



**A PAPER PREPARED FOR THE CLAIMS DISCUSSION GROUP  
PRESENTATION - 19 JUNE 2018**

**CONSUMER LAW IN PERSONAL INJURY CASES**

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**History**

- 1 Consumer protection law was first introduced into the United States via the Sherman Act in 1890. Australia first introduced consumer law via the Australian Industries Preservation Act 1906. Following a series of successful challenges in the High Court that act was repealed in 1965. That same year the then Attorney General, Sir Garfield Barwick, introduced the Trade Practices Act 1965 which itself was replaced by the Trade Practices Act 1974. The 1974 Act was intended to deal with monopolisation, restraint of trade agreements, anti-competitive mergers and consumer protection.
- 2 Following a review in 2008 of consumer law by the Productivity Commission it was determined that existing State and Federal laws should be reworked to remove many of the State, Territory and Federal laws that overlapped and which created difficulties for business and consumers. It was intended to provide a greater unification of consumer law across Australia. The result of the recommendations was the introduction of the Competition and Consumer Act 2010 (CCA).

- 3 The CCA is comprised of two parts, the first being the Competition and Consumer Act and the second being Schedule 2 to the Act titled The Australian Consumer Law (ACL). Schedule 2 principally deals with consumer protection.
- 4 Whilst the CCA and the ACL work in harmony they are separate and care must be taken not to confuse terminology in one with the other.
- 5 S.2 CCA states the object of the Act being to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. In order to do so the CCA established the Australian Competition and Consumer Commission (Part II), the National Competition Council (Part IIA), the Australian Competition Tribunal (Part III) and the Australian Energy Regulator (Part IIIAA).
- 6 The legislation itself provides for the CCA to apply to the Federal, State and Territory Governments (see S.2A, 2B and 2BA CCA).

## **The CCA**

- 7 S.4 of the CCA provides a definition for terms used in the Act. The definitions apply to the Act and not the ACL (unless otherwise stated). S.4B provides a definition of consumer but that definition is for the purpose of the CCA whereas the ACL provides its own different definition of consumer (contrast S.4B CCA with S.3 ACL).
- 8 S.5 of the CCA provides for Parts IV and XI of the CCA and most of the ACL to have extended application to apply to conduct outside Australia

by corporations carrying on business within Australia, Australian Citizens and persons ordinarily resident within Australia.

- 9 Part VIA of the CCA provides for proportionate liability for misleading and deceptive conduct. The Part only applies to claims for damages under S.236 of the ACL where the claim is limited to economic loss or damage to property (see S.87 CB) and therefore proportionate liability does not apply to claims for damages for personal injury.

**a. Assessment of Damage**

- 10 Part VIB of the CCA provides in respect to claims for damages or compensation for death or personal injury. S.87D is a definition section applicable to Part VIB.

- 11 S.87E provides for Part VIB to apply to proceedings taken under the ACL that relate to claims for personal injury damages (but not smoking related claims) relating to Part 2.2 (unconscionable conduct), Part 3.3 (safety of consumer goods and product related services), Part 3.4 (information standards), Part 3.5 (liability of manufacturers for goods with safety defects) and Division 2 of Part 5.4 (action for damages against manufacturers of goods) of the ACL.

- 12 There is a limitation period for commencing proceedings being not more than 3 years after the discoverability date or the end of the long-stop period (see S.87F). The “discoverability date” is the date when the plaintiff knew or ought to have known of the following:

- (a) that the death or injury had occurred,
- (b) that the death or injury was caused by a contravention of the CCA,

(c) that, in the case of injury, that the injury was sufficiently serious enough to justify bringing an action.

13 The limitation period fixed by S.87G of the CCA is in similar terms to S.50C Limitation Act 1969 (NSW).

14 The long-stop period fixed by S.87H of the CCA is 12 years and, again that is consistent with S.50C Limitation Act 1969.

15 Division 3 imposes a limit on personal injury damages for non-economic loss and a court must not order damages for non-economic loss inconsistent with the Division.

