



Australian Government
The Treasury



Consumer rights

Reforming statutory implied
conditions and warranties

Final report

October 2009

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ISBN 978-0-642-74534-7

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Commonwealth Consumer
Affairs Advisory Council

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30 October 2009

The Hon Dr Craig Emerson MP
Minister for Competition Policy and Consumer Affairs
Parliament House
CANBERRA ACT 2600

Dear Minister

On 12 March 2009 the former Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, requested that the Commonwealth Consumer Affairs Advisory Council (CCAAC) undertake a review of statutory implied conditions and warranties as part of the broader Australian Consumer Law reforms. As part of this process, CCAAC has examined the existing laws on implied conditions and warranties in the *Trade Practices Act 1974* and state and territory fair trading and sale of goods laws.

The findings of the report have been drawn from extensive consultation and research undertaken by CCAAC. CCAAC commissioned research from Sparke Helmore to inform the review, and this work, combined with a study undertaken by the National Education and Information Advisory Taskforce, has provided further information and assistance to the review process. Additionally, CCAAC acknowledges the considerable contribution that Consumer Affairs Victoria has made to research in this field.

Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today's environment. This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future.

I offer my thanks to and acknowledge the expertise and commitment of the CCAAC Subgroup in compiling this report. The Subgroup was led by Professor Stephen Corones and assisted by Ms Deborah Healey, Mr Ray Steinwall and Ms Carolyn Bond, along with contributions from our other colleagues. I also thank those who provided submissions to CCAAC.

I am pleased to enclose a copy of CCAAC's final report.

Yours sincerely

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GLOSSARY

ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
CCAAC	Commonwealth Consumer Affairs Advisory Council
COAG	Council of Australian Governments
FTA	Fair Trading Act
MCCA	Ministerial Council on Consumer Affairs, made up of ministers responsible for consumer affairs from the Australian, New Zealand and State and Territory governments
NEIAT	National Education and Information Advisory Taskforce
NZCGA	Consumer Guarantees Act 1993 (NZ)
PC	Productivity Commission
SGA	Sale of Goods Act
TPA	<i>Trade Practices Act 1974</i>

FINDINGS

REFORMING THE LAW (CHAPTER 5)

Findings

- 5.1 The current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law.
- 5.2 In developing the Australian Consumer Law, current laws on implied conditions and warranties should be amended to increase consumer and business understanding and to harmonise differences between existing national, state and territory laws.
- 5.3 The Australian Consumer Law should include a single set of consistent statutory consumer guarantees that are simple and clear. The new law should, at a minimum, provide:
- in respect of goods:
 - a guarantee that the supplier has the right to sell the goods;
 - a guarantee that the goods are free from any undisclosed security;
 - a guarantee that the consumer will have undisturbed possession of the goods;
 - a guarantee that goods are of ‘acceptable quality’, which would replace the concept of ‘merchantable quality’, and which includes a detailed definition of ‘acceptable quality’, so that the goods are:
 - : fit for the purposes for which the goods are commonly supplied;
 - : acceptable in appearance;
 - : free from both major and minor defects;
 - : safe; and
 - : durable;

Findings (continued)

as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to:

- : the nature of the goods;
- : the price (where relevant);
- : any statements made about the goods on any packaging or label on the goods;
- : any representation made about the goods by the supplier or the manufacturer/importer; and
- : all other relevant circumstances of the supply of the goods;
- a guarantee that the goods are fit for a particular purpose made known to the supplier by the consumer;
- where goods are sold by description, a guarantee that goods comply with that description;
- where goods are sold by sample, a guarantee that goods comply with that sample;
- where goods are first supplied to a consumer in Australia, a guarantee that the manufacturer/importer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for goods are reasonably available for a reasonable period after the goods were supplied;
- These guarantees should be enforceable against both the manufacturer/importer and the retailer of any goods supplied.
- in respect of services:
 - a guarantee that they will be carried out with reasonable care and skill;
 - a guarantee that, where the actual purpose of the services and any associated goods is made clear to the seller, the goods and services are fit for the particular purpose; and
 - a guarantee that the services will be completed in a reasonable time, unless otherwise addressed by the contract for the supply of those services;

Findings (continued)

- clear remedies for each statutory consumer guarantee, including a right to recover loss or damage suffered as a result of failure to comply with a guarantee, which distinguish between:
 - remedies for major and minor defects; and
 - remedies against suppliers and manufacturers/importers.
- These guarantees should be enforceable against both the supplier and intermediary of any services supplied.
- a consistent approach to defining ‘consumer’ in the Australian Consumer Law, with the same definition to apply to statutory consumer guarantees. Furthermore, given that some business purchases are currently afforded protection by the provisions of Part V, Divisions 2 and 2A of the *Trade Practices Act 1974*, consideration should be given as to whether such purchases should remain covered by statutory consumer guarantees;
- that statutory consumer guarantees, except for the guarantee as to the supplier’s right to sell the goods, do not apply to the sale of goods by way of genuine auctions;
- that, as part of the development of the Australian Consumer Law, Part V, Divisions 2 and 2A of the *Trade Practices Act 1974* (and similar legislation at state and territory level) will be repealed in favour of the new statutory consumer guarantees; and
- that the statutory right to rescission of contracts in section 75A of the *Trade Practices Act 1974* (and similar legislation at state and territory level) be repealed in favour of the remedies available under the new statutory consumer guarantees.

ENHANCING AWARENESS (CHAPTER 6)

Findings

- 6.1 Current understanding by consumers and businesses of Australia's laws on implied conditions and warranties is limited, leading to confusion and uncertainty about the application of the law. It is critical that Australia's consumer agencies, retailers, manufacturers/importers and consumers have a common understanding about the nature and effect of the new statutory consumer guarantees.
- 6.2 Australia's consumer agencies, together with New Zealand, should work together to:
- develop and publicise a single, simple message about statutory consumer guarantees and retailer and manufacturer/importer obligations, to inform and educate consumers and businesses about statutory consumer guarantees;
 - develop, publish and distribute a single, clear and unambiguous notice for display at the point of sale, which can be used by all retailers to tell consumers about their statutory consumer guarantees. This could be done in conjunction with retailer and consumer representative bodies; and
 - develop and publish clear and consistent information and guidance for consumers about statutory consumer guarantees and options for dispute resolution.
- 6.3 Retailers and manufacturers/importers have an important role in ensuring that consumers are aware of their statutory consumer guarantees. Retailers and manufacturers/importers should ensure that any information that they publish or provide to consumers about statutory consumer guarantees is clear, accurate and unambiguous.
- 6.4 Retailers should be strongly encouraged to display the notice recommended in Finding 6.2 at the point of sale. This notice would be available from all consumer agencies. Voluntary take-up of this initiative should be considered as part of the review of enforcement and administrative arrangements under the Intergovernmental Agreement for the Australian Consumer Law, or earlier if required. If there is evidence that retailers are not informing consumers of their statutory consumer guarantees, consideration should be given to the introduction of a legal requirement to display such a notice in a form prescribed by the Minister.

ENFORCEMENT AND DISPUTE RESOLUTION (CHAPTER 7)

Findings

- 7.1 All consumers should have access to low-cost dispute resolution mechanisms, such as tribunals or small claims processes, to facilitate timely resolution of claims.
- 7.2 Ideally, State and Territory governments should develop a consistent approach for all existing small claims court and tribunal processes so as to give consumers a consistent and distinct pathway to access dispute resolution mechanisms for statutory consumer guarantees in all Australian jurisdictions, and in New Zealand.
- 7.3 In doing this, State and Territory governments should review existing dispute resolution processes in each jurisdiction, together with New Zealand, and develop consistent and uniform approaches to procedural issues including:
- uniform claim limits;
 - uniform remedies and order making powers; and
 - uniform filing fees and administration processes.
- 7.4 State and Territory governments, in conjunction with the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), should develop and publish clear, consistent information about consumers' options for resolving disputes about statutory consumer guarantees.
- 7.5 As part of the development of administrative arrangements in the enforcement of the Australian Consumer Law, state and territory consumer agencies, together with the ACCC and ASIC, should identify emerging consumer issues concerning statutory consumer guarantees and coordinate regulatory and enforcement responses to these issues.
- 7.6 To clarify consumer understanding and business obligations about statutory consumer guarantees, Australian governments should agree to include a provision in the Australian Consumer Law which reflects the existing section 53 of the *Trade Practices Act 1974*, and particularly paragraph 53(g) which prohibits:
- a false or misleading representation concerning a:
 - statutory consumer guarantee;
 - any other condition, warranty or guarantee; or
 - right or remedy; and
 - a false or misleading representation concerning any actual or implied requirement by a person to pay for a contractual right equivalent to a statutory consumer guarantee or any other statutory right or benefit that person may enjoy.

Findings (continued)

- 7.7 Given the limited application of paragraph 53(g) to date in preventing retailers and manufacturers/importers from misrepresenting consumer rights under Part V, Divisions 2 and 2A of the *Trade Practices Act 1974*, a consistent body of law around the Australian Consumer Law will need to be developed. CCAAC considers that the law would benefit from the pursuit and publication of test cases under the new provisions in the Australian Consumer Law recommended in finding 7.6.
- 7.8 CCAAC views the role of the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and state and territory agencies as continuing to enforce the false, misleading and deceptive conduct provisions of the new Australian Consumer Law as they apply to the new statutory consumer guarantees. Any issues relating to enforcement and dispute resolution for consumer guarantees should be considered as part of the review of enforcement and administrative arrangements under the intergovernmental agreement for the Australian Consumer Law.
- 7.9 CCAAC considered various ways to encourage compliance by retailers and manufacturers. These include imposing criminal liability, imposing liability for civil pecuniary penalties, providing consumer agencies with the power to secure compensation in respect of any systemic failure to honour guarantees and providing consumer agencies with power to secure redress for consumers in respect of a failure to honour a statutory guarantee at the discretion of the relevant consumer agency. CCAAC considers that it would not be appropriate for consumer agencies to apply civil or criminal penalties in respect of failures to honour consumer guarantees. CCAAC favoured an approach whereby consumer agencies would have the power to take action on behalf of consumers to enforce their statutory consumer guarantees, where such an action would encourage compliance with the law.

EXTENDED WARRANTIES (CHAPTER 8)

Findings

- 8.1 Extended warranties are, in part, often marketed to provide ‘peace of mind’ to consumers over and above statutory implied terms and the manufacturer/importer’s voluntary warranty. However, the evidence presented to CCAAC suggests that extended warranties may not be justified in some cases. This is especially the case when retailers and manufacturer/importers are required to remedy faults or replace goods under the existing statutory regime.
- 8.2 Greater consumer awareness of statutory consumer guarantees should, in many cases, reduce consumer perceptions about the need for extended warranties where they are not justified. In preparing consistent national information and guidance for consumers on statutory consumer guarantees, Australia’s consumer agencies should include information about extended warranties and how these interact with statutory consumer guarantees.

Findings (continued)

- 8.3 CCAAC proposes that the issues around extended warranties be considered as part of the review of enforcement and administrative arrangements under the Intergovernmental Agreement for the Australian Consumer Law, or earlier if required. In addition, CCAAC finds that consumer agencies should consider a closer examination of the extended warranties market, in particular, the way in which extended warranties are sold.

DEALING WITH MOTOR VEHICLE ISSUES (CHAPTER 9)

Findings

- 9.1 CCAAC does not consider the case for the introduction of a separate ‘lemon law’ for motor vehicles to have been made at this time. However, Australian governments should monitor the effectiveness of the national statutory consumer guarantees as they apply to motor vehicles, including gathering data about the number and nature of complaints and disputes about statutory consumer guarantees involving new and used motor vehicles.
- 9.2 The new national statutory consumer guarantees should cover new and used motor vehicles.
- 9.3 Australian consumer agencies should provide clear, consistent information about the application of statutory consumer guarantees to motor vehicles, particularly about consumers’ rights, businesses’ obligations and the options for resolving disputes about statutory consumer guarantees as they relate to motor vehicles.
- 9.4 State and Territory governments should give active consideration to the appointment of specialist adjudicators and assessors to deal with disputes involving motor vehicles and statutory consumer guarantees.

ONLINE SALES (CHAPTER 10)

Finding

- 10.1 Online transactions should be covered by the national statutory consumer guarantees in the same way as in-store transactions.

LIABILITY LIMITATIONS (CHAPTER 11)

Findings

- 11.1 Consistent with the intention of the Australian Consumer Law, the new statutory consumer guarantees should apply to all sectors of the economy.
- 11.2 For consistency, the Australian Consumer Law should include a national approach to the limitation of liability for recreational services, including a consistent definition of 'recreational services'. CCAAC considers that the definition of 'recreational services' in the *Trade Practices Act 1974*, which also applies in a number of other jurisdictions, is too broad given the stated policy intention that the limitation should only cover 'inherently risky' activities.

AUCTIONS (CHAPTER 11)

Findings

- 11.3 The national statutory consumer guarantees should continue to exclude goods and services purchased at auctions conducted by an auctioneer, including those that are conducted online.
- 11.4 Goods and services sold by businesses directly to consumers through so-called 'online auctions' (except for those conducted by an auctioneer) should be covered by national statutory consumer guarantees. The legislation should clearly state that such 'online auctions' do not fall within the definition of an 'auction' for the purposes of national statutory consumer guarantees.

1 CONSUMERS IN A CHANGING MARKETPLACE

CONTEXT OF THE REVIEW

The Australian Government, together with the States and Territories, is undertaking the most significant and far-reaching reform of consumer laws for a generation. The Australian Consumer Law (ACL) will include a single set of generic consumer laws based on the consumer protection provisions in the *Trade Practices Act 1974 (Cth)* (TPA).

The Productivity Commission (PC) in its 2008 *Review of Australia's Consumer Policy Framework* recommended that the adequacy of existing legislation related to implied conditions and warranties (implied terms) should be examined as part of the development of the new consumer law.¹ The reforms seek to remove inconsistencies across jurisdictions and provide a nationally coherent approach to the purchase and use of consumer goods and services.

PURPOSE

In 2008, the Ministerial Council on Consumer Affairs (MCCA) agreed that the high-level national consumer policy objective for the future policy framework should be:

... to improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.²

In response to the PC Review and consistent with MCCA's objective, on 12 March 2009 the Australian Government announced a review of the Australian law on implied terms, to be undertaken by the Commonwealth Consumer Affairs Advisory Council (CCAAC). Under its terms of reference³, CCAAC has examined the existing laws on implied terms in the TPA and state and territory fair trading and sale of goods legislation.

On 26 July 2009 the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, released an Issues Paper, *Consumer rights: Statutory implied conditions and warranties*, on behalf of CCAAC. The Issues Paper⁴ explored and posed questions about the adequacy of the current laws on implied terms and the need, if any, for amendments to improve existing laws and to empower consumer agencies to ensure compliance with these laws. The Issues Paper also considered related issues, such as 'lemon laws' to protect consumers where goods repeatedly fail to meet expected standards, the existence of extended warranties and their interaction with laws on implied conditions and

1 PC 2008, *Review of Australia's Consumer Policy Framework*, Recommendation 8.1, pages 176-7.

2 MCCA 2008, joint communiqué of the Ministerial Council on Consumer Affairs meeting, Hobart, 15 August 2008.

3 Further detail is at Appendix A.

4 The Issues Paper can be found at www.treasury.gov.au/consumerlaw.

warranties, and other possible means to improve the operation of the existing laws on implied terms in Australia.

Interested parties were invited to comment on the paper and written submissions closed on 24 August 2009. In response to the Issues Paper, CCAAC received views from 33 submissions, as well as views from further consultation (the consultation process is at Appendix B). A range of stakeholders contributed to the process, including individual consumers, consumer agencies and businesses.⁵

THE CURRENT ENVIRONMENT

Confident and empowered consumers are essential for a thriving and innovative economy, providing individual gain as well as gains for the broader community. Within the economy, consumers play a vital role in promoting well-functioning markets. A key contributor to consumer confidence is ready access to clear and accurate information about the characteristics of products and services consumers want to purchase.⁶ Consumers send signals to suppliers through their purchasing decisions and suppliers then compete for business on cost, quality and innovation. Competition between firms and subsequent responses to these consumer signals improve outcomes for consumers and productivity in the economy. However, these outcomes rely on consumers being well informed and sufficiently confident to act on information. This allows them to obtain what they expect from a transaction or, failing that, to seek redress.

A free-market economy emphasises the benefits of markets behaving in a way in which resources are allocated efficiently. The efficient allocation of resources is critical in maximising consumer welfare. When this does not occur a market failure exists and there may be a need for government intervention to improve outcomes for the community, the environment, businesses and the wider economy.

Driven by technological change and globalisation, markets are becoming increasingly complex. The cross-border nature of an increasing number of transactions has meant markets are more national (and international) in scope. Businesses trading within only one jurisdiction are increasingly rare, as are consumers with little interaction with jurisdictions outside their own.

In conjunction with these changing markets, new attitudes towards consumer policy are providing catalysts for emerging thought. Consumer protection alongside market competition is now recognised as essential for efficient market outcomes. These developments in consumer policy have provided the link between well-functioning markets and consumer wellbeing. From this, the link in policy terms between supply-side regulation, in the form of competition policy, and demand-side interventions, in the form of consumer policy, is commonly accepted as a valid framework within which to develop policy.⁷

5 A list of submissions is at Appendix C. A submission summary key is at Appendix D. A summary of stakeholder submissions is at Appendix E.

6 Hadfield, G K, Howse, R and Trebilcock M K, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 *Journal of Consumer Policy* 131 at 150.

7 OECD, Directorate for Science, Technology and Industry, Committee of Consumer Policy, *Roundtable on Demand Side Economics for Consumer Policy: Summary Report 20 April 2006* available at: www.oecd.org.

TYPES OF WARRANTIES

Within the consumer environment three types of warranties have evolved. Consumers can rely on these differing warranties to protect themselves if goods are faulty. They are, in effect, promises by the retailer or manufacturer to stand behind the goods and services they supply and to correct any problems that may arise if the goods have a defect. The law recognises two basic kinds of warranties: a statutory implied warranty; and a manufacturer's voluntary warranty. To these may be added a third category, the so-called 'extended warranty' which is a contract separate from the contract of sale for the product, providing for the repair or service of the product. An extended warranty is a contract of insurance or a facility for managing risk.

Statutory implied warranties

Regardless of whether a voluntary or extended warranty is available, the TPA, Fair Trading Acts (FTAs) and Sale of Goods Acts (SGAs) protect consumers when they buy goods and services. They do so by implying certain rights and obligations into all consumer contracts, and these can be categorised as:

- 'conditions', which are essential terms of the contract – that is, terms that are so important to the purpose of the contract that, if they are breached, will allow a consumer to cancel the contract and seek a refund as well as seek compensation for loss or damage; and
- 'warranties', which are less significant terms – that is, secondary considerations that are important and, if they are breached, will generally allow consumers to seek damages, but will not allow consumers to terminate the contract.

Manufacturers' voluntary warranties

Manufacturers often provide a 'voluntary' warranty to their customers, for example, for electronic goods, whitegoods and mobile phones. Voluntary warranties (also called 'express warranties') set out the terms and conditions under which the manufacturer agrees to repair or replace the product or refund the purchase price. These warranties are usually – but not always – in writing and subject to time limits and other conditions. As their name suggests, manufacturers' warranties are voluntary and their terms and conditions are not prescribed by law. Hence, provision of an express warranty and any terms and conditions it contains are generally at the manufacturer's discretion⁸. However, if provided, a voluntary warranty may form a collateral contract between the consumer and the manufacturer and, if it does, the consumer has the right to take legal action against the manufacturer if the warranty is not honoured.⁹

Extended warranties

Some businesses also offer consumers the option of purchasing an extended warranty. Extended warranties are usually service or insurance contracts. Under specified conditions these will cover the costs of product repairs or replacement for a set period during and/or

8 Some jurisdictions, such as Queensland, regulate the use of express warranties. For example, see Division 5 of Part 3 of the *Fair Trading Act 1989* (QLD).

9 See Sutton, K C T, *Sales and Consumer Law*, pages 350-1.

beyond the expiration of any voluntary warranty offered by the manufacturer or any statutory warranty. The terms and conditions of extended warranties are at the discretion of the organisation supplying the warranty (which may be the retailer, the manufacturer or a third party).

CHALLENGES AND CATALYSTS FOR CHANGE

For more than a century, State and Territory governments have had provisions in their FTAs and SGAs that imply terms into contracts for the sale of goods and give basic warranties and rights to purchasers. Nationally, the TPA also includes these fundamental rights. Therefore, it is timely to reassess the warranties available to consumers as part of the ACL harmonisation process.

Clarity in the law

Consumer law, perhaps more than any other law, needs to be comprehensible to individual consumers and businesses alike. In such an extensive and important area of the law, consumers need to understand their rights and businesses need to understand their obligations without the need for recourse to expensive legal advice.

The coexistence of individual state and territory law and the nationally focused TPA has resulted in a complex law that has caused uncertainty and confusion in the market place. Changes in the consumer environment have placed further pressure on the adequacy of current laws. Technological changes, changing methods of purchase such as online shopping and electronic platforms for bringing buyers and sellers into contact (so-called online auctions), increased access to markets and the increased availability of products have revolutionised the way business and consumers interact.¹⁰ The associated benefits of these changes have arisen alongside other issues, such as increasing complexity both within products and markets, a wider variety of consumer needs and higher consumer expectations.

In addition, the provisions in the TPA and state and territory consumer legislation derive from the United Kingdom Sale of Goods Act 1893 which codified the traditional United Kingdom sale of goods law and was never intended to be a consumer protection regime. The archaic terminology used – for example ‘merchantable quality’ – has failed to provide the modern consumer with clear and meaningful guidance on the essence of the law.

The existing regime is based on the common law ‘privity of contract’ doctrine. Consumers have rights based on terms implied into contracts with retailers. There are two tiers of implied terms (conditions and warranties) with different remedies attaching to them.

Further, if the manufacturer provides a voluntary warranty there may be a collateral contract between the consumer and the manufacturer. These complex contractual arrangements can result in retailers denying liability and referring consumers back to manufacturers, or others in the supply chain, to seek a remedy. Manufacturers, in turn, may deny that a collateral contract exists, or require the consumer to prove that the defect was caused by the

10 For some recent overseas studies see Federal Trade Commission, Bureau of Consumer Protection, *Consumer Protection in the Global Electronic Marketplace* (September 2000) and Office of Fair Trading, *Internet Shopping: An OFT market study* (June 2007).

manufacturer rather than a component supplier. There is, therefore, a lack of clarity for consumers in the current laws, and this is one of the principal areas CCAAC is seeking to address.

The fundamental principle underlying the law in this area should be that consumers are entitled to get what they pay for, in the sense that goods and services will do what they are supposed to do, thereby reducing the likelihood of consumer detriment and dissatisfaction.

CCAAC believes that there is a need to clarify and simplify the law, so that consumers are provided with a basic minimum level of protection as far as possible within the existing system.

Consumers should not be forced to prove which firm in the supply chain is responsible for a fault or defect in the goods supplied. Manufacturers and retailers should assume joint responsibility for the quality of the goods and services they supply, and the common law privity of contract doctrine should not be a barrier to recovery by the consumer.

CCAAC believes that to clarify the law, a new statutory scheme should be established independently of the law of contract and that the Government should establish post-sale statutory guarantees, with statutory remedies provided for breach of these guarantees.

Awareness of rights and obligations

The complexity of the law has also contributed to the widespread lack of consumer understanding and awareness. If a consumer is unable to understand which law is applicable to their situation (or even that there is a law applicable to their situation), how can they be fully aware of their rights?

Further, the coexistence of statutory rights and obligations alongside manufacturers' voluntary warranties and extended warranties can be confusing for traders and consumers¹¹, blurring the boundaries of statutory rights with the additional rights granted by retailers or manufacturers.

According to the National Education and Information Advisory Taskforce *Baseline Study for Statutory Warranties and Refunds August 2009* (the NEIAT study), less than 20 per cent of people were able to demonstrate actual knowledge and understanding of the basic principles of federal or state legislation.

Empirical evidence suggests that 'when consumers are more informed of their statutory rights, their view of extended warranties changes; they feel that they are being asked to pay for something that they already have the right to expect'.¹² This finding highlights one of the major causes of consumer detriment in the market. While consumers may currently be satisfied with extended warranties and the 'peace of mind' they bring, the question arises: would they have the same level of satisfaction with extended warranties if they were fully aware of their existing statutory rights?

11 Consumer Affairs Victoria 2009, *Warranties and refunds in the electronic goods, white goods and mobile telephone industries*, Research Paper No. 17, May 2009.

12 Latitude Research and On Track Research, *Baseline Study for Statutory Warranties and Refunds*, September 2009, page ix. This research was conducted for the National Education and Information Advisory Taskforce, and is hereafter referred to as the 'NEIAT study'.

CCAAC believes that there is a need to raise awareness among consumers and suppliers about their statutory rights and responsibilities.

Difficulty in enforcement

Problems in relation to enforcement have also been raised. Throughout the extensive consultation process, the need for consumer certainty and 'peace of mind' was a recurring theme. Many consumers purchased an extended warranty in the belief that they were acquiring an easier avenue of redress for product failures and a direct point of contact to action redress. Despite existing law and avenues for its redress, empirical evidence suggests that consumers purchase extended warranties because of the time and effort required to gain an understanding of small claims tribunals in each State and Territory and in seeking individual redress.

The problems associated with individual redress are compounded by the fact that statutory rights form part of consumer contracts, meaning only a consumer with a contract can bring an action against a retailer. The NEIAT study found evidence which suggested that 'only one in six consumers sought advice when things didn't turn out as hoped, and this was mostly from personal or technical sources'.¹³

In addition, some individual consumers are less likely to enforce their rights as they may experience disadvantage, for example, through minimal education. Consumers from culturally and linguistically diverse communities may also encounter difficulties in accessing remedies. It is therefore important to consider how the law might be drafted to assist individuals especially in relation to self execution of the law. It is also important to consider other approaches that may be able to influence industry conduct to assist and support vulnerable consumers.

CCAAC believes that there is a need for clear laws and enhanced awareness on the part of consumers of their rights, and suppliers of their obligations. This will promote self-enforcement by building knowledge and a shared understanding of rights between all parties. Where disputes cannot be resolved by the parties, CCAAC believes that there is a need for more cost-effective dispute resolution procedures.

Incentives

The lack of incentives for retailers and manufacturers to comply with the law and assist consumers has also been highlighted. Unlike other provisions in the TPA, the warranty provisions generally only allow enforcement by individual consumers. As noted above, individual consumers can often be deterred from asserting their rights where to do so would require taking action in a court or tribunal.

Further in the case of low value goods it would not be rational economically to take such action having regard to both time and the possible expense involved. This means that retailers and manufacturers who choose not to meet their obligations, do not face the risk of enforcement action from the regulator (unless misleading and deceptive conduct is involved). It also means that retailers and manufacturers could choose whether to comply or not based on a cost/risk basis. Responding to legal action by a few individual consumer

13 *ibid.*, page viii.

actions could be regarded as being a low risk for a business compared to dealing with an action by a regulator.

The uncertainty surrounding the implied statutory protections combined with the lack of awareness by consumers of their rights and the high cost of enforcement, mean that the likelihood of consumers personally enforcing their rights is small. Thus, this further reduces the incentive for retailers to comply with their implied contractual obligations.

There is evidence of the practice of retailers referring consumers back to manufacturers and denying liability. Consumers should not bear the onus of proving which firm in a supply chain is responsible for any defects in the goods.

CCAAC believes that making it simpler for individual consumers to enforce their rights will increase the incentive for manufacturers and retailers to comply with their obligations. Wherever possible, there is a need to make the law self-executing and eliminate recourse to expensive litigation. This can be achieved by making the retailer strictly liable to the consumer for goods that have a defect, even if that defect is not obvious. The retailer must then pursue its claim against others in the supply chain.

STRUCTURE OF THE REPORT

CCAAC has conducted this review to assess the current statutory implied terms framework and identify where and why the framework is inadequate. In its examination, CCAAC has reviewed how Part V, Divisions 2 and 2A of the TPA can work in a more efficient and effective manner to increase consumer confidence, knowledge and wellbeing. The review also considered relevant international research and models for implied conditions and warranties adopted in other countries.

In order to address the issues CCAAC has been asked to canvass in its review, the report is set out in three parts. Each part highlights particular aspects of the review in response to the terms of reference, and they may be read individually or as a whole depending on the specific interests of the reader.

Part I outlines the current Australian law on implied terms, at both Commonwealth and state and territory level. Part I also considers international models for post-sale consumer protection, illustrating similarities with and divergences from the Australian law on implied terms.

Part II of the report highlights aspects of current Australian arrangements that give rise to concern about their efficacy as consumer protection arrangements. In particular, Part II looks at issues surrounding clarity in the law, awareness of the law (for both consumers and businesses) and enforcement of the law. Drawing on some of the analysis of current Australian and international models for post-sale consumer protection in Part I of the report, Part II makes a number of proposals for improvements to Australia's implied terms regime.

Finally, Part III addresses specific areas of concern about implied terms that have been raised with CCAAC, either through the terms of reference for this review or in the course of consultation. Specifically, Part III discusses issues associated with extended warranties, 'lemon laws', online transactions, and exclusions from or limitations of liability for implied terms.

PART I — CURRENT LAW

2 COMMONWEALTH LEGISLATION

All Australian jurisdictions have laws which provide consumers with basic protections in relation to the goods and services they acquire. The statutory implied terms regimes in both the TPA¹⁴ and state and territory fair trading¹⁵ and sale of goods legislation¹⁶ derive from the United Kingdom Sale of Goods Act 1893 which codified the traditional UK rights and remedies for sale of goods.

There is a separate regime that implies terms into contracts for the supply of financial services in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which is based on the TPA.¹⁷

There are 15 laws establishing generic regimes providing a range of different levels of coverage.¹⁸ In particular, the terms implied by the sale of goods legislation in the States and Territories can be effectively modified or excluded by the supplier in some jurisdictions, which denies consumers access to redress. The TPA introduced non-excludable warranties and conditions. Only NSW, Victoria, WA, SA and the NT have introduced non-excludable warranties and conditions in their respective FTAs.

In addition, there are industry-specific regimes that imply terms into consumer contracts, for example, used motor vehicles.¹⁹

The current statutory regime is a regulatory maze that imposes compliance costs on businesses that trade across more than one jurisdiction.

This Chapter examines the content of the current Commonwealth statutory implied terms regime. Chapter 3 then focuses on the state and territory statutory implied terms regimes and Chapter 4 summarises the law in other jurisdictions, namely New Zealand, the United Kingdom, the European Union, the United States and Canada.

APPLICATION OF DIVISIONS 2 AND 2A

Division 2 (Conditions and warranties in consumer transactions) of Part V of the TPA implies terms into consumer transactions. Division 2A (Actions against manufacturers and

14 Part V, Division 2 of the TPA.

15 *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1999* (Vic); *Consumer Transactions Act 1972* (SA); *Fair Trading Act 1987* (WA).

16 *Sale of Goods Act 1923* (NSW); *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1972* (NT); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Goods Act 1958* (Vic); *Sale of Goods Act 1895* (WA).

17 Section 12ED of the ASIC Act.

18 See *Comparison of Generic Consumer Protection Legislation* by Professor Stephen Corones and Professor Sharon Christensen from the Faculty of Law at Queensland University of Technology, prepared for the PC Review of Australia's Consumer Policy Framework.

19 Section 318, *Property Agents and Motor Dealers Act 2000* (Qld).

importers of goods) creates separate causes of action which consumers may enforce against manufacturers and importers where consumer goods fail to comply with certain standards.

Consumers

Division 2 (and parts of Division 2A) apply only in relation to the supply of goods or services by a corporation in the course of business to a 'consumer'.

A consumer is defined in section 4B of the TPA by reference to the type or value of goods or services purchased. Specifically, a person is taken to have acquired particular goods or services as a consumer if either:

- the price²⁰ of the goods or services is not greater than \$40,000; or
- the price of the goods or services is greater than \$40,000 but the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption (or, in the case of vehicles, the vehicle (or trailer) is acquired for use principally in the transport of goods on public roads);

and, in the case of goods, they are not purchased either for re-supply or for the purpose of using them up or transforming them in trade or commerce in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.²¹

Acquiring or supplying goods

Under the definitions in section 4, acquiring and supplying both include by way of purchase/sale, exchange, lease, hire or hire-purchase.

Extraterritorial operation

Section 6 of the TPA extends the operation of Part V, Divisions 2 and 2A to trade or commerce between Australia and places outside Australia, or trade or commerce among the States, within a Territory, between a State and a Territory or between two Territories.

Financial services

Section 52AF of the TPA provides that Part V (including Divisions 2 and 2A) does not apply to the supply or possible supply of 'financial services'.²² Mirror provisions in Part 2, Division 2 of the ASIC Act apply the consumer protection provisions to financial services.

20 Special provision is made for determining the price where goods or services are acquired otherwise than by purchase (paragraph 4B(2)(d)) and where goods or services are purchased together with other property and/or services but without an allocation of price (paragraph 4B(2)(c)).

21 The following terms in section 4B are defined elsewhere in the TPA: 'goods' (subsection 4(1)), 'services' (subsection 4(1)), 'price' (subsection 4(1)), 'acquire' (subsection 4(1), section 4C) and 're-supply' (section 4C).

22 'Financial service' is defined in section 4 to have the same meaning as in Division 2 of Part 2 of the ASIC Act. Section 12BAB of the ASIC Act contains a very broad definition of 'financial service' which is linked with the definition of 'financial product'. 'Financial product' is defined in a general way in section 12BAA of the ASIC Act, followed by a number of specific products set out in subsection 12BAA(7) that are included within the general concept, and a number of specific products set out in subsection 12BAA(8) that are excluded from the general concept. In essence, the provision of a financial service involves advising on, dealing in or selling a financial product including general insurance, life insurance, banking, superannuation, managed investments, the provision of credit and shares.

ASIC can delegate to the ACCC the exercise of authority in relation to breaches of the equivalent consumer protection provisions of the ASIC Act.

Credit

Section 73 has the effect of making the supplier and the financier both liable (jointly and severally) in certain circumstances where a consumer suffers loss or damage in relation to goods or services they have acquired from the supplier on the basis of finance provided by the financier.

Auctions

Apart from section 69 (Implied undertakings as to title, encumbrances and quiet possession), the conditions and warranties implied by Part V, Division 2 and rights of action given by Division 2A expressly do not apply to auction sales.²³

EXISTING IMPLIED TERMS AND STATUTORY RIGHTS

Part V, Division 2

Part V, Division 2 of the TPA implies into all consumer contracts certain non-excludable conditions and warranties.

