

## Consumer Guarantees & Warranties: Is Your Business Compliant?

Stephens Lawyers: Australian Consumer Law Update: September 2011

### Overview

Following the recent overhaul of Australia's consumer protection regime, the Australian Consumer Law ("ACL"), which came into operation on **1 January 2011**, introduced a comprehensive new framework of statutory consumer guarantees under the *Competition and Consumer Act 2010* (Cth).

As reported in our **December 2010 Newsletter**, [Warranties to Consumers & the new Competition and Consumer Act](#), businesses who supply goods or services to consumers (that is, goods and services of a value less than \$40,000 or those used for personal, domestic or household use), must abide by the ACL's statutory guarantees. Under the ACL Regulations [\[1\]](#) released in late 2010, all businesses will be required to include mandatory wording on all warranty/guarantee documentation from **1 July 2011**, (in relation to repair notices) and **1 January 2012** (in relation to warranties against defects).

With **1 January 2012** merely months away, businesses who sell, manufacture or import goods or services must ensure that they comply with requirements regulating consumer guarantees. Significantly, businesses that provide consumers with a written warranty against defects, must comprehensively review all warranty documentation, cards, leaflets and even representations on packaging, to ensure consistency with the ACL Regulations.

Failing to comply with the ACL may not only be "bad for business", but may also involve significant financial risks. Consumers have a range of redress options, where a business fails to comply with the consumer guarantee provisions. Furthermore, the ACCC will not hesitate to seek pecuniary penalties against parties who make false or misleading representations, including those related to consumer warranties and guarantees; maximum penalties are \$1.1 million for corporations and \$220,000 for individuals.

### What are the statutory guarantees?

The new statutory guarantees in relation to **consumer goods** include the following:

- Guarantee as to title; [\[2\]](#)
- Guarantee as to undisturbed possession (provided there are no limitations on the title disclosed to the consumer); [\[3\]](#)
- Guarantee as to undisclosed securities, charges or encumbrances; [\[4\]](#)
- Guarantee that goods are of an acceptable quality; [\[5\]](#)
- Guarantee that goods are reasonably fit for any disclosed purpose; [\[6\]](#)
- Guarantee that goods match their description; [\[7\]](#)
- Guarantee that goods match a sample or demonstration model; [\[8\]](#) and
- Guarantee that spare parts and repair facilities are reasonably available for a reasonable period after goods are supplied. [\[9\]](#) An exemption applies where manufacturers give reasonable notice, in writing, to a consumer that repair facilities or parts would not be available for a specified period. [\[10\]](#)

The *Competition and Consumer Act*, imposes statutory guarantees in relation to the **supply of services**, as to the following:

- Guarantee as to due care and skill; [\[11\]](#)
- Guarantee that services are reasonably fit for a particular purpose; [\[12\]](#)
- Guarantee that services will achieve the desired result; [\[13\]](#) and
- Guarantee as to reasonable time of supply. [\[14\]](#)

The guarantees for the supply of services do not apply to contracts for the transportation or storage of goods, or insurance contracts. [\[15\]](#)

Further, if a manufacturer or supplier provides an express warranty or "manufacturer's warranty" to consumers when supplying goods or services, the ACL imposes on the business, a statutory guarantee that they will comply with the express warranty provided in respect of their goods or services. [\[16\]](#)

The *Competition and Consumer Act* also provides that the statutory guarantees cannot be excluded, restricted or modified by contract. A contractual term excluding, restricting or modifying a guarantee will be void. [\[17\]](#) However, manufacturers or suppliers can limit their liability for failure to comply with statutory guarantees (other than guarantees as to title, undisturbed possession and undisclosed securities, charges and encumbrances), in limited circumstances.

Where a business offers an "extended warranty", care should be taken to ensure that the extended warranty offers consumers benefits, over and additional to their rights already provided under the ACL's consumer guarantees. Businesses risk contravening the *Competition and Consumer Act*, if they mislead consumers into paying for "benefits" they are already entitled to by law. [\[18\]](#)

## What do the Australian Consumer Law Regulations mean for your business?

### Warranties against defects requirements (in force 1 January 2012)

A warranty against defects, includes any representation communicated to a consumer at the time of supply of goods or services, that the business will:

- repair or replace goods or part of them; or
- provide again or rectify the services or part of them; or
- wholly or partly recompense the consumer

if the goods or services or part of them are defective. [\[19\]](#)

The ACL Regulations stipulate that any business who supplies consumer goods or services and offers a document containing a warranty against defects, must include specific information and wording in that document. [\[20\]](#) The ACCC has advised that it will consider a "warranty document" to include "any material on which there is writing or printing, or on which there are marks or symbols". [\[21\]](#) Significantly, this covers not only warranty cards or leaflets, but any representations made on advertising material or packaging.

