The Consumer Guarantee Remedial Regime: Some Uncertainties and the Role of Common Law Analogy

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The Australian Consumer Law introduced a new regime of ‘consumer guarantees’, accompanied by a unique remedial regime applying specifically to failures to comply with those guarantees. The challenge posed by this kind of new legislative regime is to develop a thorough understanding of its meaning and scope in a context where its provisions are unlikely to be frequently considered by courts. This paper aims to contribute to the interpretative process by considering tribunal decisions dealing with the consumer guarantee remedial regime and, in particular, the identification of ‘major’ failures and compensation for ‘reasonably foreseeable’ losses. More generally, the paper considers the proper relationship in this process between the statutory regime and the common law principles and doctrines with which the statute overlaps. Whilst the common law may provide useful insights in interpreting the statute, that regime is premised on the enforcement of distinct statutory rights protecting consumers and must be interpreted from that perspective.

Introduction

One of the innovations introduced by the Australian Consumer Law (‘ACL’) is a regime of ‘consumer guarantees’. These guarantees replace the terms implied under the Trade Practices Act 1974 (Cth) (‘TPA’) in providing non-excludable mandatory standards of quality in the supply of goods and services to consumers and are accompanied by a remedial regime applying specifically to failures to comply with the guarantees. The consumer guarantee remedial regime introduces a number of new and unique concepts to Australian consumer law including, in particular, a distinction between ‘major’ and other types of failures and a measure of damages based on ‘reasonably foreseeable’ losses that may overlap with, but does not completely replicate, the damages available for breach of contract or the commission of a tort. The novel features of the consumer guarantee remedial regime prompt a need for considered, authoritative guidance as to their meaning and application. Yet very subject matter of the regime means that there are unlikely to be many opportunities for judicial consideration of its provisions. Most consumer-trader disputes involving goods or services covered by the consumer guarantees will be resolved more informally through negotiation, mediation or in consumer tribunals.

This paper aims to make some contribution to a better understanding of the remedies available in response to a failure to comply with the consumer guarantees in the ACL by considering relevant state and territory tribunal decisions. While these decisions lack

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1 Contained in sch 2 of the Competition and Consumer Act 2010 (Cth).
2 Trade Practices Act 1974 (Cth) pt V div 2 (‘TPA’).
3 ACL pt 3-2.
4 ACL pt 3-2 Div 1; Pt 5-4.
The authority of judicial pronouncements they may provide considerable insight into the types of disputes the regime is being used to address, the areas of uncertainty in the application of its provisions and possible responses to these uncertainties. The paper also draws on the interpretation of similar provisions under the ACL and on common law principles from contract and tort to provide further insight into the potential scope of the statutory regime. Considerable insight may be gained from cognate common law doctrine in interpreting and applying legislative provisions operating in a similar context to those common law principles. It is however critically important that the interpretative process remains focused on the words and purposes of the statute rather relying on the unreflective use of assumptions grounded in a familiarity with the common law..

The paper begins by providing an overview of the remedies available for a failure of goods or services to comply with the consumer guarantees. It then discusses the concept of a ‘major failure’, which gives rise to a right to reject goods or services and the right to damages for ‘foreseeable losses’ where goods or services fail to comply with the consumer guarantees. The paper further considers limitations on the award of damages.

**The Consumer Guarantee Remedial Regime**

**Overview**

The ACL follows its precursor the TPA in including a regime of non-excludable standards of quality that must be met by goods and services supplied to consumers. The ACL characterises these protective standards as statutory rights, termed ‘consumer guarantees’, rather than as implied terms as was the case under the TPA. It is this characterisation that gives rise to the need for a statutory regime of remedies applying specifically to failures to comply with the consumer guarantees. The consumer guarantees do not form part of the relevant parties’ contracts and contractual remedies are accordingly not available to respond to failures to comply with those guarantees. A failure to comply with the guarantees is not of itself a contravention of the ACL. This means that consumers seeking redress cannot access the general remedial provisions of the ACL, which apply only to contraventions of the legislation such as constituted by conduct that is misleading or unconscionable.

The resultant regime of remedies for failures to comply with the consumer guarantees in the ACL utilises a two tier structure of response. The first tier response premises the available remedy on a distinction between major and non-major failures, while the second tier provides a general right to damages for foreseeable loss caused by the

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6 TPA pt V div 2.

7 But cf *Ron Cameron v Ozzy Tyres Pty Ltd* [2015] NSWCA 68, [31] (characterising the consumer guarantees as statutory implied terms).

8 But cf *Ueda & anor v Ecruising Pty Ltd and Southern Cross Safaris Australia Pty Ltd* [2014] NSWCA 30 and *Yan Tun Wu; Dong Fang Chen; Feng Wei Li; Lei Wang; Wei Kang Jiang; Hong Lian Zha; Zhi Fen Adele Dai; Shao Hua Chen v Great Wall Travel Service Pty Ltd* [2014] NSWCA 50 (applying s 236 to award damages for a failure to comply with the consumer guarantees in the ACL).

9 ACL pt 5.4.
failure.\textsuperscript{10} Where a supplier’s failure to comply with the guarantees is capable of being remedied and is not a major failure the ‘consumer may require the supplier to remedy the failure within a reasonable time.’\textsuperscript{11} Here the discretion as to remedy rests with the supplier.\textsuperscript{12} In remedying a failure to comply with the consumer guarantees applying to the supply of goods, a supplier may choose between providing a refund for return of the goods, replacing the goods or repairing the goods.\textsuperscript{13} If the supplier refuses or fails to comply with a request to remedy a failure, the consumer may recover the reasonable costs of having the failure rectified, notify the supplier that the consumer rejects the goods, or in the case of a contract for the supply of services, terminate the contract.\textsuperscript{14}

If a supplier’s failure to comply with a consumer guarantee cannot be remedied or is a major failure, the discretion as to remedy lies with the consumer. In such cases the consumer may choose either to reject the goods and terminate the contract\textsuperscript{15} or to recover compensation for the reduction in the value of the goods.\textsuperscript{16} Similarly, in the case of services, if the failure to comply with the guarantee cannot be remedied or is a major failure a consumer may terminate the contract for the supply of services or recover compensation for any reduction in the value of the services below the price payable by the consumer.\textsuperscript{17}

In all cases, regardless of the severity of the failure of the goods or services to comply with the consumer guarantees, consumers are given a right to damages for reasonably foreseeable loss or damage suffered because of a failure to comply with the consumer guarantees.\textsuperscript{18}

\textbf{Interpreting a novel regime}

The consumer guarantee remedial regime has some similarities with the general right to damages in s 236 and the courts’ discretion to award compensatory orders in ss 237-239.\textsuperscript{19} It also contains a number of new and unique responses to failures to comply with the consumer guarantees. In particular, the important threshold concepts of ‘major failure’ and of damages based on ‘reasonably foreseeable’ loss or damage are not replicated elsewhere in the statute. There is, therefore, little historical guidance as to


\textsuperscript{11} ACL ss 259(2)(a), 267(2).


\textsuperscript{13} ACL ss 259(2)(b), 267(2)(b).

\textsuperscript{14} See ACL s 263 for the consequences of rejecting goods. See ACL s 269 for the consequences of terminating a contract for the supply of services.

\textsuperscript{15} ACL s 259(3).

\textsuperscript{16} ACL s 267(3).

\textsuperscript{17} ACL ss 259(4), 267(4).

