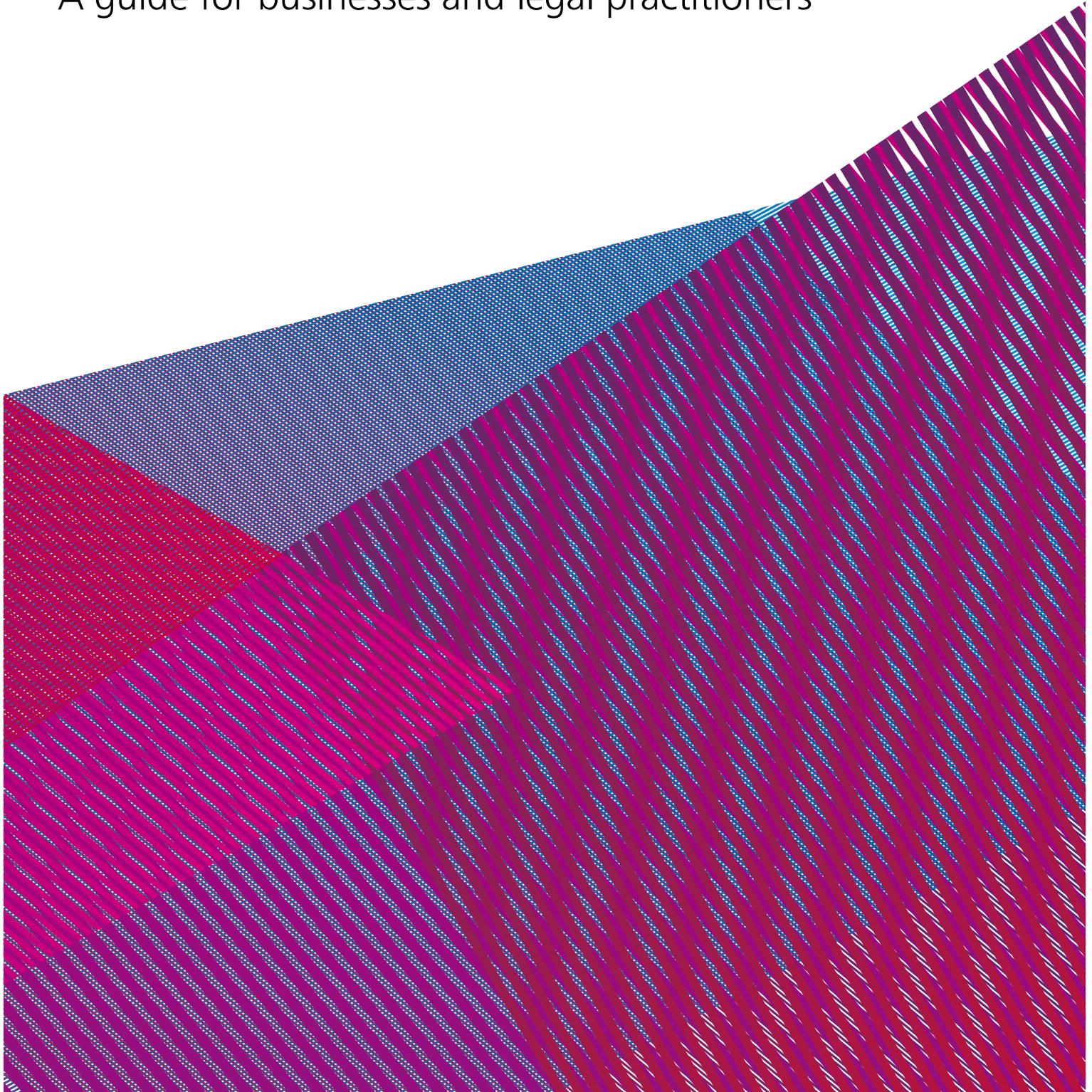


# Consumer guarantees

A guide for businesses and legal practitioners



This guide was developed by:

- Australian Capital Territory Office of Regulatory Services
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs and Fair Trading Tasmania
- Consumer Affairs Victoria
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Office of Consumer and Business Affairs South Australia
- Queensland Office of Fair Trading
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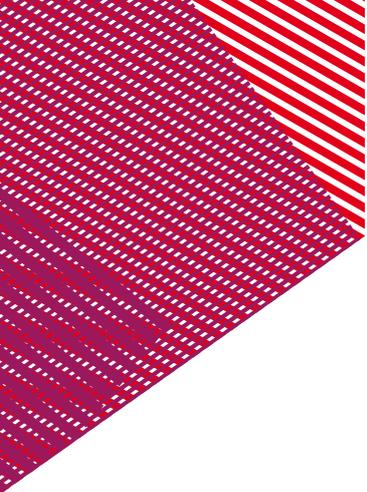
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# Introduction

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This is one of six guides to the Australian Consumer Law (ACL), developed by Australia's consumer protection agencies to help businesses understand their responsibilities under the law.

These guides:

- > explain the law in simple language but are no substitute for the legislation
- > give general information and examples – not legal advice or a definitive list of situations where the law applies.

## About this guide

This guide will help you understand:

- > what consumer guarantees apply to certain goods and services
- > who is responsible for satisfying the requirements of the consumer guarantees
- > when remedies, such as a refund, repair and replacement, will be available.

This guide is based on material prepared by the New Zealand Ministry of Consumer Affairs about their legislation, the *Consumer Guarantees Act 1993*. Consumer guarantees in the ACL are very similar to the New Zealand legislation.

## About the other guides

The other guides in this series cover:

- > **sales practices**  
explains unsolicited supplies, unsolicited consumer agreements (door-to-door and telemarketing), lay-by agreements, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion
- > **product safety**  
covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements
- > **unfair business practices**  
covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations, information standards
- > **unfair contract terms**  
outlines what an unfair term is and which contracts are affected by the law
- > **compliance and enforcement**  
outlines how consumer protection agencies will enforce the law.

The Australian Treasury also publishes information about the ACL – see *The Australian Consumer Law – a guide to provisions*, available from the Australian Treasury website at [treasury.gov.au](http://treasury.gov.au) or the Australian Consumer Law website at [consumerlaw.gov.au](http://consumerlaw.gov.au).

## About the Australian Consumer Law

The ACL aims to protect consumers and ensure fair trading in Australia.

It is a national, state and territory law from 1 January 2011 and includes unfair contract terms legislation introduced on 1 July 2010.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL. The regulators of this law include:

- > the Australian Competition and Consumer Commission (ACCC)
- > the Australian Securities and Investments Commission (ASIC)
- > each state and territory consumer protection agency.

The ACL replaces previous Commonwealth, state and territory consumer protection legislation. It is contained in a schedule to the *Competition and Consumer Act 2010* (CCA).

Aspects of the ACL are reflected in the *Australian Securities and Investments Commission Act 2001 (Cth)* (ASIC Act), to protect consumers of financial products and services.

## Consumer guarantees – relationship to implied warranties and conditions

Consumer guarantees provide consumers with a comprehensive set of rights for the goods and services they acquire.

The consumer guarantees are based on the same core principles as implied warranties and conditions that previously existed in state and territory fair trading laws and the Commonwealth *Trade Practices Act 1974*. They do not create significantly different rights and obligations, but set out the rights and obligations in a clearer way.

Existing case law and legal precedents that apply to the previous law may assist when interpreting and applying the consumer guarantees.

Warranties for financial services set out in the ASIC Act continue to apply and will be administered separately by ASIC.

Meanwhile, eligible goods and services bought before 1 January 2011 are covered by the implied warranties and conditions in state and territory fair trading laws and the *Trade Practices Act 1974*.

# 01

## Consumer guarantees: who guarantees what?

Suppliers and manufacturers automatically provide guarantees about certain goods they sell, hire or lease, and services they provide to consumers. These rights exist regardless of any warranty provided by the supplier or manufacturer.

A **supplier** is anyone – including a trader, a retailer or a service provider – who, in trade or commerce, sells goods or services to a consumer.

A **manufacturer** is a person or business that makes or puts goods together or has their name on the goods. It includes the importer, if the maker does not have an office in Australia.

