

# The ACL Scheme - an overview

Lachlan B R Allan  
Barrister

# The ACL- the major types of personal injury claims

- ▶ Actions against manufacturers as a result of a safety defect in goods (a “Defective Goods action”).
- ▶ Actions against manufacturers as a result of a breach of a consumer guarantee relating to the provision of goods.
- ▶ Actions against suppliers as a result of a breach of a consumer guarantee relating to the provision of goods.
- ▶ Actions against suppliers as a result of a breach of a consumer guarantee relating to the provision of services.

# The ACL- where does it come from?

- ▶ The source of the Australian Consumer Law text (“ACL”) is the Competition and Consumer Act 2010 (“CCA”). The CCA came into effect on 1 January 2011.
- ▶ The CCA consists of three Volumes:
  - ▶ Volume 1: sections 1-119
  - ▶ Volume 2: sections 10.01 - 179
  - ▶ Volume 3: Schedules 1 and 2
- ▶ Schedule 2 of Volume 3 is the Australian Consumer Law text.
- ▶ Note that there are, however, provisions in both Volume 1 and Volume 2 of the CCA which affect the operation of the ACL in various ways. (in particular, Part VIB - Claims for damages or compensation for death or personal injury; and Part XI - Application of the Australian Consumer Law as a law of the Commonwealth; and Part XIAA - Application of the Australian Consumer Law as a law of a State or Territory).

# The ACL - how does it get to Victoria?

## 7 The Australian Consumer Law text

The Australian Consumer Law text consists of—

- (a) Schedule 2 to the Competition and Consumer Act 2010 of the Commonwealth; and
- (b) the regulations under section 139G of that Act.

## 8 Application of Australian Consumer Law

- (1) The Australian Consumer Law text, as in force from time to time—
  - (a) applies as a law of this jurisdiction; and
  - (b) as so applying may be referred to as the Australian Consumer Law (Victoria); and
  - (c) as so applying is a part of this Act.

- ▶ Every State and Territory has an ‘application law’ in respect of the ACL. An ‘application law’ is a law that had the effect of deeming the Australian Consumer Law text to be a law of that State or Territory.
- ▶ Victoria’s ‘application law’ is the *Australian Consumer Law and Fair Trading Act 2012* (“ACLFTA”). Section 8 of the ACLFTA adopts ‘the Australian Consumer Law text’
- ▶ By virtue of the words ‘from time to time’, any Commonwealth amendments to the ACL text are automatically adopted as Victorian law.

# S 138B of the CCA confers certain jurisdiction on the Victorian Courts

## **138B Conferring jurisdiction on State and Territory Courts**

- (1) Jurisdiction is conferred on the several courts of the States and Territories in relation to any matter arising under this Part or the Australian Consumer Law in respect of which a civil proceeding is instituted by a person other than the Commonwealth Minister or the Commission.
- (2) However, subsection (1) does not apply in relation to a matter arising under:
  - (a) Division 3 of Part 3-1 of the Australian Consumer Law; or
  - (b) Part 3-5 of the Australian Consumer Law.
- (3) The jurisdiction conferred by subsection (1) on the several courts of the States is conferred within the limits of their several jurisdictions, whether those limits are as to locality, subject matter or otherwise.

# S 138B of the CCA - what's excluded?

- Confusingly, section 138B(2) of the CCA specifically excludes Part 3-5 of the ACL (Defective Goods Actions):
  - Thus, at present, one is technically unable to bring a Defective Goods Action under the ACL in a Victorian Court.
  - As early as March 2015, the government admitted that Defective Goods Actions were “mistakenly excluded” from section 138B and correction was proposed (B Billson (Minister for Small Business), ‘Second reading speech: *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015*’, House of Representatives, Debates, 18 March 2015, p. 2708). But nothing was done for two years...
  - This anomaly ought to be corrected any day now with the passing of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (see Schedule 14).
  - This Bill ought to receive Royal Assent by the end of the month, and the amendment will apply retrospectively.

# The ACL (Vic) - in which Victorian courts or tribunals can a claim be brought?

## 224 Jurisdiction of courts and VCAT

Subject to section 223, VCAT or any court of competent jurisdiction may hear and determine a cause of action arising under any provision of the Australian Consumer Law (Victoria).

- ▶ Section 224 of the ACLFTA provides that a claim under the Australian Consumer Law (Victoria) can be heard by any Court, including VCAT.
- ▶ VCAT's jurisdiction, though, is limited to:
  - ▶ “Consumer and trader disputes”, being those relating to the supply or possible supply of goods and services.
  - ▶ Personal injury claims of \$10,000 or less.
  - ▶ See s 182 of the ACLFTA.
- ▶ Be mindful also of the monetary limit for civil claims in the Magistrates' Court (\$100,000).
- ▶ As a general rule, personal injury practitioners will issue ACL claims in the County or Supreme Courts. A Federal court is also a possibility for a ‘pure’ ACL claim.

