



Consumers and Contracts

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Introduction

A contract is an agreement. One person makes an offer that is accepted by the other person. A contract is made when both parties understand what they are doing (making a contract) and have the legal capacity to make a contract.

What is a Contract?

For a contract to exist, all of the elements discussed below must be present.

Agreement about the essential features of a contract

An agreement exists when an offer is made by one person and accepted by the other person. An offer must be directed to a particular person. For example, A offers to sell a bike to B who accepts the offer made by A. In contrast, a shop advertising a bicycle for \$100 is not making an offer, as it is not directed at a particular person. The shop will not be breaching a contract if they do not sell the bicycle for \$100, although they may be breaching the misrepresentation provisions of the *Competition and Consumer Act 2010 (Cth)* (Competition and Consumer Act) (discussed below).

Consideration is given

Consideration means that each person promises to do something or give some value to create a binding contract. There is consideration where one person pays money and the other person provides goods or services.

If a person promises to give \$1000 to another person as a gift, no contract is formed as there is no consideration.

The consideration given by each person does not have to be of equal value. If a person sells something for less than it is worth, there is still a binding contract.

An intention to create a binding agreement

In a commercial or consumer transaction, it is generally easy to establish this intention.

Contracts may not be binding if:

- a mistake was made by either or both parties
- material (critical) misrepresentations were made by either party before entering the contract
- there was undue influence (overbearing someone's will) or duress (unfair pressure) exerted by one party over the other party
- either party did not have capacity to enter the contract because of their:
 - age; only some contracts entered by children are binding (e.g. for necessities and some apprenticeship agreements)
 - mental capacity; if one party did not understand the contract and the other party was aware of the lack of understanding. It is often difficult to show that the other party was aware of the lack of understanding

- the contract was unconscionable because one party took advantage of the other party's disability
- it was for an illegal purpose
- the terms of the contract were not clear.

Specialist legal advice should be sought in these cases.

Legislation affecting enforceability of contracts does not generally apply unless the seller is selling the goods in trade or commerce.

Are written contracts required?

An oral agreement is a binding contract unless the law requires a written contract. Contracts relating to the purchase of land, credit and insurance, contracts of guarantee and door-to-door sales are a few examples of where written contracts are required before the agreements are binding.

Legislation Affecting Enforceability of Contracts

There is a variety of specific and general legislation that aims to protect consumers entering contracts. Legislation that applies to the whole of the marketplace include:

- Competition and Consumer Act
- *Fair Trading Act 1989* (Qld) (Fair Trading Act).

The Competition and Consumer Act imposes basic minimum legislative standards that apply to consumers purchasing goods and services. The minimum standards seek to redress the imbalance between consumers (who are at a disadvantage when bargaining) and more powerful traders. The provisions protecting consumers, the Australian Consumer Law (ACL), are contained in sch 2 of the Competition and Consumer Act.

The Fair Trading Act adopts the provisions of the ACL so that transactions between businesses (not regulated by the Competition and Consumer Act) and consumers are covered.

In addition, there are some special legislative requirements for more expensive or complex products and services, for instance the requirement that contracts to buy land, cars and insurance are to be in writing.

Who does the Australian Consumer Law apply to?

The ACL applies to contracts for goods and services between a seller and a consumer in the course of trade or commerce purchased after 1 January 2011. It does not apply to private sales.

Any person is a consumer as long as the price of the goods and services does not exceed \$40 000 or, where the price exceeds that amount, the goods are for personal, domestic or household use or consumption, or the goods are a road vehicle or trailer.

Additionally, the consumer must not buy the goods for the purpose of selling them to someone else, using them to manufacture other goods or using the goods to repair other goods or fixtures on land.

Guarantees

Statutory guarantees (warranties) are provided for in the ACL.

