

Consumer guarantees

A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS

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Introduction

About this guide

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.

This guide will help businesses and legal practitioners understand the consumer guarantee requirements of the ACL.

It covers supplier, manufacturer and importer responsibilities when there is a problem with goods and services, refunds, replacements, repairs and other remedies.

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
- include examples of the ACL's application by Australian Consumer Protection regulators and by Australian courts.

This guide and an earlier version, are based on material originally prepared by the New Zealand Ministry of Consumer Affairs about their legislation, the *Consumer Guarantees Act 1993*, as consumer guarantees in the ACL are very similar to the New Zealand legislation.

About the other guides

Other guides in this series cover:

- **Sales practices**
Covers 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.
- **Avoiding unfair business practices**
Covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations.
- **Unfair contract terms**
Covers what an unfair term is and which contracts are affected by the law.
- **Compliance and enforcement**
Covers how regulators enforce the ACL.
- **Consumer product safety**
Covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements.

Further information and copies of these and other publications are available from the Australian Consumer Law website www.consumerlaw.gov.au

About the Australian Consumer Law

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

The ACL came into force on 1 January 2011 and replaced the *Trade Practices Act 1974* and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (CCA) and is applied as a law of each state and territory by state or territory legislation.

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 the ACL are:

- the Australian Competition and Consumer Commission (ACCC), in respect of conduct engaged in by corporations, and conduct involving the use of postal, telephonic and internet services; and
- state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory.

Some of the consumer protection provisions in the ACL are mirrored in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to financial products and services. The Australian Securities and Investments Commission (ASIC) is responsible for administering and enforcing the ASIC Act.

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 under the ACL are based on the same core principles as implied warranties and conditions that previously existed in state and territory fair trading laws and the *Trade Practices Act 1974*. They do not create significantly different rights and obligations, but set out the rights and obligations in a clearer way and provide a range of statutory remedies.

Existing case law and legal precedents that apply to the previous law may be useful 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 purchased 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*.

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 includes anyone—such as a trader, a retailer or a service provider—who, in trade or commerce, sells, leases or hires goods or services to a consumer.

A manufacturer includes a person or business that makes or puts goods together, or has their name or brand on the goods. A manufacturer also includes a person who imports goods into Australia, where the maker of the goods does not have an office in Australia. In these circumstances, the importer bears the responsibilities of the manufacturer for the purposes of the consumer guarantees regime.

Guarantees applying to goods

A supplier and a manufacturer guarantee that:

- goods are of acceptable quality
- goods will match any description provided
- 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 the sample or demonstration model provided.

A manufacturer guarantees the availability of repairs and spare parts (other than for auctioned goods).

For more information—see **Consumer guarantees applying to goods on page 12.**

Guarantees applying to services

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 specified).

For more information—see **Consumer guarantees applying to services on page 24.**

What happens if these guarantees are not met?

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

If a supplier fails to meet a guarantee, the remedy may be:

- a repair, replacement or refund
- cancellation of a service
- compensation for damages and loss.

For more information—see **Goods—dealing with problems on page 18** or **Services—dealing with problems on page 26.**

If a manufacturer fails to meet a guarantee the consumer is entitled to recover damages, and in some circumstances additional damages for reasonably foreseeable consequential loss.

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

ACL reference: Part 3–2, Division 1 (consumer guarantees, that goods and services must meet); Part 5–4 (remedies)

What do the consumer guarantees cover?

Which goods and services are covered?

In general, goods and services are covered by consumer guarantees when they are sold in trade or commerce and bought by a consumer.

In 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. The guarantees for title, undisturbed possession and undisclosed securities apply regardless of whether the goods are sold in trade or commerce.

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)
- goods or services costing more than \$40,000, which are normally used for personal, domestic or household purposes
- a vehicle or trailer used mainly to transport goods on public roads irrespective of how much it cost.

If a person buys a good in trade or commerce:

- for the purpose of re-supply
- to use them or transform them through processing, production or manufacture
- to repair or treat other goods or fixtures on land

then they have not acquired them as a consumer under the ACL.

Second-hand, leased or hired goods are also covered by most of the consumer guarantees.

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.

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 at garage sales or fêtes (except that these goods are covered by separate guarantees as to title, undisturbed possession and undisclosed securities)
- bought at auctions, whether in person or online, 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.

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.

The chart below will assist suppliers and manufacturers to determine which consumer guarantees they must comply with.