# The ACL (Vic) - the extent of the State jurisdiction

## 12 Application of Australian Consumer Law

- (1) The Australian Consumer Law (Victoria) applies to and in relation to—
  - (a) persons carrying on business within this jurisdiction; or
  - (b) bodies corporate incorporated or registered under the law of this jurisdiction; or
  - (c) persons ordinarily resident in this jurisdiction; or
  - (d) persons otherwise connected with this jurisdiction.
- (2) Subject to subsection (1), the Australian Consumer Law (Victoria) extends to conduct, and other acts, matters or things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).

- At s 12, the ACLFTA contains an ‘extraterritoriality’ provision, extending its application beyond conduct that occurs wholly in Victoria



# Defective Goods actions under the ACL

*defective goods action* means an action under section 138, 139, 140 or 141, and includes such an action because of section 138(3) or 145.

## **138 Liability for loss or damage suffered by an injured individual**

- (1) A manufacturer of goods is liable to compensate an individual if:
  - (a) the manufacturer supplies the goods in trade or commerce; and
  - (b) the goods have a safety defect; and
  - (c) the individual suffers injuries because of the safety defect.
- (2) The individual may recover, by action against the manufacturer, the amount of the loss or damage suffered by the individual.
- (3) If the individual dies because of the injuries, a law of a State or a Territory about liability in respect of the death of individuals applies as if:
  - (a) the action were an action under the law of the State or Territory for damages in respect of the injuries; and
  - (b) the safety defect were the manufacturer's wrongful act, neglect or default.

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

- (1) A manufacturer of goods is liable to compensate a person if:
  - (a) the manufacturer supplies the goods in trade or commerce; and
  - (b) the goods have a safety defect; and
  - (c) an individual (other than the person) suffers injuries because of the safety defect; and
  - (d) the person suffers loss or damage because of:
    - (i) the injuries; or
    - (ii) if the individual dies because of the injuries—the individual's death; and
  - (e) the loss or damage does not come about because of a business or professional relationship between the person and the individual.
- (2) The person may recover, by action against the manufacturer, the amount of the loss or damage suffered by the person.

# ACL s 2: definitions

*goods* includes:

- (a) ships, aircraft and other vehicles; and
- (b) animals, including fish; and
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity; and
- (e) computer software; and
- (f) second-hand goods; and
- (g) any component part of, or accessory to, goods.

*trade or commerce* means:

- (a) trade or commerce within Australia; or
- (b) trade or commerce between Australia and places outside Australia;

and includes any business or professional activity (whether or not carried on for profit).

*supply*, when used as a verb, includes:

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
  - (b) in relation to services—provide, grant or confer;
- and, when used as a noun, has a corresponding meaning, and *supplied* and *supplier* have corresponding meanings.

# ACL s 7: “manufacturer”

## 7 Meaning of *manufacturer*

- (1) A *manufacturer* includes the following:
  - (a) a person who grows, extracts, produces, processes or assembles goods;
  - (b) a person who holds himself or herself out to the public as the manufacturer of goods;
  - (c) a person who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied by the person;
  - (d) a person (the *first person*) who causes or permits another person, in connection with:
    - (i) the supply or possible supply of goods by that other person; or
    - (ii) the promotion by that other person by any means of the supply or use of goods;to hold out the first person to the public as the manufacturer of the goods;
  - (e) a person who imports goods into Australia if:
    - (i) the person is not the manufacturer of the goods; and
    - (ii) at the time of the importation, the manufacturer of the goods does not have a place of business in Australia.
- (2) For the purposes of subsection (1)(c):
  - (a) a name, brand or mark is taken to be applied to goods if:
    - (i) it is woven in, impressed on, worked into or annexed or affixed to the goods; or
    - (ii) it is applied to a covering, label, reel or thing in or with which the goods are supplied; and
  - (b) if the name of a person, a name by which a person carries on business or a brand or mark of a person is applied to goods, it is presumed, unless the contrary is established, that the person caused or permitted the name, brand or mark to be applied to the goods.
- (3) If goods are imported into Australia on behalf of a person, the person is taken, for the purposes of paragraph (1)(e), to have imported the goods into Australia.

# Defective goods actions: identifying the “manufacturer”

## 147 Unidentified manufacturer

(1) A person who:

- (a) wishes to institute a defective goods action; but
- (b) does not know who is the manufacturer of the goods to which the action would relate; may, by written notice given to a supplier, or each supplier, of the goods who is known to the person, request the supplier or suppliers to give the person particulars identifying the manufacturer of the goods, or the supplier of the goods to the supplier requested.

(2) If, 30 days after the person made the request or requests, the person still does not know who is the manufacturer of the goods, then each supplier:

- (a) to whom the request was made; and
- (b) who did not comply with the request; is taken, for the purposes of the defective goods liability action (but not for the purposes of section 142(c)), to be the manufacturer of the goods.



