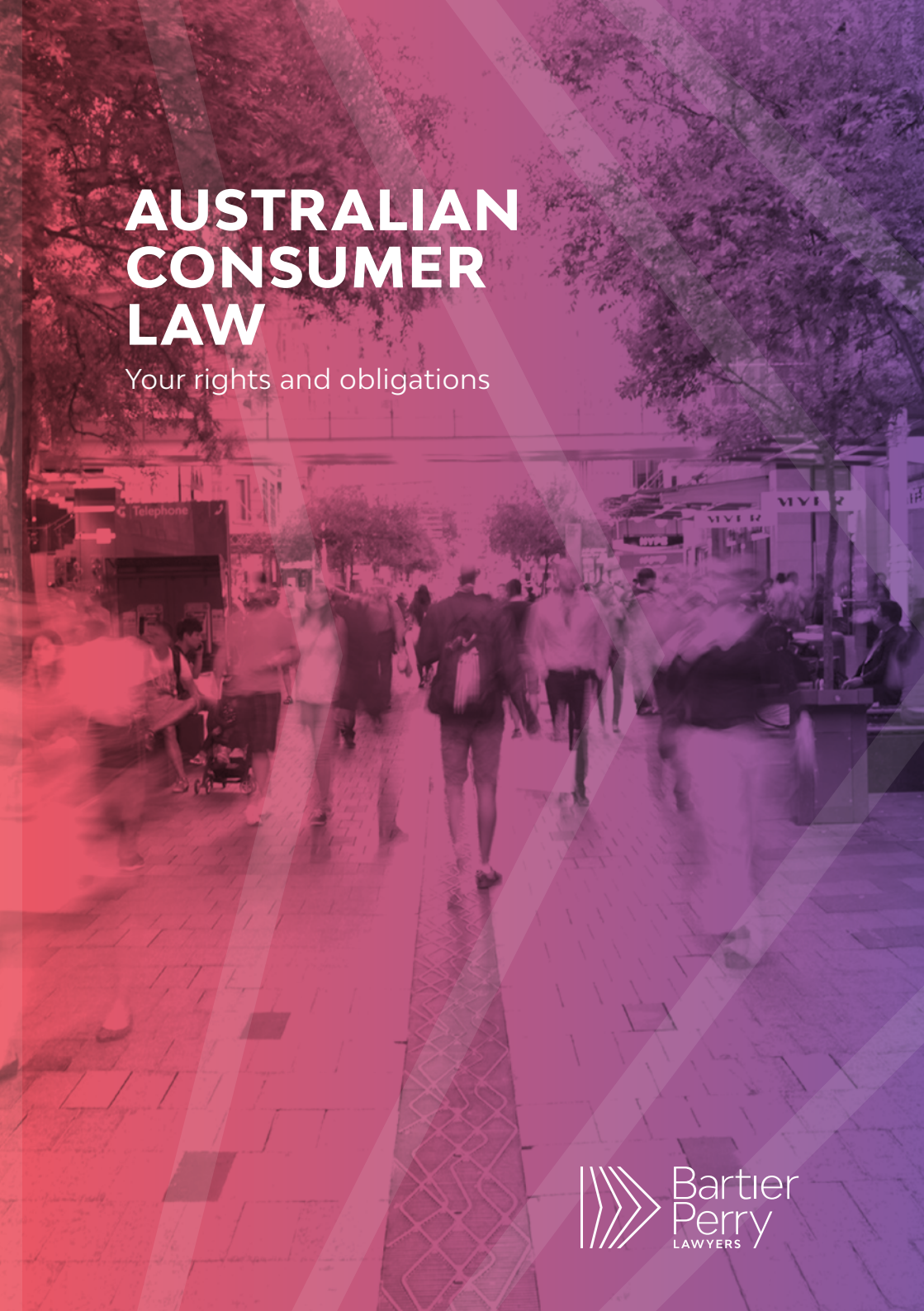