16 There is a maximum amount fixed for non-economic loss and presently that maximum is \$334,260.00 (S.87M CCA). The amount is subject to review in September of each year. Ss. 87P, 87Q, 87R and 87S provide a mechanism for determining non-economic loss which is consistent with the mechanism provided in S.16 Civil Liability Act 2002 (NSW). Additionally, however, the court may, in determining non-economic loss, inform itself of other decisions of the court or other courts to assist in reaching an appropriate figure for non-economic loss damages (see S.87T CCA).

17 In determining damages for economic loss, the court is to disregard the amount by which the plaintiff's gross weekly income during any quarter would have exceeded twice the amount of average weekly earnings (see S.87U and 87V CCA). At present average weekly earnings are determined, in accord with S.87V, at \$1,179.00 and therefore, twice average weekly earnings are \$2,358.00.

18 S.87W fixes a cap on damages that may be awarded for gratuitous attendant care arising from a personal injury claim. Ss. 87W and 87X limit the damages that may be recovered for attendant care in a manner similar to the restrictions imposed by S.15 Civil Liability Act 2002 (NSW). In essence the need for such services must have arisen solely because of the personal injury, the services would not have been provided in any event, the cost of such services is to be fixed against average weekly earnings if such services are provided for at least 40 hours per week and the services must be provided for at least 6 hours per week and for at least 6 months. The current statutory rate for gratuitous services is \$29.48 per hour and this figure is revised annually.

19 The discount rate to be applied to any damages for future economic loss is 5% (see S.87Y).

20 Furzer Crestani publish a table of damages for the Competition and Consumer Act which is similar to the table of damages they publish for the assessment of damages under the Civil Liability Act. The publication is available on their web site.

21 Exemplary and aggravated damages in respect to personal injury damages arising under the CCA are not permitted (see S.87ZB).

### **b. Application of Australian Consumer Law**

22 Part XI of the CCA applies the ACL as a law of the Commonwealth. S.130 provides some definitions and S.130A states that expressions in Part XI have the same meaning as in Schedule 2. S.131 states that Schedule 2 applies as a law of the Commonwealth to the conduct of corporations, and in relation to contravention of Chapter 2, 3 or 4 of

Schedule 2 by corporations. However, the ACL does not apply to financial services (see S.131A) as they are controlled by ASIC.

23 S.131D provides that Chapter 5 of the ACL, which deals with enforcement and remedies, is subject to Part VIB of the CCA which, as stated above, provides for the assessment of damage in claims for damages or compensation for death or personal injury. In other words, the enforcement and remedy provisions of the ACL are subject to Part VIB of the CCA which itself provides for the assessment of damages in personal injury or death claims.

#### **c. Contributory conduct in claims for economic loss**

24 S.137A and S.137B enables an assessment of contributory negligence to be made in certain cases. If, in a claim for loss or damage arising from a defective goods action under S.138, S.139, S.140 or S.141 ACL, such loss or damage arose by both an act or omission of the individual who suffers the loss or damage and the safety defect of the goods then, the amount of the loss or damage is to be reduced to the extent the court thinks fit having regard to the individual's share in the responsibility for the loss or damage (see S.137A). S.137B deals with claims for economic loss or damage to property and not personal injury cases.

25 By S.137C a person is not entitled to recover damages under S.236 (1) ACL to the extent the action is based upon conduct contravening Part 2.1 (misleading or deceptive conduct) or 3.1 (false or misleading misrepresentations) of the ACL (smoking cases are an exception).

#### **d. Contracting out**

26 Part 3.2 Division 1 Subdivision B of the ACL provides for a guarantee in relation to the supply of services. S.64 of the ACL provides that a term of a contract is void to the extent that the term purports to or its effect is to exclude, restrict or modify:

- (a) the application of all or any of the provisions of Division 1 or
- (b) the exercise of a right conferred by such a provision or
- (c) any liability of a person for a failure to comply with a guarantee that applies under Division 1 to the supply of goods or services.