# ACL s 9: meaning of “safety defect”:

## 9 Meaning of *safety defect* in relation to goods

- (1) For the purposes of this Schedule, goods have a *safety defect* if their safety is not such as persons generally are entitled to expect.
- (2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances, including:
  - (a) the manner in which, and the purposes for which, they have been marketed; and
  - (b) their packaging; and
  - (c) the use of any mark in relation to them; and
  - (d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
  - (e) what might reasonably be expected to be done with or in relation to them; and
  - (f) the time when they were supplied by their manufacturer.
- (3) An inference that goods have a safety defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.
- (4) An inference that goods have a safety defect is not to be made only because:
  - (a) there was compliance with a Commonwealth mandatory standard for them; and
  - (b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer.

# Defective goods actions - time limits

## 143 Time for commencing defective goods actions

- (1) Subject to subsection (2), a person may commence a defective goods action at any time within 3 years after the time the person became aware, or ought reasonably to have become aware, of all of the following:
  - (a) the alleged loss or damage;
  - (b) the safety defect of the goods;
  - (c) the identity of the person who manufactured the goods.
- (2) A defective goods action must be commenced within 10 years of the supply by the manufacturer of the goods to which the action relates.

- ▶ 3 year time limit after date of discoverability.
- ▶ 10-year “long stop” period following supply by the manufacturer.

# Defective goods actions - workers' compensation preclusion

## 146 No defective goods action where workers' compensation law etc. applies

Division 1 does not apply to a loss or damage in respect of which an amount has been, or could be, recovered under a law of the Commonwealth, a State or a Territory that:

- (a) relates to workers' compensation; or
- (b) gives effect to an international agreement.

- ▶ NOTE: This exclusion applies only to Defective Goods Actions.
- ▶ There is no such exclusion for the other types of ACL claims we will discuss, i.e.:
  - ▶ Actions against manufacturers as a result of a breach of a consumer guarantee relating to the provision of goods.
  - ▶ Actions against suppliers as a result of a breach of a consumer guarantee relating to the provision of goods.
  - ▶ Actions against suppliers as a result of a breach of a consumer guarantee relating to the provision of services.

# Defective goods actions - assessment of damages - CCA Part VIB applies

## **Part VIB—Claims for damages or compensation for death or personal injury**

### **87E Proceedings to which this Part applies**

- (1) This Part applies to proceedings taken under the Australian Consumer Law:
  - (a) that relate to Part 2-2, 3-3, 3-4 or **3-5**, or Division 2 of Part 5-4, of the Australian Consumer Law; and
  - (b) in which the plaintiff is seeking an award of personal injury damages; and
  - (c) that are not proceedings in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.
- (2) However, for the purposes of Divisions 2 and 7, paragraph (1)(c) does not apply.

- Part 3-5 is the “Defective Goods actions” section of the ACL.



# Defective goods actions - CCA assessment of damages - non-economic loss limits and maximums

## Division 3—Limits on personal injury damages for non-economic loss

### 87L Limits on damages for non-economic loss

A court must not, in a proceeding to which this Part applies, award as personal injury damages for non-economic loss an amount that exceeds the amount (if any) permitted under this Division.

### 87M Maximum amount of damages for non-economic loss

- (1) The *maximum amount of damages for non-economic loss* is:
- (a) during the year in which this Part commences—\$250,000; or
  - (b) during a later year—the amount worked out (to the nearest multiple of \$10) as follows:

$$\text{Previous maximum amount} \times \frac{\text{Current September CPI number}}{\text{Previous September CPI number}}$$

- As of September 2016, the stat. max is \$332,590 (September 2017 CPI numbers have not yet been released by the ABS).

# Defective goods actions - CCA assessment of damages - non-economic loss ceilings and thresholds

## 87P Most extreme cases

- (1) The court must not award as personal injury damages for non-economic loss the maximum amount of damages for non-economic loss except in a most extreme case.
- (2) A *most extreme case* is a case in which the plaintiff suffers non-economic loss of the gravest conceivable kind.

- ▶ The stat. max is to be awarded only in a “most extreme case”

## 87S Cases of less than 15% of a most extreme case

If the non-economic loss the plaintiff suffers is less than 15% of a most extreme case, the court must not award personal injury damages for non-economic loss.

- ▶ No damages for non-economic loss if less than 15% of a most extreme case

# Defective goods actions - CCA assessment of damages - other percentages for non- economic loss

## 87Q Cases of 33% or more (but not 100%) of a most extreme case

- (1) If the non-economic loss the plaintiff suffers is at least 33%, but less than 100%, of a most extreme case, the court must not award as personal injury damages for non-economic loss an amount that exceeds the applicable percentage of the maximum amount of damages for non-economic loss.
- (2) The *applicable percentage* is the extent of the non-economic loss the plaintiff suffers, expressed as a percentage of a most extreme case.