The ACL requires suppliers to guarantee when selling goods and services that:

- they own the goods so that the buyer can recover their money from the seller if the goods sold did not belong to the seller
- the goods are not mortgaged to someone else unless the goods are sold subject to that mortgage
- the goods match the description they are sold by (e.g. if a car is advertised as a 2008 Nissan Pulsar, but the vehicle bought is in fact a 2004 Nissan Pulsar, the goods do not match the description)
- the goods sold are of acceptable quality, for example:
 - do all the things someone would normally expect them to do r and for any disclosed purpose
 - look acceptable
 - are free from defects
 - deemed to be safe and durable
- the goods for purchase are comparable in quality to the sample
- the manufacturer of the goods will have spare parts and repair facilities available for a reasonable period of time
- meet any extra promises such as life time guarantees and money back offers.
- the services will be rendered with due care and skill
- any materials supplied in connection with those services and the services themselves will be reasonably fit for the purpose for which they are supplied
- the services are supplied within a reasonable time unless the contract fixes the time.

When a supplier breaches a guarantee

Sellers are responsible for fixing goods under statutory guarantees including transportation costs, but consumers need to return goods to the place of purchase. Most sellers state that they will repair any faults within one year of purchase. The ACL has not placed a specific time limit on making warranty claims, as some products would be expected to last more than one year. Accordingly, purchasing extended warranties (guarantees) may provide no greater protection than what the ACL provides.

A person cannot make a guarantee claim after six years have elapsed from the date of purchase.

If goods are faulty and require repair, consumers should:

- locate proof of purchase
- telephone the seller and return goods as directed

- write a letter stating the fault and requesting prompt repair and keep a copy of the letter
- obtain confirmation of when the repair work will be finished and confirm this promised time in writing
- keep notes of any conversations (date, time, place, who and what was promised)
- test goods when collecting after repair.

A guarantee applies to all repair work that must be carried out with due skill and diligence. If repair work is unsatisfactory, the seller must be given first right to fix the problem before the buyer goes elsewhere. It is possible to make a claim for repairs by a third party (not the seller) if the seller has been given a reasonable time to repair goods and has failed to do so. It is prudent to let the seller know in writing that you intend to take the goods elsewhere for repair, detailing how the seller has failed to make repairs in a satisfactory manner.

If a serious fault develops, consumers should ask to cancel the contract and obtain a refund on the basis of a total failure of consideration and obtain damages. Any linked contract to supply services is also cancelled (e.g. if you purchased an alarm system and also signed a contract for the supply of monitoring services, the contract for the supply of monitoring services would also be cancelled).

If a guarantee for the supply of services is seriously breached, the consumer can terminate the contract and any linked goods contract.

Consumers should seek legal advice if they believe that a supplier has seriously breached a guarantee prior to terminating a contract.

A term of the contract is unfair

The ACL also protects consumers where a term of the contract is unfair. For more information on unfair terms see *Unfair Contract Terms: A guide for businesses and legal practitioners*.

A term is void if the term is unfair and is contained in a standard form contract (most contracts to buy a car from a motor dealer are standard form contracts, but a contract to buy a car from your neighbour would not be). A term is unfair if it causes a substantial imbalance in the parties' rights and obligations arising under the contract, if it is not reasonably necessary to protect the legitimate interests of the party relying on it and if it would cause harm to a party if it were applied or relied on.

Terms that define the subject matter of the contract, set the price and are expressly permitted by law are excluded from the provisions and will not be void.

Additional protection under the Australian Consumer Law

The ACL also provides protection where a person was:

- misled or deceived
- the contract was unconscionable.

Refunds

Refunds are statutorily available if a product is faulty, not fit for the purpose for which it was sold, or does not match the description given or the sample shown before purchase. A refund is not legally enforceable just because goods are cheaper elsewhere, were damaged by the consumer or are unwanted due to a change of mind.

Some retailers will give refunds regardless of the reason for returning them. Retailers are not legally obliged to provide a specific returns policy. It is important for the buyer to determine in advance what refund policy exists for the products they intend to purchase.

Lay-bys

A lay-by is an interest free way to pay off goods while they are stored by the seller. Some sellers charge an administrative fee. The lay-by terms and conditions are set by the business. The price of the goods is the price on the day that the goods are first set aside.

It is lawful for a business to charge a reasonable termination fee (to recover their costs) if the consumer terminates or breaches the contract. The seller can also terminate the agreement if they are no longer in business or the goods are no longer available and the consumer is entitled to the return of all their money (ss 96–99 ACL).

