

April 30 2010

Senate Economics Committee

Department of the Senate

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Parliament House

Canberra ACT 2600

Australia

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Dear Committee Members,

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

Question on notice

At the public hearing on 29 April the Committee asked a question on notice about the difference between the protection to consumers provided by the consumer guarantee provisions under the Australian Consumer Law ("ACL") and the extended warranties sold to consumers by some retailers.

Difference in protection provided by consumer guarantees and extended warranties

The difference in the protection to consumers provided by consumer guarantees under the ACL and extended warranties provided by retailers must depend on the circumstances of the case in question.

However, in my opinion, in many cases extended warranties will not provide consumers with a greater range of rights in respect to defective

goods than the consumer guarantee provisions in the ACL (or the implied terms in the TPA). Nor will extended warranties provide consumers with rights of greater duration than those provided under the consumer guarantee provisions in the ACL.

In my opinion, in many cases the main benefit to consumers of extended warranties will be in providing a certain and uncontestable period of time within which the retailer will remedy specified defects in the goods in question.

Discussion

Consumer guarantees and extended warranties

The TPA implies into contracts for the sale of goods and services in Australia a range of statutory conditions and warranties giving consumers certain rights and remedies in respect to defective goods or services. Under the proposed ACL this regimes will be replaced by consumer guarantees.

Particularly in the area of electrical and white goods, many retailers also provide consumers with an opportunity to purchase 'extended warranties'. These extended warranties exist in addition to the guarantees provided under statute. In law, the effect of consumer guarantees under statute cannot be reduced by the existence of an extended warranty.

Concern over extended warranties

Concerns have frequently been expressed that many consumers (and indeed retailers) do not understand the relationship between the extended warranties provided by retailers and the consumer guarantees provided under statute. (See e.g. Consumer Affairs Victoria, 'Warranties and Refunds in the Electronic, White goods and Mobile Telephone Industries, 2009) The existence of the retailer's voluntary and extended warranty may wrongly suggest to consumers that:

- Extended warranties are the only source of rights for consumers in respect to remedying defects in goods. (I.e. that there are no statutory guarantees).
- That the time period specified in the extended warranty defines the duration of consumers' rights to a remedy in respect to defects in goods. (I.e. if the retailer offers a three year extended warranty this may suggest to consumers that any statutory guarantees do not extend to a three year period and certainly do not exceed a three year period).

If consumers do not understand their rights under statute it will be difficult for them to make an informed decision about the merits of purchasing an extended warrantee. In my submission to the Committee I suggested that consumers would benefit from an express requirement for retailers to provide information about the statutory guarantees to consumers before selling an extended warranty.

Level of protection under the two types of regime

In principle, an extended warranty might provide consumers with a wider level of protection than the consumer guarantees in the ACL. More research on the nature and extent of extended warranties would be useful. I suspect it is unlikely that many if any extended warranties are wider in scope than the statutory guarantees. In other words, in many cases extended warranties give consumers no greater level of protection than they would receive under the consumer guarantee provisions of the ACL.

Consider, for example, the guarantee that goods will be of acceptable quality (s 54(1) of the proposed ACL). Acceptable quality is defined as covering fitness for purpose, acceptable appearance, freedom from defects, safety and durability. There seems little else that would be included in an extended warranty and indeed such warranties may well be more restricted in their scope. The statutory guarantee in the ACL of acceptable quality will not cover goods damaged by abnormal

use. Extended guarantees are also unlikely to cover such damage.

The definition of acceptable quality under the ACL includes a requirement that the goods be durable. Thus, goods must be of acceptable quality for a reasonable period of time having regard to the nature of the goods. Extended warranties seem unlikely to provide consumers with protection for a longer period than the reasonable time covered by the ACL. This period of time is, by definition, the period of time for which goods can reasonably be expected to be of acceptable quality. After this period of time, defects due to wear and tear might be expected.

As a practical matter, the longer the period of time between the purchase of goods and the appearance of a defect, the more difficult it may be for a consumer to establish that the defect was caused by a lack of acceptable quality in the goods rather than being due to fair wear and tear or improper use. One advantage of extended warranties might be that, for the period of the warranty, consumers can bypass this evidentiary difficulty. Consumers seeking a remedy for a defect in goods covered by the extended warranty within the period of the extended warranty do not have to establish that the goods became defective within the reasonable time they should have been expected to last i.e. that the goods were not durable. The consumer can simply demand a remedy according to the terms of the extended warranty. It is possible that some such consumers may, nonetheless, have to deal with an argument from the retailer that the defect is due to their inappropriate use of the goods. Thus, this practical benefit of the extended warranty may not always be significant.

Please do not hesitate to let me know should the Committee require further clarification or information on this issue.

Sincerely

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