage sale are unlikely to be “in trade or commerce” and therefore unlikely to attract consumer guarantees.</p> <p>See eg:</p> <p><i>Williams v Pisano</i> (2015) 90 NSWLR 342 (sale of home via real estate agent)</p> <p><i>Hera Project Pty Ltd v Bisognin (No 3)</i> [2017] VSC 268 (representations concerning a subdivision of a residential property).</p>
trade or commerce,	<p>CCA s 4:</p> <p>In this Act, unless the contrary intention appears... "trade or commerce" means trade or commerce within Australia or between Australia and places outside Australia.</p> <p>“this Act” includes Schedule 2 to the extent that it is applied under Subdivision A of Division 2 of Part XI.<sup>13</sup></p>
goods	<p>ACL s2:</p> <p>"goods" includes:</p> <ul style="list-style-type: none"> <li>(a) ships, aircraft and other vehicles; and</li> <li>(b) animals, including fish; and</li> <li>(c) minerals, trees and crops, whether on, under or attached to land or not; and</li> <li>(d) gas and electricity; and</li> <li>(e) computer software; and</li> <li>(f) second-hand goods; and</li> <li>(g) any component part of, or accessory to, goods.</li> </ul>

<sup>13</sup> In which s 131 CCA is found.

	<p>“services” ... does not include rights or benefits being the supply of goods...</p> <p><i>ACCC v Valve Corporation (No 3)</i> [2016] FCA 196:</p> <p>Valve was a Seattle corporation operating an online games distribution business, including with 2.2M customers in Australia.</p> <p><b>Held:</b> The definition of “goods” is inclusive. It supplements the ordinary meaning of “goods”: <i>ASX Operations Pty Ltd v Pont Data Australia Pty Ltd</i> (No 1) (1990) 27 FCR 460, 468 (the Court). The definition emphasises an important aspect of a “good”. That aspect is sometimes described in theoretical studies as “thinghood”: eg Penner J, <i>The Idea of Property in Law</i> (Clarendon Press, Oxford, 1997). The legal meaning of “goods” can be analogised to the strict definition of “property” which is “a description of a legal relationship with a thing”: <i>Yanner v Eaton</i> [1999] HCA 53; (1999) 201 CLR 351, 365-366 [17] (Gleeson CJ, Gaudron, Kirby, and Hayne JJ describing the word “property”).</p> <p>This explains why a chose in action, such as a debt, is not a “good”. A chose in action is a right against a person. It is not a right in relation to a thing. The notion of rights to the various “things” in the inclusive definition complements the definition of “supply” in s 2(1) of the Australian Consumer Law. That section incorporates the concept of legal rights in relation to things by providing that when “supply” is used as a verb a “supply of goods” includes “supply (including re-supply) by way of sale, exchange, lease, hire or hire purchase”.</p> <p><b>Held:</b> the correct approach is to characterise the transaction to consider whether there has been a supply of goods. If, properly characterised, the whole of the transaction involves the supply of goods then the exclusionary words in the definition of ‘services’ will mean that none of the supply will involve a service.</p> <p>Here computer software was a good, and the fact that it was supplied by licence was still a “supply” (a word of wide import). Therefore this was a good not a service. Even though not everything supplied was a</p>
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	<p>good, at the core of the supply was the provision of games, and at the heart of the provision of games was the supply of computer software.</p> <p>This conclusion was not challenged in the unsuccessful appeal.</p> <p>Characterisation may be relevant to limitation periods as well as which guarantees to plead (more on this below).</p> <p><i>Wilson v Winnicott</i> [2021] NSWCATAP 211: Repair work to Kombi van comprised of \$1,600 for parts and \$7,000 for labour.</p> <p><i>Taberzadeh-Desovski v Kresta Blinds Ltd</i> [2022] NSWCATCD 2: the supply and installation of the curtains involved both goods (the curtains) and services (measuring and installation)</p> <p><i>Cool &amp; Sons Pty Ltd v O'Brien Glass Industries Ltd</i> [1981] FCA 99: supply and fitting of a windscreen to a motor vehicle</p>
to a consumer;	<p>ACL, s 3(12)</p> <p>a reference to a supply of goods or services to a consumer is a reference to a supply of goods or services to a person who is taken to have acquired them as a consumer</p> <p>ACL s 3(1) Acquiring goods as a consumer</p> <p>(1) A person is taken to have acquired particular goods as a consumer if, and only if:</p> <p>(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:</p> <ul style="list-style-type: none"> <li>(i) \$40,000; or</li> <li>(ii) if a greater amount is prescribed for the purposes of this paragraph--that greater amount; or</li> </ul> <p>(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or</p> <p>(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.</p> <p>Subsections (4) – (9) ACL are not reproduced in this paper. However, the amount paid or payable for the goods will usually be the contract price or obvious.</p>