Implied terms

In relation to the supply of goods by a corporation to a consumer, Division 2 provides for the following implied conditions and warranties:

- a condition that the supplier has a right to sell the goods (paragraph 69(1)(a));
- a warranty that the consumer will enjoy quiet possession of the goods (except so far as it may lawfully be disturbed) (paragraph 69(1)(b));
- a warranty that the goods are free from any undisclosed charge or encumbrance (paragraph 69(1)(c))²⁴;
- a condition that goods supplied by description will correspond with the description, and if the supply is by reference to a sample as well it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description (subsection 70(1));

²³ Auctions are discussed further in Chapter 11.

²⁴ In relation to a floating charge over assets of the corporation, the corporation is not in breach until the charge becomes fixed and enforceable (subsection 69(2)).

Part V, Division 2 (continued)

- a condition that goods are of merchantable quality (subsection 71(1))²⁵;
 - ‘merchantable quality’ is defined in subsection 66(2) as fit for the purpose(s) for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description which applied to them, the price (if relevant) and all the other relevant circumstances;
- a condition that, where the consumer (either expressly or impliedly) makes known the particular purpose for which the goods are being acquired, the goods are reasonably fit for that purpose (subsection 71(2)); and
- a condition that, where goods are supplied by reference to a sample, the bulk will correspond with the sample in quality, the consumer will have reasonable opportunity of comparing the bulk with the sample, and the goods will be free from any defect (rendering them unmerchantable) that would not be apparent on reasonable examination of the sample (section 72).

In relation to the supply of services by a corporation to a consumer, the TPA provides for the following implied warranties:

- a warranty that services will be rendered with due care and skill (subsection 74(1));
- a warranty that any goods (materials) supplied in connection with services – other than services of a professional nature provided by a qualified architect or engineer – will be reasonably fit for the purpose for which they were supplied (subsection 74(1)); and
- a warranty that, where the consumer (either expressly or impliedly) makes known the particular purpose for which the services are required or the result the consumer desires the services to achieve, the services and any goods (materials) supplied in connection with them are reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result (subsection 74(2)).²⁶

25 The condition that goods must be of merchantable quality does not apply in regard to defects specifically drawn to the consumer’s attention before the sale or, if the consumer examines the goods, defects which that examination ought to reveal (paragraphs 71(1)(a) and (b)).

26 The warranty that services must be fit for the purpose disclosed by the consumer does not apply to services of a professional nature provided by a qualified architect or engineer (subsection 74(2)).

Part V, Division 2 (continued)

Remedies

Since the terms outlined in Division 2 are implied into the contract, the action to be brought by the consumer is an action for breach of contract rather than an action for breach of the TPA.

Where a corporation breaches a condition implied into a contract for the supply of goods by Division 2, section 75A (rescission of contracts) also allows that the consumer can rescind the contract by serving a notice on the supplier or returning the goods. There are limitations on this right. First, the rescission must be made within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods. Second, the rescission is not effective if the consumer disposes of (or loses or destroys) the goods or causes the goods to become unmerchantable (or fails to take reasonable steps to prevent the goods becoming unmerchantable) or the goods were damaged by abnormal use. Where a contract has been rescinded in accordance with this section, the consumer may recover the amount paid for the goods.

Ability to exclude or contract out of provisions

Section 67 of the TPA ensures that suppliers are not able to avoid Part V, Division 2 by providing for the law of another jurisdiction to apply to the contract. If Division 2 would apply in the absence of a choice-of-law clause, then it applies regardless of the law chosen under the contract (paragraph 67(a)). Further, any terms that attempt to substitute the provisions of another jurisdiction's law in place of Division 2 are ineffective (paragraph 67(b)).

Section 68 declares void any attempts by parties to exclude, restrict or modify the application of any provisions, the exercise of any right, or the liability of a corporation for any breach under Division 2, or the application of section 75A (rescission of contracts). The only exception (in subsection 74(2A)) allows state and territory law (where that law is the proper law of the contract) to limit or preclude liability for a breach of the warranties in relation to services.

The combined operation of sections 67 and 68 ensures that contracts between foreign corporations and residents of Australia are subject to the operation of Part V, Division 2 except where the proper law of the contract is a foreign law.

Limitation of liability²⁷

Section 68A allows a corporation to limit its liability for breach of an implied term, excluding the conditions and warranties implied by section 69, other than where the goods or services supplied are goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. Liability may be limited to:

²⁷ Limitation of liability is discussed further in Chapter 11.

Part V, Division 2 (continued)

- in the case of goods, one or more of:
 - replacement of the goods or supply of equivalent goods (subparagraph 68A(1)(a)(i));
 - repair of the goods (subparagraph 68A(1)(a)(ii));
 - payment of the cost of replacing the goods or of acquiring equivalent goods (subparagraph 68A(1)(a)(iii)); or
 - payment of the cost of having the goods repaired (subparagraph 68A(1)(a)(iv)); or
- in the case of services:
 - supplying of the services again (subparagraph 68A(1)(b)(i)); or
 - payment of the cost of having the services supplied again (subparagraph 68A(1)(b)(ii)).

However, a term of a contract may not limit the liability of the corporation if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract (subsection 68A(2)).²⁸

Section 68B provides that a corporation may exclude, restrict or modify the application of section 74, the exercise of any right conferred by section 74, or the liability of a corporation for any breach of a warranty implied by section 74 in relation to the supply of recreational services. The exclusion, restriction or modification must be limited to liability for death or personal injury (defined in subsection 68B(2)). Recreational services is defined in subsection 68B(2) to mean sporting activities, similar leisure-time pursuits, or any other activities that involve a significant degree of physical exertion or physical risk and are undertaken for recreation, enjoyment or leisure purposes.

Subsection 74(3) excludes from the types of services covered by the warranties in section 74:

- contracts for the transportation or storage of goods for the purposes of the customer's business; and
- contracts for insurance.

²⁸ Subsection 68A(3) states that, for the purposes of deciding whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and, in particular, the matters set out in paragraphs 68A(3)(a) to (d).

Part V, Division 2A

Part V, Division 2A imposes certain obligations on manufacturers and importers ('manufacturers') of goods. Unlike Division 2 which will only provide a remedy to a consumer if there is a contract into which the terms can be implied, Division 2A allows the consumer to take direct action against the manufacturer in the case where there is a reseller interposed between the manufacturer and the consumer.

Paragraph 74A(2)(a) limits the liability of manufacturers to goods of a kind ordinarily acquired for personal, domestic or household use or consumption.

Rights of action

Division 2A provides for causes of action in respect of:

- goods not fit for the purpose for which they were acquired – that is, where the
- particular purpose for which the consumer is acquiring the goods is made known to the manufacturer (either expressly or impliedly) and the goods are not reasonably fit for that purpose and the consumer suffers loss or damage as a result (subsection 74B(1))²⁹;
- goods which do not correspond with the descriptions – that is, where goods are supplied to a consumer by description and the goods do not correspond with the description and the consumer suffers loss or damage as a result (subsection 74C(1))³⁰;
- goods of unmerchantable quality – that is, where a consumer acquires goods not of merchantable quality and suffers loss or damage as a result (subsection 74D(1));
- goods which do not conform to a sample – that is, where goods are supplied to a consumer by reference to a sample and the bulk does not correspond with the sample in quality, or the goods have a defect rendering them unmerchantable that is not apparent on reasonable examination of the sample and the consumer suffers loss or damage as a result (subsection 74E(1));
- failure to provide facilities for repairs or parts – that is, where goods require repair or a part but facilities for the repair or the part are not reasonably available to the consumer and the manufacturer acted unreasonably in failing to ensure they were reasonably available and the consumer suffers loss or damage as a result (subsection 74F(1))³¹; and

29 Subsections 74B(1), 74C(1), 74D(1) and 74E(1) do not apply if the loss or damage is caused by an act or default of someone other than the manufacturer or a cause independent of human control occurring after the goods have left the manufacturer's control.

30 Under subsection 74C(4), if the supply of goods is by reference to a sample as well a description, it is not a defence to an action under section 74C that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

31 Under subsection 74F(2), the manufacturer is not liable if it takes reasonable action to advise the consumer at the time of sale that it does not promise that either repair facilities or the part would be available or would be available after a specified period.

Part V, Division 2A

- non-compliance with an express warranty – that is, where the manufacturer fails to comply with its express warranty (or an undertaking, assertion or representation made in the supply or promotion of goods which, if made by the manufacturer, would have constituted an express warranty) and the consumer suffers loss or damage as a result (section 74G).

Under section 74H, where a seller is liable to pay compensation to a consumer for a breach of a condition or warranty implied by a provision of Division 2, and the manufacturer is liable to pay compensation to the consumer in respect of the same loss or damage under Division 2A (or would be liable if Division 2A applied to goods not of a kind ordinarily acquired for personal, domestic or household use or consumption), the manufacturer is liable to indemnify the seller.

Remedies

Any person who suffers loss or damage as a result of non-compliance with the provisions of Division 2A may bring an action against the manufacturer in a court of competent jurisdiction to recover compensation under the various provisions of the Division.

Subsection 74J(1) imposes a limitation period on the actions under Division 2A of three years from the time the cause of action accrues. Subsection 74J(3) provides a defence where the defendant can prove that the action was commenced more than 10 years after the date on which the defendant first supplied the goods to the consumer.

Ability to exclude or contract out of provisions

Any term of a contract that succeeds or attempts to exclude, restrict or modify the application of Division 2A is void (section 74K).

Limitation of liability

In the case of goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the liability of a manufacturer to a seller under section 74H is limited to a liability to pay to the seller an amount equal to the lowest of:

- the cost of replacing the goods;
- the cost of obtaining equivalent goods; or
- the cost of having the goods repaired (subsection 74L(1)).³²

32 Subsection 74L(2) states that subsection 74L(1) does not apply if the seller has established that it is not fair or reasonable for the liability of the manufacturer to a seller to be limited. Subsection 74L(3) states that, for the purposes of deciding whether or not it is fair or reasonable for the manufacturer to limit its liability, a court shall have regard to all the circumstances of the case and, in particular, the matters set out in paragraphs 74L(3)(a) to (c).

3 STATE AND TERRITORY LEGISLATION

All States and Territories have enacted legislation to impose obligations on suppliers or sellers of goods by implying certain terms into contracts.³³ NSW, Victoria, WA, SA and the NT have also enacted legislation to imply certain non-excludable terms into consumer contracts.³⁴

The 15 different statutes that govern implied terms law across Australia are either based on the TPA or are to similar effect. A summary of the provisions in each jurisdiction is in Appendix F.

While there is substantial consistency between the various Australian regimes in relation to the nature and scope of the implied terms, there are material differences in coverage, application and remedies with some significant impacts for consumers.

The most basic difference between jurisdictions is that state and territory laws apply to goods or services supplied by a person (whether an individual or a corporation), whilst the TPA provisions apply to individuals only to a limited extent. This difference is the result of the limited powers of the Commonwealth under the Constitution. There are also differences in the application of the statutory implied terms between each jurisdiction, which depend on the nature of the goods or services supplied or the monetary value of those goods or services. Further details about these differences are provided in the Application section of this chapter.

A summary of the key differences between the regimes across jurisdiction is in Appendix G.

IMPLIED TERMS³⁵

Implied terms relating to title, quiet possession and encumbrances (TPA section 69)

Each jurisdiction has an implied term that the seller has the right to sell the goods, that the goods will be free from encumbrances not disclosed and that the consumer will enjoy quiet possession of the goods. Supply must be to a 'consumer', but there is no requirement for the

33 *Sale of Goods Act 1923* (NSW), *Goods Act 1958* (Vic), *Sale of Goods Act 1895* (WA), *Sale of Goods Act 1896* (Qld), *Sale of Goods Act 1895* (SA), *Sale of Goods Act 1896* (Tas), *Sale of Goods Act 1972* (NT), *Sale of Goods Act 1954* (ACT); hereafter referred to collectively as the *Sale of Goods Acts* (SGAs).

34 *Fair Trading Act 1987* (NSW), *Fair Trading Act 1999* (Vic), *Fair Trading Act 1987* (WA), *Consumer Transactions Act 1972* (SA), *Manufacturers' Warranties Act 1974* (SA), *Consumer Affairs and Fair Trading Act 1990* (NT); hereafter referred to collectively as the *Fair Trading Acts* (FTAs). Note, the South Australian Parliament recently repealed the *Consumer Transactions Act 1972* (SA) and amended the SA FTA to include implied terms similar to the TPA.

35 This section draws heavily on work done for the *PC Review of Australia's Consumer Policy Framework* by Professor Stephen Corones and Professor Sharon Christensen from the Faculty of Law at Queensland University of Technology, as well as work by Sparke Helmore Lawyers, commissioned by CCAAC for this review.

seller to be acting in the course of a business. There are no significant impacts for consumers arising from the different formulations of the provisions.

The key differences between the jurisdictions' provisions are:

- In Queensland, Tasmania and the ACT the term is implied under the relevant Sale of Goods Act (SGA) and can be excluded.

The SGAs are also narrower in their operation because they apply only to the 'sale' and not the 'supply' of goods and therefore do not cover goods supplied through a lease, hire purchase or exchange.

Implied terms relating to supply by description (TPA section 70)

Each Australian jurisdiction has an implied term that goods will correspond with their description and, if the supply of goods is by reference to description and sample, also correspond with the sample. The terminology and formulation of the sections across the jurisdictions are uniform.

The key differences between the jurisdictions' provisions are as follows:

- In Queensland, Tasmania and the ACT the term is implied under the relevant SGA, and only applies to the 'sale' not the 'supply' of goods.
- The NSW, WA and NT Fair Trading Acts (FTAs) require the supply to be in the course of a business – the SA and Victorian legislation does not.

Implied terms relating to supply by sample (TPA section 72)

Each jurisdiction has an implied term to the effect that where a contract has a provision that goods are supplied by reference to a sample:

- the bulk of the goods will correspond with the sample in quality;
- the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- the goods will be free from any defect rendering them unmerchantable that would not be apparent on a reasonable examination of the sample.

The key differences between the jurisdictions' provisions are:

- In Queensland, Tasmania and the ACT the term is implied under the relevant SGA, and only applies to the 'sale' not the 'supply' of goods.
- The NSW, WA and NT FTAs require the supply to be in the course of a business – the SA and Victorian legislation does not.
- In NSW, WA and the NT, the provisions follow the TPA formulation.

- There is no separate provision in the *SA Consumer Transactions Act 1972* (CTA). However, the SGA has a similar provision applying to the sale of goods, but the provision can be excluded.
- In Victoria, the implied term will only apply if the buyer is shown a sample of the goods and is induced to buy the goods or goods of a similar kind. In the case of the third implied term outlined above (that goods are free from a defect rendering them unmerchantable), the buyer must also establish that they were not aware of any defect at the time the contract was made.

Implied terms relating to quality and fitness (TPA section 71)

Quality

Under the TPA, there is an implied term that goods are of merchantable quality, except in relation to defects specifically drawn to the consumer's attention before the contract is made or, if the consumer examines the goods before the contract is made, in relation to defects which that examination ought to reveal. 'Merchantable quality' is defined in subsection 66(2) to mean that goods are fit for the purpose(s) for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price, and all other relevant circumstances.

The key differences between the jurisdictions' provisions are as follows:

- In Queensland, Tasmania and the ACT the term is implied under the relevant SGA, and only applies to the 'sale' not the 'supply' of goods.
 - Under the SGAs, terms as to quality will only be implied if the consumer establishes certain circumstances. This may make proof of breach more difficult.
- The TPA provision is mirrored in NSW, WA and the NT except that it applies to the supply of goods by a person as well as a corporation.
- The NSW, Victorian, WA and NT FTAs require the supply to be in the course of a business – the SA legislation does not.
- In SA and Victoria, there are additional criteria in the definition of merchantable quality to those outlined in subsection 66(2) of the TPA, such as the price of the goods, the terms and conditions of the contract of supply and the apparent condition of the goods on delivery. The Victorian consumer legislation also gives the relevant court or tribunal a wide discretion to consider 'all other relevant circumstances'.

Fitness (TPA section 74B)

The TPA provides that, where goods are supplied in the course of a business by a corporation and the consumer makes known a particular purpose for which the goods are being acquired, there is an implied condition that the goods are reasonably fit for that purpose. It is immaterial whether or not that is a purpose for which such goods are commonly supplied, except where the consumer does not rely or it is unreasonable to rely on the skill or judgment of the supplier.

The key differences between the jurisdictions' provisions are as follows:

- In Queensland, Tasmania and the ACT the term is implied under the relevant SGA, and only applies to the 'sale' not the 'supply' of goods.
 - Under the SGAs, terms as to fitness for purpose will only be implied if the consumer establishes certain circumstances. This may make proof of breach more difficult.
- The TPA provision is mirrored in NSW, WA and the NT except that it applies to the supply of goods by a person as well as a corporation.
- The NSW, Victorian, WA and NT FTAs require the supply to be in the course of a business – in SA, the provisions require that the goods be of a description which it is in the course of the supplier's business to supply.
- Under the NSW, Victorian, WA and NT FTAs, where a consumer makes known a particular purpose for which goods are acquired, the term will be implied except where the consumer does not rely on the supplier or it would be unreasonable to rely on the skill or judgment of the supplier. In contrast, a consumer in SA is required to show reliance on the skill and judgment of the supplier.

Implied terms relating to services (TPA section 74)

The TPA includes the following implied warranties (but not conditions) relating to supply of services by a corporation in the course of a business:

- services will be rendered with due care and skill and any material supplied with the services will be fit for the purpose – subsection 74(1); and
- where the consumer makes known a particular purpose for which the services are required, or the result that the services are desired to achieve, the services will be reasonably fit for that purpose – subsection 74(2).

The key differences between the jurisdictions' provisions are as follows:

- The NT and WA provisions mirror the TPA provisions.
- In NSW the provisions are substantially the same but do not exclude contracts in relation to the transportation or the storage of goods for the consumer's business or contracts of insurance.
- In Victoria, the implied terms are conditions, not warranties as in the other jurisdictions.
- In SA, the provisions are similar to NSW and Victoria but domestic building work is excluded.³⁶

³⁶ The SA Parliament recently passed the Statutes Amendment and Repeal (Fair Trading) Bill 2009. The new section 74G of the SA FTA establishes a warranty that services will be rendered with due care and skill and that any materials supplied in connection with services will be reasonably fit for the purpose for which they are supplied. The warranty may be excluded, restricted or modified in relation to the provision of recreational services. Recreational services are discussed in further detail in Chapter 11.

- There are no equivalent provisions in Tasmania or the ACT.
- In Queensland, there are no provisions implying warranties for services generally, however, there are warranties implied into domestic building contracts.³⁷
- Recreational services may be excluded, restricted or modified under the TPA and in Victoria and the NT – this is not the case for the other jurisdictions.

MANUFACTURERS' LIABILITY

The TPA provides for certain statutory causes of action for a consumer against a manufacturer (or importer) of goods. Unlike the implied terms, these causes of action arise independently of any contract between the consumer and the manufacturer (and, in fact, do not apply where there is a contract). The relevant causes of action allow the consumer to bring a claim against the manufacturer of the goods where the consumer has suffered loss or damage in respect of:

- unsuitable goods (section 74B);
- false descriptions (section 74C);
- goods of unmerchantable quality (section 74D);
- goods which do not correspond with samples (section 74E);
- failure to provide facilities for repairs or parts (section 74F); and
- non-compliance with an express warranty (section 74G).

Only NSW and the NT have enacted similar provisions to the TPA in their FTAs and the only difference is that the provisions in the FTAs have wider application as they apply to persons as well as corporations in trade or commerce. In SA, non-excludable manufacturer warranties are provided for in the *Manufacturers' Warranties Act 1974* (SA).

APPLICATION

As previously mentioned, there are differences in the application of the statutory implied terms between each jurisdiction. First, the TPA applies to corporations while state and territory laws apply to 'persons', including both individuals and corporations. Second, the SGAs apply to all contracts for the sale of goods but the application of other consumer legislation is different between the jurisdictions and will depend on the nature of the goods or services supplied or the monetary value of those goods or services.

The following is a brief overview of the application of the implied terms provisions to goods and services:

³⁷ Sections 41-51 of the *Domestic Building Contracts Act 2000* (Qld). Qld has other industry-specific implied terms; for example, in sections 220-4 of the *Body Corporate and Community Management Act 1997* (Qld).

Commonwealth (TPA section 4B)

Under \$40,000 – the goods or services can be of any kind (that is, ordinarily of a domestic, household, personal or business nature).

Over \$40,000 – the goods or services must be of a kind ordinarily acquired for personal, domestic or household use or consumption (unless it is a commercial road vehicle).

The TPA does not apply to goods which were acquired for re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

New South Wales (FTA sections 5 and 40L)

No value limit, but the goods or services must be of a kind ordinarily acquired for personal, domestic or household use or consumption.

The FTA does not apply to goods or services which were acquired for re-supply or, in the case of goods, in the course of a business other than a farming undertaking, for the purpose of consuming or transforming them by a process of manufacture or production, or using them for repair or treatment of other goods or fixtures on land.

Victoria (FTA sections 32D and 32DA)

Under \$40,000 – the goods or services can be of any kind.

Over \$40,000 – the goods or services must be of a kind ordinarily acquired for personal, domestic or household use or consumption.

The FTA does not apply to goods (or services) which were acquired for re-supply, or to raw materials or goods that are ordinarily acquired for the purposes of repairing or treating other goods or fixtures on land or being incorporated in other goods where they are purchased for the purpose of transforming them or incorporating them in other goods, in trade or commerce, in the course of a process of production or manufacture or repairing or treating other goods or fixtures on land.

Western Australia (FTA section 6)

Under \$40,000 – the goods or services can be of any kind.

Over \$40,000 – the goods or services must be of a kind ordinarily acquired for personal, domestic or household use or consumption (unless it is a commercial road vehicle).

The FTA does not apply to goods which were acquired for re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

South Australia (CTA³⁸ section 2)

Under the CTA, the goods or services can be of any kind but must not cost more than \$40,000.

The CTA, however, does not include sale by auction, sale to a person who trades in goods of that description, interests in land or other contracts declared by regulation. The definition of 'consumer' in the CTA does not include bodies corporate. The definition of 'services' is limited to the services listed in the CTA and regulations.

Northern Territory (CAFTA³⁹ section 5)

The legislation contains no value limit, but excludes those goods acquired for the purpose of re-supply or for the purpose of using them up or transforming them, in the course of a business, in or in connection with a process of manufacture or production or with the repair or treatment of other goods or of fixtures on land.

However, implied terms in respect of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption can not be excluded, restricted or modified.

Queensland (SGA), Tasmania (SGA), Australian Capital Territory (SGA)

There is no value limit or limit on the type of goods to which the implied terms apply.

The SGAs apply to all contracts for the sale of goods by a seller to a buyer (a person who buys or agrees to buy goods).

The SGAs do not apply to supply of services.

EXCLUDABILITY

All jurisdictions make provision for implied terms in contracts for the sale of goods in SGAs. These terms can be effectively modified or excluded by the supplier only in some jurisdictions.

Only NSW, Victoria, WA, SA and the NT have introduced explicitly non-excludable warranties in their respective FTAs.

- Under the TPA and in WA, Victoria and the NT, liability may be limited in respect of goods or services which are not of a kind ordinarily acquired for personal domestic or household use or consumption but not otherwise.
 - Liability will not be limited if the consumer establishes that the limitation was not fair or reasonable (TPA, WA and NT) or unconscionable (Victoria).

38 *Consumer Transactions Act 1972 (SA)*

39 *Consumer Affairs and Fair Trading Act 1990 (NT)*

- In NSW, liability can not be limited but as the implied terms only apply in respect of goods or services which are not of a kind ordinarily acquired for personal domestic or household use or consumption, there is no practical difference with the TPA.
- Under the TPA and in NSW and Victoria, liability in relation to recreation services can be excluded, restricted or modified provided it is limited to liability for death or personal injury.⁴⁰

The ACT and Tasmania do not cover warranties and refunds in their FTAs. The ACT is covered by the TPA. In Tasmania, the SGA allows contracts to vary the statutory warranties relating to clear title.

In Queensland, the same provisions exist in the SGA as in Tasmania, but the FTA prohibits manufacturers' voluntary warranties from overriding statutory warranties.

REMEDIES

As with the implied terms in the TPA, the remedies for breach of these provisions in state and territory legislation are the remedies available for breach of a term of a contract, rather than damages or other remedies arising out of a contravention of the provisions of the legislation.

However, there are some additional statutory remedies available to consumers. The key differences are as follows:

- The TPA and the WA, SA, Victorian and NT FTAs all provide an additional statutory right of rescission for the breach of an implied condition. However, the procedure set down for rescission under the SA CTA has rigid time limits.
- The breach of an implied term in respect of services under the Victorian FTA will be the breach of a condition and consumers will be entitled to treat the breach as a repudiation.

Consumers in SA, NSW or the NT or covered by the TPA have additional rights to recover from manufacturers and importers (discussed above).

40 In SA a service provider's obligation under the CTA to provide services with due care and skill cannot be modified or excluded. However, the Statutes Amendment and Repeal (Fair Trading) Bill 2009 which was recently passed by the SA Parliament will allow providers of recreational services to modify, exclude or restrict their statutory obligation to provide services with due care and skill subject to certain conditions. One such condition is that a recreational service provider may not exclude, restrict or modify liability if the consumer suffered significant personal injury caused by the reckless conduct of the recreational service provider.

4 INTERNATIONAL APPROACHES⁴¹

Overall, laws implying baseline standards for supply of goods and services to consumers are substantially similar in the countries considered as part of our review, with some variations.

Relevant variations observed include the following:

- **New Zealand** – In NZ, implied warranties and conditions are expressed as statutory guarantees, with the formulation of guarantees more closely tracing the laws adopted in the UK. NZ consumer protection legislation relies to a large extent on consumers taking action for themselves.
- **United Kingdom** – Warranties and conditions implied into consumer transactions in the UK were traditionally consistent with those in Australian law. However, the overlay of the law of the European Union with domestic consumer law has resulted in confusion and a push for reform.
- **European Union** – The Consumer Sales Directive differs from the Australian law slightly in that it approaches the issue of supply of goods from the perspective of ‘conformity with contract’ rather than ‘merchantable quality’. While the directive seeks to enforce a unified approach to the sale of consumer goods in Europe, it has not been strictly transposed into the domestic law of all Member States. The directive does not cover supply of services as distinct from the supply of goods. Therefore, supply of services to consumers is governed by the domestic laws of each Member State.
- **United States** – State-based laws governing implied warranties and conditions are augmented by the Federal Uniform Consumer Code and the Magnuson-Moss Warranty Act (MMWA). The Act is aimed at providing consumers with access to reasonable and effectual remedies, where there is a breach of warranty on a consumer product. The Act also provides for alternative dispute settlement procedures. Unlike any other model, one of the essential aids to the effectiveness of the MMWA is that a prevailing plaintiff may recover reasonable costs of suit, including attorney fees. So, although it is left to consumers to enforce their rights, there is some incentive to ensure that consumers are adequately represented.
- **Canada** – Each of the common law Provinces and Territories has substantially similar legislation with respect to implied warranties and conditions. All are broadly consistent with the laws in Australia. An exception is the implied warranty that services be of ‘reasonably acceptable quality’. This more simplified formulation does not include concepts of ‘due, care skill and diligence’, as applied in Australia. The law is also substantially similar in the civil law of Quebec. However, Québécois law recognises concepts of ‘latent’ or ‘hidden’ defects rather than distinguishing between ‘warranties’ and ‘conditions’.

41 The content of this chapter is largely extracted from work by Sparke Helmore Lawyers, commissioned by CCAAC for this review.

- **South Africa** – Due to social-political issues the consumer law in South Africa has remained, until very recently, fragmented and in need of reform. However, the Consumer Protection Act 2008 was assented to earlier this year. This Act provides consumers with ‘fundamental consumer rights’.

The following table summarises the key differences between Australian and international approaches.

Table 4.1 — Summary of key differences between international approaches

	United Kingdom	European Union (CSD)	United States (Federal Regime)	Canada (Ontario)	New Zealand	Australia (TPA)
Terms can be excluded	✓	✓	✓	✗	✗	✗
Liability can be limited	✓	✓	✓	✗	✗	✓
Apply to supply of goods by hire, lease or exchange	✓	✗	✓	✓	✓	✓
Apply to auctions	✓	✗	✓	✓	✗	✗
Apply to goods and services	✓	✗	✗	✓	✓	✓
Statutory or enhanced remedies	✓	✓	✓	✓	✓	✓
There is direct liability against manufacturers	✗	✗	✗	✗	✓	✓

Further detail on each of these international approaches is outlined in Appendix H.

PART II — PROBLEMS WITH CURRENT ARRANGEMENTS

5 CLARITY IN LEGISLATION

Key points

- There is a lack of clarity in the law relating to implied terms, particularly with respect to:
 - the nature and content of rights and obligations;
 - the scope of persons to whom the rights and obligations apply; and
 - the remedies available when rights are breached or obligations are not carried out.
- This lack of clarity would be best remedied by the introduction of a statutory guarantee scheme, in place of the current implied terms, which provides consumers with statutory rights to redress against both retailers and manufacturers.
- The term ‘consumer’ – to whom the statutory guarantees would be available – should be defined so as to be consistent across the Australian Consumer Law.

Studies over the past two decades have identified three key problems with the current implied terms regime, which collectively result in a system that can fail to provide consumers with the intended rights and remedies. Lack of clarity in the legislation, lack of awareness of the law on the part of consumers, retailers and manufacturers, and difficulty for consumers in enforcing their rights – which all combine to provide little incentive for retailers and manufacturers to comply with the law – can lead to frustration and unnecessary expenditure for consumers. Evidence from the recent National Education and Information Advisory Taskforce (NEIAT) study supports this conclusion, and it has been further highlighted in numerous submissions to the review.

This and the following two chapters will address each of these three areas and discuss options for improvement as well as outline CCAAC’s findings.

PROBLEM OF LACK OF CLARITY IN LEGISLATION

A key issue with the current regime – which can be particularly difficult for retailers and manufacturers when dealing with customers – is ambiguity in the legislation. The legislation attempts to allow for flexibility by recognising that what may be of merchantable quality or fit for purpose is likely to vary between products, depending on the type of product, what is reasonable to expect considering its price and the manner in which it was described.⁴² However, with flexibility comes uncertainty. The difficulty is finding the appropriate balance between a system that can provide enough flexibility to cover all goods

42 ACCC 2004, *Warranties and refunds*, page 5.

and services, and one which provides sufficient clarity for consumers and businesses to be able to carry out their obligations and enforce their rights.

The research conducted recently for NEIAT indicates significant – but not overwhelming – uncertainty about how the law operates. While most traders are familiar with the existence of the rights consumers possess under the implied terms provisions, there is some confusion about the effect of these rights. For example, the NEIAT study found that 20 per cent of retailers and 22 per cent of manufacturers and importers did not consider that consumers had a statutory right to a refund for faulty products.⁴³

Further, the NEIAT study found that a significant proportion of traders misconceive the nature of some consumer rights and the conditions attached to them. For example, the study found that 48 per cent of retailers mistakenly believe that consumers are required to return items in their original packaging if they were faulty when purchased.⁴⁴ This view is particularly prevalent among mobile phone retailers (57 per cent), large electrical goods retailers (56 per cent) and retail franchisees (59 per cent).⁴⁵

Part of this uncertainty may be explained by a lack of awareness of consumer rights, and this is discussed in detail in the next chapter. However, even in cases where it appears traders are aware of consumer rights, they are often unaware of the remedies available for those rights, and of what their responsibilities are in terms of providing that redress. This may well be due to a lack of clarity in consumer rights, since implied terms legislation very seldom spells out with sufficient clarity what obligations arise in the event of a breach of a term, or indeed what constitutes a breach of a term.

Many submissions to this review supported the view that the law in this area is unnecessarily ambiguous and unduly complex.⁴⁶ The Trade Practices Committee of the Business Law Section of the Law Council of Australia (LCA), for example, argued that '[t]here needs to be a greater focus on clearer legislative drafting'.⁴⁷

Some of the ambiguity and complexity associated with the current provisions has resulted from the way the law has developed over time. As mentioned in Chapter 2, the origins of the implied terms lies in the English common law (mercantile law), which was codified in the SGA 1893 (UK) and then picked up by the Australian States in the late 19th and early 20th centuries. The implied terms were never intended to act as a broader consumer protection regime. The adoption and subsequent amendment of the 19th century UK model in each Australian jurisdiction has also resulted in the presence of 15 separate and relevant pieces of legislation across the country (in FTAs or SGAs, or both), leading to significant compliance costs for businesses attempting to operate in the national marketplace.

Therefore, many, if not most, of the submissions to this review supported the adoption of a harmonised national approach to consumer law and protection. CCAAC, too, believes that harmonisation is imperative to clarifying the law and raising consumer and business awareness.

43 NEIAT study, page 75.

44 *ibid.*, page 76.

45 *ibid.*

46 See, for example, Consumer Action Law Centre, page 1, and Lynden Griggs, pages 1-2.

47 LCA, page 2.

There are a number of factors which contribute to uncertainty under the current law. In its May 2009 research paper on warranties and refunds, Consumer Affairs Victoria (CAV) identified some of these (in the context of the Victorian FTA):⁴⁸

- Since the legislation relies on the common law of contract, it assumes that all consumer sales are of a contractual nature, which CAV contrasts with an understanding of consumer purchases as simple 'exchanges of money for a product that do not involve an offer, acceptance, consideration, express terms etc'.⁴⁹ The existing consumer legislation is based on the law of contract. It does not explicitly set out all the rights and remedies that flow from a breach of an implied term.
- The definition of the goods and services covered by the implied terms regime is complex (varying across jurisdictions) and often depends both on the nature of the goods or services supplied and on a monetary threshold.
- There is uncertainty around the application of the implied term of fitness for purpose. The effect of the term will depend on what level of fitness is 'reasonable' to expect, which will depend on the circumstances of each case. Further, it is unclear to what extent the fitness for purpose term is limited in time, and whether and to what extent there is a durability requirement.⁵⁰
- It is unclear whether the merchantability term extends to cosmetic or minor defects, or whether it is confined to simple workability.⁵¹
- The issue of who pays for any costs of return or pick-up of defective (or allegedly defective) goods is not addressed in the legislation, nor is the question of the seller's costs incurred in dismantling and examining goods, where the fault is determined not to be the result of a breach of an implied term.

A number of submissions to the CCAAC review echo the importance attached to these issues, and stress the inconsistencies and ambiguities in the application, definitions and terms used in the current law. For example, Mr Lynden Griggs of the University of Tasmania argued that:

[c]urrently, consumer law in Australia is a mess. The differences between jurisdictions as to applicability, the definition of consumer and the application of, and interaction between, sale of goods legislation, fair trading legislation and the *Trade Practices Act 1974* does nothing to advance the protections offered to the consumer and only leads to unnecessary complexity and confusion.⁵²

The Australian Finance Conference noted that:

variations in the definition of "consumer" adopted within the consumer protection laws, including the implied terms, add to compliance complexity and necessitate a

48 CAV 2009, *Warranties and refunds in the electronic goods, white goods and mobile telephone industries*, Research Paper No. 17, May 2009, page 18.

