



# Consumer Law Part 2

## Consumer Guarantees & more

Naomi Menon  
Head of Compliance and Operations  
AFTA

# Disclaimer: Guidance Only

- This webinar aims to provide guidance only. It is not legal advice.
- We encourage you to seek your own professional advice to find out how applicable laws apply to you and your particular circumstances, as it is your responsibility to determine your obligations.
- Examples in this guide are purely for illustration only; they are not exhaustive and are not intended to impose or imply particular rules or requirements. Please always seek legal advice for your own circumstances.

# Agenda

Item	Topic
1	Consumer Guarantees
2	Due care and skill
3	Fit for Purpose
4	Major v Minor
5	Unfair contract terms
6	Unconscionable Conduct



Consumer Guide

# CONSUMER GUARANTEES

A guide for consumers



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## Consumer guarantees

A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS



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graph TD; A[Consumer Guarantees] --> B[Goods]; A --> C[Services];
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Consumer  
Guarantees

Goods

Services

# Consumer Guarantees - Goods

1. That the seller has the right to sell the goods, unless otherwise agreed (s51);
2. That the consumer's possession of the goods will not be disturbed, unless supply was of only a limited ownership (s52);
3. That there are no undisclosed securities attached to the goods (s53);
4. That the goods are of acceptable quality (s54);
5. That the goods are reasonably fit for purposes disclosed to the supplier (s55);
6. That the goods correspond to any description given to them (s56);
7. That the goods correspond to any sample or demonstration model (s57);
8. That repair facilities and spare parts are reasonably available (s58);
9. That any additional warranties provided will be complied with (s59).

# Consumer Guarantees - Services

**Are you supplying services to a person or business that cost:**

- \$40,000 or less; or
- more than \$40,000 but are normally bought for personal or household use or consumption?

YES ►

**Unless exceptions apply, you must comply with these three consumer guarantees:**

- 1 Due care and skill
- 2 Fitness for purpose and desired result
- 3 Provision within a reasonable time when there is no agreed end date

# Section 60: Due care and skill

*“If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that services will be rendered with **due care and skill**”*

# 2 Requirements

1. The provider of the service must have “an acceptable level of skill” in the area of activity covered by the service; and
2. The provider must exercise due care in supplying the service.

# Yan Tun Wu and ors v Great Wall Travel Service [2014] NSWCATCD 50

Applicants claimed that the travel services had not been rendered with due care and skill because of:

- A cancellation of a schedule bus trip to Quebec;
- Failure to visit scheduled sites in New York including MoMA, the UN, Rockefeller Centre and Times Square.
- West Coast Tour failed to provide basic services and failed to pick up from airport.

## Cancelled trip to Quebec

- Trip was cancelled due to snow and weather conditions and was a prudent decision.
- No claim under s60 or s61
- Alternative claim of s18 that is was 'misleading and deceptive'
- Claim rejected as no-one could know there would be such weather and snow on the relevant tour day that would cause it to be abandoned.

# Empire State Building Claim

- Had refunded US \$40 of the US\$43 paid as balance paid as a tip to bus driver for alternate trip to the Jersey Shore.
- Applicants did not object at time
- Applicants received benefit of bus trip to Jersey Shore. Claim rejected.



# No visit to scheduled sites

## Museum of Modern Art (MoMA)

- MoMA was closed Mondays and applicants could only have visited on a Monday.
- “This was the responsibility of the respondent to know and schedule the tour for a day MoMA was open”
- Claim succeeds under s60.

# No visit to scheduled sites

## United Nations

- Access was not possible due to traffic restrictions for New Year's Eve
- "This was the responsibility of the respondent to know and schedule the tour appropriately".
- Claim succeeds under s60.

# No visit to scheduled sites

## Fifth Avenue

- Non-English speaking foreign tourists in New York and did not receive a guided tour for 2 hour window to sight-see.
- “This is not what was promoted”
- “The respondent had the responsibility to exercise due care and skill in organising a tour to Fifth Avenue which took account of the applicant’s circumstances, and to provide a tour”.
- Claim succeeds under s60.

# No visit to scheduled sites

Rockefeller Centre/Times Square/Broadway

- “This was the responsibility for the respondent to schedule”
- Claim succeeds under s60.



# West Coast tour

Tour guide failed to pick up at airport

- left to find their own way to their hotel
- And various tours not provided.
- Claim succeeds under s60.

# Limiting Liability

Terms that limit liability are distinguished from terms that exclude liability.

The former are permissible under s 64A, but the latter void under s 64.

# ATAS Example

- Agent rebooked a resort but complainant was of the opinion that the beaches were not “pristine” and agent lacked due care and skill.
- AFTA found no breach.
- Appealed to the ATAS Code Compliance Monitoring Committee (ACCMC) who upheld decision.



# Fit for Purposes 61

(1) If:

(a) a person (the *supplier* ) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, **makes known** to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be **reasonably fit for that purpose**.

# Fit for Purposes 61

(2) If:

(a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and

(b) the consumer makes known, expressly or by implication, to:

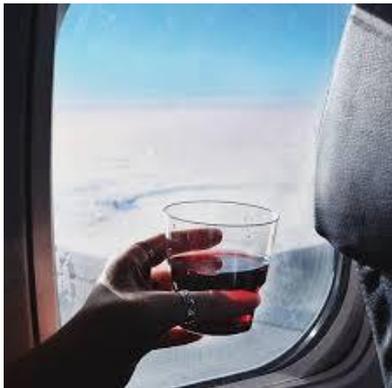
(i) the supplier; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a **nature, and quality, state or condition, that they might reasonably be expected to achieve that result.**

# ATAS Examples

- Consumer had requested full service on the airplane – in particular – that they needed wine
- booked the airline on agent recommendation but found out prior to leaving it was not full service and they could only have beer on board
- AFTA recommended a refund amount in between what the agent suggested and the complainant demanded and both parties agreed to settle by mutual resolution.



