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Make sure to write down what MORE INFORMATION needs to be known

<u>Question</u>	<u>Mark allocation</u>	<u>Time allocation</u>	<u>Actual time</u>
Reading + planning		10 mins	
1	10	23 mins	
2	10	23 mins	
3	10	23 mins	
4	30	70 mins	

Consumer Law

Does the Act apply to the conduct of [overseas entity]?

[1]

[ENTITY] engages in conduct outside of Australia (s.5(1) CCA) because [REASON]

- Edelman J in *Valve* stated that ‘engaging in conduct’ includes the ‘making of, or the giving effect to a provision of, a contract or arrangement’.

[2]

[ENTITY] engages in conduct within Australia because [REASON] ([AUTHORITY])

Requirements (s.5(1)(...) CCA):

- (g) The company was incorporated in Australia; or
- (g) The company carries on business within Australia; or
 - o Edelman J found that carrying on a business involves the repetition of acts or transactions that support the business (*Valve*)
- (h) If the entity (ie natural person) is an Australian citizen; or
- (i) If the entity is a resident of Australia

If proved to the affirmative, Australian jurisdiction would be invoked.

Valve:

- US corporation that owned Steam
- Carried on business in Australia as:
 - 2.2m Australian accounts; generated revenue from these customers
 - Significant personal property and servers located in Australia (retail value of \$1.2m)
 - Incurred expenses in Australia for rack space and power for its servers
 - Relied on relationships with 3rd party members for content delivery in Australia

[3] Consequence

The application of the CCA will extend to conduct of Australia for (s 5(1)(...) CCA):

- (a) Part IV (Restrictive Trade Practices)
- (c) The Australian Consumer Law (excluding Part 5-3)

Exclusion clause attempting to override ACL

The Supreme Court of NSW held that exclusion clauses imposing a time limit are valid and can override the ACL (*Kell & Rigby*; *Firstmac*; *Lane Cove*). However, the Supreme Court of Victoria held that exclusion clauses cannot override the ACL. The time limit is contrary to the public policy of the ACL and it is not consistent with the public purpose of the ACL to leave claimants uncertain about whether courts, on a case by case basis, will determine contracted time limits to be so unreasonable as to be unenforceable (*Brighton Australia Pty Ltd*; *Omega Air Inc*). As [company] was incorporated and trades in Victoria, the case will likely follow its Victorian precedents; ACL likely applies. As such, we recommend [P] to seek justice in Vic courts.

Consumer Guarantees

If contract says laws governed by foreign country not ACL

Although Clause [X] in the K purportedly states that the agreement is governed by the laws of [a foreign country], s.67 ACL renders that clause ineffective (Valve).

Introduction

[P] will argue that they are entitled to relief from [D] for breaching a consumer guarantee(s) under Part 3-2 ACL.

[1] Define the parties

X is a manufacturer because they produce [products] (s7(1)(a) ACL).

X is a supplier because

- Goods: they are supplying [product] by way of [sale/exchange/lease/hire/hire-purchase] (s2(a) ACL)
- Services: they are providing a service of [X] (s2(b)ACL).

Manufacturer: (s7(1)(..))

- **(a) grows, extracts, produces, processes or assembles goods**
- **(b) holds themselves out to the public as the manufacturer of goods**
- **(c) a person who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied by the person** (s7(2)(a)(...) ACL)
 - Where a name, brand or mark is taken to be applied to goods if (s7(2)(a)(...) ACL):
 - **(i)** it is woven in, impressed on, worked into or annexed or affixed to the goods; or
 - **(ii)** it is applied to a covering, label, reel or thing in or with which the goods are supplied
 - If **(c)** applies, it is presumed that the person caused or permitted the name, brand or mark to be applied to the goods, unless the contrary is established (**s.7(2)(b) ACL**)
- **(d) a person who carries or permits another person, in connection with:**
 - **(i)** the supply (or possible supply) of goods by that other person; or
 - **(ii)** the promotion by that other person by any means of the supply or use of goods to hold out the first person to the public as the manufacturer of the goods
- **(e) imports good into Australia if:**
 - (i) they aren't the manufacturer of the goods; and
 - (ii) at the time of the important, the manufacturer of the goods does not have a place of business in Australia

