The territorial scope of Australia’s consumer guarantee provisions

Article (Accepted Version)


This version is available from Sussex Research Online: http://sro.sussex.ac.uk/id/eprint/100502/

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher’s version. Please see the URL above for details on accessing the published version.

Copyright and reuse:
Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

http://sro.sussex.ac.uk
The territorial scope of Australia’s consumer guarantee provisions

Sirko Harder*

The Australian Consumer Law provides for consumer guarantees, according to which the taking of a particular action (for example, the application of due care and skill) or the presence of a particular fact (for example, a particular quality) is deemed as guaranteed where goods or services are supplied to a consumer in certain circumstances. Remedies lie against the supplier or (where goods are supplied) against the manufacturer or both. Pursuant to its application provisions, the Australian Consumer Law applies to conduct outside Australia if one of several alternative criteria is satisfied. One criterion is that the defendant carried on business within Australia. There is no express requirement that the defendant’s business activities in Australia include the transaction with the plaintiff. This article argues that comity requires an implied restriction on the territorial scope of the consumer guarantee provisions, and searches for the most appropriate criterion for that purpose.

Keywords: Australian Consumer Law, consumer guarantees, choice of law

A. Introduction

The Australian Consumer Law (“ACL”), contained in Schedule 2 of Australia’s Competition and Consumer Act 2010 (Cth) (“CCA”) contains, among others, provisions on consumer guarantees. Under these provisions, the taking of a particular action (for example, the application of due care and skill) or the presence of a particular fact (for example, a particular quality) is deemed as guaranteed where goods or services are supplied to a consumer and – for most of the guarantees – where the supply occurs in

* Reader, School of Law, Politics and Sociology, University of Sussex, United Kingdom. Email: s.harder@sussex.ac.uk. The author thanks the anonymous referees for helpful comments.
trade or commerce. The breach of a consumer guarantee generates claims against the supplier or (where goods are supplied) against the manufacturer or both.

Australian courts naturally apply the consumer guarantees in purely domestic cases, ie where both parties are located in Australia and the supply of the goods or services and any payment for them occurs in Australia. But goods and services increasingly cross borders. The CCA and state and territory statutes contain provisions (“application provisions”) on the applicability, including the territorial applicability, of the ACL as, respectively, federal law\(^1\) or state or territory law. But they do not contain general choice-of-law rules.

For the consumer guarantees to be applied by an Australian court in a case with an international element, it is necessary that the requirements of the application provisions for the ACL are satisfied. The question is whether this is sufficient or whether an additional criterion needs to be satisfied before the consumer guarantees can be applied. Such an additional criterion might be the requirement that the law of an Australian state or territory is the proper law of the contract between the consumer and the supplier. However, in *Valve Corporation v Australian Competition and Consumer Commission* (“*Valve Corp*”),\(^2\) the Full Court of the Federal Court of Australia rejected this requirement without specifying any other criterion that would apply in addition to the application provisions for the ACL.

This article will scrutinise the application provisions for the ACL (Section D) and their effect in the context of the consumer guarantees (Section E). This article will

---

\(^1\) This article uses the term “federal law” for what is usually called the “law of the Commonwealth” in Australian legal terminology.

also investigate whether there ought to be an additional requirement for the applicability of the consumer guarantees in cases with an international element (Sections F and G).\textsuperscript{3} Beforehand, a brief overview of the ACL and its consumer guarantee provisions will be provided (Section B), and it will be explained why the determination of the territorial scope\textsuperscript{4} of those provisions by an Australian court should start with the application provisions for the ACL and not with the common law choice-of-law rules (Section C).

**B. The Australian Consumer Law and its consumer guarantees**

The ACL is a body of consumer protection provisions. It came into force on 1 January 2011 and replaced equivalent provisions in the Trade Practices Act 1974 (Cth) (“TPA”) and state and territory legislation. It was a cooperative reform undertaken by the federal government and the governments of the states and territories in order to create uniform consumer protection provisions across Australia. The ACL applies either as a federal law or as a law of a state or territory.\textsuperscript{5}

\textsuperscript{3} Sections E and F will not consider any other provisions of the ACL.

\textsuperscript{4} This article uses the term “territorial scope” of a statute to denote the circumstances involving an international element to which the statute applies.

\textsuperscript{5} This will be discussed in Section D.
Sections 51-63 of the ACL provide that in certain cases of a supply of goods\(^6\) or services\(^7\) there is a guarantee that a particular action be taken (for example, that services will be rendered with due care and skill) or that a particular state of affairs exists (for example, that goods are of acceptable quality). Sections 64-68 contain ancillary provisions, in particular a general prohibition of contracting out of the consumer guarantees.\(^8\) Sections 259-270 give the consumer the right to sue the supplier of the goods or services for breach of any consumer guarantee except those under sections 58 and 59(1), and make provision for remedies, the complex details of which are not relevant for present purposes.\(^9\) Sections 271-273 provide that “an affected person” may recover damages from the manufacturer of the goods if a guarantee under section 54, 56, 58 or 59(1) has been breached. For reasons of space, this article discusses only claims against the supplier.

Most of the guarantees apply only if the supply of the goods or services occurs in trade or commerce.\(^10\) None of the guarantees applies unless the goods or services are supplied to a consumer.

---

\(^6\) Section 2(1) defines the term “goods”. The consumer guarantee provisions do not apply to the supply of gas or electricity: s 65.

\(^7\) Section 2(1) defines the term “services”. Certain services are excluded from the scope of the consumer guarantee provisions; see ss 63, 65.

\(^8\) Sections 64 and 67 will be discussed below, G.2.b.


\(^10\) The definition of “trade or commerce” is considered below, F.
However, the ACL’s definition of “consumer” is unusual in international comparison, as it is neither confined to natural persons nor generally to acquisitions for non-business purposes.\(^{11}\) Section 3 of the ACL provides that, with one exception, an acquirer of goods or services is a consumer if, and only if,\(^ {12}\) the price paid does not exceed $40,000 or the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption.\(^ {13}\) Thus, the general criteria are the price paid and, alternatively, the purpose for which goods or services of this kind are ordinarily acquired. The purpose for which the goods or services are acquired in the individual case is generally irrelevant.\(^ {14}\) A corporation or a natural person acquiring

\(^{11}\) Compare, eg, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64, Art 2(1): a consumer is “any natural person who … is acting for purposes which are outside his trade, craft, business or profession”.

\(^{12}\) An acquirer of goods is a consumer also if the goods consist of a vehicle or trailer acquired for use principally in the transport of goods on public roads: s 3(1)(c).

\(^{13}\) The meaning of “ordinarily acquired” was discussed in detail (for the TPA) in \textit{Bunnings Group Ltd v Laminex Group Ltd} [2006] FCA 682, (2006) 153 FCR 479, [81]-[106].

