

A newsletter for consumers and the consumer movement

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What's news

Negligence review recommendations threaten consumer interests

The panel undertaking the principles based review of the law of negligence issued its second report on 2 October 2002. The recommendations made in the report would, if adopted, seriously compromise consumer rights under the *Trade Practices Act 1974*. The Act contains several provisions that protect consumer rights, and provide avenues of redress where businesses do not fulfil their obligations to consumers. These are:

- Prohibitions on misleading and deceptive conduct and unconscionable conduct.
- The warranties and refunds provisions, which imply certain conditions into all consumer contracts. For example, services must be carried out with due care and skill.
- The product safety and product information provisions that require manufacturers, importers, wholesalers and retailers to ensure that certain goods meet particular standards, and that dangerous goods are not sold or can quickly be withdrawn from sale.
- In the case of defective goods, manufacturers and importers may also be liable when their goods cause personal injury or property damage to a person. Goods are defective if their safety is not what consumers are reasonably entitled to expect.

The objective of the Act is to enhance the welfare of Australians by promoting competition and fair trading and providing consumer protection. The proposed changes would undermine this objective, and the ACCC opposes any watering down of consumer rights.

One panel recommendation is to prevent individuals and the ACCC from bringing actions for damages for personal injury and death arising from a contravention of the misleading and deceptive conduct provisions of the Act. Misleading or deceptive conduct can include a failure to disclose an important fact. A market can only function effectively if consumers have confidence in claims made by suppliers. Requiring businesses not to engage in misleading or deceptive conduct is not an onerous burden, and delivers high benefits. The ACCC can conceive of no circumstance where it would be acceptable for a supplier to mislead or deceive a consumer.

The panel also recommends that businesses should not be liable for a failure to warn of an obvious risk. Obvious risks are risks that would have been obvious to a reasonable person in the circumstances, and may include matters of common knowledge, of low probability or risk that could be avoided or removed by the exercise of reasonable care.

The panel recommends that a provider of recreational services should not be liable for personal injury or death suffered by a voluntary participant in a recreational activity arising as a result of the materialisation of an obvious risk. It also recommends that providers of recreational services be able to contract out of liability for personal injury or death sustained during a recreational activity; that is, to allow consumers to assume risks themselves. In so doing, participants in recreational activities may be asked to waive their statutory rights. Other changes would limit the time to initiate an action and the amount recoverable.

The current regime of strict liability for suppliers of goods and services allocates responsibility for risk prevention to the party best placed to gauge the costs and benefits. It recognises the limited ability of consumers to properly assess risks associated with goods and services.

Consumers have the right to expect that the services they buy will be provided with care and skill. The ACCC considers business suppliers to be better placed than consumers to assess the risks and to guard against its consequences. Allowing consumers to assume such risks is likely to result in a dangerously low level of care from suppliers, and high costs of risk avoidance being borne by consumers.

The above examples are only some of the changes proposed; other reforms would also significantly compromise the welfare of Australian consumers. Details of the full report, and the ACCC's two submissions, are below.

It is also important to note the wider economic harm that, in the ACCC's view, is likely to result from such reforms. By lowering the basic standard that consumers are reasonably entitled to expect, and reducing the protection under the Act, individuals may be prevented from being compensated for harm improperly caused to them. Such an outcome would erode consumer confidence in the goods and services offered to them, and ultimately reduce the efficiency of Australia's economy.

[Review of the Law of Negligence—second report](#)

[Second ACCC submission to the principles based review of the law of negligence \(PDF\)](#)

[First ACCC Submission to the Principles Based Review of the Law of Negligence \(PDF\)](#)

Your new motor vehicle—what are your rights?

An increasing number of new car buyers contact the ACCC about their new car warranty. Specifically, consumers want to know whether their warranty is still valid if they choose to get their vehicle serviced by someone other than an authorised agent of the business that sold the car.

The Trade Practices Act contains a number of provisions relevant to this situation:

- Exclusive dealing generally involves a business attaching conditions to the sale of goods that restrict the buyer's freedom to choose with whom, or in what, they deal. Exclusive dealing, such as full-line forcing (where the consumer is required to purchase two or more items from the same trader) or 'bundling' (where two or more items are sold together as a package), is illegal where it has the purpose or effect of substantially lessening competition.

One particular kind of exclusive dealing is 'third line forcing', which involves the supply of goods or services on the condition that the buyer acquires goods from a particular third party. Third line forcing is illegal regardless of its effect on competition.

