



**MASTER BUILDERS**  
A U S T R A L I A

## Effects of the Australian Consumer Law on Building and Construction Contracts

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*building australia*



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## 1 INTRODUCTION

With the commencement of the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) on 13 July 2010, the *Australian Consumer Law* contained in Schedule 1 to that Act will come into force on 1 January 2011. Each of the States has agreed to amend its *Fair Trading Act* provisions prior to 1 January, the main purpose of those amendments being to incorporate the same Schedule into the State legislation. The effect will be to have a uniform set of consumer protection laws around the country.

I have been asked to provide a brief overview of the effect that the *Australian Consumer Law (ACL)* will have on members of Master Builders Australia. I have also been asked to advise on strategies and tactics that might be adopted by members of Master Builders Australia in the light of such changes to the law as will flow from the coming into force of the ACL.

I seek to demonstrate in the following pages that there are only two respects in which the ACL will differ in any substantial degree from the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (**the TP Act**). They are:

- in the guarantee of compliance with any express warranty, and
- in the consequences of providing a warranty against defects.

(a) *Who is protected by the ACL?*

In general terms, the ACL applies only to goods or services provided to a “consumer”, as that term is defined in section 3 of the ACL. Subsections 3(1) to (3) provide, so far as relevant:

### 3 Meaning of *consumer*

#### *Acquiring goods as a consumer*

- (1) A person is taken to have acquired particular goods as a **consumer** if, and only if:
- (a) the amount paid or payable for the goods, ... did not exceed:
    - (i) \$40,000;
    - (ii) ...; or
  - (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
  - (c) ...

- (2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:
- (a) for the purpose of re-supply; or
  - (b) for the purpose of using them up or transforming them, in trade or commerce:
    - (i) in the course of a process of production or manufacture; or
    - (ii) in the course of repairing or treating other goods or fixtures on land.

*Acquiring services as a consumer*

- (3) A person is taken to have acquired particular services as a **consumer** if, and only if:
- (a) the amount paid or payable for the services ... did not exceed:
    - (i) \$40,000;
    - (ii) ...; or
  - (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

The aspects of the ACL with which this paper deals are those sections which impose obligations on one who supplies goods or services directly to a consumer. In the light of the above definition of “consumer”, it is suggested that those members of Master Builders Australia who will be affected by the ACL are those who provide goods and services in the course of undertaking the erection, repair or renovation of domestic buildings, and who provide those goods and services directly to the person who is then living in the premises, or who will live there on the completion of the work.

The above definition of “consumer” is virtually identical with that in s 4B of the TP Act.

## **2 THE OBLIGATIONS IMPOSED BY THE ACL**

Sections 51 to 59 of the ACL specify the obligations imposed on persons who supply goods to a consumer. Those sections replace (and add to) the obligations currently implied into contracts for the provision of goods by a corporation to a consumer under sections 69 to 72 of the TP Act.

Sections 60 to 62 of the ACL specify the obligations imposed on persons who supply services to consumers. Those sections replace, and add to, the warranties implied by s 74 of the TP Act into contracts for the supply of services by a corporation to a consumer.

(a) *The mandatory application of these obligations*

One comment which applies to all of the obligations under discussion is that, as is currently the case with the equivalent obligations specified in the TP Act, their application cannot be excluded or modified by the parties to a contract.

**Section 64 of the ACL** provides, in general terms, that a term of a contract is void to the extent that it purports to exclude, restrict or modify the application of any of the obligations discussed in the following pages.

This blanket prohibition of exculpatory clauses is modified by **section 64A**.

**Section 64A(1)** provides that in the case of goods supplied under a “business” contract – that is, one for the supply of goods other than those of a kind ordinarily acquired for personal domestic or household use or consumption – the supplier may limit its liability to the replacement or repair of the goods, or the supply of equivalent goods, or the payment of the cost of such replacement, repair or supply.

**Section 64A(2)** allows the supplier of “business” services – that is, a contract for the supply of services other than those of a kind ordinarily acquired for personal domestic or household use or consumption – to limit its liability to supplying the services a second time, or paying for the cost of such a further supply.

**Section 64A(3)** allows the recipient of the goods or services to argue that it is not fair and reasonable in all the circumstances to permit the supplier of the goods or services to rely on the exculpatory clauses permitted by subsections (1) and (2) and thereby, if successful, prevent the supplier relying on them.