\(^{14}\) In the legislative process, a definition of “consumer” by reference to the purpose of the individual acquisition was rejected on the grounds that the determination of the purpose would be complex and time consuming and that the supplier could circumvent the consumer protection provisions by asking the acquirer to tick a box saying that the acquisition is for business purposes: Parliament of Australia, Senate Economics Legislation Committee, \textit{Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010}, May 2010, [3.43] and Table 3.2. The experience in the legal systems that use the individual purpose test suggests that these concerns are unfounded.
goods or services for business purposes may therefore be a “consumer” as defined in the ACL. The exception is that an acquirer of goods is not a consumer if the acquisition occurs for the purpose of re-supply or for the purpose of using the goods up or transforming them in trade or commerce.

C. Interplay between common law choice-of-law rules and forum statutes

The CCA contains provisions on the territorial scope of the ACL as a federal law, but it contains no general choice-of-law rules. The same applies to the provisions of the states and territories that render the ACL applicable as the law of the respective jurisdiction. Most choice-of-law rules applied by Australian courts are found in the common law of Australia. At common law, the proper law of a contract may generally be chosen by the parties and is otherwise the law of the jurisdiction with which the

15 See, eg, TLK Transport Pty Ltd v Thornthwaite Pty Ltd [2014] NSWCATCD 147, [93]-[95]; Sureguard Pty Ltd v M & F Hames Pty Ltd (t/as Lismore Freight Service) [2015] NSWCATCD 101, [8]; Safi v Heartland Motors Pty Ltd [2016] NSWCATCD 80, [66]; Abraham v Gogetta Equipment Funding Pty Ltd [2017] NSWCATCD 22, [20].

16 ACL, s 3(2).

17 The provisions are discussed below, 5.1.

18 The provisions are discussed below, 5.2.

19 The common law is uniform throughout Australia: Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 563.
contract as a whole has its closest and most real connection.\textsuperscript{20} An Australian\textsuperscript{21} court faced with a statute of the forum\textsuperscript{22} that does not contain general choice-of-law rules has the choice between two approaches: it could engage in a choice-of-law exercise starting with the common law choice-of-law rules,\textsuperscript{23} or it could immediately proceed to determining the territorial scope of the statute by way of interpreting the statute.\textsuperscript{24} A discussion of the preferable approach in general is beyond the scope of this article.


\textsuperscript{21} A court in another country will start with its choice-of-law rules and consider the ACL only if those rules specify the law of an Australian jurisdiction as the governing law.

\textsuperscript{22} Ie a federal statute or a statute of the state or territory in which the court sits.


Whenever the consumer guarantees of the ACL were invoked in a case with an international element, the court started with the application provisions for the ACL.\textsuperscript{25} This is entirely appropriate.\textsuperscript{26} The ACL intends to protect Australian consumers, including when dealing with overseas suppliers.\textsuperscript{27} A choice-of-law exercise starting with the common law choice-of-law rules for contract would make the applicability of the consumer guarantees dependent upon the contract having its closest connection with an Australian jurisdiction. This depends upon a consideration of all the factors of the individual contract\textsuperscript{28} and is not always the case when an Australian consumer contracts with an overseas supplier.\textsuperscript{29}


\textsuperscript{26} See Douglas, supra n 24, 201. See also Martin Davies, Andrew S Bell, Paul Le Gay Brereton and Michael Douglas, Nygh’s Conflict of Laws in Australia (LexisNexis, 10th edn, 2020), [20.61].

\textsuperscript{27} This is explained further below, G.2.c.

\textsuperscript{28} Including the parties’ places of business or residence, the place of contracting, the places of performance, and the nature and subject matter of the contract: Akai Pty Ltd v People’s Insurance Co Ltd (1996) 188 CLR 418, 437.

\textsuperscript{29} Eg, Laminex (Australia) Pty Ltd v Coe Manufacturing Co [1999] NSWCA 370, [32] (contract between Oregon seller and Australian buyer had its closest connection with Oregon); Australian Competition and Consumer Commission v Valve Corporation (No 3) [2016] FCA
It might be argued that the consumer guarantee provisions could in certain circumstances be regarded as internationally mandatory rules and be applied even though the contract does not have its closest connection with an Australian jurisdiction. The concept of internationally mandatory rules has indeed been recognised in Australian law. However, the argument conflicts with section 67(a) of the ACL, which renders the consumer guarantees applicable despite the parties’ choice of non-Australian law if the contract has its closest connection with an Australian jurisdiction. It is only a choice by the parties that can be ignored pursuant to section 67(a), and it can be ignored only if the closest connection test is satisfied. The closest connection test itself is not overridden. If the common law choice-of-law rule were the starting point in determining the applicability of the consumer guarantees, section 67(a) would indicate that it is only the subjective element of that rule, but not its objective element, that can be ignored. The consumer guarantees could not be applied unless the contract has its closest connection with an Australian jurisdiction.

196, (2016) 337 ALR 647, [75]-[84] (contract between a supplier based in Washington state and an Australian resident had its closest connection with Washington state).


31 Section 67(a) is discussed in detail below, G.2.b.

32 By comparison, section 11 of the Carriage of Goods by Sea Act 1991 (Cth) provides that the law of the place of shipment governs a sea carriage document for every shipment of goods out of Australia. This provision overrides not only a choice of law by the parties but also the closest connection test at common law.
Where the application of a forum statute in accordance with its express provisions would render its territorial scope too wide, conflicting with comity or the legislature’s intention, an implied limitation of the territorial scope needs to be considered. At this point, the common law choice-of-law rules may be relevant. But there may be other criteria (such as the location of the parties or the place of performance) which could be used to limit the territorial scope of the statute and which fit better than the common law choice-of-law rules.33

For these reasons, the following investigation will begin with the application provisions for the ACL and will subsequently discuss the need for an implied restriction on the territorial scope of the consumer guarantee provisions and the most appropriate criterion for that purpose.

D. Provisions on the applicability of the ACL

1. The application of the ACL as a federal law

The application of the ACL as a federal law is generally confined to the conduct of a corporation.34 Section 5(1) of the CCA “extends” the operation of particular provisions, 


34 CCA, s 131(1). This limitation reflects the fact that the federal parliament used its power under section 51(xx) of the Australian Constitution to legislate in respect of “trading corporations”: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [17.6]. The CCA, s 6 extends the application of
including the ACL (other than Part 5-3 which is not relevant for present purposes), to conduct outside Australia. This necessarily implies that the CCA applies to conduct within Australia,\(^{35}\) and that the CCA does not apply to conduct outside Australia except as provided by section 5(1).\(^{36}\)

The “engaging in conduct outside Australia” to which section 5(1) makes particular provisions (including the consumer guarantee provisions) applicable is conduct by “bodies corporate incorporated or carrying on business within Australia”, Australian citizens or persons ordinarily resident in Australia. A corporation is “carrying on business within Australia” if its business activities have a connection with Australia beyond the mere solicitation of customers in Australia.\(^{37}\) An actual place of business in Australia is not required.\(^{38}\) Business activities that have been held to parts of the Act, including the ACL’s consumer guarantee provisions, to the conduct of a natural person in particular circumstances.


