

COMPETITION LAW NEWS

Quarterly Consumer Law Update

22 March 2016

What you need to know

This Competition Law News contains an update on recent developments regarding the Australian Consumer Law (**ACL**), including:

- **ACCC prioritises consumer and small business issues in 2016** – The ACCC has released its compliance and enforcement priorities for 2016 and consumer and small business issues feature prominently.
- **Representations about warranties remain a real hotspot** – Recent cases involving Good Guys and Harvey Norman franchisees as well as a new action against LG highlight the importance of effective training for salespeople who will be dealing with consumers whether at or after the time of sale, in relation to warranties.
- **Nurofen products found to be false and misleading; penalties still to come** – The Federal Court has found that Reckitt Benckiser engaged in misleading or deceptive conduct in connection with four products in its Nurofen "Specific Pain Relief" range.
- **National consumer congress focuses on upcoming ACL Review** – The ACCC has hosted its annual Consumer Congress, focusing on the upcoming review of the ACL, and used a speech at that congress to outline key issues facing the current review of the ACL.
- **Other misleading and unconscionable conduct** – We have included a wrap up of the many recent developments in misleading and unconscionable conduct, including Federal Court judgments, ACCC infringement notices and more.

ACCC prioritises consumer and small business issues in 2016

ACCC Chairman, Rod Sims, has announced the Commission's compliance and enforcement priorities for 2016, with consumer and small business issues at the top of the list. Among its focus areas in 2016 will be:

- consumer protection for Indigenous persons and vulnerable consumers such as migrants and the elderly;
- misleading representations regarding consumer guarantees, in particular relating to express or extended warranties, including by new car retailers;
- product safety, specifically the effectiveness of recalls, including ongoing oversight of the Infinity cables recall;
- competition and consumer issues in the health and medical sector, including misleading health claims in relation to certain food products and misleading health insurance and health care documentation;
- protecting small business from unfair contract terms, in particular, through educational materials regarding the extension of the regime to small business, effective November this year. (The ACCC has already started releasing some such materials through YouTube videos and webinars);
- ensuring the effectiveness of industry codes of conduct, including the Food and Grocery Code, the Franchising Code and the Horticulture Code, including by taking enforcement action where necessary; and
- issues in the agricultural sector, following the recent appointment of Mick Keogh as Commissioner of the ACCC's Agriculture Enforcement and Engagement Unit.

Interestingly, the Policy also makes clear that the ACCC is likely to take enforcement action against larger companies over small business.

Representations about warranties remain a real hotspot

Recent cases involving Good Guys and Harvey Norman franchisees, as well as a new action against LG Electronics, highlight the importance of effective staff training regarding the law on warranties and consumer guarantees under the ACL.

A victory for the Good Guys – warranties, mystery shoppers and secret recordings

On 3 February 2016, the Federal Court held that the Good Guys had not engaged in misleading or deceptive conduct in promoting the benefits of its “extended warranty”.

The Director of Consumer Affairs Victoria (**CAV**) alleged that the Good Guys had breached the ACL (as in force under the Victorian Fair Trading legislation) by a series of conversations in which salespersons inadequately explained the position a customer would be in after the expiry of a manufacturer’s warranty and failed to refer to the broader rights available under the ACL.

Interestingly, the “customers” were CAV inspectors who visited five Good Guys stores and, on four occasions, secretly recorded their discussions with salespeople. The Good Guys unsuccessfully sought to have evidence of the store visits excluded on the basis that it was improperly or illegally obtained, arguing that it had been obtained by methods beyond the power of CAV, trespass, and in breach of the Victorian Charter of Human Rights and Responsibilities.