49 *ibid.*

50 See Corones, S and Clarke, P H, 2002, *Consumer Protection and Product Liability Law*, page 562.

51 *ibid.*, pages 552-3.

52 Mr Lynden Griggs, pages 1-2.

multi-layered approach to ensure appropriate compliance within a particular jurisdiction and more broadly.⁵³

Mr Spier argued that '[v]ague concepts such as "merchantable quality" add to confusion'⁵⁴, while Mr Stephens of Yarram Retravisio considered that:

[t]he current consumer laws with implied conditions and statements such as "fit for purpose" and "merchantable quality" are unsatisfactory and lead to uncertainty for the parties involved in retail sales.⁵⁵

CLARITY IN TERMS

Choice of approach

The statutory implied conditions and warranties approach can lead to confusion and uncertainty for consumers in understanding and enforcing their rights. As a mechanism for creating consumer rights, it is incomplete, since half the story lies in legislation and the other half lies in the law of contract.

Many consumers are not aware that the rights granted under the statutory regime are attached to the contract the consumer has with the supplier. In fact, consumers often do not realise that in purchasing goods or services from a supplier they are entering into a contract which carries obligations for both parties.

It may, therefore, come as a surprise to many consumers to learn that, in the event of a dispute with a retailer, they are required to enforce their contract rather than seek redress under the TPA (or relevant state or territory law). Under the current law, consumers are required to argue for contractual rather than statutory remedies against retailers, which 'relies too much on legal analysis'.⁵⁶ In CCAAC's view, it is unreasonable to expect consumers to have a sufficiently comprehensive knowledge of the law of contract to know how best to argue for their rights.

Further, it is unreasonable to expect consumers to understand the difference (or, indeed, that there is a difference at all) between a 'condition' and a 'warranty'. The concept of a 'warranty' seems to be widely recognised by consumers, but the contract law implications of the two different terms may be lost on many consumers. Consumers may not understand the difference between statutory warranties, voluntary warranties and extended warranties. This problem is compounded by the fact that the common understanding of the term 'warranty' goes beyond the legal meaning of the term in the law of contract.

There is some support in the submissions for a move away from the implied terms regime. For example, the Consumer Action Law Centre (CALC) stated its support for:

national harmonisation and clarification of Australia's laws regarding statutory conditions and warranties. The New Zealand Consumer Guarantees Act 1993 provides

53 Australian Finance Conference, page 2.

54 Spier Consulting page 1.

55 Mr Stephens, page 1.

56 Freehills, page 9.

an example of how this could be done by removing the difficult concepts such as the differences between conditions and warranties and simply providing for more clearly stated remedies that flow from failures to comply with any guarantees.⁵⁷

For simplicity and clarity, CCAAC proposes a move to a single set of consistent statutory consumer guarantees – which would be similar to that in the NZ Consumer Guarantees Act 1993 (CGA).

Other approaches – especially the international models outlined in Chapter 4 – were thoroughly discussed and considered over the course of this review. However, of all the jurisdictions analysed, the NZ approach was the only one that operated nationally, was contained within a single piece of legislation, and was laid out simply and clearly, without excessive prescription.

The importance of this last feature was highlighted by the LCA:

While the Committee would welcome proposals aimed at clarifying the application of the existing regime, the Committee submits that introducing narrow and prescriptive regimes would not be helpful or practical and would likely result in greater complexity and confusion for consumers and suppliers. Laws which are simply drafted and broadly applicable are preferable, particularly in the context of consumer goods, as they are able to adapt to evolving technologies and changes in reasonable consumer expectations.⁵⁸

The NZ CGA has been in place for over 15 years, and appears to operate well, with high levels of consumer awareness and satisfaction.⁵⁹ The NZ CGA builds on the implied terms regimes that operate in Australia. Its chief advantages are that it achieves greater clarity in consumer rights and greater certainty in available remedies.

The NZ CGA resulted from a 1987 report prepared by Professor David Vernon of the University of Iowa, entitled *An Outline for Post-Sale Consumer Legislation in New Zealand – A Report to the Minister for Justice*.⁶⁰

Professor Vernon said that interference with the functioning of the free market should be minimal, and only to the extent necessary to provide consumer protection. Therefore, the legislation should give suppliers incentives to provide goods and services that meet consumers' reasonable expectations. When goods and services fail to meet those expectations, the legislation should provide consumers with practical low-cost remedies.⁶¹

Professor Vernon took the view that consumers would see the manufacturer and retailer as being jointly responsible for the quality of the goods they purchase, and that the common law privity of contract doctrine should not be a barrier to recovery by the consumer.⁶²

57 CALC, page 4.

58 LCA, page 2.

59 NZ National Consumer Survey, 2009 (unpublished).

60 Vernon, David H, 1987, *An Outline for Post-Sale Consumer Legislation in New Zealand – A Report to the Minister for Justice*.

61 *ibid.*, pages 8-10.

62 *ibid.*, page 16.

He recommended that retailers should remain strictly liable to consumers for goods that do not meet standards of ‘acceptable quality’.⁶³ To avoid the confusion of two tiers of conditions and warranties under the implied terms regimes, Professor Vernon recommended that New Zealand establish post-sale consumer rights as statutory rights.⁶⁴

Features of the preferred model

Statutory consumer guarantees

Table 5.1 demonstrates the distinct similarity (in both intention and in drafting) between the implied terms of the TPA and the NZ CGA, and notes the key differences.

Table 5.1: Comparison of the implied terms/statutory guarantees in the TPA and CGA

Australia (Cth) <i>Trade Practices Act 1974</i>		New Zealand Consumer Guarantees Act 1993	
Section	Implied conditions and warranties	Statutory consumer guarantees	Section
Goods			
69	Condition that the supplier has a right to sell the goods. Warranty that the goods are free from any undisclosed charge or encumbrances. Warranty that the consumer will enjoy quiet possession of the goods.	Guarantee that the supplier has a right to sell the goods. Guarantee that the goods are free from any undisclosed security. Guarantee that the consumer has the right to undisturbed possession of the goods.	5
70	Condition that the goods will correspond with the description and, if supply is by reference to a sample as well, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.	Guarantee that the goods correspond with the description. If supply is by reference to a sample or demonstration model as well, the guarantees that goods comply with description and sample also apply.	9
71	Condition that the goods are of ‘merchantable quality’ (except as regards defects specifically drawn to the consumer’s attention or, if the consumer examines the goods, as regards defects which that examination ought to reveal).	Guarantee that the goods are of ‘acceptable quality’	6
66(2)	‘Merchantable quality’ means goods are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.	‘Acceptable quality’ is defined as: being as fit for all the purposes for which goods of the type in question are commonly supplied, acceptable in appearance and finish, free from minor defects, safe and durable, as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to: the nature of the goods, the price (where relevant), any representations/ statements made about the goods on any packaging or label on the goods, or by the supplier or manufacturer, and all other relevant circumstances.	7

63 *ibid.*, page 17.

64 *ibid.*, page 18.

Table 5.1: Comparison of the implied terms/statutory guarantees in the TPA and CGA (continued)

Australia (Cth)		New Zealand	
Trade Practices Act 1974		Consumer Guarantees Act 1993	
Section	Implied conditions and warranties	Statutory consumer guarantees	Section
71	Condition that goods are reasonably fit for a particular purpose disclosed by the consumer (expressly or impliedly), except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the supplier.	<p>Guarantee that goods are reasonably fit for a particular purpose disclosed by the consumer (expressly or impliedly), except where the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the supplier.</p> <p>Guarantee that the goods are reasonably fit for a particular purpose represented by the supplier, except where the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the supplier.</p>	8
72	<p>Condition that the bulk corresponds with the sample in quality.</p> <p>Condition that the consumer has a reasonable opportunity to compare the bulk with the sample.</p> <p>Condition that the goods are free from any defect (rendering them unmerchantable) not apparent on reasonable examination of the sample.</p>	<p>Guarantee that, where goods are supplied by reference to a sample or demonstration model, the goods correspond with the sample or demonstration model in quality</p> <p>Guarantee that the consumer will have a reasonable opportunity to compare the goods with the sample.</p>	10
		Guarantee that the consumer is not liable to pay to the supplier more than a reasonable price for goods (where price is not determined (or left to be determined) by the contract or in course of dealing).	11
(74F)	Action against manufacturers and importers in respect of failure to provide facilities for repairs or spare parts. (Note, this is not an implied term.)	Guarantee that the manufacturer will take reasonable action to ensure that facilities for repair of goods and supply of parts for goods are reasonably available for a reasonable period after the goods are supplied.	12
Services			
74	Warranty that services will be rendered with due care and skill.	Guarantee that services will be carried out with reasonable care and skill.	28
74	<p>Warranty that any materials supplied in connection with services are reasonably fit for the purpose for which they are supplied.</p> <p>Warranty that services (and materials supplied in connection with those services) will be fit for a particular purpose disclosed by the consumer (expressly or impliedly) or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the supplier.</p>	<p>Guarantee that services (and any product resulting from the service) will be reasonably fit for any particular purpose.</p> <p>Guarantee that services (and any product resulting from the service) will be of such a nature and quality that it can reasonably be expected to achieve any particular result disclosed by the consumer, except where the circumstances show that the consumer does not rely, or it is unreasonable for him or her to rely, on the supplier's skill or judgment.</p>	29
-		Guarantee that services will be completed within a reasonable time (where time is not determined (or left to be determined) by the contract or in the course of dealing).	30
-		Guarantee that the consumer is not liable to pay to the supplier more than a reasonable price for services (where price is not determined (or left to be determined) by the contract or in course of dealing).	31

The consumer guarantees of the NZ CGA are more clearly expressed and understandable than the implied terms of the TPA, while still achieving much the same effect. The idea of 'acceptable quality', for example, is more immediately comprehensible to consumers and businesses alike than the idea of 'merchantable quality'. It is also more readily applied to modern consumer transactions than the ancient concept of 'merchantability'.

The concept of merchantability may be connected to the expectations of the buyer; that is, buyers should get what they pay for. The TPA definition, however, refers merely to fitness for common purposes having regard to all 'relevant circumstances'. It is not clear, in the light of this definition, that consumers are genuinely entitled to receive what they have paid for. More than fitness for purpose, consumers should be entitled to expect that an item's merchantability encompasses:

- acceptability in appearance and finish;
- freedom from minor defects;
- safety; and
- durability,

unless defects have been specifically brought to their attention or they have had the opportunity to examine the item for (non-hidden) defects. If items fail to meet that definition, consumers will not, in fact, have got what they paid for.⁶⁵

For the reasons considered in Chapter 7, there will always be a degree of uncertainty surrounding statements or definitions of the standard of quality required by the law. However, the adoption of the concept of 'acceptable quality', along with a more certain definition, would retain the intended effect of the merchantability provision while providing much-needed clarity to both consumers and businesses.

There is widespread support for clarifying the existing implied terms in this way. The Australian Industry Group noted that terms such as 'merchantable quality':

are poorly or only partially understood by consumers. This situation is, we suggest, the root of disputes between suppliers and consumers.⁶⁶

CALC noted that, since 'not all the concepts [in implied terms law] are conclusively defined', difficult questions about individual circumstances will be raised whenever there is a fault to be remedied. 'There are many cases in which the answers to these questions will be clear but also many cases in which it is difficult to make conclusive decisions.'⁶⁷

Mr Griggs argued that the term 'merchantable quality' had 'outlived its usefulness'⁶⁸, and Dr Nottage considered that this 'term of art' should be abandoned.⁶⁹

65 The courts have already recognised that factors such as the cosmetic appearance of an item, when considered in the light of all relevant circumstances, may be relevant to the item's merchantability. See, for example, *Rasell v Cavalier Marketing (Aust) Pty Ltd* [1991] 2 Qd R 323 at 348-51.

66 Australian Industry Group, page 2.

67 CALC, page 3.

68 Mr Griggs, page 2.

Some of the differences between the Australian and NZ models are subtle clarifications of the law. For example, the provision in the NZ CGA about fitness for a particular purpose applies not only to circumstances where the particular purpose was disclosed by the consumer, but also where the particular purpose was represented by the supplier.

This provides stronger protection for consumers, in that it gives full effect to the bargain between purchaser and seller. It covers both situations where consumers ask for something but do not get it, and situations where businesses promise something but do not deliver it. In both circumstances, consumers are not getting what they intended to purchase.

However, there are two guarantees provided by the NZ CGA which are not reflected in the implied terms of the TPA: the guarantee as to time of completion and the guarantee as to reasonable price.

Time of completion

Section 30 of the NZ CGA creates a guarantee that services will be completed within a reasonable time where the time for the service to be carried out is not fixed by contract, left to be fixed in a manner agreed by the contract, or left to be determined by the course of dealing between the parties. There is no similar provision in the TPA, but there is a provision to the same effect in UK law.⁷⁰

Consumers have a positive time preference, and their reasonable expectations as to the time it will take for them to enjoy fully the benefits of the services they buy are factored into the prices they are willing to pay for those services. In circumstances where the time for completion is not specified by contract or specifically left to be determined at a later time, any delay beyond a 'reasonable time' for the provision of a service erodes the value of the service to the consumer.

In CCAAC's view, it would be appropriate to include this guarantee in Australian law. If a service is not carried out within a reasonable time, the consumer is not getting the full benefit of what they have paid for. Consequently, it is appropriate that a consumer guarantee be introduced providing that services must be completed within a reasonable time.

Reasonable price

Sections 11 and 31 of the NZ CGA create guarantees that consumers are not liable to pay more than a reasonable price for goods or services respectively, where the price is not determined by the contract, left to be determined in a manner agreed by the contract, or left to be determined by the course of dealing between the parties. Again, there are no similar provisions in the TPA, but a similar provision does exist in UK law.⁷¹ Similar provisions also exist, with respect only to goods and applicable only in certain circumstances, in the state and territory SGAs.

This guarantee may be distinguished from the previous guarantee, and the guarantees that have a counterpart in the TPA's implied terms. While the other guarantees are directed at ensuring consumers get what they have paid for, a guarantee as to price is directed at what consumers are willing to pay for goods or services.

69 Dr Nottage, page 2.

70 Section 14 of the Supply of Goods and Services Act 1982 (UK).

71 Section 15 of the Supply of Goods and Services Act 1982 (UK).

It is not expected that a guarantee of this kind would be invoked in any other than the most unusual circumstances, and legislation already exists to address those unusual circumstances. Where a consumer would not be considered competent to form a contract – for example, where the consumer is drunk, mentally incapacitated or a minor – but is nevertheless provided with necessaries, the consumer must pay a reasonable price for the necessaries.⁷²

However, where a consumer is competent to form a contract, it is necessary to give full effect to the contractual intention of the parties. When a consumer enters into a contract that neither specifies a price to be paid nor provides for a price to be determined at a later date, it is not immediately apparent that the parties' intention was that the consumer not be liable to pay more than a reasonable price.

The state and territory SGAs generally provide that, where the contract is effectively silent on price, the buyer must pay a reasonable price for goods, and what is 'reasonable' is a question of fact depending on the circumstances of each particular case.⁷³ So, while the SGAs require buyers to pay the reasonable price, the NZ CGA allows consumers to refuse to pay more than the reasonable price, which is not quite the same thing.

CCAAC is not, at this time, convinced that a guarantee as to reasonable price would be of significant benefit to the Australian law. The relevant provisions in the SGAs are relatively untested, and appear to apply more to business-to-business relationships than to consumer purchases, where prices or price-determination mechanisms are invariably settled by contract. However, CCAAC considers that this is an area which policy makers may care to consider further at a later time.

Potential augmentations to consumer guarantees

While CCAAC considers the adoption of consumer guarantees provides an attractive model for establishing consumer rights, any process to introduce statutory consumer guarantees must ensure that the guarantees represent best practice regulation. In particular, care must be taken to retain the effect of existing statutory conditions and warranties. Adoption of consumer guarantees ought to clarify existing consumer rights and strengthen them where necessary, but ought not to deprive consumers of rights they enjoy under existing legislation.

Additionally, some further consideration should be given to whether the range of consumer guarantees should be extended in any way. Few submissions suggested any substantial addition to the range of existing statutory implied terms.⁷⁴ However, one issue which CCAAC has considered in some detail is that of goods which may be said to be 'dead on arrival'.

72 See, for example, section 7 of the *Sale of Goods Act 1923* (NSW) and section 20 of the *Minors (Property and Contracts) Act 1970* (NSW).

73 *Sale of Goods Act 1954* (ACT), section 13; *Sale of Goods Act 1923* (NSW), section 13; *Sale of Goods Act* (NT), section 13; *Sale of Goods Act 1896* (Qld), section 11; *Sale of Goods Act 1895* (SA), section 8; *Sale of Goods Act 1896* (Tas), section 13; *Goods Act 1958* (Vic), section 13; and *Sale of Goods Act 1895* (WA), section 8.

74 Submissions that suggested the need for a 'lemon law' are discussed in Chapter 9.

'Dead on arrival'

Part IB of the Supply of Goods and Services Act 1982 (UK) (SGSA) creates certain additional remedies for consumers where goods do not conform to the contract (for example, where an implied term of fitness for purpose or correspondence with description has been breached).

Depending on the nature of any particular goods, if they do not function at all one week or one month after ownership passes to the consumer, it may be reasonable to suggest that the goods were unmerchantable. From yet firmer ground, if the goods do not function at all at the time when ownership passes to the consumer, it may be said that the goods are unmerchantable. The goods are 'dead on arrival'.

Section 11M of the SGSA extends the relative certainty about the status of goods on the day of arrival for a period beyond the first day of the consumer's ownership.

11M Introductory

- (3) ... [G]oods which do not conform to the contract for the transfer of goods at any time within the period of six months starting with the date on which the goods were delivered to the transferee must be taken not to have so conformed at that date.
- (4) Subsection (3) above does not apply if—
 - (a) it is established that the goods did so conform at that date; [or]
 - (b) its application is incompatible with the nature of the goods or the nature of the lack of conformity.

Section 11M effectively reverses the onus of proof, for a given period, as to whether or not an implied term has been breached. The term will be presumed to have been breached if goods fail to comply with the standards of an implied term within six months. Beyond that point, it would have to be demonstrated that the goods did not comply with the implied term when sold.

Implied terms and consumer guarantees necessarily raise questions about how long goods can be expected to remain in the condition in which they are sold, and the provisions typically answer those questions by reference to the 'reasonable consumer', or to standards that are reasonable to expect. 'Dead on arrival' provisions are intended to avoid recourse to the concept of 'reasonableness' by creating a rule about what is reasonable in all circumstances.

In the SGSA, six months is chosen as the reasonable period, but the period might as easily be 7, 14 or 28 days, or a number of years. It is difficult to imagine that this length of time could be arrived at by anything other than an arbitrary assessment of what policy makers think of as reasonable, which will be affected by the sorts of goods that policy makers have in mind.

Certainly, the NEIAT study found considerable variation in how long, on average, stakeholders believe consumer complaints could be automatically sustained.

In the case of total product failure, consumers believed that they should be able to receive a refund or replacement product for about seven months (median). This is in stark contrast to the quite restrictive view taken by traders in relation to ‘dead on arrival’ ... products ... Most traders considered consumers were entitled to a refund or replacement product no more than two weeks after purchase.⁷⁵

The NEIAT study found that problems tended to occur within the first six months of ownership (depending on the type of goods), while 35 per cent of problems arise within the first month.⁷⁶ However, it is not clear for what proportion of those problems the products could be considered ‘dead’, or for what proportion the problems were, in fact, the responsibility of the consumer.

No matter what time period is settled on, section 11M does not succeed in avoiding the concept of ‘reasonableness’. The concept is bound up in paragraph (4)(b), which effectively provides that the six-month period does not apply if it is unreasonable to apply that period to goods of that nature, or to breaches of particular implied terms.

CCAAC does not support the introduction of a ‘dead on arrival’ provision in relation to implied terms or consumer guarantees in Australia. Because of the necessary qualifications on any ‘dead on arrival’ period (as in paragraph (4)(b)), it is not clear that a specific provision would add meaningfully to the way in which conformity with implied terms is assessed.

Further, CCAAC is concerned that shifting the onus of proof for any period of time would obscure consumer rights after that time had elapsed. Providing that during the first six months consumers did not need to demonstrate that a guarantee had been breached, may inadvertently send the signal that, after six months, it would be a very onerous task for consumers to demonstrate a breach and enforce their rights. This would create a similar problem to that discussed in Chapter 8 with respect to extended warranties; namely, that consumers may be misled into believing their rights do not extend beyond the period of an extended warranty or a ‘dead on arrival’ period.

Choice of terminology

Rather than using the contractual language of ‘conditions’ and ‘warranties’ – which, as has been noted, are unlikely to be meaningful to many consumers – CCAAC proposes the adoption of the language of ‘guarantees’ in Australian law.

Generally speaking, a guarantee is something that is given as security for fulfilment of a condition or obligation. It is a sign of good faith, indicating that everything that is to transpire between two parties will be carried out as intended. It may also be understood as a certain minimum, which is always to be provided by one party to another save in circumstances where *force majeure* intervenes.

Adopting the terminology of ‘guarantees’ indicates that these are certain minimum standards from which parties cannot resile. They apply to all interested parties – consumers, retailers, manufacturers and importers – irrespective of the existence of any

⁷⁵ NEIAT study, page x.

⁷⁶ *ibid.*, page 38.

contract. They are a legislative security, vouching for the integrity of business dealings with consumers, and ensuring that consumers in fact receive what they have purchased.

CLARITY IN SCOPE

The implied terms in Part V, Division 2 of the TPA – and the rights to action against manufacturers and importers in Part V, Division 2A – are available only to ‘consumers’.

Current definition of ‘consumer’

The term ‘consumer’ is defined in section 4B of the TPA.

4B Consumers

- (1) For the purposes of this Act, unless the contrary intention appears:
- (a) a person shall be taken to have acquired particular goods as a consumer if, and only if:
 - (i) the price of the goods did not exceed the prescribed amount; or
 - (ii) where that price exceeded the prescribed amount – the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and
 - (b) a person shall be taken to have acquired particular services as a consumer if, and only if:
 - (i) the price of the services did not exceed the prescribed amount; or
 - (ii) where that price exceeded the prescribed amount--the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

For the purposes of subsection 4B(1), the ‘prescribed amount’ is \$40,000. There is a statutory presumption that a person is the consumer, unless the contrary is established.

This definition of ‘consumer’ can include a business in certain circumstances. A business that purchases goods for less than \$40,000, and did not purchase the goods for the purpose of re-supply or for the purpose of using them up or transforming them in the course of production, manufacture or repair, qualifies as a consumer under this definition.

Notwithstanding that Part V of the TPA is titled ‘Consumer protection’, a business that meets that definition has the benefit of the terms implied by Part V, Division 2 of the TPA, and causes of action provided for in Part V, Division 2A.

The adequacy and appropriateness of this definition was questioned by some submissions. For example, Mr Griggs considered that the definition should be reconceived such that all transactions are considered to involve a consumer:

[C]onsideration [should] be given to making all transactions consumer based (i.e. remove the financial limits, the arguments that centre on personal, domestic or household use as well as the sometime limitation in case of resupply for business use). Given the confusion surrounding how personal, domestic or household should be interpreted (compare *Bunnings Group Ltd v Laminex Group Ltd* [2006] FCA 682, with *Begbie v State Bank of NSW Ltd* [1994] ATPR 41-288), the urban-centric nature of its interpretation (see *Atkinson v Hastings Deering (Qld) Pty Ltd* (1985) 6 FCR 331), and the operation of s68A of the *Trade Practices Act 1974*, little seems served by continuing this artificial construct.⁷⁷

Other submissions note that the definition is rather broad and, given that it includes businesses in many circumstances, does not align with the common understanding of 'consumer'. Professor Carter considered that:

drafting the definition of 'consumer' to include small business contracts may well reflect some of the realities of the market place. But to treat 'commercial consumers' as having the same rights as 'ordinary consumers' leads to anomalies.⁷⁸

Alternative approaches to defining 'consumer' transactions

Unfair contract terms

The Trade Practices Amendment (Australian Consumer Law) Bill 2009, which is before Parliament at the time of writing, would amend the TPA to establish the Australian Consumer Law, and to include in it provisions rendering void unfair terms in standard-form consumer contracts.

The provisions include a definition of 'consumer contract' (the 'Unfair Contract Terms (UCT) definition') for the purposes of the unfair contract terms provisions. A consumer contract is a contract for:

- a supply of goods or services; or
- a sale or grant of an interest in land,

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Clearly, this is a definition of 'consumer contract', crafted for the specific purpose of the unfair terms provisions. However, it could be transformed into a definition of 'consumer'. It is, as Professor Carter noted, 'logical, simple and easy to apply'.⁷⁹

77 Mr Griggs, page 2.

78 Professor Carter, page 8.

79 Freehills, page 9.

NZ CGA

For the purposes of the NZ consumer guarantees, 'consumer' is defined by section 2 of the CGA.

2 Interpretation

...

Consumer means a person who –

- (a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
- (b) Does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of –
 - (i) Resupplying them in trade; or
 - (ii) Consuming them in the course of a process of production or manufacture; or
 - (iii) In the case of goods, repairing or treating in trade other goods or fixtures on land.

This definition is very similar in many respects to the definition in section 4B of the TPA. Like that definition, this one encompasses businesses insofar as they are acquiring goods of a kind which would ordinarily be considered consumer goods. However, unlike the TPA definition (but like the UCT definition), there is no monetary threshold separating purchases which must be of a kind ordinarily acquired for personal, domestic or household use, from purchases which may be of any kind. No matter what the value of the goods or services, under the NZ definition they must be in the nature of consumer goods in order for the purchaser to be a 'consumer'.

Settling a definition of 'consumer'

CCAAC supports removing the monetary threshold from the definition of 'consumer'. The threshold is – by necessity – set at an arbitrary level, which is subject to change over time.⁸⁰ In CCAAC's view, there is no meaningful distinction to be made between a person who pays \$40,000 for goods or services and a person who pays \$40,001. The focus of the definition should be on the class of person who makes the purchase, or on the kind of goods or services which are purchased.

This is the chief difference between the definition in the NZ CGA (which echoes section 4B of the TPA) and the UCT approach: the former defines consumers by reference to the kind of goods or services bought, while the latter defines consumer contracts by reference to the purposes for which goods or services are bought. Whether or not businesses will benefit from the consumer guarantees depends on which type of definition is adopted.

⁸⁰ Section 5 of the *Trade Practices Revision Act 1986* changed the monetary threshold from \$15,000 to \$40,000, and it has remained unchanged since then.

If applied to consumer guarantees, the UCT approach would effectively deny to businesses the protections offered to consumers. A business that buys, for example, a microwave for the use of staff would very likely meet the NZ CGA definition. However, it could not be said that the microwave was being bought predominantly for personal, domestic or household use. Because the microwave would not be used for personal or domestic purposes, or household use, but would be for use in a staff kitchen, the business buying it would be considered not to be a consumer under the UCT approach.

There is no obvious policy reason for insisting that a microwave sold to a consumer be of acceptable quality, while a microwave sold to a business need not be. A business may not necessarily be in any better position to assess whether a microwave was of acceptable quality, pre-sale, than is a consumer. If the UCT approach were applied to consumer guarantees, business purchasers would bear the burden of ensuring products were of an acceptable quality, while consumers would not. If the NZ CGA definition were applied, suppliers and manufacturers would have to ensure that their products were of acceptable quality irrespective of the nature of the buyer.

CCAAC considers that, so far as possible, all classes of consumer should have access to the benefits of implied terms or consumer guarantees. Most implied terms are derived from SGAs, which themselves have their origins in business transactions (and continue to apply to business transactions). However, the consumer guarantees should be a consumer protection measure, and should be targeted as much as possible towards consumer goods.

Whatever definition of ‘consumer’ is settled on, CCAAC believes that consistency is paramount, and agrees with the LCA ‘that the definition of “consumer” should be made consistent wherever possible’.⁸¹ The definition will be relevant to a number of provisions of the TPA and the ACL in addition to the consumer guarantee provisions – for example, the product safety provisions, the UCT provisions, and the prohibition of harassment and coercion – it is important that, in so far as possible, the definition is appropriate for all provisions and is consistent for all provisions. However, it is important to bear in mind that ‘business consumers’ currently have access to the TPA’s implied terms in certain circumstances, and this access should be removed only if a clear policy decision is made to do so.

Goods and services

Statutory warranties in relation to services are provided for in section 74 of the TPA, and are thereby kept distinct from the conditions and warranties attached to the supply of goods. However, the consumer guarantees model would do away with the distinction between conditions and warranties, and this would also remove some of the differentiation between the treatment of goods and services.

For example, subsection 71(2) of the TPA implies a *condition* that goods will be fit for a particular purpose, while subsection 74(2) of the TPA implies a *warranty* that services will be fit for a particular purpose. Under the consumer guarantee model, there would be no difference in status between the two rights. Remedies would flow from each guarantee as appropriate. CCAAC believes that consumer guarantees should, so far as possible, apply in the same manner to goods and services.

81 LCA, page 1.

CLARITY IN REMEDIES

As discussed in the Issues Paper (and, in greater detail, in Chapter 7), the remedies available for breach of a term implied pursuant to Part V, Division 2 are the usual remedies for breach of contract (generally, damages), with a statutory right to rescission (under section 75A of the TPA) available in certain circumstances. Compensation is the only remedy available in actions against manufacturers and importers pursuant to Part V, Division 2A.

This is an unsatisfactory state of affairs, as it requires consumers to look elsewhere than in the implied terms legislation itself in order to discover what remedies might be available. Consumers are provided with very little clarity about their rights and remedies. As Professor Carter noted:

[v]ery little is said in [Part V, Division 2] about consumer rights and remedies. To a large extent, these are based on the common law, that is, implied by law. In fact, [Part V, Division 2] does not explain the distinction between conditions and warranties by reference to consumer rights. That is left to the sale of goods legislation and the common law. ... Ideally, both the existence and content of all consumer rights and remedies should be expressed in detail in the consumer protection regime.⁸²

CCAAC supports the suggestion that remedies should be found on the face of the legislation, ideally in close proximity with the consumer guarantees themselves. This is a means of providing consumers and retailers with clarity in their understanding of consumer rights, rather than expecting them to be familiar with the law of contract.

The New Zealand model

The NZ CGA follows this rule. Part 1 of the CGA creates the consumer guarantees in respect of goods, while Parts 2 and 3 provide for the rights of redress against retailers and manufacturers respectively.

Redress against the retailer

If a retailer fails to comply with a guarantee as to title, acceptable quality, fitness for particular purpose, correspondence with description or correspondence with sample, the consumer has a right of redress against the retailer.

Where the failure can be remedied, the consumer may require the retailer to remedy the failure within a reasonable time. Where the failure cannot be remedied (or the failure is of a 'substantial character'), the consumer may either reject the goods or obtain damages for any reduction in value of the goods below the price paid or payable for the goods.

To remedy a failure, a retailer may repair the goods, cure any defect in title, replace the goods, or provide a refund (if the retailer cannot reasonably be expected to repair the goods). If the retailer does not or cannot remedy the failure within a reasonable time, the consumer may have the failure remedied elsewhere and recover the costs of doing so, or may reject the goods.

82 Freehills, pages 10-11.

Rejection of goods is very similar to exercising the statutory right to rescission under section 75A of the TPA. To reject the goods, the consumer notifies the retailer of the rejection and of the grounds for rejection, and returns the rejected goods to the retailer (unless the goods cannot be returned without significant cost to the consumer). When a consumer exercises the right to reject goods, the consumer is entitled to a refund or a replacement (where replacements are reasonably available to the retailer).

In addition to these remedies, consumers may recover damages for any reasonably foreseeable loss or damage resulting from the failure.

The guarantee as to price is self-executing. Where there is a failure to comply with the guarantee that the consumer is not liable to pay more than a reasonable price, the only remedy available is for the consumer to refuse to pay more than a reasonable price.

Redress against the manufacturer

If goods fail to comply with the guarantee as to acceptable quality, the guarantee as to correspondence with description (where the description was applied to the goods by, on behalf of, or with the consent of the manufacturer), the guarantee as to repairs and spare parts, or any express guarantee provided by the manufacturer, the consumer has a right of redress against the manufacturer.

Consumers with a right of redress may recover damages from the manufacturer for any reduction in the value of the goods, and for any reasonably foreseeable loss or damage resulting from the failure. However, where a right to repair or replacement exists under an express warranty, no action for damages may be brought unless the manufacturer has refused or neglected to remedy the failure, or has failed to remedy the failure within a reasonable time.

The NZ CGA recognises that in some circumstances it will be unreasonable to make the manufacturer jointly liable with the retailer.

Section 26 of the CGA provides that there shall be no right of redress against the manufacturer in respect of goods which do not comply with the guarantee of acceptable quality only because of:

- an act or default or omission of, or any representation made by, any person other than the manufacturer; or
- a cause independent of human control, occurring after the goods have left the control of the manufacturer; or
- the price charged by the retailer being higher than the manufacturer's recommended retail price or the average retail price.

In relation to the third situation, price will often be a relevant factor in determining the level of quality that the consumer is entitled to expect, so that in determining the manufacturer's liability, it is the price recommended by the manufacturer that is relevant.

Redress concerning services

Where a service does not comply with the guarantees as to reasonable care and skill, fitness for particular purpose or time of completion, various rights of redress are available to

consumers. If the failure to comply can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time. If the supplier refuses or neglects to remedy the failure, the consumer may recover the cost of having it remedied elsewhere, or cancel the contract for supply of the service.

Where the failure cannot be remedied (or the failure is of a 'substantial character'), the consumer may either cancel the contract for supply of the service or obtain damages for any reduction in value of the product of the service below the price paid or payable for the service.

When a contract for the supply of services is cancelled, the consumer is entitled to a refund of any money paid, and no party is subject to any further obligation to perform the contract.

In addition to these remedies, consumers may recover damages for any reasonably foreseeable loss or damage resulting from the failure to comply with a guarantee.

Like the guarantee as to price with respect to goods, the guarantee as to price with respect to services is self-executing. Where there is a failure to comply with the guarantee that the consumer is not liable to pay more than a reasonable price, the only remedy available is for the consumer to refuse to pay more than a reasonable price.

Consideration of the New Zealand model

The NZ CGA model has a number of desirable features. Because it abandons the contractual language of condition and warranty, it differentiates between important and less important breaches of the guarantees by stipulating directly which remedies are available for which guarantees. It differentiates between minor defects which can be remedied (which might be considered warranties) and major defects or failures of substantial character which cannot be remedied (conditions), specifying the remedies for each.