\(^{37}\) *Valve Corp*, *supra* n 2, [149] (Dowsett, McKerracher and Moshinsky JJ): “the territorial concept of carrying on business involves acts within the relevant territory that amount to, or are ancillary to, transactions that make up or support the business”.

constitute the carrying on business within Australia for the purpose of section 5(1) include the maintenance of servers in Australia, which were configured and updated by employees who travelled to Australia;\(^\text{39}\) the regular sending of representatives to Australia to attend trade fairs, distribute marketing brochures and inspect allegedly defective goods;\(^\text{40}\) and even the regular sale of goods to an Australian company for on-sale to Australian customers.\(^\text{41}\)

Where a corporation is “carrying on business within Australia” as just described, section 5(1) of the CCA makes the consumer guarantees (and many other provisions) applicable to every “conduct” of that corporation, not just conduct that is part of the business activities in Australia. By comparison, Article 6(1)(b) of the Rome I Regulation\(^\text{42}\) makes a contract between a professional and a consumer subject to the law of the country of the consumer’s habitual residence if the professional’s business activities were pursued in, or directed to, that country “and the contract falls within the purpose of prima facie jurisdiction: \textit{National Commercial Bank v Wimborne} (1979) 11 NSWLR 156, 165.

\(^{39}\) \textit{Valve Corp, supra n 2, [150]-[151]}.

\(^{40}\) \textit{Vautin v By Winddown, Inc (formerly Bertram Yachts) (No 4)} [2018] FCA 426, (2018) 362 ALR 702, [233], [238]-[239].


scope of such activities”. There is no equivalent to the quoted phrase in section 5(1) of the CCA.

Nor can such a requirement be implied. The category of carrying on business within Australia has been described as “business presence” in Australia and as requiring “activities in Australia which have a repetitive and permanent character”. This is consistent with the other categories of person to whose conduct outside Australia section 5(1) makes the ACL applicable: a corporation incorporated in Australia, an Australian citizen and a person ordinarily resident within Australia. Each of those categories refers to the characteristic of a person rather than particular conduct. This reflects the fact that section 5(1) contains a minimum requirement for the application to conduct outside Australia of many provisions of the CCA, which are diverse (including, for example, provisions on anti-competitive practices) and do not always regulate one particular transaction. There have been cases in which the defendant corporation was

---


44 Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth), [14.10].

found to be carrying on business within Australia through transactions other than the one with the plaintiff.46

2. The application of the ACL as a law of a state or territory

Legislation in each Australian state and territory sets out the circumstances in which the ACL applies as a law of that state or territory.47 The provisions are uniform across all jurisdictions, removing the possibility of an intra-Australian conflict of laws.

Subsection (1) of the uniform provisions stipulates that the ACL as a law of the respective jurisdiction applies to and in relation to persons carrying on business within the jurisdiction, bodies corporate incorporated or registered under the law of the jurisdiction, persons ordinarily resident in the jurisdiction, or persons otherwise connected with the jurisdiction. It can be assumed that the phrase “carrying on business within this jurisdiction” will be interpreted in the same way as the corresponding phrase in section 5(1) of the CCA, and that it will not be required that the defendant’s business activities in the respective state or territory include the transaction with the plaintiff.

46 Eg, Norcast SARL v Bradken Ltd (No 2) [2013] FCA 235, (2013) 219 FCR 14, [243]-[256].

See also Australian Competition and Consumer Commission v Facebook, Inc [2021] FCA 244, [34].

47 Fair Trading (Australian Consumer Law) Act 1992 (ACT), s 11; Fair Trading Act 1987 (NSW), s 32; Consumer Affairs and Fair Trading Act 1990 (NT), s 31; Fair Trading Act 1989 (Qld), s 20; Fair Trading Act 1987 (SA), s 18; Australian Consumer Law (Tasmania) Act 2010 (Tas), s 10; Australian Consumer Law and Fair Trading Act 2012 (Vic), s 12; Fair Trading Act 2010 (WA), s 24.
Subsection (2) of the uniform provisions stipulates that, subject to subsection (1), the ACL as a law of the respective jurisdiction extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside the jurisdiction, whether within or outside Australia. The fact that subsection (2) provides expressly for an application of the ACL as a law of the respective jurisdiction to conduct occurring outside that jurisdiction implies that the ACL as a law of a particular jurisdiction always applies to conduct occurring within that jurisdiction (provided that the requirements of subsection (1) are satisfied) and also implies that the ACL as a law of a particular jurisdiction does not apply to conduct occurring outside that jurisdiction except as provided by the application provision.

E. The territorial scope of the consumer guarantee provisions according to the application provisions for the ACL

1. The relevant conduct of the supplier of the goods or services

The application provisions for the ACL in the CCA and state and territory legislation define the territorial scope of the ACL by reference to particular conduct. This works well where liability is attached directly to a particular action or omission. The best example is section 18 of the ACL, which prohibits misleading or deceptive conduct in trade or commerce.

The consumer guarantee provisions do not directly prohibit particular conduct. They provide that, in certain circumstances, a supplier of goods or services is deemed to have guaranteed that a certain action be taken or a certain state of affairs exist. If the
guaranteed action is not taken or the guaranteed state of affairs does not exist, the court can order remedies. No further conduct of the supplier is required. It is thus not obvious what conduct triggers an application of the consumer guarantees according to the application provisions for the ACL.

The question was considered, for the guarantee that goods are of acceptable quality (section 54), in *Valve Corp.*48 Valve Corporation (“Valve”), a company based in the State of Washington, operated an online game distribution network with about 4,000 video games. Valve had about 2m subscriber accounts of Australian residents. The terms and conditions that a subscriber was required to accept stated, among others, that fees were not refundable in any circumstances. The Australian Competition and Consumer Commission contended that, in relation to Valve’s Australian subscribers, the “no refund” statement was misleading (thus breaching section 18 of the ACL as a federal law) because, if a video game was not of acceptable quality, Australian subscribers could in fact obtain a refund as Valve was in breach of the consumer guarantee under section 54 of the ACL. Valve could not be liable under section 18 for misleading conduct unless it was subject to section 54 in its dealings with Australian subscribers. Valve was subject to section 54 as a federal law if either the relevant conduct of Valve occurred in Australia or the conditions of section 5(1) of the CCA were satisfied.

The trial judge, Edelman J, concluded that Valve was subject to section 54 of the ACL, without clearly identifying the conduct of Valve that rendered section 54

---

48 *Supra* n 2.
On appeal, Valve argued that its supply of goods (computer games) to Australian consumers occurred in Washington State as the place in which Valve agreed to supply the goods. Valve relied on section 11(b) of the ACL, which provides that a reference to the supply of goods or services includes a reference to agreeing to supply goods or services. The Full Federal Court rejected this argument. Without further explanation, the Court stated that “the supply of computer games by Valve to customers in Australia took place where the customer downloaded the computer game on his or her computer”. Thus, the Court took the view that the conduct that renders section 54 of the ACL applicable pursuant to the application provisions for the ACL is the supply of the goods or services.