After pay

Buy now, pay later schemes are a new form of lay-by, but with an important difference. Unlike lay-by, these schemes allow customers to take their goods home or use services before they have paid for them, paying for the goods or services with fortnightly instalments. The consumer pays the scheme rather than the retailer. There are no specific protections for consumers beyond the general ACL provisions. Issues arise if consumers pay late, seek a refund or have overcommitted themselves as these arrangements are not regulated by consumer lending laws as they do not charge interest, only fees if payments are late.

Door-to-door Sales

Consumers purchasing goods and services via a door-to-door salesperson have special protection under ss 69–95 of the ACL.

A door-to-door sale includes where a telemarketer telephones the consumer without invitation, a salesman writes or comes to a consumer's door uninvited or arranges to come and demonstrate a product.

If the consumer asks a salesperson to leave or has a 'do not knock' sticker on their door, a salesperson must immediately leave the premises.

Sales under \$100, party plan events (e.g. where the consumer invites a group of friends to their home and a seller demonstrates a product and the friends purchase the product), credit contracts and emergency repairs are not protected by the door-to-door provisions of the ACL.

A door-to-door sale attracts a mandatory 10-business-day cooling-off period to enable a consumer to cancel the contract for any reason at all. Cancellation can be verbal or written. It is preferable that it is in writing as it is easier to prove that the consumer cancelled within the cooling off period.

A consumer can cancel a door-to-door contract within three months of sale if the supplier:

- visits outside the permitted selling hours
- does not produce identification
- does not clearly explain why they called
- does not leave the premises when requested by the consumer.

The cancellation period is extended to six months if:

- the supplier does not provide:
 - written information that the consumer has a right to cancel the contract within 10 days or within three or six months for breaches of the door-to-door provisions
 - the forms used to cancel the contract
- the contract does not set out in full all the terms of the contract before the consumer signed the contract and specifically does not include:
 - the total amount to be paid or how the total amount would be calculated
 - details of the supplier and how to contact them
 - the contract in clearly printed, typed and transparent format
- the consumer does not receive a copy of the contract immediately after it was signed
- the consumer pays a deposit or the full price during the 10-day cooling-off period
- goods over the value of \$500 or services are supplied during the cooling-off period.

If the consumer has bought the goods or services on credit, and the credit was sold to them by the door-to-door salesperson at the same time they bought the goods and services, then the credit contract can be cancelled in writing at the same time the goods or services contract is cancelled.

It is an offence once the consumer has cancelled the contract if the door-to-door salesperson lists the consumer with a credit reporting agency or takes legal action to recover the money owing under the contract, unless the legal action is brought for the purposes of determining whether the contract was capable of cancellation or properly cancelled.

Telemarketing

Sales contracts made on the phone initiated by a call from the supplier are also regulated by the ACL's door-to-door sales protections (ss 69–95 ACL).

It is possible to enter a contract to buy goods or services over the phone, but the supplier will be required to provide a written copy of the agreement within five business days after the agreement was made.

The consumer has 10 business days from the date they received the agreement to cancel the contract.

The Do Not Call register was established so that consumers could limit the number of unwanted telemarketing calls. Consumers can ring the Do Not Call register and register their home, mobile and fax numbers that they use for personal purposes. Once registered, the number remains on the registry permanently.

Once the consumer is on the register, telemarketers are unable to ring that person unless they have given consent. Consent can be implied in some circumstances. Some public interest bodies, such as charities and political organisations, are exempt from the Do Not Call register arrangements.

Consumers can complain to the register if they receive unsolicited calls.

Internet Sales

The terms and conditions of the sale of goods and services over the internet are usually displayed before the agreement is made. Often pressing 'I agree' will result in entering into a contract.

It is often difficult to work out where the contract was made when something is purchased online. This is important if the consumer wants to take legal action against the seller, as legal action can only be commenced in the place where the contract is made or a place specified by the contract.

If goods are purchased from Australian businesses, the ACL and any law of the relevant state or territory where the contract is made apply.

If overseas goods are purchased, consumer rights may also apply however the consumer may find it difficult to enforce their right if the business is not based in Australia. Even if the goods come from countries with strong consumer protection laws, it will be difficult to enforce these if the seller does not comply with the law.

There is no specific legal protection given to purchases made from auction sites (e.g. ebay) that operate over the internet.

If a credit card or some other payment method is used (e.g. paypal), it may be possible to cancel the payment to a seller if they fail to arrive. If there is a dispute, the consumer may be able to access an alternative dispute resolution scheme if the payment platform is a member of such a scheme.

