

LEGAL PROFESSION ADMISSION BOARD

MARCH 2014

COMPETITION & CONSUMER LAW

Time: Three Hours Candidates **must** attempt **one** (1) question only from **Part A** and **two (2)** questions from each of **Part B** and **Part C** for a total of **five (5)** questions. **Please note the marks that have been allocated for each of the questions.**

Make sure that only the specified number of questions is answered, because only the **first** question attempted in **Part A** and the first **two** questions attempted in each of **Part B** and **Part C** will be marked.

All questions may be answered in one examination booklet.

Write the number of the question being answered on each page of the booklet;

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade

This examination is worth 80% of the total marks in this subject

Permitted Materials: This is a closed book examination. No materials are permitted in the examination room.

Attached to this paper are copies of:

- The Case List, as contained in the Law Extension Committee's subject guide;
- An abbreviated index of the relevant provisions of the Competition & Consumer Act 2010 (CCA); and
- An abbreviated index of the relevant provisions of the Australian Consumer Law (ACL).

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

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CCA: Competition & Consumer Act
ACL: Australian Consumer Law

PART A

Attempt only **ONE** (1) question in this part.

Question 1

Write notes on only **FOUR** (4) of the following:

- a. Differentiation between "a Corporation" (s4 CCA) and "a person" as referred to in the CCA/ACL.
- b. Circumstances when Commonwealth government authorities, may be subject to the CCA. (s2A CCA).
- c. Contracts, arrangements and understandings (s 4D, 45 of CCA).
- d. "Per se offences" in CCA.
- e. 5 forms of statutory guarantees applying to goods and services (Part 3 – 2 ACL).
- f. The statutory consumer guarantee rights of gift recipients (s 266 ACL).
- g. What is meant by "unconscionable conduct within the meaning of the unwritten law", (s 20 of the ACL)?
- h. The remedies available against suppliers of goods when there is a major failure to comply with the statutory guarantee as to acceptable quality.

(20 marks)

OR

Question 2

Answer only **TWO** (2) of the following:

- (a) Based on the definition of "markets" in section 4E of the CCA and case law, derive the market for **only two (2)** of the following:
 - i. Fresh milk in either glass, plastic or Tetra Pak containers;
 - ii. Chicken fertiliser, in pellet form, contained in 50 kg plastic bags;
 - iii. Gluten free bakery products (cakes, savoury and sweet pastries & bread) made and sold by a bakery in Broken Hill;
 - iv. A popular published street directory for the city of Adelaide;
 - v. Daily disposable contact lenses.

(Part A Question 2 continued)

- (b) When is a contract, arrangement or understanding or a proposed contract, arrangement or understanding to be taken to contain an exclusionary provision? (Section 4 D)
- (c) Explain which of the following acquisitions may be taken to have been made by a consumer (s3 of ACL):
- i. 100 solar panels, each costing \$5000, to power machinery at a factory;
 - ii. Installation of the solar panels by a qualified electrician during the construction of a factory;
 - iii. A small wind turbine, costing \$15,000, to power a generator on a hobby farm;
 - iv. An 8 seater minibus, costing \$57,000;
 - v. 2 silver ingots, costing \$6,000 suitable for transforming into jewellery.

(20 marks)**PART B****Attempt any TWO (2) questions in this part.****Question 1**

Super Snow Products Pty Limited ("SSP") manufactures and distributes a range of exclusive and premium quality ski equipment including boots, bindings, skis, snowboards, clothing and accessories. The "SSP" label is worn by 90% of professional skiers as well as by those who can afford their high prices.

Since it started in 1998, SSP has sold its products through exclusive boutique ski shops and up market sports stores. To a limited extent, SSP has commenced selling directly over the Internet but is careful not to undercut the price charged by their distributors.

Sports Galore Pty Limited ("SG") is one of the sport shops supplied with SSP's products. They have shops in Parramatta, Canberra and Jindabyne.