This approach is convincing and must be applied to all consumer guarantees. Even though the supply of the goods or services to the consumer is not blameworthy, it is the event that triggers the consumer guarantees (if any further requirements are satisfied) and must therefore be the conduct that triggers the application of the consumer guarantees pursuant to the application provisions for the ACL.

49 Edelman J discussed in detail whether the conduct relevant to section 18 occurred within or outside Australia: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196, (2016) 337 ALR 647, [161]-[188]. There was no such discussion for the conduct relevant to section 54.

50 *Supra* n 2, [116], where the Court also stated that the requirements of the CCA, s 5(1) were satisfied; see above, D.1.

2. The place of the supplier's conduct

The place of the relevant conduct of the supplier (the supply of the goods or services) is important, as conduct outside Australia does not render the consumer guarantees applicable unless a further requirement, such as the supplier carrying on business within Australia, is satisfied.

As seen before, the Full Federal Court in Valve Corp held that the supply of computer games occurs where the consumer downloads the game on his or her computer.52 It is not the place where the supplier uploads the game or the place where the supplier permits the download by the consumer. Translating this rule for physical goods, their supply takes place where they are received by the consumer, not where they are dispatched. Translating this rule for services, their supply takes place where the consumer receives them, not where the supplier acts in performing them.

It is appropriate to locate the supply of goods or services at the place where the consumer received (or should have received) them rather than the place where the supplier acted (or should have acted). Since the applicability of the ACL depends upon conduct of the supplier, the place where the supplier acted might be thought more appropriate. However, the act of supplying goods or services is not complete unless and until the consumer receives them.53 Moreover, the need to protect Australian residents who order goods or services from a business based overseas was a concern of the

52 Supra n 2, [116].

53 Malbon, supra n 51, 25.
legislatures\textsuperscript{54} of the ACL.\textsuperscript{55} Regarding the place of the receipt of the goods or services by the consumer as the place of the supply ensures the applicability of the consumer guarantees whenever the consumer is located in Australia.

F. Conflict of the application provisions for the ACL with comity

The rules of statutory interpretation in Australia include a presumption that a statute does not regulate persons or matters over which the jurisdiction properly belongs to some other state\textsuperscript{56} or, in other words, that a statute is not inconsistent with comity.\textsuperscript{57} “Comity requires the judicial systems of states to grant one another equal respect,

\textsuperscript{54} The plural “legislatures” is used as the ACL was enacted through the cooperation of the federal parliament and the parliaments of the states and territories.

\textsuperscript{55} See below, G.2.c.


meaning that the courts of one state will not seize jurisdiction over claims concerning domestic issues pertaining to another state”.

It would not be consistent with comity if the consumer guarantees applied to a supply of goods or services that has no relevant connection with Australia. This is not possible for those consumer guarantees that require the supply to occur in trade or commerce. Section 2(1) defines “trade or commerce” as including “any business or professional activity (whether or not carried on for profit)” and, crucially, as meaning “trade or commerce within Australia” or “trade or commerce between Australia and places outside Australia”. As between Australia and other countries, the law of an Australian jurisdiction can legitimately claim to apply to a supply of goods and services from, into or within Australia.

The supply of the goods does not need to occur in trade or commerce for the guarantees that – in short – the supplier has a right to dispose of the property in the goods (section 51), the consumer has the right to undisturbed possession of the goods (section 52) and the goods are free from any undisclosed security, charge or encumbrance (section 53). Thus, the application provisions for the ACL render those guarantees applicable to a supply of goods that occurs wholly outside Australia if the

---


59 ACL, ss 54-62.

60 The last phrase includes the export to Australia of goods made outside Australia: Gill v Ethicon Sàrl (No 5) [2019] FCA 1905, [3130]; affirmed Ethicon Sàrl v Gill [2021] FCAFC 29, [252].
supplier carried on business within Australia (through other, unrelated transactions) or if the supplier, being a corporation, was incorporated in Australia. Neither of these factors is sufficient to make it appropriate to apply the law of an Australian jurisdiction to such a supply. The consumer may well be unaware of them and will rarely regard them as relevant.

The problem cannot be pushed aside as being insignificant in practice. Many corporations carry on business both in Australia and other countries, and an application of sections 51-53 of the ACL to all consumer contracts of these corporations throughout the world would apply those provisions to many contracts that have no connection with Australia. This will be unproblematic if litigation takes place outside Australia, as the court will start with its choice-of-law rules, which will not specify the law of an Australian jurisdiction as the law governing a contract that has no connection with Australia.

But litigation could potentially take place in Australia even where the contract has no connection with Australia. It is necessary to consider the Australian rules on prima facie jurisdiction (the power to exercise jurisdiction, resulting from a service of the originating application or claim form on the defendant) and on forum non conveniens (the discretion to decline the exercise of jurisdiction).

Prima facie jurisdiction will often exist for claims under the ACL. A claim form can always be served on a defendant in Australia. It can often be served on a defendant outside Australia where the claim arises out of the ACL. In the Federal Court, which has jurisdiction in relation to any matter arising under the ACL as a federal law (section 138 of the CCA), service of the originating application on a defendant outside Australia is
permitted for claims relating to the enforcement of Australian legislation.\textsuperscript{61} This includes claims for relief under the ACL.\textsuperscript{62} In the Supreme Courts of most states, service of the originating application on a defendant outside Australia is permitted when the claim concerns the enforcement of an Australian enactment,\textsuperscript{63} or when the claim arises under an Australian enactment and “the enactment applies expressly or by implication to an act or omission that was done or occurred outside Australia in the circumstances alleged”.\textsuperscript{64} This last phrase should include the application of the ACL to conduct outside Australia by virtue of section 5(1) of the CCA\textsuperscript{65} or by virtue of the ACL application provisions of a state or territory.\textsuperscript{66} Similar rules for service outside

\begin{flushright}
\textsuperscript{61} Federal Court Rules 2011 (Cth), r 10.42(14).

\textsuperscript{62} Ellen G White Estate, Inc v Knudson [2013] FCA 378, [17]; Unlockd Ltd v Google Asia Pacific Pte Ltd [2018] FCA 826, [45].

\textsuperscript{63} Uniform Civil Procedure Rules 2005 (NSW), r 11.4 and Sch 6 para (p); Uniform Civil Procedure Rules 1999 (Qld), r 125(p); Supreme Court Civil Rules 2006 (SA), r 40A(p); Supreme Court Rules 2000 (Tas), r 147A(p).

\textsuperscript{64} Uniform Civil Procedure Rules 2005 (NSW), r 11.4 and Sch 6 para (j)(iii); Uniform Civil Procedure Rules 1999 (Qld), r 125(j)(iii); Supreme Court Civil Rules 2006 (SA), r 40A(j)(iii); Supreme Court Rules 2000 (Tas), r 147A(j)(iii).

\textsuperscript{65} Reid Mortensen, Richard Garnett and Mary Keyes, Private International Law in Australia (LexisNexis, 4th edn, 2019), [2.79].