If goods are paid for in cash, by a debit card or by direct transfer from a savings or cheque account, these protections are generally not available unless the auction site itself guarantees receipt of the goods.

Unsolicited Goods or Services

Unsolicited goods are goods that were sent to a consumer without a request or an authorised delivery. Some typical examples are books, magazines or Christmas cards sent to the person without the person requesting those goods.

Unsolicited services are services provided to a consumer without them having made either a request or authorised the provision of the service. An example is the provision of a directory entry without the consumer requesting the entry. The ACL has specific sections dealing with unsolicited goods and services.

If a consumer receives unsolicited goods, they must keep those goods for a period of three months during which time the seller can recover the goods. The consumer can shorten the period to one month if they give a written notice to the seller of the goods. Once the period has ended, the consumer is entitled to keep the goods unless the consumer knew the goods were not intended for them (e.g. if the consumer received something in the mail addressed to someone else) or the consumer did not allow the seller to collect the goods during that period (s 41 ACL).

Holiday Time Shares and Holiday Credits

Consumers who purchase holiday shares or holiday credits so that they can access holiday accommodation can cancel the contract within seven calendar days of signing, if the seller is a member of the Australian Timeshare and Holiday Owners Council, or otherwise within 14 calendar days in accordance with the Australian Securities and Investments Commission's *Regulatory Guide 160 Time-sharing Schemes*. The cooling-off period must be disclosed in the contract and a cancellation form provided by the seller.

Consumers who have a complaint about their entry into the contract or complaints about the operation of the time share can take their complaint to the Australian Financial Complaints Authority. The complaints authority is free for consumers to use and is an alternative to consumers taking legal action.

A decision by AFCA is final for the seller, but not for the consumer who is free to access the court system if they remain dissatisfied.

Introduction Agencies

Agencies that sign up consumers to meet people interested in forming personal relationships or attending social outings must comply with the *Introduction Agents Act 2001* (Qld) (Introduction Agents Act) This Act allows consumers to cancel the contract at any time before 5 pm on the third clear business day of receiving a copy of the signed agreement without reason and without liability for damages for breaching the contract (s 58 Introduction Agents Act).

The agency can keep a fee if the agreement is cancelled. The amount of the fee must be stated in the agreement and must not be more than the difference between the contract price for the agreement and the amount that the client has paid under the agreement up to the time it is ended (s 55 Introduction Agents Act). There are a number of requirements under this Act for introduction agreements, and consumers can take legal action in the Queensland Civil and Administrative Tribunal if the agent has not met those requirements and refuses to refund money paid by the consumer.

Phone, Internet and Pay TV Services

Consumers who enter contracts for the provision of telephone and internet services are protected by the ACL and the Telecommunications Consumer Protection Code. Some consumer protections contained in the ACL do not apply to telecommunications and utility providers.

Whenever consumers receive telephone or internet services, they have entered a contract with the service provider for the provision of that service. These contracts are often entered into over the phone.

All telephone and internet service providers are required under legislation to be members of the Telecommunications Industry Ombudsman (TIO) (pt 6 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth)). The TIO provides a free, alternative, external and independent process for resolving disputes about telecommunication services. Before accessing the TIO, consumers must first try to resolve the matter with their telecommunications provider unless the matter is urgent. Once the phone or internet company has taken legal action, the TIO is unable to investigate. Complaints to the TIO can be in writing or made over the phone. The TIO has the authority to make binding decisions (up to \$50 000) that bind the telecommunications provider but not the consumer. The TIO can also make recommendations (up to the value of \$100 000, but the decision is not binding on the telecommunications provider). The decision may require the telecommunications provider to pay money or take some other remedial action.

The TIO makes decisions based on the law, good industry practice and what is fair and reasonable in the circumstances of the particular complaint. The TIO cannot make decisions about all telecommunications complaints (e.g. whether the cost imposed for a particular service is fair or the content on smartphones).

The consumer is free to access the court system if they are dissatisfied with a TIO decision or recommendation.

Mobile phone services

Consumers have the option of purchasing their mobile phones outright or entering into a contract to pay for the mobile phone.

