ACCC CONTINUES PROBE INTO OFFERS OF EXTENDED WARRANTIES

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IN BRIEF:

- The Australian Competition and Consumer Commission (**ACCC**) has accepted an undertaking from an underwriter, Virginia Surety Company, Inc. (**VSC**) about VSC's offering of Extended Warranty products – following accepting another undertaking from Lumley in December 2015.
- The ACCC is seeking to change industry practice so that insurers clearly set out for consumers what benefits consumers receive for the premiums they pay for extended warranties over-and-above the rights consumers already have under the Consumer Guarantees provisions under the Australian Consumer Law (**ACL**).
- To minimise risk underwriters, and other industry participants offering such products, including manufacturers and retailers, need to ensure that the benefits of their extended warranty products are indeed over-and-above those under the consumer guarantees in the ACL. The collateral they provide and representations they make to consumers on their websites, brochures and other materials (including oral statements), need to clarify the benefits additional to the guarantees in the ACL and the instructions to service staff/call centre staff also reflect that position.
- The ACCC will in due course focus on the activities of manufacturers and retailers.

Background

The ACCC has continued its focus on enforcement activity in the extended warranty industry in Australia by accepting a court enforceable undertaking from VSC, effective 7 November 2016 [1].

The undertaking by VSC is the second undertaking given by a major player in the extended warranty industry in the last 12 months. WFI Insurance Limited (trading as Lumley Retail Warranty) (**Lumley**) gave a court enforceable undertaking in December 2015 in response to an ACCC investigation alleging misleading and deceptive conduct and the making of false or misleading representations.

We understand that the ACCC is continuing to engage with extended warranty providers to seek similar court enforceable undertakings with other underwriters. We expect that in due course manufacturers are likely to next appear in the ACCC's line of sight.

In 2014, ACCC Chairman Rod Sims announced that the enforcement of consumer guarantees in the context of the sale of extended warranties would be a priority that year for the ACCC [2].

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At the beginning of 2016, Mr. Sims reinforced the ACCC's interest in the area, stating that the ACCC is continuing to prioritise its enforcement work on consumer guarantees, with a focus on representations made by large retailers about express and extended warranties [3].

The ACCC's high profile prosecution against Fisher & Paykel and Domestic & General, for false and misleading representations made in the course of offering extended warranties resulted in a AUD200,000 penalty for each business [4].

However, the VSC undertaking demonstrates that the approach of the ACCC is not limited to seeking undertakings in circumstances where contraventions of the ACL are alleged. Significantly, the VSC undertaking contains no allegations of wrongdoing by VSC, only an acknowledgement by VSC that certain practices in the advertisement and disclosure of extended warranties occur from time to time in the industry, and VSC will help to "improve" such practices.

VSC is a US-incorporated foreign registered company in Australia that underwrites and administrates a range of extended warranty plans (some known as Product Protection Plans) sold by retailers to consumers, particularly in the areas of electronic goods, domestic appliances and white goods. The undertaking commits VSC to revise extended warranty materials given to consumers, provide compliance training for retailers and monitor extended warranty selling practices.

ACCC's involvement with the extended warranty industry

Many retailers of electronic and household appliances offer extended warranty products, or customer care plans, at the point of sale. Such plans generally give consumers contractual rights, for a defined period, to certain remedies such as repair or replacement of faulty goods and to some consequential losses, subject to certain exclusions. These plans have the benefit of providing consumers with a level of certainty and comfort regarding their remedies in the event of failure of their goods, and, in some cases, provide additional protection, beyond what may be available under the ACL.

However, the ACCC has expressed concern about certain marketing practices in the extended warranty industry, including, in particular, the content of extended warranty plan brochures provided to consumers at point of sale.

The ACCC's concerns with the extended warranty industry focus on the alleged practice of offering extended warranty plans, which fail to identify with sufficient clarity the overlap between contractual rights offered under warranty plans and existing rights and remedies available to consumers under the ACL.

These rights and remedies include the protection afforded by the consumer guarantees under the ACL, which grant consumers the right to have goods repaired, replaced or refunded by the retailer in circumstances where the consumer guarantees have been breached. The consumer guarantees include assurances that goods are safe, durable, of acceptable quality, match descriptions made in advertising and are fit for disclosed purposes. The ACCC considers that a failure to sufficiently identify this overlap in consumer rights may have the effect that representations made to consumers could be confusing and misleading and deny consumers the opportunity to make informed decisions about the value of extended warranties.

