

Statutory Obligations in the Supply of Goods and Services

Statutory obligations

- more of a patchwork than a code;
- overlapping subject matter;
- differing remedial schemes;

Statutory obligations

- ▶ *Sale of Goods Act 1923* (NSW) (and corresponding Sale of Goods legislation in other jurisdictions);
- ▶ *Sale of Goods (Vienna Convention) Act 1986* (NSW) and corresponding legislation in other jurisdictions);
- ▶ *Competition and Consumer Act 2010* (Cth), especially Schedule 2: *Australian Consumer Law*;
- ▶ *Australian Securities and Investments Commission Act 2010* (Cth);

Statutory Obligations

- implied terms: *Sale of Goods Legislation; Trade Practices Act 1974 (Cth)* - repealed;
- Hybrid form of statutory guarantees: *Sale of Goods (Vienna Convention) Legislation*
- consumer guarantees: *Australian Consumer Law*

Statutory obligations: Sale of Goods Legislation

- ▶ *Sale of Goods Act 1923* (NSW)
- ▶ *Sections 17 - 20;*
- ▶ *Sale of Goods (Vienna Convention) Act 1986* (NSW) ('CISG')
- ▶ Article 35, CISG;

Statutory Obligations: ACL

- ▶ Consumer guarantees
- ▶ Sections 3; 51 - 53; 54, 55; 56, 57; 58; 59, 2; 60 - 63



Conditions and Warranties

- ▶ “Condition” is not defined in the Sale of Goods Legislation and the Common Law tests apply
- ▶ “Warranty” is defined in s5(1): an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated
- ▶ Whether a particular contractual term amounts to a condition or warranty, depends on the construction of the contract

continued on next page...



Conditions and Warranties...

- ▶ The terms which the Act implies into the contract are categorised by the Act as conditions or warranties
- ▶ In certain situations, breaches of condition will be treated as breach of warranty [s16]



Implied Terms

- ▶ The Act implies certain terms against the seller. The onus is on the seller to prove that it was not the intention of the parties that these terms should form part of the contract
- ▶ Implied terms under the Act
 - ▶ as to title [s17]
 - ▶ to correspond with description [s18]
 - ▶ as to quality or fitness for purpose; merchantable quality [s19]
 - ▶ sale by sample [s20]

Implied terms under the Sale of Goods Act

- ▶ **17 Implied undertaking as to title etc**
- ▶ In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:
- ▶ (1) an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass,
- ▶ (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods,
- ▶ (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Correspondence with description

- ▶ 18 Sale by description
- ▶ Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description;

Fitness for purpose

- ▶ **19 Implied condition as to quality or fitness**
- ▶ Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
- ▶ (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether the seller be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:
Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

Merchantable quality

19 Implied condition as to quality or fitness

- ▶ (2) Where goods are bought by description from a seller who deals in goods of that description (whether the seller be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

- ▶ (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- ▶ (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by sample

20 Sale by sample

- (1) A contract of sale is a contract for sale by sample where there is a term in the contract express or implied to that effect.
- (2) In the case of a contract for sale by sample:
 - (a) there is an implied condition that the bulk shall correspond with the sample in quality,
 - (b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample,
 - (c) there is an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample

Merchantable quality

Sale of Goods Act 1923 (NSW), Part 8: Consumer Sales

► 62 Definition

- In this Part, "consumer sale" means a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods:
 - (a) are of a kind commonly bought for private use or consumption, and
 - (b) are sold to a person who does not buy or hold himself or herself out as buying them in the course of a business.

► 64 Conditions and warranties in contracts for consumer sales

- (3) Without limiting the meaning of the expression "merchantable quality", goods of any kind which are the subject of a contract for a consumer sale are not of merchantable quality if they are not as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to their price, to any description applied to them by the seller and to all other circumstances.

