



## Submission to the ACL Review

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### 1 Introduction

This submission considers the Consumer Guarantee remedial regime and makes some recommendations as to how consumers could be assisted in better understanding and asserting their rights to redress under that regime. The submission then makes some recommendations relevant to access to justice, concerning the form of the legislation and the role of soft law guidelines in providing assistance in understanding the law.

Many of the issues discussed in this submission have been the subject of investigation as part of an Australian Research Council Discovery Grant project undertaken by Professor Bant and Associate Professor Paterson that has sought to examine and clarify the interaction between general law remedies and the statutory remedial scheme more broadly.

In so doing it has identified both important points of reference where the general law can usefully inform the development of the law relating to the ACL, and some areas of deficiency in the regime. It has also considered the role of statutory design in promoting the consumer protection objectives under legislation such as the ACL.

### 2 The Consumer Guarantee Regime

The Consumer Guarantee regime in the part 3-2 of ACL provides minimum mandatory standards of quality applying to the supply of goods and services to consumers. Mandatory quality standards such as these apply to address the “information asymmetry” that exists between consumers and suppliers.<sup>1</sup> Consumers are typically less knowledgeable about the goods and services that they might be purchasing than suppliers. Consumers may not be aware of the defects likely to occur in the goods or may be unable to bargain for a fair contractual allocation of those risks. Mandatory standards of quality address this information asymmetry by giving consumers a right of redress in the event that the goods or services they have purchased prove to be faulty or defective.<sup>8</sup>

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<sup>1</sup> *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, Explanatory Memorandum*, p 607, [25.45]; Hadfield, Howse and Trebilcock, *Information-Based Principles for Rethinking Consumer Protection Policy* (1998) 21 *Journal of Consumer Policy* 131, 141; Howells and Weatherill, *Consumer Protection Law* (2nd ed, Ashgate, 2005), p 146.

The consumer guarantee regime in the ACL was introduced in response to concerns that the implied term regime in the *Trade Practices Act 1974* was unduly complex and was not widely understood or followed by suppliers, manufacturers or consumers. The regime appears to have been reasonably successful with respect to these goals. The consumer guarantees in the ACL are expressed in relatively clear terms and are set out in a logical fashion.<sup>2</sup> A variety of online and hard copy tools have been developed to assist in the process of educating stakeholders about their rights and obligations.<sup>3</sup> The ACCC has been active in prosecuting traders who mislead consumers about the existence of their statutory rights and about the relationship between these rights and any contractual warranties provided by the manufacturer.<sup>4</sup>

Nonetheless, some simple amendments might be made to make the regime more accessible to consumers seeking to enforce their rights to a remedy and to improve the clarity of the regime for consumers and traders alike, without upsetting the overall balance and flexibility of the regime.

### 3 Assisting Consumers in Obtaining a Remedy

#### 3.1 Presumption that defects arising after purchase cause the goods not to be of acceptable quality

Where goods exhibit a defect after purchase, the onus is on the consumer to prove on the balance of probabilities that this defect was sufficient to make the goods not of acceptable quality at sale, as opposed to the problem simply being a result of fair wear and tear or some other cause.<sup>5</sup> This is often difficult for consumers to establish. It will usually be easier for the retailer or manufacturer to establish that there was no defect at the time of supply as they will usually have greater knowledge of and experience with the goods. This situation might be addressed by a presumption in favour of consumers that goods that become defective within a particular time frame are not of acceptable quality. This type of presumption is found in both the United Kingdom and Singapore.<sup>6</sup> Under these provisions if a fault develops six months from delivery it is presumed to have been there from the time of delivery unless the trader proves otherwise.

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<sup>2</sup> See also J M Paterson, 'The new consumer guarantee law and the reasons for replacing the regime of statutory implied terms in consumer transactions' (2011) 35 *Melbourne University Law Review* 252.

