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CORPORATE & COMMERCIAL

Time to Review Documents With Warranties to Consumers

Mandatory Conditions For Services as Well as Goods

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Does your business give warranties against defects for goods or services? If so, you may need to be aware of changes that have been made to the *Competition and Consumer Regulations 2010* which will require a careful review and revision, where appropriate, of documentation containing **warranties against defects.**

Section 102 of the *Australian Consumer Law* ("ACL") which is contained in Schedule 2 of the *Competition and Consumer Act 2010* ("CCA") provides that regulations may prescribe requirements relating to the form and content of warranties against defects. Regulation 90 contains these prescribed requirements.

Regulation 90 currently requires that a mandatory statement in words that cannot be varied must be contained in a document that contains a warranty against defects for the supply of **goods** to a consumer. The Regulation has been amended and now requires similar mandatory wording for warranties against

defects for the supply of **services** or **goods and services** to consumers. This will come into effect on **8 June 2019.**

For a warranty against defects in **goods** only, the prescribed wording is:

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.

For **services** only, the prescribed wording is:

Our services come with guarantees that cannot be excluded under the

Australian Consumer Law. For major failures with the service, you are entitled:

- to cancel your service contract with us; and
- to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to be compensated for any other reasonably foreseeable loss or damage. If the failure does not amount to a major failure you are entitled to have problems with the service rectified in a reasonable time and, if this is not done, to cancel your contract and obtain a refund for the unused portion of the contract.

For **goods and services** the wording is:

Our goods and services come with guarantees that cannot be excluded under the Australian Consumer

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Law. For major failures with the service you are entitled:

- to cancel your service contract with us; and
- to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

The intent of this mandatory wording is to make it clear to a consumer that any express warranty is given by a supplier of goods or services does not exclude the statutory guarantees that are imposed by the ACL for goods (sections 51 to 59) and for services (sections 60 to 63). Although the requirement for the mandatory wording in relation to warranties against defects for goods has been in existence since the commencement of the ACL, it is likely that this wording is often not included. The new requirements for wording in relation to services may similarly be overlooked, but it is likely that the Australian Competition and Consumer Commission (ACCC) will

be more vigilant in enforcing these requirements.

There are some exceptions to the requirements (in section 63 of the ACL) for services for the transportation or storage of goods for the purposes of the business, trade, profession or occupation; or a contract of insurance, or (in section 65 of the ACL) for a gas, electricity or telecommunications service.

Supplies to consumers (and businesses)

The requirements of Regulation 90, pursuant to section 102 of the CCA only apply to the supply, in trade or commerce, of goods or services to a *consumer*. Under section 3 of the ACL, goods or services are taken to have been acquired by a person as a *consumer*, in brief summary, if:

- the amount payable for the goods or services does not exceed \$40,000; or
- the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (for goods) the goods consist of a vehicle or trailer acquired principally for use in the transport goods on public roads.

Although the ACL refers to supplies to *consumers*, the definition includes supplies from business to business.

Other mandatory requirements

As well as the requirements for mandatory wording, Regulation 90 sets out a number of other prescribed requirements for documents containing a *warranty against defects* (these requirements are not new). The requirements are that the warranty must:

- be in a document that is transparent;
- state:
 - (i) what the person who gives the warranty must do so that the warranty may be honoured; and
 - (ii) what the consumer must do to entitle the consumer to claim the warranty.
- include the prescribed text in relation to goods, services or goods and services mentioned above;
- prominently state the following information about the person who gives the warranty:
 - (i) the person's name;
 - (ii) person's business address;
 - (iii) the person's telephone number; and
 - (iv) the person's email address (if any).
- state the period or periods within which a defect in the goods or services must appear if the consumer is to be entitled to claim the warranty;
- set out the procedure for the consumer to claim the warranty including the address to which a claim may be sent;
- state who will bear the expense of claiming the warranty and if the expense is to be borne by the person who gives the warranty, how the consumer can claim expenses incurred in making a claim; and
- state that the benefits to the consumer given by the warranty are in addition to other rights and remedies of the consumer under a law in relation to the goods or services to which the warranty relates.

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Experience indicates that many of these express requirements are not complied with in documents containing express warranties for goods and/or services.

Reviewing your agreements

If your business provides warranties in respect of goods and/or services, you need to give urgent consideration to the warranty terms contained in your contracts and other documents to ensure that they comply with the strict regulatory requirements before 8 June 2019.

As well as amendments to comply with the new mandatory wording required for express warranties against defects, the opportunity should be taken for a general review of your agreements and terms and conditions to ensure that these are effective and that they comply the ACL. Care should be taken to ensure that they do not contain *unfair* contract terms or that they do not purport to exclude the mandatory guarantees imposed by the ACL.

Limitation of liability

Although the consumer guarantees implied by the ACL cannot be excluded or modified, it is often overlooked that section 64A of the ACL does permit limitation of liability for some guarantees for supplies of goods or services provided that this is clearly contained as a term of the contract for supply. The limitations which may be made are to:

- replace or supply equivalent goods;
- repair goods;
- pay the costs of replacing goods or acquiring equivalent goods;
- pay the cost of repairs for goods;
- supply services again; and
- pay the cost of having services supplied again.

If you would like any assistance in a review of your contracts and terms and conditions, please contact our Commercial Law specialists.



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