Further, the NZ CGA clearly provides for remedies against both suppliers and manufacturers, which gives consumers an obvious choice of where to seek remedies. Consumers may choose to seek remedies against suppliers or manufacturers at their own option and as appropriate.

This leaves consumers and businesses with much greater certainty about the framework within which their rights and obligations are determined, leaving them only to decide on how it applies to given factual circumstances. As Professor Carter noted, it is not possible to cover off in detail on every remedy that will exist in every factual circumstance. In attempting to strike a balance, some things need to be left unsaid.⁸³

Consequential loss and limitation of liability

The lack of clarity in the existing remedies for implied terms creates risks that consumers will not be aware of their rights and the mechanisms for enforcing them, and that unscrupulous traders will have the incentive and the means to avoid their obligations.

83 Freehills, page 11.

Dr Luke Nottage notes that not only are the implied terms and remedies themselves not made clear in the legislation, the mechanical aspects of remedial consumer action are also unclear, notwithstanding that these aspects are well established at law:

Although Australia's present legislation does not necessarily make it completely clear, case law and general principles already do elaborate fairly well various points raised at p18 [of the Issues Paper]. The consumer (not supplier) can elect which remedy to pursue, the supplier should pay for transport costs of defective goods (as within the scope of ordinary damages), durability is involved in 'fitness for purpose', and 'merchantability' extends beyond workability to 'cosmetic' matters.⁸⁴

Because many of these aspects of the law are unclear in (or absent from) the legislation, there is little guidance available to consumers and traders as to which things they may insist upon and which they may not. For example, as suggested by Dr Nottage, it is within the normal scope of contractual damages that the supplier should pay for costs associated with transporting defective goods. Where this cost is borne in the first instance by the consumer, it constitutes loss or damage flowing from the breach of contract (in supplying defective goods), and the consumer may recover the amount of loss or damage. The cost of transport may be thought of as a 'consequential loss'.

This scenario is complicated by section 68A of the TPA, which allows traders to limit their liability for a breach of a condition or warranty to a number of specific remedies. For example, a contract for sale could recognise the supplier's obligation to provide goods of merchantable quality, but at the same time limit the supplier's liability in such a way that the only remedy the consumer has, if supplied unmerchantable goods, is to have the goods replaced or be supplied with equivalent goods, thereby excluding liability for any consequential loss.

In CCAAC's view, the case for a provision such as section 68A falls away if all available remedies are spelled out clearly on the face of the legislation. When remedies are spelled out in this way, they allow the law-makers to decide precisely what remedies are appropriate in the case of each consumer guarantee. In such circumstances, it is inappropriate that suppliers should be able to arbitrarily limit their liability. Rather, consumers should always be entitled to recover any loss or damage suffered to the extent provided for by the consumer guarantees.

Findings

- 5.1 The current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law.
- 5.2 In developing the Australian Consumer Law, current laws on implied conditions and warranties should be amended to increase consumer and business understanding and to harmonise differences between existing national, state and territory laws.

84 Dr Nottage, pages 2-3.

Findings (continued)

5.3 The Australian Consumer Law should include a single set of consistent statutory consumer guarantees that are simple and clear. The new provisions should, at a minimum, provide:

- in respect of goods:
 - a guarantee that the supplier has the right to sell the goods;
 - a guarantee that the goods are free from any undisclosed security;
 - a guarantee that the consumer will have undisturbed possession of the goods;
 - a guarantee that goods are of ‘acceptable quality’, which would replace the concept of ‘merchantable quality’, and which includes a detailed definition of ‘acceptable quality’, so that the goods are:

: fit for the purposes for which the goods are commonly supplied;

: acceptable in appearance;

: free from both major and minor defects;

: safe; and

: durable;

as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to:

: the nature of the goods;

: the price (where relevant);

: any statements made about the goods on any packaging or label on the goods;

: any representation made about the goods by the supplier or the manufacturer/importer; and

: all other relevant circumstances of the supply of the goods;

- a guarantee that the goods are fit for a particular purpose made known to the supplier by the consumer;
- where goods are sold by description, a guarantee that goods comply with that description;

Findings (continued)

- where goods are sold by sample, a guarantee that the goods comply with that sample;
- where goods are first supplied to a consumer in Australia, a guarantee that the manufacturer/importer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for goods are reasonably available for a reasonable period after the goods were supplied;
- These guarantees should be enforceable against both the manufacturer/importer and the retailer of any goods supplied.
- in respect of services:
 - a guarantee that they will be carried out with reasonable care and skill;
 - a guarantee that, where the actual purpose of the services and any associated goods is made clear to the seller, the goods and services are fit for the particular purpose; and
 - a guarantee that the services will be completed in a reasonable time, unless otherwise addressed by the contract for the supply of those services.
- clear remedies for each statutory consumer guarantee, including a right to recover loss or damage suffered as a result of failure to comply with a guarantee, which distinguish between:
 - remedies for major and minor defects; and
 - remedies against suppliers and manufacturers/importers.
- these guarantees should be enforceable against both the supplier and intermediary of any services supplied.
- a consistent approach to defining 'consumer' in the Australian Consumer Law, with the same definition to apply to statutory consumer guarantees. Furthermore, given that some business purchases are currently afforded protection by the provisions of Part V, Divisions 2 and 2A of the *Trade Practices Act 1974*, consideration should be given as to whether such purchases should remain covered by statutory consumer guarantees;
- that statutory consumer guarantees, except for the guarantee as to the supplier's right to sell the goods, do not apply to the sale of goods by way of genuine auctions;

Findings (continued)

- that, as part of the development of the Australian Consumer Law, Part V, Divisions 2 and 2A of the *Trade Practices Act 1974* (and similar legislation at state and territory level) be repealed in favour of the new statutory consumer guarantees; and
- that the statutory right to rescission of contracts in section 75A of the *Trade Practices Act 1974* (and similar legislation at state and territory level) be repealed in favour of the remedies available under the new statutory consumer guarantees.

6 AWARENESS OF THE LAW

Key points

- There is a general lack of awareness of statutory implied terms amongst not only consumers but also retailers and manufacturers.
- Consumers rely on personal and technical sources, rather than government consumer agencies, for advice about consumer issues.
- Raising the knowledge and awareness of consumers, retailers and manufacturers is fundamental to reducing consumer detriment.
- Information needs to be simple, clear, and targeted to recognise the diverse needs of consumers; provided at the right point in the consumer's decision making process; available in a range of formats; and shared between consumers, retailers and manufacturers.

THE PROBLEM OF LACK OF AWARENESS

A recurring theme throughout the review has been lack of awareness of statutory implied terms. The NEIAT study and submissions to the review support the Issues Paper in suggesting that a key problem with the current statutory implied terms regime is a lack of awareness by consumers, retailers and manufacturers of their rights and obligations.

Consumer awareness of statutory conditions and warranties is low. The NEIAT study found that seven in ten consumers, when read a succinct definition of statutory warranties, were not aware that such rights existed.

The need to remedy the widespread ignorance of consumer rights and remedies is supported by many submissions, including one from Hunt & Hunt. It not only supports the need to improve consumer awareness, but stresses the importance of standardised information in explaining statutory implied terms and a customer's rights against the retailer.⁸⁵

Consumers, however, are not alone in their lack of understanding. The NEIAT study indicates that 57 per cent of retailers and 47 per cent of manufacturers were not aware that consumers were entitled to any remedies beyond those for breach of the manufacturer's warranty. Further, one in five traders did not consider that they were subject to any legal obligation to give refunds on faulty products when sought by consumers. In addition, 15 per cent of retailers thought that, beyond the manufacturer's express warranty, the only available protection for consumers was their own insurance.

⁸⁵ Hunt & Hunt, page 1.

The Australian Retailers Association (ARA) drew attention to widespread ignorance by consumers as to their entitlement to a refund. It noted that:

[t]he ARA believes consumers are very quick to assert their rights but aren't necessarily clear about their obligations including: reporting the fault and returning the goods; providing details of the fault and their chosen remedy; providing proof of purchase; and ceasing to use faulty goods until they can be returned.

The ARA understands this may be due to the various refund policies implemented by retailers across the country that confuse consumers who are unclear about the difference between their legal rights and other retail policies that may go above and beyond the law.

Retailers would benefit from education and staff training programs regarding the laws surrounding statutory implied terms.⁸⁶

SUPPORT FOR CONSUMERS

While consumer protection agencies in Australia, such as the ACCC and the state and territory offices of fair trading, maintain websites and produce publications about the different types of warranties⁸⁷, it is clear that the message is still not getting through to the intended audience. This view is supported by Spier Consulting, which considered that consumer agencies have conducted some education, but not enough.⁸⁸

In its 2008 *Review of Australia's Consumer Policy Framework*, the Productivity Commission concluded that 'most consumers are not fully aware of the protections and redress options available under the implied warranty provisions'.⁸⁹ The review recommended that consumer agencies in Australia 'raise awareness among consumers and suppliers about the statutory rights and responsibilities conferred by the implied warranties and conditions in the generic consumer law'.⁹⁰

The Australian Competition and Consumer Commission has recently released a range of new publications in an attempt to educate consumers and suppliers about their statutory rights and responsibilities in relation to implied conditions and warranties. However, the continued level of complaints and inquiries suggests that the lack of consumer awareness remains an issue.

The importance of consumer awareness was highlighted by the NEIAT study. It demonstrated that when consumers had a greater understanding of statutory rights it lowered consumer detriment. This was evident in the number of hours different consumer groups spent on addressing their product problems. Average hours ranged from 3.7 hours for consumers with a detailed knowledge of their rights, to 5.8 hours for consumers with partial awareness and as high as 6.1 hours for consumers with no awareness at all.

86 ARA, page 6.

87 See, for example, ACCC 2009, *Warranties and refunds: a guide for consumers and business*, Canberra.

88 Spier Consulting, page 1.

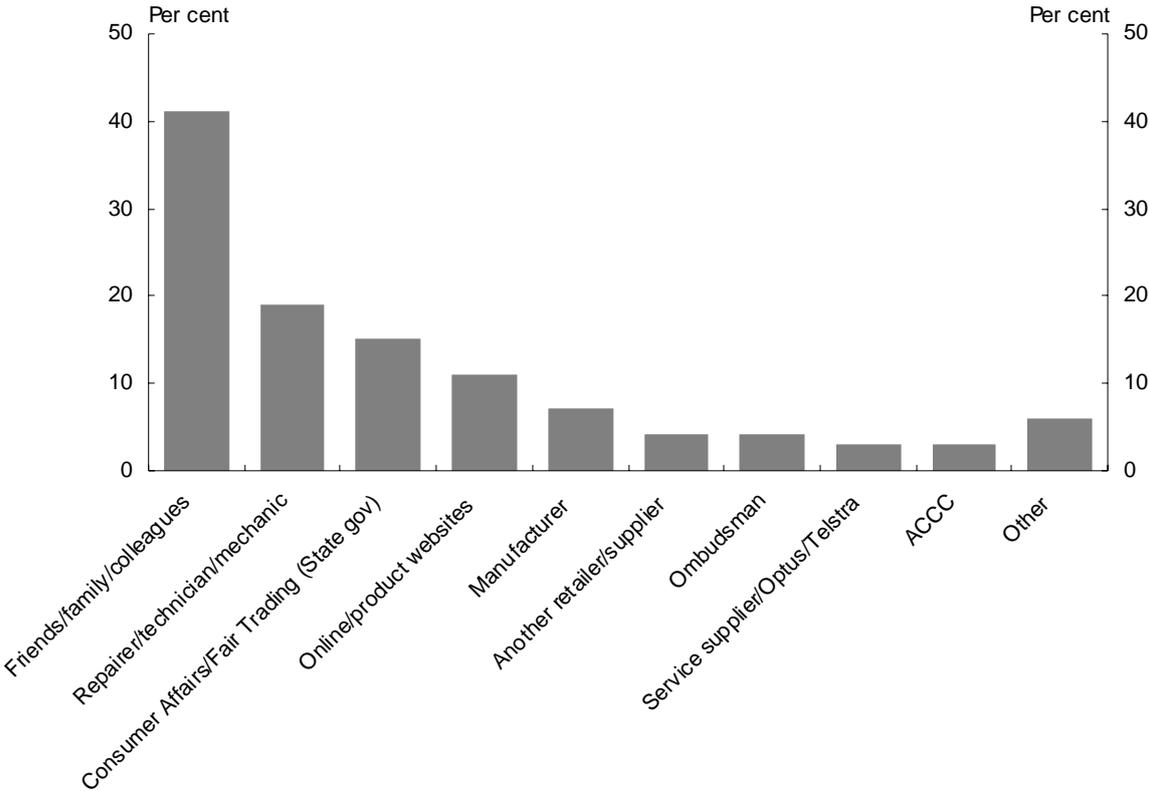
89 PC 2008, vol. 1, page 36.

90 *ibid.*, recommendation 8.1.

Further, the NEIAT study showed that increased awareness of statutory rights had flow-on effects. When consumers were offered an extended warranty with a thorough knowledge of their statutory rights, they felt they were being asked to pay for something that they already had the right to expect.

It is also clear that consumers have a poor understanding of where to go for help or information on the existence and enforcement of their rights (that is, awareness of consumer agencies). The NEIAT study demonstrated that consumers rely heavily on personal and technical sources of advice and that government agencies play a relatively limited role at present. Figure 6.1 outlines where consumers sought advice when they did not get redress.

Figure 6.1: Whom consumers sought advice from when they did not get redress
 Asked of: All consumers who sought advice



Q18: Whom did you seek advice from?

Source: NEIAT study, page 60.

The range of government agencies available for support appear to have been used by very few of the affected consumers. This view is also supported by the LCA, which outlined the complementary nature of consumer protection laws and consumer awareness programs. The LCA considered that:

[t]o date, the Government has not provided tangible evidence of the need for new or additional laws in this area, nor evidence that existing laws (including sections 52 and 53(g)/75AZC(1)(k)) are not capable of providing sufficient protection to consumers if awareness and enforcement are boosted. Accordingly, the Committee is not persuaded that the current TPA regime should be amended substantially or that additional

regulation should be introduced in this area; the focus of the Government's inquiry should be on education rather than regulation.⁹¹

It is also clear that the issue of awareness closely relates to the lack of clarity surrounding the law itself. As Professor Carter notes,

[i]t is certainly true that consumers do not understand the TPA. However, that is largely a function of its drafting.⁹²

CONSUMER DETRIMENT

CCAAC is also mindful that it is likely that there are situations where consumers are being misled about their rights (whether intentionally or inadvertently). The TPA prohibits businesses from engaging in misleading or deceptive conduct (section 52) or making false or misleading representations (section 53). Therefore, it is against the law for a seller to do anything (either in advertising or conversation) that leads consumers to believe their statutory rights are limited, or do not apply, when this is not the case; for example, claims by a seller that no refunds will be given under any circumstances.

The following are some areas where it might be possible for consumers to be misled as to their rights:

- Store return policies and 'no refund' signs – businesses may choose to display signs so consumers are aware of the store's refund and returns policies before buying, but these must not mislead consumers. Some examples that could be misleading include:
 - signs that state 'no refunds' or 'no refund on sale items', which could lead consumers to believe they have no right to claim a refund under any circumstances, which is not true because if a statutory condition has been breached, the consumer may be entitled to a refund;
 - policies that set a time limit, such as 'no refunds after 30 days', which can be misleading because statutory rights have no time limits, other than what is 'reasonable'; and
 - policies which insist that consumers return goods unopened, or in their original packaging, which may be misleading as these are not required to claim a remedy under statutory implied terms.
- 'Store credit' – a consumer is generally entitled to receive any refund in the form of their original payment. It is misleading for a seller to insist that a refund be issued as store credit.
- Passing on responsibility for a remedy to a manufacturer – because each sale is a contract between the buyer and the seller, consumers are entitled to insist that the seller provide them with a remedy, even if a problem is due to a manufacturer's fault.

91 LCA, page 3.

92 Freehills, page 5.

- ‘No responsibility’ policies in regard to services – service providers must not imply, for example, that consumers have no rights if services are not carried out with due care and skill.

Unlike a failure to comply with the terms implied by Part V, Division 2 of the TPA, engaging in misleading or deceptive conduct and making false or misleading representations are breaches of the TPA, under Part V, Division 1. The ACCC can take court action against businesses that mislead or deceive consumers about their rights.

However, some submissions, such as CALC’s, argue that there is a ‘lack of regulator will, to use available enforcement mechanisms to tackle repeated misconduct by traders’.⁹³

CCAAC, therefore, believes that increasing the knowledge and awareness of consumers, traders and manufacturers – in addition to clearer enforcement mechanisms discussed in the next chapter – is fundamental to reducing consumer detriment. Information needs to be clear and readily available to all consumers to support and complement any proposed changes to the provisions of the new ACL.

ALTERNATIVE OPTIONS FOR ADDRESSING THE PROBLEM

Clarifying the law

As discussed in the previous chapter, clarification of the law should go some way towards improving awareness of the rights, responsibilities and redress mechanisms available under it. Further, a move from the implied terms model to one of statutory consumer guarantees should be simpler to interpret and understand.

Given that CCAAC is recommending a significant simplification of the entire regime, it is anticipated that this will provide greater access to and understanding of the law.

Information provision

It is common in NZ for traders to display a sign at the point of sale that alerts customers to their rights under consumer guarantee legislation. CCAAC considers that similar signage in Australian stores would enhance the knowledge of Australian consumers in relation to consumer rights. One way of encouraging the use of signs regarding consumer rights would be for Australia’s consumer agencies to publish and distribute a common notice for display at the point of sale. Retailers would be strongly encouraged to display the notice, which would be available from all consumer agencies. If there is evidence, after the regime has been in effect for a period of time, of a lack of voluntary compliance, then the display of the notice could be mandated. The relevant Minister might be given power to prescribe the form. The Minister would seek to exercise this power only in the event that an approach based on voluntary compliance is not effective.

93 CALC, page 5.

Clearly, a solution will involve more than just providing additional information. This is supported by CALC:

In our view, it is time to consider policy responses other than merely increasing information and education to consumers and traders, given the significant and systematic nature of the problem.⁹⁴

There is no doubt information is important. However, consideration should be given to some fundamental elements of information provision. Information needs to be simpler, clearer and targeted to recognise and value the diverse needs of consumers; provided at the right point in the consumer's decision-making process; available in a range of formats; and shared between consumers, retailers and manufacturers.

The Australian Industry Group suggested that the effectiveness of consumer information could be increased significantly by providing specific examples relating to product categories. These examples would benefit from suppliers and government agencies working in partnership to ensure that examples are relevant and realistic.⁹⁵ CCAAC supports this view, especially in relation to developing a better understanding about what consumers can expect in terms of durability for each specific product category.

Dr Nottage argues that further clarification for consumers may be achieved through well-publicised test cases:

In addition, consumer agencies and peak consumer organisations (like Choice) should be encouraged to bring and publicise 'test cases', especially to determine (unavoidably general and evolving) questions like the statutory warranty's time period for various types of products (especially such large-value, high-complaint items).⁹⁶

Well-publicised test cases would provide consumers with useful examples of the operation of implied terms or consumer guarantees, which could significantly build understanding of consumers' statutory rights.

Further, as discussed in greater detail in Chapter 7, well-publicised test cases brought by consumer agencies in respect of misleading claims about consumer rights will also do much to increase awareness of those rights.

94 CALC, page 3.

95 Australian Industry Group, page 1.

96 Associate Professor Dr Nottage, page 5.

Findings

- 6.1 Current understanding by consumers and businesses of Australia's laws on implied conditions and warranties is limited, leading to confusion and uncertainty about the application of the law. It is critical that Australia's consumer agencies, retailers, manufacturers/importers and consumers have a common understanding about the nature and effect of the new statutory consumer guarantees.
- 6.2 Australia's consumer agencies, together with New Zealand, should work together to:
- develop and publicise a single, simple message about statutory consumer guarantees and retailer and manufacturer/importer obligations, to inform and educate consumers and businesses about statutory consumer guarantees;
 - develop, publish and distribute a single, clear and unambiguous notice for display at the point of sale, which can be used by all retailers to tell consumers about their statutory consumer guarantees. This could be done in conjunction with retailer and consumer representative bodies; and
 - develop and publish clear and consistent information and guidance for consumers about statutory consumer guarantees and options for dispute resolution.
- 6.3 Retailers and manufacturers/importers have an important role in ensuring that consumers are aware of their statutory consumer guarantees. Retailers and manufacturers/importers should ensure that any information that they publish or provide to consumers about statutory consumer guarantees is clear, accurate and unambiguous.
- 6.4 Retailers should be strongly encouraged to display the notice recommended in Finding 6.2 at the point of sale. This notice would be available from all consumer agencies. Voluntary take-up of this initiative should be considered as part of the review of enforcement and administrative arrangements under the Intergovernmental Agreement for the Australian Consumer Law, or earlier if required. If there is evidence that retailers are not informing consumers of their statutory consumer guarantees, consideration should be given to the introduction of a legal requirement to display such a notice in a form prescribed by the Minister.

7 DIFFICULTY IN ENFORCEMENT

Key points

- The contractual remedies available for breach of an implied term may be elusive to consumers without knowledge of the law of contract, and should be replaced by statutory remedies for breaches of statutory consumer guarantees.
- Consumer agencies play an important role in educating consumers and businesses, and in taking action where consumers are misled about their rights.
- Mechanisms for enforcing the statutory guarantees must be accessible if they are to be effective. Australian governments should work to make small claims court and tribunal processes efficient, timely, low cost and – as much as possible – uniform across jurisdictions.

A right without a remedy is no right at all. Rights only acquire substance insofar as they are backed by effective remedies. If consumers have no means of securing timely and cost-effective remedies, their consumer rights are, ultimately, of little value.

Certainly, there are remedies available for breach of an implied term. These remedies are discussed in the Issues Paper and, briefly, below. However, where these remedies are so remote and inaccessible for consumers that formal action to obtain the remedies is rarely taken, the existence of those remedies may not provide a strong incentive for retailers to honour consumer rights.

EXISTING REMEDIES FOR IMPLIED TERMS

Contractual rights

Part V, Division 2 of the TPA implies terms – both conditions and warranties – into contracts for the supply of goods or services to consumers. Consequently, remedies for the breach of these terms lie in the general law of contract and not, for example, in the provisions of Part VI of the TPA.⁹⁷ The same is the case for the various state and territory FTAs and SGAs that imply terms into contracts. There are generally no clear and explicit statutory remedies for breaches of implied terms.

Depending on the nature of the breach and of any losses suffered as a result of the breach, remedies available for breach of an implied term may include termination, damages, and various equitable remedies. Damages are the usual remedy for breach of contract, on the basis that the payment of money is often adequate compensation for any loss flowing from the breach.

⁹⁷ See *Re Franki Arturi v Zupps Motors Pty Ltd and Auswide Pty Limited* [1980] FCA 164.

Section 75A of the TPA creates a statutory right to rescind a contract where there has been a breach of a condition implied by Part V, Division 2. As Professor Carter noted, this right to ‘rescission’ is potentially confusing, since it does not conform with the traditional understanding of rescission as the winding back of contracts as if they had never occurred.⁹⁸ Rather, section 75A adopts the looser usage of ‘rescission’ as indicating the exercising of a right to terminate for breach or repudiation.⁹⁹

Statutory rights

Part V, Division 2A of the TPA creates express statutory rights of action against manufacturers and importers of goods where the goods are unmerchantable, are unfit for specified purposes or do not correspond with description or sample, and where the manufacturer or importer does not comply with an express warranty.

Unlike the implied terms, the statutory rights of action themselves specify the remedy available: compensation. Where a corporation supplies to a retailer goods which contravene a provision of Division 2A, and a consumer of those goods suffers loss or damage as a result, the corporation is liable to compensate the consumer for that loss or damage.

However, like the implied terms, the remedies provided for in Part VI of the TPA are not available when a provision of Division 2A gives a consumer a right to action. Conduct which gives a consumer the right to compensation is not conduct which *contravenes* Part V of the TPA, which is the trigger for the availability of remedies such as injunctions under section 80 or damages under section 82.¹⁰⁰

ALTERNATIVE REMEDIES

It should be noted that the remedies often associated with breaches of implied terms – repair, replacement and refund – are not necessarily provided for under the statutory regime. Section 75A provides for refunds for goods where a contract has been rescinded for breach of a condition. However, refunds are not available more generally (including in relation to services), and there is no statutory right to replacement or repair in the TPA. These ‘remedies’ may be offered by retailers or manufacturers to settle consumer complaints about breaches of implied terms or statutory rights.

Some submissions to CCAAC suggested that the range of remedies available for breaches of implied terms should be expanded. For example, Dr Nottage considered that rights to repair and replacement should be introduced into Australian law, in much the same way as it is available under section 23 of the CGA.¹⁰¹ Dr Nottage points to the 1994 recommendation of the Australian Law Reform Commission (ALRC) to amend section 75A to allow consumers

98 Freehills submission, pages 19-20.

99 As Gibbs CJ noted in *Shevill v Builders Licensing Board* (1982) 149 CLR 620, it is sometimes convenient to refer to situations of repudiation as ‘rescission’ even though there is no rescission *ab initio*. Lord Wilberforce considered that while this use may lead to confusion in some situations, to seek uniform usage of terminology in this area would be to ‘cry for the moon’ (*Photo Production Ltd v Securior Transport Ltd* [1980] AC 827). This highlights the sometimes confusing and uncertain nature of the remedies available for breach of contract.

100 See *Re George Zaravinos v Dairy Farmers Co-Operative Limited and Pure Pak Australia Pty Limited* [1985] FCA 77.

101 Dr Nottage, page 4.

the right to seek replacement goods.¹⁰² Alternatively, Mr Spier suggested that rescission should be made available at any stage in the contractual relationship, and that the guiding principle for remedies should be to return the purchaser to the pre-purchase position.¹⁰³

Conversely, some submissions suggested very strongly that the current regime, which makes contractual remedies available, continued to be the most appropriate mechanism for providing consumers with redress. The ARA, for example, 'believes the current defined remedies for breaches of statutory implied warranties are sufficient and any expansion ... would allow for an abuse of process and claims of compensation'.¹⁰⁴ While the LCA provides some cautious support for extending the scope of section 75A (perhaps to include a right to replacement at the supplier's option), its belief is that the existing remedies for breaches of implied terms are adequate.¹⁰⁵

On balance, CCAAC agrees with the ALRC's 1994 recommendation that replacement be introduced into the implied terms regime as an available remedy. Where appropriate, and subject to availability, a replacement may be the best means of providing consumers with the goods they intended to buy. The choice of whether to pursue a refund or replacement should be the consumer's, provided a replacement is reasonably available. Further, retailers should be free to continue to offer to repair goods in satisfaction of a consumer guarantee, although this need not be recognised in the legislation.

No matter what remedies are available to consumers, CCAAC considers that they should be spelled out clearly, on the face of the legislation, for each consumer right, rather than leaving consumers to consult the law of contract to determine the remedies to which they are entitled.

BARRIERS TO ENFORCEMENT

Personal enforcement

The implied terms of Division 2 vest consumers with contractual rights to remedy, and the statutory rights of Division 2A vest consumers with direct rights to compensation. Therefore, it is for consumers themselves to enforce these rights, the role of consumer agencies being largely limited to ensuring consumers are armed with accurate information about their rights.

It is generally acknowledged that consumers will very rarely go to court to enforce their rights under an implied term or statutory right.¹⁰⁶ The costs to the consumer of pursuing legal action are likely to exceed the value to the consumer of having the matter remedied. For this reason, Professor Carter suggested that mechanisms for obtaining redress must be 'self-executing', in that the consumer's rights are so clear and the remedies available are so unambiguous that court action becomes unnecessary.¹⁰⁷

102 ALRC 1994, *Compliance with the Trade Practices Act 1974*, Report No ALRC 68, Sydney, at paragraph 6.9.

103 Spier Consulting, page 2.

104 ARA, page 11.

105 LCA, page 4.

106 Freehills, page 7.

107 *ibid.*

Coordination problems

It may sometimes be the case that a retailer engages in a systemic breach of consumer rights. CALC suggested that this might occur because ‘of some comfort on the part of traders, that failing to honour their obligations – even misleading consumers – will lead to cost savings without any risk of regulatory action’.¹⁰⁸ That is, since the likelihood of consumers personally enforcing their rights is small, there may be little incentive for unscrupulous retailers to comply with their implied contractual obligations. CALC suggests that there is evidence of this in the practice of retailers referring consumers back to manufacturers and denying liability.

Where a retailer acts in such a manner there are likely to be a number of consumers harmed by that conduct. Ordinarily, there would be an incentive for harmed consumers to band together and bring a common action – to the extent possible – for any systemic breach by retailers. However, given the rights arising under implied terms are inextricably linked with the individual contracts entered into between retailers and consumers, coordinated action may be difficult to achieve.

ALTERNATIVE ENFORCEMENT MECHANISMS

Enforcement by consumer agencies

Since the provisions of Part V, Divisions 2 and 2A of the TPA do not contemplate conduct that contravenes Part V, the remedies in Part VI of the TPA are unavailable¹⁰⁹ both to consumers and – where applicable – to the regulator. The consequence of this is that consumer agencies are unable to enforce the rights established by those provisions.

Several submissions suggested that the powers of consumer agencies be augmented to allow them to bring actions to enforce implied terms. Mr Griggs, for example, proposed a ‘remedial smorgasbord’ be made available to consumer agencies in relation to implied terms, noting that amendments to the TPA’s enforcement mechanisms have recently been proposed as part of the ACL.¹¹⁰ CALC shared the view that enforcement mechanisms involving direct action by the regulator would help to overcome problems associated with personal enforcement of consumer rights.¹¹¹

However, a number of submissions considered that it remained appropriate for consumers to enforce their own statutory rights. The LCA, for example, noted that ‘there are substantial information and economic barriers that prevent customers from enforcing their rights under statutory implied terms’.¹¹² However, it considered that consumer agencies should not be empowered to bring actions for consumers. The LCA considered that, in any event, consumer agencies were unlikely to exercise such a power.

The difficulty in crafting a scheme whereby consumer agencies are empowered to act for breaches of implied terms and statutory rights lies in the nature of those provisions. The

108 CALC, page 4.

109 *Arturi v Zupps* and *Zaravinos v Dairy Farmers*.

110 Mr Griggs, page 2.

111 CALC, page 4.

112 LCA, page 6.

provisions are expressed as positive obligations, and if those obligations are not met this gives rise to a right to a remedy. By way of contrast, consumer agencies are generally asked to enforce negative obligations, where certain conduct is prohibited and, if the conduct is engaged in, this may attract both remedies and penalties.

To overcome this difficulty, CALC suggested that these consumer rights be framed as 'conduct obligations' for retailers.¹¹³ CALC proposed that 'the laws might provide that a trader must not fail to remedy a failure to comply with a guarantee as to merchantable quality'.¹¹⁴ This could create a mechanism for transforming consumer guarantees into negative obligations, which a regulator might more appropriately enforce. However, any proposal to have consumer agencies enforce consumer rights may create expectations that are difficult for consumer agencies to satisfy.

While it would be desirable to find some mechanism to empower consumer agencies to take action, particularly in circumstances of egregious or systemic breach of implied terms or statutory rights, in practice, this mechanism would be difficult to construct. A failure 'to remedy a failure to comply with a guarantee' is a cumbersome obligation to ask retailers to comply with, and it may not be a provision of sufficiently certain application to contemplate attaching penalties or other enforcement measures to its contravention.

CCAAC considers that this proposal raises issues of fairness, justice and regulatory efficacy. As regards issues of fairness and justice, there is an inherent difficulty in drafting provisions requiring standards such as 'merchantable quality' or 'satisfactory quality' or 'acceptable quality' because they must apply to a great variety of transactions.

According to Atiyah, Adams and McQueen,

All vague statements or definitions of the standard of quality required by the law ... are somewhat vacuous in practice. They tend to be replaced with concepts of reasonableness which have substantial flexibility. Most such standards give little guidance as to what kind of defects or damage will render the goods unsatisfactory (unmerchantable under the former provision), and are unhelpful in the practical application of the law. All rely heavily on the test of reasonableness: would a reasonable buyer, if he knew the condition of the goods, accept them under the contract? Would a reasonable buyer expect goods of that condition to be delivered under that sort of contract? Tests which depend so heavily upon standards of reasonableness tend to be somewhat circular in practice.¹¹⁵

What is acceptable quality under the NZ CGA depends on what 'a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable'.¹¹⁶

The issue of what a hypothetical reasonable consumer would regard as acceptable will be settled ultimately by the court's evaluation, having regard to the surrounding circumstances

113 CALC, page 5.

114 CALC, page 5. See also Spier Consulting, page 2.

115 Atiyah, PS, Adams, JN and MacQueen, HL, 2001, *The Sale of Goods* (10th ed.), page 167.

116 Section 7 of the NZ CGA, considered in Chapters 4 and 5.

of each case (and, under the NZ CGA, the attributes and characteristics specified in subsection 7(1)).

The difficulties of determining the content of the acceptable quality guarantee were highlighted by the decision of the Hon Justice Miller of the NZ High Court in *Contact Energy v Jones*, where it was claimed that electricity generators and retailers were liable to consumers under the guarantee of acceptable quality for power fluctuations or outages attributable to the distribution system.¹¹⁷

It is especially difficult to know in advance what a reasonable consumer would regard as acceptable in relation to the issue of durability. For example, if a supplier of a washing machine were to reject a claim by a consumer in relation to a defect that occurred three years after the date of purchase, and a court were to decide that a reasonable consumer would have expected a washing machine of that type and for that price to be free from defects for at least four years, would it fair or just to subject the supplier to a fine or civil penalty in such circumstances?

In relation to section 52 of the TPA, the test of whether conduct is misleading, or likely to mislead, is to be assessed in accordance with the effect of the conduct on a reasonable member of the target audience at whom the conduct was directed.¹¹⁸ Once again, this is an objective test that requires an evaluation by the court. A breach of section 52 has never given rise to criminal liability under the TPA, and will not attract liability for a civil penalty under the new regime because of the difficulty of making such an evaluation.

If a provision could be made sufficiently certain – for example, ‘all goods must remain free from defects or damage for a minimum period of six months’ – a failure to comply with it might attract a fine or civil penalty without offending notions of fairness or justice. However, it would not be feasible to draft such a provision (or provisions) that covered the vast array of goods and services currently on offer in the market place.

A provision stipulating that a corporation must not, in trade or commerce, supply goods which are not of merchantable quality would leave retailers with significant uncertainty about whether or not they are complying with the law. Whether or not a particular product is merchantable is a much less certain proposition than whether a particular statement is misleading, and this would likely remain the case even if the term ‘merchantable’ were reconceived or redefined.