<sup>3</sup> See eg Australian Competition and Consumer Commission, *Consumer Guarantees: A guide for consumers* (2013) [https://www.accc.gov.au/system/files/Consumer%20Guarantees%20A%20guide%20for%20consumers\\_0.pdf](https://www.accc.gov.au/system/files/Consumer%20Guarantees%20A%20guide%20for%20consumers_0.pdf); Australian Capital Territory Office of Regulatory Services et al, *Consumer guarantees: A guide for businesses and legal practitioners* (2010) <http://www.accc.gov.au/system/files/Consumer%20Guarantees%20a%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>.

<sup>4</sup> See eg *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *Australian Competition and Consumer Commission v Launceston Superstore Pty Ltd* [2013] FCA 1315; *Australian Competition and Consumer Commission v HP Superstore Pty Ltd* [2013] FCA 1317; *Australian Competition and Consumer Commission v Camavit Pty Ltd* [2013] FCA 1397; *Australian Competition and Consumer Commission v Avitalb Pty Ltd* [2014] FCA 222; *Australian Competition and Consumer Commission v Gordon Superstore Pty Ltd* [2014] FCA 452; *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464.

<sup>5</sup> See eg *Tonks v Woodpecker Heating and Cooling Pty Ltd (Civil Claims)* [2015] VCAT 106.

<sup>6</sup> In Singapore see further *Speedo Motoring Pte Ltd v Ong Gek Sing* [2014] SGHC 71 [30], [41] – [42]; A Loke, 'The Lemon Law and the Integrated Enhancement of Consumer Rights in Singapore' [2014] *Singapore Journal of Legal Studies* 285

*Consumer Rights Act 2015* (UK) s 19(14).

“[G]oods which do not conform to the contract at any time within six months beginning with the day on which the goods were delivered to the consumer must be taken not to have conformed to it on that day”.

### 3.2 Dead on arrival rules

Generally well-functioning goods do not usually exhibit a defect within a short time of purchase. Accordingly, where goods do exhibit a fault within a very short time after purchase, consumers should not be required to submit the goods for repair but should be free to reject the goods and walk away from the transaction if they so choose. A model for this approach is found in the United Kingdom’s *Consumer Rights Act 2015*.

*Consumer Rights Act 2015* (UK) ss 20 and 22

Section 20(1) provides for a short-term right to reject goods that are not of satisfactory quality, defined in s 22(3) as 30 days.

### 3.3 Right to reject after one attempt at repair

The remedies available to consumers for a failure to comply with a consumer guarantee under the ACL are dependent on a distinction between major and minor failures. If a supplier's failure to comply with a consumer guarantee can be remedied and is not a major failure, the consumer may require the supplier to remedy the failure within a reasonable time.<sup>7</sup> The supplier may choose between providing a refund, a replacement or a repair.<sup>8</sup> If a supplier's failure to comply with a consumer guarantee cannot be remedied or is a major failure, the consumer may reject the goods<sup>9</sup> or recover compensation for the reduction in the value of the goods.<sup>10</sup> In the case of services, if the failure to comply with the guarantee is a major failure or cannot be remedied, a consumer may terminate the contract for the supply of services or recover compensation for any reduction in the value of the services below the price payable by the consumer.<sup>11</sup>

The regime aims to strike a fair balance between the interests of consumers and traders. If a consumer can obtain a repair or replacement of goods not of acceptable quality, the consumer will often be satisfied without the need for a refund. The situation is quite different where goods continue to break despite being repaired or replaced. Such a pattern of defects suggests that the goods are not of acceptable quality and moreover that the consumer has purchased a “lemon”. Consumers should not have to put up with multiple attempts at repair, even where the defect in question is relatively minor. This situation would be addressed by a provision clarifying that one attempt to repair is sufficient and that after this consumers have a right to reject, as found in the United Kingdom.

*Consumer Rights Act 2015* (UK) s 24(5)(a).

After one repair or one replacement, the goods may be rejected by the consumer.

<sup>7</sup>ACL, ss 259(2)(a), 267(2).

<sup>8</sup>ACL, s 261.

<sup>9</sup>See ACL, s 263 for the consequences of rejecting goods. See ACL, s 269 for the consequences of terminating a contract for the supply of services.

