

**Submission to the
Australian Consumer Law Review**

31 May 2016

1. Introduction

This submission to the Australian Consumer Law Review is made by a company with a significant presence in the fast moving consumer goods market in Australia (**Company**).

The Company is subject to the obligations of the Australian Consumer Law (**ACL**). It takes its obligations under the ACL seriously and devotes significant time and resources to compliance with the ACL.

In particular, the Company grapples on a day to day basis with the consumer guarantee regime in Part 3-2, Division 1 (Consumer guarantees) and Part 5-4 (Remedies relating to guarantees), and potential product liability issues.

It is with that day-to-day experience that the Company makes this submission. It is not intended to be a comprehensive response to all of the matters raised in the *Australian Consumer Law Review Issues Paper* (**Issues Paper**). Rather, this submission is intentionally focussed only on its concerns about the practical application of the consumer guarantee regime and product liability provisions, being those matters the Company considers impact most directly on its ability to operate and compete effectively in the Australian marketplace.

The Company welcomes the opportunity to make this submission but wishes to remain anonymous.

2. Definitions used in the consumer guarantees regime

Some of the definitions used in the consumer guarantees regime are ambiguous and very difficult to apply in practice. Little or no meaningful guidance is provided by the legislation itself or by the ACL regulators as to how many of these concepts should be applied.

This creates significant uncertainty in the understanding of consumers' rights, and suppliers' and manufacturers' obligations under the consumer guarantees regime.

2.1 'Major failure'

The definition of a 'major failure' is pivotal to the operation of the consumer guarantees regime. It determines the remedies to which a consumer is entitled if there is a failure to company with a consumer guarantee.

Yet the definition of 'major failure' lacks clarity and does not assist suppliers and manufacturers, or consumers for that matter, understand where their obligations to provide certain remedies begins and ends.

A 'major failure' is defined in s 260 of the ACL to include circumstances where "*the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure*". This limb of the definition is so broad that one can imagine almost any defect with a product qualifying as a 'major failure' (from a serious manufacturing defect to a cosmetic scratch) and the purported qualification of the 'reasonable consumer' offers no assistance whatsoever. But it is reasonable to assume that this could not have been Parliament's intention, otherwise there would have been no need to differentiate between the so-called 'major failure' and 'a failure that is not a major failure'.

The practical implication is that this limb of the s 260 definition of 'major failure'; is most often cited by consumers as justifying a rejection of the product and a claim to a refund or replacement, no matter how small or insignificant the supposed failure, on the basis that had they been aware of the relevant issue, they would not have acquired the good. Seeking to persuade a consumer that that is not 'reasonable' or not what a 'reasonable consumer' would do in the circumstances, is typically not possible and in many cases fraught with some risk of misleading consumers about their rights.

This position is not sustainable. It results in a very significant compliance burden and increased compliance costs, that are invariably at risk of being passed on to consumers in the form of higher prices.

The Company suggests that s 260 of the ACL be amended to provide greater clarity on what is a 'major failure'. In particular, the Company suggests that the provision make clear that a defect or fault which results in a failure to comply with a consumer guarantee will not be a 'major failure' if it can be quickly and easily remedied. This modification would allow manufacturers and suppliers to remedy products that are capable of easy remediation rather than necessitating refunds and replacements in circumstances where they are unnecessary to deal with the problem.

2.2 'Rejection period'

If a failure to comply with a consumer guarantee cannot be remedied or is a major failure, the consumer may (among other things) notify the supplier of their rejection of the goods (s 259, ACL) in order to claim a refund or replacement (s 263, ACL), unless the consumer is not entitled to reject the goods (s 262, ACL).

A consumer is not entitled to reject the goods if (among other things) the rejection period for the goods has ended. The rejection period is defined as:

"the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee ... to become apparent having regard to:

- (a) *the type of goods; and*
- (b) *the use to which a consumer is likely to put them; and*
- (c) *the length of time for which it is reasonable for them to be used; and*
- (d) *the amount of use to which it is reasonable for them to be put before such a failure becomes apparent."*

Again, the rejection period is defined very broadly and neither the legislation nor any guidance from the regulators sheds any meaningful light on how a manufacturer or supplier, should or could consider applying the definition in practice. The definition requires the Company to understand in each case of a consumer seeking to reject a product, at least the following:

- (a) the consumer's *reasonable* expectation as to the timing for discovery of the failure;
- (b) how long it is *reasonable* for the goods to be used (but in whose estimation, the consumer's or the supplier/manufacturer's?); and
- (c) how intensively it is *reasonable* for the goods to be used before any failure becomes apparent.