\textsuperscript{66} These provisions are considered above, D.2.
\end{flushright}
Australia exist in the Australian Capital Territory.\textsuperscript{67} Thus, the mere fact that the claim is based on the ACL often provides an Australian court with prima facie jurisdiction.\textsuperscript{68}

It might be thought that an Australian court faced with a claim under the ACL’s consumer guarantee provisions will decline jurisdiction on forum non conveniens grounds where the contract has no connection with Australia.\textsuperscript{69} However, the ACL (like the previous TPA) is protective legislation, and the Australian courts have held that the fact that relief is being sought under the TPA militates against a stay of Australian proceedings if a court in the alternative foreign forum would not apply the TPA or equivalent foreign legislation.\textsuperscript{70} In those circumstances, Australian courts have refused to stay proceedings even if proceedings between the same parties on the same issues have been conducted in a foreign forum for some time,\textsuperscript{71} and even if the parties have agreed that any claims between them be exclusively litigated in a particular foreign forum.

\textsuperscript{67} See Court Procedures Rules 2006 (ACT), r 6502(j)(iii), (p)(i).

\textsuperscript{68} See \textit{Perdaman Chemicals and Fertilisers Pty Ltd v ICICI Bank Ltd} [2013] FCA 175 (service out of the jurisdiction denied only because there was no prima facie case of a breach of the ACL); \textit{Ellen G White Estate, Inc v Knudson} [2013] FCA 378; \textit{Unlockd Ltd v Google Asia Pacific Pte Ltd} [2018] FCA 826.

\textsuperscript{69} The Australian forum non conveniens test is not easily satisfied, requiring Australia to be a clearly inappropriate forum: \textit{Voth v Manildra Flour Mills Pty Ltd} (1990) 171 CLR 538.

\textsuperscript{70} \textit{Eurogold Ltd v Oxus Holdings (Malta) Ltd} [2007] FCA 811, [60]; \textit{Mineral Commodities Ltd v Promet Engineers Africa (Pty) Ltd} [2008] FCA 30, [22]; \textit{Centrebet Pty Ltd v Baasland} [2013] NTSC 59, [162].

country. The plaintiffs in these cases were Australian corporations or residents, and the courts may be less hesitant to stay proceedings in cases in which neither party is an Australian corporation or resident. However, the decision on whether to stay proceedings on forum non conveniens grounds is a balance of many factors, and it should not be left to that exercise to exclude an application of sections 51-53 of the ACL to transactions that have no connection with Australia.

Comity thus requires an implied restriction on the territorial scope of sections 51-53 of the ACL. The next Section scrutinises several criteria which may be used to that end. The discussion will not be limited to sections 51-53 or to conduct occurring outside Australia. It may be neither possible nor desirable to restrict the territorial scope of the consumer guarantee provisions only to the extent required by comity.

G. Implied restriction on the territorial scope of the consumer guarantee provisions


73 For the general point that the Australian jurisdiction rules on the assertion and exercise of jurisdiction are not apt to avoid an exorbitant application of forum statutes, see Keyes, supra n 23, 28-31.
1. **Restriction to conduct occurring in Australia**

The High Court of Australia has said that “the persons, property and events in respect of which parliament has legislated are presumed to be limited to those in the territory over which it has jurisdiction”.\(^{74}\) An Australian statute is presumed to regulate only conduct in Australia and – perhaps – conduct intended to have effect in Australia.\(^{75}\) An application of this presumption to the ACL’s consumer guarantees would restrict their scope of application to conduct occurring within Australia, rendering it consistent with comity. However, the presumption is rebutted by the provisions in the CCA and state and territory legislation that expressly provide for an application of the ACL to conduct outside Australia in particular circumstances.\(^{76}\) Policy considerations also militate against a restriction to conduct within Australia. Where the supply of the goods or services was arranged in Australia between an Australian resident and an Australian-based corporation, the consumer should enjoy the protection of the consumer guarantees even if the supply of the goods or services occurs overseas. Indeed, the consumer


\(^{75}\) “There is a general canon of construction that an enactment will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting”: *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243, (2002) 118 FCR 1, [47] (Merkel J), citing *R v Jameson* [1896] 2 QB 425, 430 (Lord Russell CJ). See also Acts Interpretation Act 1901 (Cth), s 21(1)(b).

\(^{76}\) These provisions are considered above, D.
guarantees have been applied to the provision of a European river cruise booked by Australian residents with an Australian travel agency.77

2. Restriction to contracts governed by the law of an Australian jurisdiction

The territorial scope of the ACL’s consumer guarantee provisions would be consistent with comity if it were restricted to contracts governed by the law of an Australian jurisdiction. If such a restriction were implied, the consumer guarantees would apply only where the contract between the consumer and the supplier has its closest connection with an Australian jurisdiction,78 or if the parties have chosen the law of an Australian jurisdiction as the proper law of the contract.79 The law of that Australian jurisdiction, including Australian federal law, can properly claim to regulate such a contract.

The question of whether such a restriction can and should be implied has three aspects: the proposition that the consumer guarantee provisions can apply in the absence of a contract between the consumer and the supplier, the effect of section 67 of the ACL and the purpose of the consumer guarantee provisions. These aspects will now be discussed in turn.


78 If that requirement is satisfied, the parties’ choice of a foreign law as the proper law of the contract would not exclude the applicability of the consumer guarantee provisions, pursuant to the ACL, s 67(a); see further below, G.2.b.

79 The common law choice-of-law rules for contract are considered above, C.
(a) Do the consumer guarantee provisions require a contract between the parties?

The predecessor provisions of the consumer guarantees implied certain terms into certain consumer contracts, for example a term that goods sold are of merchantable quality. These provisions necessarily presupposed the existence of a contract between the parties. The legislatures of the ACL abandoned the method of implying terms and instead enacted consumer guarantees triggered simply by a supply of goods or services to a consumer. This was done in order to make it easier for consumers to understand their rights.

It has been said in a number of cases that the consumer guarantees in the ACL do not require a contract between the consumer and the supplier. This was used by

---

80 TPA, ss 69-72 and 74 and equivalent provisions in state and territory legislation.


82 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [25.31]-[25.33], [25.37], [25.91]-[25.92].

Edelman J and the Full Court in *Valve Corp* as an argument against the applicability of the common law choice-of-law rules for contract. Edelman J gave the example of a gift for promotional purposes, to which the consumer guarantees apply even though it is not a contract.

Edelman J and the Full Court conflated two different concepts of contract. One is the concept used by the internal rules of the Australian jurisdictions, ie the rules governing the substance of a dispute. Under those rules, a contract may be defined as an agreement between two or more parties that was made with an intention to be legally bound and contains at least one promise and consideration for that promise. A gift does not meet this definition.

However, this is not the concept that Australian private international law employs for the purpose of characterising an issue, ie selecting the area of private law whose choice-of-law rule will be applied. Different legal systems employ different concepts, and the precise contours of broad universal concepts such as contract vary between legal systems. Therefore, in selecting the appropriate choice-of-law rule, the law of the forum cannot simply refer to the concepts used by its internal rules but must

---

84 [2016] FCA 196, (2016) 337 ALR 647, [103]; *supra* n 2, [106].