## 87R Cases of 15% or more (but less than 33%) of a most extreme case

If the non-economic loss the plaintiff suffers is at least 15%, but less than 33%, of a most extreme case, the court must not award as personal injury damages for non-economic loss an amount that exceeds the amount set out in the following table:

Cases of 15% or more (but less than 33%) of a most extreme case		
Item	Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount of damages for non-economic loss)
1	15%	1%
2	16%	1.5%
3	17%	2%
4	18%	2.5%
5	19%	3%
6	20%	3.5%
7	21%	4%
8	22%	4.5%
9	23%	5%
10	24%	5.5%
11	25%	6.5%
12	26%	8%
13	27%	10%
14	28%	14%
15	29%	18%
16	30%	23%
17	31%	26%
18	32%	30%

# Defective goods actions - CCA

## assessment of damages - gratuitous care

### **Division 5—Limits on personal injury damages for gratuitous attendant care services**

#### **87W Personal injury damages for gratuitous attendant care services for plaintiff**

- (1) A court must not, in a proceeding to which this Part applies, award personal injury damages for gratuitous attendant care services for the plaintiff, except in accordance with this section.
- (2) The court must be satisfied that:
  - (a) there is (or was) a reasonable need for the services to be provided; and
  - (b) the need has arisen (or arose) solely because of personal injury to which the personal injury damages relate; and
  - (c) the services would not be (or would not have been) provided to the plaintiff but for the injury; and
  - (d) the services are provided (or are to be provided) for at least 6 hours per week; and
  - (e) the services are provided (or are to be provided) over a period of at least 6 months.

#### **87X Personal injury damages for loss of plaintiff's capacity to provide gratuitous attendant care services**

- (1) A court must not, in a proceeding to which this Part applies, award personal injury damages for loss of the plaintiff's capacity to provide gratuitous attendant care services to other persons, except in accordance with this section.
- (2) The court must be satisfied that:
  - (a) prior to his or her loss of capacity to provide the services, the plaintiff had provided the services:
    - (i) for at least 6 hours per week; and
    - (ii) over a period of at least 6 months; and
  - (b) the other person would have been entitled, if the plaintiff had died as a result of the contravention of this Act to which the award relates, to recover damages under a law of a State or Territory for loss of the plaintiff's services.

# Defective goods actions - CCA assessment of damages - other provisions

## **Division 6—Other limits on personal injury damages**

### **87Y Damages for future economic loss—discount rate**

- (1) If an award of personal injury damages in a proceeding to which this Part applies is to include any component, assessed as a lump sum, for future economic loss of any kind, the present value of that future economic loss is to be determined by applying:
  - (a) a discount rate of the percentage prescribed by the regulations; or
  - (b) if no percentage is prescribed—a discount rate of 5%.

### **87ZA Interest on damages**

- (1) A court must not, in a proceeding to which this Part applies, order the payment of interest on personal injury damages for:
  - (a) non-economic loss; or
  - (b) gratuitous attendant care services for the plaintiff; or
  - (c) loss of the plaintiff's capacity to provide gratuitous attendant care services to other persons.

### **87ZB Exemplary and aggravated damages**

- (1) A court must not, in a proceeding to which this Part applies, award exemplary damages or aggravated damages in respect of death or personal injury.
- (2) This section does not affect whether a court has power to award exemplary damages or aggravated damages:
  - (a) otherwise than in respect of death or personal injury; or
  - (b) in a proceeding other than a proceeding to which this Part applies.



# Defective goods actions - CCA assessment of damages - contributory fault reduction

## **137A Contributory acts or omissions to reduce compensation in defective goods actions**

- (1) If the loss or damage to which a defective goods action under section 138 or 139 of the Australian Consumer Law relates was caused by both:
  - (a) an act or omission of:
    - (i) the individual who suffers the injuries referred to in that section; or
    - (ii) a person for whom that individual is responsible; and
  - (b) a safety defect of the goods to which the action relates;the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in the responsibility for the loss or damage.

# The ACL “goods” guarantees

## 54 Guarantee as to acceptable quality

- (1) If:
  - (a) a person supplies, in trade or commerce, goods to a consumer; and
  - (b) the supply does not occur by way of sale by auction;there is a guarantee that the goods are of acceptable quality.
- (2) Goods are of *acceptable quality* if they are as:
  - (a) fit for all the purposes for which goods of that kind are commonly supplied; and
  - (b) acceptable in appearance and finish; and
  - (c) free from defects; and
  - (d) safe; and
  - (e) durable;as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).
- (3) The matters for the purposes of subsection (2) are:
  - (a) the nature of the goods; and
  - (b) the price of the goods (if relevant); and
  - (c) any statements made about the goods on any packaging or label on the goods; and
  - (d) any representation made about the goods by the supplier or manufacturer of the goods; and
  - (e) any other relevant circumstances relating to the supply of the goods.