<sup>10</sup>ACL, s 259(3).

<sup>11</sup>ACL, s 267(3).

### 3.4 A combination of defects may constitute major failure.

The reported tribunal decisions contain a number of cases where the consumer's complaint is based on a number of failures that taken together cause considerable disruption and inconvenience. Tribunals differ as to whether a series of failures occurring at a similar time and which do not individually amount to a major failure may collectively constitute a major failure giving rise to a right to reject.<sup>12</sup> In many cases the argument has been accepted<sup>13</sup> but there remain a number of decisions going the other way.<sup>14</sup> The issue could easily be clarified by legislation that provides that courts may consider a combination of defects occurring in a short period of time in deciding whether there has been a major failure.

## 4 Transparency

A major hurdle facing consumers in enforcing their rights under the ACL is knowing of those rights and convincing the trader to provide redress where required. The way in which contracts and contractual information are presented can confuse consumers as to their legal rights and make it more difficult for them to advocate for a remedy in response to goods that are not of acceptable quality or otherwise fail to comply with the consumer guarantees in the ACL.

If things go wrong with purchased goods, consumers often turn to their contracts, whether in hard copy or displayed online on the trader's website, to identify their rights of redress. In these contracts, traders may acknowledge the existence the ACL. However, this strictly accurate information may be overshadowed by the other types of information presented to consumers, which contain a confusing array of restrictions on their rights.

Particular problems arise with respect to exclusions and limitations on consumers' rights. In most cases the guarantees under the ACL are mandatory and cannot be excluded by contract.<sup>15</sup> The ACL contains specific prohibitions on misrepresenting consumers' rights under the consumer guarantee regime.<sup>16</sup> Section 29(1)(m) prohibits a person from making a misleading representation about the "existence, exclusion or effect" of the consumer guarantees.<sup>17</sup>

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<sup>12</sup> *RAM Commercial Ltd v Hart* [2011] DCR 361, [16]; *Cooper v Ashley & Johnson Motors Ltd* (1997) 6 NZBLC 102, 102,116; See also *Woodley v Alex's Appliances* (1982) 16 Sask R 24.

<sup>13</sup> See eg *Paul Madsen v Agrison Pty Ltd* [2014] NSWCATCD 79; *Saltalamaccia v Tayser Automotive Group Pty Ltd trading as Nunawading Great Wall* (Civil Claims) [2014] VCAT 1463, [59].

<sup>14</sup> *Marwood v Agrison Pty Ltd* [2013] VCAT 1549; *Australia Rong Hua Fu Pty Ltd v Ateco Automotive Pty Ltd (Civil Claims)* [2015] VCAT 756

<sup>15</sup> ACL, s 64.

<sup>16</sup> In enforcing the CGL, the Australian Competition and Consumer Commission has relied extensively on the prohibitions on misleading consumers as to the effect of the consumer guarantee regime. See eg *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *Australian Competition and Consumer Commission v Launceston Superstore Pty Ltd* [2013] FCA 1315; *Australian Competition and Consumer Commission v HP Superstore Pty Ltd* [2013] FCA 1317; *Australian Competition and Consumer Commission v Camavit Pty Ltd* [2013] FCA 1397; *Australian Competition and Consumer Commission v Avitalb Pty Ltd* [2014] FCA 222; *Australian Competition and Consumer Commission v Gordon Superstore Pty Ltd* [2014] FCA 452; *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464.

<sup>17</sup> ACL s 29(1)(m).

Traders may recognise that they cannot contract out of most consumer guarantee obligations, yet muddy this reality with the qualification on an otherwise overly broad exclusion clause that consumers' rights are limited "to the extent permitted by law". Or they may include a statement that the consumer has rights under the law, but only towards the back of the document and bookended by restrictive provisions about the method of return of faulty goods and asserting various limitations on the trader's liability for defects. In these circumstances, it is difficult for consumers to understand that the ACL prevails or to convince the trader that this is the case.