\textsuperscript{18} See eg the discussion of causation below.
their meaning stemming from the TPA and almost no new case law on the meaning of the substantive provisions has emerged since the introduction of the regime in 2010.\textsuperscript{20} The consumer guarantee regime in the ACL substantially adopts the New Zealand Consumer Guarantees Act 1993,\textsuperscript{21} which makes decisions from this jurisdiction a useful source of guidance. However, the reliance that can be placed on New Zealand decisions is complicated by several slight variations between the two regimes,\textsuperscript{22} and in any event there are a number of remaining uncertainties in that jurisdiction as well.

In principle, the process of giving meaning to a new statutory regime should be relatively straightforward. Principles of statutory interpretation dictate that the meaning and scope of the provisions should be determined primarily by reference to the words in question, the interpretation given to other similar provisions both in the same legislation and otherwise and the purposes of the statute.\textsuperscript{23} The interpretive process may also be assisted by reference to principles and doctrine drawn from the common law. As the High Court has recognised, common law principles may provide ‘an accumulation of valuable insight and experience which may well be useful in applying the [ACL]’\textsuperscript{24} because they ‘have had to respond to problems of the same nature as the problems that arise in the application of the Act’.\textsuperscript{25}

In this context of the consumer guarantees, the common law of contract and, to some extent, tort has a long history of responding to issues of loss and damage arising from faulty or defective products. This experience and the principles developed in response to such problems may well provide valuable guidance into the scope of the statutory remedial regime. Equally, the attractions of common law analogy should not abrogate the primary significance of the words and purposes of the statute.\textsuperscript{26} The remedies provided for a failure to comply with the consumer guarantees are not ‘a mere supplement to or eking out of ‘pre-existing law.’\textsuperscript{27} They have been deliberately designed as part of a consumer protection regime and with the aim of clarifying and simplifying the law applicable to the supply or goods and services to consumers,\textsuperscript{28} and

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\item \textsuperscript{20} The case law that does exist has largely arisen through regulator action: eg. \textit{ACCC v Valve Corporation (No 3)} [2016] FCA 196.
\item \textsuperscript{21} Which is in turn based on the Saskatchewan \textit{Consumer Protection Act} 1996 Clause C-30.1, Pt III. See further Kate Tokeley, \textit{Consumer Law in New Zealand} (Butterworths, Wellington, 2014).
\item \textsuperscript{22} For example the ACL relies on the concept of ‘major’ failure to determine the available remedies for a failure to comply with a consumer guarantee: see s 260; the \textit{Consumer Guarantees Act 1993} relies on the concept of failures of a ‘substantial character’: s 18(3).
\item \textsuperscript{23} Acts Interpretation Act 1901 (Cth) s 15AA.
\item \textsuperscript{26} \textit{Murphy v Overton Investments Pty Ltd} (2004) 216 CLR 388; [2004] HCA 3 at 407 [44] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (citations omitted).
\item \textsuperscript{28} Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 608 [25.49]-[25.50].
\end{itemize}
must be interpreted from this perspective. Here indeed other equally useful sources of insight might come from the growing body of consumer protection statutes internationally which share a common objective of protecting consumers, while also giving due regard to the interests of the efficient market for goods and services.

Even recognising the potential of this rich body of interpretive resources, the process of developing an authoritative body of law around the consumer guarantees is made more difficult by the nature of the subject matter of the regime. The consumer-trader disputes to which the consumer guarantees in the ACL apply are typically unlikely to be resolved before a court. These kinds of dispute usually involve small amounts of money, particularly compared to the costs of litigation, which will not justify the resources required to take a matter to court. If not resolved informally or through mediation, consumer-trader disputes concerning the quality of goods or services will usually be heard in small claims courts and tribunals rather than in a court.

In this respect the consumer guarantee regime differs from the prohibition on misleading conduct in s 18 of the ACL and its accompanying remedies in ss 236 and 237-9. The rights provided by the consumer guarantees do not apply to all conduct in trade or commerce, as is the case with the prohibition on misleading conduct, but only to ‘consumer transactions’, defined by reference to price and then to the character of the goods and services.

This more limited application of the provisions leaves less likelihood of the type of high profile litigation between competing businesses over significant sums of money that has driven the development of the case law surrounding the s 18 prohibition. Although there are some notable exceptions of business to business litigation over this kind of regime, overall the case law remains relatively sparse.

Aspects of the consumer guarantee regime may come before courts where enforcement action is taken by a regulator. However, in this role, the ACCC has most commonly relied on the prohibition on misleading consumers as to the effect of the consumer guarantees in s 29(1)(m) of the ACL rather than a failure to comply with the consumer guarantees themselves. In the absence of a difference enforcement strategy, there is

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29 Cf Ainsworth v Buttery (Civil Claims) [2016] VCAT 1799 at [37]-[44] (applying remedies for a failure to comply with the consumer guarantees in the ACL without any reference to the statutory remedial regime and instead appearing to apply an approximation of the common law response to breach of contract).


31 (ACT) ACT Civil and Administrative Tribunal; (NSW) Consumer, Trader and Tenancy Tribunal and, from 2014, the Civil and Administrative Tribunal – Consumer and Commercial Division; (Vic) Victorian Civil and Administrative Tribunal; (SA) Magistrates Court of South Australia; (Tas) Magistrates Court of Tasmania; (Qld) Queensland Civil and Administrative Tribunal; (WA) Magistrates Court of Western Australia, Civil Division.

32 See ACL s 3.

33 See e.g Carpet Call Pty Ltd v Chan (1987) ASC 55-553; Bunnings Group Limited (formerly Bunnings Pty Ltd) v Laminex Group Limited [2006] FCA 682 (2 June 2006).

34 See e.g. Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd [2013] FCA 653; Australian Competition and Consumer Commission v Launceston Superstore Pty Ltd [2013] FCA 1315; Australian Competition and Consumer Commission v HP Superstore Pty Ltd [2013] FCA 1317; Australian Competition and Consumer Commission v Camavit Pty Ltd [2013] FCA 1397;
unlikely to be much opportunity for the kind of fine grained analysis of the provisions of the consumer guarantee regime needed to bring clarity to the parties affected by that regime through regulatory action.

This inevitable channelling of disputes raising the consumer guarantees into informal dispute resolution and tribunals places real limitations on the development of a body of case law interpreting and applying those provisions. Tribunals are not ideally suited to developing legal doctrine. A primary objective of the tribunal system is to promote access to justice. The pursuit of this goal almost inevitably comes at the cost of some compromise in the rigour of formal justice. Parties are usually self represented which limits the degree to which argument is framed around interpretation of the law. Tribunals are required to act with as little formality as the case permits, which means reasons for decisions are not always given, and there is no formal system of precedent. Nonetheless, some role for tribunals in developing the law surrounding the consumer guarantee regime appears unavoidable. In order for the consumer protection regime in the ACL to retain legitimacy, decisions made pursuant to this regime must represent a plausible interpretation of provisions being applied and be replicable between and within forums. In the absence of a body of case law developed by courts, the tribunals become the next best source of interpretative authority. It is to the body of reported tribunal decisions that this paper now turns, as complemented by decisions interpreting other comparable provisions in the ACL and the body of common law in close proximity to which the consumer guarantee regime is situated.