- The warranty and refund provisions imply certain minimum standards into all consumer transactions. The goods must be of merchantable quality, be fit for their purpose, and match any description or sample.
- Businesses are not allowed to make any misrepresentations to consumers about their right to a refund, or limiting their liability in any way.

Expressed and statutory warranties

Expressed warranties are usually specified under the agreement with the dealer; it might state a specific time period, maximum liability and limitations. Expressed warranties operate in addition to statutory warranties, and cannot restrict the provisions of the statutory warranty.

For example, the dealer may provide a warranty for one year or 20 000 kilometres, which includes free scheduled servicing and parts. However, this would not in any way affect the statutory warranty that would apply long after the expiration of the one-year voluntary warranty.

Generally dealers will be able to place certain conditions on the expressed warranty given to buyers. A consumer **may** void their expressed warranty if, for example, the car is fitted with non-genuine parts. If this is the case, it is sometimes best to check with the manufacturer before purchase. However, the statutory warranties will continue to apply unless the service of the independent mechanic or the fitting of the non-authorised part caused the fault.

New vehicle warranty

Motor vehicle dealers are entitled to insist that any servicing performed on cars they sell is carried out by qualified staff, according to the manufacturer's specifications, and using genuine or appropriate quality parts where required.

Where a problem arises with the vehicle (i.e. other than servicing requirements) that is covered under the warranty, the vehicle should be taken to the dealer for repair.

Qualified staff

Qualified staff is a party or parties, other than an 'authorised dealer', who is capable of performing car servicing.

Manufacturer's specifications

If an independent agent implies that it can perform general car servicing to manufacturers' specifications and does not perform that function satisfactorily, then the consumer has rights and remedies against the agent regardless of whether the agent has factory qualifications or not.

Genuine or appropriate quality parts

The issue here is not who manufactured the part/s, it is whether the part/s are fit or appropriate for the purpose intended. If a part is non-genuine, but is interchangeable with the genuine part, it could be seen as being fit or appropriate for the purpose and would therefore not void the manufacturer's warranty. However, it must also be noted that should the part/s installed fail or not perform satisfactorily, the consumer then has rights against the fitter and/or manufacturer of those replacement parts. If the non-genuine part fails, and causes some other damage to the vehicle, the dealer will not be liable for damage caused by the failure of that part.

Provided these conditions are met, the new car warranty should remain intact. Dealers are not, however, entitled to impose conditions beyond this in an effort to restrict trade, or unreasonably require the purchaser to buy services from an agent of their choice.

Dealers are not permitted to limit their obligations under the warranty and refund provisions, or make any representations to this effect, eg. that the warranty is void if the vehicle is not serviced by the dealer or its agent.

Provided consumers do research and ensure that wherever they take a vehicle for servicing, the staff are qualified and all other provisions above are met, the warranty will be safely intact for the warranty period. For further information, see [Warranties and refunds](#).

Recent outcomes

Company offers undertaking for supplying unsafe children's cot

An importer of children's cots which did not comply with mandatory product safety labelling and design standards has provided court enforceable undertakings to the ACCC. Lane Wrigley Pty Ltd has undertaken to implement a trade practices compliance program to reduce the possibility of similar breaches. Lane Wrigley Pty Ltd had supplied the cots, known as the 8036 Baby Bed, to discount variety stores throughout Australia. The cot was designed and marketed as one that could also be converted into a bed. The cot was of an insufficient depth to minimise the risk of child climbing or falling out of the cot and contained protrusions and hazardous openings.

After the ACCC raised its concerns with the company, it stopped further supply and recalled those it had supplied. The ACCC notes Lane Wrigley Pty Ltd's prompt action and cooperation in resolving this matter. More information: http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=823

ACCC stops false professional credentials claims

The ACCC took legal action against Rod Turner Consulting Pty Limited and Mr Rod Turner, its sole director, in July 2000. The firm, representing itself as chartered accountants, wrote a letter signed by Mr Turner to a tenant making false statements about the effect of the then New Tax System. The letter claimed that from 1 July 2000 (because of the NTS) an extra 10 per cent would be payable on residential rent charged by a landlord and that from 20 June 2000 the landlord was including a GST component in the increased rent. The letter also claimed that water rates for the rented premises would carry a GST cost to the landlord.

