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**Case number 2025/00154224**

Nathan Organ  
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## ORDER

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Case title Nathan Organ v Mobile Experts Pty Limited trading as Mobile Experts

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On 29 September 2025 the following orders (and/or directions) were made:

1 The Tribunal makes the following orders:

- (1) On or before 13 October 2025 the applicant is to return the Samsung Galaxy S23 Ultra phone and accessory to the respondent.
- (2) On or before 13 October 2025 the respondent is to pay the applicant \$1008.85.
- (3) No order as to costs.
- (4) The application is otherwise dismissed.

Reasons for decision:

### INTRODUCTION

The dispute concerns a second-hand mobile phone the applicant purchased from the respondent.

The applicant contends there has been a major failure of the consumer guarantees pursuant to Australian Consumer Law (ACL), specifically ss 54, 55 and 259 ACL, due to the handset failing from water ingress shortly after purchase. Further, he says the respondent engaged in misleading or deceptive conduct by failing to disclose that the phone's water resistance was compromised, in breach of s 18 of the ACL.

By application to the Tribunal dated 22 April 2025 the applicant seeks:

1. Full refund or supply of a sealed replacement Samsung Galaxy S23 Ultra of equivalent model, colour and capacity with intact IP-rated water resistance (Applicant's election).
2. Reimbursement of the NCAT filing fee.

3. Any ancillary orders NCAT considers just, including directions for return of the faulty handset.

4. (Optional) Compensation for distress under s 237 ACL/s 24 Disability Discrimination Act if hearing time permits.

Mr Organ appeared at the hearing via video link. Mr Emami, director, appeared on behalf of the respondent by telephone. Both gave sworn evidence.

Mr Organ relied on documents attached to his original application, as well as a statement by email dated 22 July 2025.

The respondent relied on written submissions signed by Mr Emami dated 1 July 2025, with attached documents including a copy of the purchase receipt, documents about the warranty, and a photograph of a sales display from the respondent's shop.

Both parties confirmed receipt of the other's documents.

All documents were admitted into evidence, subject to weight and relevance.

Both parties were provided the opportunity to ask the other questions.

## JURISDICTION

For the following reasons I am satisfied that the Tribunal has jurisdiction to hear and determine this application:

(1) The applicant is a "consumer" pursuant to Section 79D of the Fair Trading Act 1987 (NSW) ("FTA"). This was not in contention (section 79H).

(2) The claim involves the supply of goods to the applicant for consideration pursuant to s 2 (1) of the ACL (s 4(1) FTA);

(3) The claim is for an amount which is within the jurisdictional limit of \$100,000: (section 79S(7) and clause 13A Fair Trading Regulation 2019 (NSW));

(4) The supply of services was within New South Wales (section 79K); and

(5) The claim is registered within 3 years of the cause of action (section 79L).

## FACTUAL BACKGROUND

The following statement of the background to the proceedings either reflects factual matters which are not in dispute or documentary material received in evidence. Save to the extent that matters are said to be in dispute, the statement of the background to the proceedings represents my findings of fact.

On 20 December 2024 the applicant attended the respondent's shop to buy a mobile phone. He was assisted by Mr Emami.

On the same day he purchased a 256GB Samsung S23 Ultra mobile phone and a Samsung S23 Ultra accessory. The total cost (including a small surcharge) was \$1008.85.

The respondent's submissions describe the phone as "pre-owned refurbished".

The Samsung S23 Ultra is advertised by the manufacturer as having an IP68 rating which, according to the Samsung website, “means complete dust protection and temporary immersion in up to 1.5m of freshwater for up to 30 minutes.”

According to the applicant, he chose this particular phone to take photographs and videos of his fish and because he wanted to use it in the pool with his daughter.

When the applicant attempted to take a short video of his fish not long after purchase, the phone stopped working. On 17 January 2025 he returned it to the respondent who, upon inspection, identified water damage. He asked for a refund.

The respondent has offered to provide a discounted repair but has refused to provide a refund.

The respondent relies on a note at the bottom of the receipt:

“ \*\*\*PLEASE NOTE\*\*\*

Devices that have been repaired can no longer be considered water resistant or waterproof. Water damage will void warranty.”