The Right to Reject: Major Failures

The contrast with trivial or minor failures

One of the key new concepts introduced by the remedial regime for the consumer guarantees is that of a ‘major failure’. As we have seen, this concept is central to determining which party holds the discretion as to the primary remedy provided in response to a failure to comply with the consumer guarantees. Under the TPA, whether a consumer had the right to terminate a contract in response to a breach of the statutory implied terms depended on the character of the term breached. A breach of a term

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36 See e.g. Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 98; Civil and Administrative Tribunal Act 2013 (NSW) s 38(4).

37 For examples of the need for attention to the detail of the consumer guarantee regime in consumer tribunals see e.g.: *Brandt v Flower Power and Stone Masonry Pty Ltd* [2012] NSWCTTT 261 at [54] (applying the test of merchantable quality and failing to consider separately the different standard of acceptable quality); *Tonks v Woodpecker Heating and Cooling Pty Ltd* (Civil Claims) [2015] VCAT 106 at [50]–[57] (the tribunal member failed to consider whether a misleading statement on which the consumers relied in entering into the contract might be relevant to the failure to provide goods of acceptable quality under s 54 or amount to a failure to comply with an express warranty under s 59 entitling them to damages under s 259(4) and also the possibility that a failure of acceptable quality might lie in the trader’s failure to provide adequate use or installation instructions).
identified as a condition gave rise to a right to terminate.\textsuperscript{38} This approach led to the possibility of consumers being entitled to terminate a contract in response to a merely trivial breach of those implied terms characterised as conditions.\textsuperscript{39} Under the ACL consumers cannot use trivial or minor failures that can easily be remedied as a reason for bringing the contract to an end. The more drastic response allowing the consumer to reject the goods or services and terminate any contract is reserved for major failures, or where suppliers have not complied with a consumer’s request to remedy goods.\textsuperscript{40} In this sense the regime has closer parallels with termination for breach of an intermediate term,\textsuperscript{41} which is dependent on the seriousness of the breach, than with the historical bipartite distinction between conditions and warranties reflected in the TPA.

This way of structuring the circumstances in which a consumer may have a right to reject goods or services has implications for the way in which a failure to comply with the consumer guarantees is assessed in the first place. In contrast to legislation in the United Kingdom\textsuperscript{42} and New Zealand,\textsuperscript{43} the consumer guarantee regime in the ACL does not clarify that even ‘minor’ defects may detract from the guarantee of acceptable quality. However, the distinction made in the ACL between a major failure that allows a consumer to reject goods and bring the contract to an end, and other sorts of failures that do not carry this right, suggests that relatively minor faults may be sufficient to amount to a failure to comply with the consumer guarantee even though, proportionately, they may not justify bringing the contract to an end.\textsuperscript{44}

This argument is particularly pertinent when considering defects in aesthetic appearance. The relevance of such concerns appears to have been discounted by some tribunals.\textsuperscript{45} For example, in \textit{Lee v Sharp Motor Group} the tribunal dismissed complaints of scratches and bird droppings on the roof of a car as minor and therefore as not in breach of the guarantee of acceptable quality.\textsuperscript{46} In \textit{Brandt v Flower Power and Stone Masonry Pty Ltd}\textsuperscript{47} the tribunal referred to the condition of merchantable quality implied under the relevant Sale of Goods Act, stating, ‘a consumer generally has no right to expect a ‘perfect article’’.\textsuperscript{48} The standard of acceptable quality under the consumer guarantee regime in the ACL may be similar to the standard of merchantable quality implied under the TPA. However, the different terminology used in these two regimes means that assumptions about what constitutes merchantable quality should not dictate what amounts to acceptable quality under the ACL. Indeed, the standard of

\begin{footnotesize}
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\item \textsuperscript{38} TPA s 75A(1). See also D W Greig, ‘Condition — Or Warranty?’ (1973) 89 Law Quarterly Review 93.
\item \textsuperscript{39} See, e.g. \textit{Arcos v Ronaasen} [1933] AC 470.
\item \textsuperscript{40} ACL s 259(2)(b)(ii).
\item \textsuperscript{41} See \textit{Koompahtoo Local Aboriginal Land Council v Sampine Pty Ltd} (2007) 233 CLR 115; [2007] HCA 61.
\item \textsuperscript{42} Consumer Rights Act 2015 (UK) s 9(3)(c).
\item \textsuperscript{43} Consumer Guarantees Act 1993 s 7(1)(c).
\item \textsuperscript{44} ACL s 54(2)(c).
\item \textsuperscript{46} [2013] NSWCTTT 521, [26].
\item \textsuperscript{47} [2012] NSWCTTT 261.
\item \textsuperscript{48} [2012] NSWCTTT 261, [54].
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merchantable quality had been criticised as inappropriate in a consumer transaction prior to the introduction of the consumer guarantee regime in the ACL.\textsuperscript{49}

The ACL\textsuperscript{50} confirms the view expressed in case law under the TPA that matters of ‘appearance and finish’ are relevant in assessing whether goods are of acceptable quality.\textsuperscript{51} Consumers’ decisions to purchase many types of goods are influenced by their aesthetic qualities and the assurance of a high degree of quality in the finish of the product. In this context, consumers may well expect a ‘perfect article’, and to be entitled to seek a remedy from the retailer if the product is not delivered in this condition. Small defects in appearance or finish, while not sufficiently major to give rise to a right to terminate, may well detract from consumers’ enjoyment of the product and therefore amount to a failure to comply with the guarantee of acceptable quality.

**Factors relevant to identifying a major failure**

The ACL provides that a major failure in respect to goods occurs if the goods:

(a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or

(b) the goods depart in one or more significant respects:

(i) if they were supplied by description—from that description; or

(ii) if they were supplied by reference to a sample or demonstration model—from that sample or demonstration model; or

(c) the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or

(d) the goods are unfit for a disclosed purpose that was made known to:

(i) the supplier of the goods; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made;

and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or

(e) the goods are not of acceptable quality because they are unsafe.\textsuperscript{52}

Paragraph (a) in this list of criteria for identifying a major failure refers to the judgment of a reasonable consumer, who is also the benchmark for identifying when a defect in goods amounts to a failure to comply with the consumer guarantee of acceptable quality.\textsuperscript{53} Despite a familiarity with the hypothetical consumer in many areas of private law, in this context the concept is difficult to apply. It is not at all clear how easily to decide when ‘a reasonable consumer fully acquainted with the nature and extent of the


\textsuperscript{50} ACL s 54(2)(b).

\textsuperscript{51} Rogers v Parish (Scarborough) Ltd [1987] 1 QB 933, 944 (Mustill LJ); Rasell v Cavalier (Australia) Pty Ltd [1991] 2 Qd R 323, 350 (Cooper J).

\textsuperscript{52} ACL s 260.

\textsuperscript{53} ACL s 54(2).
failure’ would have acquired the goods or services so as to determine whether the failure if a major failure.

On one view, a reasonable consumer would never acquire goods or services if acquainted with a failure to comply with the consumer guarantees, particularly of acceptable quality or fitness for purpose. Indeed, from this perspective it might be possible to argue that all failures of acceptable quality should be characterised as major failures. This argument would proceed along the lines that if a reasonable consumer did not find goods acceptable then that consumer would be unlikely to proceed to acquire them. 54 However, this result cannot have been the intention of the legislation, given the regime of remedies is largely based on the distinction between major and other failures.