Three (3) months ago, SG changed its trading name to "Sports Discounts" and installed a large sign in the front window of their Parramatta shop which said; "*Discounted ski gear. You won't do better.*"

SG also commenced selling via the Internet and for the past 6 weeks, advertised SSP's skis, snowboards and gloves at a "50% discount".

(Part B Question 1 continues)

(Part B Question 1 continued)

Three (3) weeks ago an SSP representative visited the Parramatta store and said to the store manager:

"You should look closely at your strategy because I am having great trouble convincing my management to continue supporting your shop".

SG has continued to advertise SSP's skis, gloves and snowboards via the Internet at a 50% discount and to generally discount all products in their Parramatta shop.

SG has begun to experience delays in the supply of gloves and clothing and have not received any of the latest model skis, bindings, boots and snowboards, as ordered, from SSP.

Advise SSP as to whether they have misused their market power (s 46 of the CCA).

- i. Key facts (3 marks)**
- ii. Threshold issues (4 marks)**
- iii. "Market power" (4 marks)**
- iv. "Taking advantage" (3 marks)**
- v. Prescribed anti-competitive purpose (3 marks)**
- vi. Conclusion (3 marks)**

(20 Marks)

(Part B Question 2 follows)

Question 2

Assume the relevant facts contained in Part B question 1 and that in addition to the statements made 3 weeks ago by an SSP representative to SG, he said:

"You should check out the other retailers in the area because they are complaining about your pricing strategy. You are destroying them and we will not put up with it any longer. Some of your prices are below cost and we know that you are using that to sell other brands with higher mark-ups"

Advise SG as to whether they should commence an action against SSP for engaging in resale price maintenance (s 48 of CCA).

(20 marks)

Question 3

Nigel and Joan conduct a popular programme on a commercial radio station, 2YIMA.

They regularly engage in on-air practical jokes.

During their programme, they telephoned Bruno Bulisconi ("Bruno"), the managing director of a company that makes and sells a range of Italian pastries after Nigel had experienced an annoying delay in being served at Bruno's bakery earlier that day.

They said in a very official voice: *"We are from the New South Wales Food Hygiene Authority which is part of NSW Health. We have received a report that your shop is unhygienic and that you have been selling cakes containing salmonella. At least 6 people have had to go to hospital due to food poisoning.*

We will be sending our inspectors to your establishment this morning but in the meantime you should close down."

Both Nigel and Joan knew that Bruno, had a poor command of the English language.

Being highly agitated and worried about his future Bruno, immediately stopped producing product and closed the shop. 7 casual employees were sent home.

Nigel and Joan attempted to ring back and share the joke with Bruno but he was too busy to answer the phone.

Even when he reopened, a number of patrons, who had heard the broadcast and believed it to be genuine, refused to patronise the bakery.

(Part B Question 3 continues)

(Part B Question 3 continued)

Advise Bruno as to any action he may have against 2YIMA, Nigel and Joan pursuant to at least 2 of the deceptive trade practices sections in the ACL.

- i. Key facts (4 marks)
- ii. Threshold issues, including conduct (6 marks)
- iii. Audience related issues (6 marks)
- iv. Conclusion (4 marks)

(20 Marks)

PART C

Attempt any TWO (2) questions in this part.

Question 1

Write notes on the significance of only TWO (2) of the following cases:

- i. *Yorke v Lucas* (1983) 49 ALR 672
- ii. *Sykes v Reserve Bank of Australia* (1988) 88 FC R 511
- iii. *Truth About Motorways P/L v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616
- iv. *Butcher v Llachlan Elder Realty Pty Limited* (2004) 218 CLR 592
- v. *Effem Foods Ltd v Nicholls* [2004] ATPR 42-034
- vi. *NSW Lotteries v Kuzmanovski* [2011] FCAFC 106 (24 August 2011)

(10 marks)

(Question 2 follows)

Question 2

Explain the circumstances in which a person may breach the unconscionable conduct provisions in connection with goods or services (s21 & 22 of ACL).

