

Consumer Guarantees and the IT Industry¹

On 1 January 2011, the *Australian Consumer Law (ACL)* (schedule 2 of the *Competition and Consumer Act 2010 (Cth)*) replaced the consumer protection provisions in the *Trade Practices Act 1974 (Cth) (TPA)*.

The ACL governs the way in which businesses act, and most of these obligations are very familiar, as they're carried over from the TPA. As one might expect, the ACL contains a general ban on misleading and deceptive conduct, or unconscionable conduct in trade or commerce. You can find a general overview of the ACL [here](#).

However, we've written this guide in relation to consumer guarantees imposed by the ACL, and specifically, what they mean for B2B businesses in the IT industry.

The questions for any business in relation to Consumer Guarantees are:

- (a) When and how do the Consumer Guarantees apply to goods and services that you supply?
- (b) If the Consumer Guarantees do apply to your goods or services, then what must you offer to customers?
- (c) What are the risks for your customers if your goods and services were defective in some way? What damages might they suffer?
- (d) What can you include in your customer terms?
- (e) What else can you do to manage your risk?

However, we've written this guide in relation to consumer guarantees imposed by the ACL, and specifically, what they mean for B2B businesses in the IT industry.

1. Do the Consumer Guarantees Apply to Your Goods and Services? Notes: 2

The consumer guarantees apply to any contract dated later than 1 Jan 2011, with a 'consumer', for goods or services. A 'consumer' is defined in section 3 of the ACL as a person who acquires goods or services:

- (a) for an amount under \$40,000; or
- (b) for an amount over \$40,000, and the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (c) which consist of a vehicle or road trailer.

Resellers and people who buy goods to transform them during production or manufacture are not consumers.

¹ This guide is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this guide.

Value of Goods or Services	Hosted Services	Managed Services / Web Designers / Consultants	Hardware Suppliers	Manufacturers ² (inc Software Developers)
\$X pre 1 Jan 2011	No	No	No	No
< \$40,000 (1 Jan 2011 onwards)	Yes (for non-teleco services)	Yes	Yes	Yes
> \$40,000 (1 Jan 2011 onwards)	Yes (for non-teleco services of domestic kind)	No (services not generally domestic) ³	Yes (for goods of domestic kind)	Yes (for goods of domestic kind)

2. Consumer Guarantees

Notes: 4, 5, 12

The consumer guarantees apply no matter what your trading terms say (they cannot be contracted out of).

The consumer guarantees are different for goods and services, and are summarised below, along with the applicable limitations (circumstances where a particular guarantee might not apply).

Goods		Services	
Consumer Guarantees	Limitations	Consumer Guarantees	Limitations
Supplier/manufacturer has clear title and right to sell	None	Services provided with due care and skill	None
Consumer has right to undisturbed possession	None	Services fit for any purpose specified by either party	If consumer did not rely on supplier in determining suitability for their purpose, they cannot claim a breach of this guarantee
Goods have no undisclosed securities, charges, encumbrances	None	Services provided within timeframe / a reasonable time	None
Goods fit for any purpose specified by either party	If consumer did not rely on supplier in determining suitability for their purpose, they	Supplier complies with any express warranty (section 5)	None

² 'Manufacturer' includes anyone who makes or puts goods together; anyone who has their name on the goods; or anyone who imports the goods if the maker does not have an office in Australia. If a manufacturer sells goods directly to consumers, they will be both manufacturer and supplier and have responsibilities for both roles.

³ Untested in the courts. See note 2.2

	cannot claim a breach of this guarantee		
Goods are acceptable quality	If consumer alerted to defects, uses goods in abnormal manner, or causes quality to become unacceptable, they cannot claim a breach of this guarantee		
Goods match description, or sample / demonstration model	None		
Supplier/manufacturer complies with any express warranty (section 5)	None		
Repairs / spare parts are reasonably available for a reasonable period (for manufacturers only)	Where consumer was advised in writing that repair facilities and spare parts are not available after a specified time, the manufacturer doesn't have to meet this guarantee		

Note: the term 'supply' (and the related 'supplier') in relation to goods includes "supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase". In relation to services, it includes "provide, grant or confer".

3. Identifying Risks

Notes: 9, 10

The ACL provides statutory remedies for breaches of the consumer guarantee provisions. Two conditions need to be satisfied:

- (a) was there a breach that can be remedied?; and
- (b) does the breach constitute a 'major failure'?

For breaches which are minor, the **supplier can choose** between a repair, replacement, or refund. If the supplier or manufacturer doesn't remedy the breach, the consumer can recover reasonable costs incurred as a result of the failure, reject the goods and choose a refund or replacement, or terminate the services contract and obtain a refund.

For a major failure, the **consumer can choose** to reject the goods and choose a refund or replacement, terminate the services contract and obtain a refund, or ask for compensation for any drop in value of the goods or services.

Reasonably foreseeable loss

In addition to the remedies for non-major and major failures, a consumer may also recover damages for any loss or damage suffered because of the failure, if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

Reasonably foreseeable losses can include loss of opportunity, loss of anticipated profits or savings, expenses incurred through breach, wasted overheads, loss of contract, loss of business, loss of production, loss of use, loss of goodwill, and many other pure economic losses.