The opposing view is that a reasonable consumer would proceed to acquire goods regardless of some failures to comply with the consumer guarantees, as the risk of failure is inherent in the decision to purchase. In Australia Rong Hua Fu Pty Ltd v Ateco Automotive Pty Ltd the tribunal member stated that ‘a reasonable consumer takes risks when purchasing goods, which are most often addressed by repair of the goods.’ 55 Under this approach the inquiry should be into whether a reasonable consumer would have acquired the goods despite being acquainted with the nature and extent of the failure, but assured of repair. 56

Most tribunal decisions appear to be consistent with this second approach. It appears that only a fairly catastrophic failure, that undermines the purpose of the acquisition of the goods or services, will amount to a major failure. Such an approach has some precursor in the common law concept of intermediate breach, under which the right to terminate depends on the severity of the breach, as assessed by reference to the parties’ bargain. 57 In Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd Diplock LJ stated:

The test ... has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings? 58

While this approach is workable, and arguably consistent with the broader scheme of the consumer guarantee remedial regime, it must be acknowledged that it tends to collapse all of the listed tests in s 260 for what amounts to a major failure. Failures to comply with the consumer guarantees that meet this rigorous standard of undermining substantially the intended purpose of the contract are not only likely to meet the test in s 260(a) based on a reasonable consumer, but also that in (b), (c) and (d).

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54 See Goldiwood Pty Ltd t/as Margaret Franklin & Associates v ADL (Aust) Pty Ltd [2014] QCAT 238, [85].
55 Rong Hua Fu Pty Ltd v Ateco Automotive Pty Ltd (Civil Claims) [2015] VCAT 756, [42].
56 Compare Banatsiotis v Sunline Roller Shutters Pty Ltd (Civil Claims) [2015] VCAT 1758, [33] (setting an almost impossibly high standard by considering whether the failure could be insured against).
58 Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 at 64.
Goods not useable

Consistently with the approach outlined above, a major failure to comply with the consumer guarantees will usually be found where the goods do not work at all.\(^{59}\) *Ellis v Bailey Designed Engineering Pty Ltd*\(^{60}\) concerned an ‘off-grid’ hybrid power generator (solar and wind) that was purchased from the trader, and installed by a subcontractor. After two days, the consumer realised that the generator was not generating power and the batteries were not charging. The trader checked the system and denied that there was a problem. The consumer disputed this finding and refused to make the final payment at which point the trader’s contractors were sent to cut the cables and wiring to dismantle the system. The tribunal member found that the generator was not of acceptable quality under s 54, as it was not fit for its purpose.\(^{61}\) The failure to comply with this guarantee was a major failure because a reasonable consumer would not have acquired a power system that did not generate power.\(^{62}\)

Similarly, there will usually be a major failure where the goods cannot be used at all for their intended purpose.\(^{63}\) In *Harwood, Howard v Rich and Mor Diamonds Pty Ltd*\(^{64}\) the consumer purchased an engagement ring made according to the consumer’s own design from the trader. Two months after delivery one of the diamonds fell out of the ring. Expert evidence showed that the ring was not of a commercially acceptable standard. The size of the ring was not suitable for the size and shape of the diamond, which meant it was likely to fall out. The consumer had not been warned that the diamond ring setting was too delicate for normal wear.\(^{65}\) The tribunal member found that the ring was not of acceptable quality. It can be assumed this failure was treated as a major failure as the consumer was able to return the ring and obtain a refund.

*Ease of remedy*

Ease of remedy is specifically listed as a consideration in determining whether a failure to comply with a consumer guarantee is a major failure.\(^{66}\) New Zealand authority suggests that in making this determination, a court or tribunal may compare the cost of the repairs with the purchase price.\(^{67}\) The higher the cost/price ratio, the more likely it is that the failure is substantial. A similar approach has been followed in Australia.\(^{68}\)

\(^{59}\) See eg *Barratta v TPA Pty Ltd* (Civil Claims) [2012] VCAT 679; *Dawson v Pacific Chase Investments* (General) [2012] NSWCTT 432; *Young & Cilia v Next Generation Batteries* [2012] NSWCTT 282; *Pojzak v Congeo Nominees Pty Ltd* [2013] VCAT 2175; *Ellis v Bailey Designed Engineering Pty Ltd* (Civil Claims) [2013] VCAT 788.

\(^{60}\) [2013] VCAT 788.

\(^{61}\) [2013] VCAT 788 at [51].

\(^{62}\) [2013] VCAT 788 at [60].

\(^{63}\) See eg *Ogden Contech Technical Services Pty Ltd v Unmaned Systems Asia Pacific* [2013] NSWCTT 378; *North v Grays NSW Pty Ltd* (General) [2013] NSWCTT 291; *Harwood, Howard v Rich and Mor Diamonds Pty Ltd* [2013] NSWCTT 502; *Hardman v Henriques trading as Spoil’em* [2015] VCAT 659; *Tommie Pty Ltd v Brandt* [2015] QCATA 7.

\(^{64}\) [2013] NSWCTT 502.

\(^{65}\) [2013] NSWCTT 502 at [25].

\(^{66}\) ACL s 259©.

\(^{67}\) *Stephens v Chevron Motor Court Ltd* [1996] DCR 1 at 6.

\(^{68}\) See e.g. *Sereni v Surf Toyota* [2013] NSWCTT 531; *Barratta v TPA Pty Ltd* [2012] VCAT 679; *Aslam v Blinds & Shades Pty Ltd* (Civil Claims) [2015] VCAT 1173.
Sereni v Surf Toyota\(^{69}\) the purchaser bought a second hand car for $18,700 and experienced problems with the engine. The tribunal found that the engine was not of acceptable quality. The cost of repairing the engine, which required a new engine block, would have been between $8,500 and $9,500. Given the amount required to repair the engine, the tribunal member concluded the failure was a major failure.\(^{70}\) Conversely, in other decisions, the low cost of the required repairs has been a factor suggesting that the failure to comply with a consumer guarantee was not a major failure.\(^{71}\)

**Safety**

The ACL provides that a major failure will occur where the goods are not of acceptable quality because they are unsafe.\(^{72}\) Unsurprisingly, non-trivial concerns about the safety of goods has led to a finding that there is a major failure.\(^{73}\) However, absolute safety is rarely possible and in some contexts a greater margin of risk may be acceptable. As explained in *Marwood v Agrison Pty Ltd*:

> In the context of safety the ‘nature of the goods’ requires one to distinguish between goods which were normally used by qualified people and those who were not (say, a forklift v a jet ski) and the locations where the goods are normally used (a paddock v a confined child care centre). Similarly, whilst even a very low price could never justify the sale of goods which were dangerous, (eg, small plastic toys with sharp removable parts which could injure children), there is a point where the consumer gets what they pay for.\(^{74}\)

As in product safety law, therefore, safety for the purposes of assessing whether a failure to comply with the consumer guarantees is a major failure must be recognised as a relative concept which can only by reference to contextual and policy factors, such as the nature and price of the goods, the manner of marketing, the packaging and labelling, the risk presented and the cost of precautions.\(^{75}\)

**Combination of defects**

Different views have been expressed as to whether a series of individually minor faults can be aggregated to amount to a major failure giving rise to a right to reject the goods. In New Zealand it has been held that an accumulation of small defects may be a failure of a substantial character under the Consumer Guarantees Act 1993,\(^{76}\) In Australia the question is unresolved. Some tribunals have held that each failure to comply with a

\(^{69}\) [2013] NSWCTTT 531.

\(^{70}\) [2013] NSWCTTT 531, [15].

\(^{71}\) See, e.g. *Marwood v Agrison Pty Ltd* [2013] VCAT 1549.