Performance of the seller's obligations under the CISG

- ▶ The seller has 2 basic obligations:
 - ▶ Deliver the goods and documents in conformity with the contract of sale
 - ▶ Guarantee conformity of the goods with the contract

Performance of the seller's obligations under the CISG

- ▶ Delivery of the goods and documents is dealt with in arts. 30 - 34.
- ▶ The guarantee of conformity of the goods with the contract is dealt with in arts. 35 - 44.
- ▶ Art. 30: The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Performance of the seller's obligations under the CISG

- ▶ Seller's obligation that there is conformity of goods with terms of the contract and with the terms of Art 35
- ▶ **Article 35**
 - ▶ (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
 - ▶ (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - ▶ (a) are fit for the purposes for which goods of the same description would ordinarily be used;
 - ▶ (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
 - ▶ (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
 - ▶ (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
 - ▶ (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Performance of the seller's obligations under the CISG

- ▶ The seller's obligation in relation to conformity of goods incorporates the following elements:
 - ▶ Fitness for purpose - similar obligation as under domestic SGA
 - ▶ Merchantability of goods - similar to merchantable quality under domestic SGA but term "merchantable quality" not used - fit for the purposes for which goods of the same description would ordinarily be used (this may vary between the buyer's and seller's countries)
 - ▶ Conformity of goods with sample - similar to domestic SGA
 - ▶ Reasonable manner of packaging - no direct domestic equivalent but note that Convention has no obligation in relation to correspondence with description

Performance of the seller's obligations under the CISG

- ▶ Seller's obligation and provisos relating to implied terms - see Art 35(3).
- ▶ Seller's obligations and latent defect
- ▶ **Article 36**
- ▶ (1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

Performance of the seller's obligations under the CISG

- ▶ Seller's obligation to ensure conformity after delivery
- ▶ **Article 36**
- ▶ (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Performance of the seller's obligations under the CISG

- ▶ Seller's obligations and buyer's right of examination
- ▶ **Article 38**
- ▶ (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- ▶ (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
- ▶ (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Performance of the seller's obligations under the CISG

- ▶ Seller's obligations and notice of non-conformity
- ▶ **Article 39**
- ▶ (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- ▶ Similar issues in relation to interpretation of "reasonable time" arise as with "as soon as practicable" in art 38.

Performance of the seller's obligations under the CISG

- ▶ Seller's obligations and limitation period under the Convention
- ▶ **Article 39**
- ▶ (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Performance of the seller's obligations under the CISG

- ▶ Seller's obligations and the self-cure remedy before date for delivery
- ▶ **Article 37**
- ▶ If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

***Competition and Consumer Act 2010 (Cth),
especially Schedule 2: Australian Consumer
Law (ACL);***

Scope of the ACL

- Corporations to the extent to which they supply goods in the course of business;
- Natural persons engaged in conduct involving postal, telegraphic or telephonic services, including the internet;
- Any entity involved in international trade to or from Australia;
- The Crown to the extent to which it engages in business.
- Any entity engaged in interstate trade and commerce;
- All parts of the economy except for financial products and services (*ASIC Act 2001*).

Australian Consumer Law: s2

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

Australian Consumer Law: s2

- *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;
 - (b)

“Consumer” under the ACL

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) \$100,000*; 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.

*This threshold was increased from \$40 000 to \$100 000 by the *Treasury Laws Amendment (Acquisition as Consumer - Financial Thresholds) Regulations 2020*, which took effect from 1 July 2021.

“Consumer” (s 3 cont’d)

(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.

Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd [2017] QSC

- ▶ Tarangau (T), (Plaintiff), purchased a yacht in July 2006 from Eagle Yachts (EY), (Defendant). Soon after the sale, the fibreglass on the hull began to delaminate and other defects were discovered.
- ▶ Prior to the purchase, a director of T inspected the yacht and advised the representative of EY that he wanted a vessel that could be used as recreational fishing vessel and a commercial fishing vessel for charter.
- ▶ T sued EY under for breach of statutorily implied terms as to fitness for purpose (s.19(1), SoGA, NSW) and merchantable quality (s.19(2), SoGA, NSW) as well as under what was s.71 *Trade Practices Act 1974* (Cth) (TPA), now ss.54 - 55, ACL).
- ▶ *Held:* the yacht was not fit for the particular purpose for which it was purchased, nor of merchantable quality and therefore the vendor was in breach of its contractual obligations under s.19, SoGA, NSW.

Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd [2017] QSC

- ▶ The issue was whether the sale was a ‘consumer’ sale, for the purposes of the TPA. This, in turn, required answering two questions:
 - ▶ Was the yacht of a kind ordinarily acquired for personal use?
 - ▶ Was re-supply a substantial purpose of the purchase?
- ▶ In respect of the first question:
- ▶ **Held:** (at [284], relying on *Vautin v BY Winddown Inc* [2018] FCA 426 and *Involnert Management Inc v Aprilgrange Ltd & Ors* [2015] EWHC 2225 (Comm), that the yacht, the subject of the sale, ‘was a good of the kind ordinarily acquired for personal use.’
- ▶ *Per* Legatt J in *Involnert*: ‘where yachts differ from other vessels is that they are typically owned and used solely or mainly for their owner’s recreation and pleasure rather than as assets employed in a business...Owning a large yacht is usually an expensive luxury rather than an enterprise carried on for profit.’

Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd [2017] QSC

- ▶ In respect of the second question (Was re-supply a substantial purpose of the purchase?):
- ▶ ‘re-supply’ was not defined in the TPA but ‘supply’ was defined as including supply by way of sale, exchange, lease, hire or hire-purchase.
- ▶ At [306] - [307] of the judgment, the Court engaged with the debate concerning whether the supply of machinery together with an operator of that machinery, constituted a *bailment* of that machinery. This discussion went to the issue of the scope of the term ‘supply’ ie could it be said that a chattel was ‘supplied’ if there was no bailment (Yes).
- ▶ **Held:** (at [308], per Atkinson J: ‘I am satisfied that the business of chartering the vessel with a crew would constitute a hire and hence a supply or re-supply of the vessel. The re-supply of the vessel was one of Tarangau’s purposes in purchasing the [yacht]. The evidence shows that it was a substantial purpose. Accordingly, Tarangau is not entitled to any remedy under the TPA.’

Tarangau Game Fishing Charters Pty Ltd v Eagle Yachts Pty Ltd [2017] QSC

- ▶ Did you note that, although the matter was heard in the Queensland Supreme Court, the contract was interpreted under the *Sale of Goods Act 1923* (NSW) (SoGA NSW). What might be the explanation for this? (see also, [226] from the full judgment)
- ▶ Given that a successful plaintiff cannot recover damages twice for the same harm, why do you think the plaintiff argued under both the SoGA NSW *and* the TPA?

ACL s 51- 53: Guarantees as to title, undisturbed possession, and undisclosed securities

Section 51 Guarantee as to title

- (1) If a person (the **supplier**) supplies goods to a consumer, there is a guarantee that the supplier will have a right to dispose of the property in the goods when that property is to pass to the consumer.
- (2) Subsection (1) does not apply to a supply (a supply of limited title) if an intention that the supplier of the goods should transfer only such title as the supplier, or another person, may have:
 - (a) appears from the contract for the supply; or
 - (b) is to be inferred from the circumstances of that contract.
- (3) This section does not apply if the supply is a supply by way of hire or lease.

52 Guarantee as to undisturbed possession

(1) If:

- (a) a person (the *supplier*) supplies goods to a consumer; and
- (b) the supply is not a supply of limited title;

there is a guarantee that the consumer has the right to undisturbed possession of the goods.

(2) Subsection (1) does not apply to the extent that the consumer's undisturbed possession of the goods may be lawfully disturbed by a person who is entitled to the benefit of any security, charge or encumbrance disclosed to the consumer before the consumer agreed to the supply.

(3) If:

- (a) a person (the *supplier*) supplies goods to a consumer; and
- (b) the supply is a supply of limited title;

there is a guarantee that the following persons will not disturb the consumer's possession of the goods:

- (c) the supplier;
- (d) if the parties to the contract for the supply intend that the supplier should transfer only such title as another person may have--that other person;
- (e) anyone claiming through or under the supplier or that other person (otherwise than under a security, charge or encumbrance disclosed to the consumer before the consumer agreed to the supply).