For IT companies, reasonably foreseeable loss is a major risk. For example, if a service or piece of hardware were to fail, it's reasonably foreseeable that the customer might lose data. There is some inherent difficulty in predicting how much it might cost to replace or repair lost data, especially in a commercial environment.

4. What Can You Include in Your Terms? Notes: 6, 7, 11, 12

Section 64 of the ACL provides that the consumer guarantees can't be excluded, restricted or modified by contract. This includes the consumer's right to recover reasonably foreseeable losses.

Any supplier or manufacturer who presents terms and conditions that contain an unenforceable waiver (inconsistent with the consumer guarantees) may be misleading the consumer about their legal rights, and will be exposed to penalties for providing false and misleading information.

However, there are some exceptions that apply.

4.1 Exception to the guarantee that goods or services will be fit for any specified purpose

The 'fit for any specified purpose' guarantee will not protect the consumer if circumstances show that the consumer did not rely on (or it was unreasonable for them to rely on) the supplier's skill or judgement in determining whether the goods or services were fit for their specified purpose.

4.2 Exception for consumer guarantees for services

The consumer guarantees for the supply of services do not apply to:

- (a) insurance contracts;
- (b) contracts for the transportation or storage of goods for the purposes of a business, trade, profession or occupation;
- (c) electricity services;
- (d) telecommunications services; or
- (e) gas services.

It is not clear whether a data hosting facility could argue that they're storing goods for the purposes of a business, trade, profession or occupation, and thus be exempt from the consumer guarantees for services worth less than \$40,000.

4.3 Suppliers of business goods and services can contract out of reasonably foreseeable loss

Under section 64A, a person supplying goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption can limit their liability to the:

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

Under the same section, a person supplying services which are not of a kind ordinarily acquired for personal, domestic or household use or consumption can limit their liability to the:

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

A supplier can only do this if it is fair or reasonable to do so, which will depend on the circumstances.

So while it is possible to contract out of the liability for reasonably foreseeable loss, the difficulty is in whether the goods or services being supplied are “of a kind ordinarily acquired for personal, domestic or household use or consumption”.

4.4 Warranties against defects and repair notices Notes: 6 and 7

If a supplier or manufacturer represents at time of supply that they will repair or replace goods or parts of the goods; re-supply services or rectify parts of the services; or wholly or partly compensate the consumer if there is a defect in the goods or services, then the supplier or manufacturer should be aware that there is mandatory content they need to include in their warranty (see notes 6).

The legislation sets out requirements for repair notices which need to be provided to the consumer when the repairer accepts goods for repair (see notes 7).

4.5 Unfair contracts Notes: 10

The ACL contains provisions which make certain exclusions and limitations in standard form consumer contracts unenforceable (see notes 10 for definitions of *consumer contract* and *standard form contract*).

The unfair contract term provisions don't apply to B2B contracts.

5. Other Actions Suppliers and Manufacturers Can Take Notes: 14

Suppliers and manufacturers should closely examine their business structure to determine if they can limit their exposure. Business methods, procedures and systems should be audited to ensure they comply with the ACL.

If a supplier or manufacturer has existing template contracts, they should be reviewed to ensure they comply with the ACL, they don't contain unfair contract terms, and any liability limits and associated definitions are carefully drafted.

Suppliers and manufacturers can also limit their exposure by careful contract drafting which manages consumer expectations. A detailed scope of goods and services being supplied should always form part of your dealings with customers. The scope should detail not only what's included in the scope, but also what's excluded.

Suppliers and manufacturers can also look at purchasing IT liability insurance to try to limit their exposure further.

Discussion Notes

1. Summary

- (a) Suppliers and manufacturers of products for personal use can be liable for wide and deep losses for a breach of the consumer guarantees.
- (b) Suppliers of products for business use can contract out of foreseeable losses, but manufacturers cannot (for example, software developers).
- (c) Whether a good or service is for personal or business use is a difficult question to answer, however it does seem as if courts may be willing to classify all goods or services in B2B transactions as business goods or services.
- (d) Telecommunications services are exempt from the consumer guarantees for services.
- (e) Unfair contract term provisions apply to standard form contracts (like website terms of use), but do not apply to B2B transactions.
- (f) Exposure for breaching the consumer guarantees about acceptable quality (goods) and fitness for purpose (goods and services) can be limited with carefully constructed contract provisions and scope. An SLA would also be beneficial in some transactions.
- (g) Exposure can also be limited with IT liability insurance, although given some of the recent cases mentioned and the large sums paid out, coverage for loss of data may not come cheaply.

2. Definition of 'Consumer' for ACL

A 'consumer' is defined in section 3 of the ACL as a person who acquires goods or services:

- (a) for an amount under \$40,000; or
- (b) for an amount over \$40,000, and the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (c) which consist of a vehicle or road trailer.

Resellers and people who buy goods to transform them during production or manufacture are not consumers.