Sections 64 and 64A are, in all relevant respects, the same as sections 68 and 68A of the TP Act.

(b) *The change from “conditions” and “warranties” to “guarantees”*

A second comment which applies to all of the above provisions of the ACL, when compared with their counterparts in the TP Act, is that the ACL obligations are all described as “guarantees”, whereas the TP Act obligations are described as either “conditions” or “warranties”. The reason for this change is an attempt by the drafters of the ACL to provide greater clarity of the law for consumers.

Lawyers were certainly aware, when the TP Act was passed, of the meaning of “conditions” and “warranties” in this context, and it may be accepted that corporations which provided goods and services to consumers, and to which, therefore, Part V Division 1 of the TP Act applied, were also aware of the meaning of those words in this context. Both lawyers and corporations understood that a “condition”, in this context, is an important term in a contract, breach of which will generally entitle the injured party to terminate the contract (if that is possible) and that a “warranty” is a less important term in a contract, breach of which will generally entitle the injured party to no more than damages.

However, consumers to whom goods and services are supplied cannot be expected to know of these connotations in the two words. The word “condition” has a variety of meanings, even in relation to contracts, and a “warranty” may often be thought of by a consumer as a promise by a manufacturer as to the length of time that the manufacturer will stand behind the product and repair or replace a defective product without question. The drafters of the ACL doubtless felt that it would aid clarity to use a neutral term to describe the obligations of providers of goods and services to consumers, in order to avoid any misconceptions arising from the use of words with such a variety of meanings. The drafters happened to hit upon “guarantee”, but it would appear that they might just as readily have used any other word that would indicate a binding promise.

Having decided to make this change as an aid for consumers to better understand their rights, the drafters also took the opportunity to spell out in some detail the nature of a supplier’s obligations. Rather than continue with the notion of goods having to be of “merchantable quality” – a phrase first used by Judges in England in the eighteenth and nineteenth centuries, and not given any legislative interpretation – the drafters have used the term “acceptable quality” and sought to give some definition to the term. Similarly, rather than continuing to oblige sellers to provide goods that are “fit for purpose”, the ACL seeks to spell out more fully what is encompassed within that notion.

The change from “conditions” and “warranties” to “guarantees” required a further change, in the ACL from the pattern of consumer protection in the TP Act. As mentioned above, the use of the word “condition” and “warranty” was shorthand for both the nature of the term concerned and the remedy generally available for a breach of such a term. When the drafters of the ACL decided to abandon the use of those words, they had not only to spell out in some detail the obligations owed by a supplier of goods or services, but also to provide for a remedy regime. This has been done in sections 259 to 266 in relation to suppliers of goods, and in sections 267 to 270 in relation to suppliers of services.

(c) *The content of each obligation*

Although sections 51 to 59 of the ACL all impose obligations on persons who provide goods to consumers, it is proposed to deal in any detail only with sections 51 to 56 and section 59, as they are the ones most relevant to members of Master Builders Australia. Section 57 imposes obligations relating to the supply of goods by sample or demonstration model, and section 58 imposes obligations on the manufacturer of goods as to the availability of facilities for their repair, and the provision of spare parts. And, while sections 60 to 62 of the ACL specify the obligations imposed on persons who provide services to consumers, section 62 will not be considered here, as it is concerned only with the time within which services must be supplied.

(i) *Obligations as to title, encumbrance and quiet possession*

**Sections 51, 52 and 53 of the ACL** impose obligations on the supplier of goods to a consumer that:

- In the case of a sale, the seller has the right to dispose of the goods (s 51)
- In the case of a hire or lease of goods, to ensure that the consumer will have undisturbed possession of the goods (s 52); and

- In the case of a sale of goods, that the goods are free (and will remain free) from any undisclosed security, charge or encumbrance (s 53).

These obligations are very similar to the implied condition as to title in s 69(1)(a) of the TP Act, the implied warranty of quiet possession in s 69(1)(b) of the TP Act and the implied warranty of freedom from any encumbrance in s 69(1)(c) of the TP Act respectively.

Nothing turns on the fact that, under the TP Act, the first of those implied obligations is a condition and the other two are warranties. The reason for that distinction is that, if a seller does not have the right to dispose of goods, the buyer's only realistic choice is to terminate the contract, whereas a breach of either a covenant of quiet enjoyment of goods or their freedom from encumbrances is adequately compensated for in money. It would appear that similar remedies will be available under sections 259 to 261 of the ACL.

