1 Introduction

There are significant compliance difficulties when companies operate nationally and the
laws applying to a particular issue are different in each State and Territory. One of the
main aims of the ACL was to harmonise and simplify the consumer protection laws
across the country by taking the best laws from the States and Territories and applying
them nationally and by repealing inconsistent State and Territory based legislation.

However, whilst some conflicting sections of State/Territory based laws have been
repealed, there remains conflicting State and Territory Acts (eg. the Sale of Goods Acts)
and industry specific regulatory frameworks (eg. in telecommunications and energy). The
benefits to be gained from harmonisation have not fully been realised and in the areas
where inconsistent laws have not been repealed, instead of the ACL simplifying
consumer protection laws they have simply added another layer of regulation.

Despite this, the recent reforms to Australia’s consumer law regime have been heralded
as the “most significant reforms in Australian competition and consumer law in 35 years”\(^1\).
Those reforms comprise a new national unfair contracts regime (effective 1/7/10), new
enforcement powers and civil penalties (effective 14/4/10), new provisions dealing with
consumer guarantees, a national door to door and telesales regime, a product safety
regime and new unfair practices provisions (all effective 1/1/11).

While the new unfair contracts regime, the civil penalties and the new enforcement
powers are significant changes - many other amendments that have been made are
largely “window dressing”\(^2\) and achieve no real purpose because they simply restate the

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\(^1\) Robert Baxt, ‘The Australian Consumer Law Revolution – Is This Truly The Most Significant
Reform in Australian Competition and Consumer Law in 35 Years?’ (2010) 38 ABLR 251, 251

Law 221, 233
old law albeit by using different terminology and different section numbers or introduce
new prohibitions that were already covered by the existing law.

In the areas where there has been real change, it is too early to determine whether the
reforms have achieved all of their objectives. However, it is not too early to conclude
that, in some areas at least, the reforms are unclear in operation and have unintended
consequences.

This paper discusses in some detail, one of those areas, namely warranties.

2 Warranties

2.1 Warranty Against Defects

A warranty against defects (commonly known as a “voluntary” or “manufacturer’s”
warranty) is defined in the ACL as any representation made at or around the time that
goods or services are supplied, that a person will (unconditionally or on specified
conditions) repair or replace the goods or provide the services again or compensate the
consumer, if goods or services supplied are defective (and includes any document by
which such a representation is evidenced)\textsuperscript{3}.

The ACL provides, with effect from 1 January 2012, that a person must not, in connection
with the supply, in trade or commerce, of goods or services to a consumer:

(a) give to the consumer “a document that evidences a warranty against defects that
does not comply with” the regulations; or

(b) represent that the goods or services are goods or services to which such a
warranty against defects relates.

The regulations provide that the warranty against defects must be in a document that is
transparent and must set out a number of things including what is promised by the
warranty, what the consumer must do to claim the warranty, the name, address, phone
number and email address of the person providing the warranty, and the period within which the defect must appear.

The regulations also requires that the warranty document includes the following 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 for 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.”

("Mandatory Text")

The objectives behind these new provisions are worthy ones. It was thought that often suppliers and manufacturers provide promises to consumers that for a specified period after supply (for example 12 months) goods or services will be repaired if they are defective, but then consumers are unable to avail themselves of the promised rights because they do not have access to basic information such as the name and address of the supplier or manufacturer. Although the objectives are worthy, the new provisions are unclear in operation and the regulations have unintended consequences.

2.1.1 Warranties are often in standard form and provided by overseas manufacturers

Often “warranties against defects” are provided by overseas manufacturers and the warranty provided is a standard one, no matter in which country the goods are sold. So for example, the warranty document in the box containing a new television or a new hair dryer is likely to be the same, no matter if the good is sold in Australia or elsewhere and from 1 January 2012 the warranty will need to comply with the ACL. Australian suppliers will be in breach if the warranty documents contained in such goods do not comply with the ACL. Overseas manufacturers will need to be convinced to change their warranty documents. If they don’t, from 1 January 2012, suppliers will need to open packaging and amend or remove the warranty documents to avoid the risk of a breach.

\(^3\) s102(3) of the ACL.
2.1.2 **No sell through for current stock**

In addition, many businesses’ current stock in retail channels would include warranty documents that fail to comply with the ACL. For some businesses, this stock may take a long time to clear. There is no opportunity under the ACL to “sell through” existing stocks of product. Accordingly, from 1 January 2012, these businesses risk breaching the ACL.

2.1.3 **Difficult to include Mandatory Text on small items**

The Mandatory Text and required details are reasonably lengthy. The following paragraph illustrates (arguably) the bare minimum that would be needed to comply with the regulations:

“If this [product name] is in any way defective [other than resulting from abnormal use], you can, at your cost, return it [with its packaging] to [Smith Company, 123 Smith Street Smithtown] or [call 01 2345,6778 or email returns@smithcompany.com.au] and tell us where you bought it and we will replace it. 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 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 benefits under this warranty are in addition other rights you may have at law.”