\(^{72}\) ACL s 260(e).

\(^{73}\) *Carroll v Pollock Wholesale Pty Ltd* [2014] ACAT 14; *Banatsiotis v Sunline Roller Shutters Pty Ltd (Civil Claims)* [2015] VCAT 1758.

\(^{74}\) [2013] VCAT 1549, [55].

\(^{75}\) See ACL pt 3-5 and s 9. See also J Kellam, S S Clark and M Glavac, ‘Theories of Product Liability and the Australian Consumer law’ (2013) 21 CCLJ 1.

consumer guarantee must be considered independently. Other tribunals have accepted that where the consumer’s complaint is based on a number of failures that, taken together, cause considerable disruption and inconvenience to the consumer, these combined events may amount to a major failure.

Whether a tribunal is prepared to aggregate defects to find a major failure can produce very different results. The potential differences in result is well illustrated by the following set of three cases involving Agrison tractors, imported from China and occupying the budget end of the tractor market.

1. In Marwood v Agrison Pty Ltd\(^{80}\) Marwood bought a tractor from Agrison for $26,000 in May 2012. Marwood attempted to return the tractor in September 2012. There were a number of problems with the tractor: the steering was defective; the clutch was missing a bolt that could cause the clutch to fail; the clutch needed adjusting; the battery earth lead was crimped at one end and had caused the battery to go flat; the front end loader did not have enough hydraulic fluid, which caused it to shudder and a number of safety labels were missing. The tribunal did not consider that any of these defects amounted to a major failure that would entitle the consumer to reject the goods. Each of the defects, other than the steering issue,\(^{81}\) could easily be remedied\(^{82}\) at a very small cost.\(^{83}\) The steering problem could potentially be remedied through ‘bleeding of the steering system.’ The tribunal held that this should be attempted and only if it failed would there be a major failure.\(^{84}\)

2. In Paul Madsen v Agrison Pty Ltd\(^{85}\) Madsen bought a second-hand tractor and a new slasher from Agrison for $24,699 in April 2013. Madsen got only 14 hours of operation out of the tractor and then sought to reject the tractor and slasher. There were a number of problems with the tractor, including a persistent leakage of hydraulic oil; a misaligned the front wheel toe; a twisted front bar; a crack and poor finish on the fiberglass roof; problems with the slasher; wrongly sized pins on the slasher’s three point linkage; a defective clutch and the incorrect labelling of operational instructions. The tribunal held that the tractor

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77 TPS Developments Pty Ltd v Chef’s Hat Australia Pty Ltd (Civil Claims) [2013] VCAT 731; Marwood v Agrison Pty Ltd [2013] VCAT 1549; Australia Rong Hua Fu Pty Ltd v Ateco Automotive Pty Ltd (Civil Claims) [2015] VCAT 756
80 [2013] VCAT 1549.
81 [2013] VCAT 1549 at [27].
82 See [2013] VCAT 1549 at [33], [36], [42], [47], [48].
83 [2013] VCAT 1549, [74], [76].
84 [2013] VCAT 1549, [28]
85 [2014] NSWCATCD 79.
was not of acceptable quality. There were numerous defects and also issues with safety. The tribunal considered that these problems combined to amount to a major failure. The tractor was substantially unfit for any purpose tractors are commonly used for, unsafe, and unable to be easily repaired or replaced.

3. In *Cary Boyd v Agrison* Boyd bought a new tractor from Agrison in early 2012 for $28,360.00. Soon after he sought to return the tractor. Problems with the tractor included: peeling paint work; excessive ‘bounce’ when slashing; faulty steering, particularly at high speeds; leaking hydraulic fluid and lower speeds that had been represented to the purchaser. The magistrate found that the tractor delivered to Boyd was not of the same quality as the demonstration model he was shown, was not of acceptable quality and was not fit for its purpose. The defects individually or collectively amounted to a major failure. The magistrate concluded that the steering concerns were of ‘sufficient significance’ to constitute ‘a major failure’. The various problems also collectively amounted to a major failure.

There may be variations in the factual elements of these cases that justify the different findings. For example, one tractor had structural problems with the cabin while another suffered from significant corrosion. Nonetheless, different views were taken on the standard by which issues of safety should be assessed and on the question of whether defects had to be assessed individually or could be considered collectively. These differences of approach affected the outcome to the extent that it is arguable that the first plaintiff would have won had his case been heard in another forum.

The willingness of some tribunals to combine defects to find a major failure is understandable. Consumers might reasonably lose confidence in goods that exhibit a number of defects in a relatively short period of time. They may experience considerable irritation and inconvenience in arranging the repair of those goods. An analogy might be drawn with repudiation giving rise to a right to terminate a contract, which can be found in a series of events that collectively indicate an unwillingness or inability to perform the contract.

The language of the ACL is unclear in this regard. Section 260 provides that ‘A failure to comply with a guarantee referred … is a major failure if … ’ (emphasis added). The use of the singular ‘a failure’ suggests that it is one failure of one consumer guarantee

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86 [2014] NSWCATCD 79 at [85].
87 [2014] NSWCATCD 79 at [97].
89 [2014] VMC 231.
90 [2014] VMC 231 at [47].
91 [2014] VMC 231 at [75], [85], [86].
92 [2014] VMC 231 at [101], [105].
93 [2014] VMC 231 at [112].
94 [2014] VMC 231 at [69].
96 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 36-7, 40, 55; see also *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327.
97 Cf *Cary Boyd v Agrison*, [2014] VMC 23 at [51].
that must be sufficient to constitute a major failure, not a group of failures. By contrast s 260(b) acknowledges that there may be a major failure if the goods 'depart in one or more significant respects' from a description or sample, thereby suggesting the possibility of combining defects. If it is considered that the policy purposes of the legislation are best served by combining a series of otherwise minor failures to find a major failure then it would be useful for the legislation to be amended to include a statement to this effect in order to provide clear guidance to stakeholders. A different way of dealing with the issue would be to adopt the concept of a short-term right to reject from the Consumer Rights Act 2015 (UK). Under this approach a consumer has the right to reject goods that breach the implied terms such as satisfactory quality occurring within 30 days of supply.98 This very clear rule would respond to failures that occur early in the life of goods that may be indicative of ongoing problems.

**Damages for Reasonably Foreseeable Loss**

**Reasonably foreseeable loss**

Regardless of whether the failure to comply with the consumer guarantees is a major failure, a consumer will be entitled to recover damages from the supplier under s 259(4):

> for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.99

Given a consumer will have a primary remedy of repair, refund or replacement of the goods, this provision appears to be principally directly at consequential losses100 arising from a failure of goods and services to comply with the consumer guarantees.101 For example, a consumer might recover the cost of a hire vehicle while a car is being repaired, costs of a repair quote,102 inspection and towing costs,103 excessive fuel costs associated with defective goods104 or costs of travel accommodation associated with the repair of goods in a remote location.105

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98 Consumer Rights Act 2015 (UK) ss 19, 20 and 22.

99 See also for damages against the manufacturer: ACL s 267(4).

100 Cf Hysdall Pty Ltd v Atchison Truck Sales Pty Ltd [2013] NSWCTTT 545 at [14] (the tribunal member thought that the cost to a consumer of an expert’s report used to establish that a motor vehicle has failed to comply with the consumer guarantees was not recoverable on the ground that this was the ordinary practice of the tribunal as opposed to considering whether it was reasonably foreseeable that the consumer would incur such costs as a result of the failure of the car to comply with the consumer guarantees.)