A *supplier* and a *manufacturer* of goods guarantee that goods are of acceptable quality and match any description. They also guarantee that any express warranties will be honoured.

A supplier guarantees that a consumer is buying goods:

- > that have clear title, unless otherwise stated
- > that do not have undisclosed securities
- > that are fit for any disclosed purpose
- > with a right to undisturbed possession
- > that match sample or demonstration model.

A supplier guarantees that services are provided:

- > with due care and skill
- > which are fit for any specified purpose
- > within a reasonable time (when no time is set).

A *manufacturer* guarantees the availability of repairs and spare parts.

Consumer guarantees apply to goods and services bought on or after 1 January 2011 by a consumer from a supplier or manufacturer, in the course of trade. They apply to:

- > any type of goods or services costing up to \$40,000
- > goods or services costing more than \$40,000, which are normally used for personal, domestic or household purposes
- > a vehicle or trailer. The cost of the vehicle or trailer is irrelevant.

If a good or service fails to meet a guarantee, a consumer will have rights against the supplier and, in some cases, the manufacturer, who will have to provide a 'remedy' – an attempt to put right a fault, deficiency or failure to meet an obligation.

When the problem with the good or service is minor, the supplier can choose between providing a repair or offering the consumer a replacement or a refund.

When there is a major failure, the consumer can:

- > reject the goods or services and either choose a refund or a replacement, or
- > ask for compensation for any drop in value of the goods or services.

For more information about whether a problem with the good or service is major, see page 21.

Consumer protection agencies may take action on behalf of affected consumers when a supplier or manufacturer fails to meet obligations under the consumer guarantees.

### ACL reference:

- > Division 1 of Part 3-2 of the ACL sets out consumer guarantees that goods and services must meet when sold by a supplier or manufacturer.
- > Part 5-4 of the ACL sets out the remedies available to consumers if a good or service fails to meet a guarantee.

# 02

## What do the consumer guarantees cover?

### Which goods are covered?

Goods are covered by the consumer guarantees as long as they are sold in trade or commerce and bought by a *consumer*. Second-hand, leased or hired goods are also covered.

However, some consumer guarantees apply regardless of whether the goods are sold in trade or commerce. These are the guarantees as to title, undisturbed possession and undisclosed securities.

*Trade or commerce* means in the course of a supplier's or manufacturer's business or professional activity, including a non-profit business or activity.

A *consumer* is a person who buys:

- > any type of goods or services costing up to \$40,000 (or any other amount set by the ACL in future) – for example, a photocopier or cash register
- > a vehicle or trailer used mainly to transport goods. The cost of the vehicle or trailer is irrelevant
- > goods or services costing more than \$40,000, which are normally used for personal, domestic or household purposes – for example, a car or landscaping design.

At the time of publication, Australian courts had found three goods were not normally used for personal, domestic or household purposes. These are listed in the definition of 'consumer' in the glossary, page 36.

### Which goods are not covered?

Goods not covered by consumer guarantees include those:

- > bought **before** 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- > bought from one-off sales by private sellers, such as garage sales and fêtes
- > bought at auctions, where the auctioneer acts as agent for the owner
- > costing more than \$40,000 that a person would normally buy for business use – for example, machinery and farming equipment
- > a person buys to on-sell or re-supply
- > a person wants to use, as part of a business, to:
  - manufacture or produce something else – for example, as an ingredient
  - repair or otherwise use on other goods or fixtures.

### Which services are covered?

Services sold in trade or commerce, that:

- > cost up to \$40,000 (or any other amount set by the ACL in future), regardless of purpose or use
- > cost more than \$40,000, and are normally acquired for personal, domestic or household purposes – for example, car repairs or legal services.

### Which services are not covered?

Services not covered by consumer guarantees include:

- > services bought **before** 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- > services costing more than \$40,000, which are for commercial use – for example, installation of farm irrigation systems or factory machinery repairs
- > transportation or storage of goods for the consumer's business, trade, profession or occupation
- > insurance contracts.

**Goods bought at auction, where the auctioneer acts as agent for the owner, are not covered by consumer guarantees.**

# 03

## 'No refund' signs and other statements about consumer guarantees

### Summary

Signs and statements that limit, or seem to limit, consumers' rights are unlawful – including 'no refund' signs. Suppliers and manufacturers cannot:

- > limit, restrict or exclude consumer guarantees, or
- > avoid their obligations by getting the consumer to agree that the law of another country applies to the contract or to any dispute.

A supplier must not tell a consumer that they are required to pay for any rights equivalent to a consumer guarantee.

This means that, when selling an extended warranty, a supplier or manufacturer should be very clear exactly what it offers over and above the consumer guarantees.

Consumers cannot sign away their consumer guarantee rights. If suppliers or manufacturers attempt to put terms in their contracts to avoid responsibility, they may also be misleading the consumer about their legal right to compensation for consequential loss. Any such terms may be considered unfair contract terms.

There are special allowances for recreational service providers.

ACL reference: section 64

CCA reference: section 139A

### What can't a supplier say about consumers' rights?

A supplier must not tell a consumer that a consumer guarantee:

- > does not exist
- > may be excluded, or
- > may not have a particular effect.

Consumers cannot surrender their rights by agreeing that the consumer guarantees do not apply.

### 'No refund' signs

Suppliers must be very careful about what they say to consumers and in the wording of any signs, advertisements or any other documents.

Signs that state 'no refunds' are unlawful, because they imply it is not possible to get a refund under any circumstance – even when there is a major problem with the goods. For the same reason, the following signs are also unlawful:

- > 'No refund on sale items'
- > 'Exchange or credit note only for return of sale items'.

However, signs that state 'No refunds will be given if you have simply changed your mind' are acceptable.

A supplier must not tell a consumer that they are required to pay for any rights equivalent to a consumer guarantee (*See Extended warranties, page 11*).

The maximum civil penalty for providing false or misleading information is \$1.1 million for a body corporate and \$220,000 for an individual. Criminal penalties for the same amounts may also be imposed.

## Extended warranties

Some suppliers or manufacturers offer extended warranties to lengthen the coverage of their basic manufacturer's warranty.

Usually, consumers are offered the chance to buy an extended warranty after, or at the time, they buy the goods.

Some suppliers or manufacturers also tell the consumer an extended warranty provides extra protection, which the consumer would not have unless they buy it.

This is not necessarily true. The consumer guarantees provide rights that exist despite anything the supplier or manufacturer may say or do. Extended warranties are optional.

Suppliers and manufacturers must not:

- > pressure consumers to buy an extended warranty
- > tell a consumer that they must pay for an extended warranty when such a warranty provides rights that are equivalent to a consumer's rights under a consumer guarantee.

When selling extended warranties, suppliers and manufacturers should explain to the consumer what an extended warranty would provide, over and above the consumer's rights under the consumer guarantees.

### For example:

- > A consumer buys a plasma television for \$6000. It stops working two years later. The supplier tells the consumer they have no rights to repairs or another remedy as the television was only under the manufacturer's warranty for 12 months. The supplier says the consumer should have bought an extended warranty, which would have given five years' cover.

A reasonable consumer would expect more than two years' use from a \$6000 television. Under the consumer guarantees, the consumer therefore has a statutory right to a remedy on the basis that the television is not of acceptable quality. The supplier must provide a remedy free of charge.

This may also amount to misleading a consumer about their rights.

## Signs to inform customers about consumer guarantee rights

Suppliers can display a sign, at the point of sale, alerting consumers to their rights under the consumer guarantees. Online suppliers also have this option.

A standard sign will be available from consumer protection agencies from 1 January 2011. Suppliers may also develop their own sign.

It is not compulsory to display a sign. However, the Commonwealth minister responsible for administering the ACL can make this mandatory and specify the content, size, form and positioning of the sign to ensure consumers notice it.

ACL reference: sections 66 and 169

## Responsibility for 'consequential loss'

'Consequential losses' are the reasonably foreseeable costs to the consumer in time and money because something went wrong with the goods or services.