Consumer guarantees compliance flowchart



Statements made by businesses 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:

- modify, 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?

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

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

CASE STUDY

In July 2013, the Federal Court ordered that Hewlett-Packard, a manufacturer and retailer of computer hardware, pay a \$3 million civil pecuniary penalty for making false or misleading representations to consumers and retailers regarding consumer guarantee rights. The representations were made by Hewlett-Packard call centre staff located around the world. Representations included that:

- » the remedies available to consumers were limited to the remedies available at the business' discretion
- » consumers were required to have their product repaired multiple times before they were entitled to a replacement
- » the warranty period for products was limited to a specified express warranty period
- » consumers were required to pay for remedies outside the express warranty period
- » products purchased online could only be returned at the business' discretion.

Legal reference: ACCC v Hewlett-Packard [2013] FCA 653

‘No refund’ signs

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.

Signs to inform customers about consumer guarantee rights

Suppliers, including online suppliers, can display a sign at the point of sale, alerting consumers to their rights under the consumer guarantees.

The ACCC, together with the state and territory consumer protection regulators, have developed a point-of-sale sign to give consumers clear information about their rights to obtaining remedies under the ACL. Suppliers are encouraged to display this sign. Suppliers may also develop their own sign but should exercise care to make sure that they do not misrepresent consumers’ rights. Suppliers are best advised to use the same wording adopted by the ACCC, or to seek legal advice before using any alternative wording. For more information visit www.accc.gov.au/publications/refunds-remedies

Representation regarding responsibility for ‘consequential loss’

‘Consequential losses’ are the reasonably foreseeable costs to the consumer in time and money because something went wrong with their 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. This misleads the consumer about their legal right to compensation for consequential loss under the ACL.

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

Allowances for recreational service providers

Under the Competition and Consumer Act (Cth) (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. Liability for reckless conduct by the supplier cannot be excluded.

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

CCA reference: section 139A

Consumer guarantees applying to goods

Summary

There are nine guarantees that apply to goods. The guarantees apply to suppliers and, in certain circumstances, manufacturers.

1. Suppliers and manufacturers guarantee that goods are of acceptable quality when sold to a consumer—see **page 12**.
2. Suppliers and manufacturers guarantee that their description of goods (for example, in a catalogue or television commercial) is accurate—see **page 14**.
3. Suppliers and manufacturers guarantee that the goods will satisfy any extra promises made about them (express warranties)—see **page 14**.
4. A supplier guarantees that goods will be reasonably fit for any purpose the consumer or supplier specified—see **page 15**.
5. A supplier guarantees that goods will match any sample or demonstration model and any description provided—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 16**.
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 reference: sections 51–59

Acceptable quality

Suppliers and manufacturers guarantee that goods are of acceptable quality when sold to a consumer (other than goods sold by way of auction).

Test for acceptable quality

Goods are of acceptable quality when 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 soon after it was purchased
- 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 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 representations made about the goods by the manufacturer or 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, leased or hired goods

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

EXAMPLES

- 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. Given the price of \$250 for the machine, 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.
- 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.

When the guarantee of acceptable quality does not apply

- Goods fail to be of acceptable quality if:
 - the consumer causes them to become of unacceptable quality or does not take reasonable steps to prevent them from becoming of unacceptable quality
 - the consumer uses the goods in an 'abnormal' manner
 - the consumer examines the goods and that examination should reasonably have revealed that the goods were not of acceptable quality
 - the supplier informs the consumer of a particular fault and the consumer still agrees to buy them (however the guarantee may apply if there is a different fault).
- 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:

- informs 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 is 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.

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, for example the sole comes loose.

-
- 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.

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 make 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 television is broken by an object hitting the screen
- a small electric lawnmower is used to mow four hectares every fortnight.

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.

Express warranties

Suppliers and manufacturers guarantee that any promises (‘express warranties’) made about things such as the quality, state, condition, performance or characteristics of goods will be satisfied. For more information—see **Types of warranties on page 30**.

CASE STUDY

A consumer bought a hair restoration package which included a ‘personal hair laser’ and a range of shampoo, conditioner and scalp treatments. The package came with a 12 month money-back guarantee, which was worded as follows:

LEIMO is committed to helping you obtain thicker, fuller and healthier hair. We are so confident you will achieve these results that we are backing this with a 12 Month Money Back Guarantee on the LEIMO Personal Hair Laser. If you are not satisfied with your results after 12 months of use, we will reimburse your purchase price of the component in the LEIMO Personal Hair Laser Starter Kit less the RRP for the cost of the hair care products in the starter kit.