At worst, each of the above is unknowable. At best, in the absence of any guidance, the Company can do its best to 'guess' what might be an appropriate rejection period in each case but this would require significant enquiries to be made and significant resources to be expended. Even in the best case, the Company will inevitably reach an uncertain outcome with which the consumer may in any event disagree and which may put the Company at risk of breaching its consumer guarantee obligations and potentially also misleading the consumer about their rights.

This is all the more so when the consumer guarantee that is the subject of the alleged failure, and for which the rejection period needs to be assessed, is the guarantee of acceptable quality. This is because that guarantee itself relies heavily on concepts of 'reasonableness', namely, that goods will be acceptable quality if they are as acceptable "*as a reasonable consumer fully acquainted with the state and condition of the goods ... would regard as acceptable...*".

The consequence is a formulation so imprecise that certain and consistent implementation of consumer guarantee rights is virtually impossible.

The Company suggests that:

- (a) s 262 of the ACL be amended to clearly indicate that the length of time for which it is reasonable for goods to be used and the amount of use to which it is reasonable to subject those goods, is to be judged against the price and functional capabilities of the relevant product; and
- (b) the Australian Competition and Consumer Commission (**ACCC**) publish very clear guidance for business on the operation of rejection periods. The guidelines could indicate the rejection periods which the ACCC considers should apply for various categories of goods and/or reasonable periods of use of those goods, perhaps indicating applicable ranges. At the least, the ACCC's guidelines could set out what it considers a reasonable process for businesses to adopt in determining a rejection period.

In the absence of such amendment and/or guidance, the Company would be forced to continue to adopt an approach which results in excessive costs, uncertainty for consumers and inefficiencies in customer services processes.

3. **Confusion caused by mandatory text for warranties against defects**

Regulation 90 of the *Competition and Consumer Regulations 2010* (Cth) sets out the mandatory requirements for warranties against defects, including mandatory text to be included in each such warranty.

The Company's view is that, while the balance of Reg 90 is reasonable in providing consumers necessary information about the operation of the warranty against defects, the mandatory text is unnecessary and should be removed from Reg 90. This is because:

- (a) consumers generally understand that they have rights in legislation, above and beyond any manufacturer's or express warranty which may be offered to them; and
- (b) the mandatory text creates a very significant compliance burden, particularly for international manufacturers which, because of the requirement to print the mandatory text, need to have a separate (or at least amended) warranty card for Australian purposes.

In any event, the mandatory text, in seeking to reduce to a few sentences the very complex set of rights that *may* be available to consumers under the consumer guarantees regime, in many cases mis-states and in some cases over-states the rights available to consumers. In that way, the mandatory text is apt to mislead consumers about their rights rather than assist them to understand them, and must at the least be amended.

Set out below is a list of concerns with the mandatory text that have arisen in the Company's experience.

- (a) The mandatory text refers only to 'goods' whereas the consumer guarantees regime applies to both goods and services.
- (b) The mandatory text refers only to the guarantee of acceptable quality (which arises only in relation goods) but makes no mention of the numerous other guarantees provided for in the regime, for goods and services.
- (c) The mandatory text is inconsistent with the division of obligations in the consumer guarantees regime between suppliers and manufacturers. The mandatory text

refers to the rights of the consumer against a supplier – the only remedy a manufacturer is obliged to provide to a consumer is damages (for reduction in value and reasonably foreseeable loss, s 272). The consequence of this is that the Company, in its role as manufacturer providing warranty card to consumers, is nevertheless forced to assume the role of a supplier, with significantly more onerous obligations, including refund and replacement.

- (d) The mandatory text states that consumers are entitled to a replacement or refund for a major failure but this will not be the case if the rejection period has expired.
- (e) The mandatory text states that consumers are entitled to compensation for reasonably foreseeable loss but this will not be the case if the supplier is entitled to limit and has limited its liability.

4. **Availability of remedies under the consumer guarantees regime**

The Company is concerned with inequities between consumer rights and supplier and manufacturer obligations that appear to arise in respect of the availability of remedies under the consumer guarantees regime.

4.1 **Requirement to provide full refund**

Where a consumer has rejected goods on the grounds that goods have failed to meet a consumer guarantee and that failure is a major failure or the failure cannot be remedied, the consumer can elect under s 263(4) of the ACL to receive a refund of:

- "(i) any money paid by the consumer for the goods; and*
- (ii) an amount that is equal to the value of any other consideration provided by the consumer for the goods..."*

The unqualified reference to "any money paid by the consumer for the goods" means that the supplier is obliged to provide a full money refund in each and every circumstance where a right to reject the goods arises. This is irrespective of the fact that the consumer has enjoyed the goods (without failure) for a period of time before rejection, and in some cases has enjoyed those goods for a very significant time. The consequence of this is that the consumer who elects to obtain a full money refund receives a (possibly very significant) windfall above the value of their goods at the time the failure occurred.