2.1 "of a kind ordinarily acquired for personal, domestic or household use or consumption"

It's important to note that this second limb of the definition has been read widely by the courts in the past (courts who were considering the same definition under the TPA). The test is what the goods or services are *ordinarily* used for, rather than what they are *actually* used for.

Young J in *Bunnings Pty Ltd v Laminex Group Limited*⁴ said “First, the word ‘ordinarily’ means ‘commonly’ or ‘regularly’, not ‘principally’, ‘exclusively’ or ‘predominately’ ... Counsel for the respondent invited me to depart from these authorities, and to hold that the word ‘ordinarily’ as used in s 74A(2)(a) means ‘predominately’. In view of the authorities to which I was referred, I doubt that I am free to adopt such a construction. In any event, I am not persuaded that the word ‘ordinarily’ ... means ‘predominately’ rather than ‘commonly’ or ‘regularly’. On the contrary, I consider that the meaning which best accords with the policy and the purposes ... is that of ‘commonly’ or ‘regularly’.”

This can be complicated where goods or services have both a commercial and domestic application.

In the case of *Carpet Call Pty Ltd v Chan*,⁵ a case considered under the previous TPA, the court held that carpet sold to a nightclub in a commercial context for commercial use was still goods ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’. Thomas J said, “In my view “carpet” is a commodity, or goods, ordinarily acquired for domestic consumption, and it does not lose that description by reason of a commercial rating, or some quality which makes it last longer than other carpet normally supplied for use in a domestic setting.”

Contrast that with the case of *Engine Imports v Diesel and Industrial Engine Spares*⁶ where it was held that valve springs sold for maintenance of heavy machinery were not goods ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’. This is despite the fact that valve springs are also manufactured for the motor vehicle industry, although presumably of a different quality, size, or rating.⁷

There is therefore some uncertainty about whether goods or services supplied for more than \$40,000 will be classified as having been supplied to a ‘consumer’, even if the supplier or manufacturer has personally classified those services as only being relevant for B2B transactions.

2.2 Are IT services “of a kind ordinarily acquired for personal, domestic or household use or consumption”?

It is hoped that a court would recognise that many IT services are not services “of a kind ordinarily acquired for personal, domestic or household use or consumption”, but given the decision in *Carpet Call Pty Ltd v Chan* (see section 2.1), it’s not a guarantee.

Many IT services are commonly or regularly supplied for business purposes, and only rarely or sometimes supplied for personal, domestic or household use. For example, data hosting, IAAS, colocation, networking, managed services, security consulting, disaster recovery, systems administration, website development and IT procurement.

Software suppliers (including SaaS) and manufacturers may find their goods and services fall into a category where they are always considered to be consumer goods and services, because software is ordinarily used for personal, domestic or

⁴ [2006] FCA 682

⁵ (1987) ASC 55-553

⁶ [2014] QCAT 445

⁷ See, for example, <http://www.performancesprings.com.au/>

household use. This may come down to whether the courts are prepared to entertain an argument that there is a distinct difference between the types of software for personal, domestic or household use, and software for commercial use (CRMs and practice management systems, for example).

The case of *JR Consulting & Drafting Pty Ltd & Anor v Cummings & Ors*,⁸ a NSW Supreme Court case, provides some comfort. Black J in that case discussed whether the software in question was ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’, saying in obiter, “*I find it difficult to see that specialist computer software used in the operation of rollforming machines for, inter alia, roofing components could possibly fall within this concept*”.

A further interesting case is that of *Online Coins v eBay International AG (General)*,⁹ where Kim Holwell held that the applicant (a business selling coins and other goods on eBay) could not seek relief via consumer guarantees for the services eBay had provided because “*the services were provided to a business and were not of a kind ordinarily acquired for personal, domestic or household use or consumption.*” eBay’s services are ‘commonly’ and ‘regularly’ provided for personal, domestic or household use or consumption, so it may be that the courts are turning towards considering that any contract between commercial entities involves goods or services that are not ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’. However, it’s important to note that the decision in the eBay case is one of the New South Wales Consumer, Trader and Tenancy Tribunal, and therefore doesn’t carry much weight.

3. Supply

The term “supply” is defined in section 3 of the ACL. In relation to goods, it includes “supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase”. In relation to services, it includes “provide, grant or confer”.

4. Consumer Guarantees for Goods

A supplier/manufacturer of goods guarantees:

- (a) they have clear title and a right to sell the goods;
- (b) the consumer has the right to undisturbed possession of the goods;
- (c) the goods do not have undisclosed securities, charges or encumbrances;
- (d) the goods are fit for any purpose specified by either party;
- (e) the goods are of acceptable quality;
- (f) the goods are in accordance with their description, or sample or demonstration model; and
- (g) they will comply with any express warranty given or made in relation to the goods.

⁸ [2014] NSWSC 1252

⁹ [2013] NSWSC 480

In addition, the manufacturer guarantees that repairs and spare parts are reasonably available for a reasonable period after the goods are supplied.