Suppliers or manufacturers cannot write a term into their sales contract that says that they will not be responsible for extra loss suffered. In doing so, they would be misleading the consumer about their legal right to compensation for consequential loss.

This misleading conduct is a breach of the ACL. For more information on consequential loss, see *Putting a value on consequential loss*, page 29.

## Allowances for recreational service providers

Under the CCA and some state and territory fair trading laws, suppliers of recreational services can exclude, limit or modify liability when they do not meet the consumer guarantees to provide services:

- > with due care and skill
- > fit for any particular purpose
- > within a reasonable time (when no time is set).

Suppliers may only limit their liability for death or personal injury, including illness (mental or physical), but not for property loss.

Recreational service providers should get legal advice to establish whether they can limit their liability.

CCA reference: section 139A

# 04

## Consumer guarantees applying to goods

### Summary

There are nine guarantees that apply to goods:

1. suppliers and manufacturers guarantee that goods are of acceptable quality when sold to a consumer – see page 13
2. a supplier guarantees that goods will be reasonably fit for any purpose the consumer or supplier specified – see page 14
3. suppliers and manufacturers guarantee that their description of goods (for example, in a catalogue or television commercial) is accurate – see page 15
4. a supplier guarantees that goods will match any sample or demonstration model and any description provided – see page 15
5. suppliers and manufacturers guarantee that the goods will satisfy any extra promises made about them (express warranties) – see page 16
6. a supplier guarantees they have the right to sell the goods (clear title), unless they alerted the consumer before the sale that they had 'limited title' – see page 17
7. a supplier guarantees that no one will try to repossess or take back goods, or prevent the consumer using the goods, except in certain circumstances – see undisturbed possession page 17
8. a supplier guarantees that goods are free of any hidden securities or charges and will remain so, except in certain circumstances – see page 17
9. manufacturers or importers guarantee they will take reasonable steps to provide spare parts and repair facilities for a reasonable time after purchase – see page 17.

ACL references: sections 51 – 59

## Acceptable quality

Suppliers and manufacturers guarantee that goods are of acceptable quality when sold to a consumer.

### Test for acceptable quality

The test is whether a reasonable consumer, fully aware of the goods' condition (including any defects) would find them:

- > fit for all the purposes for which goods of that kind are commonly supplied – for example, a toaster must be able to toast bread
- > acceptable in appearance and finish – for example, a new toaster should be free from scratches
- > free from defects – for example, the toaster's timer knob should not fall off when used for the first time
- > safe – for example, sparks should not fly out of the toaster
- > durable – for example, the toaster must function for a reasonable time after purchase, without breaking down.

### This test takes into account:

- > the nature of the goods – for example, a major appliance such as a fridge is expected to last longer than a toaster
- > the price paid for the goods – for example, a cheap toaster is not expected to last as long as a top-of-the-range one
- > any statements about the goods on any packaging or label on the goods – for example, the toaster box shows a special defroster function
- > any representation made about the goods by the supplier – for example, the supplier said the crumb tray was easy to detach and clean
- > any other relevant circumstances relating to supply of the goods.

## Second-hand goods – acceptable quality

Second-hand goods sold in trade or commerce are covered by the guarantee of acceptable quality, but age, price and condition must be taken into account.

### For example:

- > A consumer buys a second-hand washing machine for \$250 from a shop. The supplier said it was two years old and in good condition but it breaks down after two months. A reasonable consumer would expect to get more than two months' use from this machine. The consumer would be entitled to a remedy from the supplier.

## Leased or hired goods – acceptable quality

Consumers 'hire' goods when they pay suppliers for the right to use goods on a temporary basis (usually short-term). A 'lease' is similar but usually involves payment in regular instalments over a longer term.

Consumer goods leased or hired to a consumer must be of acceptable quality.

### For example:

- > A consumer pays to hire a steam cleaner for one day to clean her carpet but the machine does not generate steam and leaks. She is entitled to a remedy because the steam cleaner is not of acceptable quality.
- > Two tourists hire a campervan to tour Australia for five weeks. Fifty kilometres along the road, the van breaks down. A mechanic says the van has not been properly maintained or serviced for some time. The tourists would have the right to a remedy.

## The guarantee of acceptable quality does not apply when:

### > the supplier alerts the consumer to any hidden defects

Some goods may not be of acceptable quality due to problems already known to the supplier – for example, goods with cosmetic defects sold as 'seconds'.

Defective goods can be sold, usually for lower prices, if the consumer is alerted to the defects before sale. For instance, the supplier:

- tells the consumer before selling the goods, or
- displays a written notice with the goods. This must be clearly presented, legible and expressed in plain language.

It is not enough to simply describe the goods as 'seconds', 'sale' items or 'as is'. However, a consumer is assumed to be aware of defects if a written notice setting out the defects was displayed with the goods.

When a consumer is alerted to defects in goods before sale, they will not have the right to a remedy if those particular defects later cause problems with the goods.

However, the consumer may be entitled to a remedy for a different fault.

### For example:

- > A consumer finds a bargain in a shoe shop – shoes labelled as 'seconds'. A tag attached to the shoes advises there is a problem with the stitching. He buys the shoes. When the stitching splits, he cannot claim the shoes were not of acceptable quality. However, he may be entitled to a remedy if another fault develops, such as the sole cracking.

### > the consumer examines the goods

A consumer is not entitled to a remedy if they had an opportunity to examine the goods before purchase and did not find defects that they should have noticed.

#### For example:

- > Second-hand goods and antiques are often sold on an 'as-is' basis. An antiques dealer is not required to give a remedy for defects that a consumer should have noticed when examining the goods, such as chipped surfaces or faded paint.

The amount of effort that a consumer should take examining goods, if given the opportunity, depends on the nature of the goods. For new goods, very limited or no examination would be expected.

However, a consumer may be entitled to a remedy for defects that they would not have found with even the most careful inspection.

### > the consumer uses the goods in an 'abnormal' manner

Goods are not expected to be indestructible; a consumer's use of goods can affect the durability of those goods.

The guarantee of acceptable quality will not apply if the consumer:

- uses the goods abnormally
- causes the quality of the goods to become unacceptable
- fails to take reasonable steps to avoid the quality becoming unacceptable.

The law does not define 'abnormal use'. However, examples of abnormal use include:

- a mobile phone is dropped in water or is left out in the rain
- a television is broken by an object hitting the screen
- a small electric lawnmower is used to mow four hectares every fortnight
- a laptop is picked up by the corner of its screen, which then cracks down the middle.

## Fit for any specified purpose

### Purpose specified by the supplier

A supplier guarantees that goods will be reasonably fit for any purpose that they told the consumer the goods would be fit for. For example:

A diver buys a watch, which the supplier says will be suitable for diving. A couple of weeks later, the diver goes for her first dive wearing the new watch, only to surface and see the dial filled with water. She would have the right to a remedy from the supplier.

### Purpose specified by the consumer

Consumers might want goods to do a specific job or achieve a specific purpose, different from the normal use or purpose of those goods.

A supplier guarantees that goods will be fit for such a special job or purpose if the consumer, before buying the goods:

- > expressly or implicitly told the supplier what they want to use the goods for, and
- > relied on the supplier's knowledge or expertise when deciding whether the goods were suitable for that use or purpose.

#### For example:

- > A consumer tells a car dealer that he wants a car capable of towing his boat. The dealer sells him a car that the dealer says will do that job. The car's normal purpose is to transport people but, as the consumer has told the dealer that he wants to use the car to tow a boat, then the car must be able to do so.
- > A consumer buys a middle-of-the-range lawnmower, but does not mention to the supplier that she wants to use it to mow four hectares of land each week. Because she did not disclose her intended purpose, the lawnmower would only be expected to mow the lawn of an ordinary suburban house for several years without any significant problems. She cannot claim the lawnmower is not fit for purpose.

#### **When the 'fit for any specified purpose' guarantee does not apply**

A supplier does not have to provide a remedy if they can show that:

- > the consumer did not rely on the supplier's skill or judgment when buying the goods
- > under the circumstances, it was unreasonable for the consumer to have relied on the supplier's skill or judgment (or lack of it).