Supplier (s.2(...) ACL):

- **(a)** goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase
- **(b)** services – provide, grant or confer

Y is a consumer because [Y] acquired the [good] which doesn't exceed \$40,000: here the price is [\$X] (s.3(1)(a) ACL)

- **(1) acquired goods where:**
 - **(a) the amount paid by the goods doesn't exceed \$40,000; or**

- (b) the goods were of a kind ordinarily acquired for **personal, domestic or household use** or consumption; or
- (c) the goods consisted of a **vehicle or trailer** acquired for use principally in the **transport of goods** on public roads
- (2) sub-section (1) doesn't apply if the person acquired the goods, or held himself or herself out as acquiring the goods:
 - (a) for the purpose of **re-supply**; 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
- (3) acquired services where:
 - (a) the amount paid or payable for the services doesn't exceed \$40,000; or
 - (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption

Exclusions

- Goods
 - Bought before 1 January 2011
 - Bought from one-off sales by private sellers,
 - Bought from auctions where the auctioneer acts as agent for the owner
 - Bought to on-sell or re-supply
 - They are used as part of a business to manufacture or produce something else, or repair or use on other goods or fixtures
- Services:
 - Services bought before 1 January 2011
 - Services costing more than \$40,000 for commercial use
 - Transportation or storage of goods for the consumer's business, trade, profession or occupation (s.63 ACL)
 - Contract of insurance (s.63 ACL)

[2] Does the conduct occur in trade or commerce?

In trade or commerce because the conduct occurred [within Aus/between Aus and places outside Aus] and is for the business activity of [X] because [REASON] (s.2 ACL).

- Trade or commerce means (s.2 ACL):
 - Trade or commerce within Australia; or
 - Trade or commerce between Australia and places outside Australia
 - And includes any business or professional activity (whether or not carried on for profit e.g. charities)

[3.1] Which guarantees for **goods** does [D] breach?

1. Title
2. Undisturbed possession
3. Undisclosed securities
4. Acceptable quality
5. Fitness for disclosed purpose
6. Supply of goods by description
7. Supply of goods by sample or demonstration model
8. Repairs and spare parts
9. Express warranties

1. Guarantee as to title

[P] will argue that [supplier] didn't have the right to supply [him/her] with [good] (s.51), breaching their guarantee as to title. **FACTUAL ANALYSIS.**

- This doesn't apply if it is clear from either the K for supply or inferred from the circumstances that the supplier didn't have possessed (**s.51(2)(a), (b) ACL**)
- Doesn't apply for supply by way of hire or lease (**s.51(3) ACL**)

2. Guarantee as to undisturbed possession

(no one will try to reclaim/repossess/take back your good)

As [P] has been supplied [GOOD] and it **isn't a supply of limited title**, [he/she] may take action against [Supplier] for breaching their guarantee as to undisturbed possession (s52(1))

- Does not apply if someone else has a security, charge or encumbrance disclosed prior to acquisition (s52(2)).

OR

As [P] has been supplied [GOOD] and **of limited title**, [he/she] may take action against [supplier/any party to the contract] for breaching their guarantee as to undisturbed possession (s52(3)).

- (c) supplier
- (d) any of the parties to the K
- (e) anyone claiming through the supplier or another party

Hire/lease arrangement

As this is a [hire/lease arrangement], the guarantee will only apply for the duration of the hire/lease (s52(4) ACL).

3. Guarantee as to undisclosed securities

Red Flag – lease or mortgage has been imposed on the goods

As [P] has been supplied [good] by [supplier] (s.53(1)(a)), and that supply is not of limited title (s.53(1)(b)), there is a guarantee that the good is free of any security, charge or encumbrance that [P] did not know about prior to agreeing to be supplied [good] or did not consent to (s.53(1)(c)(i), (ii)). **FACTUAL ANALYSIS.**

Supplier will not fail to comply with the guarantee if there is a floating charge over their assets unless it becomes enforceable (**s.53(2) ACL**).