Importantly, the guarantee that goods will match any sample or demonstration model applies even if the differences are unavoidable, provided they are substantial.¹⁰

4.1 Acceptable quality

The new standard of 'acceptable quality' is stronger than it was under the previous TPA. Acceptable quality means:

- (a) fit for all purposes for which goods of that kind are commonly supplied;
- (b) acceptable in appearance and finish;
- (c) free from defects;
- (d) safe; and
- (e) durable.

The criteria are applied in accordance with what a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable. The question of whether goods are of acceptable quality is determined at the time the goods are supplied to the consumer.

This means that if the reasons as to any unacceptable quality are made known to the consumer prior to them accepting and purchasing the goods, or if the consumer should have reasonably known of the unacceptable quality and still accepted and purchased the goods, then the goods will not fail under the acceptable quality test. Further, if the consumer uses the goods in an 'abnormal' manner, causes the quality of the goods to become unacceptable, or fails to take reasonable steps to avoid the quality becoming unacceptable, the guarantee of acceptable quality will not apply.

5. Consumer Guarantees for Services

A supplier of services guarantees that services are provided:

- (a) with due care and skill;
- (b) which are fit for any purpose specified by either party; and
- (c) within a reasonable time (when no timeframe is provided).

This means a supplier must:

- (d) use an acceptable level of skill or technical knowledge when providing the services; and
- (e) take all necessary care to avoid loss or damage when providing the services.

The 'fit for a particular purpose' guarantee also includes that services must be of sufficient quality to achieve any desired results which the consumer made known to the supplier prior to purchase.

¹⁰ *Cavalier Marketing (Australia) Pty Ltd v Rasell* (1990) 96 ALR 375

6. Express warranties

If a supplier or manufacturer makes extra promises about the quality, state, condition, performance or characteristic of a good or service, and the good or service doesn't satisfy that promise, then the consumer is entitled to the same remedies as for a breach of the consumer guarantees.

7. Warranties against defects

If a supplier or manufacturer represents to the consumer at or about the time of supply (whether in a document or otherwise) that they will:

- (a) repair or replace goods or parts of the goods;
- (b) re-supply services or rectify parts of the services; or
- (c) wholly or partly compensate the consumer

if there is a defect in the goods or services, then the supplier or manufacturer should be aware that there is mandatory content they need to include in their warranty.

A document can include product packaging, marketing and advertising material, product manuals, terms of use, and service agreements.

Suppliers who offer extended warranties to consumers should also be careful not to misrepresent to the consumer that the extended warranty is the only way to obtain rights equivalent to those provided under the ACL. This would be contravening section 29(1) of the ACL. Some early commentary on the ACL suggested that by offering consumers the opportunity to purchase an extended warranty which does not extend beyond the rights available to the consumer under the ACL, that the supplier could be in contravention of section 29(1)(n).¹¹ This has yet to be tested in the courts.

7.1 Mandatory requirements

The warranty against defects must concisely state:

- (a) what the person who gives the warranty must do so that the warranty may be honoured;
- (b) what the consumer must do to entitle the consumer to claim the warranty; and
- (c) the mandatory wording (which cannot be altered in any way, even to change the word 'goods' to 'services'): *"Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure."*

¹¹ Jeannie Paterson, 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions', (2011) 35 *Melbourne University Law Review* 252, 270

The warranty must also prominently state the following information about the person giving the warranty: name, business address, telephone number, and email address (if available).

The warranty must also include information about:

- (a) the period or periods when the defect is to appear in the goods or services in order for the consumer to be entitled to claim the warranty;
- (b) the procedure for a consumer to claim the warranty, including the address to which a claim may be sent;
- (c) who will bear the expense of claiming the warranty; if the consumer can claim the expense then how the consumer can claim expenses; and
- (d) the fact that benefits provided to the consumer in the warranty are in addition to any other rights and remedies of the consumer under a law in relation to the goods or services to which the warranty relates.

8. Repair Notices

The legislation sets out requirements for repair notices which need to be provided to the consumer when the repairer accepts goods for repair.

If the repairer's method includes:

- (a) supplying refurbished goods as an alternative to repairing a consumer's defective goods; or
- (b) using refurbished parts in the repair of a consumer's defective goods,

then the following wording must be provided to the consumer in a repair notice:

"Goods presented for repair may be replaced for refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods."

If the goods being repaired are capable of retaining user-generated data, the notice must also state that the repair of the goods may result in the loss of data.

9. Breaches

The ACL provides statutory remedies for breaches of the consumer guarantee provisions. Two conditions need to be satisfied:

- (a) was there a breach that can be remedied?; and
- (b) does the breach constitute a 'major failure'?

For breaches which are minor, the **supplier can choose** between a repair, replacement, or refund. If the supplier or manufacturer doesn't remedy the breach, the consumer can recover reasonable costs incurred as a result of the failure, reject the goods and choose a refund or replacement, or terminate the services contract and obtain a refund.

For a major failure, the **consumer can choose** to reject the goods and choose a refund or replacement, terminate the services contract and obtain a refund, or ask for compensation for any drop in value of the goods or services.

A consumer cannot reject goods if:

- (a) the goods have been attached to or incorporated into any real or personal property and can't be detached or isolated without damaging the goods.
- (b) the goods have been thrown away, destroyed, lost or damaged through no fault of the supplier, then a consumer cannot reject the goods.
- (c) too much time has passed. Time runs from the date of supply until the fault or problem would reasonably be expected to appear.