The role of consumer agencies

Nevertheless, consumer agencies have an important role to play in the enforcement of implied terms. As the LCA notes, an element of that role is acting as intermediaries for consumers who suffer detriment as a result of the same conduct by the same retailer. In such circumstances, consumer agencies can bring these consumers together, overcoming the coordination problem and encouraging them to bring class actions.

117 [2009] 2 NZLR 830 at [102]-[108].

118 *Campomar Sociedad Limitada v Nike International Limited* (2000) 202 CLR 45 at 85-88 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Butcher v Lachlan Elder Realty* (2004) 218 CLR 592 at 608 (Gleeson CJ, Hayne and Heydon JJ).

Perhaps more significantly, consumer agencies have a role in ensuring that consumers are not misled about their rights under implied contractual terms or statutory rights of action. For example, in addition to the general misleading and deceptive conduct provisions of the consumer law, paragraph 53(g) of the TPA prohibits the making of false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

That is, consumers are entitled not to be misled about the effect of Part V, Divisions 2 and 2A of the TPA (and similar legislation at state and territory level), as well as their other rights and remedies under the law. The regulator is empowered to take action for contravention of this provision, including criminal action under section 75AZC of the TPA. The maximum penalty for a corporation that contravenes section 75AZC is currently \$1.1 million.

There have been disappointingly few cases brought under paragraph 53(g). As CALC noted, 'these generally involve "no refunds" signs and other written statements'.¹¹⁹ A 'no refunds' sign is, in most cases, a clearly misleading statement about the retailer's obligations under the statutory conditions and warranties regime.

However, the scope of paragraph 53(g) is certainly much broader than these written statements. Anecdotal evidence suggests that consumers who make complaints about faulty goods may be referred repeatedly from retailer to manufacturer and back again, implying that either or both of the retailer and the manufacturer may be misleading consumers about their own obligations. If a retailer refuses a consumer's claim under an implied term, on the basis that it is the manufacturer's responsibility, this surely is a misleading representation about the effect of a condition or warranty.

CALC noted 'that consumer agencies have had significant opportunity to pursue traders that are known to repeatedly mislead consumers in this area, even if those misleading representations are made verbally' rather than in written material such as a sign.¹²⁰ While CCAAC has not been presented with evidence of this, it notes with disappointment that, while paragraph 53(g) is broader in its scope than prohibiting 'no refund' signs, very little has been done by consumer agencies to explore this broader scope.

CCAAC considers that the law would benefit from the increased use of 'test cases' by the ACCC, particularly in relation to paragraph 53(g). Pursuit of test cases and publicity of the results would encourage the development of a consistent body of law around the Australian Consumer Law. Increased use of test cases would also increase consumer and supplier awareness of the provisions of the ACL.

CCAAC considers that there is scope for effective action by consumer agencies in the case of systemic failures to honour guarantees. This may be the case particularly in instances where individual consumers have a limited incentive to take action, but the cumulative effect of conduct by a trader is significant. In such cases there is merit in allowing a regulator to take action on behalf of a consumer or group of consumers to seek an appropriate remedy. CCAAC considers that it would not be appropriate for consumer agencies to apply civil penalties in respect of failures to honour consumer guarantees.

119 *ibid.*, page 4.

120 *ibid.*

Incentives and the role of consumer agencies

Where goods or services fail to comply with the statutory consumer guarantees, the statutory remedies envisaged are repair, replacement or refund, depending on whether the defect is minor or major.

CCAAC is concerned that, even if the law is clarified, consumers may fail to assert their rights.

Regardless of the clarity in the law and the accessibility of redress mechanisms, many individual consumers may not try to enforce their rights. Those less likely to enforce their rights are likely to be the most disadvantaged consumers, such as those with minimal education or from culturally and linguistically diverse communities. It is therefore important to consider how the reformed law might bring about changes in industry practices that would assist those individuals. While promoting self-enforcement is important, other approaches that may influence industry conduct are required.

The lack of incentives for retailers and manufacturers to comply with the law and assist consumers has also been highlighted in submissions.

Unlike other provisions in the TPA, the existing implied terms provisions generally only allow for enforcement by individual consumers. This means that if retailers and manufacturers choose not to meet their obligations, they will not face the risk of enforcement action by the regulator (unless misleading and deceptive conduct is involved).

It also means that retailers and manufacturers may choose whether to comply or not based on a cost/risk analysis. Responding to legal action by a small number of individual consumers could be regarded as being a low risk for a recalcitrant supplier, compared to dealing with an action by a regulator.

CCAAC considered various ways to encourage voluntary compliance by retailers and manufacturers.

Criminal liability

One possibility is to provide that a manufacturer or retailer that fails to volunteer the appropriate remedy to the consumer commits an offence against the Australian Consumer Law.

Professor Vernon in his 1987 report to the New Zealand government recommended:

An efficient way to encourage voluntary compliance by suppliers would be to assess a \$100 fine against those who are ordered by the decision maker to repair, replace, refund the purchase price, or pay out-of-pocket costs. The fine would be refunded if the supplier proves to the decision maker's satisfaction that it acted reasonably, although erroneously, in failing to volunteer the appropriate remedy to the consumer. Under this system, the supplier, rather than the consumer or the Ministry, would have the burden of establishing reasonableness, and the recalcitrant supplier would be deterred from a course of conduct designed to thwart the statutory goals¹²¹.

¹²¹ Vernon, page 29.

The New Zealand Government did not adopt this recommendation at the time the NZCGA was enacted in 1993 and there has been no amendment to incorporate such a provision since that date. CCAAC believes that imposing criminal liability is a disproportionate response given the uncertainty surrounding concepts such as 'acceptable quality' considered above.

CCAAC considers that it would not be appropriate for consumer agencies to apply criminal penalties in respect of failures to honour consumer guarantees.

Liability for a civil pecuniary penalty

Another way of creating an incentive for manufacturers and retailers to provide consumers with the relief to which they are entitled is to make them liable for a civil pecuniary penalty. Part 1 of Schedule 2 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009, currently before Parliament, provides for the imposition of civil pecuniary penalties for contraventions of a provision of Pt IVA or a provision of Division 1 or 1AAA of Pt V (other than section 52).

The Explanatory Memorandum states that the availability of civil pecuniary penalties '... will enable a more targeted and proportionate regulatory response, in addition to increasing the deterrent effect of consumer law provisions'.

A breach of section 52 has never given rise to criminal liability under the TPA, and will not attract liability for a civil penalty under the new regime because of the difficulty of making an evaluation as to what constitutes misleading conduct, and for the same reason CCAAC considers that it would not be appropriate for consumer agencies to apply civil penalties in respect of failures to honour consumer guarantees.

Civil proceedings to secure redress for systemic failure to honour guarantees

CCAAC considers that there may be scope for effective action by consumer agencies in the case of systemic failures to honour guarantees. This may be the case particularly in instances where individual consumers have a limited incentive to take action, but the cumulative effect of conduct by a trader is significant.

In such cases there is merit in providing consumer agencies with a new power to take action on behalf of a consumer or group of consumers to seek an appropriate remedy.

Discretion to bring civil proceedings to secure redress for any failure to honour guarantees

CCAAC was of the view that consumer agencies should also be able to bring civil compensation proceedings to claim redress for consumers in relation to any failure to honour a guarantee. Requiring the regulator to demonstrate systemic failure may create an unnecessary barrier to providing relief, and the decision whether to bring proceedings should be at the consumer agencies discretion.

ACCESS TO REMEDIES

Whatever the remedies available to consumers for breaches of implied terms, they cannot be effective as mechanisms for consumer redress if consumers cannot access them in a timely and cost-effective way.

As has been noted, the costs of court action relative to the average value of consumer goods mean that matters are unlikely to go to court.¹²² Clarifying supplier obligations and consumer rights and the remedies available will assist consumers seeking redress, as they will be in a better position to present an incontrovertible case to retailers and manufacturers.

However, it is unrealistic to assume that all disputes will be resolved in this way. Therefore, CCAAC considers it desirable that consumers have access to an efficient, low-cost and timely process for resolving disputes about their consumer rights. CCAAC notes that this view is shared by a number of submissions.¹²³

Tribunals

Tribunals can be an effective mechanism for achieving timely consumer redress, by reducing the need for court proceedings while allowing all parties to a dispute to have their claims assessed.

There are currently a number of tribunal systems operating in Australian States and Territories, for example, the Victorian Civil and Administrative Tribunal (VCAT). These tribunals consolidate previous, more specific tribunals into a single tribunal scheme. Each of these tribunals has a civil jurisdiction allowing it to hear contractual disputes, such as disputes about compliance with implied terms.

Other jurisdictions have specific tribunals that can hear consumer disputes. NSW, for example, has a Consumer, Trader & Tenancy Tribunal, while Queensland has a Small Claims Tribunal (which will be rolled into a Queensland Civil and Administrative Tribunal on 1 December 2009). Still other jurisdictions have small claims lists or divisions in their local or magistrates courts. For example, there is a Small Claims Division in the NT Local Court and in the SA Magistrates Court, and there is a Minor Civil Claims Division in the Tasmanian Magistrates Court. In WA, the Magistrates Court hears smaller claims.

These courts and tribunals vary across jurisdictions, in terms of procedures, claim limits and filing fees. For example, there is no claim limit for most claims in VCAT¹²⁴, a consumer claim in the WA Magistrates Court cannot exceed \$50,000¹²⁵, while a minor civil claim in Tasmania can be no more than \$5,000.¹²⁶ Filing fees may vary from \$14.50 for a claim of less than \$500

122 Freehills submission, page 7.

123 See Hunt & Hunt, page 2; Dr Nottage, pages 4-5; Royal Automotive Club of Queensland, pages 8-9; Royal Automotive Club of Victoria, page 3; Spier Consulting, page 3; LCA, page 6; and Federal Chamber of Automotive Industries, pages 15-6.

124 VCAT, *Civil Disputes – Small Claims*, <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Civil+Disputes-Small+Claims?OpenDocument&1=45-Civil+Disputes-Small+Claims~&2=~&3=~>, accessed 22 September 2009.

125 Magistrates Court of Western Australia, Civil Jurisdiction, *Information for consumers and traders*, http://www.magistratescourt.wa.gov.au/files/Civil_factsheet_4.pdf, accessed 22 September 2009.

126 Magistrates Court of Tasmania, *Minor Civil Claims*, http://www.magistratescourt.tas.gov.au/divisions/civil/minor_civil_claims, accessed 22 September 2009.

in the Queensland Small Claims Tribunal¹²⁷ to \$190.50 for a claim of between \$10,000 and \$50,000 in the WA Magistrates Court.¹²⁸

There is no specialist Commonwealth body with jurisdiction to hear complaints about compliance with implied terms in contracts. Commonwealth tribunals review the merits of administrative decisions, rather than consider disputes between private parties. There are constitutional limitations on the scope for Commonwealth tribunals to make binding decisions of the kind that, for example, VCAT makes.

Alternative dispute resolution

Not all consumer dispute resolution takes place in the adversarial or quasi-adversarial context of a court or tribunal hearing. There are a number of industry-specific dispute resolution processes – for example, those provided by ombudsman services in the telecommunications and financial services industries – which can be effective mechanisms for providing consumers with redress.

While statutory consumer rights may not always be relevant to disputes brought to ombudsmen or other dispute resolution bodies, they often will be. The existence of a clear legislative basis for consumer rights, rather than rights which rely on the law of contract, will allow consumers to build stronger cases when bringing a matter to an ombudsman or other body. This may be a significant improvement to this important mechanism for redress.

Enforcement under the Australian Consumer Law

As the Federal Chamber of Automotive Industries (FCAI) noted, the state and territory tribunals and small claims courts are already operating effectively, but there is scope for improving their responsiveness to consumer disputes, raising the standards of the system to best practice.¹²⁹ Specifically, CCAAC considers that Australian governments should give consideration to the best way to harmonise, across jurisdictions, the dispute resolution processes available to consumers seeking redress.

CCAAC has not considered, in the course of this review, how best a nationally consistent dispute resolution system might be constructed to give consumers better access to redress when their rights under the implied terms have been breached. This is an area that merits further investigation in the future, after a national approach to consumer guarantees has been implemented.

Elsewhere in this paper, CCAAC has recommended that key aspects of the NZ model of ‘consumer guarantees’ be adopted in the ACL. It is worth noting that the consumer guarantees are accompanied by a successful tribunal system for dealing with consumer disputes. CCAAC considers that the NZ tribunal model may provide a useful basis for considering how to develop nationally consistent dispute resolution processes in Australia.

127 Queensland Courts, *Fees*, <http://www.courts.qld.gov.au/105.htm>, accessed 22 September 2009. From 1 December 2009 a number of Queensland tribunals will amalgamate into the Queensland Civil and Administrative Tribunal (QCAT).

128 Magistrates Court of Western Australia, *Magistrates Court Fees*, http://www.magistratescourt.wa.gov.au/files/Magistrates_Court_Fees.pdf, accessed 22 September 2009.

129 FCAI, page 15.

Whatever system is settled on, the consumer guarantees under the ACL should be enforceable by consumers by means of a uniform, simple, timely and low-cost mechanism for resolving disputes and achieving redress.

Findings

- 7.1 All consumers should have access to low-cost dispute resolution mechanisms, such as tribunals or small claims processes, to facilitate timely resolution of claims.
- 7.2 Ideally, State and Territory governments should develop a consistent approach for all existing small claims court and tribunal processes so as to give consumers a consistent and distinct pathway to access dispute resolution mechanisms for statutory consumer guarantees in all Australian jurisdictions, and in New Zealand.
- 7.3 In doing this, State and Territory governments should review existing dispute resolution processes in each jurisdiction, together with New Zealand, and develop consistent and uniform approaches to procedural issues including:
 - uniform claim limits;
 - uniform remedies and order making powers; and
 - uniform filing fees and administration processes.
- 7.4 State and Territory governments, in conjunction with the ACCC and ASIC, should develop and publish clear, consistent information about consumers' options for resolving disputes about statutory consumer guarantees.
- 7.5 As part of the development of administrative arrangements in the enforcement of the Australian Consumer Law, state and territory consumer agencies with the ACCC and ASIC, should identify emerging consumer issues concerning statutory consumer guarantees and coordinate regulatory and enforcement responses to these issues.

Findings (continued)

- 7.6 To clarify consumer understanding and business obligations about statutory consumer guarantees, Australian governments should agree to include a provision in the Australian Consumer Law which reflects the existing section 53 of the *Trade Practices Act 1974*, and particularly paragraph 53(g) which prohibits:
- a false or misleading representation concerning a:
 - statutory consumer guarantee;
 - any other condition, warranty or guarantee; or
 - right or remedy; and
 - a false or misleading representation concerning any actual or implied requirement by a person to pay for a contractual right equivalent to a statutory consumer guarantee or any other statutory right or benefit that person may enjoy.
- 7.7 Given the limited application of paragraph 53(g) to date in preventing retailers and manufacturers/importers from misrepresenting consumer rights under Part V, Divisions 2 and 2A of the *Trade Practices Act 1974*, a consistent body of law around the Australian Consumer Law will need to be developed. CCAAC considers that the law would benefit from the pursuit and publication of test cases under the new provisions in the Australian Consumer Law recommended in finding 7.6.
- 7.8 CCAAC views the role of the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and state and territory agencies as continuing to enforce the false, misleading and deceptive conduct provisions of the new Australian Consumer Law as they apply to the new statutory consumer guarantees. Any issues relating to enforcement and dispute resolution for consumer guarantees should be considered as part of the review of enforcement and administrative arrangements under the intergovernmental agreement for the Australian Consumer Law.
- 7.9 CCAAC considered various ways to encourage compliance by retailers and manufacturers. These include imposing criminal liability, imposing liability for civil pecuniary penalties, providing consumer agencies with the power to secure compensation in respect of any systemic failure to honour guarantees and providing consumer agencies with power to secure redress for consumers in respect of a failure to honour a statutory guarantee at the discretion of the relevant consumer agency. CCAAC considers that it would not be appropriate for consumer agencies to apply civil or criminal penalties in respect of failures to honour consumer guarantees. CCAAC favoured an approach whereby consumer agencies would have the power to take action on behalf of consumers to enforce their statutory consumer guarantees, where such an action would encourage compliance with the law.

PART III — OTHER ISSUES

8 EXTENDED WARRANTIES AND CONSUMER CHOICE

Key points

- There has been significant growth in the sale of extended warranties over recent years.
- In regulating the sale of goods and of extended warranties for those goods, there is currently interaction between different laws – the TPA, the ASIC Act and the Corporations Act.
- The general lack of awareness on the part of consumers between statutory implied terms and extended warranties, may be contributing to the growing uptake of extended warranties
- Consumers commonly purchase extended warranties for whitegoods and large electrical items because they intend to keep them for a longer period and they provide consumers with ‘peace of mind’.
- There is a need for disclosure of clear information to consumers about how their statutory rights interact with other warranties, including extended warranties.

NATURE OF EXTENDED WARRANTIES

An extended warranty, broadly defined, is an agreement offered by a retailer, manufacturer or third party to cover against the risk that the product will develop faults during the term of the warranty. Consumers are required to enter into a contract separate from the contract of sale for the product, and to pay a separate price for the warranty. Generally, the warranty is acquired at the point of sale soon after the purchase of the underlying product. Extended warranties are offered for a wide range of products, including whitegoods, electrical and electronic goods, furniture and motor vehicles. The level of cover varies, but they would normally cover the repair of the underlying product, and may also provide for its replacement in certain circumstances.

Uptake of extended warranties

There has been a significant growth in the sale of extended warranties over recent years. Extended warranties are being widely offered for a range of products and many consumers are purchasing them, although details of the number of claims made by consumers under extended warranties are difficult to ascertain.¹³⁰ The NEIAT study revealed that 38 per cent

¹³⁰ CHOICE 2008, *Extended warranties project*, Final Report, page 16. Hereafter ‘CHOICE report’.

of a sample of consumers reported that they had purchased an extended warranty at some time.¹³¹

In 2008, the NSW Office of Fair Trading commissioned CHOICE to research the uptake of, cost of, and consumer experiences relating to, extended warranties. The research was conducted through surveys and 'mystery shopping'. The CHOICE report found that 97 per cent of consumers surveyed who knew what an extended warranty was had been offered one before, and one-third had been offered an extended warranty on more than five occasions.¹³²

Types of extended warranties

Extended warranties are of two types, although both are offered to consumers to help them manage the risks of product defects and faults for a certain period.

The first type of extended warranty is sold by a retailer at the same time that the goods are acquired. In this case, the warranty provider is the manufacturer or retailer of the product. This is not a contract of insurance but is likely to be a facility for managing financial risk. It is likely to fall within the 'incidental product' exemption in section 763E of the *Corporations Act 2001*.

The second type of extended warranty is either sold by: the retailer/dealer as an agent or intermediary on behalf of an insurer; or a third party warranty provider who is not involved in the supply of the product covered by the warranty. This type of extended warranty is a financial service since they are either contracts of insurance or contracts for managing financial risk. Accordingly, these extended warranties are subject to the consumer protection provisions of Part 2, Division 2 of the ASIC Act, rather than Part V of the TPA.

An extended warranty of this nature is a financial product and any advice given in relation to acquiring it is a financial service subject to the implied terms regime in section 12ED of the ASIC Act. Section 12ED provides that in every contract for the supply of financial services by a person to a consumer, there is an implied warranty that the services will be rendered with due care and skill. If the consumer, expressly or by implication, makes known to the person providing the financial service any particular purpose for which the service is required or the result that they desire to achieve, there is an implied warranty that the service will be reasonably fit for that purpose.

EXISTING COMMONWEALTH LEGISLATION

Trade Practices Act 1974

Whilst the implied terms in the TPA (in Part V, Division 2) do not apply to financial products and financial services, the TPA prevents businesses from providing false, misleading or deceptive information to consumers, for instance, when selling an extended warranty.¹³³

131 NEIAT study, page 63.

132 CHOICE report, page 11.

133 Sections 52 and 53 of the TPA.

Further, businesses are not allowed to exclude, modify or restrict any of the statutory implied terms, for instance, through an express or extended warranty.¹³⁴

Regulating the sale of extended warranties

In terms of regulating the sale of goods and of extended warranties for those goods, there is currently interaction between different laws: the TPA, the ASIC Act and the Corporations Act. For instance:

- the sale of the goods is subject to the statutory implied terms in the TPA (Part V, Division 2);
- pre-contractual advice and negotiations surrounding the sale of the goods are subject to the consumer protection provisions of the TPA (Part V, Division 1);
- pre-contractual advice and negotiations surrounding the sale of an extended warranty that is not an 'incidental product' are subject to the requirements in the Corporations Act; and
- pre-contractual advice and negotiations in relation to the sale of an extended warranty that is a 'financial product' under the ASIC Act are subject to the consumer protection provisions of that Act (Part 2, Division 2).

The application of several Acts to such contracts also attracts the jurisdiction of several consumer agencies. For instance, if an extended warranty is a financial product and a retailer has provided false or misleading advice to a consumer in relation to the warranty, such as the extent of its coverage and additional benefits over the statutory warranties, then the ACCC may have a role with regard to the pre-contractual advice provided. In addition, ASIC may also have a role in relation to that same advice, but more specifically to the extended warranty.¹³⁵

CONSUMERS AND EXTENDED WARRANTIES

Consumer awareness

The various types of warranties that exist (statutory, manufacturer's voluntary and extended warranties) have the potential to create confusion for consumers, as well as for suppliers. If a consumer does not understand their statutory rights and the differences between the different warranties, they might purchase an extended warranty at high cost that offers few benefits.

The CHOICE report found that whilst 95 per cent of consumers surveyed understood the idea of an extended warranty, only half of them understood the idea of a statutory warranty.¹³⁶ This general lack of awareness can be seen as contributing to the growing uptake of extended warranties by consumers.

134 Section 68 of the TPA.

135 Sections 52 and 53 of the TPA; Part 2, Division 2 of the ASIC Act.

136 CHOICE report, page 16.

In addition, a consumer's lack of awareness of the scope of the manufacturer's warranty accompanying the product may also influence their decision to purchase an extended warranty even though the existing manufacturer's voluntary warranty could already provide adequate protection. For instance, the NEIAT study found that 86 per cent of consumers surveyed experienced product faults within the manufacturer's warranty period.¹³⁷ The CHOICE report also revealed that 74 per cent of consumers surveyed never used the extended warranty they purchased.¹³⁸

The NEIAT study also found that issues of concern for consumers in relation to extended warranties, included uncertainty regarding the identity of the extended warranty provider and the scope of coverage in relation to the exclusions, restrictions and additional charges.¹³⁹ Consumers have little opportunity to understand the precise details of the extended warranty at the point of sale. Some extended warranties that are sold do not provide comprehensive or essential coverage.¹⁴⁰ Consumers are often frustrated when they do not obtain what they expect from an extended warranty.¹⁴¹

Further, the NEIAT study found that consumers are often not informed about the price of an extended warranty until the point of sale, which can also be confusing for consumers when making decisions as to the value of purchasing an extended warranty.¹⁴²

The sale environment

Apart from a lack of awareness of their statutory rights, consumers may feel pressured into purchasing an extended warranty at the point of sale. There is evidence that some consumers feel the sales tactics used by retailers make it hard to refuse to purchase an extended warranty and can create a sense of fear about the reliability of the product if an extended warranty is not purchased.¹⁴³ For instance, the CHOICE survey found that over one-third of consumers surveyed who purchased extended warranties felt some pressure to do so¹⁴⁴, whilst 5 per cent felt a lot of pressure.¹⁴⁵

In addition, some comments by retailers may create concerns in consumers that products, and in particular expensive items, could break down and that repair costs may be high. For example, the NEIAT study cites evidence of consumers being informed by retailers that the product could break down after the manufacturer's warranty expired and incur high repair costs compared with the cost of the extended warranty.¹⁴⁶ Other consumers felt that sales staff were keen to push for the purchase of an extended warranty without setting out what the warranty would and would not cover.¹⁴⁷ The retailer or salesperson may have a financial incentive to 'push' for the purchase of an extended warranty, if they receive commission or remuneration from the sale.

137 NEIAT study, page 40.

138 CHOICE report, page 13.

139 NEIAT study, page 64.

140 ACCC supplementary submission.

141 NEIAT study, page 64.

142 *ibid.*

143 *ibid.*, page 62.

144 CHOICE report, page 12.

145 CHOICE report, page 48.

146 NEIAT study, page 62.

147 *ibid.*, page 64.

Further, a salesperson providing misleading or inadequate information could also affect a consumer's decision to purchase an extended warranty. For instance, the CHOICE report found 8 out of 14 traders had provided incorrect information about the extended warranty offered to a 'mystery shadow-shopper'.¹⁴⁸

Purchasing extended warranties

Consumers may decide to purchase extended warranties for various reasons, including concerns about the reliability of the product and the potential for high costs of repair. The NEIAT study found that extended warranties are commonly purchased by consumers for 'peace of mind', particularly in relation to expensive items.¹⁴⁹ The CHOICE report revealed that of the surveyed respondents who purchased an extended warranty, 69 per cent did so believing that repair costs would be too high, 24 per cent believed the manufacturer's warranty would not provide enough cover, whilst 6 per cent believed the product was not reliable or that the statutory warranties would not provide sufficient protection.¹⁵⁰

The 'peace of mind' offered by extended warranties is particularly attractive for consumers who experience greater vulnerability and may have difficulties enforcing their statutory rights. For instance, the NEIAT study found that consumers from culturally and linguistically diverse communities and those over the age of 65 have a higher uptake of extended warranties than other groups.¹⁵¹

The NEIAT study also found that extended warranties are commonly purchased for whitegoods and large electrical items because these are products which consumers intend to keep for a longer period.¹⁵² Over the past two years, 8.5 million consumers experienced faulty products in relation to whitegoods, electronic goods or mobile phones.¹⁵³

Extended warranties usually provide consumers with a single point of contact when a problem arises, and consumers are not left to decide whether to approach the retailer or manufacturer. This certainty and convenience is another appealing feature of extended warranties. Further, a lack of clear understanding on how statutory implied terms operate may help explain the continued uptake of extended warranties by consumers.

Using extended warranties

There is evidence that consumers who buy extended warranties are satisfied with the purchase. The NEIAT study found that consumers who purchased and successfully used an extended warranty believed they were good value, with their product being replaced or repaired at no cost to them.¹⁵⁴ However, NEIAT also found that 32 per cent of consumers who purchased an extended warranty received no redress.¹⁵⁵

148 CHOICE report, page 8.

149 NEIAT study, page 63.

150 CHOICE report, page 11.

151 NEIAT study, page 61.

152 *ibid.*

153 NEIAT study, page xii.

154 NEIAT study, page 62.

155 *ibid.*, page 64.

ACCC complaints data reveal that a total of 255 complaints and inquires were made to the ACCC regarding extended warranties between January 2006 and September 2008.¹⁵⁶ Of these, 32 per cent related to inadequate remedies under the extended warranty, where in a number of cases repair and not replacement was offered, even with repeated failures. The next most common complaint type (31 per cent) related to inadequate support and service from the warranty provider, whilst 14 per cent of complaints related to the defects covered by the extended warranty. In several cases the warranty did not cover accidental damage or accessories which came with the product such as batteries and headphones. The least common complaint type (11 per cent) related to potentially misleading or deceptive conduct on the part of a salesperson.

Motor vehicles

The Australian Automotive Aftermarket Association (AAAA) suggested that the terms 'warranty' or 'extended warranty' are occasionally used by manufacturers and retailers, particularly of motor vehicles, to tie consumers to the their services. The AAAA noted that '[s]o called "extended" warranties ... have restrictive provisions on the choice of repairer and parts used, and tie customers to long term service schedules with the car dealer'.¹⁵⁷

It is suggested that the 'extended warranties' that are offered for free with the sale of new motor vehicles are not, in fact, warranties at all, but are service contracts binding consumers to particular authorised vehicle servicers. The warranties are expressed in such terms as to make consumers unwilling to seek the services of independent repairers or use generic parts for fear of losing their rights under the service contracts. The AAAA suggests that this might be remedied by prohibiting the use of the term 'warranty' to avoid its being used in connection with what are, in effect, insurance policies or service contracts.¹⁵⁸

OVERSEAS MODELS

United Kingdom

In the UK, the Supply of Extended Warranties on Domestic Electrical Goods Order 2005 imposes obligations on suppliers of domestic electrical goods who sell extended warranties for those goods, to provide certain information to the consumer before the extended warranty can be sold.

Mandatory disclosure

The Order applies to domestic electrical goods which are goods connected to an electricity supply, or which are battery-powered and used for domestic purposes (excluding watches, jewellery or fixed installations).¹⁵⁹ It applies to extended warranties where consumers enter into a contract to purchase cover against the costs for repair or replacement of a domestic electrical good in the event of a breakdown. The Order extends to anyone who offers to supply a consumer with an extended warranty, whether directly or on behalf of a third party, at the same time as supplying a domestic electrical good to a consumer or immediately after the sale of the good.

156 The data come from the ACCC's supplementary submission.

157 AAAA, page 7.

158 *ibid.*, page 5.

159 Supply of Extended Warranties on Domestic Electrical Goods Order 2005, Article 1(3).

Where the price of the goods to which an extended warranty relates is displayed in store, the Order imposes an obligation on suppliers to display, adjacent to the price of the goods and in a clear and legible manner, the price and duration of the extended warranty and to make it clear that the purchase of the warranty is optional.¹⁶⁰ The supplier is also required to provide consumers with leaflets containing 'further relevant information', which includes information:

- about the consumer's statutory rights in relation to the goods purchased;
- that extended warranties may be available from others;
- that household insurance may extend to the goods purchased;
- that an extended warranty does not have to be purchased at the same time as the goods;
- about the consumer's cancellation and termination rights; and
- regarding whether the extended warranty offered will be terminated where a claim is made.¹⁶¹

Where the price of a domestic electrical good is displayed in store, the Order requires the supplier to provide a written quotation for an extended warranty upon a consumer's request or before the purchase of a warranty, where the request or purchase is made at the same time as or immediately after the sale of the good to which the warranty relates (unless the price of the warranty is £20 or less).¹⁶² Where the price of the domestic electrical good is advertised in a newspaper, magazine or promotional publication, the Order requires the supplier to also publish the price and duration of the extended warranty adjacent to the price of the goods in a clear and legible manner (unless the supplier has sold less than £10,000 worth of extended warranties over the past year).¹⁶³

Failure to comply with the disclosure requirements in the Order could result in civil proceedings being brought against the supplier.

Cooling off and cancellation rights

Apart from imposing disclosure requirements on suppliers of domestic electrical goods who also sell extended warranties for those goods, the Order also provides consumers with certain cancellation and termination rights after purchasing an extended warranty.

The Order imposes an obligation on these suppliers to provide consumers of an extended warranty for a domestic electrical good with the right to cancel an extended warranty within 45 days of purchasing the warranty and to provide a full refund for the price paid on the warranty where there has been no claim.¹⁶⁴ Consumers also have the right to terminate the extended warranty, whether or not a claim is made, any time after the 45-day cooling-off period and are entitled to receive a pro-rata refund of the price paid for the warranty.¹⁶⁵

160 *ibid.*, Article 3(1).

161 *ibid.*, Articles 1 and 3.

162 *ibid.*, Article 3.

163 *ibid.*, Article 4.

164 *ibid.*, Article 8.

165 *ibid.*

Further, the supplier is required to inform a consumer who has purchased such a warranty of their cancellation and termination rights, at least 20 days before the end of the 45-day cooling-off period (unless the warranty costs £20 or less).¹⁶⁶

United States

In the United States, the Magnuson-Moss Warranty Act (MMWA) imposes an obligation on warranty providers to fully and clearly disclose to consumers, in simple and readily understood language, the terms and conditions of written warranties. This disclosure requirement may include a warranty provider having to disclose:

- their identity and contact details;
- the period of the warranty;
- what properties or parts of the product are covered and not covered by the warranty;
- what the provider will do if there is a defect, malfunction or product failure;
- what the consumer's obligations are under the warranty and the expenses they must bear;
- whether there are any informal dispute settlement procedures available to the consumer;
- a brief description of the legal remedies available to the consumer; and
- the exceptions and exclusions of the warranty.

The disclosure requirements in the MMWA are aimed at improving the adequacy of information that is available to consumers, to prevent the deception of consumers and to improve competition in the marketing of consumer products.¹⁶⁷

THE CHANGING CONSUMER ENVIRONMENT

Uptake of extended warranties

The need for consumers to purchase extended warranties may not be justified in some cases when considered alongside their basic statutory rights. In other instances, however, CCAAC acknowledges that extended warranties can provide additional protections to consumers. The greater degree of certainty of redress and 'peace of mind' consumers experience from purchasing extended warranties are the main drivers for uptake. It also appears that consumers are generally satisfied with purchasing extended warranties. In this respect, some extended warranties can offer benefits and provide value for consumers. Accordingly, CCAAC believes that consumers should continue to have the option to purchase extended warranties in addition to the statutory consumer guarantees and any manufacturer's warranties.

¹⁶⁶ *ibid.*

¹⁶⁷ MMWA, section 2302.

Awareness raising

CCAAC is concerned that many consumers who purchase an extended warranty are not aware that they have basic rights under the law and that these rights may already provide adequate protection. For instance, the NEIAT study revealed that consumers who are purchasing extended warranties are doing so in the belief that their statutory rights and manufacturers' voluntary warranties offer little certainty in terms of redress.

The NEIAT study also found that when consumers are better informed about their existing statutory rights, their views of extended warranties change and they feel they are paying for something which they already have a right to expect.¹⁶⁸ This affirms the finding that enhancing consumer awareness may be all that is currently required to assist consumers when making choices to purchase extended warranties.

CCAAC considers that clarifying the law through statutory consumer guarantees and developing national guidance to improve consumer awareness could, in many cases, reduce the belief that extended warranties need to be purchased. The LCA supported the idea of improving consumer awareness of their rights under the law and extended warranties through education and publicity, rather than modifying the law.¹⁶⁹

In addition, CCAAC believes that Australian consumer agencies should more actively monitor the sale of extended warranties and investigate possible breaches of the law. This would include pursuing cases where false or misleading representations are made to consumers, requiring them to pay for a right which they already have under the law.

Information disclosure

CCAAC has concerns that many consumers are not making informed choices when purchasing extended warranties and this could be due to factors such as the type and nature of information being provided and the ability to consider the purchase at the point of sale.