27 In a claim involving death or physical or mental injury S.139A CCA overcomes the effect of S.64 of the ACL in respect to a term of a contract for the supply of recreational services by declaring such a term to be not void only because it excludes, restricts or modifies the application of the provisions of Subdivision B of Division 1 of Part 3.2 ACL. Recreational services are defined in S.139A (2) as services that consist of participation in sporting activity or similar leisure time pursuit or any other activity that involves a significant degree of physical exertion or physical risk and is undertaken for the purpose of recreation, enjoyment or leisure. The section will not apply where the personal injury was caused by the reckless conduct of the supplier of the services.

#### **e. Australian Consumer Law as law of State/Territory**

28 Part XI AA provides for the Australian Consumer Law to be the law of a participating State or Territory provided a participating State or Territory has applied the ACL to itself.

### **Australian Consumer Law (ACL)**

29 Prior to the introduction of the ACL the Federal Government had had difficulty in passing wide ranging uniform consumer protection because of the Commonwealth's limited constitutional power. Following agreement with the States and Territories the ACL was enacted and came into force on 1 January 2011. By agreement, the States and Territories adopted the ACL in place of many of their own consumer laws.

#### **a. Definitions**

30 As noted above the ACL is contained in Schedule 2 of the CCA. The ACL has its own definition section (S.2) and those definitions are applicable to Schedule 2. In particular "consumer goods" are defined as goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption. "Goods" is defined as including ships, aircraft, animals, minerals, trees and crops, gas and electricity, computer software, second hand goods and any component or accessory to goods. "Services" includes any right, benefit, privilege or facility provided, granted or conferred in trade or commerce. "Trade or commerce" is defined to mean trade or commerce within Australia or trade or commerce between Australia and places outside Australia. These definitions are very wide.

31 S.3 ACL defines "Consumer" by reference to the transaction. A person is taken to be a consumer if, and only if, the amount paid or payable for the goods did not exceed \$40,000 or, if the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption. However, a person is not a consumer if the person acquired the goods for the purpose of re-supply or for the purpose of using them in trade or commerce, in the process of production or manufacture or in the course

of repairing or treating other goods. S.3 has deeming provisions and in particular subsections 5, 7 and 8 are relevant.

32 Subsection 10 is important for it provides that if it is alleged in any proceeding under Schedule 2 that a person was a consumer in relation to goods or services, it is presumed, unless the contrary is established, that the person was a consumer in relation to the goods or services.

33 Whether the goods were of a kind ordinarily acquired for personal, domestic or household use is a question of fact and degree. Just because a good may be of a kind that is also acquired for business use does not mean it cannot also be of a kind that is ordinarily acquired for personal, domestic or household use.

34 By reason of S.9 goods are taken to have a safety defect if their safety is not such as persons generally are entitled to expect. In determining the extent of the safety of goods regard is to be given to all relevant circumstances including the manner and purpose for which the goods have been marketed, packaged, any instruction or warning provided, how the goods may reasonable be expected to be used and the time they were supplied.

#### **b. Misleading or deceptive conduct**

35 S.18 provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. This provision is in similar terms to S.52 of the former Trade Practices Act 1974. The terms of S.18 are not, themselves, defined and that is deliberately so because the section is intended to have wide application. The test to determine a breach of S.18 is an objective and a fact-based

test. Breach of the section may occur without any intent being established. Breach is measured by reference to a reasonable person within a class of person to which the conduct is directed.

36 Conduct will be misleading or deceptive if it induces or is capable of inducing a reasonable person in the position of the consumer into error. This involves an analysis of the cause and effect of the conduct on the consumer.

### **c. Consumer guarantees**

37 Part 3.2 Division 1 of the ACL provides for consumer guarantees. In particular S.54 provides that if a person supplies, in trade or commerce, goods to a consumer, and the supply does not occur by way of auction, there is a guarantee that the goods are of acceptable quality. It further provides that goods will be of acceptable quality if the goods are fit for the purpose for which goods of that kind are commonly supplied, acceptable in appearance, free from defects, safe and durable.