It appears that the ACCC has formed the view that labels and packaging that refer to a customer’s rights to have the goods repaired/replaced must include the Mandatory Text and details required by the regulations. If this is correct, this will be difficult in some circumstances, for example the labels or packaging on small items (eg. stationery items, batteries, confectionary items). What would be less difficult would be for the label/packaging to refer to a website which includes the Mandatory Text and all other information required by the regulations.
2.1.4 Where must the Mandatory Text appear?

The ACCC has recently indicated that in its view “any material with writing on it could amount to a warranty against defects, for example packaging or a label”. Further, the ACCC guidance notes provide that “in order to comply with the ACL the business should provide consumers with all the prescribed requirements on the warranty card rather than referring consumers to their website for further information”.

Whether in fact the ACL would be breached if labels or packaging of products state that a customer has a right to repair or a refund if the product is defective and refer the customer to a website for all of the information required by the regulations, is far from clear.

The prohibition is on giving “a document that evidences a warranty against defects that does not comply” with the regulations. It is unclear whether:

(a) every document that itself refers to or evidences a warranty against defects (e.g., labels and packaging) must comply with the regulations; or

(b) a document that refers to or evidences a warranty against defects does not itself have to comply with the regulations provided that the actual “warranty against defects” (i.e., the warranty detailed on a named website) complies with the regulations.

In my view, the second interpretation should be preferred. If a box containing a toaster stated “We will repair this toaster and compensate you for loss if it is defective - see inside for full details” and the warranty card inside the packaging was fully compliant with the regulations - it would seem most unlikely that this would cause any concerns about a breach of the ACL. By analogy, there should be no different result, if the box containing the toaster stated “We will repair this toaster and compensate you for loss if it is defective - see [www.toastersite] for full details” of your warranty, provided that website is fully compliant with the regulations. Enabling the required information to be on a website

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4 ACCC Guidance Notes: Warranties Against Defects.
would address the objective of ensuring that consumers have access to the information required to take advantage of the warranty.

Enabling the required information to be on a website would also reduce compliance costs because if the business address, phone number or any other required information changes, it will be much easier for a business to change a website than recall and amend non-compliant labels and packaging.

2.1.5 **Mandatory Text not fully accurate and likely to be misunderstood**

The Mandatory Text is not complete given it attempts to summarise many complicated provisions. For example, consumers are not actually entitled to a replacement or a refund for a major failure in all circumstances, including if the consumer does not return the goods within a reasonable period of time after the failure becomes apparent or in circumstances where the goods cannot be detached from other property without damaging the goods.

In addition, the Mandatory Text also contains a number of terms that are unlikely to be understood by many consumers, for example, concepts of “major failure”, “reasonably foreseeable” loss or damage and “acceptable quality”. These are all concepts which are not capable of precise definition and can easily be misunderstood by consumers. Accordingly, it is likely that use of these terms may, in some circumstances, result in consumers thinking they are entitled to compensation when they are not. This may increase the level of unfounded claims, complaints and frustration by consumers, ultimately to the detriment of businesses who will need to deal with such claims and complaints and unhappy customers.

For example, a purchaser of a new motor vehicle which after a few thousand kilometres of use, has a defect causing the engine to overheat and the car to be undriveable, may, on the basis of the Mandatory Text, think that such a defect is a “major failure” and that they are entitled to a refund or replacement of the car. However, in a similar fact scenario in New Zealand, the relevant Tribunal found that there was no breach of guarantee as the
defect could be repaired quite cheaply and the defect did not lead to other problems with the vehicle\textsuperscript{5}.

Finally, the definition of a warranty against defects clearly contemplates that it can apply to the supply of services. However, the Mandatory Text is clearly drafted on the basis that it only applies to goods. If a service provider wants to provide a warranty against defects, it must include the Mandatory Text on its warranty documents because it is an offence not to do so and pecuniary penalties apply. However, if the Mandatory Text is used on warranty documents relating to services, it is likely to confuse consumers, ultimately to the detriment of businesses.

2.1.6 \textbf{Mandatory Text misleading for non-personal goods}

In addition, a complication arises for businesses wanting to offer an express warranty against defects for goods priced at $40,000 or less that are not goods ordinarily acquired for personal, domestic or household use ("non-personal goods"). Section 64A of the ACL allows a supplier to limit its liability in respect of non-personal goods, where it is fair and reasonable to do so, to one or more of the following:

(a) the replacement of the goods or the supply of equivalent goods;
(b) the repair of the goods;
(c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
(d) the payment of the cost of having the goods repaired.