In concluding that the conversations in each of the stores did not amount to misleading or deceptive conduct by the salespeople, the judge emphasised that those discussions must be considered as a whole and in context, which included the availability of a warranty brochure for consumers. The following table summarises some of the key circumstances that led to this conclusion:

Circumstance	General principle	Example of Good Guys' conduct
Conversation as a whole	Conversations with consumers must be considered as a whole and in context, rather than seeking to impugn individual comments.	At one store visit, a salesperson incorrectly stated that they “can't do anything” if an extended warranty was not purchased. However, the Court noted that the statement was made in a particular context and that the inaccuracy was counterbalanced by other statements by the salesperson that conveyed that the customer did have rights even without the extended warranty.
Other written information	Related written material which is available to customers at the same time will form part of an overall course of conduct.	The Good Guys’ extended warranty brochure was made available in all stores and contained a prominent description of consumer guarantees and possible remedies. The conversations were clearly of a “preliminary nature” in which the customers were proposing to go away and think about the purchase (which also provided an opportunity to review the brochure).

Interestingly, the judge noted the complex nature of the consumer guarantee provisions and the fact that the availability of a remedy in any particular circumstance will depend on a number of variables; ie, there is often not a short, straightforward or easy answer to what a customer's rights are. In noting this, and in its approach to the claims made by CAV, the court appears to have been sympathetic to the plight of salespeople seeking to explain to consumers their rights.

CAV has not appealed the decision.

Another Harvey Norman franchisee told to repair its act

On 12 January 2016, the Federal Court ordered that a Harvey Norman franchisee, Bunavit Pty Ltd (**Bunavit**), pay \$52,000 in pecuniary penalties for engaging in misleading or deceptive conduct and making false or misleading representations in connection with the supply of computers. The case forms part of a series in which a cumulative \$286,000 in penalties have been imposed against 10 Harvey Norman franchisees since December 2013.

In multiple conversations with two customers during 2011 and 2012, several Bunavit sales representatives denied that the store had an obligation to repair, refund or replace the faulty computers. Bunavit admitted that the representatives had made a number of misleading statements about rights and remedies available under the ACL, which included comments such as:

- ✘ "since it's still covered by the manufacturer's warranty, you will have to go through Sony. We can't help you"
- ✘ "Harvey Norman is not willing to pay for a refund or replacement"
- ✘ "I cannot assist you further unless you want to pay for the repair"
- ✘ "...there's nothing I can do until the ACCC calls me"



Relying on a Statement of Agreed Facts, the Court found that Bunavit had made ten representations which were false or misleading concerning the existence, exclusion or effect of a guarantee, right or remedy, in contravention of the ACL. The Court also found that in doing so, Bunavit engaged in conduct which was misleading or deceptive or likely to mislead or deceive.

The ACCC and Bunavit made joint submissions on penalty, proposing an agreed figure of \$35,000. However, this was rejected by the Court and a total penalty of \$52,000 was imposed for 10 separate (admitted) contraventions of the ACL. This amount was higher than that imposed on other franchisees for similar conduct. In determining the penalty, the court took into account that, compared to similar cases, there were many more impugned statements, the conduct occurred over a longer period, more employees were involved (but no senior employees), and Bunavit's turnover and profit were higher than those of other offending companies.

In addition to the consumer guarantee aspects, the case also serves as a reminder that courts will not simply "rubber stamp" penalties which may have been agreed with the ACCC.

ACCC takes action against LG Electronics

On 15 December 2015, the ACCC commenced proceedings in the Federal Court against LG Electronics Australia Pty Ltd (**LG**) alleging that LG made false or misleading representations to consumers about the operation of warranties and guarantees in relation to goods which failed after the expiry of a manufacturer's warranty.

The ACCC alleges that LG misrepresented to suppliers, retailers, repairers and/or consumers that:

- **(limited warranty)** the remedies available in respect of defective LG goods were limited to the LG manufacturer's warranty; and
- where an LG product had a defect after the expiry of the manufacturer's warranty:
 - **(assessment cost)** a remedy was only available to a consumer if the consumer paid for the costs of assessing the defect;
 - **(act of goodwill)** LG had no further obligations in relation to the good and any steps it took to remedy the problem were an act of goodwill;
 - **(limited to repair)** the consumer was only entitled to have the good repaired; and
 - **(labour costs)** the consumer was required to pay for the labour costs to repair the good.

Most of the representations above were alleged to have been made by email or telephone. However, the ACCC has also alleged that information about express warranties on LG's website misrepresented that LG had no obligation to remedy defects after the expiry of the relevant manufacturer's warranty.