38 The guarantee provided in S.54 cannot be excluded through the contract or otherwise by reason of S.64 ACL. In order to comply with S.54 goods must be fit for the purpose for which they are commonly supplied.

39 For the purpose of S.54 it does not matter what purpose the goods were actually acquired but rather they must be fit for the purpose for which goods of that kind are commonly supplied.

40 The terms of S.54 differ from the terms of S.71 Trade Practices Act which spoke of merchantable quality and a warranty. S.54 speaks of acceptable quality, which is defined, and of a guarantee.

41 The time to determine whether the goods were of acceptable quality is at the point of supply to the consumer (see *Merck Sharp and Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145).

42 S.55 imposes a guarantee that goods will be fit for any disclosed purpose and for any purpose for which the supplier represents that they are reasonably fit. The section defines a disclosed purpose as being the particular purpose for which the goods were acquired being a purpose that the consumer made known to the supplier or manufacturer.

43 S.60 imports a guarantee into the supply of services in trade or commerce that the services will be provided with due care and skill. This section is the equivalent of s.74 Trade Practices Act except S.60 provides a guarantee.

44 S.61 provides a guarantee that services will be reasonably fit for a disclosed purpose, where the consumer expressly or by implication, makes known any particular purpose for which the services are acquired.

#### **d. Contracting out**

45 The guarantee provided by S.60 cannot be contracted out except in respect to contracts of insurance and in some contracts for the transportation or storage of goods (see S.63). Further, a term of a contract that purports to exclude, restrict or modify any of the provisions of Division 1 is void (see S.64).

46 S.64 is modified by S.64A in relation to goods or services not being goods or services of a kind ordinarily acquired for personal, domestic or

household use or consumption provided the term limits liability to goods to which the section applies to the replacement of the goods, the repair of the goods, the payment of the cost of replacing the goods or the payment of the cost of repairing the goods. Similarly, a term in a contract for the supply of services other than services of a kind ordinarily acquired for personal, domestic or household consumption, that limits liability to the supply of replacement services or payment of the cost of replacement services, will not be void.

#### **e. Actions against manufacturers**

47 Part 3.5 Division 1 makes provision in respect to actions against manufacturers of goods with safety defects. S.138 of the ACL provides for a manufacturer of goods to compensate an individual if the manufacture supplies goods in trade or commerce and the goods have a safety defect and the individual suffers injury by reason of the defect. Goods have a safety defect if their safety is not such as persons generally are entitled to expect (see S.9 ACL). Where injury is suffered in accord with S.138 the injured individual may recover damages against the manufacturer.

48 In order to succeed in an action under S.138 the individual must establish the existence of a defect in the goods, that injury was sustained and a causal connection between the defect and the injury. The onus of proof lies on the claimant.

49 A manufacturer may defend a claim under S.138 by showing the safety defect did not exist at the time the goods were supplied by the manufacturer, the safety defect occurred because of the need to comply with a mandatory standard, the safety defect could not be discovered

given the state of scientific or technical knowledge when the good was supplied or the safety defect is attributable to a component in the good and the defect is only attributable to the design of the component, the markings on it or instructions given with them (see S.142).

50 If the defect only exists because of compliance with a mandatory standard then the Commonwealth must be given notice of the defence and the Commonwealth then becomes a defendant to the action (see S.148).

51 Further, S.146 provides that a cause of action based on S.138 does not lie if damages have been or could be recovered under a Commonwealth, State or Territory Worker's Compensation scheme. This section does not just preclude recovery of the amount recovered or the amount that could be recovered under a Worker's Compensation scheme but, rather, precludes any recovery at all.