For example, a consumer may buy a fridge for \$1,000 from a supplier and have use of that fridge for 3 years before a major failure occurs. By the time of the failure the value of the fridge had diminished to \$250. On the basis of the above rights, the consumer is entitled to a full \$1,000 refund and effectively receives 'free' use of the fridge for 3 years. Put another way, the consumer has received a windfall of \$750.

The above mistakenly assumes, to the detriment of all suppliers and manufacturers, that the value of goods does not depreciate over time and that all goods end their life with the same functional operability that they possess as at the date of purchase. This is clearly not the case and the ACL should be amended to reflect practical reality (and adopt the previous approach under the *Trade Practices Act* where suppliers were required to compensate consumers for their loss, taking into account the extent to which the consumer had enjoyed the goods).

The requirement to provide a full refund under s 264(3) in respect of goods is also inconsistent with the equivalent remedy for major failure in relation to services (s 265(3)) which requires a supplier to provide a full refund "to the extent that the consumer has not already consumed the services at the time the termination takes effect". This allows the consumer to limit the refund in respect of services – refunds in respect of goods should similarly account for the extent to which the consumer has consumed the goods prior to rejection.

This would also align the remedy available from a supplier more closely with the damages remedy available under s 271 against a manufacturer.

Similar difficulties arise in the context of rental products, where consumers might have enjoyed a period of use of the product before the failure. However in this context, there is an additional layer of confusion over whether the provision of a rental product is a supply of a "good" or a "service". If any aspect of the rental is considered to be the supply of a "good", then the consumer is entitled to a full refund of the amount they have paid in the event of a major failure (s 263(4)). However, if the rental is characterised entirely as a service, any refund for a major failure would be liable to be reduced to the extent that the consumer has already consumed the services (s 269(3) or s 265(3) in relation to services connected with rejected goods). This could alter the consumer's position significantly but the positions in respect of goods or services should be the same. Moreover, the lack of a clear statement regarding the application of the refund provisions of the ACL to rental agreements, creates significant confusion for consumers and suppliers in this area and should be rectified.

4.2 Proof of purchase

The ACL does not make clear whether a consumer needs to provide a supplier or manufacturer with proof of purchase (eg. receipt) in order to exercise their rights under the consumer guarantee regime.

This is unsatisfactory because a supplier requires that proof of purchase in order to properly assess its consumer guarantee obligations under the ACL. While the ACCC's guidance in this area suggests that consumers generally need to show that they purchased the goods or services, this obligation is not enshrined in the ACL and many consumers discard their proof of purchase shortly after acquiring the goods or services.

The Company submits that the requirement to evidence proof of purchase should be enshrined in the ACL, as a threshold matter before a consumer is entitled to a remedy under the consumer guarantee regime (particularly a remedy for a major failure, at the consumer's discretion). Proof of purchase would include the receipt of purchase provided by the supplier at or shortly after the time of purchase.

4.3 Ambiguities arising from refurbished products

Some companies supply their "seconds" products at greatly reduced prices to other companies, who refurbish them in order to supply them to consumers. However, the original manufacturer retains liability under the ACL, to the consumer.

Yet if the consumer subsequently finds a fault with the product, it is often difficult to determine which party should bear the cost and practical burden of providing a remedy. The ACL should clarify who bears this responsibility, when there are effectively multiple manufacturers involved in the one product.

5. Product liability – mandatory reporting

The Company's view is that the mandatory reporting requirement in s 131 of the ACL lacks clarity, is unreasonably broad and results in unintended consequences.

There are two key issues with these requirements.

5.1 The definition of 'serious injury or illness'

"Serious injury or illness" is defined in s 2 of the ACL as "an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place)..." (subject only to the limited exceptions in sub-paragraph (a) and (b)). This means that there are only two requirements for an injury or illness to be "serious" and accordingly reportable under the mandatory reporting regime:

- (a) that the injury or illness is "acute", which in medical terms is a meaning of the time scale of the injury or illness, particularly one that has a sudden onset, is of a short duration and is rapidly progressive; and
- (b) that the injury or illness requires medical treatment.

But the above requirements are not sufficient to distinguish between serious and non-serious illnesses and injuries, particularly use of the word "acute". Potentially, any injury or illness with a rapid onset and that is of short duration, but requires medical treatment, is reportable under the regime (for example, the application of band aid by a nurse to a paper cut).

The Company suggests that an amended definition of "serious injury or illness" be developed to better distinguish between serious and non-serious (or minor) injury or illnesses.

5.2 **Reference to 'use of foreseeable misuse'**

The reference to "use or foreseeable misuse of the consumer goods" in s 131 of the ACL is ambiguous and difficult to apply in practice.

"Foreseeable misuse" is arguably very broad and could be taken to mean almost anything that occurs with the product (particularly with the benefit of hindsight), even though the manufacturer or supplier clearly does not intend that its product be used in that way.

