

REDFERN LEGAL CENTRE LAWYERS

CONSUMER CLAIMS WITHIN NCAT

Paper presented by Stuart Westgarth 26 July 2018

Introduction

- 1 On 1 January 2014, the Civil and Administrative Tribunal of New South Wales came into existence by operation of s 7(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act). Under s 7(1) the Tribunal may be called “NCAT”.
- 2 NCAT took over the work and brought together the jurisdiction of 22 previous Tribunals or bodies creating New South Wales’ largest Tribunal. It comprises four Divisions and an internal Appeal Panel. The Tribunal is headed by a Supreme Court Judge (as required by s 13 of the Act) and is managed and coordinated by a Principal Registrar (s 4(1)).
- 3 NCAT’s four Divisions are:
 - The Administrative and Equal Opportunity Division. This Division primarily conducts administrative review of a wide range of government decisions, and resolves complaints referred by the Anti-Discrimination Board for alleged breaches of the *Anti-Discrimination Act 1977*.
 - The Guardianship Division, which makes decisions about and for people who have a decision making disability;
 - The Occupational Division, which primarily hears professional disciplinary matters about a range of professionals including legal practitioners and health practitioners, along with complaints about the election or conduct of local councilors; and
 - The Consumer and Commercial Division.

- 4 The Consumer and Commercial Division deals with the resolution of consumer and commercial disputes between citizens, between citizens and businesses and when the Government is providing goods or services between citizens and Government. This includes consumer claims and motor vehicle claims (which are also considered to be consumer claims). Some of the Consumer and Commercial Division's particular rules of practice and procedure are set out in Schedule 4 to the Act. The enabling legislation (that is to say the legislation which gives jurisdiction to NCAT to adjudicate with respect to particular classes of disputes) is extensive. It includes the jurisdiction contained in Part 6A of the *Fair Trading Act 1987* (the Fair Trading Act). Prior to 1 October 2015, the relevant enabling legislation for consumer claims was the *Consumer Claims Act 1998* (the CC Act).
- 5 The general provisions relating to practice and procedure in the Act are found in Part 4, ss 35 to 70, headed "Practice and Procedure".
- 6 The guiding principle that the Act and the procedural rules should be applied so as to facilitate the just, quick and cheap resolution of the real issues in the proceedings is set out in s 36. Other general principles concerning practice and procedure are contained in ss 36, 37 and 38 of the Act.
- 7 You should also be aware of the terms of ss 17(3) and 35 of the Act. Section 17(3) provides that the provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and the other provisions of this Act or the provisions of the procedural rules. Section 35 states that each of the provisions of this Part (Part 4 Practice and Procedure) is subject to enabling legislation and the procedural rules.
- 8 Thus, when dealing with practical questions relating to practice and procedure in the Tribunal, such as representation, costs, appeal rights or similar issues, it is essential to consider not only the Practice and Procedure Part of the Act in Part 4 but also:
 - (1) The relevant enabling legislation;

- (2) The relevant Division Schedule in the Act – in this case, Schedule 4;
and
- (3) The procedural rules,

all of which prevail over the terms of Part 4 to the extent of any inconsistency.

- 9 The Tribunal has also a Rules Committee which under sections 24 and 25 of the Act may make rules for the Tribunal. These are the Civil and Administrative Tribunal Rules 2014 (the Rules). The Act, the Rules and the Civil and Administrative Tribunal Regulation 2013 (the Regulation) are on the NCAT website: <http://www.ncat.nsw.gov.au/>. In addition, the Act and the Regulation can be found on the NSW Legislation website, <https://www.legislation.nsw.gov.au/#/>.
- 10 The Tribunal has published Procedural Directions which apply across all Divisions. Examples include NCAT Procedural Direction 3 Expert Evidence (http://www.ncat.nsw.gov.au/Documents/ncat_pd3_expert_witnesses.pdf) and NCAT Procedural Direction 2 which deals with summonses (http://www.ncat.nsw.gov.au/Documents/ncat_pd2_summonses.pdf)
- 11 In addition, the Tribunal has published Division-specific Procedural Guidelines. In the Consumer and Commercial Division there are procedural guidelines in respect of:
 - (1) Adjournments;
 - (2) Conciliation and hearing by the same Member;
 - (3) Confidentiality, privacy and publication;
 - (4) Costs;
 - (5) Home Building applications;

- (6) Online applications;
- (7) Representation;
- (8) Representatives - Guardian ad litem (GAL); and
- (9) Use of electronic evidence in Tribunal proceedings.

Consumer Claims

- 12 I now turn to a consideration of consumer claims. Consumer claims form an important part of our work. In the financial year ended 30 June 2017, approximately 5,100 consumer or “general” claims were lodged and determined, and about 1,600 motor vehicle claims.
- 13 The enabling legislation which empowers NCAT to determine consumer claims is found in Part 6A of the *Fair Trading Act 1987*. Section 79B of the Fair Trading Act provides that the objects of Part 6A are to provide for remedies for, and the straight forward resolution of, disputes concerning the supply of goods and services to consumers.

