

Consumer Protection in Australia

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One Asia Lawyers Group
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1. Introduction

In Australia, **Australian Consumer Law (ACL)**, which is set out in Schedule 2 of the Competition and Consumer Act 2010, serves as the primary consumer protection legislation. As shown in the recent cases of Volkswagen¹ and Lorna Jane², the potential for huge fines and reputational risk makes the ACL an important law for companies offering products and services in Australia to be aware of.

The supply of financial services and consumer credit lending is subject to consumer protection provisions set out in the ASIC Act (Australian Securities and Investments Commission Act 2001), many provisions of which are similar to the ACL.

Under the consumer protection provisions of the ACL and ASIC Act, not only individuals but also businesses may be considered consumers. On 1 July 2021, the definition of consumer was amended to further expand the scope of the Australian Consumer Law.

In addition, on 23 August 2021, the Treasurer announced a proposed amendment on unfair contract terms, which is open for comments until 20 September 2021 (public consultation page: <https://treasury.gov.au/consultation/c2021-201582>).

This newsletter provides an overview of the Australian Consumer Law (ACL), including these legislative changes and recent cases.

2. Framework of Australian Consumer Law (ACL)

The Australian Consumer Law (ACL) is divided broadly into regulations concerned with (1) misleading or deceptive conduct; (2) unconscionable conduct; (3) unfair contract terms, (4) consumer guarantees, (5) unfair practices, especially false or misleading representations, (6) unsolicited consumer agreements, and (7) safety of consumer goods, many of which are statutory rules that cannot be excluded or modified by contract.

Among these, (3) unfair contract terms and (4) consumer guarantees have been the focus of attention in recent amendments (or proposed amendment). These are explained in 3 and 4 below respectively. The overview of other regulations is provided below.

Misleading or Deceptive Conduct (Section 18 of the ACL)

Section 18 of the ACL prohibits misleading or deceptive conduct, and are often enforced in conjunction with the false or misleading representations regulations described below.

Unconscionable Conduct (Section 20 of the ACL)

Section 20 of the ACL prohibits unconscionable conduct in general. Unconscionable conduct is not defined but has a meaning based on precedents. Generally, it is interpreted in a broad sense as a prohibition of unconscionable conduct that goes beyond the realm of transactional negotiation and violates good conscience, taking into account various circumstances such as differences in bargaining power, the consumer's ability to understand, and the reasonableness of the content of the contract.

¹ The case concerned software in Volkswagen vehicles that had two different settings for nitrogen oxide (NOx) emissions. Volkswagen made false representations by only disclosing the setting with lower emissions that met Australian emissions standards. In a judgment of 20 December 2019, the Federal Court has ordered Volkswagen to pay \$125 million in penalties, the highest in the history of the ACL. On 9 April 2021, Volkswagen's appeal against the civil sanction is dismissed. (Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft [2019] FCA 2166, Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49)

² A sports apparel manufacturer, Lorna Jane, falsely claimed between July 2 and 23 2020 that some of its products would protect the wearer by destroying viruses including COVID-19. A \$5 million penalty was imposed. (Australian Competition and Consumer Commission v Lorna Jane Pty Ltd [2021] FCA 852)

However, recent judicial decisions have clarified that it is not necessary to prove that the act exploited the vulnerability of consumers or small businesses³, and the scope of acts considered as unfair acts tends to be interpreted more broadly.

In a recent case of unconscionable conduct, Australia's largest telecommunications company, Telstra, was fined A\$50 million on 13 May 2021 for selling mobile contracts to more than 100 Indigenous consumers despite their lack of understanding and financial ability to sign the contracts⁴.

Unfair Practices (From Section 29 of the ACL)

False or misleading representations, unsolicited supplies, pyramid schemes, referral selling, etc. are regulated.

False or misleading representations are representations or actions that are false or misleading with respect to certain matters in connection with the supply and promotion of goods or services. Examples of such representations include the following.

- Standards, quality, grade, etc. of goods/services
- Testimonial
- Price
- Availability of repair and spare parts
- Place of origin
- Profitability of specific business activities, risks, etc.

Furthermore, it is expressly prohibited to make misleading statements about the existence or effect of statutory warranties or remedies, or to require payment for the exercise of a consumer's statutory rights.

In addition, there are separate regulations regarding representations of rebates and prizes, bait advertising, and price display methods. There are also certain labeling regulations for the purchase of land.

With regard to the country of origin of a product, products need to meet certain standards to use notations such as "Grown In/Product of/Made in". This is mainly determined by the degree of production and processing.

The Volkswagen and Lorna Jane cases referred to at the beginning of this article are both related to false or misleading representations, and the Google case⁵, which the ACCC won in April 2021 and is currently subject to a penalty hearing, also involved false or misleading representations, suggesting the recent trend of tightened enforcement on false or misleading representations.

Unsolicited Consumer Agreements (Section 69 of ACL)

The act of soliciting or negotiating for goods or services with a total value of \$100 or more outside the premises of the business or by telephone without the consumer's invitation is regulated. There are detailed provisions on the time frame for negotiations, matters to be notified to the consumer at the start of negotiations, the obligation to prepare a contract, cooling off etc. For solicitation by telephone, it is also necessary to comply with the regulations of the Do Not Call Register Act 2006.