*Competition and Consumer Regulations 2010* (Cth), r 77A - Prescribed amount—acquiring goods or services as a consumer

For the purposes of paragraph 3(1)(a) of the Australian Consumer Law, the amount of \$100,000 is prescribed.

S3(1)(a) – (c) ACL are alternatives. Meaning you can acquire goods as a consumer even if they are not for personal, domestic or household use (ie what might be described as consumer use) if they are under \$100K.

Exception ACL s 3(2)

(2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

(a) for the following purpose:

- (i) for goods other than gift cards--for the purpose of re-supply;
- (ii) for gift cards--for the purpose of re-supply in trade or commerce; 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.

*Solar Lord Pty Ltd v Wilo Australia Pty Ltd (Civil Claims)* [2019] VCAT 478

Solar Lord was a wholesaler and supplier of rooftop solar hot water systems to builders. Wilo Australia was the Australian supplier to Solar Lord of the French manufactured “Wilo pump”.

Solar Lord claimed that the pumps were not of acceptable quality and not fit for purpose.

**Held:** I find that Solar Lord affixed the Wilo pump to its pump controller unit so that it formed an integral part of the solar hot water

	<p>system Solar Lord sold in Australia. However, it did not otherwise transform or use up the Wilo pump in its manufacturing or production processes. As a result, I am satisfied that the exemption in subsection 3(2)(b) does not apply to Solar Lord.</p> <p>However, given that Solar Lord acquired the Wilo pumps for the purpose of manufacturing its solar hot water systems, which it then sold to other end users within the Australian community, I am satisfied that it acquired these goods for the purposes of re-supply. As a result, I find that Solar Lord acquired the Wilo pumps for the purposes of re-supply and, therefore, it is excluded by paragraph 3(2)(a)(i).</p> <p><i>Zee v Australian Construction Fasteners Dandenong Pty Ltd (Civil Claims)</i> [2018] VCAT 1568: a “single use” product is not “used up” for these purposes in the sense of being consumed (see also <i>Lams v GWS Machinery Pty Ltd</i> [2007] NSWSC 316).</p>
<p>and the supply does not occur by way of sale by auction;</p>	<p><i>Solomons v Valley Motor Auctions Pty Ltd &amp; New Model Wreckers Pty Ltd</i> [2016] NSWCATCD 63</p> <p>There is no definition of “sale by auction” in the ACL... There is some authority on the requirements for a sale to be a sale by auction in other contexts. In <i>Smythe v Thomas</i> (2007) 71 NSWLR 537, Rein AJ determined that the online bidding process conducted by EBay was an auction and gave rise to a binding contract...</p> <p>It is not necessary that I determine definitively the meaning of the term ‘sale by auction’ in the ACL. Whatever the limits of the concept, a public process by which more than one potential purchaser may put forward a bid for a particular item submitted for sale, with the item being sold to the highest bidder, will constitute a sale by auction.</p>
<p>there is a guarantee</p>	<p>See above; not an implied term</p>
<p>that the goods are of acceptable quality</p>	<p>ACL s 54</p> <p>(2) Goods are of acceptable quality if they are as:</p> <p>(a) fit for all the purposes for which goods of that kind are commonly supplied; and</p>