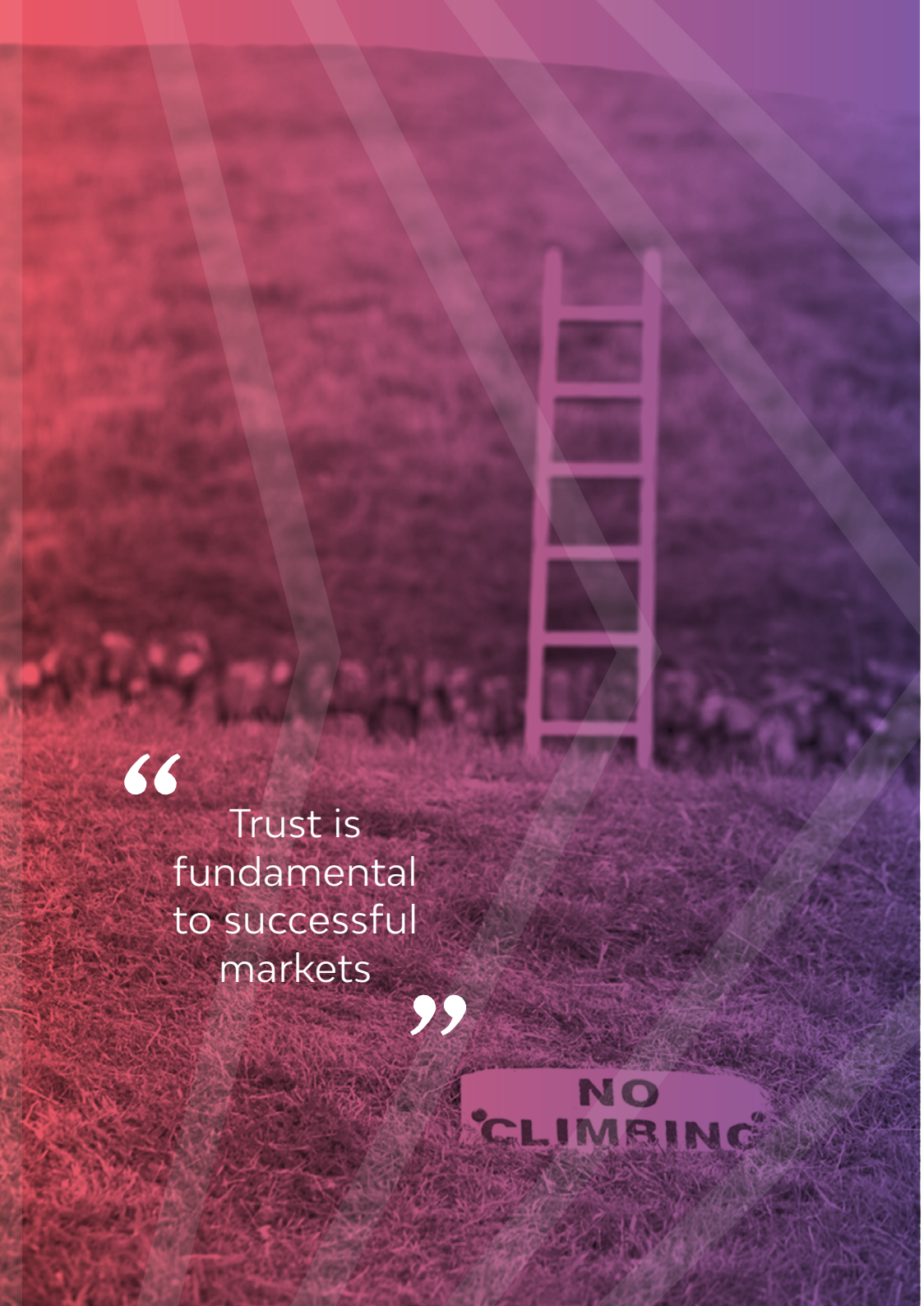
AUSTRALIAN CONSUMER LAW