#### For example:

- > A consumer tells a fellow customer at a discount department store that he wants a television capable of showing all available digital channels. The other customer tells the consumer that a particular television "looks like one my dad bought, which I think does what you want". After buying the television, the consumer discovers that it is analogue and will not capture digital signals.
- > The consumer did not rely on the supplier when buying the goods, so is not entitled to a remedy.

#### **Match description**

Suppliers and manufacturers guarantee that their description of goods (for example, in a catalogue or television commercial) is accurate. This does not apply to goods bought at auction.

A consumer who buys goods that do not match the description – for example the goods are a different colour or size – is entitled to a remedy.

A supplier or manufacturer cannot argue that the consumer inspected the goods before purchase and should have picked up any errors in the description.

Goods must also match any sample or demonstration model shown to the consumer.

#### **Match sample or demonstration model**

Suppliers guarantee that when a consumer buys goods based on their model or sample, the goods will match the sample or demonstration model and any description provided.

#### For example:

- > A sample of fabric is used to sell a couch but the couch delivered to the consumer is a different colour from the sample. The consumer has a right to a remedy.

This guarantee does not apply to goods bought at auction.

#### **No hidden defects**

Goods sold by relying on a sample or demonstration model must not have any hidden defects.

A hidden defect is a problem that would:

- > make the goods of unacceptable quality, and
- > not be noticeable to someone looking at the goods.

### Unavoidable differences

The guarantee that goods will match any sample or demonstration model applies even if the differences are unavoidable, provided they are substantial.

#### For example:

- > If shading, piling or colouring in an installed woollen carpet is substantially different from the sample used to sell it, the consumer may be entitled to remedy.

Legal reference: *Cavalier Marketing (Australia) Pty Ltd v Rasell* (1990) 96 ALR 375)

### Reasonable time to compare the goods

The consumer must be given a reasonable amount of time to compare the goods with the original sample. This does not apply to demonstration models.

#### For example:

- > A consumer buys a car based on a demonstration model shown to them by the car dealer. The dealer can sell the demonstration model to someone else – he does not have to keep it to allow the consumer to compare their car to that model.
- > However, a furniture retailer would easily be able to keep a sample of the fabric used to sell a couch, to allow a consumer to compare it with the couch supplied.

If the supplier shows a sample or demonstration model to the consumer and provides a description of the goods, the goods must also match that description.

### Express warranties

Suppliers and manufacturers often make extra promises (sometimes called 'express warranties') about such things as the quality, state, condition, performance or characteristics of goods.

If so, they guarantee that the goods will satisfy those promises.

#### For example:

- > A supplier tells the consumer that a bed will last for 10 years. If the bed only lasts for six years, the consumer will be entitled to a remedy.

### Warranties against defects or 'manufacturer's warranty'

Suppliers or manufacturers may provide a warranty that promises consumers that:

- > goods or services will be free from defects for a certain period of time
- > defects will entitle the consumer to repair, replacement, refund or other compensation.

#### For example:

- > A consumer buys a deck chair that comes with a written warranty. The warranty says the manufacturer will replace the deck chair if it breaks within two years of the purchase date.

This is called a 'warranty against defects', also commonly called a 'manufacturer's warranty'.

From 1 January 2012, a warranty against defects must be in writing and:

- > be expressed in a transparent way – in plain language, legible and presented clearly
- > contain the warrantor's name, business address, phone number and email address (if any)
- > set out relevant claim periods or procedures, and
- > include a statement that rights under the warranty sit alongside the consumer guarantees, which cannot be excluded.

Failing to meet these criteria may lead to a maximum civil penalty of \$50,000 for a body corporate and \$10,000 for an individual. Criminal penalties for the same amounts also apply.

**A warranty against defects, also known as a manufacturer's warranty, is different from an express warranty.**

## 'Warranties against defects' versus 'express warranties'

A warranty against defects, also known as a 'manufacturer's warranty', is different from an express warranty.

A warranty against defects deals with what the manufacturer promises to do when something goes wrong with goods.

An 'express warranty' focuses on a promise or promises, for example, about what the goods will look like, will do (or are capable of doing) and for how long.

Sometimes a warranty against defects may contain an express warranty.

### For example:

- > When a consumer buys a deck chair, the written warranty (the warranty against defects) states that the chair can hold up to 100 kilograms. This is an express warranty about what the goods can do. If the chair breaks after a person weighing 50 kilograms sits on it, the consumer can insist that the express warranty contained in the warranty against defects be honoured. If not, they will be entitled to a remedy.

However, an advertisement or a promotional brochure that simply mentions that a car comes with a 'four-year warranty' would need to give further detail about the nature of the warranty in order to determine whether it is a warranty against defects or an express warranty.

ACL references: sections 59, 102, 192.

## Title to goods

A supplier guarantees they have the right to sell the goods (clear title), unless they alerted the consumer before the sale that they had 'limited title'.

If goods are sold with limited title, any other person with ownership rights – for example, a person owed money by the previous owner – can ask a court for permission to take the goods back from the consumer.

This happens most often when goods are sold from deceased estates. While alive, the person may have pledged the goods as security. People owed money by the deceased sometimes try to repossess the goods after the items were sold as part of the deceased estate.

## Undisturbed possession of goods

A supplier guarantees that no one will try to repossess or take back goods bought by a consumer, or prevent the consumer from using those goods, except when:

- > a consumer has not met their obligations under the sale, hire or lease contract
- > before the sale, the supplier told the consumer that another person had a security interest over the goods
- > the consumer hired or leased the goods and the hire or lease period has ended
- > at the time of buying the goods, the consumer was aware the supplier only had limited title.

## No undisclosed securities on goods

A supplier guarantees that goods bought by a consumer are free of any hidden securities or charges and will remain so, unless the security or charge was either:

- > placed on the goods with the consumer's permission
- > brought to the consumer's attention in writing before they bought the goods.

A supplier who makes it clear to the consumer there is limited title before sale can claim to have disclosed all known securities or charges over the goods.

### For example:

- > A financier claims to be owed money by the former owner of some goods, who may have used

the goods as security for a loan. If the consumer did not know about the outstanding debt when buying the goods, the supplier would have to provide a remedy – for example, replacement goods.

## Repairs and spare parts

Manufacturers or importers guarantee they will take reasonable steps to provide spare parts and repair facilities (a place that can fix the consumer's goods), for a reasonable time after purchase.

### For example:

- > A consumer drops his digital camera, which he bought new a year ago for \$2000. He contacts the importer and asks where he can get it repaired. The importer advises they no longer supply parts for that model of camera. A reasonable consumer would expect a one-year-old camera to be repairable. The manufacturer has not taken reasonable steps to provide spare parts or facilities, so the importer must provide a remedy.

### How much time is 'reasonable'?

This will depend on the type of goods. For instance:

- > it would be reasonable to expect that tyres for a new car will be available for many years after its purchase
- > it may not be reasonable to expect that spare parts for an inexpensive children's toy are available at all.

## When the guarantee on repairs and spare parts does not apply

A manufacturer or importer does not have to meet the guarantee on repairs and spare parts if they advised the consumer in writing, at the time of purchase, that repair facilities and spare parts would not be available after a specified time.

# 05

## Consumer guarantees applying to services

### Summary

A supplier must meet the consumer guarantees of providing services:

- > with due care and skill
- > which are fit for any specified purpose
- > within a reasonable time (when no time is set).

This means they must:

- > use an acceptable level of skill or technical knowledge when providing the services, and
- > take all necessary care to avoid loss or damage when providing the services.

Suppliers guarantee that services will be reasonably fit for any purpose specified by the consumer and any product resulting from the services are also fit for that purpose.

The guarantee that services will be fit for a purpose, or for achieving a result made known to the supplier, does not apply to professional services provided by a qualified architect or engineer.

The supplier also guarantees to supply the service within a reasonable time. What is 'reasonable' will depend on the nature of the services.

