

# Retirement Village Contracts and the Consumer Protection Act

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# The beginning

- Contract is king
- It is the starting point
- Contract exists from all forms of communications
- What you say and promise counts and matters
- Conduct is contract
- Consumer Law is about impact of your words and conduct on the relationship you have entered into

# General scope of provisions – The Australian Consumer Law

- Misleading and deceptive conduct - s18
- False and misleading representations – s29
- Unconscionable conduct – s20-21
- Unfair contract terms – Part 2.3
- Wrongly accepting payment for services – s36

## s18 Misleading or deceptive conduct

- *Person must not in trade or commerce engage in **conduct** that is misleading or deceptive or is likely to mislead or deceive.*
- Is issue of conduct
- Objective test
- Ordinary meaning

## s18 Misleading or deceptive conduct

- **Arises when:** A resident acts on an error, caused by the operator's conduct, and suffers loss.
- **Purpose:** to create a norm of business conduct
- **Commonly used:** a general 'catch-all' in claims.
- **Example:** *Murphy v Overton Investments Pty Ltd*  
216 CLR 388

## s29 False or misleading representations

- **Arises when:** A resident acts on an error, caused by the operator's representations, and they suffer loss. Specific types of conduct
- **Overlaps with:** misleading and deceptive conduct.
- **Examples:**
  - Advertising “AAA-standard” cleaning, which is in fact carried out irregularly by an untrained employee
  - Advertising or promoting a service or feature that a resident requires but is not provided

## ss20-21 Unconscionable Conduct

- *s20 - Person must not in trade or commerce engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.*
- *s21- Person must not in connection with supply of goods or services to a person or the acquisition from a person engage in conduct that is, in all the circumstances, unconscionable.*
- Section 21 broader. Court must not have regard to circumstances not reasonably foreseeable, can have regard to prior circumstances.

# ss20-21 Unconscionable Conduct

- **Elements:**

- a person takes undue advantage of another person
- that other person has a special disadvantage
- as a result, that other person cannot conserve their own interests

- **Examples:**

- Using high-pressure sales tactics
- Discouraging a resident from seeking legal advice – is prohibited under Act



## Pt. 2.3 Unfair contract terms

- *Term of **consumer contract** void if:*
  - ***Unfair and***
  - *Is standard form contract.*
- *Contract continues if capable of working without void term.*
- *Consumer contract means:*
  - *Supply of goods or services*
  - *Sale or grant of interest in land*  
*to an individual for personal, domestic use.*

## Pt. 2.3 Unfair contract terms

- Section 24 – meaning of unfair
  - *If it would cause significant imbalance of rights;*
  - *Not reasonably necessary to protect legitimate interests of party advantaged by term*
  - *Would cause detriment to party is applied*
- *Court must take into account following :*
  - *Term is **transparent** – plain language, legible, presented clearly, available to either party*
  - *Contract as whole*
- *Presumption is against being reasonably necessary.*

## Pt. 2.3 Unfair contract terms

- **Elements:**

- Significant imbalance in rights and obligations
- Not reasonably necessary to protect legitimate interests
- Detriment.

- **Example:**

- An operator can unilaterally vary the total lease sum or DMF
- The resident can choose to terminate, but must pay a substantial penalty.

## S36 Wrongly accepting payment for services

- **Elements:** The operator accepts payment for a service when that operator:
  - intends to not supply the service, or supply a materially different service; or
  - is or should be aware that it cannot provide the service being paid for.
- **Exception:** The operator has exercised due diligence, but cannot provide the services due to circumstances outside of its control – Act allows for variations to services if no recurrent charges to fund.

# Consequences and Financial implications

- Penalties/fines
- Dispute resolution
- Legal costs
- Damages (*Murphy v Overton*)
- Inability to enforce terms
  - Term is void (unfair contract terms)
  - Injunction
  - Estoppel

**But: The ACL is typically used as a catch all, not a cure.**

# Overview

- Consumer protection law not a substitute to breach of contract or breach of Act
- Can operate in tandem
- Catch all not a cure.
- One situation could apply to different heads of claim eg advertising a service that is never provided or making a representation as to cost that is not honoured
- Turns on what operator says/does – management of expectations and delivering ‘the deal’.

# Red flags

- Penalty clause – over charging expenses, costs without foundation
- Unilateral rights not balanced by proportionate need of operator to protect business interest.
- Advertising in resolute terms what may change in the future – the ‘escape statement’
- Wide discretionary power not balanced by proportionate need of operator to protect business interest.

# Questions?

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