Your rights and obligations



Bartier Perry LAWYERS



CONTENTS

WHAT IS THE AUSTRALIAN CONSUMER LAW?	04
KEY TERMS	05
MISLEADING OR DECEPTIVE CONDUCT	08
FALSE OR MISLEADING REPRESENTATIONS	12
UNFAIR CONTRACT TERMS	15
CONSUMER GUARANTEES	20
WARRANTY AGAINST DEFECTS	26
REMEDIES	30
KEY CONTACTS	31

WHAT IS THE AUSTRALIAN CONSUMER LAW?

The Australian Consumer Law **(ACL)** is a national law for the promotion of fair trading and consumer protection. It is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

If you sell goods or services – whether as an individual or a business – to consumers or small businesses, you're almost certainly bound by its provisions.

§§

BREACHING YOUR OBLIGATIONS

It's important to understand your obligations, as breaching them can be costly. In recent years, one organisation and its director were jointly fined a total of **$18 million**.

The ACL covers your obligations regarding unfair practices, consumer dealings and product safety. It is a long and complex piece of legislation, so we created this easy to understand guide to set out some of its key elements.

Note that the ACL does not apply to the supply of financial products and services. This is covered by the *Australian Securities and Investments Commission Act 2001* (Cth).

KEY TERMS

KEY TERMS

Let's start by defining some key terms.



CONSUMER

A person who acquires:

- goods or services that cost **$40,000** or less
- goods or services of a kind ordinarily acquired for personal, domestic or household use.



GOODS

Include ships, aircraft, other vehicles, animals, minerals, trees and crops, gas and electricity, computer software, second-hand goods and any component part of, or accessory to, goods.



MANUFACTURER

Includes a person who:

- grows, extracts, produces, processes or assembles goods
- holds themselves out, or causes or allows themselves to be held out by another, to the public as the manufacturer
- uses their own brand or name in relation to goods
- imports goods where the person manufacturing the goods does not have a place of business in Australia.

Under the ACL, you don't have to physically manufacture goods to be classed as a manufacturer. If you import or apply your brand to them, you'll still be considered a manufacturer.



REPRESENTATION

Is a statement, made orally or in writing or by implication from words or conduct, relating to a matter of fact. It may be made by plans, drawings, maps, pictures, photographs, gestures, demeanour and/or other conduct. Silence or inaction may also amount to a representation.



SAFETY DEFECT

Goods will have a safety defect if their safety is not what people are generally entitled to expect.

In determining the safety of the goods, the court will have regard to:

- the manner and purposes for which they have been marketed
- their packaging
- the use of any mark in relation to them
- any instructions for, or warnings
- what might reasonably be expected to be done with them
- the time when they were supplied by their manufacturer.



SERVICES

Rights, benefits, privileges or facilities provided in trade or commerce.



SUPPLY

- Goods: includes resupply by way of sale, exchange, lease, hire or hire-purchase
- Services: provided, granted or conferred



TRADE OR COMMERCE

Includes a business or professional activity (whether or not carried on for a profit) within Australia or between Australia and places outside Australia.

KEY TERMS

MISLEADING OR DECEPTIVE CONDUCT

MISLEADING OR DECEPTIVE CONDUCT

Trust is fundamental to successful markets. The ACL places great emphasis on ensuring that consumers can rely on what you, as a supplier, say and do – as well as the things you don't say or do.



UNDERLYING PRINCIPLE

The underlying principle is that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.

Don't make the mistake of thinking that if no one was deceived, your actions won't fall foul of the ACL. In fact, it's not necessary to prove that anyone was actually misled; only that the conduct was likely to mislead or deceive.



What constitutes misleading or deceptive behaviour isn't explicitly stated. But if the overall impression of the conduct induces or is capable of inducing error, it's likely to breach the ACL.

TYPES OF MISLEADING OR DECEPTIVE CONDUCT

This table outlines various ways it's possible to be misleading or deceptive.

Silence	Silence may amount to misleading or deceptive conduct. The test is whether there was a reasonable expectation that the relevant fact would be disclosed or whether there was a duty to disclose.
Half-truths	A half-truth may amount to a misrepresentation where it lulls the receiver into a false sense that they are receiving the whole truth.
Predictions	A prediction or forecast that does not eventuate can amount to misleading or deceptive conduct if: – it was made knowing it was false or made with reckless disregard – the maker does not have reasonable grounds for making the representation.
Opinions	Even a statement of opinion can constitute misleading or deceptive conduct if it is not genuinely held, or a reasonable degree of professional skill and care is not used in giving it, or there are no reasonable grounds for expressing it.
Comparative advertising	Is a direct challenge to a competitor's product or service in an advertisement. There is a 'heavy responsibility' to ensure it is accurate, because an inaccurate comparison is inherently likely to mislead the public.
Ratings	The use of star ratings on packaging or advertising can be a quick and easy way to help consumers with comparing products. It also means that star ratings and imagery are powerful and can influence consumer decision making.
Corrections	Failure to correct a true representation which later becomes untrue may be misleading. Correcting a misleading statement does not absolve you of liability – conduct is considered at the time you made the statement.