85 [2016] FCA 196, (2016) 337 ALR 647, [103]. For the purposes of the consumer guarantee (and certain other) provisions, a donation must be for promotional purposes to be treated as a “supply”: ACL, s 5(1)(a).

take an international outlook.\textsuperscript{87} The internal rules of many legal systems give the concept of contract\textsuperscript{88} a wider scope than do the internal rules of the Australian jurisdictions. In particular, many legal system do not require consideration.\textsuperscript{89} Australian courts should therefore apply the choice-of-law rules for contract whenever the issue relates to the enforceability of an obligation voluntarily undertaken, including a gift.\textsuperscript{90} Thus, the choice-of-law rules for contract apply whenever a supply of goods or services occurs voluntarily.

It is highly doubtful that the consumer guarantee provisions apply to an involuntary supply of goods or services. Section 2(1) of the ACL defines the verb “supply” as including supply “by way of sale, exchange, lease, hire or hire-purchase” (for goods) and “provide, grant or confer” (for services). Even though this list is not exhaustive, it is telling that all the examples given involve a voluntary supply.

The variable meaning of “contract” is demonstrated by section 275 of the ACL, which provides that particular state or territory laws exclude or limit liability under a


\textsuperscript{88} More precisely, obligatory contract in contradistinction to conveyance or transfer.


\textsuperscript{90} Mortensen et al, \textit{supra} n 65, [17.3]. Australian courts are likely to follow Re Bonacina [1912] 2 Ch 394, where the choice-of-law rules for contract were applied to the enforceability of a promise made without consideration.
consumer guarantee for services where “the law of a State or Territory is the proper law of the contract”. If the consumer guarantees for services are capable of applying to circumstances in which there is no contract as defined by the internal rules of the Australian jurisdictions, section 275 must also apply to those circumstances.\(^\text{91}\) It would be odd if the fact that the services are provided gratuitously rather than for a fee led to the supplier losing the exclusion or limitation of liability under state or territory law. If, accordingly, section 275 requires the determination of “the proper law of the contract” even in circumstances in which there is no contract as defined by the internal rules, the term “contract” in the phrase “the proper law of contract” in section 275 must have a wider meaning than the concept of contract under the internal rules.

In conclusion, whenever the consumer guarantee provisions apply, there is a contract as defined for choice-of-law characterisation purposes and it is thus possible to apply the choice-of-law rules for contract. Whether it is desirable to apply those rules will be discussed further below.

(b) *The significance of section 67 of the ACL*

In *Valve Corp*,\(^\text{92}\) Valve’s central argument in favour of restricting the territorial scope of the consumer guarantee provisions by reference to the choice-of-law rules for contract

\(^{91}\) The issue was left open in *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238, (2018) 361 ALR 456, [375] (reversed on other grounds, without consideration of the present issue: *Moore v Scenic Tours Pty Ltd* [2020] HCA 17, (2020) 377 ALR 209).

\(^{92}\) *Supra* n 2.
was that section 67 of the ACL would otherwise be redundant. Section 67 prevents a contracting out of the consumer guarantees by way of a choice-of-law clause.93 It is necessary to set out section 67 in full:

If:

(a) the proper law of a contract for the supply of goods and services to a consumer would be the law of any part of Australia but for a term of a contract that provides otherwise; or

(b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:

(i) the provisions of the law of a country other than Australia;

(ii) the provisions of the law of a State or Territory;

the provisions of this Division apply in relation to the supply under the contract despite that term.

The argument that section 67 would be redundant if the consumer guarantees could apply to contracts governed by foreign law can swiftly be rejected for section 67(b). Consider the following example. A corporation incorporated or carrying on business in Australia supplies goods or services in trade or commerce to a consumer. A term in the

---

93 Section 64 invalidates any clause that purports to exclude, restrict or modify the consumer guarantee provisions or is inconsistent with them (with limited exceptions being set out in section 64A). Choice-of-law clauses must fall outside the scope of section 64, as section 67 would otherwise be redundant. The draftspersons regarded the two provisions as complementing each other: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, [7.17].
contract (the “impugned term”) between the consumer and the supplier provides for the application of a particular statute of foreign country X (without choosing the law of X as the proper law of the contract). That statute conflicts with the consumer guarantees of the ACL. The impugned term is enforceable under the proper law of the contract (pursuant to the choice-of-law rules of the common law of Australia), which is the law of foreign country Y (because the contract has its closest connection with Y). If the consumer guarantees can apply to contracts governed by foreign law, they will apply in this example in the absence of the impugned term.\textsuperscript{94} But the impugned term would exclude the application of the consumer guarantees if it were not invalidated by section 67(b).

By contrast, section 67(a) would indeed be redundant if the consumer guarantees could apply to contracts governed by foreign law. Section 67(a) provides that, where the contract between the parties has its closest connection with an Australian jurisdiction, the consumer guarantees apply \textit{despite} the parties’ choice of a foreign law as the proper law of the contract. The word “despite” indicates that without section 67(a) the choice-of-law clause would render the consumer guarantees inapplicable, which is not possible unless their applicability depends upon the proper law of the contract.

If the applicability of the consumer guarantees did not depend upon the proper law of the contract, there would be no need for section 67(a). If the application provisions for the ACL in the CCA and state and territory legislation are capable of rendering the consumer guarantees applicable to a case where the contract has its closest connection with foreign country X, the application provisions must \textit{a fortiori} be capable

\textsuperscript{94} The requirements of the CCA, ss 5(1) and 131(1) and of the ACL application provisions of at least one state or territory are satisfied in the example; see Section D.
of rendering the consumer guarantees applicable to a case where the contract has its closest connection with Australia but the parties have chosen the law of X as the proper law. Section 67(a) is not engaged in the first case and is not needed in the second.

The Full Court in Valve Corp said that section 67(a) “should be seen as being directed to a particular attempt to avoid the operation of the consumer guarantees”.95 It is unclear what form of attempt the Full Court had in mind. The parties’ choice of foreign law as the proper law of the contract cannot be an attempt to avoid the operation of the consumer guarantees if the proper law of the contract is irrelevant in the first place. Perhaps the Full Court took the view that the choice of a foreign law as the proper law of the contract also constitutes a purported contracting-out of the consumer guarantees specifically. But section 67(b) already invalidates a purported contracting-out of the consumer guarantees by way of a choice-of-law clause.96

Responding to Valve’s argument more generally, both Edelman J and the Full Court in Valve Corp said that section 67 invalidates certain attempts to reduce the scope of operation of the consumer guarantees and that it would defeat that purpose to read section 67 as restricting the consumer guarantees’ scope of operation.97 That response is not entirely satisfactory. Valve was not arguing that section 67 itself imposes a restriction on the territorial scope of the consumer guarantee provisions. Valve was arguing that the existence of section 67 is evidence of the existence of an implied

95 Supra n 2, [113] (Dowsett, McKerracher and Moshinsky JJ).

96 In Valve Corp, Edelman J held that section 67(b) prevented the parties’ choice of the law of Washington State as the proper law of their contract from rendering the ACL’s consumer guarantees inapplicable: [2016] FCA 196, (2016) 337 ALR 647, [89].