There was some support, from both industry and consumer groups, for disclosure of clear information to consumers of their statutory rights at the point of sale and how they interact with other warranties, including extended warranties.¹⁷⁰ However, disclosure at the point of sale would provide little opportunity for many consumers to absorb the information and reconsider purchasing an extended warranty. Nevertheless, there are currently prescriptive information disclosure requirements in place for extended warranties which are financial products under the Corporations Act.¹⁷¹

On balance, CCAAC considers that the combination of clarification of the law and national guidance should suffice to inform consumers without imposing disclosure obligations, and additional compliance costs, on business. The LCA was also of the view that compulsory disclosure requirements are inappropriate due to the cost burdens they would place on businesses.¹⁷²

168 NEIAT study, page 63.

169 LCA, page 3.

170 Australian Industry Group, page 2.

171 Parts 7.7 and 7.9 of the Corporations Act.

172 LCA, page 3.

CCAAC is of the view that issues related to extended warranties should be revisited as part of the review of enforcement and administrative arrangements under the Intergovernmental Agreement for the Australian Consumer Law. In addition, CCAAC finds that the ACCC should consider a closer examination of the extended warranties market, in particular, the way in which extended warranties are sold.

Cooling-off periods

CCAAC received submissions from consumer groups, such as CHOICE and CALC, that consumers often feel pressured at the point of sale to purchase extended warranties.¹⁷³ Some support was received for the idea of providing cooling-off periods and cancellation rights for extended warranties.¹⁷⁴

Some of the benefits of a cooling-off period include allowing consumers time to reconsider their purchase away from the point of sale, and the opportunity to 'shop around' for alternatives. However, CALC was not in support of cooling-off rights on the basis that they could encourage consumers to purchase extended warranties without informed consideration, knowing that they could later cancel the purchase.¹⁷⁵ CALC also submitted that, in practice, consumers are less likely to cancel a purchase once made, and that some retailers may use the cooling-off period as a means to promote the sale of extended warranties.¹⁷⁶ There may also be the risk that consumers, after purchasing the extended warranty, are unaware of their cancellation rights.

There is little supporting evidence available to CCAAC to justify the introduction of a mandatory cooling-off period and cancellation right for extended warranties. There is also little evidence that consumers are likely to 'shop around' for alternative extended warranties after buying a product. Further, in most cases the only extended warranty on offer is that which is available at the point of sale, limiting competition in this market.

CCAAC also notes that the Corporations Act currently provides a cooling-off period of 14 days for extended warranties that are also financial products.¹⁷⁷

Overall, CCAAC considers that effective education campaigns to raise consumer awareness of their statutory rights and how they interact with extended warranties will alleviate some of the pressures that consumers may feel at the point of sale to purchase extended warranties.

Motor vehicles

CCAAC notes that the ACCC has considered the issue of motor vehicle dealers' and manufacturers' use of the terms 'warranty' and 'extended warranty'. For example, the ACCC's *Consumer Express* newsletters of October 2002 and April 2005¹⁷⁸ inform consumers about their rights in relation to the servicing of new motor vehicles. The ACCC has consistently put forward the position that, provided certain conditions are met, consumers

173 CHOICE, page 4; CALC, page 7.

174 CHOICE, page 6.

175 CALC, page 9.

176 *ibid.*

177 Section 1019A of the Corporations Act.

178 Available at www.accc.gov.au/content/index.phtml/itemId/815654, accessed 25 September 2009.

are free to have their vehicles serviced wherever they choose without voiding their warranty rights.

To suggest that, on the contrary, an 'extended warranty' offered by a new vehicle dealer or manufacturer will be voided if the consumer has the vehicle serviced other than by the dealer may be likely to constitute a false or misleading representation contrary to section 52 and paragraph 53(g) of the TPA.¹⁷⁹ While CCAAC is sympathetic to the AAAA's submission regarding the misleading use of the term 'warranty', it considers that the best remedy for this concern lies in the TPA's misleading conduct provisions.

Regulation and enforcement

It was submitted to CCAAC that the interaction between extended warranties and the existing laws (the ASIC Act, the Corporations Act and the TPA), and between the different enforcement roles of the consumer agencies, ASIC and the ACCC, is complicated and can be confusing.¹⁸⁰

To ensure that consumers who purchase extended warranties are adequately protected, CCAAC believes that Australia's consumer agencies should have arrangements in place to deal with extended warranty complaints.

Findings

- 8.1 Extended warranties are, in part, often marketed to provide 'peace of mind' to consumers over and above statutory implied terms and the manufacturer/importer's voluntary warranty. However, the evidence presented to CCAAC suggests that extended warranties may not be justified in some cases. This is especially the case when retailers and manufacturer/importers are required to remedy faults or replace goods under the existing statutory regime.
- 8.2 Greater consumer awareness of statutory consumer guarantees should, in many cases, reduce consumer perceptions about the need for extended warranties where they are not justified. In preparing consistent national information and guidance for consumers on statutory consumer guarantees, Australia's consumer agencies should include information about extended warranties and how these interact with statutory consumer guarantees.
- 8.3 CCAAC proposes that the issues around extended warranties be considered as part of the review of enforcement and administrative arrangements under the Intergovernmental Agreement for the Australian Consumer Law, or earlier if required. In addition, CCAAC finds that the ACCC should consider a closer examination of the extended warranties market, in particular, the way in which extended warranties are sold.

179 The Queensland FTA has specific provisions (in Part 3, Division 5) about the use of extended warranties and associated terminology.

180 Dr Nottage, page 6.

9 LEMON LAWS

Key points

- There is little empirical evidence to suggest that ‘lemons’ are a common feature of the market for motor vehicles or any other market in Australia.
- Most problems which drive consumers to complain about lemons are, in fact, the result of a lack of incentive for retailers and manufacturers to deal adequately with consumer complaints.
- The introduction of clear statutory consumer guarantees will increase that incentive and ensure that consumers have appropriate access to redress, particularly if dispute resolution mechanisms have a special facility for dealing with motor vehicle issues.
- There is no need for a lemon law in Australia at this time. However, this is an area which policy makers should consider in the future.

IDENTIFYING LEMONS

What is a ‘lemon’?

The idea of the ‘lemon’ as an undesirable or unsatisfactory thing has been in common use for at least one hundred years, particularly in the United States. The *Oxford English Dictionary* quotes *The Saturday Evening Post* of 20 February 1909 complaining that ‘[t]he wheel goes around; wherever the little indicator at the point of the pin stops, there is your prize – or your lemon’.

In its colloquial use, a lemon is considered to be something that is completely useless or without value. It is something that will not function as intended and, when bought, returns to its owner more grief than utility.

However, when applied particularly to new motor vehicles, the use of the word ‘lemon’ often signifies the buyer’s frustration with the product and the support services of the dealer or manufacturer. The anecdotal evidence presented to CCAAC and previous inquiries into lemon laws suggests that the pejorative ‘lemon’ is often invoked where a vehicle is defective but not irreparable, yet the dealer has repeatedly failed to repair it.

For example, Mr Guden tells of a faulty vehicle that was not repaired satisfactorily by the dealer in 33 attempts over the course of 28 months, yet was repaired on the first attempt by another repairer. Depending on the nature of the fault, it would have been tempting to call the vehicle a lemon after 33 failed attempts at repair. However, that the fault was repaired ‘for good’ after the thirty-fourth attempt indicates that the vehicle was not inherently useless or without value. If a fault is capable of remedy but is not in fact remedied by a particular

repairer, this may indicate not that the vehicle is a lemon but that the repairer does not have appropriate incentives or skills to repair the fault.

In CCAAC's view, the term 'lemon' should be understood to mean only those products that simply will not function as intended, for reasons that are beyond the expertise of a reasonable repairer to remedy. A lemon is product which is not only unmerchantable but, further, defies attempts to be made merchantable by repair. Nothing a repairer may reasonably be expected to do can turn a lemon into a well-functioning motor vehicle.

While a repeated failure to repair a particular product may be evidence that the product is a lemon, it may alternatively indicate that the repairer has insufficient incentives to repair the product. A more expansive understanding of the term would blur any distinction that might be made between a genuine lemon and a product that is simply faulty.

Prevalence of lemons

Popular concern about lemons in the motor vehicle industry first came to prominence in the 1960s and 1970s, prompting both George Akerlof's famous article about the 'market for lemons'¹⁸¹ with an accompanying wave of academic discussion about information asymmetry, and, more practically, a wave of 'lemon laws' in the United States by way of response.

Submissions from the motor vehicle industry suggest that the number of new vehicles sold in Australia which might be called lemons has declined significantly since that time. As the Motor Trades Association of Australia (MTAA) notes,

Approximately 1,000,000 new motor vehicles are sold in Australia every year. Of those, approximately one third are sold in New South Wales: a jurisdiction that, through the operation of its Consumer Trader and Tenancy Tribunal (CTTT), is able to make a determination on a vehicle in terms of its being of 'merchantable quality' or as being 'fit for purpose' ...

In the period from 2004/2005 to 2007/2008, some 410 applications were made to the CTTT with respect to seeking a determination as to the 'merchantable quality / fit for purpose' nature of new motor vehicles sold in NSW ... Of that 410, only three vehicles – or 0.0003 per cent of all vehicles sold in that period – were deemed by the CTTT to not be of merchantable quality.¹⁸²

Of course, these figures may not definitively represent the incidence of the supply of lemon vehicles in NSW. Not every consumer sold a lemon will go to the CTTT, and any number of lemon claims may be settled to the consumer's satisfaction before they reach any tribunal.

However, the fact that such a small number of vehicles are ultimately the subject of a finding of unmerchantable quality by a tribunal may indicate both that the number of lemons supplied to consumers is small, and that the law is operating effectively by providing appropriate incentives for retailers and manufacturers to address consumer concerns in relation to faulty motor vehicles.

181 Akerlof, G 1970, *The market for "lemons": Quality uncertainty and the market mechanism*, *The Quarterly Journal of Economics*, vol. 84, no. 3 (Aug 1970), pages 488-500.

182 MTAA, page 2.

There is little empirical evidence to suggest that lemons are a common feature of the market for motor vehicles in Australia. The Royal Automobile Club of Victoria (RACV) supports a motor vehicle lemon law, however, notes that it is 'not aware of any quantitative data to state the number of defects in new vehicles that are not satisfactorily repaired'.¹⁸³

The RACV referred to previous market research, which found 20 per cent of respondents had 'issues' with new vehicle purchases, and of those who experienced issues only 13 per cent were dissatisfied with the process of addressing the issues. Issues identified as contributing to consumer dissatisfaction included:

- difficulties contacting and returning to the motor vehicle dealer;
- the dealer being reluctant to fix the problem, or indicating that the consumer has no right to have a problem rectified;
- an excessive length of time before problems are fixed;
- problems persisting after a dealer has claimed to have fixed them; and
- unexpected and unreasonable charges associated with fixing problems.¹⁸⁴

Many of these issues may indicate not that a vehicle is a lemon, but rather that motor vehicle dealers may not have proper incentives to repair vehicles in an effective and timely matter. However, even if it were accepted that a lemon law might address all these issues, the incidence of the problem appears to be relatively small. RACV estimates that around 1 per cent of motor vehicle purchases might require some dispute resolution.¹⁸⁵

Significance of the problem

While the incidence of lemons in the market for motor vehicles may be small it is generally acknowledged that, where it does occur, the supply of lemons can cause significant detriment to consumers.

Motor vehicles do not represent an insignificant cost for Australian consumers. In most cases, a vehicle will be the second-most significant purchase a consumer is likely to make, after a house. Once bought, the motor vehicle is likely to play a very important part in the consumer's life, and may be used every day.

Because of the significance of the purchase – both in terms of its price and of the utility gained from it – the purchase of a faulty vehicle may be particularly difficult to bear. Once a consumer takes possession of a motor vehicle, they are entitled to rely on it being available for their use. If the vehicle is unavailable because it is being repaired frequently and at length, this will cause significant inconvenience and hardship.

Consequently, even if a very small proportion of motor vehicles sold in Australia are lemons, by any measure, the detriment occasioned by their sale may be significant.

183 RACV, page 3.

184 *ibid.*, pages 3-4.

185 *ibid.*, page 4.

Used goods

Chapter 6 of the Issues Paper asked whether a lemon law might most usefully apply to new goods, used goods, or both. It is well recognised that different standards of ‘merchantability’ are likely to apply to new and used goods, particularly in the market for motor vehicles.

Some jurisdictions adopt ‘bright line’ tests in relation to used motor vehicles. For example, section 318 of the *Property Agents and Motor Dealers Act 2000* (Qld) implies a statutory warranty that used vehicles will be free from defects at the time of taking possession and for the warranty period; and that defects reported during the warranty period will be repaired free of charge. The warranty period starts at the time of taking possession and ends when the vehicle travels 5,000km or three months after taking possession in the case of ‘class A’ warranted vehicles, or when the vehicle travels 1,000 km or one month after taking possession in the case of ‘class B’ warranted vehicles.¹⁸⁶

Academic analysis of lemons has focused on used vehicles. However, faults in a product as sold might be more easily identified (and responsibility more readily allocated) for new goods.

Used goods cannot be expected to be in factory condition when they are sold, and the quality which consumers should reasonably expect of the goods will vary according to price and other attributes of the product. New goods can be expected to meet the manufacturer’s specifications in every respect, but used goods cannot, and two used products which were identical when produced may vary widely in terms of current performance.

In order to make an informed decision about the purchase of a used product – and thereby to avoid disappointment – it is essential that the consumer have access to as much information about the product as possible. Veda Advantage proposes that non-personal vehicle data should be made more widely available, in order that consumer information products on second-hand vehicles might be developed.¹⁸⁷ While such proposals could be costly to implement, there is merit in considering ways to improve the information available to consumers about used goods of all kinds.

MOTOR VEHICLE LEMON LAWS

Lemon laws in other jurisdictions

Motor vehicle lemon laws have existed in all US states for several decades. As noted previously, this may well have been a response to widespread concerns about the prevalence of lemons in the market for motor vehicles at that time.

However, the various states have enacted different lemon laws, leading to a lack of uniformity of consumer rights in this area. What appears to be the most common form of lemon law identifies a lemon as a vehicle where the manufacturer is incapable, within a reasonable period, of correcting any defects that substantially impair the use, value or safety of the vehicle. Rules about how long constitutes a ‘reasonable period’, and what remedies are available, vary markedly from state to state.

¹⁸⁶ Section 314 *Property Agents and Motor Dealers Act 2000* (Qld).

¹⁸⁷ Veda Advantage, page 2.

Application of lemon laws to other goods

It is not immediately obvious that a lemon law need be restricted in its application to motor vehicles. For example, Dr Nottage considers that discussion of lemon laws has focused on motor vehicles 'due to the high cost of cars, potential for fraudsters in used-goods markets, and simply Akerlof's famous article. Prime candidates in Australia would be high-value whitegoods and consumer electronics, both new and used.'¹⁸⁸

Industry-specific regulation

To introduce a lemon law for motor vehicles and not for other consumer goods would give consumers a different level of protection or mechanism for redress in relation to one class of products compared to others.

The 2008 PC *Review of Australia's Consumer Policy Framework* considered in detail the nature and value of industry-specific consumer regulation. The PC found that industry-specific regulation may be appropriate 'where the risk of consumer detriment is high and/or the quality of the product or service is difficult to establish prior to purchase'.¹⁸⁹ However, the PC also made it clear that industry-specific regulation should avoid being overly prescriptive, and that the need for any such regulation should be considered in the light of the provisions of the generic consumer law.

While it has been noted that the detriment occasioned by the supply of a lemon motor vehicle may be particularly significant for those consumers who buy them, the evidence in submissions indicates that the risk of detriment is low. The RACV indicated that perhaps 1 per cent of new motor vehicle sales risk generating disputes between consumers and dealers.¹⁹⁰

Further, it is not necessarily the case that the quality of motor vehicles is much more difficult to establish prior to purchase than the quality of other products. As the LCA noted, consumers are able to undertake additional enquiries before purchasing a motor vehicle, to satisfy themselves that a particular vehicle is of the standard they are seeking.¹⁹¹

Additionally, particularly in respect of used motor vehicles, a number of organisations offer a pre-purchase vehicle inspection service, which may be an appropriate mechanism for informing consumers about the quality of the cars they purchase. While positing the need for increased disclosure about the previous uses of used motor vehicles, Veda Advantage noted that consumers currently have access to:

- generic advice on the performance of a make and model;
- an assessment of a car's current running condition through mechanical inspection;
- a REVS [Register of Encumbered Vehicles] check to verify encumbrances; and

188 Dr Nottage, page 6.

189 PC 2008, vol. 2, page 81.

190 RACV, page 4.

191 LCA, page 8.

- Government vehicle products, providing information limited to the period of registration within that state.¹⁹²

No evidence was submitted to CCAAC indicating that information asymmetries in relation to new motor vehicles are insurmountable.

Notwithstanding the significance of the purchase of motor vehicles for Australian consumers, and the detriment that can arise when a motor vehicle is out of service, it is not clear that problems with motor vehicles should necessarily be subject to a greater degree of regulation than problems with other consumer products, provided the generic consumer law deals with those problems adequately.

ADEQUACY OF THE GENERIC LAW

Merchantable quality and fitness for purpose

The utility of the term ‘merchantable quality’ is discussed elsewhere in this report, and it is suggested that the term be replaced with ‘acceptable quality’ and defined in more detail in the ACL. That is, CCAAC proposes that the NZ approach to guaranteed ‘acceptable quality’ in relation to consumer products be adopted.

Whatever the form, the merchantability provisions of the generic law apply to the sale of motor vehicles to consumers. The implementation of national consumer guarantees will reduce uncertainty for consumers as rights and remedies will both be provided for in the TPA.

To a significant extent, submissions received by CCAAC indicated that the implied terms found in the TPA and other legislation adequately encompassed the problem of lemons. Hunt & Hunt, for example, considered that ‘the existing statutory implied terms provide sufficient protection for consumers, and that introducing a new lemon law would be unlikely to add anything of significance to these terms’.¹⁹³ Hunt & Hunt suggested that the emphasis of any lemon law should be on ensuring consumers are properly informed about the extent of their rights.

Similarly, the LCA considered that existing protections are adequate, and that to introduce a lemon law ‘will likely add an unnecessary layer of regulatory burden and complexity ... [and] add to the cost and confusion in this area’.¹⁹⁴

Even those submissions most supportive of a lemon law indicated that the existing law does recognise lemons as failing to meet the standards required by the implied terms.¹⁹⁵ It appears, then, that calls for a lemon law are not driven by the inadequacy of the implied terms themselves in capturing lemons, but rather by concerns about the effectiveness of the implied terms regime as a mechanism for redress.

¹⁹² Veda Advantage, page 3.

¹⁹³ Hunt & Hunt, page 3.

¹⁹⁴ LCA, page 8.

¹⁹⁵ See, for example, RACV, pages 2-3; Royal Automobile Club of Queensland [RACQ], page 3.

Incentives to repair or replace

Clearly, there exist circumstances in which consumers of motor vehicles have difficulty in enforcing their contractual right to be supplied with a vehicle of merchantable quality. The example supplied by Mr Guden¹⁹⁶, of a vehicle returned to a dealer for repair 33 times without achieving a satisfactory outcome, is a telling illustration of this difficulty.

As noted in the Issues Paper, the lack of incentives for dealers to deal appropriately with a faulty vehicle is driven by the asymmetry of information between dealer and consumer. It may be that, in the case of latent vehicle faults, repairers will not feel moved to make the further examinations necessary to identify and repair the fault. It has been put to CCAAC that this situation may arise because there is insufficient clarity around consumer rights and, as the RACV noted, there is a lack of a clear process for consumers to follow when they identify faults in their vehicles.¹⁹⁷

Enforcement rights

Some submissions in support of lemon laws considered that while the existing implied terms did provide 'an option, [they] are costly and rely upon the vehicle's owner being able to mount a sufficiently strong case in support of a claim'.¹⁹⁸ The RACV noted several obstacles to achieving effective outcomes for consumers of lemons, based on there being no clear process to follow when claiming redress:

- difficulty in establishing the existence and cause of a vehicle's problems;
- the manufacturer being obliged only to repair the vehicle, rather than responding to a consumer's request for a refund or replacement vehicle;
- the respective responsibilities of dealers and manufacturers being unclear, leading to consumers being referred from one to the other; and
- the dispute resolution process being potentially 'lengthy and arduous'.¹⁹⁹

For these reasons, the RACV recommends the development of a dispute resolution process with binding outcomes, which might give consumers a clearer process for pursuing redress.

Chapter 7 of this report deals with the enforcement of consumer rights under implied contractual terms, and finds that consumers would benefit from a cheaper, timelier and more accessible mechanism for resolving disputes than the current system. The more inaccessible the dispute resolution mechanism, the less certain are the consumer's rights, whatever the law itself provides.

The measures contemplated in Chapter 7, to increase the availability of accessible tribunal mechanisms for resolving disputes about implied terms (or consumer guarantees), will go a long way to addressing concerns about motor vehicle lemons.

196 Mr Guden, page 1.

197 RACV, page 2.

198 RACQ, page 3.

199 RACV, page 2.

However, it cannot be denied that motor vehicles are a highly technical class of consumer product, and often require special expertise and diagnostic equipment to identify and analyse their faults. It follows that consumers who are supplied lemon motor vehicles may continue to face difficulties enforcing their rights even under a simplified enforcement regime.

The consumer guarantee regime in NZ is accompanied by both a general disputes tribunal and a specialist Motor Vehicle Disputes Tribunal (MVDT). Consumers are able to bring disputes about motor vehicle traders to the MVDT, which – through an informal hearing process – can make a decision about how best to resolve the dispute.

It is desirable, in CCAAC's view, that any dispute resolution system introduced to handle complaints related to consumer guarantees should have a special facility for dealing with motor vehicle disputes, to ensure that an appropriate level of expertise is brought to bear on consumer complaints about motor vehicles.

Reducing disputes

Ideally, the existence of specialist dispute resolution mechanisms for a motor vehicles tribunal would not just provide a more effective mechanism for resolving disputes, but would discourage disputes from reaching that stage at all. This would increase the incentive for dealers to examine vehicles thoroughly when a consumer suspects a fault, and for them to remedy the fault in the most appropriate manner as quickly as possible. This is the most appropriate way to ensure consumers get what they pay for when they buy motor vehicles, reducing the likelihood of consumer dissatisfaction and detriment.

A LEMON LAW FOR AUSTRALIA?

On balance, CCAAC considers that a case has not been made for the introduction of a lemon law in Australia, whether for new motor vehicles or more generically. Even the most enthusiastic supporters of lemon laws acknowledge that the current laws in respect of implied terms cover the supply to consumers of motor vehicle lemons. There is no evidence to suggest the implied terms themselves would benefit from the addition of an implied term dealing with lemons, whether in contracts for motor vehicles or in consumer contracts more generally.

The aspects of the current regime which appear most in need of change in order to address problems associated with lemons are the lack of clarity in the implied terms, uncertainty or lack of awareness about the law and the remedies available, and the inaccessibility of mechanisms for redress. These are the same chief difficulties associated with the application of implied terms to generic consumer products.

However, CCAAC recognises that motor vehicles constitute a special class of product. In particular, they are often the second most expensive purchase for consumers outside the family home. They may be particularly difficult for consumers to understand as compared with other consumer products, and when they fail they are likely to cause significantly more detriment to consumers than do other consumer products. For these reasons, it is appropriate that the dispute resolution and redress mechanisms for consumer guarantees create some uniform facility for dealing specifically with motor vehicle complaints.

Further, CCAAC believes that the introduction of consumer guarantees as statutory rights independent of the law of contract – as well as a move away from the somewhat archaic language of the current TPA provisions – will provide much-needed clarity for consumers dealing with motor vehicle lemons. Nevertheless, it may emerge that problems with motor vehicle lemons persist after the introduction of a new, clearer consumer guarantee regime. If evidence emerges over time to indicate that consumers continue to suffer as a result of the supply of motor vehicle lemons notwithstanding clarification of the law, it may be appropriate to reconsider the need for a lemon law at that time.

As Mr Griggs notes, '[t]he 'acceptable quality' definition [of] the *Consumer Guarantees Act 1993* (NZ) may well provide a starting point for consideration with this embellished by elements of time, cost and downtime'.²⁰⁰ CCAAC agrees that it is best to begin with a generic law governing 'acceptable quality', and consider at a later time whether the generic law may require industry-specific embellishments.

Findings

- 9.1 CCAAC does not consider the case for the introduction of a separate 'lemon law' for motor vehicles to have been made at this time. However, Australian governments should monitor the effectiveness of the national statutory consumer guarantees as they apply to motor vehicles, including gathering data about the number and nature of complaints and disputes about statutory consumer guarantees involving new and used motor vehicles.
- 9.2 The new national statutory consumer guarantees should cover new and used motor
- 9.3 Australian consumer agencies should provide clear, consistent information about the application of statutory consumer guarantees to motor vehicles, particularly about consumers' rights, businesses' obligations and the options for resolving disputes about statutory consumer guarantees as they relate to motor vehicles.
- 9.4 State and Territory governments should give active consideration to the appointment of specialist adjudicators and assessors to deal with disputes involving motor vehicles and statutory consumer guarantees.

200 Mr Griggs, page 3.

10 THE ONLINE ENVIRONMENT

Key points

- There has been strong growth in the use of the Internet as a means of retailing goods to consumers over recent years.
- Unique issues for consumers who purchase goods and services online include jurisdictional issues when goods are purchased from overseas, the inability to physically examine goods, payment security and limited after-sales support.
- The TPA and the state and territory FTAs generally provide the same protections for online transactions as are provided for other consumer transactions involving goods and services.
- Some overseas jurisdictions provide additional protections for online transactions, such as cooling-off periods. CCAAC does not consider that a case has been made, as yet, for online transactions to be subject to different laws compared to other transactions.

ONLINE SALES

Online transactions are continuing to grow in popularity as another channel for goods and services to be sold and purchased. For instance, in 2006, 5.9 million Australians were using the Internet to shop online, with transactions totalling over \$11 billion.²⁰¹ The Internet offers a convenient way for consumers to shop and to compare prices, brands and models at any time without having to physically visit a store. The Internet also gives consumers access to both domestic and international markets, as well as allowing consumers located in remote or regional areas to access goods and services not otherwise available to them locally.

Unique issues facing online sales

While online shopping offers benefits that include choice, convenience and variety, at the same time there are particular issues associated with online shopping which are not similarly faced by consumers shopping 'offline', in a store and in person.²⁰² Such issues include difficulties in identifying or contacting the supplier for pre-sale enquiries and after-sale support; the inability to physically examine goods; payment security; and privacy concerns.²⁰³ Consumers are often left to rely on information that is disclosed by the supplier on its website to answer queries such as suitability of the product or the refund policy about the goods or services.

201 AC Neilson Australia, *Aussies' online spending tops \$11 billion*, news release, 18 September 2006.

202 For a recent report on the additional risks and problems associated with obtaining redress see Office of Fair Trading 2007, *Internet shopping: An OFT market study*, London.

203 *ibid.* The most common barriers to online shopping for consumers relate to distrust in releasing credit card details and preference to physically examine items before purchasing.

The risks associated with online transactions present a difficulty not usually encountered with store purchases. Such risk is something that consumers balance against the convenience and other benefits of buying products over the Internet.

Overseas purchases

A significant advantage of using the Internet is that consumers have access to goods and services in the global market. However, as well as the other risks associated with online shopping in general, there is an additional level of complexity and risk. This may be evident when the supplier or its agent is not located or registered in Australia and enforcement challenges could occur.

For consumers, it can be challenging to resolve complaints about an overseas purchase. Depending on the choice of law, consumers in Australia may not enjoy the same protections they have for domestic purchases. Further, it can be complicated and costly for the consumer to obtain redress (refund, repair or replacement) where the supplier is located overseas.

EXISTING REGULATION

Trade Practices Act 1974

The definition of 'supply' under the TPA extends to online transactions, including online sales. The online supply of goods or services is not currently excluded from the existing statutory implied terms in the TPA.²⁰⁴ In other words, goods or services that are sold online are subject to the statutory warranties in Part V, Division 2 of the TPA, in the same way as offline in-store sales. The right to expect that the goods supplied will correspond with description, will be of 'merchantable quality' and will be fit for purpose applies to online purchases. Similarly, these statutory rights cannot be excluded, varied or restricted, irrespective of whether the sale occurs online or offline.²⁰⁵ Further, suppliers must not include information on their website which may be potentially false, misleading or deceptive, and therefore contrary to the TPA.²⁰⁶

However, goods or services that are not sold 'in the course of business' and lack commercial character, such as private sales, are not subject to the statutory implied terms regime, irrespective of whether the goods have been sold in-store or online.²⁰⁷

With respect to overseas purchases, the TPA prevents suppliers from being able to exclude any of the statutory implied terms through a choice-of-law clause or from substituting another country's law for the implied terms regime.²⁰⁸

Fair Trading Act 1999 (Vic)

Victoria's *Fair Trading Act 1999* contains provisions which require suppliers to disclose certain information to consumers prior to the conclusion of a non-contact sale, including

204 From a combined reading of sections 4 and 6 of the TPA.

205 Sections 68 of the TPA.

206 Section 52 and 53 of the TPA.

207 Sections 70, 71, 72 and 74 of the TPA.

208 Section 67 of the TPA.

online purchases.²⁰⁹ Specifically, the supplier is required to provide the following information to the consumer in a conspicuous and prominent manner in the sale agreement:

- the total price to be paid by the consumer, including any postal or delivery charges;
- any cancellation rights which the consumer has; and
- the name, business address and phone number of the supplier.²¹⁰

A supplier who fails to comply with these disclosure requirements may be guilty of an offence and will not be able to enforce the sale agreement against the consumer.²¹¹

If the sale agreement allows the consumer to cancel the sale within a cooling-off period, the Victorian FTA requires the period to be at least 10 days, starting from the day the consumer received the goods or the day the service contract was made.²¹² Where a consumer cancels the sale within the cooling-off period, the supplier is required to refund the price paid and the consumer is required to take reasonable care of the goods and arrange for the goods to be returned to the supplier.²¹³

Self-regulation

Online trading in Australia is subject to some degree of voluntary regulation and self-regulation in the form of business practices and standards set out in industry guidelines and industry codes.

The Australian Government has developed a best practice model, *The Australian Guidelines for Electronic Commerce*, that provides guidance to suppliers and consumers for transacting over the Internet.²¹⁴ The Australian Direct Marketing Association has also developed a voluntary code of practice, *Direct Marketing Code of Practice*, which in part protects the interests of consumers when transacting online.²¹⁵ Compliance with these is self-enforced by the industry.

PURCHASING ONLINE

Information on websites

The information which suppliers disclose on their website can play an important role in the purchasing decisions consumers make, including descriptions, photos, price, fees and charges, and the terms and conditions of the sale. It is not unusual, however, for websites to mislead consumers into believing that a product is of a particular description which it does not meet or can perform a specific function which it cannot, or to misrepresent that

209 Part IV, Division 3 of the Vic FTA.

210 Section 69 of the Vic FTA.

211 Section 70 of the Vic FTA.

212 Section 71 of the Vic FTA.

213 Section 73 and 75 of the Vic FTA.

214 Australian Treasury 2006, *The Australian guidelines for electronic commerce*, Canberra. Available at: <http://www.treasury.gov.au>.

215 Australian Direct Marketing Association 2006, *Direct Marketing Code of Practice*, Sydney. Available at: <http://www.adma.com.au>.

consumers have fewer rights than they do under the law (such as by excluding certain liabilities or remedies).²¹⁶ The statutory implied conditions of merchantable quality, correspondence with description and fitness for purpose are particularly important where online shoppers are unable to examine the good and may be unable to make pre-sale enquiries prior to purchasing, and therefore rely on the accuracy of any information that is provided.

Accordingly, clauses on websites which misrepresent the rights of the consumer or make misleading claims, not only distort the decision-making process for consumers, but could also potentially be in breach of the law.²¹⁷ Clauses which provide that sellers cannot ensure, and assume no responsibility for, the accuracy of the information on a website may similarly constitute a breach.²¹⁸

Consideration should be given to requiring online retailers to display notices informing consumers about statutory consumer guarantees in a similar form to that recommended in Chapter 6 of this Report. This would ensure that online retailers are treated in the same way as other retailers in respect of the requirement to display notices at the point of sale.

Awareness of statutory rights

With the increasing use of the Internet for shopping, it is important that consumers are aware of what rights they have when it comes to purchasing goods or services online. In particular, it is important that consumers are aware that they have similar rights when buying online to those they have when shopping in person in a store. That is, online consumers can expect that goods bought over the Internet will correspond with their description, be of merchantable quality and comply with the other statutory implied terms.

Based on the NEIAT study which found evidence of a general lack of awareness amongst consumers of the statutory warranties, there is no reason to believe that this general lack of awareness is not similarly faced by online shoppers. Whilst it was submitted during consultations as an indication of awareness of rights that there are online consumers who cancel sales and return defective goods²¹⁹, this does not necessarily indicate that online shoppers are any different to offline shoppers in relation to awareness of statutory warranties and remedies.

After-sales assistance

Accessing after-sales support can be a particular challenge facing consumers who have purchased a product online. In contrast, after-sales assistance is more readily accessible to offline consumers who can return the product in question to the original retailer. Some websites also contain the supplier's complaints handling process designed to help resolve

216 ACCC 2004, *Shopping online: rights and obligations when trading over the internet*, Canberra. See also sections 68 and 68A of the TPA.

217 Sections 52 and 68 and paragraph 53(g) of the TPA.

218 Sections 68 of the TPA.

219 Hunt & Hunt, page 3.

consumer concerns.²²⁰ However, some suppliers disclose their refund, exchange and/or cancellation policies on their websites.

The absence of the supplier's (or its agent's) contact details and access to after-sales support for consumers poses unique problems for online purchases compared to most offline sales. Further, where the supplier is not registered in Australia and does not have a local agent, it poses particular difficulties for consumers who want to access after-sales assistance.

Existing guidance

CCAAC notes that consumer protection agencies in Australia have published information about online trading for consumers and suppliers, as well as information on the avenues available to consumers if they have problems. For instance, the ACCC has published information on its website to make businesses and consumers more aware of their rights and obligations when trading online, and outline whom consumers can turn to for consumer protection advice. The ACCC has also been monitoring Australian trading websites and investigates appropriate cases.²²¹

Within Australia, there are also websites such as 'Scamwatch'²²² dedicated to protecting consumers from cyberscams and online unfair trading practices. Consumers may need to contact the responsible consumer protection regulator in the other country for assistance. The International Consumer Protection and Enforcement Network (ICPEN), with which the ACCC has assumed a lead role, is a global network of more than 40 countries focused on enhancing consumer protection by increasing cooperation between consumer agencies across international borders.²²³ ICPEN has set up a database for consumers to report online shopping complaints where the online supplier is from another country and the dispute cannot be resolved.²²⁴

OVERSEAS MODELS

Europe and the United Kingdom

Businesses in the UK and other Member States of the European Union that sell goods or services online to a consumer may be subject to regulations relating to electronic commerce and/distance selling. Businesses must comply with the information disclosure requirements in both electronic commerce and distance selling regulations.