## 55 Guarantee as to fitness for any disclosed purpose etc.

- (1) If:
  - (a) a person (the *supplier*) supplies, in trade or commerce, goods to a consumer; and
  - (b) the supply does not occur by way of sale by auction;there is a guarantee that the goods are reasonably fit for any disclosed purpose, and for any purpose for which the supplier represents that they are reasonably fit.
- (2) A *disclosed purpose* is a particular purpose (whether or not that purpose is a purpose for which the goods are commonly supplied) for which the goods are being acquired by the consumer and that:
  - (a) 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 goods were conducted or made; or
  - (b) the consumer makes known to the manufacturer of the goods either directly or through the supplier or the person referred to in paragraph (a)(ii).

### 3 Meaning of *consumer*

## ACL s 3: Meaning of consumer

#### *Acquiring goods as a consumer*

- (1) A person is taken to have acquired particular goods as a *consumer* if, and only if:
  - (a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:
    - (i) \$40,000; or
    - (ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or
  - (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
  - (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.
- (2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:
  - (a) for the purpose of re-supply; or
  - (b) for the purpose of using them up or transforming them, in trade or commerce:
    - (i) in the course of a process of production or manufacture; or
    - (ii) in the course of repairing or treating other goods or fixtures on land.

*acquire* includes:

- (a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and
- (b) in relation to services—accept.

Note: Section 5 deals with when receipt of a donation is an acquisition.



# The ACL “goods” guarantees – case law

- ▶ “acceptable quality”:
  - ▶ “fit for all the purposes for which goods of that kind are commonly supplied”: *Madsen v Agrison Pty Ltd* [2014] NSWCATCD 79; *Harwood, Howard v Rich and Mor Diamonds Pty Ltd* [2013] NSWCTTT 502.
  - ▶ “acceptable in appearance and finish”: *Rasell v Cavalier Marketing (Australia) Pty Ltd* (1991) ATPR 41-152.
  - ▶ “free from defects”: *Contact Energy v Jones* [2009] 2 NZLR 830.
  - ▶ “safe”: *Marwood v Agrison Pty Ltd* [2013] VCAT 1549; *Madsen v Agrison Pty Ltd* [2014] NSWCATCD 79.
  - ▶ “durable”: *Barratta v TPA Pty Ltd* [2012] VCAT 679.
- ▶ “reasonable consumer”: *Stephens v Chevron Motor Court Ltd* [1996] DCR 1; NZ DCR Lexis 29; *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170; NZDR Lexis 19; *Contact Energy v Jones* [2009] 2 NZLR 830.
- ▶ other matters:
  - ▶ “price of the goods”: *Cary Boyd v Agrison Pty Ltd* [2014] VMC 23
  - ▶ “representation made about the goods by the supplier or manufacturer”: *Brandt v Flower Power and Stone Masonry Pty Ltd* [2012] NSWCTTT 261.
- ▶ “fitness for disclosed purpose”
  - ▶ This guarantee requires a “higher standard of quality” than that of the guarantee of acceptable quality. The example given in the Second Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 is:
  - ▶ *A lawnmower that is sold to a consumer who does not mention the purpose for which it is to be used might be expected to mow the lawn of an ordinary suburban house once per week for several years without any significant problems to satisfy the guarantee of acceptable quality. If a consumer indicates to a supplier that he or she wants a lawnmower to mow a 4 hectare block of land each week, the standard that the lawnmower would need to meet to be fit for that disclosed purpose would be higher than required by the guarantee of acceptable quality for a domestic lawnmower.*

# “Goods” guarantees actions - suing the manufacturer

## 271 Action for damages against manufacturers of goods

(1) If:

(a) the guarantee under section 54 applies to a supply of goods to a consumer; and

(b) the guarantee is not complied with;

an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.

((3) If:

(a) a person supplies, in trade or commerce, goods by description to a consumer; and

(b) the description was applied to the goods by or on behalf of the manufacturer of the goods, or with express or implied consent of the manufacturer; and

(c) the guarantee under section 56 applies to the supply and it is not complied with;

an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.

- ▶ Section 54 is the “acceptable quality” guarantee. One cannot bring a section 55 (“disclosed purpose” guarantee) action against a manufacturer.
- ▶ Note that the action can be brought against the manufacturer by any “affected person” (i.e. the person bringing the action need not be the actual “consumer” of the goods.

*affected person*, in relation to goods, means:

(a) a consumer who acquires the goods; or

(b) a person who acquires the goods from the consumer (other than for the purpose of re-supply); or

(c) a person who derives title to the goods through or under the consumer.

# “Goods” guarantees actions - suing the manufacturer - recoverable damages and time limits

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

- (1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:
- (b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.

## **273 Time limit for actions against manufacturers of goods**

An affected person may commence an action for damages under this Division at any time within 3 years after the day on which the affected person first became aware, or ought reasonably to have become aware, that the guarantee to which the action relates has not been complied with.