97 Ibid, [106]; supra n 2, [114].
restriction. Because section 67 extends the scope of operation of the consumer guarantees, the implied restriction must exist, for no extension would be necessary or even possible if there was no restriction in the first place.

The fact that a particular interpretation of the consumer guarantee provisions renders section 67(a) redundant militates against that interpretation. A statute is not generally interpreted in a way that renders a provision redundant or tautologous.98 However, this rule “is of limited application”99 because “the legislature does sometimes repeat itself, and does not always convey its meaning in the style of literary perfection”.100 Section 67 of the ACL is almost identical to section 67 of the former TPA, and it seems that, when replacing the statutorily implied terms under the TPA with statutory consumer guarantees under the ACL, the legislature did not consider whether this change required a change to the choice-of-law provision.

Whether the applicability of the consumer guarantee provisions ought to depend upon the law of an Australian jurisdiction being the proper law of the contract between the parties should ultimately be determined by reference to the purpose of the provisions. This will be discussed next.

---

98 Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672, 679 (Mason J).


100 Brisbane City Council v Attorney General for Queensland (1908) 5 CLR 695, 720 (O’Connor J). See also Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672, 679 (Mason J).
(c) Purpose of the consumer guarantee provisions

Section 15AA of the Acts Interpretation Act 1901 (Cth) provides:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object of the Act is expressly stated in the Act) is to be preferred to each other interpretation.

As mentioned before,\textsuperscript{101} the key purpose of replacing the implied terms under the TPA with consumer guarantees under the ACL was to make consumer rights less complex and easier to understand for consumers. This objective would be thwarted if the applicability of the consumer guarantees depended upon the law of an Australian jurisdiction being the proper law of the contract. Their applicability would then depend upon an Australian jurisdiction being the jurisdiction with which the contract has its closest and most real connection.\textsuperscript{102}

In order to determine with which jurisdiction a contract has its closest connection, the court considers all the factors of the case. The outcome of that exercise is sometimes difficult to predict. This is particularly the case where the two parties are located in different countries and obligations under the contract are performed in both countries.

\textsuperscript{101} See above, G.2.a.

\textsuperscript{102} If it does, s 67(a) would ensure that the consumer guarantee provisions apply despite the parties’ choice of a foreign law as the proper law of the contract.
Moreover, the test of closest connection is blind to protective aims such as consumer protection. There is no equivalent to Article 6 of the Rome I Regulation, mentioned earlier. For a contract between a business and a consumer located in different countries, there is no guarantee that a court would find the closest connection with the country in which the consumer lives.

If the applicability of the consumer guarantees depended upon the law of an Australian jurisdiction being the proper law of the contract, they would not always (and perhaps not even frequently) apply where an Australian resident orders goods or services from a business in a foreign country. But there can be no doubt that the consumer guarantees were intended to apply to every such case, provided the requirements of the application provisions of the CCA or the relevant state or territory statute are satisfied. The Explanatory Memorandum to the Act introducing the consumer guarantee provisions observes that “[c]onsumers increasingly respond to price and quality signals by seeking supplies outside of their local area or outside of Australia”, and cites a report by the Commonwealth Consumer Affairs Advisory Council which notes problems faced by Australian residents ordering goods from overseas businesses.

---

103 See above, D.1.

104 See supra n 29.

105 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [25.10].

106 Ibid, [25.4].

The need to protect Australian residents who order goods or services from a business based overseas was a concern of the legislatures and constitutes a compelling reason not to make the applicability of the consumer guarantees dependent upon the law of an Australian jurisdiction being the proper law of the contract. It overrides the concern that section 67(a) will be redundant as a consequence.\(^{108}\)

3. **Restriction to activities directed at Australian consumers**

The territorial scope of the ACL’s consumer guarantee provisions would be consistent with comity if it were restricted to the supply of goods or services that is part of activities directed towards Australian consumers, meaning natural persons resident or present in Australia and corporations that have their (principal) place of business in Australia.\(^ {109}\) The concept of activities being directed towards a particular country is borrowed from Article 17(1)(c) of the Brussels I Recast Regulation and Article 6(1) of the Rome I Regulation, which use this concept (together with the concept of pursuing activities in a particular country) to connect a consumer contract to the country of the

---


\(^{109}\) A corporation can be a “consumer” for the purposes of the ACL; see above, B.
consumer’s habitual residence for purposes of, respectively, jurisdiction and choice of law.

The suggested criterion renders the consumer guarantees applicable to all the scenarios that have already been mentioned as scenarios to which they should apply. One scenario is where the supply of the goods or services occurs outside Australia (for example, a European river cruise) but has been arranged by an Australian resident through the Australian office of the supplier.\textsuperscript{110} In those circumstances, the supplier directed its business activities to Australian residents.

Another scenario is the supply in Australia of goods or services ordered by an Australian resident through the website of an overseas supplier, as occurred in \textit{Valve Corp}.\textsuperscript{111} This should also be regarded as being part of business activities directed towards Australian residents. Physical activity of the supplier in Australia should not be required in the present context.\textsuperscript{112} It should be sufficient that the supplier offers goods or services on an English-speaking website and fails to take all reasonable steps to prevent contracts with Australian consumers, such as refusing to ship goods to Australian mail addresses or to accept orders from Australian IP addresses (geoblocking). In those circumstances, the supplier’s activities can justifiably be said to be directed towards Australian consumers.\textsuperscript{113}

\textsuperscript{110} See above, G.1.

\textsuperscript{111} See above E.

\textsuperscript{112} It may be required for the concept of “carrying on business within Australia” in the CCA, s 5(1); see above, D.1.

\textsuperscript{113} This approach differs slightly from the EU Regulations mentioned before, where the trader must have manifested an intention to establish commercial relations with consumers in the
The suggested criterion renders the consumer guarantees inapplicable where a supply of goods or services occurs entirely outside Australia, the only connection with Australia being that the supplier was incorporated in Australia or carries on business in Australia through other, unrelated transactions. Comity requires the removal of those circumstances from the scope of application of some of the consumer guarantees.\textsuperscript{114}

However, the suggested criterion renders the consumer guarantees also inapplicable where an Australian-based business supplies goods or services to a resident of a foreign country. Such a supply is directed towards the foreign country rather than Australia. Whether the consumer guarantees ought to apply to those circumstances is not easy to decide.

The intention of the legislatures might be gleaned from the object of the CCA as stated in its section 2: “The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.” The word “Australians” in section 2 cannot mean Australian citizens, as the legislatures cannot have intended to protect Australian citizens as consumers wherever in the world they happen to enter into contracts. If an Australian citizen lives in a foreign country and buys goods in a shop there, the regulation of that transaction is

---

\textsuperscript{114} See above, F.
properly a matter for the legislature of that country and not of Australia. The word “Australians” in section 2 must mean Australian residents.

In the second reading speech for the Act enacting the consumer guarantees, the Minister explained the purpose of the new law by saying that “Australian consumers deserve laws which make their rights clear and consistent”.