At the end of 12 months, the consumer was not happy with the results and sought a refund. He was told that the package needed to be used for more than 12 months to achieve the promised results and was not provided with a refund.

The consumer then extended the package for another 12 months. At the end of the additional 12 months, he was still not satisfied with the results and asked for the total amount paid to be refunded. The trader argued that the consumer had not complied with the terms and conditions of their money-back guarantee and did not provide a refund.

The consumer’s case was then heard at the Queensland Civil and Administrative Tribunal.

The case revealed that the trader’s standard contract contained seven pre-conditions for a refund, along with a term that limited its liability for a failure to comply with an express warranty.

The Tribunal found that the money back guarantee amounted to an express warranty within the meaning of the ACL, that the trader had not complied with it, that the terms that limited the trader’s liability were void, and ordered the trader to refund the total purchase price of \$3,659.99.

Legal reference: Norman Enterprises Pty Ltd t/as Leimo Australia v Deng [2013] QCATA 047

Fit for any specified purpose

A supplier guarantees that goods will be reasonably fit for any purpose the supplier or consumer specifies.

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.

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, including for a purpose that is different from the normal purpose for which those goods are commonly supplied.

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

- expressly or implicitly told the supplier what they want to use the goods for
- relied on the supplier's knowledge or expertise when deciding whether the goods were suitable for that use or purpose; and
- it was reasonable for the consumer to rely on the supplier's knowledge and expertise.

EXAMPLES

- 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.

CASE STUDY

A consumer wished to buy a horse as a 'show hack', which is a horse that performs at horse shows.

The consumer found a horse for sale, described as having 'clean sound legs' and arranged for a pre-purchase examination by a veterinarian, which did not include X-rays. The consumer then asked the trader whether the horse had any problems with its legs and whether she should obtain X-rays. The trader advised that the horse had never had any problems and that the cost of X-rays would not be justified in this case. The consumer purchased the horse for \$12,000 and shortly after being ridden the horse became lame.

When this case was heard at the Queensland Civil and Administrative Tribunal, the Tribunal found that the horse was so lame that it was 'virtually worthless' and was not reasonably fit for the disclosed purpose. The trader was ordered to refund the consumer the amount paid in full, along with the Tribunal filing fee.

Legal reference: Campbell v Lane (No 2) [2013] QCATA 307

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).

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 relied upon the other customer rather than the supplier when buying the goods, so is not entitled to a remedy.

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.

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 sample or demonstration model.

Unavoidable differences

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

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 a remedy even if the difference in shading after being laid is a natural characteristic of the carpet.

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.

EXAMPLES

- 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.
- 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.

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 and who had a security right over the goods—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 person 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.

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. This applies even if the consumer did not purchase the goods directly from the manufacturer or importer.

EXAMPLE

- A consumer drops his digital camera, which he bought new a year ago for \$2,000. He contacts the importer, as the manufacturer does not have an office in Australia, 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 valued at \$2,000 to be repairable. The 'manufacturer' has not taken reasonable steps to provide spare parts or facilities, so the importer must provide a remedy. Given that a repair is not possible, the appropriate remedy would be to replace the goods or provide a refund.
-

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 or before the time of purchase, that repair facilities and spare parts would not be available at all or after a specified time.

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’—to put right a fault, deficiency or failure to meet an obligation.

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

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

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: Part 5–4, Division 1, Subdivision A

When is a consumer entitled to a remedy?

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

However, a consumer is not entitled to a remedy if the supplier or manufacturer failed to 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 were supplied.

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.

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. 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.

Rights of gift recipients

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

Who can the consumer claim a remedy from?

The supplier, if goods do not meet the consumer guarantees for:

- fitness for any disclosed purpose
- matching sample or demonstration model
- title
- undisturbed possession
- undisclosed securities
- an express warranty given or made by the supplier.

The manufacturer or importer, if goods do not meet the consumer guarantees for:

- repairs and spare parts
- an express warranty given or made by the manufacturer.

Both the manufacturer or importer and the supplier, if goods do not meet the consumer guarantees for:

- acceptable quality
- matching description.

A supplier of goods cannot refuse to help a consumer by sending them to the manufacturer or importer.