## **From 1 January 2012, any warranty against defects must:**

- be in a transparent document;
- concisely state what the person who gives the warranty must do to honour the warranty and what the consumer must do to entitle them to claim on the warranty;
- prominently state the name of the person giving the warranty, their business address, telephone number and email;
- provide the length of the warranty term;
- set out the procedure the consumer is required to follow to claim under the warranty;
- state who bears the cost of claiming under the warranty;
- state that the benefits to the consumer given by the warranty are in addition to other rights and remedies of the consumer under the consumer guarantees; and
- include the following mandatory text:

*"Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure."*

The ACCC has further recommended that any warranty against defects information must be available either at the time when a consumer purchases a good, or about the time the goods or services are supplied. [\[22\]](#) Consequently, it may be insufficient for businesses to merely refer consumers to the website for further information; businesses should take measures to ensure that all the information required by the ACL Regulations is included in warranty cards or leaflets with goods.

## **Repair notices requirements (in force 1 July 2011)**

The ACL Regulations also introduced specific requirements for businesses in relation to repair notices. **From 1 July 2011**, any business who repairs goods which are capable of retaining user-generated data (for example, computer hard-drives, mobile phones, tablet computers, portable media players, games consoles), must provide consumers with notice that the repair of their goods may result in loss of the data. [\[23\]](#)

Further, if the repairer sometimes supplies refurbished goods as an alternative repairing defective goods, the repair notice must include the following text:

*"Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods."*

## **Implications**

As 1 January 2012 approaches, it is critical that business engaged in selling, manufacturing or supplying consumer goods or services ensure that they comply with the ACL's statutory and regulatory requirements. For many businesses, this may involve a comprehensive consumer law review, to ensure that all warranty documentation and packaging contains the mandatory wording and notices.

If a business failure to comply with a consumer guarantees, consumers can seek a wide range of remedies, including the ability to recover damages for reasonably foreseeable loss or damage suffered. [\[24\]](#)

Further, if a manufacturer's or supplier's contracts and product/service warranties do not comply with the *Competition and Consumer Act*, they expose themselves to risks of prosecution or legal proceedings by the ACCC or the State regulator for false or misleading representations relating to the consumer's rights. [29]

Stephens Lawyers & Consultants can advise on all aspects of Australian Consumer Law compliance and the *Competition and Consumer Act*.

**Our** lawyers represent leading companies in both litigious and commercial matters.

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[1] Trade Practices (Australian Consumer Law) Regulations 2010 (No. 1) (now part of the Competition and Consumer Regulations 2010).

[2] *Competition and Consumer Act 2010*, Schedule 2, section 51.

[3] *Competition and Consumer Act 2010* Schedule 2, section 52.

[4] *Competition and Consumer Act 2010* Schedule 2, section 53.

- [5] *Competition and Consumer Act 2010* Schedule 2, section 54.
- [6] *Competition and Consumer Act 2010* Schedule 2, section 55.
- [7] *Competition and Consumer Act 2010* Schedule 2, section 56.
- [8] *Competition and Consumer Act 2010* Schedule 2, section 57.
- [9] *Competition and Consumer Act 2010* Schedule 2, section 58(1).
- [10] *Competition and Consumer Act 2010* Schedule 2, section 58(2).
- [11] *Competition and Consumer Act 2010* Schedule 2, section 60.
- [12] *Competition and Consumer Act 2010* Schedule 2, section 61(1).
- [13] *Competition and Consumer Act 2010* Schedule 2, section 61(2).
- [14] *Competition and Consumer Act 2010* Schedule 2, section 62.
- [15] *Competition and Consumer Act 2010* Schedule 2, section 63.
- [16] *Competition and Consumer Act 2010* Schedule 2, section 59.
- [17] *Competition and Consumer Act 2010* Schedule 2, section 64.
- [18] *Competition and Consumer Act 2010* Schedule 2, section 29(n).
- [19] *Competition and Consumer Act 2010* Schedule 2, section 102(3).
- [20] ACL Regulations, regulation 90.
- [21] ACCC, "Warranties against defects", available at <http://www.accc.gov.au/content/index.phtml/itemId/996742>.
- [22] ACCC, "Warranties against defects", available at <http://www.accc.gov.au/content/index.phtml/itemId/996742>.
- [23] ACL Regulations, regulation 91.
- [24] *Competition and Consumer Act 201*, Schedule 2, sections 259(4), 267(4), 271, 272.
- [25] *Competition and Consumer Act 2010* Schedule 2, sections 259(2)(a), 267(2)(a).
- [26] *Competition and Consumer Act 2010* Schedule 2, sections 259(2)(b), 267(2)(b).
- [27] *Competition and Consumer Act 2010* Schedule 2, section 261.

[\[28\]](#) *Competition and Consumer Act 2010* Schedule 2, sections 259(3), 267(3).

[\[29\]](#) *Competition and Consumer Act 2010* Schedule 2, sections 18 and 29 (equivalent to sections 52 and 53 *Trade Practices Act*).