If a consumer notifies the supplier they are returning the goods, the consumer must return the goods to the supplier unless the cost of returning, removing or transporting is significant, in which case, the supplier must collect the goods at their own expense and within a reasonable time.

If the consumer terminates services, but the services have already been consumed by the consumer at the time the termination of the contract takes place (when the supplier is made known of the termination by either words or conduct), then the consumer is not entitled to a refund.

If the consumer chooses a refund, the supplier cannot refuse the refund, or offer a credit note, exchange card or replacement goods instead of a refund.

If the consumer chooses a replacement, the replacement must be of the same type and similar value. If this is not reasonably available, the consumer may choose a repair or refund.

If the consumer has to take the goods elsewhere for a repair, they do not have to get the supplier's agreement or provide quotes. However, the supplier only has to pay the 'reasonable costs' of repair (which includes associated costs such as transport). If a consumer attempts to claim excessive amounts for fixing an item, the supplier does not have to pay the full amount.

9.1 Major failure

A major failure of goods will occur if:

- (a) the goods are unsafe;
- (b) the goods significantly depart from their description, sample or demonstration model;
- (c) the goods would not have been acquired by a reasonable consumer who was acquainted with the issue; or
- (d) the goods are substantially unfit for a purpose which goods of the same kind are commonly supplied or a purpose disclosed by the consumer prior to purchase and cannot easily be remedied in a reasonable time.

A major failure of services will occur if:

- (e) the supply of the services creates an unsafe situation;
- (f) the services would not have been acquired by a reasonable consumer who was acquainted with the issue;

- (g) the services and any product resulting from them are substantially unfit for a purpose for which services of the same kind are commonly supplied or a purpose disclosed by the consumer prior to purchase and cannot be remedied in a reasonable time; or
- (h) the services and any product resulting from them cannot reasonably be expected to achieve a consumer's desired result disclosed prior to purchase; and the services and any of those products cannot easily be remedied in a reasonable time.

9.2 Receipts and other 'proof of purchase'

Consumers claiming faulty goods or services against a supplier or manufacturer will generally need to show they obtained the goods or services from that supplier or manufacturer (even if they received the goods or services as a gift).

Acceptable forms of evidence include:

- (a) Tax invoice or receipt;
- (b) Lay-by agreement;
- (c) Confirmation or receipt number provided for a telephone or internet transaction;
- (d) Credit card statement;
- (e) Warranty card showing the supplier's or manufacturer's details and the date or amount of purchase; and
- (f) Serial or production number linked with the purchase on the supplier's or manufacturer's database.

Goods do not have to be returned in their original packaging or wrapping.

10. Reasonably Foreseeable Loss

In addition to the remedies for non-major and major failures, a consumer may also recover damages for any loss or damage suffered because of the failure, if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

Reasonably foreseeable losses can include loss of opportunity, loss of anticipated profits or savings, expenses incurred through breach, wasted overheads, loss of contract, loss of business, loss of production, loss of use, loss of goodwill, and many other pure economic losses.

Reasonably foreseeable loss is not recoverable if the failure of goods to comply with the consumer guarantee happened independently of human control after the goods left the control of the supplier.

JW Carter (Professor, Emeritus, at the University of Sydney, Consultant to Herbert Smith Freehills and Fellow of the Australian Academy of Law) also notes:

'Reasonably foreseeable' loss or damage is a very broad concept more familiar in the context of breach of a duty of care than the breach of a strict duty analogous to a contractual duty. It is generally considered that the

test of remoteness of damage under the rule in *Hadley v Baxendale*¹² is narrower than that applicable where damages are sought in tort for breach of a duty of care.¹³ But most of the consumer guarantees in the *Australian Consumer Law* create strict duties. Two other points of difficulty may be noted.

First, there is no indication of whether the *Australian Consumer Law's* criterion of 'reasonably foreseeable' loss or damage is applied at the time when the contract for the supply of goods or services was entered into, or at the time when the consumer guarantee is not complied with. A contract analogy suggests the former.

Second, when the concept of 'reasonably foreseeable' loss or damage is applied to the tort of negligence, the impact is to enable a plaintiff to recover out-of-pocket losses and consequential loss. But assessment is generally on a reliance basis, rather than on an expectation basis. In contrast, in a breach of contract claim the plaintiff is entitled to have damages assessed on an expectation basis. The *Australian Consumer Law* is unclear whether a consumer is entitled to recover damages on an expectation basis for failure to comply with a consumer guarantee. For 'genuine' consumers that is hardly likely to be an issue, even in relation to economic loss. However, where the consumer is a corporation which has acquired goods or services in the course of a business, it will generally prefer to have damages assessed on an expectation basis.¹⁴

10.1 Reasonably foreseeable losses in the IT industry

For software developers and for suppliers of IT services deemed to be 'of a kind ordinarily acquired for personal, domestic or household use or consumption', the reasonably foreseeable losses reasonably foreseeable from a breach of a consumer guarantee could potentially be very wide and very deep.