If you're wondering why puffery isn't on that list, it's because puffery is not misleading or deceptive. While it will depend on the specific facts, claims that are so wildly exaggerated, fanciful or vague that no one could possibly treat them seriously or find them misleading will not breach section 18.

What should you do?

- Make sure all advertising and other promotional material is not misleading.
- Ensure you can substantiate all product claims, statements and representations with actual proof.
- Make sure everything you say about your products and services is not only accurate, but is not likely to mislead anyone.
- Get advice if you suspect proposed statements or conduct may be misleading.

What shouldn't you do?

- Don't remain silent when it is necessary to say something to prevent someone from being misled. If you think a customer is not sure about a particular deal term or a feature of a product or service, then make it clear.
- Don't make predictions without reasonable grounds.
- Don't hand out material prepared by others without checking that it's accurate.

Remedies: See the Remedies section on page 30.

FALSE OR MISLEADING REPRESENTATIONS

FALSE OR MISLEADING REPRESENTATIONS

As well as misleading or deceptive conduct, the law prohibits making false or misleading representations. Put simply, it's not okay to lie and it's not okay to make statements that can't be substantiated.



DON'T LIE

Specifically, don't lie about these things

You must not make a false or misleading representation about:

- the standard, quality, grade, composition, style or model, or history of goods
- the standard, quality, value or grade of services
- whether goods are new
- a particular person having agreed to acquire products
- the sponsorship, approval, performance characteristics, accessories, uses or benefits of use of products or services
- the price of products or services
- the availability of facilities for the repair of goods or the availability of spare parts
- the place of origin of goods
- the need for the products or services
- the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy.

While this prohibition is similar to 'misleading and deceptive conduct', there are more remedies available. See the Remedies section on page 30.

What should you do?

- Make sure all advertising and promotional material contains accurate statements about the qualities and other characteristics of your products.
- If you think any statements about your products may be false or misleading, and prohibited, get advice.

What shouldn't you do?

- Don't make claims about the qualities or origin of your products or services unless you can prove them.
- Don't use deceptive pricing practices. For example, an 'original price' must have been the original price for a reasonable time.
- Don't make statements or enter discussions about legal rights under warranties, etc.
- Don't make claims that another person has agreed to buy your products when they have not yet formally agreed.

$

RECORD PENALTY

In December 2019, the Federal Court imposed a record penalty of $125 million against Volkswagen AG for making false or misleading representations about its compliance with Australian diesel emissions standards. The penalty reflected what the ACCC claimed was 'blatant and deliberate' conduct by Volkswagen. The **$125 million** penalty imposed on Volkswagen was calculated under the old penalties regime where companies could be penalised up to $1.1 million for each breach. Now, the ACCC can seek penalties of up to the greater of $10 million per breach, three times the profit or benefit obtained or, if this cannot be accurately determined, 10% of turnover.

Remedies:

See the Remedies section on page 30.

UNFAIR CONTRACT TERMS

UNFAIR CONTRACT TERMS

Not all unfair contracts are invalid. In business to business dealings, for example, the law recognises that pre-contractual negotiations give both parties ample opportunity to avoid unfair contract terms.

However, if a consumer contract[1] or small business contract[2] contains unfair terms and the contract is a standard form contract, those terms will be void.

The objective is to protect consumers and small businesses from unfair terms in standard form contracts which they have no opportunity to individually negotiate.



ACCC ACTION

Since the unfair contract terms regime was introduced, the ACCC has prosecuted and forced businesses across a range of industries to vary their standard form contracts – including those involved in telecommunications, mobile phone services, car hire, car parking, health and fitness centres, furniture removal, waste disposal, recycling, serviced office provision, potato wholesaling, meal delivery, shipping container stevedoring, project home building, and hair loss treatment.