52 S.139 provides for a manufacturer to be liable where another person suffers injury by reason of injury to someone else. The section provides for a manufacturer of goods to compensate a person if the manufactured good was supplied in trade or commerce, had a safety defect and an individual (other than the person) suffers injury because of the safety defect. The section excludes damage arising from a business or professional relationship between the person and the individual.

53 In a claim under S.138 or S.139 the liability of the manufacturer may be reduced to the extent of any contributory act or omission by the person who was injured (see S.137A CCA).

54 S.143 provides a time limit within which to commence a defective goods action that being 3 years from the date the person became aware or ought

to have been aware of the alleged loss or damage, the safety defect of the goods and the identity of the manufacturer.

55 Where the manufacturer cannot be identified S.147 provides for the claimant to give written notice to each supplier of the good who is known to the claimant and for the supplier/s to identify the manufacturer. If the claimant still does not know the identify of the manufacturer after 30 days from the giving of notice then each supplier to whom notice was given and who did not comply is deemed to be the manufacturer.

#### **f. Enforcement and remedies under ACL**

56 Chapter 5 of the ACL deals with enforcement and remedies. Division 3 provides for damages and, in particular, S.236 provides that if a person suffers loss or damage because of conduct of another person and the conduct contravenes Chapter 2 or 3 of the ACL then the claimant may recover the amount of the loss or damage. Such an action must be commenced within 6 years of the date on which the cause of action accrued (S.236 (2) ACL). There is no power to extend the limitation period.

57 It should be remembered that S.137A and S.137B of the CCA enables a court to reduce damages to which those sections relate where the court finds the claimant has contributed to the loss or damage.

58 In assessing damages under S.236 in respect to a personal injury or death claim the court is to apply Part VIB of the CCA.

59 In order to succeed in a claim under S.236 the claimant must establish the loss or damage was caused by the conduct of a person whose conduct

contravened Chapter 2 or 3 of the CCA. Causation is a question of fact to be determined by reference to common sense (*March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506).

60 In a claim under S.236 it is not necessary for the breach to be the sole cause of the loss or damage but the breach must be a material contributing factor (*Henville v Walker* (2001) 206 CLR 459).

61 It is necessary for a claimant to prove reliance in order to succeed in a claim under S.236 although direct evidence of reliance is not necessary. By way of example a claim based on a breach of a S.60 guarantee will only succeed if the claimant can prove reliance upon the guarantee provided.

62 Exemplary or punitive damages are not available under the ACL (see *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494).

### **g. Application of State/Territory law**

63 Finally, I wish to touch on S.275 of the ACL which provides as follows:

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 (ie Ss. 60 and 61 ACL) 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.

64 Notwithstanding that S.64 of the ACL provides that statutory consumer guarantees cannot be excluded or modified by contract, this section provides an exemption. Provided the law of a State or Territory is the proper law of the contract and that law limits or precludes liability, then that law will apply. The NSW Civil Liability Act 2002 is an example of such a law.

65 However, to be caught by S.275 the State or Territory law must limit or preclude liability. In *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 the plaintiff, who had contracted with Insight for a European tour, was injured whilst travelling on a bus between Prague and Budapest when it braked hard whilst she was standing inside the bus.

66 The insurer claimed the contract was governed by NSW law and that it contained a term excluding liability to which S.5N Civil Liability Act, dealing with recreational activity, applied. Therefore, it was claimed, that exclusion clause was picked up by the equivalent of S.275.

67 The High Court noted that the Civil Liability Act did not have extra territorial operation and it raised issue as to whether travelling on a bus was a recreational activity however, the Court determined that S.5N operated to permit parties to a contract for recreational services to provide, by the contract, for exclusion, restriction or modification of liability (see page 157). S.5N did not, itself, operate to exclude, restrict or modify liability. Therefore, S.5N was not picked up into the TPA.

68 The High Court read the equivalent of S.275 narrowly so that for a State or Territory Law to be picked up into the ACL it must, itself, limit or

preclude liability for the breach of the guarantee provided in S.60 or S.61  
ACL.

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Chambers: 19 June 2018

