

Consumer Law

CONSUMER REMEDIES AND THE AUSTRALIAN CONSUMER LAW

If you have a problem with an item or service you have purchased (or in some cases been given) you may be protected under consumer laws.

This factsheet is about the *Australian Consumer Law ('ACL')*,¹ which is the most relevant legislation for the majority of consumer disputes. The ACL is a national law that is applied both by the Commonwealth and by the States. This means that a claim under the ACL can be pursued in a wide range of State and Federal courts and tribunals.

You should note that if your dispute concerns financial products or services, motor vehicles, or home building, it may be covered by the more specific legislation relating to those areas.² There may also be a number of remedies available to you under the *Sale of Goods Act 1923 (NSW)*.

WHO DOES THE ACL APPLY TO?

The ACL applies to disputes between 'consumers' of goods or services and 'suppliers'. Some provisions apply to 'manufacturers' as well.

Under the ACL, a person is a 'consumer' if:

- They acquired the goods or services for less than \$100,000,³ or
- The goods or services are of a type ordinarily used for personal or household consumption, or
- The goods consist of a vehicle to be used principally for the transport of other goods by public roads.⁴

A person (or a business) is taken to be a 'supplier' if they provide services or if they provide goods for sale, exchange, lease, hire, or hire-purchase.⁵

Parts of the ACL apply to disputes with suppliers of loans and other financial products and services. However, other legislation also applies. For assistance with these disputes, you should seek specialist advice (see links below).

WHAT PROTECTIONS ARE AVAILABLE?

The ACL provides a number of prohibitions (which suppliers must not breach) and guarantees (which suppliers must comply with). These protections cannot be fully excluded by contract, though in some cases notifying consumers of a practice that would otherwise breach a provision will make the practice lawful.

The main prohibitions include:

- 'Misleading and deceptive conduct', both generally and in a variety of specific settings.⁶
- 'Unconscionable conduct', which relates to the taking advantage of some particular vulnerability of the consumer.⁷
- 'Unfair contract terms' in standard form contracts (that is, 'take it or leave it' contracts which are provided in the same terms to all consumers).⁸
- A number of other 'unfair practices', including the supply of unsolicited goods, the use of pyramid schemes, referral sale schemes, and the use of undue harassment and coercion.⁹

¹ The ACL can be found as schedule 2 to the *Competition and Consumer Act 2010* (Cth).

² See the *Home Building Act 1989 (NSW)*, *Motor Dealers Act 1974 (NSW)*, and the *National Credit Code*, which forms part of the *National Consumer Credit Protection Act 2009* (Cth).

³ *Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020*

⁴ ACL - Section 3.

⁵ ACL - Section 2.

⁶ ACL - Section 3.

⁷ ACL - Sections 18, 29-38.

⁸ ACL - Sections 20-22A.

⁹ ACL - Sections 23-28.

The main guarantees relating to goods include:

- That the supplier has ownership (or 'title') over the goods and that ownership is passed to the consumer on sale.¹⁰
- That the goods are of acceptable quality and are fit for any disclosed purpose.¹¹
- That goods supplied by description or sample will match the description or sample.¹²
- That repairs will be reasonably available.¹³

The main guarantees relating to services include:

- That the services will be provided with due care and skill.¹⁴
- That the services will be fit for any purposes that are known to the supplier.¹⁵
- That, if there is no agreement about when the services are to be provided, they will be provided in a 'reasonable time'.¹⁶

THE 'TRADE OR COMMERCE' REQUIREMENT

Most of the protections in the ACL apply only to disputes 'in trade or commerce'. The main provisions that do *not* have this limitation are the prohibitions on unfair contracts, unsolicited goods and pyramid schemes.

'Trade or commerce' is defined to include 'any business or professional activity (whether or not carried on for profit)'. It includes trade carried out between Australia and other countries, such as purchasing goods from overseas.¹⁷

There is a large quantity of judge-made law on the precise meaning of 'trade or commerce'. In general, any transaction with a company or business, if it relates to their usual activities, will be included. More difficult cases arise where the transaction is a private sale between individuals, or is not directly related to a business' core activities. You should seek legal advice in those cases.

ONLINE TRANSACTIONS

The ACL applies to online transactions, including purchasing goods from overseas, as it would to local transactions made in person. However, there may be practical difficulties in enforcing the provisions of the ACL against foreign suppliers or manufacturers. It is therefore often a better idea to lodge a complaint with the consumer body in the country where the trader is situated. One way to do this is through www.econsumer.gov, a multilateral consumer complaints system which routes complaints to the relevant consumer bodies within the 13 participating countries (including Australia).

SALE BY AUCTION

As a general rule, the ACL does *not* apply to auctions (including online auctions). However, the seller is still required to provide the goods with 'clear title' (that is, without any pre-existing claims over them by third parties), unless the claim is disclosed before purchase. In addition, the NSW Fair Trading may be willing to consider claims of false or misleading representations regarding goods purchased at auction.

Note also that goods purchased on auction sites using immediate purchase functions (such as eBay's 'Buy it now' function) are treated as normal sales and are covered by the ACL (assuming that the sales are made 'in trade or commerce', as discussed above).