Remedies for failures with goods

If goods fail to meet a consumer guarantee, the supplier who sold the consumer the product may be required to:

- repair or replace the product
- provide a refund
- provide compensation for any consequential loss.

When the problem with the goods is minor, the supplier can choose the remedy—either a repair, replacement or refund.

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

- 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.

Where a good fails to meet the guarantees for acceptable quality, repairs and spare parts, matching description (stated by or on behalf of the manufacturer/importer) or an express warranty given by the manufacturer/importer, a consumer has the right to recover damages from the manufacturer/importer of the goods.

If the consumer purchased the goods from the manufacturer/importer, their obligation to provide a refund is the same as any other supplier.

What is a major failure with goods?

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.

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 37**.

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.

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.

EXAMPLE

- A consumer subscribes to 12 monthly editions of a cooking magazine for \$200, including \$80 for delivery. After six months, she has received only three editions, so cancels the subscription and delivery and informs the supplier that her reason for doing so is the failure to meet the consumer guarantees. 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 an identical type. 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 cannot be done without significant cost to the consumer, the supplier must collect the goods at their own expense within a reasonable time—see **How long can a supplier take to fix goods? on page 21**.

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

EXAMPLE

- A consumer buys a new mobile phone. Due to a problem, the supplier replaces it. The same consumer guarantees apply to the replacement phone as they applied to the original mobile phone.

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.

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
- type of problem with the goods. For example, 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 be likely to collect:

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

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 caused by a failure to meet the consumer guarantees.

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.

EXAMPLES

- When there is a problem with the title to goods, the supplier may deal with the problem, for example, by paying the necessary money owed to the person who has a security interest in the goods to eliminate that person's interest.
- 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.

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.

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 is unable to repair 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.

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.
-

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 on page 21**.

Refunds cannot be reduced if the consumer has brought the goods back without their original packaging—see **When the consumer chooses a refund on page 20**.

Consumer guarantees will also apply to replacement goods—see **When the consumer chooses a replacement on page 20**.

'Reasonable costs of repair'

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 necessary transport costs.

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 reasonable price for a tailor to fix the trousers, the retailer would have to reimburse the consumer.
-

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.

The wording is as follows:

Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the 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 provide this notice may face:

- a civil penalty of \$50,000 for a body corporate or \$10,000 for an individual
- a criminal penalty for the same amount
- an infringement notice with a penalty of \$10,800 for a body corporate or \$2,160 for an individual
- legal action (for example, an injunction) by either a consumer protection agency or the consumer.

ACL reference: section 103, Regulation 91

CASE STUDY

In December 2013 the Australian Competition and Consumer Commission (ACCC) took legal action against Apple, following a number of consumer complaints from Apple customers about their experiences dealing with the company.

In particular, the ACCC was concerned that:

- » Apple staff were not offering customers a refund, replacement or repair, under circumstances in which these remedies are required under the ACL.

Apple staff were referring complaints about faulty items purchased from Apple, which were manufactured by a different supplier, to the manufacturer instead of dealing with the complaints themselves.

Apple acknowledged that, in doing so, it made representations to consumers which may have breached the ACL and agreed to implement a number of compliance measures as part of a court enforceable undertaking.

In the undertaking Apple publicly acknowledged that, without limiting consumers' rights, the company would provide its own remedies equivalent to those remedies in the consumer guarantee provisions of the ACL at any time within 24 months of the date of purchase.

To avoid any doubt, Apple also acknowledged that the ACL may provide for remedies beyond 24 months for a number of its products.

The undertaking also required Apple to provide clearer advice to their customers about their consumer rights under the ACL via their staff, their website, call centre and packaging. Apple was also required to make available in its retail stores in Australia copies of the ACCC's 'Repair, Replace, Refund' brochure.

The undertaking is available on the ACCC's undertaking register on the ACCC website www.accc.gov.au

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 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.

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.
-

CASE STUDY

A consumer hired a handyman to provide painting and tiling services in a guest house run by the consumer. In the course of tiling an en-suite, the handyman removed and re-installed a bath. The handyman failed to adequately tighten a plumbing fixture on the bath. The plumbing fixture leaked, causing damage to the paintwork in the room below the en-suite.

The consumer's case was heard at the Queensland Civil and Administrative Tribunal. The Tribunal found that the handyman had caused the water leak and that he had failed to perform work with due care and skill and that the work he performed was not fit for the purpose for which it was acquired. The Tribunal awarded damages to cover the cost of a plumber to remedy the handyman's failure by fixing the plumbing leak and to cover the consequential loss incurred in repainting the downstairs room damaged by the leaking water.