*(ii) Obligations as to acceptable quality*

**Section 54 of the ACL** imposes an obligation on the supplier of goods that they be of "acceptable quality". As mentioned above, this section is based on s 71(1) of the TP Act, but is considerably more extensive, as it seeks to give some clear meaning to the phrase "acceptable quality".

Section 71(1) of the TP Act merely obliges a seller to provide goods that are of "merchantable quality", without defining that phrase, and excuses the seller of liability for those defects which it brought to the attention of the consumer before the sale, and of those defects which any examination actually made by the buyer ought to have revealed.

Section 54 of the ACL, on the other hand, provides that goods are of acceptable quality if on an objective basis, they fulfil the various requirements of subsection (2) (which includes fitness for use, appearance, freedom from defects, safety and durability), having regard to the nature of the goods, their price and any written or oral statements or representations made about them. The excuses from liability in s 71(1) of the TP Act mentioned above continue to apply (see subsections 54(4) and (7)) and are supplemented by subsection 54(5), under which any defects in the goods are deemed to have been drawn to the consumer's attention by a written notice on the goods. The supplier is also excused from liability if the consumer fails to take reasonable care of the goods, and they are damaged by abnormal use (see s 54(6)).

*(iii) Obligations as to fitness for purpose*

**Section 55 of the ACL** imposes on the supplier of goods an obligation that they will be fit for any purpose for which the supplier represents that they are reasonably fit, and for any other particular purpose for which the goods are being acquired, and which the consumer makes known to the supplier, the supplier's agent or the manufacturer. However, this obligation does not arise if the circumstances show that the consumer did not rely on the skill or judgment of the supplier, the supplier's agent or the manufacturer, or that it was unreasonable for the consumer to so rely on the skill or judgment of those others.

This obligation is similar to that in s 71(2) of the TP Act, except that the ACL imposes this obligation on the supplier in circumstances where the consumer has made known to the manufacturer (rather than the supplier) the purpose for which the goods are being supplied. In such a case, section 274 of the ACL allows the supplier to seek an indemnity from the manufacturer for any costs incurred by the supplier because of the breach of section 55: see section 274(2)(b)(ii) of the ACL.

(iv) *Obligations of correspondence with description*

**Section 56 of the ACL** imposes on a person who supplies goods by description the obligation that the goods as supplied correspond with that description. The section goes on to provide that a sale of goods still comes within the meaning of a sale by description even though the consumer has selected the item from goods that have been exposed for sale. This section is not materially different from section 70 of the TP Act.

(v) *Obligations as to express warranties*

**Section 59(2) of the ACL** provides, so far as relevant for present purposes:

If a person supplies, in trade or commerce, goods to a consumer ... there is a guarantee that the supplier will comply with any express warranty given or made by the supplier in relation to the goods.

Section 59(1) imposes a similar obligation on the manufacturer of goods, and has therefore been omitted.

The phrase “express warranty” is defined in section 2(1).

***express warranty***, in relation to goods, means an undertaking, assertion or representation:

- (a) that relates to:
  - (i) the quality, state, condition, performance or characteristics of the goods; or
  - (ii) the the provision of services that are or may at any time be required for the goods; or
  - (iii) the supply of parts that are or may at any time be required for the goods; or
  - (iv) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods, in relation to which the undertaking, assertion or representation is given or made, form part; and
- (b) that is given or made in connection with the supply of the goods, or in connection with the promotion by any means of the supply or use of the goods; and

- (c) the natural tendency of which is to induce persons to acquire the goods.

Section 59 does not have any direct parallel in the TP Act. Subsection (2), when read with the definition of an “express warranty”, may appear to put an unacceptable burden on the seller of goods to a consumer, in that, in broad terms, any statement about goods made in connection with their sale, and which might objectively be regarded as an inducement to the purchaser to acquire them, if it turns out to be false, will lead to the supplier being in breach of section 59(2). Such a breach would render the supplier liable, under section 259 of the ACL, to either make good the statement or pay damages for any loss suffered by the purchaser.

The drafters of the ACL did not see section 59 as having the apparently serious consequences just referred to. In the Explanatory Memorandum to the legislation by which the ACL was introduced into Parliament, the only comment about what is now section 59 was:

7.53 Suppliers and manufacturers often provide express warranties, when they sell goods to consumers. The ACL includes a guarantee that any such guarantees are complied with. This ensures that the full suite of remedies available for breaches of consumer guarantees are available when a person fails to comply with an express warranty.