- i. Threshold issues in s21 (3 marks)**
- ii. Application of section 21 of the ACL (3 marks)**
- iii. Application of section 22 of the ACL (4 marks)**

(10 marks)

Question 3

Identify 5 remedial orders the Court can make under s87 of the CCA and pursuant to section 243 of the ACL.

(10 marks)

Question 4

Explain

- i. What actions may be brought against manufacturers for goods with a safety defect as prescribed in Part 3.5 of the ACL?**
- ii. The time limitations for commencing a defective goods action.**

(8 marks)

(2 marks)

Question 5

Differentiate between "full line forcing" and "third line forcing" (s47 CCA).

(10 marks)

Question 6

- a. Identify the 2 preconditions, contained in s23 .ACL, which would make a term of a consumer contract void.**
- b. Explain what is meant by an "unfair term" of a consumer contract pursuant to section 24 of ACL.**
- c. Give 5 examples of unfair terms in a consumer contract (s25 ACL).**

(10 marks)

END OF PAPER

CASE LIST

Please Note: The **Course Materials** section on the LEC Webcampus includes the lecture synopsis for the subject.

1. CONSTITUTIONAL ISSUES, EXTENDED JURISDICTION, DEFINITIONS

Re Trade Practices Tribunal: ex parte St George CC (1974) 130 CLR 533
R v Federal Court of Australia: ex parte W A National Football League (1979) 143 CLR 190
State Superannuation Board of Victoria v TPC (1982) 150 CLR 282
O'Brien v Smolonogov (1983) 53 ALR 107
Fencott v Muller (1983) 152 CLR 570
Hughes v WACA (1986) 69 ALR 660
E v The Australian Red Cross Society (1991) 99 ALR 601 at 630-47
SGIC v GIO of NSW (1991) 101 ALR 259
Crisp v ANZ Bank Corp (1994) ATPR 41-294
Dataflow P/ L v Goodman (1999) 168 ALR 169

Application to Governments

JS McMillan P/ L v C'w (1997) 77 FCR 337
State of NSW v R.T. & Y.E. Falls Investments P/L; R.T. & Y.E. Falls Investments P/L v State of NSW [2003] NSWCA 54
Village Building v Canberra International Airport (No 2) 2004 208 ALR 98
NT Power Generation Pty Ltd v Power and Water Authority [2004] 210 ALR 312

“In Trade or Commerce”

Concrete Constructions (NSW) v Nelson (1990) 169 CLR 594

Australian Federation of Consumer Organisations v Tobacco Institute of Australia (1991) 98 ALR 670
Pears v Balzer (1996) 137 ALR 180
Martin v TDR (1999) 163 ALR 79
McCormick v Riverwood International (Australia) Pty Ltd (1999) 167 ALR 689
Pritchard v Racecage (1997) 142 ALR 527
Village Building v Canberra International Airport (No 2) 2004 208 ALR 98; FCFCA210 ALR 114

Conduct by Silence

Demagogue v Ramensky (1992) 110 ALR 608,
Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd (1998) 155 ALR 714
Peninsular Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211

Forwood Products v Gibbert [2002] ATPR 41-870
Metalcorp Recyclers Pty Ltd v Metal Manufacturers [2004] ATPR 46-243

2. PART IV OF THE ACT – RESTRICTIVE TRADE PRACTICES

(a) Definition of “market”, competition policy

Mark Lyons v Bursill Sportsgear (1987) 75 ALR 581
Qld Co-op Milling Assoc (1976) 8 ALR 481
Singapore Airlines v Taprobane Tours WA (1991) 104 ALR 633
Australian Meat Holdings v Trade Practices Commission (1989) 11 ATPR 40-932
Trade Practices Commission v A I & S (1990) 92 ALR 395