Legal reference: Tait Management Services Pty Ltd v Boyle and Anor [2012] QCAT 90

Fit for a particular 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.

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.

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.

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.

Services—dealing with problems

Summary

If services fail to meet a guarantee, a consumer will have rights against the supplier who will have to provide a ‘remedy’—to put right a fault, deficiency or a failure to meet an obligation.

When the problem is minor, the supplier can choose between fixing the problem with the service (free of charge and within a reasonable time), or offering the consumer a refund. If the supplier refuses to fix the problem or takes too long, the consumer can get someone else to fix the problem and recover the reasonable costs from the supplier, or cancel the service (if it is ongoing) and get a refund.

When there is a major failure, the consumer can:

- cancel the services and get a refund for the parts of the service not already consumed; or
- keep the contract and get compensation for the difference in value.

Where there is a major failure, the consumer may also take action to recover damages from the supplier for any reasonably foreseeable loss of damage.

ACL reference: Part 5–4, Division 1, Subdivision B

When is a consumer entitled to a remedy?

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

However, a consumer is not entitled to a remedy if the supplier failed to 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 services were supplied.

EXAMPLE

- It should take a qualified painter three weeks to paint the exterior of 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.

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.

Rights of gift recipients

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

Who can the consumer claim a remedy from?

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

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

Consequential loss

A consumer may also seek compensation from the supplier 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.

EXAMPLE

- A consumer hired a trader to build a deck onto his house. The deck was not properly constructed and collapsed, injuring the consumer and causing damage to his outdoor furniture. The consumer may be entitled to compensation for his medical expenses and the repair or replacement of his outdoor furniture, in addition to a refund for the cost of the deck.

For more information—see **Compensation for consequential loss on page 29**.

What is a major failure?

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 for such a purpose, 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 service, and any resulting product, do not achieve that purpose and the service cannot easily and within a reasonable time be made to achieve such a purpose. For example, a consumer tells a pay TV company they are specifically buying the service because 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 the service cannot easily and within a reasonable time be made to achieve such a result. For example, a consumer asks a technician to increase the memory capacity of a computer within one week. 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.

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

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 for the parts of the service not already consumed; or
- keep the contract and get compensation for the difference in the service delivered and what they paid 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 may be entitled to compensation.

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 on page 21**.

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 recover the reasonable costs from the supplier
- 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.

Cancelling a service

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.

If the supplier has failed to meet one of the consumer guarantees, and the failure is a major failure, a consumer can cancel the contract for services at any time. The consumer may also cancel the contract if the failure is a not major failure but the supplier has failed to remedy the failure within a reasonable time.

Refunds for cancelled services

Cancelling a contract for services gives the consumer the right to a refund for the proportion of the services not already consumed at the time of cancellation.

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

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.

When does cancellation take effect?

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

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.

Compensation for consequential loss

Summary

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

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 or manufacturer 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 40–41**).

Which losses are covered?

Suppliers and manufacturers will have to pay for losses that:

- resulted from their own failure to meet a consumer guarantee; and
- are reasonably foreseeable.

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

Suppliers and manufacturers do not have to pay for:

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

EXAMPLES

- 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, as it is reasonably foreseeable that water damage to flooring would result from a fault in a washing machine which causes it to leak.

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.

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 curtains were new, the supplier would probably have to meet the cost of replacement. Compensation would be less for curtains in poorer condition.
-

Types of warranties

Summary

There are different types of warranties that businesses (suppliers or manufacturers) voluntarily offer consumers. These warranties are always provided in addition to the consumer guarantees and do not override or limit consumers' rights under the ACL. Consumers may be entitled to a repair, replacement or refund even after any voluntary warranty or extended warranty has expired.

Express warranties

As a business you may make extra promises or representations verbally or in writing about the quality or standard of a good. This may for example refer to:

- the quality, state, conditions, performance or characteristics of the good
- what the good can do and for how long
- the availability of servicing, supply of parts or identical goods.

When you provide an express warranty, under the consumer guarantees you automatically guarantee that the goods will meet this warranty. If such a claim does not hold true, the consumer can assert their rights under the consumer guarantees.

EXAMPLE

- A supplier tells the consumer that a bed will remain suitable for its purpose for 10 years. This is a statement about how long the bed will be able to be used for and if the bed does not meet this standard (i.e. only lasts for six years) the consumer will be entitled to a remedy.
-

Sometimes a warranty against defects may contain an express warranty.