<p>(b) acceptable in appearance and finish; and</p> <p>(c) free from defects; and</p> <p>(d) safe; and</p> <p>(e) durable;</p> <p>as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).</p> <p>(3) The matters for the purposes of subsection (2) are:</p> <p>(a) the nature of the goods; and</p> <p>(b) the price of the goods (if relevant); and</p> <p>(c) any statements made about the goods on any packaging or label on the goods; and</p> <p>(d) any representation made about the goods by the supplier or manufacturer of the goods; and</p> <p>(e) any other relevant circumstances relating to the supply of the goods.</p> <p>(4) If:</p> <p>(a) goods supplied to a consumer are not of acceptable quality; and</p> <p>(b) the only reason or reasons why they are not of acceptable quality were specifically drawn to the consumer's attention before the consumer agreed to the supply;</p> <p>the goods are taken to be of acceptable quality.</p> <p>(5) If:</p> <p>(a) goods are displayed for sale or hire; and</p> <p>(b) the goods would not be of acceptable quality if they were supplied to a consumer;</p> <p>the reason or reasons why they are not of acceptable quality are taken, for the purposes of subsection (4), to have been specifically drawn to a consumer's attention if those reasons were disclosed on a written notice that was displayed with the goods and that was transparent.</p> <p>(6) Goods do not fail to be of acceptable quality if:</p>
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	<p>(a) the consumer to whom they are supplied causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality; and</p> <p>(b) they are damaged by abnormal use.</p> <p>(7) Goods do not fail to be of acceptable quality if:</p> <p>(a) the consumer acquiring the goods examines them before the consumer agrees to the supply of the goods; and</p> <p>(b) the examination ought reasonably to have revealed that the goods were not of acceptable quality.</p>
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### Remedies for consumers against suppliers

22. Essentially the remedies depend on whether the failure is a “major failure” or not. If a failure to comply with a consumer guarantee is a major failure the consumer may either reject the goods (if within the rejection period) or accept the goods and claim compensation because they are of lower value than the contract price. Monetary compensation / damages are dealt with separately below.

### What is a major failure?

23. A “major failure” is defined in ACL s 260 as a number of alternatives. These include s 260(1)(a) that “the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure.”
24. There is some case law of questionable assistance.
25. *Knox v Tait Motors Pty Ltd t/as Tait Auto Group* [2021] QCATA 87: Whether a failure to comply with a consumer guarantee is a major failure is an objective test based upon a reasonable consumer. The question to be posited is whether a reasonable consumer, given the option of acquiring the specific good or not would have acquired the good had they been aware of the nature and extent of the failure of the goods to comply with the relevant statutory guarantee. If the answer is ‘no’ there has been a ‘major failure’.
26. *Allcroft v Shem-mell Pty Ltd trading as Capalaba Car World* [2021] QCAT 375: the inquiry contemplated by s 260(1)(a) is whether a reasonable consumer would have acquired the goods despite being acquainted with the nature and extent of the failure, having regard (amongst other things) to the availability of repairs within a reasonable time.
27. The decision in *Allcroft* contains criticism of the Appeals Tribunal decision in *Knox* which appeared to state the test as being “whether a reasonable consumer, given the option of acquiring the vehicle or alternatively purchasing either nothing or a different model, would have acquired the vehicle if they had been aware of the nature and extent of the failure”.

28. In *Allcroft* it was stated this appeared to be “an impermissible gloss on the language contained in s 260(1)(a), which does not refer to the options of purchasing a different vehicle or no vehicle at all. In particular, the inquiry as to whether a reasonable consumer would instead have chosen to purchase a different vehicle (presumably one free from defects) will invariably only have one answer.”
29. *Baas v JB Hi Fi Group Pty Ltd* [2021] NSWCATAP 10:

Not every fault or combination of faults which represents a breach of the guarantee of acceptable quality constitutes a major failure under s 260(a) of the ACL: *Safi v Heartland Motors PL t/as Heartland Chrysler* [2016] NSWCATAP 80. The test is objective. Relevant considerations include the availability and cost of repairs relative to purchase price and the nature of the fault(s). The test in s 260(a) of the ACL is whether a reasonable consumer with knowledge of the faults and what would be needed in terms of time, costs and degree of difficulty to fix them would have bought the goods or made a different decision.