Trade Practices Commission v Arnotts
(1990) 97 ALR 555

(b) Cartel Conduct – Division 1

(c) Section 45: anti-competitive non-price

Top Performance Motors v Ira Berk
(Queensland) (1975) 5 ALR 465
Trade Practices Commission v Nicholas Enterprises (No. 2) (1979) 26 ALR 609
Morphett Arms Hotel v Trade Practices Commission (1980) 30 ALR 88
Trade Practices Commission v Email (1980) 43 FLR 383
Trade Practices Commission v Ansett Transport (1978) 20 ALR 31
O'Brien Glass v Cool & Sons (1983) 48 ALR 625
Radio 2UE Sydney v Stereo FM (1982) 44 ALR 557
TPC v Tubemakers (1983) 5 ATPR 40-358
TPC v David Jones (Aust) (1986) 64 ALR 67
TPC v Service Station Assoc (1993) 116 ALR 643
News Limited v Australian Rugby Football League Limited (1996) 139 ALR 193
ACCC v CC (NSW) P/L (1999) 165 ALR 468
News Limited v South Sydney District Rugby League Football Club Ltd [2003] 200 ALR 157
Visy Paper P/L v ACCC [2003] 201 ALR 414
Rural Press Ltd v ACCC [2003] 203 ALR 217
Apco Pty Ltd v ACCC [2005] FCAFC 161
ACCC v Leahy Petroleum Pty Ltd [2007] FCA 794 (29 May 2007)

(d) Section 46: misuse of market power

Top Performance Motors v Ira Berk
(Queensland) (1975) 5 ALR 465
Victorian Egg Marketing Board v Parkwood Eggs (1978) 33 FLR 294
TPC v CSBP and Farmers (1980) 53 FLR 135
Mark Lyons v Bursill Sportsgear (1987) 75 ALR 581
Q W I v BHP (1989) 167 CLR 177
ASX v Pont Data (1990) 97 ALR 513
Eastern Express v General Newspapers (1992) 106 ALR 297
Singapore Airlines v Taprobane Tours WA (1991) 104 ALR 633
Dowling v Dalgety (1992) 106 ALR 75
General Newspapers v AOTC (1993) ATPR 41-215
TPC v Pioneer Concrete (Qld) (1994) 124 ALR 685
Sita Qld Pty Ltd v Q'land (1999) 164 ALR 18
Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 178 ALR 253
Monroe Topple & Associates v Institute of Chartered Accountants; (2002) ATPR 41-879
Boral Besser Masonry Ltd v ACCC [2003] 195 ALR 609

(e) Section 47: exclusive dealing (solus agreements, vertical customer and territorial restraints, third line forcing)

S W B Family Credit Union v Parramatta Tourist Services (1980) 48 FLR 445
Victorian Egg Marketing Board v Parkwood Eggs (1978) 33 FLR 294
Nashua Australia (1975) 1 TPCD 168
Trade Practices Commission v Legion Cabs (Trading) Co-operative Society (1978) 35 FLR 372
Dandy Power Equipment v Mercury Marine (1982) 44 ALR 173
Outboard Marine Aust v Hecar Investments (No 6) (1982) 44 ALR 667
O'Brien Glass v Cool (1983) 48 ALR 625

Castlemaine Tooheys v Williams and Hodgson Transport (1986) 162 CLR 395

Paul Dainty Corporation v National Tennis Centre Trust (1990) 94 ALR 225

ACCC v Health Partners (1997) 151 ALR 662

Munday v ACT (No 2) (1999) 137 ACTR 53

Munroe Topple & Associates v Institute of Chartered Accountants; (2002) ATPR 41-879