Electronic commerce

In the EU, the *Electronic Commerce Directive (2000/31/EC)* (EC Directive) creates a basic legal framework for Member States with regards to electronic commerce. The EC Directive sets out transparency requirements for online advertising and principles for contracting online. It aims, amongst other things, to generate consumer confidence when transacting online by

220 The ACCC reported receiving complaints relating to online trading with issues such as warranty and refund problems. ACCC 2004, *Shopping online: rights and obligations when trading over the internet*, Canberra.

221 For instance, the ACCC conducted a survey of the top 1,000 Australian consumer websites in 2003 to ascertain how well popular websites recognise consumers' rights.

222 www.scamwatch.gov.au.

223 In August 2009, the ACCC was appointed as the new ICPEN president.

224 More information about ICPEN is available at www.econsumer.gov.

clarifying the rights and obligations of businesses. The EC Directive is given legal effect through the Electronic Commerce (EC Directive) Regulations 2002 (EC Regulations). The EC Directive, and therefore the EC Regulations, apply to businesses which advertise or sell goods or services online, including online shopping, that are of a commercial nature.

The EC Regulations requires a business to disclose certain information to consumers, including its name, business address and email address, and the price of the product as well as any associated taxes and delivery costs.²²⁵ Before consumers place an order, businesses are required to disclose, in a clear, comprehensive and unambiguous manner, the process for concluding the contract, how consumers can correct mistakes when placing an order, and the terms and conditions of the sale.²²⁶

A business failing to comply with the EC Regulations could result in the consumer being able to walk away from the sale and legal sanctions being imposed (such as a 'stop now' order on the business).²²⁷

Distance selling

The EU's *Distance Selling Directive (97/7/EC)* (DS Directive) provides minimum protections to consumers in Member States in relation to distance contracts. The DS Directive is implemented by the Consumer Protection (Distance Selling) Regulations 2000 (DS Regulations). The DS Regulations apply to distance contracts, which are contracts for the sale of goods or services between a supplier and consumer using distance communication (and without the simultaneous physical presence of the consumer and supplier).²²⁸ The DS Regulations do not apply to the sale of food, beverages or other goods intended for everyday consumption, or to the provision of certain accommodation, transport, catering or leisure services.²²⁹

The DS Regulations require minimum information to be disclosed to consumers by suppliers in distance sales.²³⁰ The kinds of information required to be disclosed, in a clear and comprehensible manner, include:

- the identity and address of the supplier;
- main characteristics and price (including all taxes and any delivery costs) of the goods or services;
- arrangements for payment, delivery or performance;
- the right for the consumer to cancel the contract and the obligation for the supplier to bear the cost of returning the goods in the event of a cancellation; and
- that substitutes will be provided where the goods or services are unavailable.²³¹

225 Electronic Commerce (EC Directive) Regulations 2002, regulation 6.

226 *ibid.*, regulation 9.

227 *ibid.*, regulation 15.

228 Consumer Protection (Distance Selling) Regulations 2000, regulations 3 and 4.

229 *ibid.*, regulation 6.

230 *Distance Selling Directive (97/7/EC)*, Articles 4 and 5.

231 Consumer Protection (Distance Selling) Regulations 2000, regulation 7.

In addition, before the contract is concluded, or at latest at the time goods are delivered or services are performed, consumers must be provided with the following information:

- the process and conditions for cancelling the contract;
- the supplier's address where complaints can be forwarded to; and
- any after-sales services and guarantees.²³²

Suppliers are also required to provide consumers with a written confirmation of the above information.²³³

The DS Regulations allow consumers to cancel the contract within seven days of receiving the goods or of the service contract concluding. However, where the supplier has failed to disclose all of the required information above to the consumer, the cancellation period is extended to three months.²³⁴ Upon cancelling the contract, the supplier must refund the price paid to the consumer within 30 days of receiving the cancellation notice.²³⁵ Consumers are required to take reasonable care of the goods and to restore them to the supplier.²³⁶

The DS Regulations also require suppliers to perform the contract within 30 days of an order being placed, and to refund the price paid within 60 days of the order being made where the order is unavailable (unless the contract allows substitutes to be provided).²³⁷

Canada

Canada has a sales contract template in place which is available for provincial governments to adapt and apply in their own jurisdiction in relation to regulating online sales. The *Internet Sales Contract Harmonization Template* sets out the minimum information which online suppliers of goods or services are required to disclose in sales contracts.²³⁸ The provinces of Alberta and Manitoba, for instance, have adopted parts of the Template and applied them in their consumer protection laws.²³⁹ Although each province determines the scope of the Template as it applies to their jurisdiction, including what types of businesses or products it should apply to, the requirements in the Template generally apply to the online supply of goods or services that are primarily used for personal, family or household purposes.²⁴⁰

The minimum information required to be disclosed by suppliers to consumers, in a clear and comprehensible manner, before entering into an Internet sales contract, includes:

- the supplier's contact details;
- a fair and accurate description of the goods or services being sold, including any relevant technical or system specifications;

232 *ibid.*, subregulation 8(1)

233 *ibid.*, regulation 8.

234 *ibid.*, regulations 11 and 12 (and regulation 13 for exclusions).

235 *ibid.*, regulation 14.

236 *ibid.*, regulation 17.

237 *ibid.*, regulation 19.

238 The *Internet Sales Contract Harmonization Template* can be accessed at www.strategis.gc.ca

239 Alberta's Fair Trading Act (SA 1998); Manitoba's The Consumer Protection Act (C2000).

240 Sections 1 and 2 of the *Internet Sales Contract Harmonization Template*.

- an itemised list of the price of the goods or services being sold and any associated costs payable by the consumer, including taxes and shipping charges;
- a description of any additional charges that could apply, such as custom duties;
- the total price of the contract or any periodic payments under the contract;
- the terms, conditions and method of payment;
- the date the goods will be delivered or services will commence;
- delivery arrangements, including the mode of delivery, deliverer's identity and place of delivery;
- the supplier's cancellation, return, exchange and/or refund policies; and
- any other limitations or conditions which may apply to the contract.²⁴¹

Suppliers are also required to provide consumers with an express opportunity to accept or decline the contract, and to correct any errors, before entering into the contract.²⁴²

The Template allows consumers to cancel an Internet sales contract within seven days of receiving a copy of the contract where the supplier has disclosed any of the above minimum information, or within 30 days of entering into the contract if the supplier has failed to provide a copy of the contract to the consumer.²⁴³ In addition, consumers may cancel an Internet sales contract any time before delivery of the goods or the commencement of services if there has been no delivery or commencement within 30 days of the specified delivery or commencement date (or within 30 days of entering into the contract if no delivery or commencement date has been specified).²⁴⁴

Where a consumer cancels an Internet sales contract, the Template requires the supplier to refund any price paid within 15 days of the cancellation.²⁴⁵ Consumers must return the goods to the supplier unused and in the same condition they were delivered to them, whereby the supplier must accept the goods and bear reasonable costs for their return.²⁴⁶

CCAAC's view

The regulatory impact of allowing consumers a cooling-off period for online sales is difficult to determine at this stage. CCAAC considers that providing for a cooling-off period may allow consumers to seek a refund when they change their mind about a purchase, as opposed to when they have genuine issues with the quality or performance of a product. Accordingly, CCAAC recommends that the Government continue to monitor international developments in this area with a view to making amendments to the law if it becomes evident that a cooling-off period is required for online transactions.

241 *ibid.*, paragraph 3(1)(a).

242 *ibid.*, paragraph 3(1)(b).

243 *ibid.*, subsection 5(1).

244 *ibid.*, section 5.

245 *ibid.*, subsection 9(1).

246 *ibid.*, section 9.

ONLINE AUCTIONS

Online 'auction' websites provide a virtual marketplace for buyers and sellers to trade new and used items. The low operating fees and the opportunity to reach a wide potential customer base are an attractive feature for suppliers whilst for consumers, the wide variety of items that are available, often at bargain prices, have made online auctions an increasingly popular way to shop.²⁴⁷

Existing regulation

Although the existing statutory implied terms in the TPA apply to goods and services sold online, they do not, however, extend to auctions which take place over the Internet, in much the same way as they do not extend to auctions which take place offline and in person.²⁴⁸

Auction websites must also be careful not to publish information that could be potentially false or misleading, for example, about descriptions and suitability.²⁴⁹

In Europe, the DS Regulations do not apply to distance contracts, including online sales contracts, which have been concluded at auction.²⁵⁰

Existing guidance

Some auction websites do provide safe trading guidelines and have buyer protection or complaint-handling policies in place to help resolve consumer concerns. Consumer protection agencies in Australia have published guidance and other education materials to help improve consumer awareness of the risks associated with online auctions and to improve sellers' awareness of their obligations.²⁵¹

Auctions are discussed further in Chapter 11.

ONLINE CONSUMER PROTECTION

Consultations revealed support for the protections which consumers are afforded under the law for in-store purchases to equally apply to online sales, and for all suppliers to be subject to the same obligations. However, CCAAC received mixed responses on the issue of whether additional regulation of online sales was required in Australia.

The LCA was of the view that no separate or additional regulation was required for online sales.²⁵² Hunt & Hunt noted that consumers are aware that shopping online carries a degree

247 AC Neilson Australia, *Aussies' online spending tops \$11 billion*, news release, 18 September 2006.

248 Apart from the implied term in section 69 of the TPA which does not exclude goods sold at auction.

249 Sections 52 and 53 of the TPA.

250 *Consumer Protection (Distance Selling) Regulations 2000*, regulation 5.

251 For example, CAV, *Online Shopping and Consumer Protection*, [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Computers_Internet_Discussion_Papers/\\$file/onlineshopping.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Computers_Internet_Discussion_Papers/$file/onlineshopping.pdf), accessed 2 October 2009; NSW Office of Fair Trading, *Internet shopping*, http://www.fairtrading.nsw.gov.au/Consumers/Ways_to_shop/Internet_shopping.html, accessed 2 October 2009; Qld Office of Fair Trading, *Online shopping*, <http://www.fairtrading.qld.gov.au/online-shopping.htm>, accessed 2 October 2009.

252 LCA, page 12.

of risk not encountered with retail shopping, which is the risk that accompanies the convenience of using the Internet.²⁵³ It was also suggested that such risks associated with online sales warranted consumers receiving additional protection.

Whilst Hunt & Hunt expressed support for national compulsory disclosure requirements for online transactions, similar to the disclosure requirements in Victoria's non-contact sales agreement provision, it did not support the introduction of a cooling-off period and cancellation rights, which do exist for non-contact sales in Victoria.²⁵⁴

Hunt & Hunt submitted that cooling-off periods with cancellation rights were essentially equivalent to allowing consumers to return products and to obtain a refund simply for a change of mind, which in contrast is not a right consumers automatically have if they purchased the product from a store.²⁵⁵ Hunt & Hunt also believed that providing cooling-off periods would not only place an unreasonable burden on business but could also act as a disincentive for businesses to sell products online.²⁵⁶

Hunt & Hunt suggested disclosure requirements as an alternative to a cooling-off period for online sales, for instance, requiring websites to provide information on the rights consumers have under the law and publishing warnings of the risks associated with shopping online.²⁵⁷

In relation to online auctions, the Australian Industry Group was of the view that where a consumer is unable to inspect the goods, more protection is needed.²⁵⁸

CCAAC's view

Whilst CCAAC acknowledges that shopping online presents unique risks for consumers which do not similarly arise when shopping in-store, this should not be a reason for online consumers to receive any less protection compared to consumers who shop offline. However, at the same time CCAAC has not received enough evidence to support the conclusion that online purchases require additional protection to purchases made offline and in-store, including the need for information disclosure requirements and/or cancellation rights.

CCAAC considers that there is no justification for consumers to be provided with a cooling-off period and a right under the law to withdraw from purchases made online for 'change of mind' which consumers who have made similar purchases in-store do not have. There is no evidence that consumers require more time to consider or reconsider a purchase made over the Internet. At a broader level, there is no justification for allowing consumers to cancel contracts for a 'change of mind', regardless of whether the purchase was made online or in-store. The national statutory consumer guarantees are concerned with providing basic minimum statutory protections to consumers, which does not include a right under the law to a refund for a 'change of mind'.

253 Hunt & Hunt, page 3.

254 *ibid.*, pages 3-4.

255 *ibid.*, page 4.

256 *ibid.*

257 *ibid.*

258 Australian Industry Group, page 3.

However, CCAAC notes that some online suppliers, such as airline, accommodation and events service providers, may have (voluntary) refund or exchange policies in place which allow for a 'change of mind' in certain circumstances. These services appear to be the most popular items purchased online by consumers.²⁵⁹

There is evidence that Australians are making repeat purchases online. For instance, of the 5.9 million Australians who were shopping online in 2006, over half of these were making repeat purchases.²⁶⁰ This repeat purchasing behaviour indicates that consumers are generally satisfied with their online shopping experience and that additional regulation is not necessary.

While CCAAC believes that up-to-date contact details of suppliers, and their after-sales assistance processes, should be clearly disclosed to all consumers, this information should apply equally to online and offline sales. However, with regards to online sales, this could present enforcement challenges where the supplier is not registered or does not have an agent in Australia. This challenge could make any disclosure requirement difficult to regulate.

Whilst CCAAC does not consider there is a case for introducing a separate or different law for online sales, Australian governments and consumer agencies should monitor the effectiveness of the national statutory consumer guarantees regime as it applies to online sales, including gathering data on the number and nature of consumer complaints in relation to online purchases.

Australia's consumer agencies should also provide a clear and consistent message to both consumers and suppliers that the statutory consumer guarantees equally apply to online sales of goods and services. Further, agencies should actively monitor information being published on websites by traders which are accessible to Australian consumers, and investigate potential actions for false, misleading or deceptive representations.

Finding

- 10.1 Online transactions should be covered by the national statutory consumer guarantees in the same way as in-store transactions.

259 AC Neilson's *Online Consumer Report*, September 2006.

260 AC Neilson Australia, 'Aussies' online spending tops \$11 billion, news release', 18 September 2006.

11 EXCLUSIONS AND LIMITATIONS

Key points

- The TPA and the FTAs include provisions for liability to be limited in respect of the supply of recreational services. CCAAC considers that the ACL will provide uniformity in respect of the limitation of liability for recreational services and should allow limitation of liability only in respect of activities that are ‘inherently risky’.
- CCAAC considers that the existing law limiting the ability of suppliers to contract out of statutory implied conditions and warranties should be retained.
- The TPA includes exemptions to the requirement for services to be fit for a purpose that a consumer makes known to a supplier in respect of services of engineers and architects. CCAAC does not consider that there is adequate justification for these exemptions and they should not apply in respect of a consumer guarantees regime.
- Historically, implied conditions and warranties did not apply to auctions. As online auctions are often merely an alternative sales channel for consumer goods and services, CCAAC considers that the consumer guarantees should apply to online auctions but not to traditional auctions that are conducted via electronic means.
- CCAAC considers that consumer guarantees should apply to all consumer goods and services, including electricity and gas supplies.

LIMITATION FOR RECREATIONAL SERVICES

Trade Practices Act 1974

Section 68B of the TPA includes a limitation of liability in relation to supply of recreational services. Specifically, a corporation is entitled to exclude, restrict or modify:

- the application of warranties (outlined in section 74) to the supply of recreational services;
- the exercise of a right conferred by section 74 in relation to the supply of recreational services; or
- any liability of the corporation for a breach of a warranty implied in section 74 in relation to the supply of recreational services,

provided the exclusion, restriction or modification is limited to liability for death or personal injury (subsection 68B(1)).

The term ‘recreational services’ is defined in subsection 68B(2) to mean services that consist of participation in:

- a sporting activity or a similar leisure time pursuit; or
- any other activity that:
 - involves a significant degree of physical exertion or physical risk; and
 - is undertaken for the purposes of recreation, enjoyment or leisure.

This section was inserted into the TPA in 2002 following national reforms to negligence laws. The intention of the section – as outlined in the Explanatory Memorandum to the Bill²⁶¹ which introduced section 68B – was to:

permit self assumption of risk by individuals who choose to participate in inherently risky activities, and [to] allow them to waive their right under the TPA to sue the business providing the activity, should they suffer personal injury as a consequence of the service provider’s failure to supply the services with due care and skill.

State and territory legislation

Three other jurisdictions – NSW, Victoria and the NT – include provisions in their FTAs to limit liability in relation to the supply of recreational services. A fourth – SA – recently passed legislation which includes the ability for suppliers of recreational services to limit liability in some situations. Across the jurisdictions, the provisions are all broadly similar but there is some variation, including in the definition of recreational services.

A summary of the provisions in each jurisdiction is provided below.

New South Wales

Fair Trading Act 1987 (NSW)

Subsection 40M(3) of the NSW FTA – which prohibits the application of the implied terms provisions from being excluded or modified – notes that the section is subject to section 5N of the *Civil Liability Act 2002* (NSW).

Civil Liability Act 2002 (NSW)

Section 5N of the NSW *Civil Liability Act 2002* allows that a term of a contract for the supply of recreation services may exclude, restrict or modify liability that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill (subsection 5N(1)). The term of the contract must be to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at their own risk (subsection 5N(3)). However, liability cannot be excluded if it is established (on the balance of probabilities) that the harm resulted from a contravention of a provision of a written law of NSW or the Commonwealth that establishes specific practices or procedures for the protection of personal safety (subsection 5N(6)).

²⁶¹ Trade Practices Amendment (Liability for Recreational Services) Bill 2002.

New South Wales (continued)

'Recreation services' is defined in subsection 5N(4) as services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity. 'Recreational activity' is further defined in section 5K to include:

- any sport (whether or not the sport is an organised activity);
- any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

Victoria

Fair Trading Act 1999 (Vic)

Subsections 32N(1) and (2) of the Victorian FTA are drafted similarly to subsection 68B(1) of the TPA. However, section 32N includes further qualifications above those in the TPA.

As well as the restriction that the exclusion only applies if it is limited to liability for death or personal injury (paragraph 32N(2)(b)), the exclusion also only applies if:

- the term contains the prescribed particulars and is in the prescribed form (or is exempted from these requirements under section 32NA) (paragraph 32N(2)(c));
- if there is a prescribed form for the term, the supplier has not made a false or misleading statement as to a material particular in or in relation to the term (paragraph 32N(2)(d)); and
- the term was brought to the attention of the purchaser prior to the supply of the recreational services (paragraph 32N(2)(e)).

Further, subsection 32N(3) prevents an exclusion applying where an act or omission, that resulted in the breach of the implied term, was done (or omitted to be done) with reckless disregard for the consequences (with or without consciousness).

The definition of 'recreational services' in subsection 32N(4) is identical to the definition used in the TPA.

Northern Territory

Consumer Affairs and Fair Trading Act (NT)

Subsection 68A(1) of the NT CAFTA is to the same effect as subsection 68B(1) of the TPA.

However, as well as being limited to liability for death or personal injury (paragraph 68A(1)(d)), the exclusion must be disclosed to the person entering into the contract for the recreational services in such a manner that the person should be aware of the general effect of the exclusion and has a reasonable opportunity to consider whether or not to enter into the contract on that basis (paragraph 68A(1)(e)). The disclosure may be in writing (for example, prominent signage or written notices handed to the person), verbally (for example, asking the person if they understand and accept the effect of the exclusion) or by a combination of the two (subsection 68A(2)).

The definition of 'recreational services' in subsection 68A(3) is identical to the definition used in the TPA.

South Australia

Statutes Amendment and Repeal (Fair Trading) Bill 2009 (SA)

The Bill inserts new section 74H into the SA FTA which allows a supplier to exclude, restrict or modify a warranty implied in a contract for the supply of recreational services if:

- the exclusion, restriction or modification is limited to liability for any personal injury suffered by the consumer or another on whom or on whose behalf the consumer is acquiring the services (a third party consumer) (paragraph 74H(2)(a));
- the term contains the prescribed particulars and is in the prescribed form (paragraph 74H(2)(b));
- the term was brought to the attention of the consumer prior to the supply of the services (paragraph 74H(2)(c));
- the consumer has agreed to the term in the prescribed manner (paragraph 74H(2)(d));
and
- a statement containing any other information prescribed by regulation is made available to the consumer in accordance with the requirements prescribed by regulation (paragraph 74H(2)(e)).

The supplier cannot exclude liability for damages for any significant personal injury (personal injury that is 'not nominal, trivial or minor') suffered by the consumer (or third party consumer) if it is established that the reckless conduct of the supplier caused the injury.

South Australia (continued)

Subsection 74H(7) defines 'reckless' conduct to be where the supplier is aware, or should reasonably have been aware, of a significant risk that their conduct could result in personal injury to another and engages in the conduct despite the risk and without adequate justification.

The definition of 'recreational services' in subsection 74H(7) is identical to the definition used in the TPA.

Background to the provisions

As noted above, modification of the usual operation of section 74 of the TPA for recreational activities came about because of the civil liability reforms of 2002, which were originally intended to be uniform across all jurisdictions. This uniformity did not eventuate and, as is clear from the summary of provisions above, there are differences in the way the reforms were implemented. This creates a number of anomalies in the application of the various provisions and their interaction with the TPA.

The civil liability reforms were based on the idea that those undertaking risky recreational activities should undertake some responsibility for their choices. In all States, under the civil liability reforms, there is no liability for materialisation of an 'inherent risk', although this is in the context of potential negligence proceedings.²⁶² 'Inherent risks' are defined as risks which cannot be excluded by the exercise of due care and skill. It is arguable that these risks could not have been the subject of a negligence action in any event.

However, the civil liability reforms go further than this and in some jurisdictions restrict or minimise liability of those involved in dangerous recreational activities. Case law so far suggests that the categorisation of activities as 'dangerous' or 'inherently risky' is the most difficult question. Among consumers, this will almost always be a subjective determination, and it is unlikely that they will be in a position to know whether or not they have access to redress in any given situation prior to undertaking the activity. In this sense, the idea that consumers might make an informed choice about recreational activities, and the risks they are willing to bear, is unrealistic.

It has been suggested that gross negligence should not be able to be excluded from the operation of section 74. The report of the expert panel on the Review of the Law of Negligence (the Ipp Report) on which the civil liability reforms were based did not mention gross negligence at all. In Victoria, there is no ability to exclude gross negligence, and this is noted in the standard warning which must be given to consumers for exclusions to apply.

Further, it is argued that the definition of 'recreational activity' in the TPA is too broad (although it is significantly narrower than the NSW definition). In its submission to the Ipp Review, following the introduction of the Bill but prior to the section's introduction, the ACCC expressed concern with the proposed provision.²⁶³ It highlighted the fact that the

262 See, for example, *Civil Liability Act 2002* (NSW), section 51; *Civil Liability Act 2003* (Qld), section 16; *Civil Liability Act 1936* (SA), section 39; *Civil Liability Act 2002* (WA), section 5P; *Wrongs Act 1958* (Vic), subsection 55(3). Inherent risks are defined as risks which cannot be avoided by the exercise of due care and skill.

263 ACCC 2002, submission to the principles-based review of the law of negligence.

very broad definition of recreational services in section 68B encompasses activities (for example, swimming, dancing and aerobics) which would not commonly be regarded as 'inherently risky'.

The LCA outlined these two issues in the context of the Trade Practices Amendment (Liability for Recreational Services) Bill 2002:

[The Ipp Report] reviewed the relevant Bill ... and recommended that the right to exclude liability should be limited to "obvious risks", and be only in respect of recreational activities involving a "significant degree of physical risk". The Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) raised concerns that the scope of the exemption provided by the Bill may be too wide and did not contain appropriate safeguards.

The Senate Economics Legislation Committee also reviewed the Bill before it was passed. ... The Democrats and Labour [sic] senators in particular were critical of the ability of the Bill to provide "unlimited waivers... including those cases involving gross negligence" and the fact that "recreational activities" were defined in such a way as would include activities not involving any significant degree of inherent physical risk.

To ensure a timely response, given the perceived urgency of the public liability insurance "crisis", the majority of the Senate Economics Committee recommended the Bill be enacted. This recommendation, however, was provided on the basis that "a close watching brief be maintained in relation to the operation of the Act, when it becomes law, with a view to further amendment ... should the need arise."²⁶⁴

As the Issues Paper indicated, the terms of reference of this review do not encompass consideration of civil liability reform more generally.²⁶⁵ However, at a minimum, CCAAC considers that the ACL should include a single national approach to the limitation of liability for recreational services, including a consistent definition of 'recreational services'. Further, given the stated intention of section 68B (outlined in the Explanatory Memorandum extracted above), CCAAC considers that the definition of recreational services is too broad and should be limited to cover only 'inherently risky' activities.

OPTIONAL LIMITATION OF LIABILITY

Contracting out

Existing provision

Subject to specific exceptions, suppliers are unable to contract out of their obligations under the statutory implied terms regime in the TPA. Section 68 of the TPA provides that a term or clause in any contract is void if it purports, or has the effect of, excluding, restricting or modifying any of the statutory implied terms in Part V, Division 2 of the TPA, or the

²⁶⁴ LCA, page 11.

²⁶⁵ See, for recent summaries of the reforms that have occurred, Australian Government 2006, *Available and affordable: Improvements in liability insurance following tort law reform in Australia*, and Australian Government 2004, *Reform of liability insurance law in Australia*.

supplier's liability for breaching any of the implied terms. This means the supplier is unable to enforce a term in a contract that seeks to exclude, restrict or modify any of the terms implied by Part V, Division 2 of the TPA.

Under the statutory consumer guarantees regime

No direct comments were made in submissions in relation to section 68 of the TPA.

CCAAC considers that a provision equivalent to section 68 should be included in the statutory consumer guarantee regime. The statutory consumer guarantees aim to provide basic and minimum consumer protections which all consumers are generally entitled to expect and receive when purchasing goods and services. CCAAC considers that suppliers should not be able to exclude, restrict or modify these basic protections and their associated liability. As a general principle, suppliers should not be allowed to contract out of an obligation to guarantee to consumers that goods or services will be of acceptable quality, be fit for purpose or correspond with a description, or that a provider of services will exercise due care and skill.

Limiting liability

Existing provision

Section 68A of the TPA provides that section 68 of the Act does not prevent a supplier from including a term in a contract that limits their liability for breaching a statutory implied term (apart from the implied terms of title, encumbrance and quiet possession). This is, however, subject to several requirements.

Only suppliers of goods or services that are not ordinarily acquired for personal, domestic or household use or consumption may limit their liability.²⁶⁶ Suppliers of goods can only limit their liability to replace goods, repair goods, pay for replacement costs and/or repair costs. Suppliers of services can only limit their liability to the re-supply of the service or re-supply costs.²⁶⁷ In addition, suppliers are unable to rely on a 'limitation of liability' clause if it is unfair or unreasonable for them to rely on that term.²⁶⁸ The TPA provides guidance to courts in determining whether reliance on a limitation of liability clause of a contract is fair or reasonable.

Under the statutory consumer guarantees regime

CCAAC received submissions that took differing positions in relation to section 68A of the TPA. Dr Luke Nottage submitted that section 68A is problematic in that there is little by way of case law which clarifies what is a 'fair or reasonable' reliance, or how the provision interacts with the current definition of 'consumer' under section 4B of the TPA:

The biggest problem is that it [section 68A] has been added due to an expansive preliminary definition of 'consumer' in TPA s4B – in particular, the latter's coverage of most transactions where each contract price is (currently) less than \$40,000. These provisions reveal a distinctive Australian bias favouring the protection of 'small

266 Subsection 68A(1) of the TPA.

267 Paragraph 68A(1)(a) of the TPA.

268 Subsection 68A(2) of the TPA.

business', which may extend to large inter-firm deals and which is actually of debatable merit for individual consumers.²⁶⁹

The LCA indicated support for the retention of section 68A to limit supplier liability for business certainty:

[T]he ability for the supplier to limit its liability in relation to the supply of goods or services is crucially important in ensuring sufficient certainty in business transactions. The inability to control a business' exposure in relation to potentially unlimited losses (such as for loss of profit or other consequential losses) may result in significant increase in the price for goods or services, and may also mean that the supply of certain goods or services will no longer be viable.²⁷⁰

The LCA also commented on the interaction between section 68A and the definition of 'consumer' currently in section 4B:

This can produce an odd result in that suppliers are unable to limit their liability in relation to goods or services which are clearly acquired by businesses for business use, simply because the underlying good is of a kind ordinarily acquired for personal use.²⁷¹

Whilst section 68A of the TPA provides additional certainty and flexibility for suppliers, it offers less certainty for consumers. The statutory consumer guarantees will set out each of the remedies with respect to each of the guarantees for both goods and services. This will provide greater certainty for consumers, as well as for suppliers, on avenues for redress.

Accordingly, CCAAC believes that the new approach to remedies within the consumer guarantee regime will mean that a provision equivalent to section 68A of the TPA is unlikely to be required. For example, it may be the case that a repair, replacement or re-supply of services may be a remedy that is only available to consumers for certain guarantees. In addition, this approach will reduce uncertainty for suppliers and consumers, as issues about what is 'fair and reasonable' will be avoided.

However, CCAAC recognises the interaction currently existing between the definition of 'consumer' (section 4B) and section 68A of the TPA. Therefore, whether a provision equivalent to section 68A should be part of the statutory consumer guarantees regime, and if so in what form, is dependent on what the agreed definition of 'consumer' is for the consumer guarantees.

SPECIFIC INDUSTRIES

Exemption for architects and engineers

Subsection 74(2) of the Act implies into contracts a warranty that services will be fit for a purpose that a consumer makes known to the supplier. Services provided by architects and

269 Dr Nottage, pages 6-7.

270 LCA, page 10.

271 *ibid.*

engineers are specifically excluded from being subject to this implied warranty. State and territory legislation includes similar exclusions for architects and engineers.

The Australian Institute of Architects indicated that the exemption is motivated by:

- issues with obtaining insurance coverage for 'fitness for purpose';
- the 'one off' or prototypical nature of architectural and engineering services; and
- uncertainty about the often subjective and implied purposes for which consumers engage architectural and engineering services.

The Association of Consulting Engineers of Australia indicated that the exemption applies to its industry for the following reasons:

- an engineer will often be providing advice for a small element of a large project;
- clients often do not reveal the purpose for which engineering design advice is provided and purposes might change as a project progresses; and
- insurers for engineering services typically exclude 'fitness for purpose' from warranties for professional indemnity insurance taken out by engineers.

In NZ, there is no exemption for architects and engineers in relation to the consumer guarantees that apply to services under the CGA.

CCAAC does not consider that the exemption for these professions is justified given that the same factors that apply to these professions also apply to many other service industries. In the interests of simplicity, uniformity and fairness, the exemption should be removed.

Utilities

Special issues arise in relation to the electricity, gas and telecommunications industries.

Gas and electricity are included within the definition of 'goods' under subsection 4(1) of the TPA.

In NZ, the Consumer Guarantees Amendment Act 2003 (NZ) amended section 2 of the CGA to provide that 'goods' includes electricity and gas, and that 'services' includes 'a contract for, or in relation to, the supply of electricity, gas, telecommunications, or water, or the removal of waste water'.

New Zealand electricity and gas retailers are responsible for supplying electricity and gas to consumers that is of acceptable quality.²⁷² Electricity transmission and distribution companies are responsible for supplying line function services with reasonable care and skill. They are not responsible for the acts of third parties, or events beyond human control.

²⁷² See *Contact Energy v Jones* [2009] 2 NZLR 830 at [101] where Miller J held that by insisting that electricity be defined as a good, the legislature opted for strict liability for retailers.

CCAAC considers that the consumer guarantees outlined in Chapter 5 should apply to all products and services supplied to domestic consumers, including electricity, gas and telecommunications. However, CCAAC also acknowledges that there are sector-specific laws that relate to the quality of the provision of electricity, gas and telecommunications. Consideration should be given to the interaction between sector-specific laws and statutory consumer guarantees during the development of the relevant legislation.

AUCTIONS

Existing regulation

Australia

Goods which are sold at auctions are currently excluded from the statutory implied terms in the TPA, apart from the implied terms of title, encumbrance and quiet possession.²⁷³

Not all States and Territories exclude sale by auction from their statutory implied terms regime.²⁷⁴

Overseas

The NZ CGA excludes goods supplied by auction, or by competitive tender, from the statutory consumer guarantees.²⁷⁵

The European Commission's Consumer Protection (Distance Selling) Regulations 2000 do not apply to contracts that are concluded at auctions.²⁷⁶ The Regulations set out minimum information disclosure requirements for suppliers who use distance communication to sell goods or services.

Under the statutory consumer guarantees

Auctions

The concept of 'auctions', as used for the purposes of the statutory implied terms regime in Part V, Division 2 of the TPA, includes the following features:

- a marketplace for goods to be bought and sold, and often providing a means for goods to be cleared away;
- interested buyers or their representatives being physically present and with the opportunity to see and examine the goods prior to placing a bid to purchase the goods;
- interested buyers competing to purchase the goods by offering higher bid prices;
- the seller or the auctioneer considering the highest bid price on offer before accepting the bid and selling the goods at that price (for instance, if there is a reserve price); and
- buyers often being able to purchase goods at bargain prices.

²⁷³ Auctions are not excluded from section 69 of the TPA, but are excluded from sections 70, 71 and 72.

²⁷⁴ For example, see the Victorian FTA.

²⁷⁵ Subsection 41(3) of the CGA.

²⁷⁶ See regulation 5 of the Consumer Protection (Distance Selling) Regulations 2000.

'Auctions', for the purposes of the statutory implied terms, provide consumers with the opportunity to examine goods for defects and compare them with the description and offer a price (bid) based on that inspection. In addition, auctions often allow consumers to purchase new and used goods at bargain prices. Accordingly, these factors need to be weighed against the exclusion of auctions from some of the statutory implied terms when deciding whether to purchase goods at auctions.

Unlike in-store transactions, auctions provide consumers with the opportunity to examine goods, note defects and then make a bid based on an evaluation of the value of the goods to the consumer. Further, auctions often act as a clearing-house, allowing consumers to purchase new and used goods at bargain prices. Accordingly, the case for auction-based consumer transactions to receive the same consumer protections as other transactions is less clear.

On the issue of whether auctions should continue to be excluded from the statutory consumer protections, CCAAC received submissions both for and against the exclusion. The Australian Industry Group, Professor John Carter and the Australian Finance Conference all expressed their support for continuing to exclude goods sold by auction.²⁷⁷ On the other hand, the LCA argued that there was little justification for excluding goods sold by auction on the basis of the nature of the sale channel, and supported extending the statutory protections to auctions.²⁷⁸

In the light of the above features of 'auctions' for the purposes of the statutory implied terms, CCAAC considers that goods which are sold at an auction should also be excluded from the statutory consumer guarantees, apart from the following guarantees:

- the supplier has the right to sell the goods;
- the goods will be free from any undisclosed security; and
- the consumer will have undisturbed possession of the goods.