Where there is a major failure, the consumer is required to reject them within the ‘rejection period’ in order to obtain a refund or replacement of the goods.

In *Nesbit v Porter* [2000] NZCA 288; [2000] 2 NZLR 465 at [39] (Nesbit), the New Zealand Court of Appeal held, in interpreting comparable legislation, that the rejection period is one that:

...suffices to enable the consumer to become fully acquainted with the nature of the defect, which, where the cause of breakage or malfunction is not apparent, the consumer can be expected to do by taking the goods to someone, usually or preferably the supplier, for inspection. In this context, therefore, a defect is not ‘apparent’ until its cause has been identified and the buyer knows what has to be done to fix it, and what that will cost; in other words, until the buyer is in a position to determine whether the defect is substantial.

[...]

The proper approach to ascertaining the rejection period is, again, exposed in *Nesbit*, given the similarity in the legislation being applied there by the Court, at [34] to [35].

In summary, applying those comments to the relevant provisions of the ACL:

The rejection period runs from the date of supply, not from the date on which any defect was, or ought to have been, detected.

The relevant failure is the failure actually encountered by the consumer whose right of rejection is under consideration.

The period must be reasonable in relation to the particular defect or combination of defects causing the consumer to reject the goods. The question to be asked is “within what time would it be reasonable to expect such defect(s) to become apparent?”

The actual experience of the particular consumer is relevant but is to be tested against the objective criteria in s 262(2) of the ACL. Subsection (a) refers not to the particular article which was supplied but to the type of goods. Subsection (b) requires consideration of the use to which a consumer (not the actual consumer) is likely to put them, that is, that type of goods. Subsections (c) and (d) require regard respectively to the length of time for which it is reasonable for that type of goods to be used and the amount of use to which it is reasonable for that type of goods to be put before the defect becomes apparent.

Taking those considerations into account, there is nothing inherently perverse or incorrect in the Tribunal determining that the rejection period expired before the defect became apparent to the appellant, which appears to be the thrust of his argument in this regard.

There is an evaluative and discretionary aspect to the determination of the rejection period, in that the Tribunal needs to weigh the various mandatory considerations in s 262(2) of the ACL in order to reach a conclusion as to the proper assessment of the rejection period in each particular case.

### **Teething problems with motor vehicles**

30. This is a recurring theme.
31. The reasonable consumer may be considered likely to accept the risk of “teething problems” with a new purchase, that can be repaired under warranty. Thus the ACL accepts that a reasonable consumer would proceed to acquire a vehicle despite being acquainted with some failures, as there is a risk of failure inherent in the decision to purchase: if the reasonable consumer was not prepared to purchase any vehicle because vehicles may experience faults soon after purchase, which would be repaired under warranty, then the reasonable consumer would not purchase any vehicle: *Australia Rong Hua Fu Pty Ltd v Ateco Automotive Pty Ltd* [2015] VCAT 756; *Safi v Heartland Motors Pty Ltd t/as Heartland Chrysler* [2016] NSWCATAP 80; *Allcroft v Shem-mell Pty Ltd trading as Capalaba Car World* [2021] QCAT 375.

**C. Consumer guarantees and services – when can a consumer obtain a remedy?**

32. This can be analysed by using s 60 ACL as an example:

S 60 (1)	Commentary / analysis
If a	As for s 54 above
person	As for s 54 above
supplies	As for s 54 above
in	As for s 54 above
trade or commerce,	As for s 54 above
services	<p>ACL s2:</p> <p>"services" includes:</p> <p>(a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and</p> <p>(b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:</p> <p>(i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or</p> <p>(ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or</p> <p>(iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or</p> <p>(iv) a contract of insurance; or</p> <p>(v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or</p> <p>(vi) any contract for or in relation to the lending of money;</p>