ACL reference: sections 60 – 63

### Due care and skill

Suppliers guarantee their services are provided with due care and skill. This means they must:

- > use an acceptable level of skill or technical knowledge when providing the services and
- > take all necessary care to avoid loss or damage when providing the services.

### For example:

- > A consumer hires a painter to paint her house. Before starting the job, the painter does not remove all of the old, flaking paint. Six months later, the new paint starts to flake. The painter has not met the 'due care and skill' guarantee.
- > While painting the consumer's house, the painter knocks over a can of paint, which spills over her newly paved driveway. The painter has not met the guarantee and must fix the damage.

## Fit for a particular purpose

### Services must achieve the consumer's stated purpose

Suppliers guarantee that services will be reasonably fit for any purpose specified by the consumer and any products resulting from the services are also fit for that purpose.

#### For example:

- > A consumer asks a carpenter to build a carport to cover his 4WD vehicle, which is two metres wide. If the carpenter builds a 1.8m-wide carport that does not cover the car, the carpenter will not have met the 'fit for purpose' guarantee.

### Services must be of sufficient quality to achieve desired results

Suppliers guarantee that services, and any resulting products, are of a standard expected to achieve the desired results that the consumer made known to the supplier.

#### For example:

- > A consumer asks a handyman to fix double gates at the entrance to his driveway. The gates are poorly aligned and make a loud metal scraping noise when opened. The consumer tells the handyman that he wants to stop the noise. The handyman realigns the gates but in less than two days the problem returns. The handyman will have to fix the problem free of charge, as the service did not achieve the desired result.

## When the consumer does not rely on the supplier in choosing the services

The 'fit for a particular purpose' guarantee will not protect the consumer if they did not rely, or it was unreasonable for them to rely, on the supplier's skill or judgment in agreeing to particular services.

For example, it may not be reasonable for a consumer to rely on a receptionist in a large service company for advice about which service is suitable.

### Are there any industries where this guarantee does not apply?

The guarantee that services will be fit for a purpose, or for achieving a result made known to the supplier, does not apply to professional services provided by a qualified architect or engineer. (This maintains an exemption granted by previous law.)

However, an architect or engineer who provides a service outside their area of professional expertise (for example, building services) must still meet the guarantee.

Architects or engineers must provide services with due care and skill.

## Services must be supplied within a reasonable time (if no time set)

A contract or agreement for the supply of services usually states when the services will be provided and the date they will be completed.

If not, the supplier guarantees they will supply the service within a reasonable time.

What is 'reasonable' will depend on the nature of the services. For example, the time needed to build a house will be longer than the time required to lop a tree.

**Suppliers guarantee that services will be reasonably fit for any purpose specified by the consumer and achieve any desired results.**

# 06

## When goods or services do not meet a consumer guarantee

### Summary

A consumer has the right to a remedy if goods or services do not meet a consumer guarantee.

The consumer guarantees apply to both major (serious) and minor problems.

The type of remedy, and who must provide it, will depend on the problem and which consumer guarantee was not met.

Gift recipients have the same rights as a consumer who has bought goods directly.

ACL reference: Division 1 of Part 5-4

### Who can the consumer claim a remedy from?

The *supplier*, if goods do not meet the consumer guarantees as to:

- > fitness for any disclosed purpose
- > matching sample or demonstration model
- > title
- > undisturbed possession, or
- > undisclosed securities.

The *manufacturer*, if goods do not meet the consumer guarantees as to repairs and spare parts.

Both the *manufacturer* and the *supplier*, if goods do not meet the consumer guarantees as to acceptable quality, express warranties and matching description.

The *supplier*, if services do not meet the consumer guarantees as to:

- > due care and skill
- > fitness for particular purpose, or
- > completion within a reasonable time (where no time was set).

For further information on remedies available from a manufacturer, see Consumer claims against the manufacturer, page 30.

### Consequential loss

A consumer may also seek compensation from the supplier or manufacturer for any consequential or associated loss or damage resulting from failure to meet the consumer guarantees. The loss or damage must have been reasonably foreseeable and not caused by something outside human control, such as a cyclone.

#### For example:

- > A faulty toaster sets fire to a consumer's house or burns the consumer's hand. The consumer is entitled to compensation to make up for that loss and damage, not just a refund for the faulty toaster.

For more information, see *Compensation for consequential loss*, page 28.

## What sort of problems do the consumer guarantees deal with?

Consumer guarantees apply to both major and minor failures with goods and services.

## What is a major failure?

A major failure with *goods* is when:

- > a reasonable consumer would not have bought the goods if they had known about the problem. For example, no reasonable consumer would buy a washing machine if they knew the motor was going to burn out after three months
- > the goods are significantly different from the description, sample or demonstration model shown to the consumer. For example, a consumer orders a red bicycle from a catalogue, but the bicycle delivered is green
- > the goods are substantially unfit for their normal purpose and cannot easily be made fit, within a reasonable time. For example, a ski jacket is not waterproof because it is made from the wrong material
- > the goods are substantially unfit for a purpose that the consumer told the supplier about, and cannot easily be made fit within a reasonable time. For example, a car is not powerful enough to tow the consumer's boat because its engine is too small – despite the consumer telling the supplier they needed the car to tow a boat.
- > the goods are unsafe. For example, an electric blanket has faulty wiring.

A major failure with *services* is when:

- > a reasonable consumer would not have acquired the services if they had known the nature and extent of the problem. For example, a reasonable consumer would not pay to have acrylic nails attached if they knew the nails would fall off within an hour
- > the services are substantially unfit for their normal purpose and cannot easily be made fit, within a reasonable time. For example, a carpet-cleaning service changes the colour of the consumer's carpet in some places
- > the consumer told the supplier they wanted the service for a specific purpose but the services, and any resulting product, do not achieve that purpose and cannot easily or within a reasonable time be made to achieve it. For example, a consumer tells a pay TV company they want to watch the Olympics. They sign up to a 24-month contract but the Olympics are over before the company installs the service
- > the consumer told the supplier they wanted a specific result but the services, and any resulting product, do not achieve that result and cannot easily or within a reasonable time be made to achieve it. For example, a consumer asks a technician to increase the memory capacity of a computer. When installing an extra drive, the technician damages the hard drive. Repairs will take six weeks but the consumer needs the computer within a week.
- > the supply of the services has created an unsafe situation. For example, an electrician incorrectly wires wall sockets in a consumer's new kitchen, which makes the electrical outlets unsafe.

## Rights of gift recipients

People who receive goods and services as gifts have the same rights and responsibilities and are entitled to the same remedies as consumers who buy goods directly.

## When is a consumer not entitled to a remedy?

A consumer is not entitled to a remedy when a supplier does not meet one of the consumer guarantees due to something:

- > someone else said or did (excluding the supplier's agents or employees), or
- > beyond human control that happened after the goods or services were supplied.

For example:

- > It takes a qualified painter three weeks to paint a house but the job has taken four weeks. The sole reason for the delay was the weather, which is outside the painter's control. The consumer would not be entitled to a remedy.

This exception does not apply when a supplier has not met the guarantee of due care and skill.

Sometimes, a manufacturer may recall goods in order to fix a potential safety issue – for example, a car manufacturer may recall a car of a particular make and model because of a possible brake defect.

If so, the potential safety issue with the good does **not automatically** amount to a major failure on the basis that the car is unsafe. Each of the goods subject to the recall would need to be considered individually.

# Goods – dealing with problems

## Summary

If goods fail to meet a guarantee, a consumer will have rights against the supplier and, in some cases, the manufacturer, who will have to provide a 'remedy' – an attempt to put right a fault, deficiency or failure to meet an obligation.

When the problem is minor, the supplier can choose between providing a repair or offering the consumer a replacement or a refund.

When there is a major failure, the consumer can:

- > reject the goods and choose a refund or a replacement, or
- > ask for compensation for any drop in value of the goods.

ACL reference: Division 1 of Part 5-4

## Remedies for major failures with goods

If there is a major failure, the consumer can:

- > reject the goods and get a refund
- > reject the goods and get an identical replacement, or one of similar value if reasonably available, or
- > keep the goods and get compensation for the drop in value caused by the problem.