101 In certain circumstances a supplier may limit damages for consequential losses under s 64A of the ACL. See, e.g. Engine Imports v Diesel and Industrial Engine Spares [2014] QCAT 445.

102 North v Grays NSW Pty Ltd (General) [2013] NSWCTTT 291.


104 Ellis v Bailey Designed Engineering Pty Ltd (Civil Claims) [2013] VCAT 788.

105 Engine Imports v Diesel and Industrial Engine Spares [2014] QCAT 445 (also discussing the extent to which foreseeable consequential losses can be limited under s 64A of the ACL). See also Doherty v Griffith & European Design Pty Ltd [2015] QCAT 280 (interest on money paid for goods that were delivered late).
Loss of profit damages

There does not appear to have been any consideration as to whether damages under s 259(4) could extend to compensation for expectation losses, namely the profits or gains that a plaintiff expected to make but lost as a result of the failure of goods or services to comply with the consumer guarantees. Consider, for example, a consumer who purchases a solar power system to produce electricity for the family home. The consumer is induced to enter into the contract by a statement by the supplier that the system was so efficient it will earn $20 a month selling energy back to the power grid. In fact, the system does not work well enough for that amount of energy to be produced. There is no evidence that the system is worth less than the consumer paid for it. In these circumstances if, on discovering the problem in capacity, the consumer elected to keep the solar power system, what compensation would be available?

If the consumer sued for breach of contract, the consumer would need to show that the statement about the excess power produced was made as a promise and intended to be a term of the contract. If the consumer could pass this hurdle, the consumer could claim damages compensating him or her for the loss of $20 per month he or she expected to obtain had the contractual promise been met. If the consumer sued for misleading or deceptive conduct, the case law is currently uncertain as to whether the consumer could recover this measure of damages, but it seems unlikely. Assuming there was a failure to comply with the guarantee of acceptable quality or an ‘express warranty’ under the ACL, loss of the expected financial gain from the solar power system would seem reasonably foreseeable for the purposes of recovering damages under s 259(4). Certainly, in Barton v Transmissions and Diesels Ltd the District Court in Auckland (New Zealand) held that the general principle under the remedies provisions of the Consumer Guarantees Act is that the plaintiff should be placed, as far as money can do it, in the same position as if the terms of the guarantee had been complied with.

The consumer guarantee remedial regime has elements aimed at protecting both expectation and reliance interests, without prioritising either option. If a supplier’s failure to comply with the guarantees in the ACL is capable of being remedied and is not a major failure the ‘consumer may require the supplier to remedy the failure within a reasonable time.’ This remedy comes close to approximating a demand for specific performance of the contract, with the caveat that although the supplier may fulfil this requirement by repairing or replacing the expected goods, the supplier can choose to refund the purchase price and recover the goods. If the supplier refuses or fails to comply with a request to remedy a failure, the consumer may recover the reasonable costs of having the failure rectified. This outcome approximates a common measure of expectation loss. Equally if a supplier’s failure to comply with a consumer guarantee cannot be remedied or is a major failure, the consumer may reject the goods and

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107 ACL s 59.

108 Barton v Transmissions and Diesels Ltd [2001] DCR 412 at 415, [7]. See also Jones v Portelli Tile Centre Pty Ltd [2016] VCAT 1689 at [36].

109 ACL ss 259(2)(a), 267(2).

110 ACL ss 259(2)(b), 267(2)(b).
terminate the contract or recover compensation for the reduction in the value of the goods. This measure of compensation for the reduction in the value of the goods replicates the measure available in tort compensating a consumer for how much worse off they are as a result of entering into the contract. If the consumer guarantee remedial regime does not favour any particular measure of damages in response to a failure of goods or service to comply with the guarantees, there is no reason not to apply the natural meaning of s 259(4), which would allow a consumer to recover damages as compensation for any foreseeable loss of the benefits he or she expected to obtain had the goods complied with the consumer guarantee.

Disappointment and Distress

For similar reasons it is possible that the right to damages for foreseeable losses under the consumer guarantee remedial regime might include damages for disappointment and distress arising from the failure or goods or services to comply with the consumer guarantees. In contract, damages are not generally awarded to compensate non-pecuniary losses, such as any disappointment, anxiety, distress or loss of reputation occurring on breach of contract. No such limitation exists under s 259(4) and disappointment or distress might be a ‘reasonably foreseeable’ consequence of some failures of goods or services to comply with the consumer guarantees. In New Zealand it has been held that damages for consequential loss under the Consumer Guarantees Act can extend to damages for distress and inconvenience. In Hosking v The Wharehouse Ltd a defective electric blanket started a fire that caused extensive damage to the consumer’s house. The District Court awarded an additional $7500 in consequential damages in order to compensate for the distress and inconvenience suffered by consumer.

All Australian States and Territories have enacted legislation that limits the damages that may be claimed by a plaintiff for personal injury caused by a breach of a duty of care, whether claimed in tort or contract. While the form of the legislation varies

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111 See ACL s 263 for the consequences of rejecting goods. See ACL s 269 for the consequences of terminating a contract for the supply of services.
112 ACL s 259(3).
113 See eg Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39 (Lord Blackburn); Gates v The City Mutual Life Assurance Society Ltd (1986) 160 CLR 1, 12 (Mason, Wilson and Dawson JJ).
114 Fink v Fink (1946) 74 CLR 127, 144; Baltic Shipping Co v Dillon (1993) 176 CLR 344.
116 District Court, Auckland, NP 1476/97, 5 October 1998. The case was unsuccessfully appealed on grounds unrelated to the quantum of damages: A&W Holdings (NZ) v Hosking (Unreported, High Court of New Zealand, HC 191/98, 14 April 1999).
118 Civil Law (Wrongs) Act 2002 (ACT); Personal Injuries (Liabilities and Damages) Act (NT); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic); Civil Liability Act 2002 (WA).
between the jurisdictions, it has been interpreted to limit the damages that may be awarded for disappointment and distress arising from the breach of a contractual duty to use reasonable care. This limitation may not apply to limit the availability of damages for disappointment and distress under the consumer guarantee remedial regime. Many of the guarantees are not premised on any element of fault or negligence on the part of the trader, and a failure to comply with many of the guarantees can occur without any lack of care. In such circumstances the legislation limiting damages for injury caused by a lack of care should have no application.

Rectification damages

Where a failure to comply with the consumer guarantee can be remedied and is not a major failure, the consumer may request the supplier to remedy the failure. If the consumer has requested the supplier to remedy the failure and the supplier has refused or failed to comply within a reasonable time, the consumer may:

otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied …

In some cases a consumer faced with even a major failure may prefer to pursue this option rather than rejecting the goods. This right to damages to cover the reasonable costs of remedying a failure to comply with the consumer guarantees is reminiscent of rectification damages that may be awarded in contract for the breach of an undertaking to repair or build. Some tribunals have drawn on this head of contract damages in awarding damages for the costs of remedying a failure to comply with the consumer guarantees.

Zhang v United Auctions concerned a granite kitchen bench sold and installed by the trader. The two pieces of granite forming the bench were not equal in size and the join was ‘noticeable’. Even after an attempt to repair by the trader, the join was slightly uneven (it appeared jagged as if hand cut) and the visual appearance of the bench top was ‘not of the quality that would be expected of a competent tradesman.’ The tribunal found that the bench was not of acceptable quality due to the aesthetic problems. The tribunal ordered rectification damages of $5360 under s 8 of the Consumer Claims

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120 ACL s 259(a)(i).