The court found that Rod Turner Consulting Pty Limited had breached s. 52(1) of the Trade Practices Act because of its chartered accountants' misrepresentation. The court also found the firm to be in breach of s. 52(1) for the misrepresentations it had made about the effect of the GST on residential rents and water rates. The court found that Mr Turner had been knowingly concerned in these breaches. The court restrained Rod Turner Consulting Pty Limited from representing that it was a firm of chartered accountants and also Mr Turner from representing that he was a chartered accountant. The court also ordered Mr Turner to attend a trade practices seminar at his own expense, and for the firm and Mr Turner to pay a contribution towards the ACCC's costs in this matter. More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=814

Recent investigations and actions

Viva Olive oils

The ACCC has instituted proceedings in the Federal Court, Adelaide against The South Australian Olive Corporation and Inglewood Olive Processors Limited, the producers and marketers of Viva brand olive oils for country of origin on product labels, in television and magazine advertising, and on the website at <http://www.barkworth.com.au>.

The ACCC alleges The South Australian Olive Corporation and Inglewood Olive Processors Limited have engaged in misleading and deceptive conduct by making various representations about Viva olive oils being Australian when, in fact, each bottle of Viva brand olive oil contains approximately 20 per cent imported olive oil.

The ACCC is also taking action against Mr Mark Troy, a director of The South Australian Olive Corporation and Mr James Smyth, the General Manager of The South Australian Olive Corporation, for allegedly aiding or abetting or being knowingly concerned in the breaches.

The ACCC seeks declarations, injunctions, corrective advertising, a trade practices compliance program and costs. A directions hearing is listed in the Federal Court, Adelaide on 4 November 2002. More information: http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=826

See also the recently released *Country of origin guide for the food and beverage industry*.

Publications

Competition and consumer issues in indigenous communities

The ACCC has issued a research report *Competition and consumer issues for Indigenous Australians*.

The report by the Centre for Aboriginal Economic Policy at the Australian National University provides better awareness of relevant Indigenous cultural issues and market practices which affect Indigenous communities.

While the views expressed in the report are not necessarily of the ACCC, the report will be valuable in developing future Indigenous strategies. The research has already assisted in developing *Store charter—a service charter serving remote and Indigenous communities*, and other education materials. The establishment of the ACCC's Rural Network, comprised of more than 450 regional supporters, and ACCC staff visits, are key methods of providing better access to this information.

Copies of the report are available from the ACCC for \$25 or may be downloaded free from the website. More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=832

ACCC/REIA launches guide for the real estate industry

The ACCC, in cooperation with the Real Estate Institute of Australia, recently launched *Fair and square*, an industry guide to the Trade Practices Act. Written for owners, managers and advisers to the real estate industry, *Fair and square* sets out what practices are acceptable when marketing property.

Fair and square (\$10) is available from the ACCC Publishing Unit on (02) 6243 1143, or free from the [ACCC website](#). It will soon be available from the [REIA website](#). More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=830

Health insurance updates

Medibank Private

The ACCC is seeking special leave to appeal to the High Court the decision of the Full Federal Court in September to uphold an application by Medibank Private to strike out aspects of the ACCC's claims for remedial orders.

The ACCC, under a delegation from the Australian Securities and Investment Commission (ASIC), instituted proceedings against Medibank Private alleging false, misleading and deceptive advertising of its health insurance products. The advertising related to rate increases, waiting periods and other conditions.

The decision, handed down in the Federal Court, Melbourne, stated that the court was persuaded by Medibank Private's arguments that certain parts of the ACCC's claims should be struck out. The decision raises

important questions about the extent of powers given to the court under s. 80 of the Trade Practices Act.

The Full Federal Court overturned the decision of Ryan J who had decided on 21 March 2002, that the ACCC's claims should be allowed to proceed to trial in their entirety. More information:
http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=824

MBF

In February 2001 the ACCC instituted proceedings against Medical Benefits Fund of Australia Limited in the Federal Court, alleging false, misleading and deceptive advertising of its health insurance products. The alleged conduct includes the use of pregnancy related images to advertise insurance, when in fact a 12 month waiting period applied to claims for obstetric related services. The ACCC alleged the disclosure of applicable waiting period in 'fine print' was insufficient to detract from the overall impression that the advertisements were misleading and deceptive. The ACCC sought orders including the publication and broadcast of corrective advertisements

The Federal Court found that the television and billboard advertising was misleading and made orders for corrective advertisements to appear on television and in newspapers, but stayed the orders pending the outcome of an appeal lodged by MBF. Advertising agency for MBF, John Bevins Pty Ltd, was found to be knowingly concerned in the conduct and has similarly lodged an appeal against the decision. More information:
http://203.6.251.7/accc.internet/media/search/view_media.cfm?RecordID=251

NRMA/Saatchi and Saatchi (ad agency)

In July this year the Federal Court in Sydney made orders by consent against NRMA Health Pty Ltd (also trading as SGIC Health and SGIO Health) and NRMA Insurance Ltd concerning advertisements which appeared in various newspapers in September 2001 and on its web site.

