

## MAJOR CHANGES TO CONSUMER LAW

The new *Australian Consumer Law* will come into force from 1 January 2011. The *Law* will supersede all of the state and territory *Fair Trading Acts*, and apparently also the fair trading provisions of the *Commonwealth Trade Practices Act 1974*. Enforcement of the Act will be administered jointly by the Offices of Fair Trading of the states and territories, ASIC and the ACCC. As yet, no guidance has been given on how these ten separate entities will divide the work between them.

The ACL introduces new laws for guarantees, unfair contracts and product safety. The *Law* will apply as between a "supplier" (which tends to have its normal English meaning), manufacturers and importers on the one hand and "consumers" on the other. A "consumer" is defined as a person "including a corporation":-

- (a) Who purchases goods or services valued at up to \$40,000; or
- (b) Who purchases goods or services of any value if they are for personal or domestic use; or
- (c) Who purchases a vehicle or trailer for "goods" use.

This means that, for example, a business can be a consumer if it purchases goods under \$40,000 for use in the business, or a vehicle to be used for carrying goods.

Under the *Act*, suppliers, manufacturers and importers automatically give certain guarantees, which replace the implied warranties and conditions contained in, for example, the *Queensland Fair Trading Act 1989*. These guarantees also apply to contracts for hire, lease and for the sale or provision of second hand goods. The expressed guarantees are that:

### 1. The goods or services will be of an acceptable quality.

This means that they must be fit for the purpose for which they are intended, last for a reasonable period of time in all the circumstances, and be safe and durable. What is reasonable depends on the nature and value of the goods; for example a "cheap" toaster would not be expected to last as long as an "expensive" fridge.

### 2. The goods must be fit for their purpose.

In essence, this means that the goods must do what they are supposed to. For example, a toaster must make toast. This particular guarantee can be voided if a consumer chooses not to rely on any advice given by the sales

person, or the advice should not reasonably have been given. For example, if asked, any reasonable salesman would advise that cheese on toast should not be made in a toaster. If that advice is ignored, the consumer has no complaint because he discovers his toaster is gummed up with melted cheese.

**3. The goods must match the description given.**

**4. The goods must match the sample or demonstration model.**

These are fairly self explanatory.

**5. Service and spare parts must be available for a reasonable period of time.**

If the manufacturer of a particular item does not have service network in Australia, then the onus falls on the importer or retailer to ensure that, if the goods go wrong, there are facilities available to repair them, either in-house or using an outside contractor. These facilities must be available for a "reasonable time" after the goods have been sold. Again, what is reasonable will depend on the nature, cost, and use of the goods.

**6. The warranty will apply to the goods.**

This means that a supplier cannot provide false and misleading information relating to the goods. A consumer has rights under the new guarantees, regardless of any warranty given by the manufacturer. This will avoid the situation, much beloved of (particularly) electrical retailers, where the retailer refuses to take any responsibility for a faulty item, claiming that it must be returned to the manufacturer. Under the *ACL*, the consumer has rights against both the supplier and the manufacturer (and in certain cases, the importer as well). Depending on the circumstances, the consumer is entitled to a refund, replacement or repair of the item.

**7. Right to sell**

This is a statutory recognition of the Common Law rule that a person can only sell something to which they have the title.

**8. Undisturbed possession**

This largely follows on from the above. Once the consumer has purchased the goods, they are not at risk of having them repossessed unless, for example, they fail to make loan repayments.

## **9. Free of undisclosed charges**

This means that the consumer cannot be hit with, for example, additional delivery fees that were not made known at the time that the contract was entered into.

## **10. Guarantees related to services**

Any person providing a service (ranging from professionals, such as lawyers, to mowing services and dog groomers) guarantees that they will use reasonable care and skill, and take all necessary care when providing the service. If there is no time stipulated in the contract, there is a guarantee that the service will be provided in a reasonable time, which depends on the circumstances.

## **Remedies**

The remedy depends on what the problem is. If there is a “major” problem, the consumer can choose whether to receive a full refund or replacement item, or keep the goods and be paid some form of compensation. If the problem is not major, then it is for the retailer to decide on which remedy to use. If, however, the retailer takes too long to make up its mind, the right to stipulate the remedy passes back to the consumer. In these circumstances, the consumer can also claim the costs of repair, and any related costs, such as postage, from the retailer.

A major failure is one where “a reasonable consumer wouldn’t have bought the goods if he knew of the problem, or the goods are significantly different from what was asked for”.

There are certain exceptions to these guarantees, specifically, one off sales (eg a garage sale), commercial transactions of more than \$40,000.00, insurance contracts, and transport costs. Auction sales are exempt where the auctioneer is acting as an agent (eg in real estate); sales by a business on auction sites, such as e-bay, are not exempt, although sales by individuals not in the course of a business, will be exempt.

The ACO has also strengthened the laws relating to unsolicited goods and services, and relating to the safety of products. With the latter, as soon as any party to a transaction (eg supplier, manufacturer or repairer) becomes aware that a consumer has suffered injury or illness as a result of a defect in the goods, a report must be made to the Federal Consumer Affairs minister within forty-eight (48) hours.

Further information can be obtained from [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au) or you can contact our senior litigation solicitor, Nigel Collins, for help.