	<p>but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.</p> <p><i>ACCC v Valve Corporation (No 3)</i> [2016] FCA 196: if properly characterised, the whole of the transaction involves the supply of goods then the exclusionary words in the definition of ‘services’ will mean that none of the supply will involve a service.</p> <p><i>Obeid v ACCC</i> [2014] FCAFC 155: definition is inclusive, not intended to be exhaustive and has a wide application.</p> <p><i>Scenic Tours Pty Ltd v Moore</i> [2018] NSWCA 238: “services” is not co-extensive with (ie limited to) contractually agreed obligations: “The threshold inquiry mandated by each of the Consumer Guarantees is to identify (relevantly for present purposes) the benefits and facilities the supplier is to provide to the consumer. This requires an objective assessment of the dealings between the supplier and the consumer to determine the benefits or facilities the consumer can reasonably expect the supplier to provide in return for the consumer’s payment. The assessment is not confined to the terms of any contract between the supplier and the consumer. Nor is it foreclosed or limited by any contractual limitations on the supplier’s ability for failing to provide the services for which the consumer has paid.”</p> <p>S 131A CCA: consumer guarantees do not apply to the supply, or possible supply, of services that are financial services, or of financial products.</p>
to a consumer;	ACL s 3(3) Acquiring services as a consumer is the same as s 3(1) but services replaces goods
there is a guarantee	See above; not an implied term
that the services will be rendered with due care and skill	This is mercifully not defined. It can be equated with the common law duty to take reasonable care: <i>Lets Go Adventures Pty Ltd v Barrett</i> [2017] NSWCA 243. See eg <i>Damanios v Stateroads Pty Ltd</i> [2015] NSWCATCD 108 - the consumer guarantee that services be provided with “due care and skill” that is implied into consumer contracts is a guarantee that the services will be performed in a “careful, skilful, and workmanlike” manner.

Again, the remedies depend on whether there is a “major failure”: ACL s 267 -268.

#### **D. Some aspects of damages**

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##### ***Consequential loss***

33. Actions for financial compensation or damages:

##### **259 Action against suppliers of goods**

(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may: [...] (b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure. [...]

(6) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

*[See s 267(3) and (4) for equivalent provisions against suppliers of services]*

##### **271 Action for damages against manufacturers of goods**

(1) If:

- (a) the guarantee under section 54 applies to a supply of goods to a consumer; and
- (b) the guarantee is not complied with;

an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.

*[See the balance of s 271 for rights in respect of other consumer guarantees for goods]*

##### **272 Damages that may be recovered by action against manufacturers of goods**

(1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:

(a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates, below whichever of the following prices is lower:

- (i) the price paid or payable by the consumer for the goods;
- (ii) the average retail price of the goods at the time of supply; and

(b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.

34. At least generally speaking, the appropriate measure of damages for breach of a consumer guarantee looks to contract not negligence: see eg *Irving v D'Michelle t/as Westside Customs and Mechanical* [2015] NSWCATCD 152.
35. While there is some contention about what “consequential loss” may mean in certain circumstances, the words of the statute simply require that it be “reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure”.

***The defective vehicle cases and consequential loss***

36. Mrs Capic’s Ford was found not to be of acceptable quality (s 54 ACL). It was therefore worth less at the time than what she paid for it. Peram J assessed the reduction in value of the car as follows (at [884], [885] and [897]):

The process of assessing what the value of a chattel was 9 years in the past when the defects it suffered from are risks not actualities is inherently impressionistic [...]

I have concluded that Ms Capic’s vehicle was worth 30% less than its fair market value without any defect on the day that she purchased it. I accept that its fair market value on 24 December 2012 without defects was the amount she paid for it, \$22,736.36 and I assess her reduction in value damages at \$6,820.91. This is the amount which, if tendered to her on 24 December 2012, would have put her in the position she would have been in if the guarantee of acceptable quality had been complied with at least in a balance sheet sense (ie expectation damages). [...]

This is a less than perfect version of what her position would have been if s 54 had been complied with and is mired with real world difficulties. In this imperfect world Ms Capic has received a car worth \$15,915.45 and received \$6,820.91 in cash as reduction in value damages. Yet she has paid GST, stamp duty and excess financing costs on the basis that the vehicle was worth \$22,736.36. The award of reduction in value damages is incapable of putting her in the precise position she would have been in if the guarantee had been complied with because the award of reduction in value damages is not a perfect tool for achieving that outcome.