Universal Music v ACCC [2003] 201 ALR 639

ACCC v Australian Safeway Stores Ltd (No 2) (2001) 119 FCR 1

(f) Sections 48 and 96-100: resale price maintenance

Bata Shoe Co -Aust v TPC (1980) 44 FLR 149

Ron Hodgson (Holdings) v Westco Motors (Distributors) (1980) 29 ALR 307

Trade Practices Commission v Orlane Australia (1984) 51 ALR 767

Trade Practices Commission v Mobil Oil Australia (1984) 55 ALR 527

BP Australia v Trade Practices Commission (1986) 66 ALR 148

Heating Centre v Trade Practices Commission (1986) 65 ALR 429

Trade Practices Commission v Penfolds Wines (1992) ATPR 41-163

ACCC v Australian Safeway Stores Ltd (1997) 145 ALR 36 & (No 2) (2001) 119 FCR 1

ACCC v Dermalogica Pty Ltd (2005) 215 ALR 482

ACCC v Jurlique International Pty Ltd [2007] FCA 79

(g) Section 50: mergers/acquisitions

Trade Practices Commission v Ansett Transport Industries (1978) 32 FLR 305

TPC v Bowral Brickworks (1984) 5 ALR 733

Australian Meat Holdings v TPC (1989) 11 ATPR 40-932

Trade Practices Commission v Australian Iron and Steel (1990) 92 ALR 395

TPA v Arnotts (1990) 97 ALR 555

3. THE DECEPTIVE TRADE PRACTICES (ACL)

(a) Predictions and promises

ACCC v IMB Group [1999] FCA 819
O'Neill v MBF of Australia [2002] 122 FCR 455

Digitech (Aust) v Brand 2004 NSWCA 58

Sykes v Reserve Bank (1988) 88 FCR 511, 158 ALR 710

(b) Misleading and deceptive conduct

Hornsby Building Info Centre v Sydney Building Info Centre (1978) 140 CLR 216

McDonald's System of Australia v McWilliam's Wines (No 2) (1979) 41 FLR 429

Taco Co of Aust v Taco Bell (1982) 42 ALR177

Parkdale Furniture v Puxu (1982) 149 CLR 191

Gates v City Mutual Life Assurance Society (1986) 160 CLR 1

Glorie v WA Chip & Pulp (1981) 55 FLR 310

Smolonogov v O'Brien (1982) 67 FLR 311

Henjo Investments v Collins Marrickville (1988) 79 ALR 83

Campomar Sociedad, Limitada & Anor v Nike International Ltd & Anor (2000) 169 ALR 677

NSW Dairy Corp v Murray Goulburn Co-op (1989) 86 ALR 549

Telmak v Coles Myer (1989) 89 ALR 48

Fraser v NRMA Holdings (1995) 127 ALR 543

NRMA Holdings v Fraser (1995) 127 ALR 577

Cassidy v Saatchi & Saatchi [2004] ATPR 41-980

Bodum v DKSH Australia Pty Limited [2011] FCAFC 98 (5 August 2011)

NSW Lotteries Corp Pty Ltd v Kuzmanovski [2011] FCAFC 106 (24 August 2011)

(c) Unconscionable conduct

NAB v Nobile (1988) 100 ALR 227

Zoneff v Elcom Credit Union (1990) 12 ATPR 41-009

Qantas v Cameron (1996) 145 ALR 294

ACCC v Samton Holdings (2002) 189 ALR 76

Monroe Topple & Associates v Institute of Chartered Accountants (2002) ATPR 41-879

ACCC v Berbatis Holdings [2003] 197 ALR153

ASIC v National Exchange [2005] 147FCR 132

ACCC v Lux Distributors Proprietary Ltd (2013) FCAFC 90 (15 August 2013).

(d) Other sections of ACL

Yorke v Lucas (1985) 158 CLR 661

Global Sportsman v Mirror

Newspapers (1984) 55 ALR 25

Brown v The Jam Factory (1981) 53 FLR 340; 35 ALR 79

TPC v Pacific Dunlop (1994) ATPR 41-307

QDSV Holdings (t/as Bush Friends Aust) v TPC (1995) 131 ALR 493

Kizbean v W G and B (1995) 184 CLR 281

Qantas v Cameron (1996) 145 ALR 294

Qantas Airways v Arauco (1996) 136 ALR 510

Nationwide News v ACCC (1996) 142 ALR212

Acohs Pty Ltd v Bashford Consult

(1997) 144 ALR 528; (appeal)