Definitions

- 14 There are a number of important definitions of which you should be aware. These include the following.
- 15 **Consumer Claim** - Section 79E contains a definition of “consumer claim”. A consumer claim means “a claim by a consumer, for one or more of the following remedies, that arises from a supply of goods or services by a supplier to the consumer (whether or not under a contract) or that arises under a contract that is collateral to a contract for the supply of goods or services:
- (a) the payment of a specified sum of money;
 - (b) the supply of specified services;

- (c) relief from payment of a specified sum of money; and
- (d) the delivery, return or replacement of specified goods or goods of a specified description”.

16 Section 79E(2) provides that:

“For the avoidance of doubt, a reference in this Part to a consumer claim includes a reference to a claim by a consumer against a supplier (for example, a manufacturer or wholesaler) who is not the direct supplier of goods or services to the consumer if the claim arises from or in connection with the supply of those goods or services by the direct supplier to the consumer.”

17 **Consumer** - Section 79D contains a number of definitions. The definition of consumer is:

“**consumer** means any of the following persons or bodies to whom or to which a supplier has supplied, or agreed to supply, goods or services (whether or not under a contract), or with whom or with which a supplier has entered into a contract that is collateral to a contract for the supply of goods or services:

- (a) a natural person,
- (b) a firm (within the meaning of the Partnership Act 1892),
- (c) a small proprietary company (within the meaning of the Corporations Act 2001 of the Commonwealth),
- (d) an owners corporation constituted under the Strata Schemes Management Act 2015,
- (e) a company that owns an interest in land and has a memorandum or articles of association conferring on each owner of shares in the company a right to occupy under a lease or licence a part or parts of a building erected on the land,
- (f) an incorporated association,
- (g) an unincorporated body whose members are associated for a common purpose,
- (h) a company limited by guarantee (other than a company limited both by shares and by guarantee).

18 **Goods, Supplier, Services** - Other important definitions are:

goods means any tangible thing that is or may be the subject of trade or commerce, but does not include money or an interest in land.

supplier means a person who, in the course of carrying on (or purporting to carry on) a business, supplies goods or services.

19 Services is defined in s 79F which provides:

(1) For the purposes of this Part, a reference to services is a reference to any of the following:

- (a) the performance of work (including work of a professional nature), whether with or without the supply of goods,
- (b) the provision of gas or electricity or the provision of any other form of energy,
- (c) the provision, or the making available for use, of facilities for amusement, entertainment, recreation or instruction,
- (d) the letting of premises for vacation or recreational purposes,
- (e) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction,
- (f) the provision of insurance cover,
- (g) the rights or benefits provided, granted or conferred under a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking,
- (h) the provision of credit,
- (i) any other rights (including rights in relation to, and interests in, property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce.

(2) However, a reference in this Part to services does not include a reference to any of the following:

- (a) the supply of goods or the performance of work under a contract of employment,
- (b) rights or benefits provided, granted or conferred under a service contract (within the meaning of the Retirement Villages Act 1999),
- (c) the provision of assurance cover in respect of a person's life.

20 Section 79H provides that:

For the purposes of this Part:

- (a) a person or body claiming to be a consumer is to be presumed to be a consumer until the contrary is proved, and
- (b) in any legal proceedings (including proceedings before the Tribunal), the onus of proving that a person or body claiming to be a consumer is not a consumer is on the party who seeks to establish that fact.

Jurisdiction

21 The basis for the Tribunal's jurisdiction is set out in ss 79I and 79J. They provide:

(1) 79I Consumer may apply to Tribunal (cf CC Act 1998, s 6)

Any consumer may apply to the Tribunal for determination of a consumer claim.

(2) 79J General statement of jurisdiction (cf CC Act 1998, s 7 (1))

The Tribunal has jurisdiction, except as otherwise provided by this Division, to hear and determine a consumer claim the subject of an application under this Division.

Limits on Jurisdiction

22 Then follows a number of sections which limit the Tribunal's jurisdiction. These are dealt with in the following paragraphs.

23 Section 79K provides:

- (1) The Tribunal has jurisdiction to hear and determine a consumer claim only if:
 - (a) the goods or services to which the claim relates were supplied in New South Wales, or
 - (b) a contract or other agreement to which the claim relates contemplated that the goods or services would be supplied in New South Wales (whether or not they were so supplied), or
 - (c) a contract or other agreement to which the claim relates was made in New South Wales (whether or not the goods or services were supplied in New South Wales).
- (2) The Tribunal has such jurisdiction whether or not:
 - (a) a contract or other agreement to which the claim relates confers jurisdiction on any other court or tribunal (whether in New South Wales or elsewhere), or
 - (b) the rules of private international law require a law other than the law of New South Wales to be applied to the hearing or determination of the claim.