The ACCC is now lobbying to extend the regime so it also applies to insurance contracts.

[1] Since 1 January 2011
[2] Since 12 November 2016

KEY TERMS

Before looking at this more closely, let's define some of the key terms in this area.



CONSUMER CONTRACT

Contract for the supply of goods or services, or a sale or grant of an interest in land, to an individual. Acquisition of the goods, services or interest in land must be wholly or predominantly for personal, domestic or household use or consumption.



SMALL BUSINESS CONTRACT

Contract for the supply of goods or services, or a sale or grant of an interest in land, to a small business.



SMALL BUSINESS

Employs fewer than **20 persons** (head count not including casual employees). Upfront price:

- does not exceed **$300,000**; or
- does not exceed **$1 million** if the contract duration exceeds **12 months**.



STANDARD FORM CONTRACT

A contract is presumed to be a standard form contract unless proven otherwise. A court will consider:

- the bargaining power of each party
- who prepared the contract
- whether there was an opportunity to negotiate – was it on a take-it-or-leave-it basis?
- was it tailored to the deal?

THE UNFAIR CONTRACT TERMS REGIME DOES NOT APPLY TO:

- terms that define the main subject matter of a contract
- contracts for marine salvage or towage
- charter party of a ship
- contract for the carriage of goods by ship
- constitutions of a company, managed investment scheme or other body
- small business contracts to which a prescribed law of the Commonwealth, State or Territory applies
- contracts relating to the supply, or possible supply, of services that are financial or of financial products
- certain insurance contracts.

A term is unfair when:

01	it causes a significant imbalance in rights and obligations under the contract
02	it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term
03	it would cause significant detriment to the consumer or small business if it were relied on by the other party.

Examples of unfair terms:

Terms that allow one party to:

- avoid or limit performance of a contract
- terminate or renew the contract
- penalise the other for breach or termination of the contract
- vary the upfront price without the right of the other party to terminate
- vary the characteristics of the goods or services
- impose excessive default fees
- limit the evidence that one party can present if taking legal action
- exclude liability (including for negligence or wilful breach).

What should you do?

- Identify any unfair terms in your standard contracts and consider whether other terms counterbalance them.
- Consider whether the terms of the contract as a whole are balanced.
- Seek legal advice if a customer or supplier tries to enforce an unfair contract term that disadvantages you.

What shouldn't you do?

- Renew a standard contract containing unfair terms without considering the contract as a whole.
- Include terms that are not reasonably necessary to protect your business interests.

Remedies:

No million-dollar fines can be handed out initially for falling foul of the unfair contract terms regime. A term declared unfair will simply be voided.

However, if a term is declared unfair by a court and continues to be relied upon, damages, compensation and other remedies are available.

CONSUMER GUARANTEES

CONSUMER GUARANTEES

What are they?

The consumer guarantees are rules applying to goods and services purchased by consumers.

A supplier automatically gives a consumer guarantee whenever it supplies goods and services:

- for **$40,000** or less, or
- for over **$40,000** if it's usually bought for personal or household use.

A supplier cannot contract out of the consumer guarantees.

The consumer guarantees do not apply to goods bought for resupply or for use during production or manufacture.

APPLE REPAIRS

In **2018**, Apple had to pay **$9 million** for making false or misleading representations about repairs for faulty iPhones and iPads in breach of consumer guarantee requirements.

The consumer guarantees for **services** are:

CONSUMER GUARANTEE	SECTION OF THE ACL	DESCRIPTION OF GUARANTEE
Guarantee as to due care and skill	**s60**	That the services will be rendered with due care and skill
Guarantee as to fitness for a particular purpose	**s61**	That the services and any product resulting from the service will be fit for purpose
Guarantee as to reasonable time for supply	**s63**	That the services will be supplied within a reasonable time

The consumer guarantees for **goods** and the relevant section of the ACL are:

CONSUMER GUARANTEE	SECTION OF THE ACL	DESCRIPTION OF GUARANTEE
Guarantee as to title	**s51**	That the supplier has the right to to pass title to the buyer
Guarantee as to undisturbed possession	**s52**	That the consumer will have a right to undisturbed possession (subject to any disclosed security over the goods)
Guarantee as to undisclosed securities	**s53**	That there are no undisclosed security interests in the goods
Guarantee as to acceptable quality	**s54**	That goods are of acceptable quality (except if supplied by auction)
Guarantee as to fitness for any disclosed purpose	**s55**	That the goods are reasonably fit for the purpose represented by the supplier or disclosed by the consumer (whether expressly or by implication)
Guarantee as to the supply of goods by description	**s56**	That the goods supplied by description correspond with that description (except if supplied by auction)
Guarantee relating to the supply of goods by sample or demonstration model	**s57**	That the goods supplied by sample or demonstration model correspond in quality, state and condition with the sample or demonstration model (except if supplied by auction)
Guarantee as to repairs and spare parts	**s58**	That the manufacturer will reasonably ensure that parts and facilities for repair are readily available, other than for auction goods
Guarantee as to express warranties made by the manufacturer	**s59(1)**	That the manufacturer will comply with any express warranty it gives in relation to the goods (except if supplied by auction)



What should you do?

- Ensure your customer service teams understand any consumer guarantee obligations you have as a supplier.
- If a customer complains about the products or services you have supplied, make sure an appropriate remedy under the consumer guarantees is provided.

What shouldn't you do?

- Don't display 'no refund' signs *except* if you have a 'change of mind policy' and clearly state 'no refunds for change of mind'.
- Don't refuse a customer a refund or repair if the goods don't comply with a consumer guarantee.
- Don't tell a customer they need to make a claim direct to the manufacturer – if you are the supplier you must deal with the problem if approached.
- Don't suggest that a customer's rights under the consumer guarantees are limited to a warranty period.

Remedies:

There are no pecuniary penalties for non-compliance with the consumer guarantees. However, a court can make non-punitive orders such as implementing a compliance program and training, corrective advertising and adverse publicity orders.

The remedies available to a consumer will depend on whether failure to comply with the guarantee is major or minor.

A minor failure is one that can normally be fixed or resolved in a reasonable time.

A major failure is one that can't be fixed or is too difficult to fix. For example, when a good:

- has a problem that would have stopped someone from buying it if they'd known about it
- is significantly different from the sample or description
- is substantially unfit for its common purpose or doesn't do what the consumer asked for, and can't easily be fixed within a reasonable time
- is unsafe.



MINOR PROBLEM

When the problem is **minor**, the supplier can choose between:

- with goods: providing a repair or offering the consumer a replacement or a refund
- with services: resupply or a refund.



MAJOR FAILURE

When there is a **major** failure, the consumer can:

- with goods:
  - reject the goods and choose a refund or a replacement
  - ask for compensation for any drop in value of the goods.
- with services:
  - cancel the contract and pay a reasonable amount for the work done, or seek a refund for money already paid
  - keep the contract and negotiate a reduced price for the drop in value of the service.



FAILURE OF THE CONSUMER GUARANTEES

A consumer can also seek damages against the manufacturer of goods where there is a failure of the consumer guarantees for:

- acceptable quality
- matching description:
  - repairs and spare parts
  - express warranties.

WARRANTY AGAINST DEFECTS

WARRANTY AGAINST DEFECTS

What are they?

As well as consumer guarantees, a supplier may provide their own express warranties against product defects.



WARRANTIES

Typically, a warranty tells the consumer that if the goods (or part of them) are defective, the supplier will:

- repair or replace them (or part of them) or
- provide compensation.

Warranties against defects:

- are provided in addition to consumer guarantees and do not limit or replace them
- must have a warranty document which complies with specific ACL requirements
- will only be a warranty against defects if it is made at or around the time that goods are supplied
- do not have to be provided in a formal document, and any material with writing on it could evidence a warranty against defects; for example, wording on the packaging or on a label, if those words contain a promise about what you will do if something goes wrong with a good.