EXAMPLE

- When a consumer buys a deck chair, the written warranty 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 in the way the product is normally intended to be used, 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.
-

More information—see **What a consumer can do if a manufacturer fails to honour an express warranty on page 34**.

Warranties against defects

As a supplier or manufacturer you may provide promises to consumers about what you will do when something goes wrong with goods or services. These promises are often referred to as 'voluntary warranties' or 'manufacturer's warranties'. Under the ACL, these are called 'warranties against defects'.

A warranty against defects is a representation communicated to a consumer, at or around the time that goods or services are supplied, that if the goods or services (or part of them) are defective, the business will:

- repair or replace goods (or part of them)
- resupply or fix a problem with services (or part of them)
- provide compensation to the consumer.

EXAMPLES

- A consumer purchases a motor vehicle that comes with a three year or 100,000km written warranty outlining what the manufacturer will do if there are certain problems with the vehicle. This is a warranty against defects and must comply with the requirements of the ACL.
- A consumer hires a tiler to renovate his bathroom. The written contract states that the tiler will repair any tiles that become loose within five years of the tiling being carried out. This contract contains a written warranty against defects.

If a supplier or manufacturer chooses to provide a warranty against defects to consumers then the warranty document provided must comply with specific ACL requirements.

Any material with writing on it could evidence a warranty against defects, for example, wording on the packaging or on a label. A warranty against defects may also be contained in a document inside the product's packaging.

Requirements for warranties against defects

A 'document which details a warranty against defects' must be in writing and state clearly:

- what the business (giving the warranty) must do if goods are faulty or defective—for example, repair or replace the goods
- what the consumer must do to entitle them to claim under the warranty—for example, stop using the goods when a fault arises or contact the supplier or manufacturer and point out the defect
- information about the business giving the warranty including the name, business address, phone number and email address (if any)
- the warranty period—how long the warranty lasts for
- the claim procedure— how the consumer can contact the business and where to send the claim
- whether the business or the consumer is responsible for any expenses associated with the warranty claim and how the consumer can claim back any expenses incurred

- that any benefits provided to the consumer by the warranty is in addition to any other rights and remedies available to them under the law
- contain the mandatory text outlined on **page 32**.

A warranty against defects must be presented clearly either when:

- the supply of the good or service takes place. For example, when a consumer purchases a good
- around the time the supply of the good or service takes place. For example, a warranty may be provided with a good when it is delivered even though the consumer purchased it at an earlier time.

The mandatory information must be available with the product itself—it is not sufficient to refer consumers to information on a website or in-store.

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. The ACCC could alternatively issue an infringement notice with a penalty of \$10,800 for a body corporate or \$2,160 for an individual.

EXAMPLE

- A manufacturer of electric drills states on the drill packaging that it will repair any drill if a fault arises within three years of purchase. The packaging is evidence of a warranty against defects. All the information required by the ACL would need to be set out either on the packaging itself or on a separate warranty document inside the packaging. The ACL regulators would regard this as compliance with the warranty against defects requirements.

ACL reference: sections 102, 192

Mandatory text

In addition to the requirements above, a document detailing a warranty against defects must include mandatory text to ensure consumers are aware that any warranty against defects operates in addition to consumers' rights under the ACL. This mandatory text is:

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

ACL reference: Regulation 90

Extended warranties

Some suppliers or manufacturers offer extended warranties to lengthen the coverage of their basic manufacturer's warranty (also known as a warranty against defects).

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:

- use undue pressure or unfair tactics to get a consumer to buy an extended warranty
- mislead a consumer into paying for rights that they already have under the consumer guarantees.

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 to minimise the risk of misleading the consumer.

Businesses that sell extended warranties which offer anything less than or simply mirrors what a consumer is entitled to under the consumer guarantees, could risk misleading consumers into thinking they are receiving additional benefits when they are not.

EXAMPLE

- A consumer buys a plasma television for \$6,000. The supplier tells the consumer that once the manufacturer's warranty expires, they will only replace or repair a faulty product if the consumer buys an extended warranty. This is misleading as a consumer's statutory rights may entitle them to the same remedy.

CASE STUDY

In 2015, the Federal Court declared, by consent, that both Fisher & Paykel Customer Services Pty Ltd and Domestic & General Services Ltd made false or misleading representation in the course of offering an extended warranty to consumers, and imposed a civil penalty of \$200,000 on each business.

