

## Consumer guarantees

[X] will argue that they are entitled to relief from [SUPPLIER / MANUFACTURER / BOTH] for breaching a consumer guarantee under Part 3-2 of the ACL.

### Checklist

1. Part 3-2 only applies if
  - a. there is an acquisition of goods or services by a consumer
  - b. the supply was in trade or commerce
2. There are a number of specific exclusions
3. Identify which consumer guarantees apply
4. What remedies are available for a breach of a consumer guarantee?

### Step 1: Identify the parties

#### Consumer

[P] is a consumer as [GOODS/SERVICES] were valued at less than \$100k and were of a kind ordinarily acquired for personal, domestic, or household use (s 3(1) for goods / s 3(3) for services) – i.e. [FACTS].

EXCEPTION: However, an exception to s 3(1) is made out because [P] acquired the goods...

- for the purpose of resupply (s 3(2)(a))
- in order to use them up in trade or commerce (s 3(2)(b)) – i.e.
  - production or manufacture
  - repairing or treating other goods

#### Manufacturer

[D1] will be deemed a manufacturer as they...

- grew / extracted / produced / processed / assembled the goods (s 7(a))
- held themselves out to the public as the manufacturer of the goods (s 7(b))
- permitted their brand name to be applied to the good (s 7(c))
- permitted [X] to hold them out to the public as the manufacturer of the goods (s 7(d))
- imported the goods in Australia (s 7(e)). Note: Only applied if the manufacturer does not have a place of business within Australia.

#### Supplier

GOODS: As [D] supplied [GOODS] by way of sale / exchange / lease / hire, he/she will be deemed a supplier for the purposes of Part 3-2 (s 2(a)).

SERVICE: As [D] provided / granted / conferred [SERVICES], he/she will be deemed a supplier for the purposes of Part 3-2 (s 2(b)).

Note: A donation of goods/services is not treated as supply, unless the donation is for promotional purposes (s 5(1)(a))

## Step 4: Analogies

The facts are analogous to / can be distinguished from...

- Amadio, where the Amadios were under a special disability because of:
  - their age,
  - their limited grasp of written English,
  - their desire to assist their son,
  - their reliance on and confidence in their son, and
  - their lack of knowledge and understanding of the document
 All of which was known the bank.
- Blomley, where it was unconscionable for Blomley to purchase Ryan's property at a substantial undervalue because Ryan was **old, uneducated, and mentally impaired from regular** drinking – all of which was known to Blomley's father.
- Berbatis, where the Roberts were found not to have special disability in renegotiating a lease as they were merely in a **difficult bargaining position**.
- Louth, where it was held that a disadvantage may arise within a personal relationship due to emotional dependence
- Kavakas, where it was held that a gambler's **pathological interest in gambling was not a special disadvantage**, and the casino had no predatory state of mind in allowing K to gamble.

## Step 5: What is unconscionable?

Unconscionability...

- is something **not done in good conscience** (National Exchange)
- is measured by reference to the normative standards of conscience permeated with **accepted community values**, including factors of **honesty and fairness** (Lux)
- requires an unconscientious taking advantage by one party of some disabling condition or circumstance that seriously affects the ability of the other party to make a rational judgment as to his or her own best interests (Kavakas)

## Step 4: Conclude

Thus it is likely / unlikely that [D] has engaged in s 21 unconscionability.

## Misuse of market power

[ACCC / PLAINTIFF] will argue that [CONDUCT] amounts to a misuse of market power by [X] in breach of s 46 CCA.

- The market in which [X] operates (s 46(1)(a))
- A market [X] supplies goods/service to (s 46(1)(b))
- A market [X] acquires goods/service from (s 46(1)(c))

### Step 1: Define the market + SDMP

To determine whether this is the case, it is important to first define the relevant market (Boral; Safeway). > See Topic 5

### Step 2: Substantial degree of market power (SDMP)

Within this market, [X] must have a substantial – i.e. considerable or large (Dowling) – degree of market power (SDMP). The court will note the fact that...