The print advertisements depicted a woman nursing a new born baby and stated: 'free delivery...no matter how advanced your pregnancy is', and contained fine print disclaimers that full coverage for obstetric services was subject to any excess or co-payment and service of a 12 month waiting period with NRMA or another health fund.

The orders included declarations that the advertising was misleading, a requirement that NRMA inform consumers of the misleading conduct, waiver of waiting periods for those who were misled and the availability of refunds for excesses and co-payments.

The ACCC also alleged that Saatchi & Saatchi, NRMA's advertising agency, was involved in the contraventions. On 3 October 2002 Jacobsen J dismissed the ACCC's application as it related to the involvement of Saatchi and Saatchi. An appeal to the Full Federal Court was filed on 24 October 2002. More information:
http://203.6.251.7/accc.internet/media/search/view_media.cfm?RecordID=815

October media releases

31 October 2002 Federal Court Finds Rockhampton Obstetricians' Boycott of 'No-Gap' Billing Breached Competition Laws
29 October 2002 ACCC Action Against BMW (AUSTRALIA) Limited Over Jacks
29 October 2002 Wizard Found to Have Misled or Deceived Home Loan Consumers
25 October 2002 False Labelling and Misleading Information: Federal Court Fines Tamar Knitting Mills
25 October 2002 Federal Court Decision – Re: Michael Kotowicz - Shark Challenge 2000 Competition
25 October 2002 ACCC Announces Final Decision on Postal Prices
24 October 2002 ACCC Authorises Scheme to Increase the Number of Skilled Bricklayers in NSW
24 October 2002 ACCC Institutes Against Telstra 'Say G'Day' Calling Card Product
24 October 2002 ACCC Receives Public Liability Pooling Proposal for Not-for-Profit Organisations
22 October 2002 Federal Court Declares Westfund Health Insurance Fund Misled Consumers
21 October 2002 ACCC Opposes Part of James Cook University's Enrolment Policy
18 October 2002 Fair and Square: Real Estate Industry Guide from the ACCC and the R.E.I.A.
18 October 2002 ACCC Issues Research Report into Competition and Consumer Issues in Indigenous Communities
18 October 2002 ACCC Draft Determination on Market and System Operations Rules to Promote Certainty in the Victorian Gas Industry
17 October 2002 ACCC Institutes Against the Producers of Viva Olive Oils
17 October 2002 ACCC not to Oppose Acquisition of Budget by Avis Parent Company
17 October 2002 Internet Domain Name Resellers Warned Against Misleading, Deceptive Conduct
16 October 2002 ACCC Not to Oppose Incitec/Pivot Merger
15 October 2002 ACCC to Seek Leave to Appeal to High Court from Full Federal Court's Decision to Strike Out Part of ACCC Case Against Medibank Private
14 October 2002 Company Offers Undertaking for Supplying Unsafe Children's Cot
14 October 2002 Golden Casket to Reform Procedure for Assessing Gaming Applications
14 October 2002 Victorian Electricity Transmission Networks Revenue Cap – Draft Decision
10 October 2002 ACCC Releases Guide on Telecommunications Dispute Resolution Processes
10 October 2002 ACCC Appointment Consultation
10 October 2002 ACCC Interim Decision Allows Myer/Grace Bros Concession Businesses to Participate in Discount Promotions
9 October 2002 Peter Foster Joined to ACCC Weight Loss Case
8 October 2002 ACCC Issues Decision on Collective Negotiations in NSW Chicken Meat Industry
4 October 2002 Federal Court Verdict on Saatchi & Saatchi Element in N.R.M.A.
4 October 2002 ACCC Stops False Professional Credentials Claim by Accounting Firm
1 October 2002 ACCC Supports Consistent Pricing Principals for Mobiles