24 Section 79L contains limitation periods. It provides:

79L Limitation periods(cf CC Act 1998, s 7 (4) and (4A))

- (1) The Tribunal does not have jurisdiction to hear and determine a consumer claim if any of the following apply:
 - (a) the cause of action giving rise to the claim first accrued more than 3 years before the date on which the claim is lodged,
 - (b) the goods or services to which the claim relates were supplied (or, if made in instalments, were last supplied) to the claimant more than 10 years before the date on which the claim is lodged.
- (2) Nothing in this section affects any period of limitation under the Limitation Act 1969.

25 Accordingly, some claims may not be time barred but the Tribunal may not be able to decide them. Those claims should be transferred to or continued in the relevant Court.

Orders

- 26 The orders which the Tribunal may make are set out in ss 79N, 79O, 79P, 79Q, 79R and 79S. Those sections provide:

79N Orders in favour of claimant (cf CC Act 1998, s 8 (1))

In determining a consumer claim wholly or partly in favour of a claimant, the Tribunal may, subject to this Division, make any one or more of the following orders that it considers appropriate:

- (a) an order that requires a respondent to pay to the claimant a specified amount of money,
- (b) an order that requires a respondent to perform specified work in order to rectify a defect in goods or services to which the claim relates,
- (c) an order that requires a respondent to supply to the claimant specified services other than work,
- (d) in the case of a claim for relief from payment of money—an order declaring that a specified amount of money is not due or owing by the claimant to a respondent,
- (e) an order that requires a respondent to deliver to the claimant goods of a specified description,
- (f) an order that requires a respondent to return to the claimant specified goods which are in the possession or under the control of that respondent, whether the property in the goods has passed or not,
- (g) an order that requires a respondent to replace goods to which the claim relates,
- (h) an order that requires a respondent to refund all or part of the purchase price of specified goods that are in the possession (or under the control) of the claimant and the claimant to return all or part of those goods to the respondent (whether the property in the goods has passed or not).

79O Orders in favour of respondent (cf CC Act 1998, s 8 (2))

In determining a consumer claim wholly or partly in favour of a respondent to the claim, the Tribunal may make any one or more of the following orders that it considers appropriate:

- (a) an order dismissing the claim or a part of the claim,
- (b) an order that requires the claimant to pay to the respondent a specified amount of money,
- (c) an order that requires the claimant to return to the respondent specified goods which are in the possession or under the control of the claimant, whether the property in the goods has passed or not.

79P Orders where more than one respondent (cf CC Act 1998, s 8 (2A))

Without limiting section 79N or 79O, in determining a consumer claim in which there is more than one respondent, the Tribunal may make any one or more of the following orders that it considers appropriate:

- (a) an order that requires a respondent to pay to another respondent a specified amount of money,
- (b) an order that requires a respondent to supply to another respondent specified services other than work,
- (c) an order that requires a respondent to deliver to another respondent goods of a specified description,
- (d) an order that requires a respondent (the first respondent) to return to another respondent specified goods that are in the possession or

under the control of the first respondent, whether the property in the goods has passed or not.

79Q Other matters relating to orders under section 79N, 79O or 79P (cf CC Act 1998, s 8 (3)–(5))

(1) In making an order under section 79N, 79O or 79P requiring a party to a consumer claim to pay a specified amount of money or to take any other specified action, the Tribunal must, unless it has good reason to the contrary, specify a period within which the money must be paid or the action must be taken.

(2) The Tribunal may not make any of the orders referred to in this section unless the claimant's case has been presented to the Tribunal (whether or not in person) following the making of the relevant application under section 79I.

(3) Nothing in subsection (2) prevents the Tribunal from dismissing or adjourning proceedings under section 55 of the Civil and Administrative Tribunal Act 2013.

Monetary Limits

27 Section 79S imposes a monetary limit on the Tribunal's jurisdiction. It provides:

79S Monetary limit on Tribunal's jurisdiction to make orders (cf CC Act 1998, s 14 and CC Reg 2014, cl 4)

(1) The Tribunal has no jurisdiction to make, in respect of a particular consumer claim, an order or orders in favour of the claimant (or, where there are two or more claimants, in favour of those claimants) if the relevant total under or because of the order or orders would exceed the prescribed amount.

(2) For the purposes of subsection (1), the relevant total is the total of:

- (a) the amount or amounts (if any) of money to be paid, and
- (b) the value or values (if any) of the work to be performed, or the services to be supplied, and
- (c) the amount or amounts (if any) of money to be declared not to be due or owing, and
- (d) the value or values of goods (if any) to be delivered or replaced.

(3) The Tribunal has no jurisdiction to make in respect of a particular consumer claim an order or orders referred to in section 79O if the amount or the total of the amounts (if any) to be paid under or because of the order or orders would exceed the prescribed amount.