Bialkower v Acohs (1999) ATPR 41-685

Burg Design P/ d v Walli (1999) 162 ALR 639

Kenny & Good v MGICA (1999) 199 CLR 413

Henschke v Rosemount [2001] ATPR 41-793

Peninsular Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211

Cassidy v Saatchi & Saatchi [2004] ATPR 41-980

ACCC v Cadbury Schweppes (2004) FCA 516

Butcher v Lachlan Elder Realty Pty Limited (2004) 218 CLR 592

Campbell v Backoffice Investments Pty Limited [2009] HCA 25; 83 ALJR 903

ACCC v Kingisland Meatworks & Cellars FCA August 2012

Google v ACCC High Court 6 February 2013

4. PRODUCT LIABILITY – ACL PARTS 3.2 Div 1, 3 – 5 AND 5 – 4

Glendale Chemical P/L v ACCC (1998) 90 FCR 40

Ryan v Great Lakes Council [1999] FCA 177

Medtel Pty Ltd v Courtney [2003] 198 ALR 630

Effem Foods Ltd v Nicholls [2004] ATPR 42-034

5. ENFORCEMENT AND REMEDIES – PART VI OF CCA & CHAPTER 5 of ACL

(a) Enforcement

TPC v CSR (1991) 13 ATPR 41-076

TPC v Sun Alliance Aust (1994) ATPR 41-286

NW Frozen Foods v ACCC (1996) 141 ALR 640

TPC v Vales Wine Comp (1996) 145 ALR 241
ACCC v Aust Safeway Stores (1997) 145 ALR 36
ACCC v Aust Safeway Stores (No2) [2001] FCA 861
ACCC v George Weston Ltd & Lonergan [2004] 210 ALR 486
ACCC v Dermalogica Pty Ltd (2005) 215 ALR 482
ACCC v Jurlique International Pty Ltd [2007] FCA79
ACCC v Visy Industries Holdings Pty Ltd (No 3)[& Pratt, Debney, Carroll] [2007] FCA 1617

(b) Remedies and other related issues

Phelps v Western Mining (1978) 20 ALR 183
World Series Cricket v Parish (1979) 16 ALR 191
Yorke v Lucas (1983) 49 ALR 672
TPC v Tubemakers of Aust (1983) 5 TPR 321
Gates v The City Mutual Life Assurance Society (1986) 160 CLR 1
Henjo v Collins Marrickville (1989) 89 ALR 539
State of WA v Wardley Aust (1991) 102 ALR 213
Poseidon v Adelaide Petroleum (1992) ATPR 41-164
Kizbeau P/L v W G & B L (1995) 184 CLR 281
Gregg v Tasmania Trustees (1997) 143 ALR 328

Marks v GIO Ltd (1998) 196 CLR 497
McKellar v Container Terminal Management Services Ltd (1999) 165 ALR 409
Truth About Motorways P/L v Macquarie Infrastructure Investment Management Ltd (2000) 169 ALR 616
Henville v Walker (2001) 182 ALR 37
Blacker v NAB (2001) ATPR 41-817
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 76 AJLR 1461

Murphy v Overton Invest [2004] 20 ALR 26
HTW Valuers (Central Qld) Pty Ltd v Astonland P/Ltd (2004) 211 ALR 79
Master Education Services v Ketchell [2008] HCA 38 (27/8/8)
APIR Systems Limited v Donald Financial Enterprises [2009] FCAFC 45 (9/4/9)
Unilever v Goodman Fielder [2009] FCA 1305 (13/11/9)
Keller v L E D Technologies Pty Ltd [2010] FCAFC (9/6/10)
ACCC v Powerballwin Com.FC (23/4/10)
NSWLotteries Corp Pty Ltd v Kuzmanovski [2011] FCAFC 106 (24 August 2011)