The consumer gets to choose, not the supplier or manufacturer.

## Can a consumer get a refund for changing their mind?

A supplier does not have to give a refund when a consumer simply changes their mind about the goods or services.

But a supplier can have a store policy to offer a refund, replacement or credit note when this happens. If so, they must abide by this policy.

## Consumer responsibilities when rejecting goods

A consumer must advise the supplier if they intend to reject goods, and explain why. They must:

- > return the rejected goods to the supplier, or
- > ask the supplier to collect the rejected goods, if the goods cannot be returned without significant cost to the consumer.

Sometimes, faced with a major failure, a consumer may agree to or request a repair – for example, if they did not know they were entitled to a refund or replacement. If so, the consumer does not lose their right to a refund or replacement. The problem with the goods is still 'major', so they may reject the goods at any time and ask for a refund or replacement.

## When a consumer cannot reject goods

A consumer cannot reject goods when:

- > the goods have been thrown away, destroyed, lost or damaged through no fault of the supplier, after delivery to the consumer
- > the goods have been attached to other property and cannot be removed without damage. For example, removing wallpaper will damage it
- > too much time has passed. The right to reject the goods runs from the date of supply to the consumer, until the fault or problem would reasonably be expected to appear. This depends on:
  - the type of goods
  - how a consumer is likely to use the goods
  - the length of time the goods could reasonably be used, and
  - the amount of use the goods could reasonably be expected to tolerate before the problem or fault became apparent.

Even if the consumer has lost the right to reject the goods, they will still have the right to keep the goods and ask for compensation for any drop in the goods' value.

## Responsibility for returning goods

When the consumer notifies the supplier they are returning the goods, the goods become the supplier's property.

The consumer must return the goods to the supplier unless the cost of returning, removing or transporting is significant; for example, due to the:

- > size or height of the goods, or the way the goods are installed (if any)
- > type of problem with the goods. For instance, a consumer would not usually be able to remove a light fitting that has melted and stuck to a wall.

If the cost to the consumer would be significant, the supplier must collect the goods at their own expense and within a reasonable time.

Examples of goods a supplier would have to collect:

- > a 127 cm LCD TV
- > a bed
- > a swimming pool filter connected to a pool by fixed pipes
- > an extension ladder stuck in the extended position.

## When the consumer chooses a refund

The supplier must repay any money paid by the consumer for the returned goods, and return any other form of payment made by the consumer – for example, a trade-in.

If this is not possible, they must refund the consumer the value of the other form of payment.

A supplier must not:

- > offer a credit note, exchange card or replacement goods instead of a refund
- > refuse a refund, or reduce the amount, because the goods were not returned in the original packaging or wrapping.

A consumer will usually need to show a receipt or other 'proof of purchase'. For more information, see *Receipts and other proof of purchase* on page 34.

### Services connected to returned goods (linked service contracts)

Consumers often buy goods linked to a contract for services. An example is a mobile telephone, often linked to a contract for network services.

A consumer who has returned goods within a reasonable time and is entitled to a refund, may also cancel the linked service contract. They can do this when returning the goods, or within a reasonable time.

Such contracts do not terminate automatically.

#### For example:

- > A consumer signs up for a package that includes a modem and internet access. She rejects the modem because it turns out to be faulty but chooses to keep her internet connection. Alternatively, she could reject the faulty modem and cancel the connection.

A consumer who cancels a linked service contract is entitled to a refund or can refuse to pay for any services not yet received.

The supplier does not have to give a refund for any services the consumer has received up to the time they reject the related goods.

#### For example:

- > A consumer subscribes to 12 editions of a cooking magazine for \$200, including \$80 for delivery. She receives only three editions in six months, so cancels the subscription and delivery. The supplier must refund \$150 for nine magazines not received – \$90 for the magazines and \$60 for delivery.

### When the consumer chooses a replacement

The supplier must provide goods of the same type and similar value. If such a replacement is not reasonably available, the consumer may choose a repair or a refund.

The consumer must return goods to the supplier. If this involves significant cost to the consumer, the supplier must collect the goods at their own expense (see page 23).

The consumer guarantees that applied to the original goods will apply to the replacements.

#### For example:

- > A consumer buys a new mobile phone. Due to a problem, the supplier replaces it. Consumer guarantees apply to the replacement phone as if it were a new mobile phone.

### Remedies for minor problems with goods

If a failure of goods is not major and can be repaired within a reasonable time, the consumer cannot reject the goods and demand a refund.

They can ask the supplier to fix the problem. The supplier may choose to:

- > provide a refund
- > replace the goods
- > fix the title to the goods, if this is the problem
- > repair the goods.

#### For example:

- > *Fixing problems with title*  
When there is a problem with the title to goods, the supplier may deal with the problem, for example, by paying money owed to the person who has a security interest in the goods.
- > *When replacement may be preferable*  
If the cost of repairing the goods is more than the value of the goods, the supplier might instead offer the consumer a replacement.

It is the supplier's responsibility to return goods to the manufacturer for repair.

#### Reasonable costs

If the consumer has no option but to take goods elsewhere for repair, they do not have to get the original supplier's agreement or provide quotes. However, the supplier only has to pay the 'reasonable costs' of repair.

A reasonable cost would be within the normal range charged by repairers of such goods, and include:

- > the cost of the repair
- > any other associated costs incurred by having the goods fixed elsewhere, such as transport costs.

For example:

- > The zip on a pair of trousers breaks after one week. The retailer tells the consumer the repair will take a month. The consumer explains he needs the trousers for work urgently but the retailer offers no other option. The consumer gets the zip replaced by a tailor for \$25. When the consumer asks the retailer to pay for this, the retailer says that their tailor would have done it for \$20. If the higher price is a normal price for a tailor to fix the trousers, the retailer would have to reimburse the consumer.

### What if the supplier is unable to repair the goods?

If a supplier cannot repair the goods (for instance, because the supplier does not have the requisite parts) or cannot do so within a reasonable time, the consumer can:

- > reject the goods and seek either a refund or replacement, or
- > have the goods fixed elsewhere and claim reasonable costs from the supplier.

For example:

- > Several buttons came off a consumer's new shirt due to poor stitching. The tailor who made the shirt could not supply matching buttons. The consumer is entitled to ask for a replacement or refund.

### How long can a supplier take to fix goods?

The supplier must fix the problem within a reasonable time. What is 'reasonable' will depend on the circumstances.

For example:

- > A supplier would be expected to respond quickly to a request for a repair to an essential household item, such as a water heater. For goods used less often, such as a lawnmower, the reasonable time for repair would be longer.

### When a supplier refuses or takes too long to repair goods

If the supplier refuses or takes more than a reasonable time to repair the goods, the customer can:

- > take the goods elsewhere to be fixed and ask the supplier to pay reasonable costs of this repair
- > reject the goods and ask for a refund, or
- > reject the goods and ask for a replacement, if one is reasonably available to the supplier.

There are some restrictions on rejecting goods. See *When a consumer cannot reject goods*, page 23.

Refunds cannot be reduced if the consumer has brought the goods back without their original packaging. See *When the consumer chooses a refund*, page 23.

Consumer guarantees will also apply to replacement goods. See *When the consumer chooses a replacement*, page 24.

### Prescribed requirements for repairs of consumer goods

A *repairer* of goods (whether or not this is the supplier) must notify the consumer of particular information before accepting the goods for repair, as follows:

- > The repairer must tell the consumer if the repairer intends to replace defective goods with refurbished goods of the same type rather than repairing the problem with the original goods, or to use refurbished parts to repair the goods. The ACL Regulations prescribe certain wording about refurbished goods.
- > For goods capable of storing data created by the user of the goods (user-generated data), the repairer must advise the consumer that repairing the goods may result in loss of the data. User-generated data includes, for example, songs, photos, telephone numbers and electronic documents.

Repairers who fail to comply may face:

- > a civil penalty of \$50,000 for a body corporate and \$10,000 for an individual
- > a criminal penalty for the same amount
- > an infringement notice
- > legal action (for example, an injunction) by either a consumer protection agency or the consumer.