Under the ACL, the consumer guarantee of acceptable quality applies in addition to any manufacturer's warranty and is not defined to be limited to the period of that warranty. If a product is not of acceptable quality (and therefore does not comply with the consumer guarantees), consumers are entitled to a range of remedies, such as a refund, replacement or repair, at no cost to the consumer.

The ACCC is seeking declarations, injunctions, pecuniary penalties, corrective notices, a compliance program and costs.

What you need to know

Consumer guarantees are a deceptively difficult area. The key lessons from these recent consumer guarantee cases are:

- **It can be very useful to make a good warranty brochure available to consumers:** A critical factor in the Good Guys' favour was the availability of a warranty brochure with a prominent and accurate description of the consumer guarantees under the ACL. Businesses should ensure such warranty brochures include reliable, prominent and up-to-date information about consumer rights under the ACL.
- **Effective consumer guarantee training for salespeople is essential:** The rights, remedies and obligations under the ACL are complex and salespeople cannot be expected to be legal experts – however, staff should be adequately trained to understand the nature of consumer guarantees and identify or refer customers to these rights. In-house counsel should consider ways to simplify these complex provisions for staff training purposes.

Pain and no gain: Nurofen products found to be false and misleading; penalties still to come

In December 2015, the Federal Court of Australia declared by consent that in its packaging and online promotion of four Nurofen Specific Pain Relief products, Reckitt Benckiser (Australia) Pty Ltd (**Reckitt Benckiser**) engaged in misleading or deceptive conduct (or conduct likely to mislead or deceive) and conduct that was liable to mislead the public as to the nature, characteristics and suitability of the goods, in contravention of the ACL.

The products in question were tablets which were packaged and described on the Nurofen website as targeting specific pain, being back pain, period pain, migraine and tension headache. Each product was packaged in a different colour, referred to a different pain condition, and contained statements such as, the product "is fast and effective in the temporary relief of pain associated with [the relevant pain condition]".

The Nurofen website also contained a "Product Comparator Page", which listed different types of pain and compared different Nurofen products, directing consumers that for specific pain relief options, the relevant Nurofen specific pain relief product should be chosen, as well as a "Specific Pain Relief" page which noted the importance of using the right product for specific pain.

The court declared by consent that from 2011 in relation to the packaging and from December 2012 – May 2014 in relation to the website conduct, Reckitt Benckiser made misleading representations that each relevant Nurofen product:

- a. was specifically formulated to treat that particular type of pain; and
- b. solely or specifically treated that particular type of pain,

when in fact, each product: contained the same active ingredient (being ibuprofen lysine 342mg); had the same approved indication from the Australian Register of Therapeutic Goods; had the same formulation; and was equally effective in treating all the symptoms shown on each of the products.

The Court ordered by consent that Reckitt Benckiser remove the relevant Nurofen products from all retail outlets within 3 months, be restrained from selling the products with the current packaging (or otherwise contravening packaging) for 3 years, publish newspaper and online corrective notices, revise its existing compliance program, and pay the ACCC's costs. Separately, Reckitt Benckiser has reportedly also entered into an "interim packaging arrangement" with the ACCC, to enable it to continue to use the existing packaging without misleading consumers, while it redesigns the products and seeks approval by the TGA. There is little information about this arrangement on the public record, save that a sticker on the packaging is intended to clearly disclose that the relevant products are equally effective for other types of pain.

Interestingly, Reckitt Benckiser and the ACCC did not make joint submissions to the Court as to the amount of pecuniary penalties, which is set down for hearing in April this year. The parties have already been back before the Court regarding the discovery sought by the ACCC in relation to those penalties, though have subsequently reached agreement on the categories.

In addition to potential penalties, Reckitt Benckiser will also have to face a class action which was launched against it last month in respect of this conduct. The action seeks refunds and damages for consumers who purchased these Nurofen products between January 2011 and December 2015, on the basis that Reckitt Benckiser failed to comply with the statutory guarantees concerning acceptable quality, the description of products and warranties.