However, it is suggested that section 59 is, in its effect on parties negotiating for a contract, less burdensome on suppliers of goods than section 52(1) of the TP Act, which is to be replaced by section 18(1) of the ACL. Section 18(1) provides:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

It is well known that the courts have interpreted s 52 of the TP Act very broadly, and have read it exactly as written, with no attempt to modify the apparent meaning and effect of the words by reference to any implications drawn from Judge-made law about the effect of statements or other conduct made or engaged in during negotiations for a contract, or its subsequent performance. Hence, section 52 imposes strict liability on anyone who makes a statement during the course of negotiations for a contract, on which a contracting party relies, and which turns out to be wrong, or which otherwise leads the recipient of that statement into error. Indeed, it is possible that the very particularity of the definition of “express warranty” in the ACL may lead to that phrase having a narrower meaning, in some particular circumstances, than the broad generality of section 18(1) of the ACL.

(vi) *Obligations as to supply of services*

**Section 60 of the ACL** imposes on anyone who provides services to a consumer the obligation that the services will be rendered with due care and skill. **Section 61(1)** imposes on the supplier of services an obligation that the services, and any product resulting from those services, will be reasonably fit for any particular purpose for which the consumer has made it known that the services are being acquired. **Section 61(2)** imposes on the supplier of services an obligation that the services, and any product resulting from those services, will be of such a nature and kind that they might reasonably be expected to achieve any particular result which the consumer has made it

known he or she wishes those services to achieve. **Section 61(3)** excuses the supplier of such services from that obligation if either the consumer did not, in fact, rely on the skill or judgment of the supplier, or it was unreasonable in all the circumstances for the consumer to so rely. **Section 61(4)** declares that the section does not apply “to a supply of services of a professional nature by a qualified architect or engineer.” Sections 60 and 61 of the ACL are not materially different from section 74 of the TP Act.

It is suggested that these provisions are of limited relevance to members of Master Builders Australia, since in the great majority of cases, members of Master Builders Australia, when providing services to those who come within the definition of “consumer” in the ACL, will have bound themselves by express terms in the contract to comply with the specifications included therein, and not merely to have taken reasonable care to ensure compliance with those specifications.

### **3 THE REMEDY REGIME OF THE ACL**

#### *(a) Introduction*

In discussing the change from “conditions” and “warranties” in the TP Act to “guarantees” in the ACL, it was mentioned that one consequence of that change is that the ACL must spell out the remedy regime for breaches of those “guarantees” in more detail than was done in the TP Act. It is to those remedies that we now turn.

The ACL deals separately with remedies for breach of one of the obligations discussed above relating to the supply of goods and with remedies for a breach of the obligations relating to the supply of services. In view of the suggestion made above that the obligations relating to the supply of services are of marginal relevance to members of Master Builders Australia, it is proposed to deal only with sections 259 to 265 of the ACL, dealing with remedies for breach of an obligation relating to the supply of goods.

#### *(b) The notion of a “major failure”*

One of the basic concepts in the remedy regime is that of a “major failure”. That concept is described in s 260 and, at the risk of unacceptably paraphrasing the section, a supplier of goods to a consumer who fails to comply with any of the obligations referred to previously in this paper – that is, who commits a breach of that obligation – has been responsible for a “major failure” if the consumer does not receive substantially the whole of the benefit promised by the supplier.

This is a concept which is ideally suited to an oral contract in retail premises for the sale of goods to a consumer. However, it is arguable that it has no place when considering a breach by a builder, in relation to a written contract for the erection or renovation of domestic premises, which is the paradigm relationship with which this paper is concerned. In such a building contract, if the builder has agreed to provide and install some of the fixtures and fittings, such as a dishwasher, it could not be said that the provision of a defective dishwasher is such a breach of the whole contractual arrangement as would deny to the consumer substantially the whole of the benefit of that contractual arrangement.

It is therefore argued that, for the purposes of this paper, if a builder has supplied fixtures and fittings any one of which does not comply with the obligations imposed by

the ACL, the consumer could not reasonably argue that the builder's conduct is a "major failure" for the purposes of the remedy regime in the ACL.

(c) *What remedy does a consumer of building services have?*

The conclusion to be drawn from the argument in the preceding paragraphs is that the remedy most readily available to a consumer of building services is to be found in section 259 of the ACL.