- ▶ Recoverable loss and damage is limited to that which is a “reasonably foreseeable” consequence of the failure to comply with the goods guarantee as to acceptable quality.
- ▶ 3 year time limit after date of discoverability

# “Goods” guarantees actions - suing the manufacturer - CCA Part VIB damages scheme applies

## **Part VIB—Claims for damages or compensation for death or personal injury**

### **87E Proceedings to which this Part applies**

- (1) This Part applies to proceedings taken under the Australian Consumer Law:
  - (a) that relate to Part 2-2, 3-3, 3-4 or 3-5, or **Division 2 of Part 5-4**, of the Australian Consumer Law; and
  - (b) in which the plaintiff is seeking an award of personal injury damages; and
  - (c) that are not proceedings in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.
- (2) However, for the purposes of Divisions 2 and 7, paragraph (1)(c) does not apply.

- ▶ NOTE: Division 2 of Part 5-4 of the ACL encompasses sections 271 and 272.
- ▶ I.e. an action taken against a manufacturer for failure to comply with a consumer guarantee in relation to goods is subject to Part VIB of the CCA, and the “most extreme case” provisions
- ▶ Refer back to the Part VIB slides presented earlier for guidance on the assessment of economic and non-economic loss damages.

# “Goods” guarantees actions - suing the supplier as a “consumer”

## 259 Action against suppliers of goods

- (1) A consumer may take action under this section if:
  - (a) a person (the *supplier*) supplies, in trade or commerce, goods to the consumer; and
  - (b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is not complied with.
- (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

- ▶ S 259(1)(b): encompasses both the guarantees as to “acceptable quality” and “disclosed purpose”.
- ▶ Note that this provision refers only to a “consumer” taking action, not an “affected person”.



# “Goods” guarantees actions - suing the supplier as a “gift recipient”

## 266 Rights of gift recipients

If a consumer acquires goods from a supplier and gives them to another person as a gift, the other person may, subject to any defence which would be available to the supplier against the consumer:

- (a) exercise any rights or remedies under this Subdivision which would be available to the other person if he or she had acquired the goods from the supplier; and
- (b) any reference in this Subdivision to a consumer includes a reference to the other person accordingly.

- ▶ A person who receives goods as a gift from a consumer may take action against a supplier in the same way as an injured consumer.

# “Goods” guarantees actions - suing the supplier - time limits?

## 236 Actions for damages

- (1) If:
  - (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
  - (b) the conduct contravened a provision of Chapter 2 or 3;the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

## 27B Application

- (1) This Part applies to a cause of action for damages that relate to the death of or personal injury to a person, regardless of whether the action for damages is founded in tort, in contract, under statute or otherwise.
- (4) This Part applies despite anything to the contrary in section 217(4) of the **Australian Consumer Law and Fair Trading Act 2012** or section 236(2) of the **Australian Consumer Law (Victoria)**.

- ▶ A bit unclear since there are no time limit provision specific to goods guarantees actions against suppliers in the ACL (cf. defective goods or goods guarantees actions against manufacturers).
- ▶ It seems that s 236(2) of the ACL would apply *if not* for the operation of section 27B(1) and (4) of the *Limitation of Actions Act 1958*.
- ▶ Therefore: “normal” three-year time limit applies under section 27D of the *LAA*, with possibility of an extension pursuant to section 23A of the *LAA*.

# “Goods” guarantees actions - suing the supplier - how are damages assessed?

## ~~Part VIB—Claims for damages or compensation for death or personal injury~~

### ~~87E Proceedings to which this Part applies~~

- ~~(1) This Part applies to proceedings taken under the Australian Consumer Law:
  - ~~(a) that relate to Part 2-2, 3-3, 3-4 or 3-5, or **Division 2 of Part 5-4**, of the Australian Consumer Law; and~~
  - ~~(b) in which the plaintiff is seeking an award of personal injury damages; and~~
  - ~~(c) that are not proceedings in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.~~~~
- ~~(2) However, for the purposes of Divisions 2 and 7, paragraph (1)(c) does not apply.~~

### ~~28C Application of Part~~

- ~~(1) This Part applies to an award of personal injury damages, except an award that is excluded by subsection (2).~~
- ~~(3) This Part extends to an award of personal injury damages even if the damages are recovered in an action for breach of contract or in any other action.~~

- ▶ An action for damages against a supplier for breach of a consumer goods guarantee falls under Division 1 of Part 5-4. It does not come within Part 87E/Part VIB of the CCA.
- ▶ At first there was some suggestion that this was a legislative oversight (see, e.g. S G Corones, ‘The Australian Consumer Law’, Thomson Reuters, p 687). However, there was no attempt to alter the current position in the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*.
- ▶ An action for damages against a supplier for breach of a consumer goods guarantee would therefore seem to be a deliberate omission from the Part VIB scheme (see also *Moore v Scenic Tours Pty Limited* (No. 2) [2017] NSWSC 733 at [872]).
- ▶ How, then, are damages assessed for these claims to be assessed in Victoria? “At large”, or pursuant to the Wrongs Act 1958?
- ▶ This is an interesting, and as yet undecided, legal question. My own view is that damages for both economic and non-economic loss fall to be assessed under the *Wrongs Act 1958* (e.g. Part VB for economic loss and VBA for non-economic loss).
- ▶ The end result, in either case, is that a supplier may be at significantly greater risk on quantum than a manufacturer in an action for damages relating to a failure to comply with a consumer guarantee as to acceptable quality.