121 ACL s 259(2)(b)(i).

122 See e.g. Tonks v Woodpecker Heating and Cooling Pty Ltd (Civil Claims) [2015] VCAT 106, [58] (fire bricks replaced)


124 [2013] NSWCTTT 6 at [37].
Act 1998 (NSW),\(^{125}\) which would cover the cost of another company dissembling the structure, providing new materials and installation.\(^{126}\) In making this award, the tribunal suggested that rectification damages for a failure to comply with the consumer guarantees in the ACL might be rejected as unreasonable ‘in cases where the defect does not significantly affect either the functionality or the aesthetics of the building’.\(^{127}\)

The tribunal stated that this qualification was important in many other home building and tenancy cases. The tribunal explained that:

> In many home building and tenancy cases before the Tribunal the defects or breaches are minor, with no functional relevance and little aesthetic loss, except perhaps to the most fastidious of owners e.g. a minor burn mark on a bench top or a small stain on a carpet. If Tabcorp were applied uncritically it would result in a great deal of economic waste in discarding perfectly functional things to satisfy the demands of the owner that most ordinary people would consider unreasonable.\(^{128}\)

In the case at hand, the tribunal was prepared to award rectification damages because the defects in the granite bench top produced a negative aesthetic effect that was ‘quite noticeable’ and went beyond the ‘merely fastidious’.\(^{129}\)

The qualification on the availability of rectification damages for failures to comply with the consumer guarantees suggested in this decision - that tribunals should not award damages to rectify defects ‘with no functional relevance and little aesthetic loss’ - is not consistent with the approach of the High Court in Tabcorp Holdings Ltd v Bowen Investments Pty Ltd. In Tabcorp the High Court said that rectification damages would

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\(^{125}\) In NSW, tribunals in a number of decisions have awarded rectification damages under the Consumer Claims Act 1998 (NSW) s 8, rather than by applying the remedial provisions in the ACL: see e.g. Zhang v United Auctions [2013] NSWCTTT 6, [66] and [84]; Ryan James Poolman v Ibuytrader Pty Ltd [2014] NSWCATCD 246, [35] applying the. This is on the ground that the Fair Trading Act 1987 (NSW) applying the ACL as the law of NSW does not ‘deal with the procedural remedy for consumers seeking to enforce’ the causes of action in the ACL: [2013] NSWCTTT 6, [65]. A different view, recognizing the tribunals jurisdiction to award remedies under the ACL pt 5-4, was taken in Lam v Steve Jarvin Motors Pty Ltd [2016] NSW CATAP 186. The Fair Trading Act 1987 (NSW) s 74 only grants the tribunal jurisdiction in actions for damages or compensation in connection with a ‘contravention’ of the Chapter 2 or 3 of the ACL. A failure to comply with a consumer guarantee in pt 3-2 of the ACL does not constitute a contravention of the ACL. Cf Australian Consumer Law and Fair Trading Act 2012 (Vic) s 224: ‘VCAT or any court of competent jurisdiction may hear and determine a cause of action arising under any provision of the Australian Consumer Law (Victoria).’ However, Fair Trading Act 1987 (NSW) s 28 provides that:

> ‘(1) The Australian Consumer Law text, as in force from time to time:

(a) applies as a law of this jurisdiction, …’

Given the consumer guarantee regime in the ACL contains its own remedial provisions, it follows that in purporting to give relief in respect to the consumer guarantees in the ACL (NSW) pt 3-2 a tribunal should also apply the remedial regime attached to those guarantees. See further Lam v Steve Jarvin Motors Pty Ltd [2016] NSW CATAP 186 (also taking the view that pt 5-4 does not operate as an comprehensive code precluding the availability of other remedies under the Fair Trading Act 1987 (NSW)).

\(^{126}\) [2013] NSWCTTT 6 at [84].


\(^{128}\) [2013] NSWCTTT 6 at [94].

\(^{129}\) [2013] NSWCTTT 6 at [95].
only be rejected as unreasonable in ‘fairly exceptional circumstances’. The High Court also acknowledged that parties may contract for high aesthetic standards and that the role of the courts in awarding damages is not to judge what the parties contracted for but to protect that contractual expectation. In *Tabcorp* the High Court quoted Oliver J in *Radford v De Froberville* to the effect that:

> if [a party to a contract] contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way ....

In any event, the question under s 259(2) is not whether rectification would be unreasonable. A defect that was so minor as to be unreasonable to rectify would be unlikely to amount to a failure to comply with the consumer guarantees in the first place. Goods will not be of unacceptable quality if the failure does not affect the fitness for purpose of goods or is so trivial that a reasonable consumer would not regard the goods as unacceptable. Once there is a failure to comply with a consumer guarantee, the consumer has a right to request the supplier to remedy that failure and if this does not occur the consumer is entitled to recover ‘all reasonable costs incurred by the consumer in having the failure so remedied’. The concept of reasonableness in this context requires a comparison between the cost of the repair and the outcome. The right to a remedy is presumed and what would be excluded are repairs that went beyond what was reasonably necessary to correct the failure.

**Limitations on the Award of Damages**

In contract and in tort an award of damages is subject to the limiting principles of causation, remoteness, mitigation and contributory negligence. These limitations are not expressly built into in the remedial regime for a failure to comply with the consumer guarantees. Rather, as we have seen, a consumer may claim damages under s 259(4):

> for any loss or damage suffered … because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

The limitations on an award of damages under this section arise from the requirements that the loss or damage arise ‘because of’ the failure to comply with the consumer guarantees and that the loss or damage to be ‘reasonably foreseeable’. These concepts do not necessarily import the common law limiting concepts, although as we shall see the common law limitations on damages may provide guidance on the types of questions that may be asked in awarding damages under s 259(4).

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130 (2009) 236 CLR 272 at [18].
131 (2009) 236 CLR 272 at [18].
132 ACL s 54(2)(a).
133 ACL s 54(2).
134 ACL s 259(2).
Causation

Under s 259(4), damages may be awarded ‘for any loss or damage suffered by the consumer because of the failure to comply with the guarantee …’. The words ‘because of’ linking the loss for which damages are sought and the failure to comply with the consumer guarantees are also found in s 236, which provides damages for a contravention of the ACL and s 237 compensation orders. Under these provisions, and their precursors in the TPA, the use of the words ‘because of’ linking the statutory wrong and the loss for which redress is sought has been interpreted to import a requirement of causation. The words must have the same meaning in s 259(4) so as to require a causal connection between the failure to comply with a consumer guarantee and the loss for which damages are claimed. The question then becomes what types of enquiries are encompassed by this statutory concept of causation.

Under the common law, the causation encompasses two types of inquiry: first, into whether the conduct as a matter of fact led to the loss that occurred and second, into whether the defendant should be held legally responsible for that loss, often conducted via doctrines of remoteness, mitigation and contributory negligence. State and territory civil liability acts formalise this type of causal inquiry by directing courts to approach causation in applicable negligence cases through a two-stage analysis encompassing factual causation and scope of liability considerations. There is support for a similar approach in awarding a remedy under ss 236 or 237-9 for a contravention of the prohibition in the ACL on misleading or deceptive conduct.