Consumers who do not fully understand their rights under legislation such as the ACL, and the relationship between those rights and their contractual obligations, may be confused about the effect of these types of qualifications on their statutory rights. They may assume their rights are as limited as set out in the contract, and there will therefore be a chilling effect on consumers' efforts to obtain redress for goods that fail to comply with the consumer guarantees in the ACL.

There are two possible responses to this problem of lack of transparency in consumer contracts. The first is a stronger obligation on traders clearly to indicate consumer rights under the ACL in their contracts. The second is a requirement that consumer rights under the ACL are made clear at the point of sale.

#### 4.1 A transparency obligation

Under the ACL transparency is a factor to consider in deciding whether a term is unfair under Pt 2-3 but is not an independent obligation.

A stronger response would be to impose an obligation on traders to ensure that consumer contracts are transparent. This type of provision would address the problem of consumer contracts that are written in unintelligible or legalistic language that risks confusing consumers about their rights under the ACL.

*Consumer Rights Act 2015 (UK) s 68.*

"A Trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.

A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible."

#### 4.2 Mandatory display notices at the point of sale

Another response to the problem of consumer confusion over the relationship between contractual obligations and the rights given to consumers under the ACL would be to require traders to display a notice alerting consumers to the mandatory nature of these guarantees.

The form of the notice might be based on the current disclosure requirements for the sale of extended warranties under the ACL:<sup>18</sup>

"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 for compensation for any other reasonably foreseeable loss or damage. You are also entitled

<sup>18</sup> *Competition and Consumer Regulations 2010 (Cth) reg 90.*

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”.<sup>19</sup>

To be effective this type of notice should be prominently displayed at the point at which consumers are contracting and also in their contracts. Thus the notice might be required at the point of sale, on trader’s websites and also at the top of their contracts.

This type of mandatory disclosure may have the added advantage of prompting consumers to reconsider the value in extended warranties when they are offered to consumers at the time of purchase.<sup>20</sup> Inclusion of this information in the contract arguably comes too late to have an impact.

There is a model for point of sale mandatory disclosure requirements in the *National Consumer Credit Protection Act 2009* (Cth). Under this regime small amount lenders are required to display a warning at their store premises and on their websites:

“Warning: Do you really need a loan today?”<sup>21</sup>

The requirement is premised on insights from behavioural economics to the effect that consumers do not process well large amounts of information and also need short, direct warnings to counter the emotive appeal of entering into a consumer contract.<sup>22</sup>

## 5 The form and structure of legislation

### 5.1 Multiple sources of law

A major impediment to both the orderly development of the law in this area and the access to justice objectives informing the ACL is the complex and even convoluted and confusing form of the legislation. In particular the legislative structure of the ACL that often requires users to connect provisions located in quite different sections of the same legislation (for example, the statutory prohibition against misleading conduct in s 18 with the remedial options in ss 236, 237, 238 and 243 of the ACL) or within different legislation (e.g. the apportionment provisions found in s 137B CCA, relevant to liability under the ACL).<sup>23</sup> These isolated but connected provisions are challenging to navigate for the legally trained, let alone for the lay stakeholders to whom the legislation is addressed. In this context of consumer protection less ambitious legislation may be more effective than regimes that attempt to be comprehensive.

Uniformity between the regimes that adopt the ACL as the law of the states and territories is also to be encouraged. For example, the apportionment provision in s137B CCA has not been replicated in the law of the states and territories, with the consequence that it is uncertain whether a defendant’s liability under those legislative schemes can be apportioned on the ground of, for example, the plaintiff’s failure to exercise reasonable

<sup>19</sup> *Competition and Consumer Regulations 2010* (Cth) reg 90(2). This requirement came into effect from 1 July 2011.

<sup>20</sup> For concerns about the lack of value provided by many extended warranties, see Jeannie Marie Paterson, “The New Consumer Guarantee Law” (2011) 35 *Melbourne U L Rev* 252 at 266–267.

<sup>21</sup> *National Consumer Credit Protection Act 2009* (Cth) s 133 CB and regulation 28XXA.