- [X] is **related to [Z]**, a company that has a SDMP (s 46(3))
- [X] can have SDMP **even though [Y] does as well** (s 46(7))
- the conduct of [X] is **constrained / unconstrained** by its...
  - competitors / potential competitors (s 46(4)(a))
  - customers / potential customers (s 46(4)(a))

Note: Consumers have less power / influence when it comes to essential goods (food, medicine, cleaning etc.) compared to non-essential (e.g. entertainment)
- [X] has power in the market due to its (proposed) **contract / arrangement / understanding** with [Y] (s 46(4)(b))
- [X] may still have SDMP even though...
  - it does not substantially control the market (s 46(5)(a))
  - it does not have absolute freedom from competitors / customers (s 46(5)(b))

Note: This is a counter argument the ACCC can raise if [X] argues s 46(4)(a)(ii)
- [ANY ADDITIONAL FACT], which may be a **relevant matter** per s 46(6)
  - High barriers to entry into the market (Qld Wire)
  - High market share of [X] (Qld Wire)

As such, it is like that [X] does / does not have SDMP.

### Step 3: What is the conduct?

[ACCC] will argue that [X] has misused its market power by engaging in...

- **refusal to deal** with [Y] in order to lessen competition (Qld Wire). By applying the future with and without test (AGL), we can see that the market structure would be affected by this refusal to deal because [REASONS]. Note: Setting prices ridiculously high can still amount to a refusal to deal (Qld Wire)
- **product bundling** by forcing consumers to purchase [PRODUCT 1] alongside [PRODUCT 2].
- **predatory pricing** by setting the price of [PRODUCT] so low that other firms are unable to compete (Boral). Per the two-pronged US test endorsed in Boral, it appears that [X] may be operating below its variable costs – i.e. the cost of the materials /any other additional costs towards making the goods because [FACTS]. Furthermore, it appears that [X] can recoup their losses once their competitors leave the market by raising their prices because [FACTS].

## Withholding supply

### *Because of conduct of 2P*

[SUPPLIER] has likely engaged in RPM as they withheld the supply of [GOODS] for the reason that [SECOND PARTY]...

- didn't agreed not to sell the goods at a price less than that specified (s 96(3)(d)(i))
- sold / is likely to sell the goods at a price less than that specified (s 96(3)(d)(i))

Note: Per s 4F, the reason needs to be a substantial reason but not the only reason.

### *Because of conduct of 3P*

[SUPPLIER] has likely engaged in RPM as they withheld the supply of [GOODS] to [SECOND PARTY] for the reason that [SECOND PARTY] has...

- [THIRD PARTY] has not agreed to the minimum pricing suggested by [SUPPLIER] (s 96(3)(e)(i)).
- [THIRD PARTY] has sold the good/service for less than the price specified / desired by [SUPPLIER] (s 96(3)(e)(ii); Sony Australia).

Note: Per s 4F, the reason needs to be a substantial reason but not the only reason.

### *Definition of withholding supply*

Per s 98, "withholding supply" will include...

- [SUPPLIER] **refusing / failing to supply** goods to / as requested by [SECOND PARTY]
- [SUPPLIER] refusing to supply the goods except on **terms that are disadvantageous** to the [SECOND PARTY]
- [SUPPLIER] **treating [SECOND PARTY] less favourably** in respect to...
  - time of delivery
  - method of delivery
- [SUPPLIER] **causing / procuring [Z] to withhold the supply** of goods to [SECOND PARTY]

... even if just temporarily (Pye Industries).

### *Rebuttable presumption*

If [SECOND PARTY] can show that [SUPPLIER] withheld supply of the goods, and [SUPPLIER] had previously been supplying [SECOND PARTY] goods of that kind, and during the 6 months prior to withholding the supply [SUPPLIER] became aware of a matter capable of constituting a reason referred to in s 96(3)(d) or (e), it will be presumed, unless shown otherwise, that the matter was the reason for [SUPPLIER] withholding the supply (s 100(1)).

As such, [APPLY TO FACTS].

## Step 2: Have the goods been "sold"?

The concept of "selling" includes...

- advertising goods (s 96(7)(a))
- displaying goods (s 96(7)(b))
- offering goods (s 96(7)(c))

... for sale at a price less than that specified by [SUPPLIER].