Some examples of reasonably foreseeable losses are:

- (a) loss of data and economic loss flowing from the loss of data;
- (b) economic loss flowing from an extended data centre power loss;
- (c) economic loss flowing from a server failure which prevents access for an extended period of time;
- (d) economic loss flowing from online services being unavailable for an extended period of time;

¹² (1854) 9 Ex 341 at 354; 156 ER 145 at 151

¹³ In contract law, the remoteness rule in *Hadley v Baxendale* refers to losses that were 'reasonably contemplated' by both parties. In negligence, the rule of remoteness states that a loss is too remote if it is not reasonably foreseeable. But note that courts in Australia are deviating from the decision in *Hadley v Baxendale* and adopting a broader approach that the traditional English position. Courts in Victoria, New South Wales and South Australia are now holding that certain losses are now covered by the definition of consequential loss, such as loss of profits or additional expenses incurred as a result of the breach. The High Court has not yet rendered a decision on the meaning of 'consequential loss'. (Idealaw comment – not part of quoted text).

¹⁴ JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, Australia, 6th ed, 2012) at [11-37]

- (e) economic loss flowing from an online store being down for an extended period of time;
- (f) economic loss flowing from security breach of a server, data centre, or website; and
- (g) economic loss flowing from a privacy breach.

A recent case shows just how extensive reasonably foreseeable losses in the IT industry can be.¹⁵ In April 2012, two off-site servers located overseas failed, resulting in complete loss of data to customers of a Sydney hosting company. According to the hosting company's lawyers:

Customers stored their entire business' [sic] intellectual property, including developmental history, bug fixes and the entirety of their client data on the hosting company's platform, which was backed up and stored on the off-site servers in Colorado. The server failures resulted in total data loss, which essentially meant that the hosting company's customers were put out of business by the failure. All lost data was irretrievable and needed to be re-created from scratch, necessitating thousands of engineering hours by the customers, resulting in substantial business and opportunity losses. Claims against [our] client, totaling nearly \$10 million ensued.

The servers were manufactured and supported by Dell Computer and were being operated by a third-party vendor in Colorado. Intense and technically complex year-long negotiations between Dell Computer, the Denver-based operator of the servers, and [our] client, as well as the several claimants (customers), resulted in pre-litigation settlements totaling nearly \$2 million. Federal class action lawsuits were prepared, but never filed and served, thus avoiding numerous lawsuits by other customers of [our] client, who were also affected by the server failures.

The test will be what is 'reasonably foreseeable'. In a non-IT case before the Victorian Civil and Administrative Tribunal,¹⁶ R Phillips held the applicants could recover damages for stress and inconvenience suffered as a result of not being able to start a car on two occasions (among other items). In a New Zealand case under a similar provision, the High Court of New Zealand raised the issue that damages might be claimed for disappointment and distress arising from a failure to comply with consumer guarantees.¹⁷ Such damages are not generally available for breach of contract. For a client of an IT service, the cost of stress and inconvenience, or disappointment and distress, flowing from a reasonably foreseeable loss could be very high, particularly if the loss involved loss of data or an extended period of not being able to access services.

11. Unfair Contracts

The ACL also contains provisions which make certain exclusions and limitations in standard form consumer contracts unenforceable.

¹⁵ *Arc Touch Inc v Atlassian Pty Ltd*

¹⁶ *Saltalamaccia v Tayser Automotive Group Pty Ltd trading as Nunawading Great Wall* (Civil Claims) [2014] VCAT 1463

¹⁷ *Pier v Imation Holdings Ltd* (unreported, High Court of New Zealand, Hansen J, 5 December 2006) [19], [32]–[34]

A consumer contract is a contract for a supply of goods or services, or a sale or grant of an interest in land, to someone who acquires the goods, services or interest wholly or predominantly for personal, domestic or household use or consumption.

A standard form contract is typically one that has been prepared by one party to the contract and is not subject to negotiation between the parties. Website terms of use are one example.

From 12 November 2016, the unfair contract term provisions will also apply to small business contracts. A small business contract is one:

- (a) for the supply of goods, services, land, financial products, or financial services;
- (b) where at least one party is a business that employs less than 20 people (full time, part time, or casuals employed on a regular and systematic basis);
- (c) where the price payable under the contract is:
 - (i) less than \$300,000; or
 - (ii) \$1,000,000 or less if the contract is for longer than 12 months; and
- (d) where the contract employs standardised, non-negotiated terms which are prepared by one party to the contract.

The price payable under the contract is assessed on the total amount payable under the contract which is disclosed when the contract is being entered into. The price payable doesn't include interest payments, or amounts that are contingent and may not be payable (such as termination fees, surcharges, expenses, out-of-scope fees, etc).

11.1 Unfair terms

A term is unfair when it:

- (a) causes significant imbalance in the parties' rights and obligations arising under the contract;
- (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) would cause detriment to another party if it were to be applied or relied on.