Prepaid mobile phones

If the consumer pays for the mobile phone outright, they have the option of entering a contract with a particular service provider to give services, which they are billed for in arrears, similar to the arrangement for a home phone or fixed line service. Consumers can also have a prepaid service that allows the consumer to control their level of debt as no credit is extended by the telecommunications provider.

If consumers pay for the phone outright and then enter a contract with another telecommunications provider for phone services, they cannot complain to the TIO if they have a problem with the mobile handset.

Mobile phone contracts

If the consumer does not pay for the mobile phone up front, they will enter a contract to pay for the phone and services over an extended period. This option usually includes an obligation for the consumer to stay with a particular provider for a set period of time.

A consumer can enter a written or oral contract. If the consumer signs a contract, the document signed will only contain the most relevant terms of the contract. A copy of the complete terms and conditions of the contract can usually be found on the telecommunications provider's website.

There is no such thing as a free phone. When entering a payment plan or a fixed-term contract, the consumer is unable to cancel without paying a cancellation fee. The cancellation fee can be substantial.

The consumer is responsible to the telecommunications provider for the calls made on the mobile, even where the consumer and a third party (e.g. girlfriend, boyfriend or flat mate) agreed that the third party would be liable for the calls made.

Standard mobile phone contracts do not have guarantees or referees. Consumers signing mobile phone contracts believing that they are guarantors or referees find themselves noted as the owner of the phone and liable not only for the contract amount but any calls made on the account. Consumers who entered contracts believing that they were guarantors or referees can take legal action or complain to the TIO, however, it can be difficult to show that the belief was legitimately held given that the contract clearly states that they are responsible.

Pay TV and other subscription-on-demand services

Complaints about the content of Pay TV or other subscription-on-demand services fall outside the jurisdiction of the TIO. However, if the subscription services are provided by the internet service provider, the TIO can deal with some complaints. You should at first instance complain to your internet service provider.

If you remain unsatisfied with how your complaint about the subscription on demand video service was resolved by the internet service provider, you can complain to the TIO. However, the TIO's jurisdiction is quite limited. Complaints about the content of subscription services including Pay TV and information provided on smart phones can be made to the Australian Communications and Media Authority (ACMA). In most cases, complainants should first raise the issue with the provider of the services and, if the issue is not adequately resolved, refer the matter to the ACMA.

Energy Services

When consumers have electricity or gas connected, they enter into a contract with the energy provider. The contracts must comply with the National Energy Retail Rules and the ACL.

The Australian Government provides information for Queensland consumers about comparative electricity and gas tariffs. Pension discounts are not taken into account.

The Queensland Council of Social Service also has consumer factsheets on energy contracts.

Energy suppliers are obliged to have hardship policies.

Consumers, who would like to make a complaint should contact the energy supplier first and give a reasonable opportunity to resolve the complaint before contacting the Energy and Water Ombudsman Queensland (the Energy Ombudsman) for assistance.

The Energy Ombudsman can assist with a wide variety of disputes including account disputes, disconnections, service guarantees and debt collection.

Once a complaint is made, an investigation takes place and negotiation or mediation may follow. If the matter is not resolved, the Energy Ombudsman can determine the matter with a decision that binds the energy supplier.

If the Energy Ombudsman cannot assist, consumers can take action in the Queensland Civil and Administrative Tribunal.

Training Colleges

Training colleges are bound by the ACL and a student or former student of such a training college can complain to the Australian Consumer and Competition Commission (ACCC) about breaches of the ACL, or they may decide to take action in court.

Students may not have to pay for these courses upfront. These courses may be subsidised by loans from the Commonwealth Government (e.g. Vocational Education and Training (VET) Student Loans). Loans are repaid through the tax system once the student has reached a certain income threshold

Sometimes people are approached in public places or online with offers to undertake a course of study. The offer may include free incentives if the consumer signs a contract. The advertisement of the courses may misrepresent the qualifications that can be obtained, give the impression that they are free or subsidised, that the consumer has the ability to complete the study, that employment in a given field is guaranteed and that the particular qualification will be accepted by employers.

The role of the ACCC is to investigate breaches and, if necessary, take legal action in the public interest. The ACCC does not give individuals legal advice or representation. However, the ACCC can act on behalf of a collection of consumers if it decides to take the matter on.