However, if a business wants to provide a warranty notifying customers of the circumstances in which the supplier will repair or replace the goods, from 1 January 2012 the business will have to include the Mandatory Text which includes the following sentence:

\textit{"You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage."}

\textsuperscript{5} Wellington Motor Vehicle Disputes Tribunal Decision No. WN 07/00
If the supplier has limited its liability in accordance with s64A of the ACL as it is entitled to do, this statement will not be correct in respect of non-personal goods as customers will not be entitled to compensation for reasonably foreseeable loss or damage. In these circumstances suppliers are placed in the remarkable position of being required to include a representation in their warranty documentation that is incorrect.

For example, a supplier supplies a commercial coffee machine for $25,000. The supplier of that coffee machine wants to limit its liability to repairing the machine and wants to exclude all liability for lost profits. The supplier provides a warranty document setting out the circumstances in which the supplier will repair the machine. In these circumstances, s102 of the ACL and the regulations would apply and would require the Mandatory Text and other information set out in the regulations to be provided. The Mandatory Text provides that compensation is payable in circumstances when it is not, if the supplier has limited its liability to the repair of the machine, as it is entitled to do.

### 2.1.7 Time Period

Regulation 90(1)(e) requires that:

> “a warranty against defects must state the period or periods within which a defect in the goods or services to which the warranty relates must appear if the consumer is to be entitled to claim the warranty”

If the warranty against defects complies with Regulation 90(1)(e) and (say) provides that the consumer has 12 months to make a claim under the warranty and includes the Mandatory Text as it must do, the warranty against defects will provide:

> “If this [product name] is in any way defective [other than resulting from abnormal use], you can, at your cost, and within 12 months from the date of purchase, return it [with its packaging] to [Smith Company, 123 Smith Street Smithtown] or [call 01 2345,6778 or email returns@smithcompany.com.au] and tell us where you bought it and we will replace it. 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 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 benefits under this warranty are in addition other rights you may have at law.”

The likely implication for at least many consumers will be that the guarantees and rights under the ACL are only effective for the stated warranty period (eg. 12 months). This may, of course, be incorrect, as consumers rights under the ACL, may well extend beyond the stated period. This is also a curious result caused by the requirements under Regulation 90(1)(e) and the Mandatory Text.

2.2 **Extended Warranties**

Generally, extended warranties extend the period of protection given by a voluntary warranty for an additional cost. Extended warranties are a highly profitable revenue source for those who supply them. They are common for a wide range of consumer products including electronic goods, white goods, mobile phones and cars.

The National Education and Information Advisory Taskforce’s (NEIT) 2009 study found that whilst consumers usually purchase extended warranties for “peace of mind”, they often felt pressured by retail sales tactics which made extended warranties “hard to refuse”\(^6\).

To address this concern, the ACL introduced a prohibition on a person from making a false or misleading representation concerning a requirement to pay for a contractual right that is “wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that a person has under any” law.

Some of the commentary in relation to the new prohibition suggests that its main objective is to prevent the marketing and sale of extended warranties where the warranty

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provides the consumer with no additional benefit to that provided at law. But that is not how the new prohibition has been drafted.

The words “partly or wholly equivalent” suggest that an extended warranty containing a mix of rights, some beyond and some duplicating those provided under the new guarantees regime, could breach the ACL. The ACCC guidelines suggest that a price a consumer pays for an extended warranty must be in exchange for rights that are completely “over and above” the statutory rights.

This is a real problem for businesses providing extended warranties as often the extended warranty does provide additional rights but is drafted generally and also covers rights the consumer would have at law to have their product repaired or replaced in the event the goods are defective. Warranties that are drafted in this way could breach the new prohibition.

For example a national retailer of electronic products currently sells 2, 3 and 4 year extended warranties which promise the repair or replacement of products in the event they “break down”. Again a manufacturer of white goods provides a 3 year Extended Warranty which promises “unlimited repairs” and “new for old replacement if yours cannot be repaired” where there is “electrical or mechanical failure” of the appliance. A car manufacturer sells extended warranties which provides that “during the warranty period…(X thousand kilometres or Y years)... we will, at our option, repair, replace or adjust free of charge any part of the vehicle (except batteries) which are found to be defective in factory materials or workmanship under normal use and operation within Australia”.

All of these extended warranties, are “partly” equivalent to rights the consumer would have at law because for at least the first period after supply of the goods (e.g 12 or 24 months) the consumer would not have any additional rights under the extended warranty.
In order to ensure compliance, businesses who offer extended warranties “need to have a clear understanding of where their liability under the ACL stops, in order to ascertain where an extended warranty … can start”\(^7\).