# “Goods” guarantees actions – manufacturers to indemnify suppliers

## 274 Indemnification of suppliers by manufacturers

- (1) A manufacturer of goods is liable to indemnify a person (the *supplier*) who supplies the goods to a consumer if:
  - (a) the supplier is liable to pay damages under section 259(4) to the consumer for loss or damage suffered by the consumer; and
  - (b) the manufacturer is or would be liable under section 271 to pay damages to the consumer for the same loss or damage.
- (3) The supplier may, with respect to the manufacturer’s liability to indemnify the supplier, commence an action against the manufacturer in a court of competent jurisdiction for such legal or equitable relief as the supplier could have obtained if that liability had arisen under a contract of indemnity made between them.
- (4) The supplier may commence the action at any time within 3 years after the earliest of the following days:

- (a) the day, or the first day, as the case may be, on which the supplier made a payment with respect to, or otherwise discharged in whole or in part, the liability of the supplier to the consumer;
- (b) the day on which a proceeding was commenced by the consumer against the supplier with respect to that liability or, if more than one such proceeding was commenced, the day on which the first such proceeding was commenced.

- S 274(1(b): Since a manufacturer can only be liable under s 271 in relation to a breach of the goods “acceptable quality” guarantee, there will be no indemnity of a supplier if the supplier breaches the goods “disclosed purpose” guarantee”.

# The ACL “Services” guarantees

- ▶ “Due care and skill”: The Second Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 states:
  - ▶ *This guarantee requires that the provider of services must have an acceptable level of skill in the particular area of activity involved in the supply of services. The provider must also exercise due care in providing the services.*
  - ▶ *Examples of the application of this guarantee include where a supplier installs a burglar alarm that is easily bypassed by burglars and loss or damage to personal luggage in the course of transportation of passengers by an airline or cruise ship operator.*
  - ▶ *Cheryl Foster v Mahamudur Rahman t/as Smarty Web Solutions [2014] NSWCATCD 17.*
- ▶ “Due care”:
  - ▶ *see Mayne Nickless v Crawford [1992] ASC 56-188; Dillon v Baltic Shipping Co (1989) 21 NSWLR 614.*
- ▶ Fitness for a particular purpose or a desired result: Similar in operation to the “disclosed purpose” guarantee in relation to goods.
  - ▶ *See TLK Transport Pty Ltd v Thornwaite Pty Ltd t/as Yass Valley Mobile Mechanic [2014] NSWCATCD 147; Ueda v Ecrusing and Southern Cross Safaris Australia Pty Ltd [2014] NSWCATCD 30.*

## 60 Guarantee as to due care and skill

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

## 61 Guarantees as to fitness for a particular purpose etc.

(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.

(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.

# “Services” guarantees – suing the supplier

## 267 Action against suppliers of services

- (1) A consumer may take action under this section if:
    - (a) a person (the *supplier*) supplies, in trade or commerce, services to the consumer; and
    - (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and
    - (c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:
      - (i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
      - (ii) a cause independent of human control that occurred after the services were supplied.
  - (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.
- Note that only a “consumer” of the services can take action.
  - Division 1 of Part 3-2: includes both the “due care and skill” and “fitness for a particular purpose” guarantees.
  - “Reasonable foreseeability” required in relation to loss and damage

# “Services” guarantees – important definitions (ACL s 2 and s 7)

## *Acquiring services as a consumer*

- (3) A person is taken to have acquired particular services as a **consumer** if, and only if:
- (a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:
    - (i) \$40,000; or
    - (ii) if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or
  - (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

*services* includes:

- (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
- (b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
  - (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or
  - (ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
  - (iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
  - (iv) a contract of insurance; or
  - (v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
  - (vi) any contract for or in relation to the lending of money; but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.



# “Services” guarantee actions - relevance of the *Wrongs Act 1958*

## 275 Limitation of liability etc.

If:

- (a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and
- (b) the law of a State or a Territory is the proper law of the contract;

that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.

- ▶ This provision means that in any action based on a failure to comply with an ACL “services” guarantee (where the agreement for the services is governed by the law of Victoria), one must apply the provisions of the *Wrongs Act 1958*.
- ▶ Case law:
  - ▶ *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219.
  - ▶ *Perisher Blue Pty Ltd v Nair-Smith* [2015] NSWCA 90.
  - ▶ *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 (22 September 2017)
  - ▶ *Moore v Scenic Tours Pty Limited (No.2)* [2017] NSWSC 733.