If the student decides to take court action, this action must be commenced within six years from the date the college stopped providing the training course to the consumer or from the breach of the contract. Legal advice should be sought prior to taking action in court.

The VET Student Loan replaced the failed VET FEE-HELP scheme. It offers greater protection for students and focusses on courses that address industry needs, providing greater employment opportunities. The VET FEE-HELP assistance ceased to be available on 31 December 2018. The VET Student Loans Ombudsman (VET Ombudsman) deals with complaints about VET FEE-HELP debts and provides remedies to students who have incurred a VET FEE-HELP debt as a result of inappropriate conduct by their provider. If the conduct of the provider is determined to be inappropriate, the legislation allows for debts to be waived.

The VET Ombudsman can transfer complaints to more appropriate departments depending on the circumstances including the Australian Skills Quality Authority where the complaint relates to training quality.

Borrowing Money Interest Free

Consumers borrowing money are generally protected by the National Credit Code (sch 1 *National Consumer Credit Protection Act 2009* (Cth)).

The National Credit Code contains rules about how credit contracts and consumer leases should be entered into, the terms of the agreements and enforcement of agreements.

If the credit is interest free, then the National Credit Code will not apply unless:

- the price of the goods is more than the market value
- the interest-free period expires without payment being received in full and when the credit then attracts significant interest, fees and penalties that are calculated from the date the consumer entered the contract. Even a delay in payment of one day can trigger the imposition of substantial interest (for further information see the chapter on *Consumer Credit and Banking*).

Buying a Used Car from a Dealer

When buying a used car from a motor dealer, the *Motor Dealers and Chattel Auctioneers Act 2014* (Qld) (Motor Dealers Act) and the *Motor Dealers and Chattel Auctioneers Regulation 2014* (Qld) (Motor Dealers Regulation) provide additional consumer protection. Some protections do not apply to new cars.

Special rights and obligations provided by the Act

The Motor Dealers Act provides for:

- a cooling-off period when buying a used car (s 99)
- written contracts of sale (s 118)
- statutory warranties (s 115, sch 1).

Documents a motor dealer is required to provide

According to the Motor Dealers Act, a motor dealer is required to provide the following documents:

- a copy of the signed contract immediately after signing (s 118)
- a statement about the previous ownership of the vehicle (reg 8 Motor Dealers Regulation)
- a notice about the car's statutory warranty if any
- a cooling-off clause in the contract (s105)
- a security interest certificate on the day the ownership of the car transfers, showing that no one else has a registered financial interest in the car (bill of sale or mortgage)
- a statement about the odometer reading, previous ownership and other particulars (s 74, reg 8 Motor Dealers Regulation)
- a safety certificate (previously known as roadworthy certificate)
- documents about the loan if finance is provided through or by the motor dealer (see the chapter on *Consumer Credit and Banking*).

If the buyer is not given notice of the cooling-off period or the statement identifying the vehicle, then the buyer can avoid the contract up to seven days after the day the car passes legally to the buyer (s 104 Motor Dealers Act)

Other failures to deliver required documents mean the motor vehicle dealer has committed an offence, and it may also be evidence that the contract is not binding.

Complaints about motor dealers should go to the Office of Fair Trading.

Avoiding the contract during the cooling-off period

A cooling-off period of roughly one business day is the time allowed to a buyer to cancel a contract without reason and without liability for damages for breaching the contract (s 110 Motor Dealers Act).

The exact time of the cooling-off period needs to be calculated using the provisions of s 99 of the Motor Dealers Act.

A part of the deposit can be retained by the motor dealer if the contract is avoided during the cooling-off period. The current maximum amount is \$100.

The cooling-off period does not apply if the buyer takes possession of the car before the expiry of the cooling-off period, unless the purpose of taking the car is to go for a test drive or undertake a vehicle inspection.

A motor dealer (unless the used vehicle is bought on consignment or at auction) must give a notice to the consumer of their right to cancel the contract during the cooling-off period.

When the contract does not contain a notice of the cooling-off period, the consumer has seven days to avoid the contract (s 105 Motor Dealers Act).

Cancelling a binding used-car contract

If a binding contract is cancelled, the used-car dealer is entitled to damages for breach of the contract. The standard contract used in Queensland has a term that provides that a pre-estimate of a car dealer's loss when a binding contract is cancelled is 10 to 15% of the purchase price of the vehicle.