(4) This section applies to a supply by way of hire or lease only for the period of the hire or lease.

53 Guarantee as to undisclosed securities etc.

(1) If:

- (a) a person (the **supplier**) supplies goods to a consumer; and
- (b) the supply is not a supply of limited title;

there is a guarantee that:

- (c) the goods are free from any security, charge or encumbrance:
 - (i) that was not disclosed to the consumer, in writing, before the consumer agreed to the supply; or
 - (ii) that was not created by or with the express consent of the consumer; and
- (d) the goods will remain free from such a security, charge or encumbrance until the time when the property in the goods passes to the consumer.

(2) A supplier does not fail to comply with the guarantee only because of the existence of a floating charge over the supplier's assets unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.

Note: Section 339 of the *Personal Property Securities Act 2009* affects the meaning of the references in this subsection to a floating charge and a fixed charge.

(3) If:

- (a) a person (the **supplier**) supplies goods to a consumer; and
- (b) the supply is a supply of limited title;

there is a guarantee that all securities, charges or encumbrances known to the supplier, and not known to the consumer, were disclosed to the consumer before the consumer agreed to the supply.

(4) This section does not apply if the supply is a supply by way of hire or lease.

ACL s54 - 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.

(4) If:

(a) goods supplied to a consumer are not of acceptable quality; and

(b) the only reason or reasons why they are not of acceptable quality were specifically drawn to the consumer's attention before the consumer agreed to the supply;

the goods are taken to be of acceptable quality.

(5) If:

(a) goods are displayed for sale or hire; and

(b) the goods would not be of acceptable quality if they were supplied to a consumer;

the reason or reasons why they are not of acceptable quality are taken, for the purposes of subsection (4), to have been specifically drawn to a consumer's attention if those reasons were disclosed on a written notice that was displayed with the goods and that was transparent.

(6) Goods do not fail to be of acceptable quality if:

(a) the consumer to whom they are supplied causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality; and

(b) they are damaged by abnormal use.

(7) Goods do not fail to be of acceptable quality if:

(a) the consumer acquiring the goods examines them before the consumer agrees to the supply of the goods; and

(b) the examination ought reasonably to have revealed that the goods were not of acceptable quality.

Vautin v BY Winddown Inc (formerly Bertram Yachts)(No 4) [2018] FCA 426

- ▶ Vautin (V), (Applicant), purchased a recreational fishing vessel named 'Revive' from Eagle Yachts (EY).
- ▶ The vessel was of a kind marketed and sold for ocean going travel. It was able to withstand all but the most extraordinary sea conditions.
- ▶ After he acquired the vessel, it began to delaminate resulting in the vessel being unseaworthy and not capable of being used for the purpose for which V had acquired it.
- ▶ V brought an action against EY under the sales contract and a separate action against the manufacturer of the vessel, Bertram Yachts (BY) under the ACL.
- ▶ V argued that the vessel was not of 'acceptable quality' under s.54 ACL.
- ▶ **Held:** The vessel was not of an acceptable quality under s.54 ACL at the time it was supplied.

Vautin v BY Winddown Inc (formerly Bertram Yachts)(No 4) [2018] FCA 426

- ▶ Note the discussion at [142] of the judgment concerning the ‘objective test’ of ‘acceptable quality’ required under s.54 ACL and the references to the perspective of the ‘reasonable consumer’ and the summation in [143]: ‘In compendious terms, the issue is whether, objectively, the goods supplied (when taking into account their actual quality, including any latent defects) are, to an acceptable standard, fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe and durable when measured by a standard which reflects the nature of the goods and any other relevant circumstance.’
- ▶ Note also the discussion at [144] where Derrington J considers whether the new regime under the ACL of ‘acceptable quality’ replaces the test of ‘merchantable quality’ in s.71 TPA, itself modelled on the Sale of Goods legislation.
- ▶ “An important difference [between ‘merchantable quality’ and ‘acceptable quality’] is that s54 [ACL] specifically imposes an obligation that the goods in question are free from defects as well as being fit for *all* of the purposes for which they are commonly supplied.” [144]

ACL s 56: Guarantee relating to supply of goods by description

(1)[Goods match their description]

If:

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

(b) the supply does not occur by way of auction;

there is a guarantee that the goods correspond with the description.