# 08

## Services – dealing with problems

### Summary

If services fail to meet a guarantee, a consumer will have rights against the supplier and, in some cases, the manufacturer, who will have to provide a 'remedy' – an attempt to put right a fault, deficiency or a failure to meet an obligation.

When the problem is minor, the supplier can choose between providing a repair or offering the consumer a refund. If the supplier refuses or takes too long, the consumer can get someone else to fix the problem and ask the supplier to pay reasonable costs, or cancel the service and get a refund.

When there is a major failure, the consumer can:

- > cancel the services and get a refund, or
- > keep the contract and get compensation for the difference in value.

ACL reference: Division 1 of Part 5-4

### Remedies for major failures with services

When there is a major failure with a service, a consumer can choose to:

- > cancel the service contract with the supplier and get a refund, or
- > keep the contract and get compensation for the difference in the service delivered and what they paid for.

#### For example:

- > A consumer has signed a building contract that sets out the specifications for her new house. When the house is completed, the consumer notices a few windows are not in the right place. Because the builder has not met the standard required by the contract, the consumer is entitled to compensation.

### Can a consumer get a refund for changing their mind?

A supplier does not have to give a refund when a consumer simply changes their mind about the services.

But a supplier can have a policy to offer a refund or credit note when this happens. If so, they must abide by this policy.

## How can a consumer cancel services?

A contract for services ends when the consumer tells the supplier of their intention to cancel the services – verbally, in writing or, if this is not possible, by any other means.

A consumer can cancel a contract for services at any time.

## Refunds for cancelled services

Cancelling a contract for services gives the consumer the right to a refund.

The amount will depend on whether some or all of the services provided were unsatisfactory, or provided at all.

For example:

- > A hairdresser has cut and permed a consumer's hair. The cut is good but the perm has 'fallen out' after a day. The consumer must pay for the cut but not for the perm, as another hairdresser will not need to cut her hair to fix the problem.

## What happens to goods connected with cancelled services?

As stated earlier, consumers often buy goods linked to a contract for services. When a consumer is entitled to cancel a contract for services, they may also reject goods linked to the contract for services. The consumer is entitled to a refund of any money or other type of payment made for the goods.

To get a refund, the consumer must return the goods to the supplier. If this involves significant cost to the consumer, the supplier must collect the goods at their own expense.

## Remedies for minor problems with services

If a minor problem with a service can be fixed, the consumer cannot cancel and demand a refund immediately.

The consumer must give the supplier who provided the services an opportunity to fix the problem:

- > free of charge; and
- > within a reasonable time. This depends on the circumstances (see *How long can a supplier take to fix goods?* page 25).

For example:

- > A reasonable time to fix a problem with a haircut would be much shorter than the reasonable time to fix a problem with a landscaping project.

If the supplier refuses to fix the problem or takes too long, the consumer can:

- > get someone else to fix the problem (deliver the services) and ask the supplier to pay reasonable costs; or
- > cancel the contract and get some or all of their money back, if they have already paid. A consumer who has not yet paid, or only partly paid, can refuse to pay for the defective services at all, or pay less than the agreed price.

## When does cancellation take effect?

A service is cancelled when the consumer notifies the supplier that they want to cancel it.

# Compensation for consequential loss

## Summary

A consumer can claim compensation for consequential loss from a supplier who failed to meet one or more of the consumer guarantees.

Consequential loss is the cost to a consumer of a problem with goods or services.

Compensation should put the consumer in the position they would have been in if the goods or services had met the consumer guarantees.

## What is consequential loss?

Consequential loss is the cost to a consumer of a problem with goods or services. It is usually financial but can include other costs, such as lost time or productivity.

A consumer can claim compensation for consequential loss from a supplier who failed to meet one or more of the consumer guarantees.

The consumer can apply directly to the supplier for compensation. If the supplier declines or an agreement cannot be negotiated, the consumer can take the matter to formal dispute resolution services or pursue legal action.

For more information about dispute resolution, contact the relevant consumer protection agency (these are listed on page 38).

## Is the supplier required to pay for all losses?

A supplier will have to pay for losses that:

- > could have been expected to result from a failure to meet a consumer guarantee; and
- > are reasonably foreseeable.

In other words, a consumer can recover losses that would probably result from the supplier's failure to meet the guarantee.

Suppliers do not have to pay for:

- > problems unrelated to their conduct or the goods they supplied; and
- > losses caused by something completely independent of the supplier, after the goods left their control.

**For example:**

- > A consumer recently bought a car, which leaked oil on her driveway. A neighbour's dog ran through the oil and into the car owner's house, dirtying the carpet. The car dealer would not have to pay for carpet cleaning, as the dealer could not predict that a dog would run through the oil and into the house – the cost was not reasonably foreseeable.
- > A consumer's washing machine breaks down due to a fault. As a result, there is water damage to carpet in part of the house. The supplier will be responsible for the cost of replacing the carpet damaged by flooding from the faulty washing machine.

**Putting a value on consequential loss**

It can be hard to put a dollar figure on consequential loss.

Compensation should put the consumer in the position they would have been in if the goods or services had met the consumer guarantees.

**For example:**

- > A consumer used a liquid cleaner according to instructions on the pack to remove a stain on his new curtains. The product badly damaged a curtain in the living room. As the curtain was new, the supplier would probably have to meet the cost of replacement. Compensation would be less for curtains in poorer condition.

**A consumer can recover reasonably foreseeable losses that would probably result from the supplier's failure to meet a consumer guarantee.**

# 10

## Consumer claims against the manufacturer

### Summary

Consumers will usually deal with suppliers but may sometimes ask the manufacturer to fix a problem. Manufacturers are responsible for meeting certain consumer guarantees.

A manufacturer includes a person or business that:

- > makes or puts goods together
- > has their name on the goods, or
- > imports the goods (if the maker does not have an office in Australia).

ACL reference: Division 2 of Part 5-4

### When is a manufacturer responsible?

A manufacturer must provide a remedy when goods fail to meet the consumer guarantees for:

- > acceptable quality
- > matching description
- > repairs and spare parts.

A manufacturer must also honour any additional promise or representation they made about the goods – for example, an express warranty (see *Express warranties*, page 16)

The manufacturer must honour a consumer's rights under consumer guarantees, regardless of whether the goods are covered by any other warranty.

### Manufacturer failure to honour an express warranty

If the manufacturer refuses to honour an express warranty or fails to do so within a reasonable time, the consumer can take legal action to enforce the warranty in a tribunal or court.

The consumer can also:

- > assert their rights under the consumer guarantees
- > ask for compensation for consequential loss due to the manufacturer's failure to meet the warranty (see *Compensation for consequential loss*, page 39).

## What if there is no express warranty?

If there is no express warranty and the manufacturer has not met a consumer guarantee, the consumer can assert their rights under the consumer guarantees.

## How much compensation does the manufacturer have to pay?

A consumer is entitled to ask for an amount covering any drop in the value of the goods. This amount must be equal to or less than the difference between the current value of the goods and the lowest of either:

- > the average retail price of the goods at the time of purchase, or
- > the actual price paid.

### For example:

- > A consumer bought goods for \$30. The average retail price at the time was \$28. The goods are worth only \$10 due to failure to meet a consumer guarantee. The manufacturer must pay the consumer \$18 – the difference between the average retail price of \$28 (because it is lower than the price paid) and the value of the goods as a result of the problem.

The consumer can also ask for compensation for any reasonably foreseeable loss suffered due to the manufacturer's failure to meet the consumer guarantees.

'Reasonably foreseeable' costs include the cost of inspecting and returning the goods to the manufacturer. See *Compensation for consequential loss* on page 28.

## What if the manufacturer did not cause the problem?

Manufacturers are not responsible for problems with goods beyond their control.