No other warranty information was provided to the applicant.

The respondent purchased the phone from Green Gadgets. Its warranty policy states relevantly:

“Products are not expected to be indestructible; use of a smartphone can affect its durability. The ... Warranty will not apply in the below instances: ... Water damage ... Customer has failed to take reasonable steps to avoid the product becoming unacceptable ... Customer has used the product abnormally ...”

The applicant retains the phone and the accessory.

## THE PARTIES' SUBMISSIONS AND EVIDENCE

The respondent submits that the warranty explicitly excludes water damage. Mr Emani believes he told the applicant this during their conversation before purchase, but the applicant is adamant he did not. Given this competing evidence, I am not persuaded that Mr Emani did verbally disclose this. I accept that the waterproof feature of the phone was an important feature for the applicant, and he likely would remember if that disclosure had taken place.

The respondent says it has never advertised the phone as waterproof. Its in store signage makes no reference to the phones being waterproof and discloses they are pre-owned. Samsung's own warranty, according to the respondent, typically does not cover water damage, even for new devices.

The parties disagree about the meaning of the notation at the bottom of the receipt. The respondent argues the word 'repaired' includes phones that have been 'refurbished' therefore water damage is excluded in the warranty attached to the applicant's refurbished phone.

According to the Macquarie Dictionary, refurbish means “to refurbish again; renovate; polish up again; brighten”, and repair means “to restore to a good or sound condition after decay or damage; mend”

I consider that, in ordinary language, a phone that has been repaired is a phone that has suffered damage, whereas a refurbished phone does not imply damage, but indicates a used phone that has been renovated.

## WAS THE PHONE OF ACCEPTABLE QUALITY?

--- Relevant law ---

Section 54 of the ACL provides a consumer with a guarantee that goods sold will be of an acceptable quality i.e. if they are fit for purpose for which they are commonly supplied, are of an acceptable quality and finish, free from defects, safe and durable as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable.

Section 54 also sets out the criteria to determine acceptability, including the nature of the goods, the price and any representations made about the goods by the supplier or manufacturer.

The test as to whether goods are of an “acceptable quality” is an objective one, being taken from the perspective of a “reasonable consumer” (APS Satellite Pty Ltd (formerly known as Sky Mesh Pty Ltd) v Ipstar Australia Pty Ltd [2016] NSWSC 1898 at [57]; Merck Sharp & Dohme (Australia) Pty Ltd v Peterson (2011) 196 FCR 145.

The guarantee as to acceptable quality in section 54 applies at the time of supply of the goods (Volkswagen Group Australia Pty Ltd v Saad [2022] NSWCATAP 133).

Further, goods are not of unacceptable quality if the consumer is at fault. At section 54(6) goods do not fail to be of acceptable quality if the consumer causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality and they are damaged by abnormal use.

The applicant must prove his claim to the civil standard of proof, that is, on the balance of probabilities.

--- Consideration and findings ---

I am satisfied that a reasonable consumer, fully acquainted with the state and condition of the phone, would regard the phone as not of acceptable quality when sold because the phone:

- (1) Was not free from defects; and
- (2) Was not durable.

In making this determination, I take the following into consideration:

- (1) The purchase price of \$979.00 was a not insignificant amount;
- (2) The phone was sold as ‘refurbished’;
- (3) No damage or repairs to the phone were disclosed;
- (4) The particular model is advertised by the manufacturer as having IP68 rating and “protection against temporary immersion in up to 1.5m of freshwater for up to 30 minutes.”
- (5) The phone immediately failed after immersion in a fish tank for a very short period of time.

I am satisfied that the applicant did not by his own fault cause the phone to not be of acceptable quality (s 54(6)). He used it in water in accordance with the advertised guidelines.

The consumer guarantees in the ACL cannot be excluded or modified by a term of a contract such as a warranty which excludes water damage (s64).

Therefore the respondent has breached the consumer guarantee pursuant to s 54 of the ACL.

## WAS THE RESPONDENT'S FAILURE TO COMPLY WITH THE GUARANTEE OF ACCEPTABLE QUALITY A MAJOR FAILURE?

--- Relevant law ---

To obtain a full refund of the phone, the applicant must also prove that the respondent's failure to comply with the guarantee is a 'major' failure.