(2)[Guarantee applies despite prior inspection of goods]

A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

ACL s 55: Guarantee as to fitness for any disclosed purpose

(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) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier, the person referred to in subsection (2)(a)(ii) or the manufacturer, as the case may be.

Cavalier Marketing (Australia) Pty Ltd v Rasell

[1991] 2 Qd 323

- ▶ Mr and Mrs Rasell (R) entered into a contract with Cavalier Marketing (Australia) Pty Ltd (C) for the supply of bespoke carpeting for their home.
- ▶ The contract was concluded following conversations between Mrs R and a representative of C (Mr White) regarding the requirements of R/
- ▶ Six weeks after the carpet had been laid, Mrs R noticed markings and apparent discolouration in the carpet. The carpet was of good quality and had 'pile reversal' an effect that appeared to create shading in the carpet and something known in the carpeting industry to be a characteristic of better quality wool carpeting. Mrs R had never been informed of this characteristic.
- ▶ R brought an action against C and another for breach of contract and contravention of provisions under the TPA. The issue in respect of C was whether the latter as *manufacturer*, was under an obligation, imposed under s.74B of the TPA, to supply carpet that would be fit for the particular purpose of fitting the décor of Mr and Mrs R's house.
- ▶ The reasoning is relevant to understanding the scope of s.55 ACL.

Cavalier Marketing (Australia) Pty Ltd v Rasell

[1991] 2 Qd 323

- ▶ **Held:** (relying on case law under the Sale of Goods legislation, particularly *Baldry v Marshall* [1925] 1 KB 260) The evidence showed that the R (plaintiff/respondent) had made clear the particular purpose for which the carpet was required; had demonstrated that they relied on the skill and judgment of the supplier; and that the carpet was not fit for that particular purpose
- ▶ **Per Shepherdson:** ‘In the present case, the carpet was not, from the point of view of the light and dark shades of colour, reasonably fit for the purpose for which the respondents had acquired the carpet and made known to the appellant. Section 75B, in its reference to “a particular purpose”, introduces a subjective element. The existence of a subjective element in the application of s.74B to any particular case is confirmed by the presence in para (d) thereof of the words “whether or not that is a purpose for which such goods are commonly supplied.”

ACL s 56 - Guarantee relating to supply of goods by sample or demonstration model

(1) If:

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

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the goods correspond with the description.

(2) A supply of goods is not prevented from being a supply by description only because, having been exposed for sale or hire, they are selected by the consumer.

(3) If goods are supplied by description as well as by reference to a sample or demonstration model, the guarantees in this section and in section 57 both apply.

ACL s 57 - Guarantee relating to supply of goods by sample or demonstration model

(1) If:

(a) a person supplies, in trade or commerce, goods to a consumer by reference to a sample or demonstration model; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that:

(c) the goods correspond with the sample or demonstration model in quality, state or condition; and

(d) if the goods are supplied by reference to a sample--the consumer will have a reasonable opportunity to compare the goods with the sample; and

(e) the goods are free from any defect that:

(i) would not be apparent on reasonable examination of the sample or demonstration model; and

(ii) would cause the goods not to be of acceptable quality.

(2) If goods are supplied by reference to a sample or demonstration model as well as by description, the guarantees in section 56 and in this section both apply.

Additional guarantees in the ACL

- ACL s 58 - Guarantee as to repairs and spare parts
- ACL s 59 - Guarantee as to express warranties

Subdivision B--Guarantees relating to the supply of services

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.

(3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.

(4) This section does not apply to a supply of services of a professional nature by a qualified architect or engineer.