COMPETITION & CONSUMER ACT 2010 ("CCA")
INCORPORATING, IN SCHEDULE 2, THE AUSTRALIAN
CONSUMER LAW ("ACL")

ABBREVIATED INDEX FOR EXAM PURPOSES

CCA – PRELIMINARY

- 2. Object of this Act
- 2A. Application of Act to Commonwealth and authorities
- 2B. Application of Act to States and Territories
- 2BA. Application of Part IV to local government bodies
- 2C. Activities that are not business
- 4. Interpretation
- 4B. Consumers
- 4C. Acquisition, supply and re-supply
- 4D. Exclusionary provisions
- 4E. Market
- 4F. References to purpose or reason
- 4G. Lessening of competition to include preventing or hindering competition
- 4K. Loss or damage to include injury

PART IV OF CCA – RESTRICTIVE TRADE PRACTICES

Division 1—Cartel conduct

- Subdivision A—Introduction
- Subdivision B—Offences etc.
- Subdivision C—Civil penalty provisions
- Subdivision D—Exceptions

Division 2—Other provisions

- 45. Contracts, arrangements or understandings that restrict dealings or affect competition
- 46. Misuse of market power
- 47. Exclusive dealing
- 48. Resale price maintenance (refer to Part VIII of CCA as follows)
- 50. Acquisitions that would result in a substantial lessening of competition

PART VIII OF CCA – RESALE PRICE MAINTENANCE

- 96. *Acts constituting engaging in resale price maintenance*
- 96A. *Resale price maintenance in relation to services*
- 97. *Recommended prices*
- 98. *Withholding the supply of goods*
- 99. *Statements as to the minimum price of goods*
- 100. *Evidentiary provisions*

PART IVB OF CCA– INDUSTRY CODES

51ACA. Definitions

51AD. Contravention of industry codes

PART VI OF CCA – ENFORCEMENT AND REMEDIES

75B. Interpretation

76. Pecuniary penalties

76C. Defence to proceedings relating to exclusionary provisions

80. Injunctions

81. Divestiture where merger contravenes section 50 or 50A

82. Actions for damages

83. Finding in proceedings to be evidence

84. Conduct by directors, servants or agents

85. Defences

87. Other orders

THE AUSTRALIAN CONSUMER LAW **CHAPTER 1 OF ACL--INTRODUCTION**

- 1 Application of this Schedule
- 2 Definitions
- 3 Meaning of consumer
- 4 Misleading representations with respect to future matters
- 7 Meaning of *manufacturer*
- 8 Goods affixed to land or premises
- 9 Meaning of *safety defect* in relation to goods
- 11 References to acquisition, supply and re-supply
- 13 Loss or damage to include injury

CHAPTER 2 --GENERAL PROTECTIONS

PART 2-1--MISLEADING OR DECEPTIVE CONDUCT

- 18 Misleading or deceptive conduct

PART 2-2--UNCONSCIONABLE CONDUCT

- 20 Unconscionable conduct within the meaning of the unwritten law
- 21 Unconscionable conduct in connection with goods or services
- 22 Matters the court may have regard to for the purposes of section 21

PART 2-3--UNFAIR CONTRACT TERMS

- 23 Unfair terms of consumer contracts
- 24 Meaning of *unfair*
- 25 Examples of unfair terms
- 26 Terms that define main subject matter of consumer contracts etc. are unaffected
- 27 Standard form contracts
- 28 Contracts to which this Part does not apply

CHAPTER 3 --SPECIFIC PROTECTIONS

PART 3-1--UNFAIR PRACTICES

Division 1--False or misleading representations etc.