Section 260(a) provides that a failure to comply with a guarantee that applies to a supply of goods is a major failure if relevantly:

'the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure'.

In *Safi v Heartland Motors Pty Ltd t/as Heartland Chrysler* [2016] NSWCATAP 80 the Appeal Panel said that:

"The question to ask is whether the reasonable consumer, given the option of acquiring that particular good or alternatively purchasing either nothing or a different model, would not have acquired the good ... the purchase price for the goods and the nature of the defect are also relevant considerations for a "reasonable consumer".'

--- Consideration and findings ---

For the following reasons I find that a reasonable consumer, given the option of acquiring the particular phone or alternatively purchasing either nothing or a different phone, would not have acquired the phone:

- (1) The Samsung Galaxy S23 Ultra is a premium device, even as refurbished;
- (2) A key feature and selling-point of the Samsung Galaxy S23 Ultra is its IP68 waterproof rating;
- (3) A reasonable consumer would expect such a phone, when sold as 'refurbished', to have retained its waterproof feature;
- (4) There is no evidence that even if the general operation of the phone can be repaired, its IP68 waterproof rating can be restored.

## WHAT IS THE APPROPRIATE REMEDY?

Section 259(3) of the ACL provides that if the failure to comply with the consumer guarantee is a major failure, the consumer may notify the supplier that they reject the goods and of the grounds for the rejection.

The applicant rejected the phone on 17 January 2025 when he returned to the store. I am satisfied that the rejection occurred within the rejection period (s 262).

In such circumstances the applicant may obtain a refund of the money paid for the goods and must return the goods to the supplier (s 263(4)).

A consumer may also 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 (s 259(4)).

I consider that the applicant incurred the reasonably foreseeable loss of the cost of the Samsung S23 Ultra accessory. Without the use of the phone, the accessory is redundant.

I consider that the small surcharge paid by the applicant is also reasonably foreseeable loss.

I am not persuaded that any financial stress and upset experienced by the applicant upon failure of the phone is loss that is reasonably foreseeable as a result of the breach of the guarantee.

If a representative of the respondent did threaten the applicant (and I make no findings on that point) and if the applicant was embarrassed and distressed when the police were called to the store on 17 January 2025, this does not give rise to a cause of action pursuant to the ACL, nor do I consider it reasonably foreseeable loss as a result of the breach of the consumer guarantee.

The Tribunal does not have jurisdiction under the Disability Discrimination Act 1992.

The Tribunal does not award interest or 'indexation'.

## COSTS

The applicant seeks an order for the cost of the NCAT filing fee.

The usual position under s 60 (1) of the NSW Civil and Administrative Tribunal Act is that each party bears its own costs. This is designed to promote access to justice generally and to minimise the overall level of costs in Tribunal proceedings as far as is practicable: *Choi v University of Technology Sydney* [2020] NSWCATAP 18 at [41].

Section 60(2) says that the [Tribunal] may award costs to a party 'only if' satisfied there are special circumstances warranting an award of costs.

Section 60(3) sets out a non-exclusionary list of factors to which the Tribunal may have regard in determining whether special circumstances warranting an award of costs exist.

'Special circumstances' are circumstances that are out of the ordinary, but need not be those which are exceptional or extraordinary: *Cripps v G & M Dawson Pty Ltd* [2006] NSWCA 81 at [60] (Santow J).

I am not persuaded that there are any circumstances in this case that justify departing from the general rule that each party bear their own costs.

## CONCLUSION

Because I have found in favour of the applicant in relation to breach of the guarantee pursuant to s 54, there is no utility in considering the alternative grounds for his claim.

The Tribunal therefore makes the following orders:

- (1) On or before 13 October 2025 the applicant is to return the Samsung Galaxy S23 Ultra phone and accessory to the respondent.
- (2) On or before 13 October 2025 the respondent is to pay the applicant \$1008.85.
- (3) No order as to costs.
- (4) The application is otherwise dismissed.

Dr K M George, Senior Member

Issued: 29 September 2025



For further information about your rights and obligations in relation to this order please read NCAT's Rights and Obligations Guideline available on the NCAT website at [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au).