4. Guarantee as to acceptable quality (s54)

1) Acceptable purpose test to test if merchantable quality (Aus Knitting Mills):

- fit for all the purposes for which goods of that kind are commonly supplied (s54(2)(a))
- acceptable in appearance and finish (s54(2)(b))
- free from defects (s54(2)(c))
- safe (s54(2)(d))
- durable (s54(2)(e))

Here, pursuant to s54(2), a reasonable consumer that is fully acquainted with the state and condition of [Good] would likely/not likely consider this acceptable (Dixon J in Aus Knitting Mills)

2) Taking into consideration:

- **nature** of the goods (s54(3)(a))
 - e.g. new versus second hand, the type of item it is (e.g. aircon is supposed to be noisy – but it is a residential aircon so should be relatively quiet)
 - taking into acc age, mileage, price of product (Paisley)
- **price** of goods above (s54(3)(b))
 - 500 is considered a significant purchase in my eyes lol
- any **statements** made about the goods by the supplier or manufacturer of the goods (s54(3)(c))
- any **representation** made about the goods by the supplier or manufacturer (s54(3)(d))
- any **other** relevant circs (see Geros) (s54(3)(e))

3) Satisfies acceptable quality:

- If **P was made aware** of something, and that something is the only reason why it is not of acceptable quality, the good will be of an acceptable quality (s.54(4))
- If P **causes the good to be of unsuitable quality**, fails to prevent them from becoming of unreasonable quality and damages them through abnormal use (**s.54(6)**)
- If P **examined the goods beforehand** and the examination ought to have revealed that the goods were not of acceptable quality (**s.54(7)**)

In the circumstances, failure is/is not likely of “substantial character” (Stephens), s54 has/has not been breached.

Defining auction:

- Sale by auction, in relation to the supply of goods by a person, means a sale by auction that is **conduct by an agent of the person** (whether the agent acts in person or by electronic means) (s.2)

Acceptable quality:

Geros:

- Doorframe/door purchased too short + narrow
- Carpenter had to cut or it wouldn't fit properly + would cut into floor

Paisley:

- Purchase of car was out of petrol/no mats provided/battery flat the next day
- Satisfies the conditions it was sold for: was 8 years old, had run 80,000 km, given the price of \$12,500

Kloet

- Fireplace insufficiently warm
- Just inefficient

Merck Sharp:

- Consumer argued that the Vioxx medication for arthritis pain doubled the risk of a heart attack
- No causal connection because it was the consumer's personal unfit condition that led to the increased risk.

Not acceptable quality:

Ridley

- Clutch of vehicle failed 8 days after purchase

Stephen

- **10 year old 2nd hand vehicle required repairs soon after purchase**

Medtel

- **Batch had problems as a result of soldering**
- Not of merchantable quality even though P's pacemaker had not failed
- It was enough to consider the impact it would have had to determine whether it was fit for all purposes for which it was supplied

Henry Kendall:

- The farmer asked the employee whether he could purchase a product that was described as animal food for his cattle and poultry; employee said he could
- The farmer fed this product to their pheasant (birds) which died
- The product had a toxin in it that didn't affect most animals (cattle, sheep, etc), but it did affect birds
- The product was fit for one purpose – animal food for some animals
- If goods have:
 - 1 ordinary use – supplier impliedly promising that goods are fit for that purpose
 - More than 1 ordinary use – no implication that it's fit for all uses
- If the buyer specifies that they need a product for a particular ordinary use, then the supplier is liable unless they can prove that goods are fit for at least one of the ordinary uses

5. Guarantee as to fitness for disclosed purpose

As [P] supplied [good] in trade or commerce and not by way of an auction, there is a guarantee that they will be fit for their disclosed purpose (s.55(1)). The disclosed purpose here is [...] (s55(2)).

Therefore, it is sufficient that [P] having disclosed the purpose, had acted and relied on the skill and judgement of [D] (Ashford Shire; Ashington Piggeries).