The ACCC's case reflects its continued focus on truth in advertising and consumer claims in the health and medical sectors (see above). Businesses should take care when marketing their products (particularly in contexts where it is difficult for a consumer to verify information) and ensure that any claims made can be substantiated.

Consumer Congress and ACL Review

On 16 March 2016, the ACCC hosted its annual Consumer Congress, which this year focused on the upcoming review of the ACL, as well as protecting consumers online and issues affecting disadvantaged and vulnerable consumers, among other topics. Rod Sims used the opportunity to again note some topics which the ACCC expects will be discussed during the upcoming review, including:

- **penalties:** whether there is a need for higher penalties, and the possible extension of the reach of penalties to include conduct which falls under the general prohibition on misleading or deceptive conduct;
- **unconscionable conduct:** the application of the unconscionable conduct provisions of the ACL to listed public companies;
- **how well current provisions are working:** whether the current provisions are working as intended, including in relation to component pricing and unfair contract terms;
- **expanding the scope of the ACL:** whether there are any actions which are not caught by the ACL but ought to be, including by comparing the US prohibition on unfair and deceptive practices;
- **information sharing:** consideration of the ways in which consumers can be given access to information to enhance informed consumer choice;
- **phoenix companies:** how the ACL can prevent bad behaviour of individuals or businesses, including by "phoenix companies";
- **sharing economy:** how the ACL applies to the sharing economy; and
- **safety standards:** the opportunity to reduce duplicated domestic safety standards where an international standard exists.

If you are interested in reading more about these issues, you can find further detail in our previous [Consumer Law Quarterly](#). We will also provide updates as the review of the ACL progresses.

Other misleading and unconscionable conduct – wrap up

The last three months have seen a significant number of misleading and deceptive conduct cases, many of which were dealt with by infringement notices issued by the ACCC. We have selected some key cases to highlight below.

Key developments - misleading advertising & promotions	
<p>Misleading broadband claims - "NBN like speeds"</p> <p><i>Infringement notice - Optus</i></p>	<p>Optus has paid penalties of \$51,000 after receiving five infringement notices from the ACCC. The notices related to conduct between January 2015 and August 2015, in which time Optus represented that its cable broadband services had "NBN-like speeds". The representations were featured on websites, billboards, flyers and shopping centre posters. The ACCC considered that Optus was misrepresenting its cable broadband plans, as the plans advertised were not able to achieve speeds comparable to the NBN. Optus also provided a court-enforceable undertaking in relation to the same conduct, which (among other things) requires Optus to allow affected customers to cancel their plans at no cost and to refund the start-up fee they paid.</p>
<p>Misleading "strike-through" price</p> <p><i>Infringement notice - Froothie</i></p>	<p>The supplier of commercial kitchen appliances, Athena Solutions Pty Ltd trading as Froothie Australia (Froothie), has paid a \$10,800 penalty after receiving an infringement notice from the ACCC. Froothie falsely represented to consumers that they were obtaining a discount when purchasing a blender, by using a strike through price statement. However, in fact, the blender had not been offered for sale at the higher price, prior to that representation being made.</p>
<p>Misleading discount percentage</p> <p><i>Infringement Notice - Kogan</i></p>	<p>The online retailer of electronic goods, Kogan.Com Pty Ltd (Kogan) has paid penalties of \$32,400 for making false and misleading representations about the price of computer monitors.</p> <p>Kogan ran a Father's Day promotion on its eBay store offering consumers a 20% discount on three computer monitors, if purchased during the promotion period. Prior to the promotion commencing, Kogan raised the prices of the monitors so that when consumers bought the monitors during the promotion period, they were actually receiving only a 9% discount off the initial price. Following the promotion, Kogan re-advertised the monitors at their initial prices.</p> <p>The ACCC issued Kogan with three infringement notices on the grounds that this conduct misled consumers on the percentage discount that they were actually receiving.</p>
<p>Misleading internet product reviews</p> <p><i>ACCC v A Whistle & Co (1979) Pty Limited ACN 001 267 054</i></p>	<p>In December 2015, the Federal Court declared (by consent) that the franchisor of Electrodry Carpet Cleaning (Electrodry) had contravened the ACL by making false or misleading representations on the internet that purported to be customer testimonials, and by attempting to induce its franchisees to publish false testimonials.</p> <p>Electrodry was ordered to pay \$215,000 in penalties, was restrained from making false customer testimonials for a period of 3 years, and was required to publish a corrective notice.</p>