Seeley International Pty Ltd v Cintra Pty Ltd (Newtronics) [2002] ASAL 55-075

- ▶ Consumer guarantees for services
- ▶ In 1992, Seeley (S) contracted with Cintra/Newtronics (CN) to design a radio frequency control unit to safely and satisfactorily control S's air conditioners with an on/off function so that when in the 'off' position, all energy sources to the air conditioner were deenergised.
- ▶ In 1994 S contracted with CN to manufacture 3000 of these remote control units. S believed the CN design was safe and were unaware of the fact that it was possible that, if a certain function failed, the motor of the air conditioner could in fact be powered. This, in turn, meant that potentially, the air-conditioning unit could overheat and catch fire. Three fires in fact occurred.
- ▶ In respect of the supply contract it was found that S relied on the expertise of CN, not on its own expertise, in entering into the supply contract. It was further found that terms as to fitness for purpose and merchantable quality under s 14, *Sale of Goods Act 1895* (SA) were implied into the contract.
- ▶ The issue was whether there was also a contravention of s.74 TPA (now s.60 ACL).

Seeley International Pty Ltd v Cintra Pty Ltd (*Newtronics*) [2002] ASAL 55-075

- ▶ Consumer guarantees for services
- ▶ Per O'Loughlin J: 'That submission [that s.74 TPA is concerned only with 'services'] overlooks...that the design agreement (as distinct from the supply agreement) was not just a contract for the supply of 'goods'; it was a contract that included the design of the 'goods'. The work that was involved in designing the remote control was, in my opinion, clearly a contract for the supply by a corporation, in the course of its business, of services to a consumer...I am satisfied that there were implied terms that the design services that Cintra was to supply to Seeley would be prepared and presented with due skill and care, that they might reasonably be expected to achieve the required result and that they would be reasonably fit for the purpose for which they were required.'
- ▶ See further, his Honour's discussion at [160] - [164] of the judgment where he considers what falls within the definition of 'services'. Not the similarity of the discussion here, with that in the case law concerning the question of whether a contract is for the sale of 'goods' (attracting the application of the Sale of Goods legislation) or a contract for work and materials (which would not attract that legislation). Similar considerations are at play, even if the legislation being interpreted is different.

Seeley International Pty Ltd v Cintra Pty Ltd (Newtronics) [2002] ASAL 55-075

- ▶ Other matters considered in the judgment:
 - ▶ The duty of care (independent but concurrent with the contractual duty)
 - ▶ Misleading or deceptive conduct

62 Guarantee as to reasonable time for supply

If:

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

(b) the time within which the services are to be supplied:

(i) is not fixed by the contract for the supply of the services; or

(ii) is not to be determined in a manner agreed to by the consumer and supplier;

there is a guarantee that the services will be supplied within a reasonable time.

63 Services to which this Subdivision does not apply

(1) This Subdivision does not apply to services that are, or are to be, supplied under:

(a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or

(b) a contract of insurance.

(2) To avoid doubt, subsection (1)(a) does not apply if the consignee of the goods is not carrying on or engaged in a business, trade, profession or occupation in relation to the goods.

Note: This subsection was inserted as a response to the decision of the High Court of Australia in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* [1994] HCA 17.

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

64 Guarantees not to be excluded etc. by contract

(1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Division; or
- (b) the exercise of a right conferred by such a provision; or
- (c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.

(2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with the provision.

64A Limitation of liability for failures to comply with guarantees

(1) A term of a contract for the supply by a person of goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 64 merely because the term limits the person's liability for failure to comply with a guarantee (other than a guarantee under section 51, 52 or 53) to one or more of the following:

- (a) the replacement of the goods or the supply of equivalent goods;
- (b) the repair of the goods;
- (c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
- (d) the payment of the cost of having the goods repaired.

64A Limitation of liability for failures to comply with guarantees

....

(2) A term of a contract for the supply by a person of services other than services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 64 merely because the term limits the person's liability for failure to comply with a guarantee to:

- (a) the supplying of the services again; or
- (b) the payment of the cost of having the services supplied again.

(3) This section does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the person who supplied the goods or services to rely on that term of the contract.

(4) In determining for the purposes of subsection (3) whether or not reliance on a term of a contract is fair or reasonable, a court is to have regard to all the circumstances of the case, and in particular to the following matters:

(a) the strength of the bargaining positions of the person who supplied the goods or services and the person to whom the goods or services were supplied (the **buyer**) relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;

(b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.