

CONSUMER GUARANTEES AND THE SUPPLY OF CHILD CARE SERVICES

A contract for child care services may be one of the most important contracts parents ever enter given the precious subject matter. However, the terms of such contracts are often given only a cursory glance by parents. Fortunately, like with most 'mums and dads services' supplied in Australia, under the Australian Consumer Law (**ACL**)¹, a child care centre charging parents a fee for its child care services, even if it is a not-for-profit incorporated association set up for the public benefit, guarantees their child care services are:

- provided with due care and skill ² (This means they must use an acceptable level of skill or technical knowledge when providing the childcare services and take all necessary care to avoid loss or damage when providing the services); and
- fit for purpose ³ (**the Consumer Guarantees**).

A child care centre cannot contract out of its obligations under the consumer guarantees. 'A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying' its liability for a failure to comply with a consumer guarantee.⁴

Child care centres should ensure that they do not mislead consumers in relation to the Consumer Guarantees. Such misleading conduct may come in two forms. Firstly, in the form of a void term contained in a contract that represents to parents that the consumer guarantees are excluded and or its rights and remedies are limited. Secondly, where the child care centre seeks to rely on the void term and denies or attempts to limit its liability on the basis of such term. The child care centre may be guilty of the offence of making a false or misleading representation about goods or services namely making a false or misleading representation concerning the exclusion of a consumer guarantee and the available rights and remedies to the parent.⁵ This offence carries a fine of up to \$1,100,000 for a body corporate and \$220,000 for a non-body corporate.⁶ Any child care centre with any concerns based on this information should instruct a solicitor to conduct a review of their contract template.

Important Notice

This publication does not constitute legal advice. Your access of this publication does not constitute a retainer with Phillip Gray Barrister to perform legal work or provide any advice. You should seek legal advice for any legal issues raised in your own affairs.

¹ Child care centres in Australia are often companies registered under the *Corporations Act 2001* or not-for-profit incorporated associations under the various State and Territory statutes. In such cases there will be some doubt as to whether the ACL (Cth) or an ACL (Applications Acts) applies depending on whether or not the corporation is a 'trading corporation'. Given the application of the 'activity test' in cases such as *Bankstown Handicapped Children's Centre Association Inc v Hillman* [2010] FCAFC 11 and the Australian Competition & Consumer Commission's view of a trading corporation for the applicability of the CCA to the human services sector (*ACCC: Supplementary submission to the Competition Policy Review: Further Matters*, 15 August 2014 at page 4), it is more likely than not that the ACL (Cth) applies and that the ACCC will be the enforcement agency rather than the respective state consumer affairs body. In any event, Schedule 2 of the *Competition and Consumer Act 2010* applies one way or the other.

² **Section 60 of the ACL - Guarantee as to due care and skill**

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

The definition of consumer in section 3(3) of Schedule 2 of the *Competition and Consumer Act 2010* provides:

A person is taken to have acquired particular services as a consumer if, and only if:

(a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:

(i) \$40,000; or

(ii) if a greater amount is prescribed for the purposes of subsection (1)(a)--that greater amount; or

(b) the services were of a kind ordinarily* acquired for personal, domestic or household use or consumption.

*The word 'ordinarily' means 'commonly' or 'regularly', not 'principally', 'exclusively' or 'predominantly'. The test is an objective one based on the essential character of the services supplied: *Bunnings Group Ltd v Laminex Group Ltd* [2006] FCA 682. Parents of children in childcare are consumers for the purposes of the ACL guarantees.

The definition of 'services' in section 2 of Schedule 2 of the *Competition and Consumer Act 2010* includes 'any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce.' The supply of child care services by a day care centre is the supply of services within the meaning under the ACL.

The definition of trade and commerce in section 2 of the ACL includes any business 'whether or not carried on for a profit.' The supply of child care services for a fee is a supply in trade or commerce.

³ **Section 61 of the ACL - Guarantees as to fitness for a particular purpose etc.**

(1) If:

(a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

⁴ Section 64 of the ACL. Note that the term must expressly exclude, restrict or modify the application of a consumer guarantee or is inconsistent with a guarantee. Also note there are some exceptions contained in subsection 64A(2), however such exceptions only apply to services which are not 'services of a kind ordinarily acquired for personal, domestic or household use or consumption'.

⁵ Paragraph (m) of subsection 151(1) of the ACL.

⁶ Subsection 151(1) of the ACL.