The use of the word “Australian” before “consumers” is revealing. So is the fact that both the report and the survey of consumers cited by the Explanatory Memorandum to the Act enacting the consumer guarantees address the situation of an Australian resident ordering goods or services from an overseas business but not the converse situation. Thus, the legislatures seem to have envisaged that only “Australians” (however that may be defined) can invoke the consumer guarantees of the ACL.

However, policy considerations must also be taken into account. To that end, it is useful to consider the approach taken towards the predecessor of section 44 of the

115 Commonwealth, Parliamentary Debates, House of Representatives, 17 March 2010, 2718 (Craig Emerson).


118 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [25.4], [25.26].

119 TPA, s 65AAC.
ACL, which prohibits the participation in a pyramid scheme\textsuperscript{120} without express geographical limitation. In \textit{Worldplay Services Pty Ltd v Australian Competition and Consumer Commission},\textsuperscript{121} the Full Court of the Federal Court of Australia held that what is now section 44 applies where a corporation, through conduct in Australia, participates in a pyramid scheme that runs entirely outside Australia. The Court refused to restrict the scope of what is now section 44 to pyramid schemes affecting Australian residents. Tamberlin J said:

\begin{quote}
[T]he protection of consumers outside Australia from the acts of corporations participating in pyramid selling schemes within Australia can be perceived to promote the welfare of Australians by enhancing foreign confidence in Australia’s ability to promote competition and fair trading outside Australia. It would detract from Australia’s reputation and standing in the international business community if Australia were to be seen as a safe haven for the organisation and administration of such schemes.\textsuperscript{122}
\end{quote}

The approach taken towards the territorial scope of section 44 is convincing. However, there are two significant differences between section 44 and the consumer guarantees.

First, a pyramid scheme is not a sustainable business model and comes close to being fraudulent. It soon runs into a dead end and benefits only those who set it up. The laws of the Australian jurisdictions should not permit a pyramid scheme even if it only affects residents of a country in which it is permitted. By contrast, the consumer

\begin{flushleft}\textsuperscript{120}A pyramid scheme is a scheme where new participants must provide a financial benefit to existing participants, and this is induced by the prospect that the new participants will obtain a financial benefit from introducing further new participants: ACL, s 45.\textsuperscript{121}\[2005] FCAFC 70, (2005) 143 FCR 345.\textsuperscript{122}\textit{Ibid}, [43].\end{flushleft}
guarantees are enlivened as soon as goods or services have been supplied and the end result in a particular respect falls short of what the consumer was entitled to expect. Fault or immoral conduct on the supplier’s part is not required. Nor are the consumer guarantees concerned with goods that are inherently unsafe. Those are dealt with by the product liability provisions in Part 3-5 of the ACL.

It might still be argued that the Australian people have an interest in Australian-based businesses maintaining the same high standard with regard to all the goods and services they supply, even if they are supplied to residents of other countries. The supply of sub-standard goods or services to overseas consumers may affect the reputation of Australia and Australian businesses. However, it must be borne in mind that the level of consumer protection influences (through insurance premiums) the price charged for goods and services. Australia, like many other countries, has chosen high consumer protection and accepted higher prices for goods and services in return.123 Other countries, in particular developing countries, may prefer lower prices and accept lower consumer protection in return. Each country should make that choice for its residents. This is reflected in Article 6 of the Rome I Regulation, which gives preference to the mandatory consumer protection rules of the country of the consumer’s habitual residence.

Secondly, while victims of a pyramid scheme will be left without remedy under the laws of the Australian jurisdictions if they cannot invoke section 44 (unless a common law tort could be utilised), consumers receiving sub-standard goods or services do have a remedy under the laws of the Australian jurisdictions even if they cannot

---

123 See Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [25.45].
invoke the consumer guarantees of the ACL. Where a business promises to deliver goods, the Sale of Goods Acts of the Australian states and territories imply conditions which largely mirror the consumer guarantees in sections 51-57 of the ACL and render the seller liable.\(^{124}\) Where a business undertakes to provide services, Australian common law largely mirrors the guarantees in sections 60-62 of the ACL by requiring the service provider to act with due care and skill,\(^{125}\) to provide services fit for purpose\(^{126}\) and to provide them within a reasonable time.\(^{127}\) While the range of remedies at common law is not as wide as under the ACL, the customer can still claim damages for loss suffered\(^{128}\) and may be able to terminate the contract with the service provider.\(^{129}\)

On balance, overseas consumers should not be able to invoke the consumer guarantee provisions of the ACL. Those provisions should be interpreted as requiring that the supply of the goods or services was part of activities pursued wholly in Australia or directed towards Australia.


\(^{125}\) Eg, *Astley v Austrust Ltd* [1999] HCA 6, (1999) 197 CLR 1, [47]-[48].

\(^{126}\) Eg, *Pindan Pty Ltd v Seattle Holdings Pty Ltd* [2016] WADC 97, [295]-[306].

\(^{127}\) Eg, *Oaktwig Pty Ltd v Glenhaven Property Holdings Pty Ltd* [2007] NSWSC 1533, [131].

\(^{128}\) Eg, *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG* [2008] QSC 141, [458], [471].

\(^{129}\) Eg, *Idameneo (No 3) Pty Ltd v Zahedpur* [2015] QSC 255, [65].
H. Conclusion

The shift from statutorily implied terms in the TPA to statutory consumer guarantees in the ACL has brought a number of changes, the detailed consequences of which have yet to be fully recognised. One important change is to the applicability of the provisions in Australian litigation with an international element. The applicability of Australian legislation implying particular terms into a contract naturally depends upon the law of an Australian jurisdiction being the proper law of the contract (at least if a choice-of-law clause is ignored) under the common law choice-of-law rules for contract. But the applicability of those rules is doubtful where legislation imposes consumer guarantees simply by virtue of an event (the supply of goods or services in particular circumstances) occurring.

The Full Federal Court in *Valve Corp* held that the common law choice-of-law rules for contract are not relevant for the applicability of the consumer guarantee provisions in cases with an international element. This is in line with the provisions’ purpose of protecting Australian consumers in their dealings with the suppliers of goods and services, including suppliers based overseas. This purpose would not be fully achieved if the common law choice-of-law rules for contract were relevant. Even if a choice-of-law clause in the contract were to be ignored, the requirement that the contract between the consumer and the supplier has its closest connection with an Australian jurisdiction would often shelter suppliers based overseas from an application of the consumer guarantees.
On the other hand, an application of the consumer guarantees in every case in which the ACL applies pursuant to its application provisions would not be consistent with comity, as it would render the consumer guarantees applicable to some supplies of goods that do not have a sufficient connection with Australia. The consumer guarantee provisions ought to be interpreted as being impliedly restricted to a supply of goods or services that was part of activities of the supplier directed towards Australian businesses or residents. This does not leave overseas consumers without remedy under the laws of the Australian jurisdictions, as they can still rely on the implied terms under the Sale of Goods Acts (where goods are supplied) or on Australian common law (where services are supplied).