Key developments - misleading advertising & promotions

<p>Misleading advertising and unfair contract term</p> <p><i>Exetel</i></p>	<p>Following an investigation by the ACCC, telecommunications company Exetel has agreed to provide compensation to consumers who were affected by changes it made to its fixed term residential broadband plans.</p> <p>Exetel's standard residential broadband agreement included a clause that permitted it to unilaterally vary any part of the agreement for any reason. Relying on this clause, Exetel wrote to more than 2,000 customers on 12-month fixed term plans stating that they either had to change their broadband plan or terminate their service without penalty.</p> <p>The ACCC formed the view that the term amounted to an unfair term and was likely to contravene the ACL. Further, the ACCC considered that Exetel's advertising of these broadband plans was likely to be misleading, as it incorrectly represented that consumers would receive the service for the entire of the 12-month fixed term when this was not necessarily the case. In response, Exetel agreed to remove the clause from its standard form agreement for residential broadband services and to refund costs and charges incurred by affected consumers.</p>
<p>Misleading claims – "Australian Government/ TGA approved"</p> <p><i>Infringement notices - Clews & Burnz</i></p>	<p>Clews Holdings Pty Ltd (Clews) and D Burnz Investments Pty Ltd (Burnz), were each issued infringement notices for \$20,400 for making misleading representations in the sales of their adjustable beds and mobility products.</p> <p>Clews supplied products branded with the Commonwealth Coat of Arms accompanied by the words "Australian Government", "Department of Health and Ageing", and "Therapeutic Goods Administration". Its brochure also referred to "TGA Approved Products" and included the "Australian Standard" image/logo.</p> <p>Similarly, Burnz supplied products which stated that they had received a certificate from the "Registered Australian Therapeutic Goods Association".</p> <p>Neither company's products had received any such endorsement(s), nor did any Australian Standard exist.</p> <p>The brochures for Burnz' products also contained a further misrepresentation that motors in certain adjustable massaging beds were made in Germany when they were actually manufactured in China.</p> <p>As noted above, protecting vulnerable consumers is an ACCC priority for 2016.</p>
<p>Misleading representations to small business</p> <p><i>ACCC v Safety Compliance Pty Ltd</i></p>	<p>The Federal Court has ordered that Safety Compliance Pty Ltd (Safety Compliance), a company selling safety wall charts and first aid kits, pay penalties of \$515,000 for contravening the ACL. Three individual respondents were also ordered to pay penalties for their involvement in the "scam conduct" and were disqualified from managing a corporation for various periods of time.</p> <p>Safety Compliance used telemarketing calls to sell wall charts and first aid kits to small businesses, stating that workplace safety laws required businesses to maintain workplace wall charts and first aid kits of the kind that Safety Compliance sold. The Court found that those statements (and others) amounted to false or misleading representations and that Safety Compliance had engaged in misleading and deceptive conduct.</p>