(4) The Tribunal has no jurisdiction to make in respect of a particular consumer claim an order or orders under section 79P if the relevant total under or because of the order or orders would exceed the prescribed amount.

(5) For the purposes of subsection (4), the relevant total is the total of:

- (a) the amount or amounts (if any) of money to be paid, and
- (b) the value or values (if any) of the services to be supplied, and
- (c) the value or values of goods (if any) to be delivered.

(6) Subsections (1), (3) and (4) do not apply in relation to a consumer claim:

- (a) arising from the supply of a new motor vehicle that is used substantially for private purposes within the meaning of the Motor Vehicles Taxation Act 1988, or
- (b) relating to commission fees charged by agents licensed under the Property, Stock and Business Agents Act 2002.

(7) In this section:

new motor vehicle means a motor vehicle that is not a second-hand motor vehicle within the meaning of the Motor Dealers and Repairers Act 2013.

prescribed amount means \$40,000 or such other amount as is prescribed for the purposes of this section.

- 28 The prescribed amount is currently \$40,000.00 but there is no prescribed amount where the dispute concerns a new motor vehicle.

Additional Considerations

- 29 Finally, it is necessary to mention s 79U which provides:

79U Matters to be considered by Tribunal when making orders (cf CC Act 1998, s 13)

(1) When making any orders under this Division, the Tribunal must be satisfied that the orders will be fair and equitable to all the parties to the claim.

(2) Without limiting subsection (1), when determining whether or not to make an order under this Division, the Tribunal is to take the following factors into consideration if they are material to the particular circumstances of the case:

(a) whether or not there was any material inequality in bargaining power between the parties to the claim,

(b) whether or not any party to the claim was not reasonably able to protect the party's interest because of the age or physical or mental capacity of that party,

(c) whether or not any person who represented any of the parties to the claim was not reasonably able to protect the interests of the party represented because of the age or physical or mental capacity of that person,

(d) the relative economic circumstances, educational background and literacy of the parties to the claim and of any person who represented any of those parties,

(e) whether or not and when independent legal or other expert advice was obtained by the claimant,

(f) whether any undue influence, unfair pressure or unfair tactic was exerted on or used against the claimant:

(i) by any other party to the claim, or

(ii) by any person acting or appearing or purporting to act on behalf of any other party to the claim, or

(iii) by any person to the knowledge of any other party to the claim or of any person acting or appearing or purporting to act on behalf of any other party to the claim,

(g) the conduct of the parties to the claim in relation to similar transactions to which any of them has been a party,

(h) where the subject of the claim is a contract for the supply of goods or services or a contract collateral to such a contract:

(i) whether or not before or at the time when the contract was made its provisions were the subject of negotiation, and

- (ii) whether or not it was reasonably practicable for the claimant to negotiate for the alteration of the contract or to reject any of its provisions, and
 - (iii) whether or not any provisions of the contract impose conditions that are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the claim, and
 - (iv) if the contract is wholly or partly in writing, the physical form of the contract and the intelligibility of the language in which it is expressed, and
 - (v) the extent (if any) to which the provisions of the contract and their legal effect were accurately explained by any person to the claimant and whether or not the claimant understood the provisions and their effect, and
 - (vi) the commercial or other setting, purpose and effect of the contract.
- (3) Without limiting subsection (1), when determining whether or not to make an order or orders under section 79N, 79O or 79P, it is appropriate for the Tribunal to consider (if relevant to the particular circumstances of the case):
- (a) any code of practice prescribed under this Act, and
 - (b) if the Secretary has brought to the attention of the Tribunal any other code of practice (whether or not prescribed by or under any other Act)—that code of practice.

Motor Vehicle Claims

- 30 The Tribunal manages a list concerning motor vehicle claims which is separate from the Tribunal’s consumer claims list. The reason for that distinction is that a claim with respect to a motor vehicle is capable of being both a consumer claim pursuant to the Fair Trading Act, as well as a claim relying upon the *Motor Dealers and Repairers Act 2013* (MDR Act). That Act provides for certain statutory warranties. They are set out in ss 68 and 69 which provides:

68 Dealer guarantee for defective vehicles

(1) Dealer guarantee

A motor dealer must, at the motor dealer’s own expense, repair or make good a motor vehicle sold by the motor dealer, if it is a defective vehicle, so as to place the motor vehicle in a reasonable condition having regard to its age.

Note. Any repairs must be carried out by the holder of a tradesperson’s certificate (see section 16).

- (2) The following persons have the benefit of the dealer guarantee:
- (a) the purchaser of the motor vehicle from the motor dealer,
 - (b) any subsequent owner of the motor vehicle, but only if the motor vehicle was not a second-hand motor vehicle when sold by the motor dealer liable for the dealer guarantee.

(3) A motor dealer ceases to be liable for the dealer guarantee for a motor vehicle if the motor vehicle is at any time acquired by the motor dealer or another motor dealer.