Consumers can challenge the amount of the damages claimed by the dealer. If the dealer sells the car to another purchaser within a short period of time for the same amount, then the consumer can argue that they should only pay the actual loss suffered.

The contract may include the words 'subject to'. This means that something must happen before the contract is binding. The clause may also require that the happening of an event be satisfactory to the purchaser and have words such as 'subject to being satisfactory to the purchaser'.

If the contract is subject to finance, then it is merely an offer to purchase until finance has been approved. If a mechanical check or finance approval is unsatisfactory to the purchaser, then the purchaser can end the contract in the time period specified in the contract by written notice, stating that the result from the check or application for finance was not satisfactory to the purchaser. The purchaser does not have to show that a reasonable person would not have been satisfied, only that

they were not satisfied. The purchaser cannot cancel the contract if they have not undertaken a check or made an application for finance.

Sometimes the contract might state a particular financier's name.

It is possible to argue that the finance condition is too vague and uncertain. For example, if the clause or term in the contract does not state the amount to be financed, the date by which finance should be approved or the type of finance, then it can be argued that the contract term is so vague that it means the contract cannot be binding. Even where the dealer obtains finance on the purchaser's behalf, it is possible to have the lender withdraw the finance offer if further information about the purchaser's capacity to pay is given to the lender.

When there is no written clause about finance, but the dealer knew that the buyer could not complete the contract without obtaining finance, it may be possible to argue that the contract contained an implied term that it was subject to finance. In that case, if the purchaser is unable to obtain finance, they can still cancel the contract without being liable to pay damages on the basis that it was not binding until they obtained finance.

Purchasers should seek further advice if they intend to rely on an implied term or a condition precedent.

Problems with the car

Statutory warranty

There is a period (statutory warranty) during which a purchaser can return a used car for repairs if it has a defect, unless the purchaser bought the car privately, the car was sold unregistered, or it is a caravan, motorcycle or commercial vehicle. Schedule 1 of the Motor Dealers Act includes all warranty provisions unless indicated otherwise.

A defect is part of a vehicle that cannot be reasonably relied upon or is not performing its intended function. Defects in tyres, batteries, lights, radiator hoses, airbags and sound/music systems are not covered by the statutory warranty (reg 47 Motor Dealers Regulation). The government can regulate to extend the list of items not covered by the warranty at any time. The warranty does not cover damage to the car that occurred after the sale by the purchaser, or paintwork and upholstery problems that the purchaser should have been able to see when they bought the car.

Only used cars that have travelled less than 160 000 km and that are less than 10 years old have a warranty. The warranty is for three months or 5000 km, whichever occurs sooner.

If the car has a defect covered by warranty, the buyer must give the dealer a defect notice and deliver the car during the warranty period to the dealer or his nominated repairer.

The buyer should establish whether the dealer is prepared to repair the vehicle under warranty before they return the car for repairs. The dealer is required to give written advice as to their acceptance or rejection of the claim. Not responding to the claim is similar to saying that they accept the claim for warranty repairs.

The dealer has five days to advise if the defect is covered by the warranty. If the dealer accepts that the defect is covered, the dealer has 14 days to repair.

If the dealer claims that the defect is not covered by the warranty, the purchaser can apply to QCAT to obtain an order that the defects be repaired.

If the dealer refuses to comply with the order of the tribunal to fix the defects or does not fix them to a reasonable standard, the Office of Fair Trading may take disciplinary action against the motor dealer in QCAT. This can lead to a cancellation of the motor dealer's licence.

Was the car of acceptable quality?

Even if the statutory warranty does not apply, the warranties contained in the ACL may also apply including the warranty that the car is of acceptable quality. This means that the car must be of sufficient quality and fit for the purpose for which it was sold, having regard to the price.

In practice, the purchaser would need to show that at the date they bought the car there was a roadworthy defect. This means that the purchaser would need an independent mechanical inspection stating that the problem existed when the car was purchased.

It is very hard to get an independent written report unless it is obtained reasonably quickly after the sale.

If the purchaser can show the defect did exist on the day the car became legally theirs, then they might have a right to end the contract and return the car.