Mandatory wording

There are mandatory text requirements for 'warranties against defects'. A 'document which evidences a warranty against defects' must state:

- what the supplier must do if goods are faulty or defective – eg, repair or replace them
- what the consumer must do to be able to claim the warranty – eg, stop using the goods when a fault arises or contact the supplier or manufacturer and point to the defect
- the name, address, phone number and email (if any) of the business giving the warranty

- the warranty period – how long it lasts for
- what a consumer must do to lodge a claim under the warranty – how to contact you and where to send the claim
- whether you or the consumer are responsible for expenses associated with a warranty claim and how the consumer can claim back any expenses
- that the benefits provided by the warranty are in addition to other rights and remedies available to the consumer under the law.

In addition to these requirements, a warranty against defects must contain the following mandatory text:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

You are free to include extra information in a warranty against defects to explain how consumer rights in the ACL apply. However, make sure that information does not limit or negate the mandatory text.



The mandatory text for the supply of goods and services is:

Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

- *to cancel your service contract with us; and*
- *to a refund for the unused portion, or to compensation for its reduced value.*

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

What should you do?

- Ensure that your customer service teams understand that any specific warranties you provide are in addition to any consumer guarantee obligations you have.
- If a customer complains about the products or services you have supplied, make sure that the appropriate remedy under your express warranty or under the consumer guarantees is provided.

What shouldn't you do?

- Don't display 'no refund' signs except if you have a 'change of mind policy' and clearly state 'no refunds for change of mind'.
- Don't refuse a customer a refund or repair if the goods supplied don't comply with a consumer guarantee even if you have an express warranty. A consumer can still choose to obtain a remedy available under the consumer guarantees.
- Don't tell a customer they need to make a claim direct to the manufacturer – if you are the supplier you must deal with the problem if approached.
- Don't suggest that a customer's rights under the consumer guarantee are limited to a warranty period or are displaced, reduced or affected in any way by your express warranty.

Remedies:

Breaching the warranty requirements can be either a criminal offence resulting in fines, or a civil offence resulting in pecuniary penalties. In either case the financial burden is severe – **$50,000** if you operate as a company, or **$10,000** for an individual.

Alternatively, the ACCC can issue infringement notices totalling $6,600 if you operate as a company, or **$1,320** for an individual.

Importantly, the offence is one of strict liability. In other words, it is not necessary to show that you acted with intent, knowledge, recklessness or negligence, but only that you engaged in the conduct.

REMEDIES

CONDUCT/ REMEDY	Pecuniary Penalty	Damages	Compen-sation	Injunc-tions	Other Orders
Misleading or Deceptive Conduct	No	Yes	Yes	Yes	Yes
False or Misleading Representa-tions	Yes[3]	Yes	Yes	Yes	Yes
Unfair Contract Terms	No	No	Yes[4]	Yes	Yes
Consumer Guarantees	No	Yes	Yes	Yes	Yes
Warranties Against Defects	Yes[5]	Yes[6]	Yes	Yes	Yes

[3] For companies, the greater of:
- $10 million;
- 3x any benefit derived from the conduct;
- if no benefit is derived, 10% of annual turnover for past 12 months.

For individuals, $500,000 per breach
[4] Only after a term has been declared unfair by a court, and the contravening individual or business continues to rely on it
[5] For companies, $50,000 and for individuals, $10,000
[6] Where the warranty against defects does not comply with Regulation 90

KEY CONTACTS

For more information, contact one of our key team members.



Michael Cossetto
Partner
P 02 8281 7892
mcossetto@bartier.com.au



Jason Sprague
Partner
P 02 8281 7824
jsprague@bartier.com.au



Rebecca Hegarty
Partner
P 02 8281 7941
rhegarty@bartier.com.au



Karen Wong
Special Counsel
P 02 8281 7959
kwong@bartier.com.au

BARTIER PERRY PTY LTD
Level 25, 161 Castlereagh Street, Sydney NSW 2000
T + 61 2 8281 7800
F + 61 2 8281 7838
bartier.com.au
ABN 30 124 690 053

Bartier Perry
@BartierPerryLaw
Bartier Perry
@bartierperrylawyers

To subscribe to our bulletins and events please visit
www.bartier.com.au

Bartier Perry Pty Limited is a corporation and not a partnership.

09/26