(4) The dealer guarantee does not apply to a motor vehicle if no limitation period is specified for the motor vehicle under this Division.

(5) Vehicle must be defective before end of limitation period

The dealer guarantee applies only to a motor vehicle that is or becomes a defective vehicle before the end of the limitation period for the motor vehicle (whether or not it is known before the end of the limitation period that the motor vehicle is a defective vehicle).

(6) Defects that become apparent after limitation period

A motor dealer is not required to comply with the dealer guarantee if the condition or defect that causes a motor vehicle to be a defective vehicle becomes apparent after the limitation period and the owner of the motor vehicle fails to report the condition or defect to the motor dealer within a reasonable period of becoming aware of the condition or defect.

69 Limitation periods

(1) Calculation of limitation period generally

The limitation period for a motor vehicle ends when either the distance limit or time limit specified in this section is first reached for the motor vehicle.

(2) The period of the time limit for a motor vehicle commences when the motor dealer sells the motor vehicle. If the purchaser takes possession of a new motor vehicle before the sale by the motor dealer is completed, the sale is taken to have occurred on the day the purchaser first takes possession.

(3) New vehicle driven less than 15,000 km before sale (not motor cycle)

For a motor vehicle (not being a motor cycle or a second-hand motor vehicle) driven less than 15,000 km when sold by a motor dealer, the distance limit is 20,000 km after manufacture and the time limit is 12 months less 1 month for each 2,000 km that the vehicle was driven before it was sold by the motor dealer.

(4) New vehicle driven for more than 15,000 km before sale (not motor cycle)

For a motor vehicle (not being a motor cycle or a second-hand motor vehicle) driven 15,000 km or more when sold by a motor dealer, the distance limit is 5,000 km after sale and the time limit is 3 months.

(5) Second-hand vehicle driven for not more than 160,000 km before sale (not motor cycle)

For a second-hand motor vehicle (not being a motor cycle) driven not more than 160,000 km, and not more than 10 years old, when sold by a motor dealer, the distance limit is 5,000 km after sale and the time limit is 3 months.

(6) New motor cycle driven less than 7,000 km before sale

For a motor cycle (not being a second-hand motor cycle) driven less than 7,000 km when sold by a motor dealer, the distance limit is 10,000 km after manufacture and the time limit is 6 months less 1 month for each 2,000 km that the vehicle was driven before it was sold by the motor dealer.

(7) New motor cycle driven more than 7,000 km before sale

For a motor cycle (not being a second-hand motor cycle) driven more than 7,000 km when sold by a motor dealer, the distance limit is 3,000 km after sale and the time limit is 3 months.

(8) Unregistrable new motor cycle

For a motor cycle (not being a second-hand motor cycle) that is of a design that makes it incapable of being registered in this State, the distance limit is 5,000 km after sale and the time limit is 3 months.

(9) Second-hand motor cycle driven for not more than 30,000 km before sale

For a second-hand motor cycle (other than a motor cycle of a design that makes it incapable of being registered in this State) driven not more than 30,000 km, and not more than 5 years old, when sold by a motor dealer, the distance limit is 3,000 km after sale and the time limit is 3 months.

(10) Other categories

The regulations may prescribe additional categories of limitation periods for specified motor vehicles for the purposes of this section.

31 Sections 70 to 76 deal with various aspects and limits to the dealers' guarantees. These are not dealt with in this paper.

32 Finally, note s 77 which provides:

77 Effect on Australian Consumer Law remedies

A person who has enforced the dealer guarantee under this Division in respect of the condition of or a defect in a motor vehicle is not, if the dealer guarantee is fully complied with, entitled to take action against the motor dealer under the Australian Consumer Law (NSW) in respect of any aspect of the motor vehicle that is made good or repaired under this Division.

Australian Consumer Law

33 Section 28 of the Fair Trading Act states that the Australian Consumer Law text, as in force from time to time applies as a law of New South Wales and maybe referred to as the "Australian Consumer Law (NSW)". For convenience I will refer to it as simply the Australian Consumer Law, or ACL.

34 Section 27 of the Fair Trading Act states that the Australian Consumer Law text consists of Schedule 2 to the *Competition and Consumer Law Act 2010* (Cth) and the regulations under s 139G of that Act. Accordingly, when considering whether the Australian Consumer Law is relevant to a Consumer Claim, it is necessary to make reference to the Australian Consumer Law which is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) and regulations under s 139G.