<sup>22</sup> A Duggan and I Ramsay “Front end strategies for improving consumer access to justice” In M Trebilcock, A Duggan & L Sossin (Eds.), *Middle income access to justice* (Toronto, Canada: University of Toronto Press, 2012) pp. 95–144.

<sup>23</sup> See also *Wingecarribee Shire Council v Lehman Brothers Australia Ltd* (in liq) [2012] FCA 1028, [947] – [949] (Rares J).



care in entering into the impugned transaction, or a failure by the plaintiff to take reasonable steps to mitigate her loss.

## 5.2 The role of practice notes

Where the overall architecture of a legislative scheme has become as complex as discussed above, this may prompt consideration of what supplementary materials are required in order to ensure access to justice aims and the coherent ongoing development of consumer law.

The reality is that relatively few consumers' claims for relief from proscribed conduct under the ACL reach courts and make it into the law reports. Many disputes covered by the regime involve relatively small amounts of money, and the value of the claim will not justify the expense of going to court. Effectively in this context the regime needs an ability to self-enforce, which means that problems to be resolved without input by lawyers or judges. Yet, if access to justice is not to be illusory, it is critically important that those problems are resolved in accordance with the statutory regime. It is not enough to settle disputes through alternative dispute resolution if those settlements are reached on a basis that denies parties' respective rights and responsibilities. Regulators typically engage in enforcement proceedings with a view to the award of civil pecuniary penalties that will operate to deter contravening conduct and encourage broad-based compliance with the law. Although this high-level litigation is of significant value in promoting the statutory purpose, it is unlikely to address fine points of interpretation of the remedial regime that has been provided under statute to address individual rights.

This submission suggests that practice notes which address the operation of the law and, importantly, likely remedial outcomes in common dispute scenarios, may prove an invaluable tool in this context. Soft law guidelines seek to encapsulate key legal principles in a straightforward and accessible format and then illustrate their operation by reference to a series of simple but realistic examples. In a statutory context, the guidelines need not seek to be exhaustive: the aim would be to provide general guidance on the main rights and liabilities that arise under relevant provision, accepting that exceptions and distinctions can arise which warrant different outcomes. Importantly, the practice notes should reflect a considered consensus of the law, taking into account the views and understandings of key stakeholders, which have in turn had the opportunity to review and respond to the notes prior to their general release.

Soft law guidelines of the form suggested here can perform a different function to regulatory guidelines. These sources tend to be 'front of shop' guides to avoiding contravention of the statute. They do not necessarily address the interpretation and application of the remedial provisions to particular kinds of disputes once they arise, and the complex problems that may arise in their application to unique fact scenarios. Regulatory guidance is necessarily broad brush and is usually pre-emptive. Practice notes can represent an objective snapshot of the law, drawing on a consensus of the views of invested and disinterested stakeholders alike, reflecting the body of case law and reality of common dispute patterns, to produce a guide to dispute resolution that is not aligned to any particular stakeholder perspective. They can readily engage in important remedial enquiries that potentially fall outside the regulator's mandate and serve to support and enforce broader legislative objectives beyond those held by the regulator.

Soft law guides in this format potentially serve an important function in promoting access to justice. However, they also potentially support the principled and coherent development of the law. They can be applied across jurisdictions and be responsive to different types of claims and evolving trends in other cognate areas of the law. Moreover, such guidelines may promote the development of a shared and coherent conception of the law, by feeding into both curial and non-curial proceedings. Courts will retain an important role in this process by both drawing on the guidelines as a source of shared conceptions of the operation of the regime and also feeding back into the process, by correcting and rationalising the guidelines as required and in light of the broader legal landscape.

## 6 Unfair trading/ external dispute resolution

Associate Professor Paterson also supports the proposals by the Consumer Law Action Centre for a prohibition on unfair trading<sup>24</sup> and for industry based external dispute resolution for motor vehicles.<sup>25</sup>

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<sup>24</sup> <http://consumeraction.org.au/unfair-trading-discussion-paper/>.

<sup>25</sup> <http://consumeraction.org.au/lemon-laws-an-inquiry-into-consumer-protections-and-remedies-for-buyers-of-new-motor-vehicles/>.