# ATAS Examples



- Consumer was under 21 and Agent was booking an extensive US trip with this in mind.
- Booked a hotel in Las Vegas that did not allow under 21's.
- The Agent offered alternatives but none were of similar location or standard and consumer had booked multiple shows/tours etc on basis of original location.
- AFTA negotiated a mutual resolution between the parties prior to the consumer leaving.

# ATAS Examples

- Consumer arrived at Euro river cruise and decided to not board as cabin was below waterline and did not have a balcony.
- Never had specified those requirements. Information was supplied in invoice and had never been questioned.
- No breach and no refund.

# ATAS Examples

- 2 teenage sisters went on a Japanese holiday.
- When arrived at one hotel found out it was a Love Hotel.
- Immediately checked out.
- AFTA required the agent to refund the nights booked as it was not fit for purpose.



# Failure to meet a guarantee

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.

MAJOR

V

MINOR

# Major

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.

# Minor

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

- Free of charge; and
- Within a reasonable time.

# Minor

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



# Minor con't

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;
- Cancel the contract and get some or all of their money back, if they have already paid.

Minor



Supplier  
Chooses  
Remedy

Major



Consumer  
Chooses  
Remedy

# Exception – Fit for purpose

A consumer is not entitled to a remedy if the supplier failed due to something:

- Someone else said or did; or
- Beyond human control that happened after the services were supplied.

# 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.

# Consequential loss

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.



So let's revisit Yan Tun Wu and ors v Great Wall Travel  
Service [2014] NSWCATCD 50

“It is a matter of common sense that the applicants would not have paid for a tour organised by the respondent if they had known that the iconic New York sites would be omitted from the tour, or that they would not visit these sites as part of the tour being left to their own devices”

Damages under ACL, s236 are to be awarded by reference to a solution best adapted to give the applicants damages which will most fairly compensate them: *Johnson v Perez*

“The principle is clear. If the court finds damage has occurred it must do its best to quantify the loss even if a degree of speculation and guess work is involved.

The Principle applies only when the court finds that loss or damage has occurred..... It is not enough for a plaintiff merely to show wrongful conduct by the defendant.” *Enzed Holdings v Wynthea*

The difference between what  
you received and what you paid  
for.

# Guess \$\$ ?

US \$100 per person for not visiting sites

Plus

US \$60 per person for the West Coast Tour

# Scenic

“I have concluded that Mr Moore is entitled to compensation under the ACL for a breach of the due care and skill guarantee by Scenic amounting to a total of \$12,990 plus interest. He has also established breaches of the purpose and result guarantees”.

# VCAT Example

- Itinerary stated scheduled return date of 30 Sep 16 but e-tickets issued dated 16 Sep 16.
- Complainant discovered error on 8 Sep 2016
- Booked alternative return flights.
- Found it was a major failure and was to pay additional fares booked.

# Unfair Contract Terms



- Must be a 'standard form' contract
- The role of the courts is to determine whether a term in a standard form consumer contract is unfair. Once a term is declared by the court to be unfair, the term is void.

# What is unfair?

A term of a consumer contract is unfair if it:

- Would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- Would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In deciding whether a contract is a standard form consumer contract, a court may consider a range of relevant matters but must take into account:

- Whether one of the parties has all or most of the **bargaining power** in the transaction;
- Whether the contract was prepared by one party **before any discussion** occurred between the parties about the transaction;
- Whether the other party was, in effect, required to accept or reject the terms of the contract in the form in which it was presented;
- Whether the other party was given an effective **opportunity to negotiate** the terms of the contract; and
- Whether the terms of the contract take into account the **specific characteristics** of the other party or the particular transaction.

## **CASE STUDY**

A mobile phone contract that had an immediate termination clause for any breach potentially had an application so broad that it was considered unfair. VCAT found:

*A customer may have breached the agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for receipt of billing information) this will also provide a ground to AAPT to terminate the Agreement. Because these provisions are so broadly drawn, and are one-sided in their operation, they are unfair terms within the meaning of the FTA.*

**Legal reference: Director of Consumer Affairs  
Victoria v AAPT Limited [2006] VCAT 1493 at [53]**

- The ACCC has the responsibility of enforcing the unfair contract terms law by taking action in the Federal Court.
- The States and Territories also enforce these laws in their respective jurisdictions and can also take action in the Federal Court.

# Unconscionable Conduct s21

- Unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience.
- Under the Australian Consumer Law, businesses must not engage in unconscionable conduct, when dealing with other businesses or their customers

# How to avoid engaging in unconscionable conduct

- do not exploit the other party when negotiating the terms of an agreement or contract;
- **do not reward your staff for unfair, pressure-based selling;**
- take care to be reasonable when exercising your rights under a contract;
- consider the characteristics and vulnerabilities of your customers. For example, use plain English when dealing with customers from a non-English speaking background;
- make sure your contracts are thorough, easy to understand, not too lengthy and do not include harsh, unfair or oppressive terms;
- ensure you have clearly disclosed important or unusual terms or conditions of an agreement;

- ensure customers understand the terms of any agreement associated with the transaction and give them the opportunity to consider the offer properly.
- observe any cooling-off periods that may apply or consider offering a cooling-off period;
- give customers the opportunity to seek advice about the contract before they sign it;
- if things go wrong, be open to resolving complaints.

Please fill out the  
survey, your  
feedback is valued.

Thank you for your  
time.