37. Ms Capic claimed to be entitled to be put in the position she would have been in if she had in fact paid only for what the car was worth having regard to its defects. She therefore argued she would have paid 30% less GST, stamp duty and financing costs and claimed those losses under s 272(1)(b). Peram J awarded these losses and stated (at [891]):

As Edelman J has observed in relation to the similar provisions of the ACL (s 267(3) and s 267(4)), s 272(1)(a) and s 272(1)(b) resemble the two components of compensatory damages available at common law for breach of contract: *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; 94 ALJR 481 at [63]- [67]. These two components are (1) compensation directly for the performance interest and (2) compensation for consequential losses, which is bounded in the same manner as at common law by the second limb of the rule in *Hadley v Baxendale* (1854) 156 ER 145: see also *Swick Nominees*

*Pty Ltd v LeRoi International Inc (No 2)* [2015] WASCA 35; 48 WAR 376 at [265]- [272] per Buss JA in relation to the *Sale of Goods Act 1895* (WA) s 52.

This might suggest that the point of the award was to put Ms Capic in the position she would have been in if the vehicle had been of acceptable quality. That view of s 272(1) would suggest that although it is a statutory cause of action it takes its cue from familiar provisions in sale of goods legislation dating back to the *Sale of Goods Act 1893* (UK) elegantly drafted by Sir Mackenzie Chalmers, remnants of which even now may be perceived, fresco-like, under the crude graffiti of the ACL. The implied term that goods will be of merchantable quality was imposed by Chalmers' statute and the measure of damages was the contractual one, namely, expectation damages – the plaintiff was to be put in the position she would have been in if the term had been complied with.

38. Lee J adopted the same approach in *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344:

The s 272(1)(b) limb resembles the second component of compensatory damages available at common law for breach of contract. That is, the requirement of reasonable foreseeability in s 272(1)(b) resembles the second limb of the rule in *Hadley v Baxendale* (1854) 9 Ex 341: see *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; (2020) 268 CLR 326 (at 348–349 [63]–[67] per Edelman J, speaking in respect of the similar provision in s 267(4) of the ACL); *Capic* (at 435 [891]). This suggests that the purpose of an award of damages under s 272(1)(b) is to put the affected person in the position they would have been in had the goods been of acceptable quality at the time of supply: *Capic* (at 435 [891]).

### ***Damages for disappointment and distress***

#### **275 Limitation of liability etc.**

If:

(a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and

(b) the law of a State or a Territory is the proper law of the contract;

that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.

39. In *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, Mr Moore brought an ACL claim in respect of a European River Cruise that fell short of expectations. He claimed under the guarantees of failure to exercise due care and skill in the supply of the tour (s 60), unfit for purpose for which it was acquired (s 61(1)) and not of a nature and quality as could reasonably be expected to achieve the result he wished (s

61(2)). He sought compensation for disappointment and distress for breach of a contract to provide a pleasant and relaxed holiday.

40. Scenic argued that disappointment and distress was "pain and suffering" or "loss of amenities of life", and therefore the restrictions on such matters as personal injury damages in the *Civil Liability Act 2002* (NSW) precluded Mr Moore's claim for damages for disappointment and distress.
41. The High Court held that compensation for disappointment and distress consequent on a breach of a contract for a relaxing holiday was an established head of loss in such cases and separate from personal injury.

#### **E. What businesses cannot say in relation to consumer guarantees**

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42. Under s 29(1)(m) ACL, a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2).
43. Australian entities have found a remarkable number of different ways to contravene this obligation. They include:
  - a. *ACCC v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653 (webpage representation that consumers could not return certain products not of acceptable quality unless agreed by HPA at its sole discretion; also oral representations)
  - b. *ACCC v HP Superstore Pty Ltd* [2013] FCA 1317 (oral representations by Harvey Norman franchise)
  - c. *ACCC v Camavit Pty Ltd* [2013] FCA 1397 (oral representation by Harvey Norman franchise that only the manufacturer was potentially liable)
  - d. *ACCC v Scoopon Pty Ltd* [2014] FCA 820 (consumer-specific representations about remedies for dishonoured vouchers)
  - e. *ACCC v Spreets Pty Ltd* [2015] FCA 382 (refunds are not applicable, non-refundable, no refunds, time limits on refunds)
  - f. *ACCC v Chrisco Hampers Australia Ltd (No 2)* [2016] FCA 144 (statement in Chrisco's order confirmations and on website that consumers could not terminate their lay-by agreements after the final payment was made but before delivery of the goods, when s 97(1) ACL provided for such a right).
  - g. *Valve Corporation v ACCC* [2017] FCAFC 224 (website representations that fees not refundable)