35 An Appeal Panel in *Lam v Steve Jarvin Motors Pty Ltd* [2016] NSWCATAP 186 dealt with the interaction of the ACL with the Tribunal's powers as set out in the Fair Trading Act. The essential principles referred to in that case may be summarised as follows:

- (1) The ACL sets out consumer guarantees in Division 1 of Part 3–2, ss 51 – 68 of the ACL. Those guarantees relate to title, acceptable quality, fitness for any disclosed purpose, due care and skill etc. The ACL also sets out the remedies for failure to comply with the guarantees in Part 5–4. ss 259 - 270 of the ACL;
- (2) In order to obtain the benefit of a consumer guarantee, it is necessary for the consumer to establish that he or she falls within the definition of “consumer” in s 3 of the ACL, that (in the case of the supply of goods) the supply occurred otherwise than by auction of goods to the consumer in trade or commerce and that the defects were not drawn to the consumer's attention;
- (3) It is necessary for the defects to have the consequence that the goods were not or are not of “acceptable quality” as explained in s 54(2) and (3) of the ACL;
- (4) If a consumer establishes each of the elements required to be satisfied to obtain the benefit of a consumer guarantee, the remedies to which the consumer may be entitled are found in Part 5–4 of the ACL;
- (5) Section 259 establishes that a consumer can, where an applicable consumer guarantee has not been complied with, require the supplier to remedy the failure, recover by action certain amounts in various circumstances or reject the goods in certain circumstances. The section is in the following terms:

259 Action against suppliers of goods

- (1) A consumer may take action under this section if:
 - (a) a person (the supplier) supplies, in trade or commerce, goods to the consumer; and

(b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is not complied with.

(2) If the failure to comply with the guarantee can be remedied and is not a major failure:

(a) the consumer may require the supplier to remedy the failure within a reasonable time; or

(b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time--the consumer may:

(i) 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; or

(ii) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.

(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

(a) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection; or

(b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(4) The consumer may, by action against the supplier, recover damages 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.

(5) Subsection (4) does not apply 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.

(6) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

(7) The consumer may take action under this section whether or not the goods are in their original packaging.

(6) Section 259 refers to a failure to comply with a consumer guarantee in two situations. One is where the failure can be remedied and is not a major failure. The second is where the failure cannot be remedied or is a major failure. Whether or not the failure is a "major failure" is one of the most important circumstances which determines what options a consumer has under s 259. Failure to comply with a consumer guarantee may be a major failure for at least five different reasons as explained in s 260 (a), (b), (c), (d) and (e) which is provides as follows:

260 When a failure to comply with a guarantee is a major failure

A failure to comply with a guarantee referred to in section 259(1)(b) that applies to a supply of goods is a major failure if:

- (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.
- (7) Section 261 specifies the various ways in which a supplier may remedy a failure in response to a requirement made by a consumer under s 259(2)(a). These include repairing the goods, replacing the goods with goods of an identical type or refunding the money paid for the goods and an amount equal to any other consideration provided
- (8) Section 263 deals with the consequences of rejecting goods;
- (9) By reason of s 263(4), a consumer has a statutory cause of action in tort for breach of a statutory duty entitling the consumer to recover damages because of the contravention by the supplier of the duty to refund any money paid or provide replacement goods;
- (10) The Tribunal thus has jurisdiction to make an order for the payment of a specified amount of money being the amount of the refund payable under s 263(4)(a) and an order that requires a supplier to deliver to the consumer goods of a specified description, namely goods of the same type, and of a similar value to the rejected goods as described in s 263(4)(b);

- (11) The ACL does not limit or prohibit a consumer from bringing a consumer claim based upon breach of contract or in negligence or on the basis of misleading or deceptive conduct against a supplier if defective goods are supplied by the supplier to the consumer; and
- (12) Similar remedies apply in the case of the supply of services: see ss 267 to 270.

36 The Federal Government publishes a number of very helpful guides or introductions to the ACL. I recommend, in particular Consumers and the ACL (<http://consumerlaw.gov.au/consumers-and-the-acl/>). This link takes you to a number of ACL “guides”, including the Consumer Guarantee Guides (https://cdn.tspace.gov.au/uploads/sites/60/2016/05/0553FT_ACL-guides_Guarantees_web.pdf). An Overview of the NCAT Process – from application to hearing

An Overview of the NCAT Process – from application to hearing

- 37 An applicant is required to complete the Tribunal’s application form. That form contains a requirement to identify the respondent (and the respondent’s address) and to set out the orders which the applicant seeks. There is also a requirement to set out the facts giving rise to the claim. Once the application has been lodged with the Tribunal, the Tribunal arranges for a copy to be served upon the respondent and for the application to be listed before a Member at a hearing which is called a “Conciliation and Hearing (Group List)”.
- 38 At the Group List hearing, the Tribunal often will usually have a conciliator present. If both parties are in attendance, the Tribunal will encourage the parties to engage in a discussion with the assistance of a conciliator with a view to seeing if the parties can reach a settlement. If a settlement is reached, it is usually reduced to writing and signed by both parties. The parties then return to the hearing room and ask the Member to make consent orders consistent with the terms of the settlement. A Member will not make a consent order if one or more of the orders is an order for which the Tribunal has no power to make. For example, if the parties agreed that the respondent would pay to the applicant an amount in excess of \$40,000.00, the Tribunal would

not make an order to that effect. However, where the parties agree upon terms which go beyond the Tribunal's order making powers, the Tribunal will note the agreement between the parties.