However, this is not always possible, because the scope of the new guarantees are not clear. For example, the “scope of the guarantee of acceptable quality … gives rise to considerable uncertainty, especially as regards durability”\(^8\). That is, the period for which the guarantee of acceptable quality requires a product to operate free from defects is very difficult to determine and will always depend upon an assessment of all of the relevant circumstances including the precise use to which the product has been put.

The ACCC has provided the following relevant example:

“A consumer buys a plasma television for $6,000. It stops working two years later. The supplier tells the consumer they have no rights to repairs or another remedy as the television was only under the manufacturer’s warranty for 12 months. The supplier says that the consumer should have bought an extended warranty, which would have given five years’ cover. A reasonable consumer would expect more than two years’ use from a $6000 television. Under the consumer guarantees, the consumer therefore has a statutory right to a remedy on the basis that the television is not of acceptable quality. The supplier must provide a remedy free of charge”\(^9\).

Presumably this example is just given for illustrative purposes, because whether the TV in the example would not be “of acceptable quality” because it only was “defect free” for 2 years, must be dependant upon all of the relevant circumstances. For example, if the purchaser of the plasma TV bought it for use in an all day/all night café and it was turned on 24/7 for 2 years and at $6,000 the TV was one of the cheapest on the market for a TV of its size, perhaps a reasonable consumer would not expect that it would last any longer.

\(^7\) Judith Miller and Mark Worsman, ‘Manufacturers’ warranties, extended warranties and service plans - what you need to know’ (2011) Australian Product Liability Reporter 83, 84

\(^8\) Stephen Corones, The Australian Consumer Law (2011) 241

\(^9\) ACCC: Consumer guarantees - A guide for businesses and legal practitioners p11.
than 2 years. However, if, in the example, the purchaser of the plasma TV had it in a “cinema room” and was only used by the family on Saturday nights, and at $6,000 the TV was one of the most expensive on the market for a TV of its size, a reasonable consumer may well expect the TV to last longer than 2 years.

Given that the protection and scope of the consumer guarantee that goods will be of acceptable quality will depend upon all of the relevant circumstances, and given that strictly speaking, any extended warranty providing that goods will be repaired or replaced should only commence once the guarantee of acceptable quality has expired, it will be difficult (and will require very careful drafting) for manufacturers or suppliers to provide extended warranties for a fixed period of time (e.g. 2 or 3 or 4 years) without risk of breach.

2.3 Express warranties

The ACL introduces a series of consumer guarantees. One of the guarantees is that both a supplier and manufacturer will comply with any “express warranty” given or made in relation to goods. An “express warranty” is defined as including an undertaking or representation which is given or made in connection with the supply or promotion of the goods and which has a natural tendency of inducing consumers to acquire the goods and which relates to the quality, state, condition, performance or characteristics of the goods or the provision of services or spare parts that may be required for the goods.

This consumer guarantee is much wider in scope than the previous provisions relating to express warranties. The previous provisions imposed liability on manufacturers directly to consumers for non-compliance with express warranties. Where there was non-compliance, manufacturers were obliged to compensate the consumer for loss or damage. There was no provision relating to express warranties and contracts with suppliers. Of course, if suppliers chose to actually provide an express warranty and did not comply with it, consumers would have rights for breach of contract against the supplier.
However, the definition of “express warranty” is very broad and extends beyond traditional contractual “warranties” given by suppliers. Most marketing claims made by a supplier will now constitute an express warranty. If the claims are incorrect, claims can be made under ss18 and 29 of the ACL for damages, but also the remedies relating to a breach of a consumer guarantee will apply. If the breach constitutes a “major failure”, the consumer may choose to reject the goods and is entitled to a refund and damages for reasonably foreseeable loss.

For example, one retailer promotes the iPad 2 on the basis it is “Thinner, Lighter, Faster, with a 10 hour battery”. Let’s say, a consumer purchases the iPad 2 from that retailer and would have purchased it regardless of the truth or otherwise of the 10 hour battery claim. The purchaser subsequently learns that the price of the iPad from another retailer is $300 less and also discovers that in fact, the battery only lasts 5 hours. Under the TPA, the consumer would have had no rights to damages (the consumer could not have established under s52/53 they would not have purchased the iPad, but for the claim) whereas under the ACL, the consumer can reject the goods (assuming the battery cannot be fixed to ensure it can last for 10 hours) and obtain a refund. This is a curious result.

3 Conclusion

The ACL is a significant consumer protection reform. However, it is unclear whether the ACL has simplified the area of consumer protection or relieved businesses from additional compliance costs, in the way that was originally intended. Also, practical problems in complying with the ACL will cause businesses to suffer unfortunate legal uncertainty and place many of them in the invidious position of relying upon the ACCC’s discretion, rather than the terms of the ACL, to avoid civil and criminal pecuniary penalties.

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