

UN-FITBIT! ACCC PURSUES FITBIT OVER DODGY CONSUMER WARRANTY CLAIMS

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The ACCC has once again showed it will not tolerate companies misleading consumers. In this case, manufacturer of pulse-monitoring watches, FitBit (Australia) Pty Ltd had told consumers that a warranty for faulty products existed for one year and faulty products would only be replaced for the 'remainder of the calendar year or 30 days, whichever was longer'. The ACCC received more than 100 complaints about this warranty policy. The problem is that this policy is in direct breach of the Australian Consumer Law ("ACL").

After an investigation by the ACCC, FitBit agreed to a court enforceable undertaking whereby it agreed to amend the information provided to customers about their consumer rights, plus FitBit extended their express manufacturer's warranty period out to two years and will make other corrections to its marketing and packaging.

So, what are the ACL Consumer Guarantees, and what exactly did FitBit do wrong?

Under the ACL (contained within the *Competition and Consumer Act 2010* (Cth)), Australian consumers can rely on some specified guarantees from the suppliers/manufacturers of products they purchase. These guarantees cannot be contracted out of, and will apply automatically to any purchase (subject to some minor limitations in the ACL which are not relevant here).

The most relevant consumer guarantees are that goods they purchase:

- Are of acceptable quality;
- Are fit for purpose;
- Match the description of the product and match any sample/demonstration model; and
- Come with a guarantee from the seller/manufacturer that they can provide repairs or spare parts for a reasonable time after purchase.

Further, if a seller or manufacturer makes additional express warranties about the product's condition, quality or performance, the seller must meet these promises in addition to the statutory consumer guarantees.

If consumers purchase goods which fail to meet a consumer guarantee, they are entitled to remedies under the ACL which include repair, replacement or refund, in addition to any remedy the manufacturer's express/additional warranty may provide. This means that consumers may still have the right to return defective goods, even if the manufacturer's warranty period has expired, and again manufacturers cannot avoid or water down the consumer guarantees with their own express warranties.

A key question is how long these additional remedies are available to consumers. The answer depends on a few factors, including the nature of the product, the price of the goods, statements made about the product on the packaging and its intended use. This means a consumer can expect a longer guarantee period to apply for goods that generally last a long time, that are relatively expensive, and where any claims are made about the quality and/or durability of the product by either the salesperson or manufacturer. For example, an air conditioning unit may come with a one-year manufacturer's warranty however consumers generally buy an air conditioning unit with a reasonable expectation that it will last at least 5 years. In these circumstances, the consumer guarantees may extend to, for instance, 5 years and failures of the consumer guarantees within that timeframe may allow for the above remedies. This 5 year period is obviously considerably longer than the express warranty provided by the manufacturer. Price is also important – in our example,

more expensive air conditioners coming with strong product claims about quality and durability may be held to a higher standard than cheaper units.

In the FitBit case, FitBit erred by advising customers that they are *only* entitled to a one-year warranty and that must be redeemed in a certain time period. Clearly, this information does not align with the ACL consumer guarantees. Consumer guarantees cannot be excluded, restricted or modified, and they are automatically available to consumers under the ACL when they obtain goods or services. Therefore, any warranty that a manufacturer makes to customers is voluntary and applies in *addition* to the consumer guarantees, not instead of them.

Current ACCC Focus on Consumer Guarantees

While we are at it, the ACCC has '*systemic issues involving large or national traders avoiding or misrepresenting consumer guarantee rights*' as a current compliance and enforcement priority. What does that mean? Simply, the ACCC is keeping a very close eye on statements made by big business about consumer rights and investigating wrongdoers where appropriate, as was the case with FitBit.

This focus has already led to a number of actions against manufacturers and retailers that have represented to consumers they have more limited rights than those actually available at law. In December 2017, electronics vendor Belkin admitted to selling lifetime warranty guarantees that were actually only valid for up to 5 years. After the ACCC's intervention, Belkin agreed to honour the lifetime warranty on products for 3 years and cease making lifetime warranties unless they were true (see our recent publication about this case [here](#)). In early 2018, Netgear incorrectly told customers they could not receive a remedy for faulty products unless it was covered by the manufacturer's warranty, thus ignoring the ACL guarantees. After ACCC involvement, Netgear agreed to provide customers with refunds and compensation. More recently, in June 2018, as part of a suite of claims, Jenny Craig paid \$37,000 to the ACCC for three infringements, including regarding false or misleading representations made in breach of the ACL. One of the infringements related to Jenny Craig's standard form membership agreement, which advised that customers' refund rights in relation to faulty products required the customer to notify Jenny Craig within 3 days and return faulty products within 10 business days, in their original packaging, which is in breach of the consumer guarantees discussed above. The ACCC penalised Jenny Craig as it failed to advise customers they were entitled to a statutory remedy under the ACL.

What does all of this mean for you?

Broadly, you need to be aware of the ACCC's suite of enforcement powers, including to pursue court enforceable undertakings, issue fines, issue substantiation notices, impose compliance programs, or in particularly bad cases, take wrongdoers to Court. FitBit agreed to enforceable undertakings, which are on the public record and generally involve the company agreeing to remedy the harm caused, and frequently to accept some responsibility and establish and review or improve processes. It goes without saying that court-based outcomes by the ACCC are best avoided, but so are the other outcomes which can be extremely costly, damaging and brand-dilutive. It is therefore crucially important when selling and/or marketing a product that customers are *properly* informed about the rights they may have under the ACL, in addition to any warranties that come from the product's manufacturer and/or retailer. If you are not sure what they are, get in touch.

Contact us

If you would like further information about the ACL guarantees and how they impact you or your business, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with ensuring you and your clients are ACL compliant.

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