- h. *ACCC v ABG Pages Pty Ltd* [2018] FCA 764 (online advertising services)
  - i. *ACCC v Apple Pty Ltd (No 4)* [2018] FCA 953 (Oral and website representations that if a component of a device had previously been repaired, serviced or replaced by someone other than Apple, Apple was not required to, and would not provide, a remedy at no cost)
  - j. *ACCC v Jetstar Airways Pty Ltd* [2019] FCA 797 (website representation that certain fares not refundable and if consumers wished to have any entitlement to a refund, it was necessary for them to purchase a flight bundle at additional cost – misleading because eg a breach of ss 60-62 ACL would entitle them to a refund in certain circumstances)
  - k. *ACCC v Jayco Corporation Pty Ltd* [2020] FCA 1672 (email saying, in substance, that a consumer was not entitled to a refund or replacement from anyone and the only remedy available to them was a repair – went to all legal rights not just contractual ones)
  - l. *ACCC v Mazda Australia Pty Ltd* [2021] FCA 1493 (false representations concerning the existence or effect of consumer guarantees regarding vehicles purchased)
44. For example, *ACCC v LG Electronics Australia Pty Ltd* [2018] FCAFC 96 relevantly concerned two oral statements by customer services representatives to different customers.

*First statement:*

Customer service representative: “Your television is out of warranty. You will have to pay to have it fixed.”

Customer: “The television is faulty. It is not relevant that it is out of warranty. If you purchase a television, it should be repaired or replaced if it fails within a reasonable period after it is purchased.”

Customer service representative: “We cannot repair the television for you, because it is out of warranty. Here are the details of the technician we would recommend. However, you will have to pay for the repairs.

*Second statement:*

LG representatives said words to the effect that “because my television was outside of the manufacturer’s warranty, there was nothing they could do in respect of the television”.

Held: this conduct contravenes s 29(1)(m) and s 18(1) ACL because it falsely represents the non-existence, exclusion or non-effect of the ACL consumer guarantee as to acceptable quality. The character of the statement, as false, means that the conduct was also misleading or deceptive given the context.

45. Do not do these things.

## F. Some brief notes on manufacturers

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46. “Manufacturer” is defined inclusively in s 7 ACL. It includes importers where the manufacturer does not have a place of business in Australia.
47. Part 3.5 provides for the liability of manufacturers for goods with safety defects. Section 9(1) ACL provides that goods have a safety defect if their safety is not such as persons generally are entitled to expect (see the remaining sub-sections for further considerations).
48. Section 274 ACL requires manufacturers to indemnify suppliers if both are liable for the same loss or damage. This is subject to the proviso that if the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, the liability is limited to a liability to pay to the supplier the lowest of the cost of replacement or repair (s 276A(1)).
49. However the proviso in s 276A(1) does not apply in relation to particular goods if the supplier establishes that it is not fair or reasonable for the liability of the manufacturer of the goods to be limited: ss 276(2) and (3).
50. See for example *Zee v Australian Construction Fasteners Dandenong Pty Ltd (Civil Claims)* [2018] VCAT 1568, concerning the supply of contaminated “cup liners” used by Zee for spray-painting cars:
  - a. The cup liners caused beading of the paint on cars which needed to be rectified.
  - b. Zee recovered against ACF as Zee’s supplier under ACL.
  - c. ACF recovered against Spray Shop (from whom ACF bought the cup liners) under Goods Act (ACL did not apply because ACF purchased for resupply).
  - d. Zee recovered against the importer under the ACL as satisfying the definition of manufacturer.
  - e. The importer was thus liable to indemnify ACF as supplier under s 274.
  - f. The Court found that it was not fair or reasonable for the liability of the importer to be limited to the value of supply of alternative goods (s 276A), and found it liable to indemnify ACF to the full extent of ACF’s liability to Zee.
  - g. Supply by the importer to Spray Shop was in breach of the implied terms as to merchantable quality and fitness for purpose implied by s 19 of the Goods Act as to fitness for purpose and acceptable quality. Accordingly, the importer was liable to Spray Shop for the loss or damage suffered by Spray Shop as a consequence of those breaches (being the amount Spray Shop was liable to pay ACF).
51. Further, ss 276A(4) provides that the section is subject to any term of a contract between the manufacturer and the supplier imposing on the manufacturer a greater liability than the liability mentioned in subsection (1).