For example, the following terms might be regarded as unfair:

- (d) terms that permit the supplier but not the customer to avoid or limit the performance of the contract, terminate it, vary its terms or renew or not to renew the contract;
- (e) terms that permit the supplier to:
 - (i) change prices without the customer's right to terminate the contract;
 - (ii) unilaterally determine when the contract has been breached, or interpret the meaning of the contract;

- (iii) unilaterally vary the characteristics of the goods or services to be supplied; and
 - (iv) assign the contract to the customer's detriment without the customer's consent.
- (f) terms that penalise the customer but not the supplier for breach or termination of contract;
 - (g) terms that levy excessive fees or impose excessive interest rates on outstanding monies;
 - (h) terms that limit the customer's right to sue the supplier; and
 - (i) terms that limit the supplier's explicit liability for its agents.

Terms which are required by law, or which define the main subject matter of the contract, or which set the price are exempt from being declared unfair.

Terms that have previously been found by the Federal Court to be unfair include terms that:

- (a) allowed an ISP to vary the price for providing services to the customer without prior notice and without providing the customer with a right to terminate the contract;
- (b) required a customer to indemnify a supplier in all circumstances, even where the loss had been caused by the supplier's breach of the contract or wilful misconduct; and
- (c) allowed only the supplier and not the customer to terminate the contract at any time, without cause or reason.

12. Can You Exclude or Limit Your Liability?

Section 64 of the ACL provides that the consumer guarantees can't be excluded, restricted or modified by contract. This includes the consumer's right to recover reasonably foreseeable losses.

Any supplier or manufacturer who presents terms and conditions that contain an unenforceable waiver (inconsistent with the consumer guarantees) may be misleading the consumer about their legal rights, and if found to be misleading, will be exposed to civil penalties for providing false and misleading information (currently up to \$1.1 million for a body corporate). Breaching that particular provision of the ACL is also an offence, and criminal penalties of the same amount may also be imposed.

However, there are some exceptions that apply.

12.2 Exception to the guarantee that goods or services will be fit for any specified purpose

The 'fit for any specified purpose' guarantee will not protect the consumer if circumstances show that the consumer did not rely on (or it was unreasonable for them to rely on) the supplier's skill or judgement in determining whether the goods or services were fit for their specified purpose.

12.3 Exception for consumer guarantees for services

The consumer guarantees for the supply of services do not apply to:

- (a) insurance contracts;
- (b) contracts for the transportation or storage of goods for the purposes of a business, trade, profession or occupation;
- (c) electricity services;
- (d) telecommunications services; or
- (e) gas services.

It is not clear whether a data hosting facility could argue that they're storing goods for the purposes of a business, trade, profession or occupation, and thus be exempt from the consumer guarantees for services worth less than \$40,000.

12.4 Suppliers of business goods and services can contract out of reasonably foreseeable loss

Under section 64A, a person supplying goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption can limit their liability to the:

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

Under the same section, a person supplying services which are not of a kind ordinarily acquired for personal, domestic or household use or consumption can limit their liability to the:

- (e) supplying of the services again; or
- (f) payment of the cost of having the services supplied again.

A supplier can only do this if it is fair or reasonable to do so, which will depend on the circumstances.

So while it is possible to contract out of the liability for reasonably foreseeable loss, the difficulty is in whether the goods or services being supplied are "of a kind ordinarily acquired for personal, domestic or household use or consumption".

It is very important to note, however, that **there is no equivalent provision for manufacturers of goods**, which includes software developers and anyone who supplies goods as their own. There was previously such a provision in the TPA (section 74A(2)(a)), but it has been left out of the ACL. This seems to be an oversight, and not an intentional change. As the Law Council of Australia points out, there is nothing in the studies and reports produced about the consumer policy provisions prior to the introduction of the ACL, or in the extrinsic materials to the Bills introducing the ACL, to suggest there was any intention of parliament to

remove the ability of manufacturers and importers to limit their liability. In fact, when introducing the amendments limiting liability for business goods and services, the extrinsic materials reference the fact that manufacturers should be included.

12.5 Exception for guarantee on repairs and spare parts

A manufacturer or importer doesn't have to meet the guarantee on repairs and spare parts if they advised the consumer in writing at the time of purchase that repair facilities and spare parts would not be available after a specified time.

12.6 Limited liability for manufacturers to suppliers

A manufacturer has limited liability to a supplier if the goods are not ordinarily acquired for personal, domestic or household use or consumption (except when the contract between the parties provides for greater liability). The liability is limited to an amount equal to the lower of:

- (a) the cost of replacing the goods;
- (b) the cost of obtaining equivalent goods; or
- (c) the cost of having the goods repaired.

This limited liability doesn't apply if the supplier can establish that it's not fair or reasonable because of:

- (a) the availability of suitable alternative sources of supply of the goods;
- (b) the availability of equivalent goods; and
- (c) whether the goods were manufactured, processed or adapted to the special order of the supplier.