Key developments - Misleading Terms & Conditions

<p>Misleading disclosure – hospital fees</p> <p>Calvary Bruce Private Hospital</p>	<p>Calvary Health Care (Calvary) has agreed to a request by the ACCC to enhance its disclosure of potential out-of-pocket costs to consumers.</p> <p>The ACCC investigated Calvary's cost disclosure following a complaint that patients at Calvary's hospitals were paying higher hospital costs when they were discharged earlier than initially expected. This situation occurred where private health insurers provided rebates on a per-day basis instead of meeting the fixed costs for specific hospital services.</p> <p>Calvary's disclosure form stated that the quote for hospital services may vary from the final amount payable, but the ACCC considered those representations to be inadequate. Calvary has agreed to provide greater disclosure to customers that an early discharge may increase the amount payable in some instances.</p>
<p>Misleading lay-by representation and unfair contract terms</p> <p>Chrisco Hampers</p>	<p>Following last year's judgment against Chrisco Hampers Australia Ltd (Chrisco), (see our December Consumer Law Quarterly) the Federal Court has now made orders as to the appropriate sanctions in the case.</p> <p>The Court declared that Chrisco made false or misleading representations in its order confirmations and on its website that consumers could not terminate their lay-by agreements after making their final payment but before delivery of the goods – a statutory right available to consumers under the ACL. The Court ordered Chrisco to pay a pecuniary penalty of \$200,000 for this contravention.</p> <p>The court also declared that a term in Chrisco's 2014 lay-by agreement, which allowed Chrisco to continue to debit payments out of a consumer's account (as payment towards the following year's order) after the consumer had fully paid for their order, was void, as it was an unfair term.</p> <p>The ACCC had submitted that a much higher penalty (\$600,000) was appropriate, but this was rejected by the Court. In addition, the Court ordered that the ACCC pay Chrisco 50% of its costs of the remedies hearing, noting that "almost all of the remedies hearing was occupied by matters upon which the ACCC was unsuccessful". The ACCC also sought injunctions but those were also refused by the Court.</p>



Key developments – safety and older consumers	
<p>Misleading claims - product suitability</p> <p>ACCC v Woolworths</p>	<p>In February, the Federal Court ordered Woolworths to pay approximately \$3 million in penalties for engaging in misleading or deceptive conduct and making false or misleading representations in connection with the supply of certain house brand products, as well as failure to give notice of certain safety incidents as required under the ACL.</p> <p>In some cases, representations made on the packaging of the products were declared to be misleading (eg, a "flop chair" and folding stool), and in others, Woolworths was found to have made misrepresentations concerning the suitability of products for sale by its silence and by refraining from withdrawing or recalling the products after it became aware of certain hazards (eg, deep fryer and safety matches).</p> <p>Woolworths co-operated with the ACCC and the central issue before the Court was the amount of penalty.</p>
<p>Misleading claims - choice of service provider</p> <p>Infringement notice - Voiteck</p>	<p>Voiteck Pty Ltd (Voiteck), a telecommunication services provider, has paid a \$10,200 penalty in response to an infringement notice from the ACCC. Voiteck had sent a letter to residents in Lifestyle SA retirement villages stating that that it was to become their new billing provider in July 2015. The letter stated that Voiteck was a chosen service provider by Lifestyle SA and that Voiteck would be migrating all residents to new phone and internet services.</p> <p>The ACCC formed the view that Voiteck's letter gave the residents the misleading impression that they were required to use Voiteck's services. As noted above, consumer law cases involving vulnerable consumers, particularly older customers, are an enforcement priority for the ACCC in 2016</p>

Unconscionable conduct	
<p>Acquire learning – VET fee help</p>	<p>In yet another case involving the VET FEE-HELP industry, the ACCC has commenced proceedings in the Federal Court against Acquire Learning & Careers Pty Ltd (Acquire).</p> <p>Acquire engaged in education brokering on behalf of numerous Registered Training Organisations and received commissions based on the quantity of students it enrolled into VET FEE-HELP courses. The ACCC is alleging that Acquire engaged in unconscionable conduct in its telemarketing of VET FEE-HELP diploma courses to prospective students by taking advantage of vulnerable consumers and pressuring students into enrolling through the use of unfair sales tactics.</p>
<p>FDRA – Aboriginal Community</p>	<p>The ACCC has commenced proceedings against FDRA Pty Ltd (FDRA) and its shareholder and director Jackson Anni.</p> <p>The proceedings relate to at least 600 agreements that FDRA representatives entered into with particularly vulnerable Indigenous consumers in remote communities and in Royal Darwin Hospital, for the supply of iPads.</p> <p>The ACCC alleges that FDRA engaged in unconscionable conduct, made false and misleading representations and did not comply with the provisions of the ACL in relation to unsolicited consumer agreements. It alleges that FDRA's conduct targeted particularly vulnerable Indigenous consumers and that FDRA took advantage of the consumers' personal circumstances, such as their limited understanding of English and of commercial transactions, and used the consumer's bank card to withdraw money for their immediate payment.</p>

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