They do not have to pay damages if goods do not meet the consumer guarantees due to:

- > an act, default, omission or representation made by some other person (excluding an employee or agent of the manufacturer). For example:
  - A mechanic, not employed by the manufacturer, uses the wrong engine oil in a car. This damages the engine. The mechanic, not the manufacturer, would have to compensate the consumer
- > a cause independent of human control that occurs *after* the goods left the manufacturer's control. For example:
  - The day after a supplier finishes building a gazebo for a consumer, gale force winds lift two sheets of iron off the gazebo roof
- > the supplier charging a higher price than the recommended or average retail price for the goods. This covers situations where there is a higher standard of acceptable quality expected of goods due to their price. Manufacturers will be held to the standard required if the goods were sold at the recommended retail price or the average retail price.

## Goods bought directly from the manufacturer

Manufacturers and importers act as suppliers when they sell goods directly to consumers and have the same responsibilities under consumer guarantees.

# 11

## Limits on compensation for non-household goods or services

Suppliers and manufacturers can limit their liability under the consumer guarantees for goods or services not used for personal, domestic or household purposes.

They can limit remedies to:

- > replacing or repairing goods
- > reimbursing the consumer for repairing or replacing the goods
- > re-supplying services
- > reimbursing the consumer for paying someone else to supply the services.

**For example:**

- > A supplier has a contract to provide accounting software to a large Australian company. The supplier may insert a term into the contract providing that, in the event of a problem with the software, the supplier is only required to replace the software for free. This means they would not have to, for example, provide a refund.

A supplier or manufacturer can only do this if it is fair or reasonable. What is 'fair or reasonable' will depend on the circumstances, including whether:

- > the consumer had no choice but to agree to limit compensation
- > the consumer was given something in return for buying the goods or services from that particular supplier or manufacturer, at the expense of buying from someone else
- > the consumer knew or should have known about the limit on compensation
- > the goods were a special order for the consumer.

ACL reference: section 64A

# 12

## When a supplier fixes a problem that is not their fault (manufacturer's indemnity)

Some goods may not be of acceptable quality due to a manufacturing defect, may not match a description given by the manufacturer or are unfit for a purpose specified to the manufacturer.

A consumer may ask a supplier, not the manufacturer, to deal with the problem. If so, the manufacturer must reimburse the supplier. The amount can include any compensation paid to the consumer for reasonably foreseeable consequential losses.

### How long does a supplier have to ask for reimbursement?

A supplier has three years to ask the manufacturer for reimbursement, from the date that:

- > they fixed any problems with the consumer's goods, or
- > the consumer took legal action against the supplier.

### Are there any limits on reimbursement?

Manufacturers cannot contract out of this obligation to reimburse the supplier.

However, when goods are not used for personal, domestic or household purposes and it is fair and reasonable to do so, the manufacturer can limit their liability to the lowest cost among the following:

- > replacing the goods
- > obtaining equivalent goods, or
- > repairing the goods.

Suppliers and manufacturers can also make an agreement about what they will each cover, as this does not affect the consumer's rights.

ACL reference: sections 274, 276A

**A supplier has three years to ask a manufacturer for reimbursement.**

# 13

## Receipts and other 'proof of purchase'

A consumer who wants to make a claim about faulty goods or services against a supplier or manufacturer will generally need to show that they obtained the goods or services from that supplier or manufacturer. The same applies to people who received the goods or services as a gift.

Businesses are understandably concerned to ensure that claims made to them about goods and services are genuine.

The best proof of purchase is a tax invoice or receipt, and consumers are strongly advised to obtain one and keep it.

A number of other forms of evidence are also generally acceptable. Among these are:

- > a lay-by agreement
- > a confirmation or receipt number provided for a telephone or internet transaction
- > a credit card statement
- > a warranty card showing the supplier's or manufacturer's details and the date or amount of the purchase
- > a serial or production number linked with the purchase on the supplier's or manufacturer's database.

Sometimes a consumer may need to provide more than one type of proof of purchase to support their claim – for example, when a receipt does not clearly itemise the faulty goods or service.

If a consumer cannot show that they bought the goods or services, a supplier or manufacturer may still choose to accept the consumer's claim.

If a dispute arises about whether a supplier should accept a claim without proof of purchase, the consumer may seek the opinion of an Australian court or tribunal.

**For example:**

- > A consumer buys a well-known brand of toaster using cash at a medium-sized store. The toaster malfunctions within the first week.

The consumer takes the toaster back to the supplier but has lost the receipt. The supplier has no record of the transaction and declines to provide a replacement or repair.

The consumer contacts the manufacturer, who identifies the serial number of the toaster as one of a recent batch and agrees to accept the claim.

Had the toaster been part of an older product line (three or four years old), it may have been difficult for the manufacturer to know whether the problem was a malfunction or due to wear and tear by the consumer.

For information about supplier responsibilities when issuing proof of purchase, see another guide in this series – *Sales practices: a guide for businesses and legal practitioners*.

**The best proof of purchase is a tax invoice or receipt, and consumers are strongly advised to obtain one and keep it. Some other forms of evidence are also acceptable.**

# Glossary and abbreviations

<b>Term</b>	<b>Definition</b>
<b>acquire</b>	to take possession of something by hiring, leasing or buying it, or by exchange or gift
<b>body corporate</b>	includes a company registered under the Corporations Act 2001, an incorporated association, a co-operative or an owners corporation
<b>buy</b>	see 'acquire'
<b>consumer</b>	<p>a person who buys:</p> <ul style="list-style-type: none"><li>&gt; any type of goods or services costing up to \$40,000 (or any other amount stated in the ACL Regulations)</li><li>&gt; goods or services costing more than \$40,000 which would normally be for personal, domestic or household use, or</li><li>&gt; goods which consist of a vehicle or trailer used mainly to transport goods on public roads.</li></ul> <p>Australian courts have said that the following are not normally used for personal, domestic or household purposes:</p> <ul style="list-style-type: none"><li>&gt; an airseeder – <i>Jillawarra Grazing Co v John Shearer Ltd</i> (1984) ATPR 40-441</li><li>&gt; a large tractor – <i>Atkinson v Hasting Deering (Queensland) Pty Ltd</i> (1985) 6 FCR 331</li><li>&gt; an industrial photocopier – <i>Four Square Stores (QLD) Ltd v ABE Copiers</i> (1981) ATPR 40-232 at 43,115.</li></ul>
<b>goods</b>	<p>include, among other things:</p> <ul style="list-style-type: none"><li>&gt; animals, including fish</li><li>&gt; gas and electricity</li><li>&gt; computer software</li><li>&gt; second-hand goods</li><li>&gt; ships, aircraft and other vehicles</li><li>&gt; minerals, trees and crops, whether on or attached to land</li><li>&gt; any component part of, or accessory to, goods.</li></ul>

<b>Term</b>	<b>Definition</b>
<b>liability</b>	an obligation to put right a problem – for example, fixing a defective product, providing compensation or taking other action
<b>manufacturer</b>	includes a person who: <ul style="list-style-type: none"> <li>&gt; grows, extracts, produces, processes or assembles goods</li> <li>&gt; holds him/herself out to the public as the manufacturer of goods</li> <li>&gt; causes or permits his/her name, business name or brand mark to be applied to goods he/she supplies</li> <li>&gt; permits him/herself to be held out as the manufacturer by another person, or</li> <li>&gt; imports goods into Australia where the manufacturer of the goods does not have a place of business in Australia.</li> </ul>
<b>remedy</b>	an attempt to put right a fault, deficiency or a failure to meet an obligation
<b>services</b>	duties, work, facilities, rights or benefits provided in the course of business. For example: <ul style="list-style-type: none"> <li>&gt; dry cleaning</li> <li>&gt; installing or repairing consumer goods</li> <li>&gt; providing swimming lessons</li> <li>&gt; lawyers' services.</li> </ul>
<b>supplier</b>	someone who, in trade or commerce, sells goods or services and is commonly referred to as a 'trader', 'retailer' or 'service provider'
<b>supply</b>	includes: <ul style="list-style-type: none"> <li>&gt; in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase, and</li> <li>&gt; in relation to services – provide, grant or confer.</li> </ul>

## Abbreviations

<b>ACL</b>	Australian Consumer Law
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ASIC</b>	Australian Securities and Investments Commission
<b>CCA</b>	Competition and Consumer Act 2010

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