There are regulations on other consumer transactions such as Australia-specific lay-by agreements, gift cards and invoicing.

Safety of Consumer Goods

Consumer goods and their services such as installation and delivery are required to comply with the prescribed safety standards and rulings. For example, safety standards⁶, information standards, permanent/interim bans⁷, and safety warning notices have been issued by the government. In addition, there are obligations imposed on warranties regarding defects, such as the requirement to include

³ ACCC v Quantum Housing Group Pty Ltd [2021] FCAFC 40

⁴ Australian Competition and Consumer Commission v Telstra Corporation Limited [2021] FCA 502

⁵ Google LLC and Google Australia Pty Ltd misled consumers into believing that they could disable the collection of personal location data on their Android devices by turning off the Location History setting, even though there were other settings (Web & App Activity) that enabled this setting by default, and thus continued to collect consumers' location data.

(Australian Competition and Consumer Commission v Google LLC (No 2) [2021] FCA 367)

⁶ <https://www.productsafety.gov.au/product-safety-laws/safety-standards-bans/mandatory-standards>

⁷ <https://www.productsafety.gov.au/product-safety-laws/safety-standards-bans/product-bans>

certain matters in a written warranty.

The ACCC also regulates the recall of products with safety issues, and has issued guidelines for this purpose. In the event of an accident caused by a product safety issue, the company is obliged to report the incident to the government within two days of becoming aware of the incident.

3. Unfair Contract Terms (From Section 23 of ACL)

In a purchase agreement with a consumer or small business, a contract that is considered a standard form contract may be considered void if it contains an unfair clause.

A standard form contract is not only the so-called standard terms and conditions, but even an ordinary contract may be deemed to fall under this category, taking into consideration various circumstances such as differences in bargaining power and whether or not the other party can request changes to the wording.

Whether or not a clause is unfair requires a judgment as to whether or not the clause would cause a material imbalance between the parties and whether or not the clause is reasonably necessary for the protection of the proper interests in light of the entire contents of the contract.

It is noteworthy that this regulation is applied not only to sales contracts with general individuals but also to contracts with small businesses. Currently, a small business is defined as a business with less than 20 employees. However, the Unfair Contract Terms will not apply to a contract with a small business where the consideration exceeds \$300,000 (or \$1,000,000 if the contract is for a period exceeding 12 months).

Currently, there are no fines or other penalties for violations of this regulation. However, a proposed amendment was announced on 23 August 2021, which, if passed, would result in penalties comparable to the maximum penalties under other regulations, as well as other remedies (e.g., injunctions, orders to modify contracts, etc.).

Furthermore, it is expected that the small business size cap will be increased to 100 employees or A\$10 million in annual turnover and the consideration cap will be removed.

In addition to the above, there are other minor amendments to the regulations, and overall, the regulations will be strengthened with respect to unfair contract terms. Since the amendments are expected to be applied to existing contracts, it is recommended that companies take measures such as reviewing their current contract formats before the amendments come into effect.

4. Consumer Guarantees (From Section Article 51 of the ACL)

Any goods or services provided to a consumer are subject to statutory warranties, which may not be excluded or amended by contract, with some exceptions. These statutory warranties are referred to as consumer guarantees.

In general, a buyer is considered to have acquired the goods or services as a consumer if (1) the consideration is less than \$100,000 or (2) the goods or services are normally acquired for personal or household use. Therefore, sellers shall be obligated to provide consumer guarantees to not only individuals but also companies and business owners who purchase such goods or services. As mentioned at the beginning of this article, the amendment on 1 July 2021⁸ has increased the maximum amount of consideration from AUD 40,000 to AUD 100,000 and expanded the scope of application of consumer guarantees.

As examples of Consumer Guarantees, products must:

- come with undisturbed possession
- be of acceptable quality
- be fit for the purpose notified before the purchase
- match any demonstration model or sample

⁸ Treasury Laws Amendment (Acquisition as Consumer - Financial Thresholds) Regulations 2020

- have spare parts and repair facilities available

A good is deemed to be of acceptable quality when it can be reasonably judged that the product satisfies all of the following: (1) fitness for the purpose normally assumed, (2) appearance and finish, (3) being free from defects, (4) safety and (5) durability.

5. Penalty

For both criminal and civil sanctions, companies can be fined up to the greatest of (1) A\$10 million, (2) three times the value of the benefit directly or indirectly obtained from the offence, or (3) 10 per cent of consolidated annual turnover. Individuals can be fined up to A\$500,000. The criminal penalty is strict liability, which means that the offence can be committed without the psychological element of intent or negligence on the part of the offender.

6. Conclusion

As Australia's consumer protection laws cover a wide range of conduct and are highly regulated, the use of labelling, contracts or sales practices used in other countries may result in an unintentional offence. In view of the vigorous enforcement by the authorities and the trend towards stricter regulations through legislative changes, this is an area where companies offering goods and services in Australia particularly need to be aware of.

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