# “Services” guarantees actions – suing the supplier – time limits?

## 236 Actions for damages

- (1) If:
- (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
  - (b) the conduct contravened a provision of Chapter 2 or 3;
- the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

## 27B Application

- (1) This Part applies to a cause of action for damages that relate to the death of or personal injury to a person, regardless of whether the action for damages is founded in tort, in contract, under statute or otherwise.
- (4) This Part applies despite anything to the contrary in section 217(4) of the **Australian Consumer Law and Fair Trading Act 2012** or section 236(2) of the **Australian Consumer Law (Victoria)**.

- ▶ A bit unclear since there are no time limit provision specific to services guarantees actions against suppliers in the ACL (cf. defective goods, or goods guarantees, actions against manufacturers).
- ▶ It seems that s 236(2) of the ACL would apply *if not* for the operation of section 27B(1) and (4) of the *Limitation of Actions Act 1958*.
- ▶ Therefore: “normal” three-year time limit applies under section 27D of the *LAA*, with possibility of an extension pursuant to section 23A of the *LAA*.

# “Services” guarantee actions - how are damages assessed?

## ~~Part VIB—Claims for damages or compensation for death or personal injury~~

### ~~87E Proceedings to which this Part applies~~

- ~~(1) This Part applies to proceedings taken under the Australian Consumer Law:
  - ~~(a) that relate to Part 2-2, 3-3, 3-4 or 3-5, or **Division 2 of Part 5-4**, of the Australian Consumer Law; and~~
  - ~~(b) in which the plaintiff is seeking an award of personal injury damages; and~~
  - ~~(c) that are not proceedings in respect of the death of or personal injury to a person resulting from smoking or other use of tobacco products.~~~~
- ~~(2) However, for the purposes of Divisions 2 and 7, paragraph (1)(c) does not apply.~~

### 28C Application of Part

- (1) This Part applies to an award of personal injury damages, except an award that is excluded by subsection (2).
- (3) This Part extends to an award of personal injury damages even if the damages are recovered in an action for breach of contract or in any other action.

- ▶ As with “goods” guarantee actions taken against a supplier, “services” guarantee actions taken against a supplier do not fall within Part VIB of the CCA.
- ▶ S 275 of the ACL expressly directs attention to the *Wrongs Act 1958* for “services” guarantee actions in relation to the “recovery of... liability”.
- ▶ Thus one needs to apply the *Wrongs Act*, Parts VB and VBA. See, e.g. in NSW context:
  - *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219.
  - *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243.
  - *Moore v Scenic Tours Pty Limited (No.2)* [2017] NSWSC 733.

# Non-economic loss, the ACL and the *Wrongs Act 1958*: Is a Part VBA Certificate required?

## **28LC Application of Part**

- (1) This Part applies to claims for the recovery of damages for non-economic loss, except claims that are excluded by subsection (2) or (3).
- (4) This Part extends to a claim for damages for non-economic loss even if the claim is founded on breach of contract or any other cause of action.

*fault* includes act or omission;

## **28LE Restriction on recovery of damages for non-economic loss**

A person is not entitled to recover damages for non-economic loss in any proceeding in a court in respect of an injury to a person caused by the fault of another person unless the person injured has suffered significant injury.



# Non-economic loss, the ACL and the *Wrongs Act 1958*: Is a Part VBA Certificate required?

If brought in a Victorian Court:

- ▶ “Services” guarantee actions against a supplier (s 267 ACL)? *Yes, a Certificate is required in most cases* - see section 275 ACL which specifically provides for the application of the *Wrongs Act 1958* in “services” guarantee actions in relation to both the limitation and recovery of liability.
- ▶ “Goods” guarantees actions against a supplier (s 259 ACL)? *Not settled, but a Certificate is very likely required*. Sections 28LC and LE of the WA are very broad and appear to catch all awards for non-economic loss made by a Victorian Courts regardless of the cause of action. Further, this type of claim is not governed by the CCA Part VIB damages assessment regime, and so there is no obvious “doubling up” if the injuries are assessed under the *Wrongs Act 1958*.

# Non-economic loss, the ACL and the *Wrongs Act 1958*: Is a Part VBA Certificate required?

If brought in a Victorian Court:

- ▶ “Goods” guarantees actions against a manufacturer (s 271 ACL), and “Defective goods actions” brought against a manufacturer (s 138 and s 139 ACL)? *Not settled, but likely required, though arguments can be made both ways:*
  - ▶ FOR: Sections 28LC and LE of the WA are very broad and appear to catch all awards for non-economic loss by Victorian Courts regardless of the cause of action. See also *Downie v Spiral Foods Pty Ltd & Ors* [2015] VSC 190, though hardly a conclusive statement on the issue.
  - ▶ AGAINST: These two types of actions are already subject to the CCA Part VIB damages assessment regime. Arguably, there ought not to be a “doubling up” of assessment regimes. Further, there is no s 275 equivalent in respect of this type of action.