The purchaser would need to act quickly and make a complaint in writing to the dealer. If the dispute continues, the purchaser may need to take the matter to court. If the purchaser is claiming less than \$25 000, then the purchaser will be able to take the matter to QCAT.

Other remedies

Sections 20 to 22 of the ACL aim to protect consumers against unconscionable conduct when the purchase is for personal, domestic or household use.

The time limit for making a claim under the ACL is six years after the conduct (s 236).

In deciding if conduct is unconscionable, the court will look at:

- the relative strengths and bargaining positions between the parties
- whether the consumer was required to comply with conditions not reasonably necessary for the protection of the legitimate interests of the dealer
- whether the consumer understood the documents
- whether undue influence, pressure or unfair tactics were used by the dealer
- the cost of identical or equivalent goods from another dealer.

The court can cancel a contract because of unconscionable or misleading and deceptive conduct (s 18).

The dealer offers to swap the car for another vehicle

Consumers are not obliged to accept a different vehicle from the one they originally inspected. If the consumer agrees to accept another vehicle, the dealer is obliged to write up a new contract or vary the

original contract. The consumer can argue that the dealer has waived the right to insist on the original contract by offering the consumer another car.

Waiver is where one party, by their conduct:

- leads another to believe that the rights arising under the contract will not be insisted upon
- intends that the other should act on that belief and the other party does act on the belief.

The first party will not afterwards be allowed to insist on strict legal rights under the contract when it would be unfair to do so. This is the legal concept of waiver. The result of waiver may lead to a dealer losing their rights to insist that the contract is binding.

Buying a Car Privately

If the consumer buys a vehicle privately, the law offers very little protection. In most cases, the ACL and the Motor Dealers Act will not apply, and the buyer has to rely on common law. No statutory warranty applies. In addition, title is not guaranteed. If the car or parts of the car were stolen, the purchaser has no right to keep the car or parts. If the car is security for a loan, and the security (or bill of sale) is registered with the Personal Property Securities Register, then the holder of the security can take action to recover the car if the loan is not paid out. Purchasers buying cars privately need to check the register before they agree to purchase a vehicle to see if it is mortgaged or stolen.

If the vehicle is purchased from an individual, they will not be able to take action in the Queensland Civil and Administrative Tribunal when suing for damages.

Buying a Car Online

A consumer's rights will depend on where the seller is located, the type of sale (auction or fixed) and who the seller is.

If the seller is a dealer located in Queensland, the ACL and Motor Dealers Act (if the car is used) will apply. If the seller is an individual living in Queensland, see Buying a Car Privately above. If the seller is interstate, then the ACL applies as well as any relevant state law. Enforcing rights against interstate sellers may be difficult, and consumers should exercise caution when purchasing an interstate vehicle.

How to Take Legal Action about Goods and Services

The Queensland Civil and Administrative Tribunal and courts

If a dispute arises about goods or services, consumers can take action in the Queensland Civil and Administrative Tribunal, which deals with disputes between consumers and traders involving up to \$25 000. The time limit for making a complaint is six years from when the dispute arose. The tribunal provides for an upfront one-off filing fee, but otherwise there are no costs, and lawyers cannot be engaged unless the tribunal allows it.

Where the tribunal does not have jurisdiction, consumers must bring an action in the Magistrates Court.

Proposed ‘Lemon Laws’ legislation for Queensland Civil and Administrative Tribunal

In November 2018, the Queensland Government introduced a Bill to parliament to help people who have been sold faulty vehicles including cars, motorhomes and caravans.

The Queensland Civil and Administrative Tribunal and Other Legislation Amendment Bill 2018 would enable the tribunal to hear matters for new and old vehicles with numerous defects, sometimes called ‘lemons’.

The proposed legislation would see the tribunal’s jurisdictional limit be raised to \$100 000 for motor vehicles.

The proposed changes have not yet been passed. Until the Queensland Parliament passes the new legislation, the tribunal’s current jurisdictional limit of \$25 000 remains in place.

Mediation

Consumers may try the court’s mediation service at dispute resolution centres in Queensland.

Alternative dispute resolution schemes

Consumers can also take their complaint to alternative dispute resolution schemes depending on the goods or services purchased. Schemes are free for consumers. There are schemes for most financial products and services.

Legal Notices

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