Under paragraph 259(2)(a), the consumer may require the supplier to remedy any defect in the goods supplied within a reasonable time.

If the supplier refuses or fails to comply with that requirement, paragraph 259(2)(b) provides that the consumer may either have the defect repaired by some-one else and recover the costs thereof from the supplier, or (subject to the limitations listed in section 262(1)) reject the goods and either return them to the supplier, or have the supplier collect them. The right to reject goods is lost if the consumer has not exercised that right within such time as would have been reasonable in all the circumstances for the consumer to have discovered the defect, or if the goods cannot (for whatever reason) be returned in the same good order in which they were delivered.

(d) *"Warranties against defects"*

A point that the drafters of the ACL made about the consumer protection provisions of the TP Act is that regrettably few members of the public were aware of their rights under that legislation. In an apparent attempt to overcome that ignorance, the ACL provides, in s 102, that if (say) a builder supplies goods along with the residential premises, and if such a builder were to represent "directly to the consumer" that the goods or services supplied come with a warranty against defects, then the builder must give the consumer a document specifying the details of that warranty.

The required content of such a document is set out in new reg 90 of the relevant regulations (currently, the *Trade Practices Regulations 1974*, but the name will change to the *Competition and Consumer Regulations 2010* on 1 January 2011). This regulation, and the consequent need to provide such a document, does not commence until 1 January 2012. A sample of such a document is:

This warranty is given by [*insert name of builder*] of [*insert builder's business address, telephone number and email address (if any)*]. 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. This warranty applies to any defect that appears within [*insert length of warranty period*]. If such a defect appears within that period, you must inform [*insert name of builder*] in writing sent to me by pre-paid post at the above address. I [*insert name of builder*] will bear the expense you may be put to in claiming this warranty, when you send me receipts evidencing all the expenses to which you have been put. The benefits given by this warranty are in addition to any other rights and remedies you may have under a law in relation to these goods.

It must be made very clear that such a written warranty is not compulsory. It must be given if, **but only if**, the supplier of the goods or services has made some representation that the goods or services come with a warranty against defects. But there is no penalty of other consequence flowing from a failure to indicate that a warranty against defects is being provided. As the Explanatory Memorandum points out, in para 7.74:

A warranty against defects is a narrower concept than an express warranty. A warranty against defects applies only if a person has promised to repair or replace goods or services, or provide other compensation to a consumer if goods or services are defective.

Obviously, the simplest way to avoid having to give such a written warranty is not to say anything to the consumer about such a remedy. However, a builder would clearly be exposed to a considerable risk of, say, answering a question about particular goods, only to realise that he or she has made such a representation as would come within section 102. The better approach would appear to be for all builders to require of the providers of fixtures and fittings an indemnity against the potential liability created by this section.

#### **4**     **CONCLUSION**

##### (a)     *The effect of the ACL*

The Explanatory Memorandum to the legislation by which the ACL was introduced into Parliament makes it clear that the principal purpose of the legislation is to have a nationally uniform set of legislative provisions for consumer protection and safety. But the Explanatory Memorandum also notes that the ACL is largely intended to incorporate the existing consumer protection provisions of the TP Act, rather than to create a wholly new legislative scheme.

It has been the purpose of this paper to stress that the effect of the ACL is to do little more than to continue the obligations imposed by the TP Act. The drafting of the ACL has been aimed at achieving greater clarity for consumers, but the intention is clearly not to impose substantially different burdens on those who provide goods and services to consumers.

##### (b)     *Strategies and tactics to deal with the ACL*

The only two circumstances in which the ACL differs substantially from the TP Act are:

- In the imposition of a guarantee of compliance with any express warranty that a supplier has given or made; and
- In the imposition of the obligation to provide written evidence of any warranty against defects that a supplier has given.

But these obligations are imposed only as a result of the conduct of the supplier of goods or services. There is no statutory obligation on a builder to give an express warranty. The ACL applies **if, and only if**, the supplier has made such a statement or representation. Similarly, the obligation to provide a written warranty against defects will

arise **if, and only if**, the supplier has made some representation that particular goods or services come with a warranty against defects.

The only strategy for builders to avoid these obligations is to be aware of these aspects of the ACL.

With respect to all of the other obligations imposed by the ACL, since they are not materially different from the obligations currently imposed by the TP Act, whatever tactics and strategies are currently employed to lessen the risk of coming under those obligations will continue to be effective from 1 January 2011, on the commencement of the ACL.

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