In regard to factual causation, courts have tended to apply an ‘a factor’ test, finding it sufficient that the misleading conduct was a material factor contributing to the plaintiff’s loss, even if it was not the sole cause of that loss. The same approach would be expected under s 259(4). In regard to the second stage of inquiry courts have precluded liability for extrinsic or extraneous losses, which are sometimes held to

135 See also for damages against the manufacturer: ACL s 267(4).


138 Civil Law (Wrongs) Act 2002 (ACT), s 45(1); Civil Liability Act 2002 (NSW), s 5D(1); Civil Liability Act 2003 (Qld), s 11(1); Civil Liability Act 1936 (SA), s 34(1); Civil Liability Act 2002 (Tas), s 13(1); Wrongs Act 1958 (Vic), s 51(1); Civil Liability Act 2002 (WA), s 5C(1).


142 See eg HTW Valuers v Astonland (2004) 217 CLR 640 at 659 (extrinsic losses); I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109 at 119–20 (grossly unreasonable conduct by the plaintiff may reduce defendant liability as a supervening cause);
have broken the ‘chain of causation’ between the misleading conduct and the losses.\textsuperscript{143} The role of such considerations in determining whether loss or damage arose ‘because of’ a failure to comply with the consumer guarantees is supported by s 259(5) which provides that there is no right to damages for foreseeable losses:

if the failure to comply with the guarantee occurred only because of a cause independent of human control that occurred after the goods left the control of the supplier.

\textbf{Foreseeability / Remoteness}

Section 259(4) also requires the loss or damage for which damages are sought to have been ‘reasonably foreseeable’. The requirement of reasonable foreseeability has obvious analogues in the test of remoteness under the law of torts.\textsuperscript{144} As in the common law context, determining what is reasonably foreseeable for the purposes of the consumer guarantee remedial regime will rely on an element of normative judgment about the proper scope of legal liability in the light of the purpose of the legislation.

\textbf{Mitigation}

There is no reference in s 259(4) to principles of mitigation that would reduce the damages available to a consumer who has failed to take reasonable steps to mitigate his or her loss under the consumer guarantee regime, although some tribunals have applied such principles.\textsuperscript{145} Thus, there can be no automatic assumption that losses are to be mitigated merely because this qualification applies at common law.\textsuperscript{146} The question is whether the losses for which damages are claimed were ‘reasonably foreseeable’. In assessing this requirement, the general policy considerations of reducing economic waste that inform mitigation requirements under general law, need to be balanced against the policy of the legislation in protecting consumers.

In \textit{Pojzak v Congeo Nominees Pty Ltd}\textsuperscript{147} the consumer had purchased a second hand car. The engine of the car seized up and needed to be replaced. The consumer purported to reject the car on 29 March 2012. In VCAT on 23 December 2013, the engine defect was found to make the car not of acceptable quality. The failure was a major failure entitling the consumer to reject the car. After the car had broken down it was placed in storage at a garage, incurring alleged charges of $6240. As these fees had not been paid, damages under s 259 did not have to be awarded in any event.\textsuperscript{148} However it would seem that had they been claimed, such damages would have been rejected. The tribunal stated that ‘any entitlement to claim damages comes with the obligation to mitigate

\textsuperscript{143} Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd [2010] VSCA 247 (drawing from the law of negligence, criminal acts by a third party held to ‘break the chain’ of causation).

\textsuperscript{144} Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd [1961] AC 388 at 426.

\textsuperscript{145} Pojzak v Congeo Nominees Pty Ltd [2013] VCAT 2175; Ellis v Bailey Designed Engineering Pty Ltd (Civil Claims) [2013] VCAT 788; Ron Cameron v Ozzy Tyres Pty Ltd [2015] NSWCA 68 at [31]; Chen v Homeland Furniture Canterbury Pty Ltd [2015] NSWCA 102 at [25].


\textsuperscript{147} [2013] VCAT 2175.

\textsuperscript{148} [2013] VCAT 2175 at [77].
damages. In this case the tribunal considered that the consumer failed to mitigate her damages by having the car towed to the seller’s garage or her own driveway. It may seem unreasonable for the consumer to have left the car at a garage incurring storage charges over the period of the dispute. However, this consideration should be balanced against whether it was reasonable for the supplier to reject the consumers’ attempt to reject the goods or foreseeable that the dispute would take nearly a year to resolve.

**Contributory negligence**

Section 137B of the *Competition and Consumer Act 2010* (Cth) directs a court to take into account the claimant’s failure to take reasonable care in awarding damages for a contravention of s 18 of the ACL. Courts have interpreted this provision literally and refused to extend contributory negligence considerations to the discretionary award of compensation orders under the equivalent of s 237 or to contraventions of other similar provisions of the ACL that involve misleading conduct but which are not referred to in s 137B. There similarly seems no ground for applying contributory negligence principles directly to the award of damages under s 259(4).

A consumer’s own carelessness may be relevant to the assessment of whether there has been a failure of goods and services to meet many of the consumer guarantees. The consumer guarantee regime provides potential defences for suppliers whose goods are claimed not to comply with the guarantee of acceptable quality. Goods will not fail to be of acceptable quality in circumstances where:

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

(b) they are damaged by abnormal use.

Essentially, these limitations on a trader’s liability recognise that in some cases the conduct of the consumer will ‘break the chain of causation’ between the failure to comply with a consumer guarantee and the loss or damage suffered by the consumer. In such circumstances it would be unfair to extend liability to a supplier for damage effectively caused by a consumer. A good example of this type of case is *Gallant v Larry Woods Used Cars Ltd.* In this case the consumer had bought an 8 year-old vehicle that needed a major repair three weeks after purchase. During the three weeks the consumer had driven 3000 miles. The New Brunswick Queen’s Bench held that the

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149 [2013] VCAT 2175 at [80].
150 [2013] VCAT 2175 at [80].
151 *Havyn Pty Ltd v Webster ASAL* [2005] NSWCA 182 at [116]. See also *Selig v Wealthsure Pty Ltd* [2015] HCA 18; [2015] 255 CLR 661.
153 There is no equivalent provision to s 137B of the Competition and Consumer Act 2010 in state or territory legislation applying the ACL in those jurisdictions.
154 ACL s 54(6).
155 See also ACL s 259(5).
156 (1982) 38 NBR(2d) 262.
guarantee as to acceptable quality had not been breached because the failure was due to the consumer overusing the vehicle.

**Conclusion**

The inquiry in this paper into the key concepts of ‘major failure’ and ‘foreseeable loss’ in the regime of remedies available in response to a failure to comply with the consumer guarantees in the ACL has identified a number of issues of continuing uncertainty. These uncertainties include: the treatment of minor or aesthetic defects, whether a number of defects can combine to amount to a major failure, the appropriate measure of damages, and the limitations on the award of damages. Some of these issues of uncertainty might be addressed as part of the review of the ACL currently being undertaken. But open textured legislative provisions will always also require a process of interpretation to develop an authoritative understanding of their meaning and scope. As there are unlikely to be many opportunities for judicial consideration of the consumer guarantees remedial regime, consumer tribunals are likely to carry most of the responsibility for clarifying the interpretation and application of the relevant provisions. Tribunals are not ideally suited to developing legal doctrine. However, in this context there seems to be little other option. In this process it has been suggested that useful insights into the scope of the consumer guarantee remedial regime may be drawn from other provisions of the ACL and also from the common law. The important caveat suggested by this paper is that common law analogy must be used in a manner that is consistent with the language and purposes of the statute. The consumer guarantee remedies granted under the ACL are not a mere codification of common law but part of an independent regime of unique statutory rights for the protection of consumers.

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