VSC undertaking

Without making any admissions, VSC provided an undertaking to the ACCC that it would assume certain obligations for a period of two years, including the following:

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1. Information for consumers about ACL rights: VSC will engage with retailers within 30 days to commence changing the terms of the extended warranty plan brochures and use reasonable endeavours to procure its retailers publish the amended terms within 150 days. The changes to the terms of the extended warranty plan brochures are to include, at a minimum, the information included at Annexure A of the undertaking.
   The information in Annexure A intends to provide a summary of relevant consumer rights and remedies granted under the ACL, and also a table which seeks to compare specific consumer rights and remedies under the ACL, with the rights offered under the extended warranty plan.
2. Compliance training: VSC will develop and implement compliance training for VSC representatives who are involved with advising retailers about extended warranty plans and retailers involved in the sale of these plans. The compliance training will focus on the information contained in Annexure A and also the implications of making false and misleading representations in contravention of the ACL.
3. Compliance monitoring: VSC will develop a program to monitor whether representations made by staff of retailers in extended warranty plans selling practices are consistent with the compliance training provided and the information in Annexure A. This compliance monitoring program may include mystery shopper deployments to be anonymously conducted by suitably qualified, independent third parties.
4. Compliance reporting: VSC will report to the ACCC on participation rates in compliance training, the results of mystery shopper deployments and remedial action taken by VSC or retailers in instances of compliance failures.

What does this mean for participants in the extended warranty industry?

The undertaking by VSC states that "VSC has offered this Undertaking to the ACCC in order to help set a new industry benchmark for the promotion and supply of Warranty Plans". This statement suggests that the ACCC will continue its practice of approaching extended warranty providers with a view to receiving court enforceable undertakings, notwithstanding the absence of any allegations of wrongdoing.

Whilst the ACCC's concerns that consumers may unknowingly be paying for protections they already receive at law came to light in the examples of Fisher & Paykel and Lumley, such practices are not reflective of the extended warranty industry as a whole. In the Federal Court decision of *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22, the Court found that the extended warranty plans offered by the Goods Guys provided benefits which were in addition to consumers' statutory rights under the ACL.

The ACCC's practice of seeking voluntarily undertakings from extended warranty providers that have engaged in no wrongdoing is likely to extend in the foreseeable future to manufacturers of goods.

In order to minimise the risk of an ACCC investigation or enforcement action, extended warranty providers should ensure that the benefits they offer under their extended warranties provide consumers with benefits in addition to those consumers are already entitled under the ACL – and, at least for their own internal records seek to "quantify" the proportion of the premium that is referable to the features over and about the consumer guarantees under the ACL. This will allow consumers to readily identify what "value" they are getting from the extended warranty.

Further, extended warranty providers, including manufacturers and retailers should review their collateral including material on their websites, brochures and other customer-facing materials to ensure that they contain

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information which allows consumers to compare the features of the extended warranty plans being sold against existing remedies available under the ACL. They should also review instructions to service/call centre staff to ensure that there is consistent "messaging" about what is being represented to consumers about their ACL rights and the benefits offered under the extended warranty products.

Extended warranty providers and manufacturers should also ensure they are familiar with consumer rights and remedies under the ACL and standards within the industry in order to place themselves in a position of confidence in deciding whether committing to court enforceable undertakings is worth the burdens it imposes. In particular, parties approached by the ACCC seeking an undertaking should be aware that the ACCC has the power to bring proceedings for alleged breaches of an undertaking, and from an evidentiary perspective, it is significantly easier for the ACCC to prove a breach of an undertaking, as opposed to a breach of the ACL.

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[1] Available at: http://registers.accc.gov.au/content/index.phtml/itemId/1199513
[2] R Sims, *CEDA conference: Looking forward to 2014, Speech delivered at the Committee for Economic Development of Australia Conference*, Sydney, 21 February 2014, at http://www.accc.gov.au/speech/ceda-conference-looking-forward-to-2014
[3] *ACCC, Compliance and Enforcement Policy,* February 2016, at: https://www.accc.gov.au/publications/compliance-and-enforcement-policy
[4] *ACCC v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393

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