13. Additional Risks

- (a) Failure of even a relatively inexpensive product may give rise to losses that are completely disproportionate to the value of the product supplied. The Law Council of Australia provides the following two examples:
 - (i) If a computer server has a price of less than \$40,000, the supply of that server to an end user will be covered by the consumer guarantees (regardless of whether it's a B2B transaction). If a fault in the server were to cause a business to lose large amounts of work, the owner of the business would be able to sue the manufacturer or importer of the server to recover its losses; and
 - (ii) Individual modules or user licences of many business software packages have a price of less than \$40,000. If a module of, say, a point of sale software system were to have a fault that caused users' sales systems to fail, the creator of the software may be held liable for all lost sales of all affected businesses.
- (b) Suppliers of goods who are not also the manufacturers of those goods can themselves be responsible for remedying faults in the goods, including being liable for damages arising from reasonably foreseeable loss. There are provisions which provide for the supplier to be reimbursed by the

manufacturer, but there is no guarantee the manufacturer will oblige without a costly court battle (and no guarantee even after that).

- (c) For suppliers of goods and services who can limit their liability in terms of reasonably foreseeable loss (see section 12.4), there is a risk that any contract term seeking to limit liability for reasonably foreseeable loss will not have its intended effect. Any contract clause seeking to do so will need to be carefully drafted. This can operate both ways – you as supplier may think you’re not liable for certain losses when you are, or you as consumer may think you can recover certain losses when you can’t. In a recent NSW Supreme Court case,¹⁸ the parties entered into a contract which included a clause 18.5 stating, “Despite anything else in this contract, neither party will be liable to the other for any Consequential Loss”. Consequential Loss was defined in the contract as, “(a) any special or indirect loss or damage; and (b) any loss or [sic] profits, loss or [sic] production, loss or [sic] revenue, loss of use, loss of contract, loss of goodwill, loss of opportunity or wasted overheads, whatsoever, whether direct or indirect.” McDougall J held that the expression ‘contract’ was short for ‘benefit of contract’, and that the definition was wide enough to include the very contract containing the exclusion clause, as opposed to simply other contracts the injured party might have lost as a result of breach. His Honour stated that the parties had “constructed a careful bargain in which they provided for the way in which liability each might have to the other would be limited or regulated” and that he “did not think that the clear words of cl 18.5 should be read down.” As such, the defendants were not held liable for repudiation of contract damages.

14. Actions Suppliers and Manufacturers Can Take

14.1 Systems audit

Audit your business methods, procedures and systems to ensure you’re complying with the ACL. Any changes are likely to cost you less than a claim against you for breaching the consumer guarantees.

For example, data storage and management businesses need to make sure they have excellent back up systems in place to avoid data loss.

14.2 Review your contracts

If you have existing contracts (standard form or otherwise) you are using to govern your relationship with consumers, you should have them reviewed to ensure they are compliant with the ACL, and don’t contain any unfair contract terms.

Prior to the introduction of the ACL, there were several cases which held that limitation clauses in a contract could be effective in placing limits upon a claim for damages under the former TPA. The courts held that such clauses did not amount to ‘contracting out’ of the TPA, but instead reflected the parties’ intention to impose limits on claims under the TPA.¹⁹ Nothing in the ACL appears to prohibit such limitations continuing to be used by parties entering into contracts.

¹⁸ *Macmahon Mining Services v Cobar Management* [2014] NSWSC 502

¹⁹ For example, *Owners Strata Plan 62930 v Kell & Rigby Pty Ltd* [2009] NSWSC 1342

If you are able to limit your liability and/or exclude foreseeable losses, ensure any clauses and definitions are very carefully drafted to avoid undesired results.

14.3 Managing consumer expectations

Suppliers and manufacturers can limit their exposure by careful contract drafting which manages consumer expectations.

The scope of what is being supplied should be very carefully drafted, and including what is not covered by the scope. The scope should be drawn to the consumer's attention and there should be a discussion about whether the scope meets all of the consumer's stated purposes and desired results.

A carefully constructed SLA would also be beneficial to both parties, and would help to clarify for what purposes the service is fit, as well as clarifying whether the services are of sufficient quality to achieve the consumer's desired results.

Finally, ensure that you, your employees, contractors and representatives don't make any guarantees or promises about a good or service that can't be delivered.

14.4 IT liability insurance

Allianz's 2014 Risk Barometer report found that, for Australia, the risks associated with cyber crime, IT failures and espionage ranked fifth in terms of the risks facing Australian business. This category of risk did not even make the top ten in the 2013 survey.²⁰

Suppliers and manufacturers can take out IT liability insurance to try to protect themselves against claims for direct and indirect losses.

The two main sections of a policy are professional indemnity insurance and public & products liability insurance, but a policy can also be extended to include:

- (a) breach of the *Competition and Consumer Act 2010* (Cth) (including the Australian Consumer Law);
- (b) loss of data and documents;
- (c) loss mitigation expenses;
- (d) product recall expenses;
- (e) unintentional breach of contract;
- (f) dishonesty of employees;
- (g) accidental breach of *Copyright Act 1968* (Cth), *Trade Marks Act 1995* (Cth), *Patents Act 1990* (Cth), and other legislation relating to intellectual property rights;
- (h) defamation;
- (i) breach of confidentiality; and
- (j) breach of privacy.

²⁰ <http://www.allianz.com.au/media/news/2014/allianz-launches-cyber-risk-insurance-product>