[D] may argue

- From the facts, [P] didn't actually rely on the skill or judgment of [D] (s55(3)) - [P] had knowledge on the topic as [...]
- [P] will argue irrelevant as they did not have sufficient knowledge about the [specific good], like with the tractors in Ashford Shire and mink food in Ashington Piggeries.

Ashford Shire:

- Asked salesperson if tractor could be used for road work
- Salesperson said yes
- Purchased tractor but was unable to use for road work
- Sufficient that [D] having disclosed the purpose, acted and relied on the skill and judgement of the salesperson
- [D] argue that [P] had sound knowledge about tractors – rejected bc [P] didn't have knowledge about the certain good

Ashington piggeries

- [P] relied on its own skill and judgement for the formula
- [P] relied on [D]'s skill and judgement to supply the herring meal + obtain suitable ingredients.

6. Guarantee as to supply of goods by description

As [P] supplied [good] in trade or commerce, and was not done through auction, there is a guarantee that the goods match with their description (**s.56(1)**). [apply facts]

7. Guarantee as to supply of goods by sample or demonstration model

As [P] supplied [good] in trade or commerce, and was not done through auction, there is a guarantee that:

- The goods match the **demonstration model** (s.57(1)(c))
- If sold by reference to a **sample**, that it reasonably compares to the same (s.57(1)(d))
- The goods are free from any defect which would not be apparent on the **sample/demo model** (s.57(1)(e)(i)), and any defect which would not be of acceptable quality (s.57(1)(e)(ii))

8. Guarantee as to repairs and spare parts

As [P] supplied [good] in trade or commerce and was not done through auction, there is a guarantee that the manufacturer will take reasonable action to ensure spare parts and facilities for repair and reasonably available (**s.58(1)**).

However will likely not apply as manufacturers took reasonable action to ensure [P] was given **written notice at the time of supply** that:

- The facilities would not be available (**s.58(2)(a)**)
- Parts would not be available (**s.58(2)(b)**)

9. Guarantee as to express warranties

As [P] supplied [good] in trade or commerce, and was not done through auction, there is a guarantee that the manufacturer will comply with any express warranties made with relation to the goods by the manufacturer (or supplier) (**s.59(1) or (2)**). Facts like HP; [D] should be entitled to refund.

Express warranty was made in the prescribed form: (**s.102 (2) ACL**): (a) In a transparent document (b) states what [P] must do to honour warranty.

Failure to comply can attract penalties per offence of up to \$50,000 for companies or \$10,000 for individuals, as well as other remedial orders such as damages or injunctions.

HP:

- Claimed that consumer had to take to the manufacturer to remedy, even though product still covered by warranty.
- Informed not entitled to refund/had to pay for postage + handling to return goods
- [D] should have at least attempted to repair product/replace/offer refund

[3.2] Which guarantees for **services** does [D] breach?

1. Due care and skill
2. Fitness for a particular purpose
3. Reasonable time for supply

1. Guarantee as to due care and skill

As [P] has been supplied [service] by [D], there is a guarantee that the services will be rendered with due care and skill (s.60). Apply facts.

2. Guarantee as to fitness for a particular purpose

As [P] has been supplied [service] by [D] in trade or commerce and has expressly made it known to [supplier] the purposes for that service, there will be a guarantee that the service will be fit for purpose (s.61(1)).

Here, [P] was not sufficiently informed by [P] about [the nature of the service] (Warnock). Apply facts.

Argue that won't apply here as:

- Circs show that [P] did not rely on (or it was unreasonable to) the skill or judgement of [D] (s61(3))
- It is for the supply of professional services by a qualified architect or engineer (s61(4)).

- This extends to any product resulting from the service (s.61(2))

Warnock:

- Customer took out loan – bank manager didn't tell them they had to take out insurance
- Not properly informed about the nature of the insurance
- Did not advise customers correctly (s60)

3. Guarantee as to reasonable time for supply

As [P] has been supplied [service] by [D], there is a guarantee that the services will be provided in a reasonable time (s.62).

This is

- Not fixed by the contract (s62(a)(i)).
- Not determined in a manner agreed to by the customer (s62(a)(ii))