- 39 On occasion, the applicants will agree to waive their rights to seek a sum greater than the Tribunal's jurisdiction.
- 40 If the application is not settled, directions are made for the filing and serving of evidence and submissions by the applicant, followed then by the respondent, and the applicant in reply.
- 41 The periods for each of the above steps are typically three weeks each (less for evidence and submissions in reply), meaning that the timetable will run for eight to nine weeks. The Tribunal will then set the matter down for a hearing.
- 42 If the position at the Group List hearing is that only the applicant is present, the Tribunal will, if time permits (and often there is insufficient time), invite the applicant to put its case on an ex parte basis. Accordingly, the applicant should be ready to proceed and take advantage of that situation should it arise. The Member will need to give consideration to whether it is fair to the respondent to proceed. Having said that, parties have the right to ask the Tribunal to set aside decisions made in their absence if the decision was made in the absence of a party and the Tribunal is satisfied that the party's absence has resulted in the party's case not being adequately put to the Tribunal (see reg 9). Such applications must be made within 7 days of the decision.
- 43 When a contested matter is listed for a subsequent hearing, the parties will be obliged to present their cases in the usual way. That is, the applicant's case proceeds first, followed by the defendant's case followed by any evidence in reply followed by submissions. Witnesses are sworn in. The evidence is provided beforehand in written form and therefore there is little or no oral evidence in chief. The witnesses are required to be present for the purposes of any cross examination.

How to best advise an applicant to frame the law in their application?

44 Tribunal Members cannot give advice to the parties. However, they often ask questions and raise issues for the parties to consider. Many consumer claims can be articulated by reference to the terms of the agreement entered into between the parties and, to the extent necessary, the provisions of the ACL and/or the MDR Act. The applicant's case can often be framed in terms of a breach of contract and/or a breach of a consumer guarantee as set out in the ACL. These commonly are:

- (1) The guarantee as to acceptable quality (s 54);
- (2) The guarantee as to fitness for any disclosed purpose (s 55);
- (3) The guarantee relating to the supply of goods by description (s 56);
- (4) The guarantee relating to the supply of goods by sample or demonstration model (s 57); and
- (5) The guarantee as to repairs and spare parts (s 58).

45 There are similar guarantees relating to the supply of services:

- (1) s 60 deals with the guarantees as to due care and skill;
- (2) s 61 deals with the guarantee as to fitness for any particular purpose; and
- (3) s 62 deals with the guarantee as to a reasonable time for supply.

46 An applicant relying upon the ACL will need to state whether they assert a major failure or not, and the remedy they seek.

How specific does the applicant need to be when asking for certain orders at the application stage?

- 47 It is necessary for the applicant to be specific as to the orders being sought. Commonly, an applicant seeks orders for compensation or a return of money paid.

An understanding of the standard of evidence expected by the Tribunal and what admissible evidence applicants can gather if they have no money to pay for expert reports. How will that evidence be weighed?

- 48 The Tribunal does not apply the rules of evidence but must determine disputes according to law. A feature of that obligation is to require applicants to prove their case to a standard which is known generally as the “civil standard”. This means the Tribunal must be satisfied on the balance of probabilities that an alleged event or other accusation has occurred. The Appeal Panel recently said in *Alliance Motor Auctions Pty Ltd v Saman* [2018] NSWCATAP 137 at [18] that:

A court or tribunal is informed and persuaded only by the presentation of evidence. Evidence is material which tends to persuade the court or tribunal of the truth or probability of the facts being alleged. Evidence may be photograph[ic], documentary or testimonial. But it will only succeed in persuading the tribunal if it appears as being truthful, reliable and cogent. In civil cases the standard of proof depends on the balance (or preponderance) of probabilities. This simply means that a party must prove that their case is more likely than not to be true. If the scales tip in favour of the party, however slight, they have proved their case. But if the probabilities are equal, they have failed to prove their case. ...

- 49 As to expert evidence, it is beneficial to have expert evidence supporting allegations of defects or justifying the amount being claimed. This may be a tradesman’s report or quotation. In *Khan v Kang* [2014] NSWCATAP 48, the Appeal Panel said at [50] the following:

A quotation from a supplier willing to rectify defects or complete incomplete work can, depending on the circumstances and the nature and content of the quotation, constitute evidence of the defects or incomplete work and of the amount required to remedy the defective work or complete any incomplete work. For example, if the person providing the quotation was suitably qualified or experienced, inspected the work, identified defects or incomplete work on that inspection, recorded his or her observations in the quotation and gave a price to rectify or complete the work, it is difficult to understand why that quotation would not provide evidence in support of a claim for defective or incomplete work. The weight to be given to the evidence would, of course,

depend upon many factors. Nonetheless, it would be wrong to conclude that simply because an applicant relied only upon a quotation or quotations for the rectification or completion of work that there was no evidence to support the claim that the work was defective or incomplete.