- 29 False or misleading representations about goods or services
- 30 False or misleading representations about sale etc. of land
- 31 Misleading conduct relating to employment
- 32 Offering rebates, gifts, prizes etc.
- 33 Misleading conduct as to the nature etc. of goods
- 34 Misleading conduct as to the nature etc. of services

35 Bait advertising

Division 4--Pricing

47 Multiple pricing

48 Single price to be specified in certain circumstances

Division 5--Other unfair practices

49 Referral selling

50 Harassment and coercion

PART 3-2--CONSUMER TRANSACTIONS

Division 1--Consumer Guarantees

Subdivision A--Guarantees relating to the supply of goods

51 Guarantee as to title

52 Guarantee as to undisturbed possession

53 Guarantee as to undisclosed securities etc.

54 Guarantee as to acceptable quality

55 Guarantee as to fitness for any disclosed purpose etc.

56 Guarantee relating to the supply of goods by description

57 Guarantees relating to the supply of goods by sample or demonstration model

58 Guarantee as to repairs and spare parts

59 Guarantee as to express warranties

Subdivision B--Guarantees relating to the supply of services

60 Guarantee as to due care and skill

61 Guarantees as to fitness for a particular purpose etc.

62 Guarantee as to reasonable time for supply

63 Services to which this Subdivision does not apply

Subdivision C--Guarantees not to be excluded etc. by contract

64 Guarantees not to be excluded etc. by contract

64A Limitation of liability for failures to comply with guarantees

PART 3-5—LIABILITY OF MANUFACTURERS FOR GOODS WITH SAFETY DEFECTS

Division 1--Actions against manufacturers for goods with safety defects

138 Liability for loss or damage suffered by an injured individual

139 Liability for loss or damage suffered by a person other than an injured individual

- 140 Liability for loss or damage suffered by a person if other goods are destroyed or damaged
- 141 Liability for loss or damage suffered by a person if land, buildings or fixtures are destroyed or damaged
- 142 Defences to defective goods actions

Division 2--Defective goods actions

- 143 Time for commencing defective goods actions
- 144 Liability joint and several
- 147 Unidentified manufacturer

Division 3--Miscellaneous

- 150 Application of all or any provisions of this Part etc. not to be excluded or modified

CHAPTER 4 --OFFENCES

Part 4-1--Offences relating to unfair practices

Division 1--False or misleading representations etc.

Division 5--Other unfair practices

Part 4-2--Offences relating to consumer transactions

CHAPTER 5 OF ACL--ENFORCEMENT AND REMEDIES

Part 5-1--Enforcement

Part 5-2--Remedies

Division 1--Pecuniary penalties

Division 2--Injunctions

- 232 Injunctions
- 234 Interim injunctions

Division 3--Damages

- 236 Actions for damages

Division 4--Compensation orders etc. for injured persons and orders for non-party consumers

Subdivision A--Compensation orders etc. for injured persons

- 237 Compensation orders etc. on application by an injured person or the regulator

Subdivision B--Orders for non-party consumers

- 239 Orders to redress etc. loss or damage suffered by non-party consumers

240 Determining whether to make a redress order etc. for non-party consumers

Subdivision C--Miscellaneous

242 Applications for orders

243 Kinds of orders that may be made

PART 5-4--REMEDIES RELATING TO GUARANTEES

Division 1--Action against suppliers

Subdivision A--Action against suppliers of goods

259 Action against suppliers of goods

260 When a failure to comply with a guarantee is a major failure

261 How suppliers may remedy a failure to comply with a guarantee

262 When consumers are not entitled to reject goods

263 Consequences of rejecting goods

264 Replaced goods

266 Rights of gift recipients

Subdivision B--Action against suppliers of services

267 Action against suppliers of services

268 When a failure to comply with a guarantee is a major failure

269 Termination of contracts for the supply of services

Division 2--Action for damages against manufacturers of goods

271 Action for damages against manufacturers of goods

272 Damages that may be recovered by action against manufacturers of goods

273 Time limit for actions against manufacturers of goods

Division 3--Miscellaneous

274 Indemnification of suppliers by manufacturers

275 Limitation of liability etc.

276 This Part not to be excluded etc. by contract

276A Limitation in certain circumstances of liability of manufacturer to seller