52. Meanwhile section 64A ACL provides that a term of a contract for the supply by a person of goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 64 merely because the term limits the person's liability for failure to comply with a guarantee (other than a guarantee under section 51, 52 or 53) to one or more of replacement, repair or the costs replacement or repair.

## G. Some miscellaneous issues

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### Choosing an appropriate court

53. Jurisdiction may depend on the particular guarantee: *Wilson v Winnicott* [2021] NSWCATAP 211:

“In basic terms, the accrual of the cause of action for breach of the consumer guarantees in relation to services occurs at the date of breach (whether or not known to the consumer), but in relation to goods (where there is a major failure or where a failure to comply with the consumer guarantee cannot be remedied) the accrual of the cause of action for breach of the consumer guarantees may not occur until much later.”

Section “79L(1)(a) of the FTA, which limits the Tribunal to determining consumer claims where the cause of action accrues within three years of Tribunal proceedings being commenced.”

“*Cairns v AHG Newcastle Pty Ltd* [2020] NSWCATAP 103 and *Barbour v Autosports Five Dock Pty Ltd* [2020] NSWCATAP 141 both held that the cause of action accrues at the time of the rejection of the goods (assuming that falls within the “rejection period”, and as distinct from the time of breach of the guarantee), as it is only then that the cause of action accrues and time begins to run under s 79L of the FTA.”

“The decision whether to pursue his claim against the respondent in the Tribunal (with its three-year limit) or the Local Court (with its six-year limit) is a matter for the appellant. Of course, there are other differences between the Tribunal and the Local Court for the appellant to consider including the generally cheaper cost of undertaking proceedings in the Tribunal, the prohibition against parties being legally represented in the Tribunal (unless permission is given otherwise) and the general rule in the Tribunal that parties pay their own costs of proceedings irrespective of the outcome. All of those considerations are matters for the appellant.”

### Stop pleading statutory guarantees as implied terms

54. *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263: case conducted on the basis that the statutory guarantee in s 60 ACL was incorporated into the contract, with no alternative claim that the statutory guarantee in s 60 applied regardless of the existence of a contract. Primary judge held no contract, and appellant was not allowed to depart from her case on appeal (special leave was refused on this ground: *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2021] HCATrans 74). *See also James v USM Events Pty Ltd* [2022] QSC 63.

**What if the consumer guarantees do not apply?**

55. A consumer may of course still may have many other remedies, including breach of contract.
56. A statutory remedy of misleading or deceptive conduct may be available: eg *Collyer v Grays (NSW) Pty Ltd* [2022] QCATA 80: Mr Collyer bought a land rover at auction which had an engine that didn't turn over. The online description of the vehicle, relied upon by Mr Collyer, said "Engine turns over: yes". Mr Collyer said: "If I had known the engine was seized, I would not have purchased the car." Awarded \$9,900 for new engine (he did not seek recovery of the purchase price).
57. The *Sale of Goods Acts* also should not be forgotten: eg *Rider v Pix* [2019] QCA 182: breach of the the implied condition of merchantable quality by reason of paintwork defects in \$2.5M catamaran. Awarded \$544,000 plus interest comprised of (i) \$418,000 as the difference between the boat's value had it been of merchantable quality (ie, without the paintwork defects) and its actual value at delivery; and (ii) \$126,000 as compensation for loss of use of the chattel while being repaired.

PW McDonald

3 Wentworth Chambers