Both companies sent letters to consumers who had purchased a Fisher & Paykel appliance inviting them to purchase an extended warranty. The letters contained statements such as

'Your Fisher & Paykel [appliance] is now a year old, which means that you have 12 months remaining—after that your appliance won't be protected against repair costs.'

The Court held that the letters contained a false or misleading representation to consumers that they would not be protected against repair costs for their appliance after a period of two years from the date of purchase (being the period of the manufacturer's warranty), unless they purchased the extended warranty. In fact, under the ACL consumers may be protected beyond the manufacturer's warranty period without the purchase of an extended warranty.

Legal reference: Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd [2014] FCA 1393

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 a place of business in Australia).

ACL reference: Part 5–4, Division 2

When is a manufacturer responsible?

As stated previously, a consumer is entitled to recover damages from a manufacturer/importer if goods fail to meet the consumer guarantees for:

- acceptable quality
- matching description (where the description was applied by the manufacturer/importer)
- repairs and spare parts
- express warranties.

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

How much compensation does the manufacturer have to pay?

A consumer is entitled to ask for an amount covering any decrease 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.

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 consumer may be able to recover damages of \$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 29**.

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 the consumer guarantees.

What if the manufacturer fails 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 on page 29**.

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.

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
- 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 or average retail price.

If the manufacturer refuses to honour an express warranty...the consumer can take legal action.

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.

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 provide a refund.
-

A supplier or manufacturer can only rely on any term limiting their liability 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

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 by 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 take action against 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

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 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, including:

- 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 service, a supplier or manufacturer may still choose to accept the consumer’s claim.

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

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. In that case, the manufacturer may be justified in declining to provide a remedy if three to four years is the limit of the expected life of the toaster, having regard to the purchase price and any guarantees or representations made at the time of purchase.

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*, available from www.consumerlaw.gov.au

Glossary and abbreviations

TERM	DEFINITION
acquire	to take possession of something by hiring, leasing or buying it, or by exchange or gift.
body corporate	includes a company registered under the <i>Corporations Act 2001</i> (Cth), an incorporated association, a co-operative or an owners corporation.
buy	see ‘acquire’
consumer	a person who buys: - any type of goods or services costing up to \$40,000 (or any other amount stated in the ACL Regulations) - goods or services costing more than \$40,000 which would normally be for personal, domestic or household use; or - goods which consist of a vehicle or trailer used mainly to transport goods on public roads. Australian courts have said that the following are not normally used for personal, domestic or household purposes: - an air seeder—<i>Jillawarra Grazing Co v John Shearer Ltd</i> [1984] FCA 30 - a large tractor—<i>Atkinson v Hastings Deering (Queensland) Pty Ltd</i> [1985] 6 FCR 331 - an industrial photocopier—<i>Four Square Stores (QLD) Ltd v ABE Copiers</i> [1981] ATPR 40–232 at 43,115.
goods	include, among other things: - animals, including fish - gas and electricity - computer software - second-hand goods - ships, aircraft and other vehicles - minerals, trees and crops, whether on or attached to land - any component part of, or accessory to, goods.
liability	an obligation to put right a problem—for example, fixing a defective product, providing compensation or taking other action.

TERM	DEFINITION
manufacturer	includes a person who: • grows, extracts, produces, processes or assembles goods • holds him/herself out to the public as the manufacturer of goods • causes or permits his/her name, business name or brand mark to be applied to goods he/she supplies • permits him/herself to be held out as the manufacturer by another person; or • imports goods into Australia where the manufacturer of the goods does not have a place of business in Australia.
remedy	an attempt to put right a fault, deficiency or a failure to meet an obligation
services	include duties, work, facilities, rights or benefits provided in the course of business, for example: • dry cleaning • installing or repairing consumer goods • providing swimming lessons • lawyers' services.
supplier	someone who, in trade or commerce, sells goods or services and is commonly referred to as a 'trader', 'retailer' or 'service provider'.
supply	includes: • in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase • in relation to services—provide, grant or confer.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ALR	Australian Law Reports
ASIC	Australian Securities and Investments Commission
ATPR	Australian Trade Practices Reporter
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
FCA	Federal Court of Australia
FCR	Federal Court Reports
QCAT	Queensland Civil and Administrative Tribunal
QCATA	Queensland Civil and Administrative Tribunal Appeals

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