¹⁰ ACL - Sections 39-50.

¹¹ ACL - Sections 51-53.

¹² ACL - Sections 56-47.

¹³ ACL - Section 58.

¹⁴ ACL - Section 60.

¹⁵ ACL - Section 61.

¹⁶ ACL - Section 62.

¹⁷ ACL - Section 2.

WHAT REMEDIES ARE AVAILABLE?

The remedies available for different breaches of the ACL are complex, and you should seek legal advice on them before making a claim.

Damages

The main remedy available under the ACL is 'damages'. This is a money payment intended to compensate you for loss caused by the breach of the ACL. It is not the same as a full refund. For instance, if you are alleging that a person has failed to use due care and skill in supplying you a service, the damages you can claim will amount to the difference between the price you paid the person and the actual worth of whatever services you received.

Additional Remedies for Breaches of Consumer Guarantees

A number of other remedies are available for failures to comply with the consumer guarantees. Which of these is available depends on whether or not the deficit is classed as a 'major failure'.

A 'major failure' of a guarantee relating to supply of goods is defined as one where:¹⁸

- A reasonable consumer would not have acquired the goods if they had known about the failure;
- The goods are unsafe;
- The goods are substantially unfit for purpose; or
- The goods are significantly different from the demonstration model or sample.

A 'major failure' of a guarantee relating to supply of services is defined as one where:¹⁹

- A reasonable consumer would not have acquired the goods if they had known about the failure;
- The supply of services creates an unsafe situation; or
- The services are substantially unfit for purpose and this cannot be easily remedied.

If the failure to comply with a guarantee is a 'major failure', you may have the right to reject and return goods for a full refund, to terminate a services contract, or to pay only the actual value of the services received.²⁰

If the failure to comply with a guarantee is not a 'major failure', the supplier may be required to remedy it within a reasonable time (by repair or replacement), or to pay costs for you remedying it.

If a failure to comply with a guarantee is not a "major failure", but happens repeatedly, this can amount to a major failure.²¹

Remedy for Unfair Contract Terms

Where a term in a standard form contract is found to be unfair, you can seek a declaration that the unfair term is void, meaning that the supplier cannot invoke it.²²

This does not necessarily mean that the entire contract will be voided. It is more likely, if the contract can stand without it, that only the specific unfair term will be 'severed' and the remainder will continue to operate.

OPTIONS FOR RESOLVING CONSUMER COMPLAINTS

Informal resolution

You should first contact the supplier to explain the complaint and how they would like it resolved. It is usually a good idea to start by just visiting or calling the supplier and then, if the matter does not resolve, send them a letter

¹⁸ ACL – Section 260.

¹⁹ ACL – Section 268.

²⁰ ACL – Sections 259-269.

²¹ *Treasury Laws Amendment (2020 Measures No. 6) Act 2020*

²² ACL – Sections 16, 243.

outlining the problem. Many issues resolve at this stage.

Mediation

You may be able to solve your dispute via assisted mediation, in which you and the supplier are assisted to come to an agreement by a trained negotiator. Mediation services for small, relatively simple disputes are available without cost from NSW Fair Trading and from Community Justice Centres (see links below). This approach is likely to be significantly easier and cheaper than formal legal proceedings.

Taking Legal Action

You should consider getting legal advice about what options are available before commencing any legal proceedings.

The appropriate place to commence proceedings, for most people, will be the NSW Civil and Administrative Tribunal (NCAT). NCAT hears disputes under the ACL where the amount claimed is less than \$40,000. Applications to NCAT can be made online (see links below), and attract a fee ranging from \$52 to \$279 (as at July 2021), depending on the amount claimed. A reduced fee of \$13 to \$70 is available to most persons in receipt of a Centrelink payment.

If your matter cannot be heard by NCAT, it may be heard in any of a number of courts, depending on the situation. In this case, you should seek specific legal advice.

USEFUL REFERRALS AND LINKS

Inner City Legal Centre (www.iclc.org.au; 02 9332 1966)

Provides consumer law advice by appointment to residents of the inner city and surrounding areas. To find a legal centre for other areas, see www.clcnsw.org.au.

Financial Rights Legal Centre (www.financialrights.org.au; 1800 007 007)

Provides specialist advice on consumer disputes relating to financial products and services.

NSW Office of Fair Trading (www.fairtrading.nsw.gov.au; 13 32 20)

NSW body providing mediation, advice and information for consumer complaints.

Australian Competition and Consumer Commission (www.accc.gov.au; 1300 302 502)

Federal body providing advice and information on consumer disputes. The Commission also has responsibility for overseeing the ACL.

Community Justice Centres NSW (www.cjc.justice.nsw.gov.au; 1800 990 777)

Provides free mediation, including for disputes between small businesses and consumers.

NSW Civil and Administrative Tribunal (ncat.nsw.gov.au/ncat/case-types/consumers-and-businesses.html; 1300 006 228)

Has the jurisdiction to hear most consumer disputes where the amount claimed is less than \$40,000.

This information is current to 27 August 2021 and reflects the law in New South Wales. It is general information and is no substitute for legal advice tailored to your particular circumstances. For assistance, contact the ICLC on 9332 1966.