50 In par [52] of the above decision, the Appeal Panel said:

Even where a quotation is based upon assumptions as to defective or incomplete work and not the observations of the person giving the quotation, it still may amount to evidence of an estimate of the cost of rectifying or completing the work and be relevant for that more limited purpose. Whether or not that evidence should be accepted would be a matter for the Tribunal to assess in all the circumstances of the case.

51 Invariably, the Tribunal does not reject the evidence of experts because they have not complied with the usual expert's code of conduct. In this respect, NCAT Procedural Direction 3 Expert Evidence does not apply to consumer and motor vehicle claims, unless otherwise directed by the Tribunal.

52 Rather, the Tribunal's approach is to consider what weight should be given to an expert's report having regard to the usual relevant factors. These include the independence of the expert, and the nature and extent of the reasons provided by the expert for his or her opinion.

Can a successful applicant ask for the costs of an expert report to be paid by the respondent? If so, would that order be made in practice?

53 The general rule is that the Tribunal does not make orders for costs and each party should pay its own costs: see s 60 of the NCAT Act. However, s 60 goes on to say that the Tribunal may award costs if it is satisfied that there are special circumstances warranting an award of costs. Section 60(3) says that in determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the factors set out in paragraphs (a) to (g) of s 60(3). Unless a respondent engages in conduct which has unnecessarily disadvantaged the applicant or defended a case unreasonably, it is very unlikely that an applicant will be awarded costs.

54 However, in some cases r 38 is applicable. That rule provides that the Tribunal may award costs even in the absence of special circumstances if the amount claimed or in dispute is more than \$30,000.00. Accordingly, for large

consumer claims in excess of \$30,000.00 there is the possibility of costs being awarded even in the absence of special circumstances. Indeed costs usually follow the event.

- 55 I note that, broadly speaking, costs means the costs of legal representation and advice, it does not include a litigant's time away from work or travel costs. Costs include the costs of obtaining an expert's report.

What orders can the Tribunal make if the applicant is successful?

- 56 The nature and extent of the range of orders have been set out earlier in this paper. Orders typically made in consumer claims involve either an order for the repair of goods or orders involving a refund to the applicant coupled with an order that the goods be made available for the respondent to collect.

What happens if the respondent does not attend the Tribunal?

- 57 The Tribunal's obligation is to ensure that the proceedings between the parties comply with the principles of procedural fairness. If a respondent does not attend and the Tribunal is satisfied that the respondent has had notice of the hearing, and is satisfied that there is no good reason for the absence of the respondent, then the Tribunal may hear and determine the matter in the absence of the respondent. This is specifically provided for in r 35 of the Rules. This provides that the Tribunal may proceed to hear a matter in the absence of a party if the Tribunal is satisfied that the notice of hearing was duly served on the party, or the Tribunal being satisfied that service of notice of the hearing on the party has been duly attempted, considers that justice requires that the matter be dealt with in the absence of the party.

Any common mistakes made by self-represented litigants?

- 58 Self-represented litigants vary in their presentation skills and the Tribunal Member is under an obligation to ensure that parties understand the nature of the proceedings (see s 38(5)(a) of the NCAT Act). The only practical advice I can give is to recommend that parties prepare a folder of their evidence with each page numbered (preferably not in plastic sleeves!). A further piece of advice would be for parties to consider before they arrive, whether they are

willing to resolve their dispute by negotiation. The Tribunal encourages parties to attempt to settle their dispute by negotiation and the Tribunal mostly offers conciliators to assist parties in the conduct of the conversation that they have between them. Applicants are at a disadvantage if they have not considered how far they might compromise before they get to the Tribunal, or are unwilling to negotiate without the input of an absent partner or friend who is unavailable to be contacted.

- 59 Some applicants have little or no understanding of procedural fairness. For example, an applicant may forget to serve evidence on the respondent or seek to rely on documents tendered at the hearing even though they were not lodged beforehand or a copy served on the respondent. That conduct puts the Tribunal in to the position of considering whether the respondent has been unfairly disadvantaged and therefore whether the late documents should be rejected.

Other practical tips to self-represented litigants:

- 60 This is a very difficult matter to respond to because people vary so much in their knowledge and understanding of their case, the relevant law and in their ability to articulate or present their case. The only helpful tip applicable to all self-represented litigants is to be prepared to conciliate and remember that although the law surrounding consumer claims is intended to protect consumers, at the same time it provides defences to suppliers.
- 61 I would strongly emphasise the need to comply with the directions of the Tribunal in the preparation of evidence. Quite apart from helping the Tribunal, it helps the litigant who is likely to be flustered and nervous on the day.
- 62 I would also recommend that the parties, in advance of the hearing, consider whether they are going to ask the other party any questions and for what purpose.