Online auctions

Online auction websites provide a virtual marketplace for buyers and sellers to trade new and used items. The low operating fees and the opportunity to reach a wide potential customer base are features which make auction websites an attractive channel for suppliers to sell their goods. For consumers, the variety of goods and services available, often at relatively low prices, has made online auctions an increasingly popular way to shop.²⁷⁹

Most auction websites operate differently to 'auctions' as envisaged for the statutory implied terms regime in the TPA, and do not possess many of the above features of a traditional auction. Rather, auction websites merely provide another channel for suppliers to sell goods and services to consumers. Although online auctions provide a marketplace (albeit virtual) for goods and services to be sold through a competitive bid process – much like traditional offline (in-person) auctions – a significant difference between online and offline auctions is that consumers are unable to physically examine goods prior to purchasing. That is,

²⁷⁷ AIG, page 2; Freehills, page 10; AFC, page 10.

²⁷⁸ LCA, page 9.

²⁷⁹ See AC Neilson Australia, 'Aussies' online spending tops \$11 billion', news release, 18 September 2006.

consumers are unable to check goods for defects and are unable to check whether goods offered for sale correspond with their description.

Another distinguishing factor between online auctions and traditional auctions is that auction websites often allow buyers and sellers to interact directly, without the need for an auctioneer or the protections that are offered when an auctioneer acts on behalf of a seller. Further, auction websites often explicitly disclaim the types of liabilities that an auctioneer would have when conducting a traditional auction.

CCAAC acknowledges that the inability to physically examine goods is a risk which consumers accept given the convenience and choice offered by online shopping. However, the ability for consumers to physically examine goods is an important feature of offline in-person auctions and is an important reason why auctions will be excluded from most of the statutory consumer guarantees (and are currently excluded from most of the statutory implied terms). In addition, auctions that operate without recourse to the seller (in respect of warranties or other claims) play an important function within the economy by allowing goods to be cleared quickly in appropriate circumstances (such as insolvencies and deceased estates).

CCAAC recognises the increasing use of the Internet by consumers to shop and the growing popularity of auction websites as a means for consumers to shop online, which has made the market for goods to be bought and sold very different to 30 years ago when the TPA was enacted.²⁸⁰

In the light of these factors, CCAAC considers that many so-called 'online auctions' are not 'auctions' as originally envisaged for the purposes of the statutory implied terms regime in the TPA. Accordingly, CCAAC is of the view that such online auctions should not be excluded from the statutory consumer guarantees. To do so may encourage faulty goods to be offloaded to unsuspecting and unprotected consumers.

The auction exemption should continue to apply in respect of traditional auctions conducted by auctioneers, whether or not such auctions are conducted in person or online. This will ensure that consumers who buy goods from businesses are protected either by the liabilities assumed by a responsible auctioneer or by statutory guarantees.

CCAAC also considers that Australia's consumer agencies should actively monitor auction websites and investigate potential actions for false, misleading or deceptive representations by the use of the term 'auction'.

Findings

- 11.1 Consistent with the intention of the Australian Consumer Law, the new statutory consumer guarantees should apply to all sectors of the economy.
- 11.2 For consistency, the Australian Consumer Law should include a national approach to the limitation of liability for recreational services, including a consistent definition of 'recreational services'. CCAAC considers that the definition of 'recreational

280 *ibid.* The AC Neilson Online Consumer Report found that eBay had the greatest retail share of traders in the online retail market, with 57 per cent of online shoppers having made a purchase using eBay.

services' in the *Trade Practices Act 1974*, which also applies in a number of other jurisdictions, is too broad given the stated policy intention that the limitation should only cover 'inherently risky' activities.

Findings (continued)

- 11.3 The national statutory consumer guarantees should continue to exclude goods and services purchased at auctions conducted by an auctioneer, including those that are conducted online.
- 11.4 Goods and services sold by businesses directly to consumers through so-called 'online auctions' (except for those conducted by an auctioneer) should be covered by national statutory consumer guarantees. The legislation should clearly state that such 'online auctions' do not fall within the definition of an 'auction' for the purposes of national statutory consumer guarantees.

12 CONCLUSION

Under its terms of reference, CCAAC was required to examine the adequacy of the existing laws on implied terms in the TPA and the state and territory fair trading and sales of goods legislation.

CCAAC believes that if the ACL is to reflect world's best practice, a fundamental change is needed to protect consumers in relation to goods and services that do not meet acceptable standards of quality.

CCAAC's recommendations are designed to:

- strengthen and harmonise the laws relating to consumer protection;
- provide consumers with a new level of certainty in relation to their rights; and
- reduce business compliance costs and foster competition.

Under the current law, consumers are required to argue for contractual rather than statutory remedies against retailers and manufacturers. The existing regime is based on the common law 'privity of contract' doctrine, where consumers have rights based on terms implied into contracts with retailers. There are two tiers of implied terms (conditions and warranties), with different remedies attaching to them according to the law of contract. Further, where the manufacturer provides a voluntary warranty there may be a collateral contract between the consumer and the manufacturer.

These complex contractual arrangements can result in retailers denying liability and referring consumers back to manufacturers, or others in the supply chain, to seek a remedy. Manufacturers, in turn, may deny that a collateral contract exists, or require the consumer to prove that the defect was caused by the manufacturer rather than a component supplier.

The fundamental principle underlying the law in this area should be that consumers are entitled to get what they pay for, in the sense that goods and services will do what they are supposed to do, thereby reducing the likelihood of consumer detriment and dissatisfaction.

Part I of this report illustrates how the current law with respect to implied terms can be complex, confusing and inconsistent across jurisdictions. It is fundamental to the Australian Consumer Law reforms that jurisdictional inconsistencies should be ironed out wherever possible.

CCAAC believes that there is a need to clarify and simplify the law, so that consumers have access to a single set of laws which provide a basic minimum level of protection.

Consumers should not be forced to prove which firm in the supply chain is responsible for a fault or defect in the goods supplied. Manufacturers and retailers should assume joint responsibility for the quality of the goods and services they supply, and the common law privity of contract doctrine should not be a barrier to recovery by the consumer. Consumers

should have clear rights to redress, where appropriate, against both retailers and manufacturers, at their own choosing, leaving manufacturers and retailers to negotiate indemnity arrangements between themselves.

CCAAC believes that to clarify the law, a new statutory scheme should be established independently of the law of contract, and Australian governments should establish post-sale statutory guarantees with statutory remedies provided for breach of these guarantees. The increased transparency and consumer confidence generated by such a scheme are likely to promote competition in the supply of goods and services.

Adoption of a statutory guarantees framework would create a new strict liability regime in relation to the quality of goods and services. This is not an alien concept to Australian trade practices law. There are parallels in the statutory code in Part VA of the TPA, which deals with goods that are so defective as to be unsafe, as opposed to goods with defects of quality. Moreover, statutory guarantees are not so different in many respects from the statutory causes of action against manufacturers and importers in Part V, Division 2A of the TPA.

Statutory guarantees would provide consumers, retailers and manufacturers with a single set of rules governing quality and would be more readily understood than the current law. They would provide clear signals to consumers about their statutory rights, and to businesses about their responsibilities. They would clarify the remedies available when consumer rights are breached. And, where accompanied by effective enforcement mechanisms, they would strengthen consumers' hands when dealing with retailers and manufacturers.

There is a high level of awareness amongst NZ consumers of their statutory rights, and the consumer guarantee scheme appears to have worked well during its 16 years of operation. While not a primary consideration, the adoption of consumer guarantees along the lines of those that apply in NZ has the added advantage of advancing one of the objectives of the Closer Economic Relations Trade Agreement entered into by Australia and New Zealand in 1984, by encouraging harmonisation of the business environment across both nations. The implementation of the agreement was given new impetus by the meeting between the Australian and New Zealand Prime Ministers in Sydney in March 2009, where both parties made clear their commitment to accelerating regulatory harmonisation.²⁸¹

CCAAC believes that the measures proposed in this report's findings will improve the effectiveness of the law, while reducing the burdens imposed on consumers and businesses by unclear drafting and jurisdictional inconsistency. The changes are a necessary element in ensuring that the Australian Consumer Law achieves its objective:

to improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.²⁸²

281 Rudd, the Hon K, 'Joint Statement with Prime Minister John Key on Strengthened Trans-Tasman Cooperation', media release, 3 March 2009.

282 MCCA 2008, joint communiqué of the Ministerial Council on Consumer Affairs meeting, Hobart, 15 August 2008.

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Re George Zaravinos v Dairy Farmers Co-Operative Limited and Pure Pak Australia Pty Limited [1985] FCA 77

Shevill v Builders Licensing Board (1982) 149 CLR 620

Stephens v Chevron Motor Court [1996] DCR 1

APPENDICES

A TERMS OF REFERENCE

CCAAC is to undertake a review of the adequacy of existing laws on implied conditions and warranties in the TPA and state and territory FTAs and SGAs legislation.

CONTEXT

The PC *Review of Australia's Consumer Policy Framework* recommended that the adequacy of the existing laws on implied warranties and conditions should be examined as part of the development of the new national consumer law, which was agreed to by the Council of Australian Governments (COAG) on 2 October 2008.

On 23 May 2008 MCCA agreed that the Commonwealth should initiate a comprehensive review of the TPA, state and territory FTAs and Sale of Goods legislation, with the aim of developing a clear codified law to be applied nationally. On 15 August 2008, MCCA further agreed that the review should cover so-called 'lemon laws'.

BACKGROUND

Implied conditions and warranties

The statutory conditions and warranties implied into contracts by the TPA and state and territory FTAs are designed to provide consumers with basic and guaranteed levels of protection in relation to the goods and services they acquire.

Part V, Division 2 of the TPA provides for certain non-excludable, implied conditions and warranties into contracts for the supply of goods and services, as follows:

- consumers will have the right to title and quiet possession of the goods;
- goods will be free from encumbrance;
- goods will comply with their description or sample;
- goods will be of merchantable quality and fit for purpose; and
- services will be rendered with due care and skill and any material supplied with the services will be fit for the purpose.

Further, in all jurisdictions (except for Queensland, Tasmania and the Australian Capital Territory) statutory warranties cannot be excluded from a contract by the seller.

The PC Report's recommendation 8.1 stated:

- Australia's consumer agencies should:

- raise awareness among consumers and suppliers about the statutory rights and responsibilities conferred by the implied warranties and conditions in the generic consumer law; and
 - where appropriate, take specific enforcement action against misleading marketing and sale of extended warranties.
- The adequacy of existing legislation related to implied warranties and conditions should be examined as part of the development of the new national generic consumer law.

Lemon laws

- The term ‘lemon law’ refers to legal measures that are available to consumers who purchase goods that repeatedly fail to meet expected standards of performance and quality, such as motor vehicles.
- Lemon laws exist, for example in most US states, but not in Australia.

Extended warranties

- Extended warranties are service or insurance contracts offered by suppliers to provide repair and maintenance for a specific period, and offered typically on purchases such as whitegoods and large electronics.
- The PC Report noted that, there may be a legitimate role for extended warranties in the market place. However, the apparent lack of understanding by consumers of their statutory rights in relation to implied warranties and the proliferation of extended warranty offerings across a broad spectrum of consumer goods could provide a case for a stronger policy response in the future.

SCOPE OF STUDY

CCAAC is to examine the existing laws on implied conditions and warranties in the TPA and state and territory FTAs and, in particular, consider:

- the adequacy of the current laws on implied conditions and warranties;
- the need for any amendments to the current laws on implied conditions and warranties and, if so, how those amendments would improve existing laws and better empower consumer agencies to ensure compliance with those laws;
- the need for ‘lemon laws’ in Australia to protect consumers who purchase goods that repeatedly fail to meet expected standards of performance and quality;
- the existence of extended warranties in the market place and their interaction with laws on implied conditions and warranties; and
- other means for improving the operation of existing statutory conditions and warranties in Australia.

KEY CONSIDERATIONS

In conducting the review, CCAAC shall:

- perform a review of existing Australian literature, including conclusions and recommendations made in relevant Australian reviews;
- consider relevant international research and models for implied conditions and warranties adopted in other countries;
- have regard to the rights and obligations of consumers and businesses under contracts for the sale of goods and services and, in particular, those contracts entered into on the internet; and
- have regard to the intended objectives of the new national consumer law, which were agreed to by the Council of Australian Governments on 2 October 2008.

CCAAC is to undertake a targeted consultation process with industry stakeholders.

CCAAC will report to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs by 31 July 2009.²⁸³

²⁸³ The Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, subsequently extended the reporting date to 30 October, in order to facilitate more comprehensive consultation in the development of CCAAC's report.

B CONSULTATION PROCESS

CCAAC, under its terms of reference, examined the existing laws on implied terms in the TPA and state and territory fair trading and goods legislation. An Issues Paper, *Consumer rights: Statutory implied conditions and warranties*, was released for public comment on 26 July 2009 by the Minister for Competition and Consumer Affairs, the Hon Dr Craig Emerson MP. A range of stakeholders were invited to comment on the issues paper. Submissions closed on 24 August 2009.

A parallel consultation process was conducted with a roundtable held on 21 August 2009 with state and territory consumer agencies. The roundtable discussion was facilitated by Professor Stephen Corones, Ms Deborah Healey and Mr Ray Steinwall

In addition, a targeted consultation was undertaken based on written submissions led by Professor Corones and Ms Healey. They met stakeholders on 7 September 2009 in Canberra and 8 September 2009 in Melbourne, with additional discussions held via teleconference on 16 and 17 September 2009.

CCAAC also had discussions with the NZ Ministry of Consumer Affairs, ASIC and the ACCC on specific consumer policy issues.

Consultations were augmented by 33 written submissions from a range of interested parties. Written submissions are available at www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1614. At the request of CCAAC some stakeholders were invited to provide additional information to support their submissions. For a list of all stakeholder submissions refer to Appendix C.

Participant	Date
Canberra	
Australian Competition and Consumer Commission (ACCC)	7 September 2009
Federal Chamber of Automotive Industries (FCAI)	7 September 2009
Motor Traders Association of Australia (MTAA)	7 September 2009
Veda Advantage	16 September 2009
Melbourne	
Australian Automotive Aftermarket Association (AAAA)	8 September 2009
Royal Automobile Club of Victoria (RACV)	8 September 2009
Wesfarmers	8 September 2009
Teleconferences	
Australian Securities and Investments Commission (ASIC)	13 August 2009
BSR Group	17 September 2009
IC Frith	7 September 2009
Ministry of Consumer Affairs (New Zealand)	17 August 2009

C LIST OF SUBMISSIONS

Stakeholder submissions
Australian Competition and Consumer Commission (confidential) (ACCC)
Association of Consulting Engineers
Australian Automotive Aftermarket Association (AAAA)
Australian Chamber of Commerce and Industry
Australian Finance Conference
Australian Industry Group
Australian Institute of Architects
Australian Retailers Association (ARA)
Ms Jenny Buchan, University of NSW
CHOICE
Consumer Action Law Centre (CALC)
Federal Chamber of Automotive Industries (FCAI)
Ford Australia (confidential)
Freehills
IC Frith (confidential)
Mr Lynden Griggs, University of Tasmania
Mr Nick Guden
GM Holden (confidential)
Hunt & Hunt
Ms Madeline Kingston
Motor Trades Association of Australia (MTAA)
Motor Trades Association of Queensland
Dr Luke Nottage, University of Sydney
Retailers Association (confidential)
Retail Traders Association of WA inc.
Royal Automobile Club of Queensland Limited
Royal Automobile Club of Victoria (RACV)
Mr Hank Spier, Spier Consulting
Mr Gary Stevens
Trade Practices Committee of the Business Law Section of the Law Council of Australia (LCA)
Veda Advantage
Victorian Automobile Chamber of Commerce (VACC)
Wesfarmers (confidential)

D SUBMISSION SUMMARY KEY

Issue	
Chapter 2	Warranties
2.1	Do consumers and businesses have sufficient information—which is easily accessible and understandable—about the existence and nature of statutory implied terms? If not, what could be done to improve this?
2.2	Is there additional information that could assist consumers to understand the time period within which their statutory rights may be exercised for different products?
2.3	Does existing consumer information about implied terms provide consumers with enough support to take action?
Chapter 3	Current Australian law
3.1	Bearing in mind existing consumer awareness about implied terms, are the statutory implied terms in the TPA adequate? If not, what amendments should be made?
3.2	Are the terms used in these provisions (for example, ‘merchantable quality’)—and the way the terms are defined—clear and appropriate?
3.3	Are there particular elements of state and territory implied terms legislation which work well for consumers?
3.4	Are the statutory implied terms in the TPA and state and territory legislation clear?
Chapter 4	Enforcement
4.1	Do existing remedies provide adequate redress to consumers harmed as a result of breaches of statutory implied terms?
4.2	What additional or alternative remedies might complement or replace existing remedies?
4.3	Are there institutional, structural or economic barriers that prevent consumers from enforcing their rights under implied terms?
4.4	Should consumers’ rights be implied into contracts, leaving it to the consumer to take action for breach of contract (as is currently the case in the TPA)? Or should consumers’ rights form part of a stand-alone statutory regime where the regulator can also bring action on behalf of the consumer (along similar lines to the New Zealand model)?
4.5	Do litigation costs act as a deterrent for the personal enforcement of consumer rights? Do such costs contribute to consumer uptake of products such as extended warranties?
4.6	What, if any, alternative dispute resolution forums should be available?
4.7	Should consumer agencies be able to take action in respect of breaches of implied terms?
4.8	Would retailers and manufacturers have a greater incentive to comply if the regulator could take action against them on behalf of the consumer?
4.9	Are existing processes and mechanisms for facilitating consumer access to remedies adequate?
4.10	Is the process for seeking redress for faulty goods clear and accessible to consumers?
Chapter 5	Extended warranties
5.1	In relation to a problem with an extended warranty, is the process for a consumer seeking redress clear? If not, how could this be clarified?
5.2	How does the availability of information about the three different types of warranties affect a consumer’s choice of a warranty?
5.3	Can the way in which information is provided to consumers about extended warranties be improved? How might this best be done in both regulatory and non-regulatory contexts?
5.4	Are there any other relevant factors that influence consumers when deciding to purchase an extended warranty? Please provide any information/data available on
5.5	• the take-up of extended warranties;
5.6	• the cost of extended warranties relative to the price of the product or profit margins on extended warranties;

Issue	
5.7	• the number of claims on extended warranties; and
5.8	• commissions received for the sale of extended warranties.
Chapter 6	Lemon laws
6.1	In what circumstances can a faulty or defective good be characterised as a lemon?
6.2	Are lemons particularly prevalent —or are they particularly problematic — in the market for motor vehicles? Are lemons a particular problem in any other market?
6.3	What is meant by a 'lemon law' and what should it deal with? Should lemon laws apply to new goods, used goods, or both? Should lemon laws differ according to the type or class of good?
6.4	Are there any specific product or service markets where information asymmetries are especially problematic? Are they as problematic for both new and used goods? What detriment is caused by these asymmetries?
6.5	Are there any non-regulatory means available to consumers, industries or governments which might deal with asymmetries of information?
6.6	Would a lemon law provide a clearer indication of the rights and responsibilities of consumers and businesses? Would this increase the likelihood that those rights would be enforced and those responsibilities carried out?
6.7	How do lemon laws in other jurisdictions identify a 'lemon' as distinct from a good which simply needs repair?
6.8	How effective have these laws been at addressing the existence of lemons in the market?
6.9	Are enhanced consumer warranties or new dispute resolution processes —or both— more effective means of addressing problems associated with lemons?
6.10	Are existing consumer protections well used in connection with lemons? Is their applicability to lemons well understood?
6.11	Do the remedies currently available provide adequate redress for consumers who purchase lemons?
6.12	Does the existing regime provide suppliers, manufacturers and importers with the incentives necessary to respond to lemon problems in a timely and effective manner?
6.13	Does the existing regime give consumers sufficient confidence to engage with markets and buy the goods they desire?
6.14	Is there a need for a lemon law in Australia? What would it add to existing conditions and warranties? To what type of goods might a lemon law apply? What business costs might such a law impose?
6.15	What kind of remedies might assist consumers who buy lemons? Could an alternative dispute resolution process assist those consumers? How might that process operate?
6.16	Are there any non-regulatory approaches that might address the problems associated with lemons?
Chapter 7	Other issues
7.1	Is it clear that consumers do not have access to the statutory implied terms when purchasing goods through an auction?
7.2	Should the statutory implied terms apply to sales by auction? Why?
7.3	Do the 'limitation of liability' provisions in section 68A of the TPA remain appropriate?
7.4	Is the definition of 'recreational services' appropriate in the context of section 68B? What, if any, changes should be made to this definition?
7.5	Is there evidence that consumers are unaware of their rights when shopping online? Where problems are encountered, is it clear whom consumers can contact for after-sales assistance? Is there a need for more education and information?
7.6	Have self-regulatory measures such as industry codes or sale templates been effective in helping to enforce online business best practice?
7.7	How well does the Victorian 'non-contact' sales agreement provision operate?
7.8	Should the implied terms regime in Part V Division 2 of the TPA apply to online auctions?
7.9	What specific issues do consumers face when participating in online auctions?

E SUMMARY OF SUBMISSIONS

Stakeholder	Issue number	Key points
Australian Competition and Consumer Commission (confidential)		
Australian Competition and Consumer Commission Supplementary Submission	5.1	Information and data provided on extended warranties.
Association of Consulting Engineers	Other	The implied fitness for purpose warranty in subsection 74(2) excludes services of a professional nature provided by a qualified architect or engineer: this is a necessary exclusion and should be maintained. This exemption should also be applied to section 74(1).
Australian Automotive Aftermarket Association	2.1	Reform in this area cannot be focused on more consumer education, as consumers are victims of deliberate and coordinated misinformation - consumers believe that the car makers' voluntary warranty is their legal protection, and car makers and car dealerships actively mislead consumers about their rights. There is an urgent requirement for national leadership, consumer law and enforcement regulations to provide a clear definition of the differences between statutory and express warranties and ensure consistency and clarity in the terminology used.
	3.2	It is unclear to what extent fitness for purpose terms are time-limited. The term 'warranty' should be subject to restrictive use, must be clearly defined and delineated from other service options including insurance and vehicle service contracts.
	4.1	The role of consumer protection provisions of the TPA and equivalent state and territory is limited to educating consumers about their rights and businesses about their obligations.
	4.7	Supports the position that a new consumer framework should incorporate a stand-alone statutory regime where the regulator can bring action on behalf of the consumer to address systematic trader breaches of statutory rights.
	4.8	A greater incentive exists to ensure compliance and also to protect other consumers from abuse of warranties or misleading warranty information. Addressing system wide abuses also allows an industry association such as the AAAA to work with the regulator to ensure compliance in its own sector.
	5.2	Where particular warranties begin and end and what representations can and cannot be made regarding warranties is very low at present.
	5.3	All extended warranty products should require a product disclosure statement including the disclosure of commissions or payments to the repairer.
	Other	Vehicle dealers and manufacturers should be prevented from including conditions in express warranties that specify that 'genuine parts' must be used in vehicle servicing. Many car warranties have restrictive provisions on the choice of repairer and parts used, contain ambiguous language and do not clearly specify the additional benefits over and above the consumer's basic statutory rights.
Australian Chamber of Commerce and Industry	Other	A fundamental revision of the existing legislation would undermine business certainty. No new business regulation should be contemplated without a thorough and independent cost benefit analysis.
Australian Finance Conference	2.3	The unique circumstances of the lease and hire-purchase product where the financier is best regarded as a bystander in the sale of transactions and end-use of the goods, mean it may be appropriate to extend the implied protections to facilitate their availability between the hire-purchase customer and the original supplier. In addition, the rights should also be available to be exercised by the financier.
	3.4	There is a need for a national legislative framework.
	6.14	Any proposed lemon laws should expressly recognise a financier's full interest in the original finance/sales contract.
	Other 2.1	Any proposed legislative reform needs to recognise the tiered arrangement of selling (which may see a manufacturer/supplier/financer/insurer and customer involved) to ensure that the relationships and transactions affected are appropriately considered.

Stakeholder	Issue number	Key points
Australian Industry Group		The ACCC website has information but it is not easy to find. Suggest that specific handbooks or fact sheets clarifying legislation for each type of good are prepared and a targeted education program is implemented, such as the attachment provided. More guidance is required regarding considerations and obligations when suppliers/manufacturers should or must repair/replace/refund: examples provided in handbook.
	2.2	Consumers need to be provided with greater information pre-purchase regarding product operation and maintenance requirements, product capabilities in terms of suitable applications and any performance limitations.
	3.2	Consumers only have claims where the goods have been found to be unsuitable for 'any particular purpose the buyer has made known to the seller' or 'reasonably fit for any particular purpose the consumer made known to the seller'. There is a need for clarification of 'abnormal use' - some consumers have the impression that if it is not specifically excluded in the instructions then it is acceptable use.
	6.14	If a lemon law is to be introduced it should only apply to serious or safety-related faults.
	7.2	Standard auctions where the buyer can inspect the product should be 'buyer beware', in the case of on-line auctions where the consumer is not able to inspect the goods, there is a need for greater consumer protection.
	Other	There is a need for national consistency across jurisdictions — a Commonwealth regulatory framework built around the TPA and supported by state based enforcement.
Australian Institute of Architects	3.1	The services of architects and engineers are presently exempt from statutory implied warranties of fitness for purpose and this must be preserved. Insurers in the Australian market continue to decline to insure for fitness of purpose warranties. Architects rely on the present exemption under s74(2) of the TPA and parallel state and territory legislation from warranties of fitness for purpose of their services to consumers: this exemption should be maintained.
	3.1	Implied warranties for services should not apply to architects.
Australian Retailers Association	2.1	Information and support regarding refunds and warranties is unbalanced. More attention is needed in relation to advice available to consumers regarding their warranty and refund obligations and education available to retailers regarding their warranty and refund rights and responsibilities.
	3.1	Rates of dispute would be significantly reduced if there was legislation requiring each party to act in good faith.
	4.1	Current defined remedies for breaches of statutory implied warranty are sufficient and any expansion would allow for an abuse of process and claims of compensation.
	4.2	Claims against retailers should be in writing and include proof of purchase receipts. ARA believes manufacturers would have a greater incentive to comply if the regulator could take action on behalf of the retailer.
	5.3	Suggest a warranty information card be included with each product, with clear and concise contact details for the warranty provided — this would allow for clarity about who is the warranty provider.
	6.14	Lemon laws not necessary. The concept of a 'lemon law' needs to be defined in regards to what constitutes a 'lemon'. Any law regarding 'lemons' must be limited to goods of significant value.
	7.2	Auction sales should be subject to the same warranties as other purchases.
	7.4	Recreational service is a sufficient definition in the context of section 68B in the TPA.
	Other	The Australian Government should fund further education to retailers regarding their rights and obligations.
CHOICE	2.1	Only about half of the November 2008 survey respondents stated they understood the idea of a statutory warranty. Consumers should receive clear information about their statutory rights at the point of sale, including a clear explanation of how these rights relate to the manufacturer's warranty and potential extended warranties. This could be achieved through signage at the point of sale and accurate written summary information on statutory and manufacturers warranties with any documents promoting extended warranties.
	2.1	To address retailers' poor understanding/acceptance of their responsibility, they should: be targeted with information by consumer agencies, provide consumers with clear information about warranty rights and, for the most serious abuse of consumer warranty rights, be subject to vigorous enforcement action by consumer agencies.

Stakeholder	Issue number	Key points
	3.2	The policy rationale behind limiting the circumstances in which refunds are provided, when repair and replacement is unrestricted, is unclear. The use of the term 'warranty' may be problematic- two possible meanings are: an umbrella term and a term which is used as the counterpart to 'statutory conditions'. Other possible terms could be 'primary protections' instead of 'statutory conditions' and 'secondary protections' instead of 'statutory warranty'.
	5.4	Consumers should be given an opportunity to purchase extended warranties at a time other than when they purchase the goods. Suppliers should have to provide consumers with a written quote for an extended warranty valid for 30 days, give a written explanation of the relationship between extended warranty and manufacturer and statutory warranties and allow consumers a 'cooling-off' period on the purchase of extended warranties — similar to the UK model.
	Other	Warranty reform creates an opportunity to address product sustainability issues — the law could require businesses to repair goods where possible and practical when honouring a warranty. The Government should consider a mechanism to ensure consumers are protected if a company becomes insolvent, such as a requirement to keep a separate fund that would cover the value of customer warranties the business has provided, based on an estimate of malfunction.
Consumer Action Law Centre	2.1	Supports national harmonisation and clarification of Australia's laws on statutory conditions and warranties, so long as harmonisation does not weaken protection for consumers.
	3.1	Recommend legislative reform to tackle the extensive problems with the selling of extended warranties to consumers, including capping commissions and introducing measures that separate the decision to purchase an extended warranty from the purchase of the underlying item. Do not support cooling-off rights because they can encourage consumers to make hasty decisions, thinking they can always cancel later.
	4.1	There has been a failure by consumer agencies to take enforcement action to tackle what is a systematic, market-wide problem. Recommend that consumer agencies adopt a more active and strategic approach to enforcing statutory condition and warranty laws, with the help of legislative reforms to incorporate direct enforcement mechanisms into the laws.
	4.2	Suggests that regulator-developed guidelines could provide more detailed guidance about how statutory implied conditions and warranties should operate in practice in different contexts.
	4.2	Other enforcement remedies such as criminal penalties (including fines) or civil monetary penalties are also possibilities.
	4.4	New laws should provide that consumer rights are conduct obligations similar to other conduct obligations in the TPA, such as those preventing misleading and deceptive conduct. These conduct obligations could then be enforced in the same way as existing consumer protection conduct obligations in the TPA. Part VII of the TPA provides for a range of enforcement tools, for example the regulator (or other parties) can seek an injunction against a contravention (section 80).
	6.14	Supports the introduction of lemon laws in Australia.
	Other	Submission endorsed by the Australian Financial Counselling and Credit Reform Association.
Dr Luke Nottage, University of Sydney	2.1	Firms should restate the TPA warranties in their standard-form contracts and/or in notices at the point-of-sale. Consumer agencies and peak consumer organisations should be encouraged to bring and publicise 'test cases' to determine questions like the statutory warranty's time period.
	3.1	Suppliers should be required to provide reasonable explanations about what has been repaired and why, pursuant to any prior warranty, if consumers reasonably so request.
	3.2	Suggests the use of the term 'acceptable quality' instead of 'merchantable quality'.
	4.2	Consumers should have the extra option of obtaining replacement goods, rather than just rescission/refund or repair - similar to the New Zealand model.
	4.5	Believes that litigation costs are too high, and that class actions are not functioning effectively. Tribunals should allow consumers (not suppliers) to claim reasonable legal fees and/or tribunals should publish more results.
	4.6	There is a need for more ombudsman schemes covering general consumer products.
	4.7	The law should allow the ACCC to bring representative actions for damages, injunctions preventing supply of goods likely to breach implied terms, or even impose penalties, at least for certain types of breaches (such as safety) or certain products (such as whitegoods).

Stakeholder	Issue number	Key points
	5	A new business model of manufacturers reducing the timeframe of voluntary warranties has led to increased instances of extended warranties. This business model is good for suppliers at the cost of consumers. Therefore, there is a need for statute or case law to restore realistic time lengths and other minimum features for statutory warranties.
	5.1	There should be one piece of extended warranty legislation and one regulator, preferably the TPA and the ACCC.
	6.14	Information asymmetry is not limited to cars — other prime candidates would be high-value whitegoods and consumer electronics, both new and used.
	7.2	Auction sales should be subject to same warranties as other purchases.
	7.3	Exclusion should not be for gross negligence or like conduct.
	Other	In relation to overseas purchases, the TPA needs to consider extending its scope to suppliers from overseas.
Federal Chamber of Automotive Industries	6.2	FCAI survey indicated that there are fewer than 100 claims per year, on average which result in some form of litigation or legal action before a court or tribunal.
	6.4	There is extensive independent testing and review of new motor vehicles and this information is widely available to consumers.
	6.9	The experiences in Canada compared to the USA would suggest that an alternative dispute resolution process is a more effective means of addressing problems associated with lemons.
	6.10	Warranty claims are generally resolved without recourse to the statutory consumer protections. However, to the extent to which a consumer feels that they have a justifiable complaint which requires legal redress, the existing statutory regime provides them with more than adequate rights.
	6.12	Suppliers are driven by the extremely competitive and responsive motor vehicle market in Australia to resolve disputes.
	6.14	Does not support the introduction of a lemon law.
	6.15	As an alternative to a lemon law the FCAI would support further discussion on the merits of a national, low-cost forum for consumers to seek redress for goods that are not fit for purpose.
Ford Australia (confidential)		
Freehills	4.5	Consumers are unlikely to seek redress through the courts; therefore a successful consumer protection regime must be self-executing — so clear that it is unnecessary to resort to the courts.
	7.2	Auction sales should be subject to the same warranties as other purchases.
	7.3 & 7.4	A supplier of inherently dangerous recreational services should be permitted to limit its liability for negligence to a sum of money. A supplier of services which are not inherently dangerous should not be permitted to limit liability for negligence causing personal injury or death.
Gary Stevens	3.1	There needs to be clearer regulations about the actual length of statutory warranties-suggests linking value with replacement, for example, \$100 means one-year replacement etc.
	3.2	'Fit for purpose' and merchantable quality' lead to uncertainty, which has led to the emergence of manufacturers' voluntary warranties and the introduction of extended warranties.
GM Holden (confidential)		
Hank Spier, Spier Consulting	3.2	Avoid or define 'merchantable quality'. Suggests the inclusion of a rebuttable presumption that goods are faulty when the purchaser reasonably claims they are or services have not been properly carried out.
	3.3	The state and territory Motor Dealers legislation with its statutory warranties containing a maximum time frame or number of kilometres has been successful.
	4.2	Purchaser to be put back into the position they were before the purchase of defective goods or unsatisfactory services that includes consequential damages: section 68A repealed. Actual supplier to the purchaser is responsible for putting the purchaser back into that position. That supplier should be indemnified by its suppliers.
	6.14	Lemon laws not necessary.
	7.2	Auction sales should be subject to the same warranties as other purchases.

Stakeholder	Issue number	Key points
Hunt & Hunt	2.1	There is a need for better information for consumers. The development of a standardised information sheet explaining statutory implied terms and a customer's rights against the retailer could address this issue. This may take the form of a handout or a notice at the point of sale. Consideration would need to be given to adapting this to individual products and non-shopfront retailers.
	4.4 & 4.6	If a regulator is allowed to bring action on behalf of consumers to enforce statutory implied terms, there may be a perception that the regulator's independence is compromised in favour of consumer claims. An alternative to this method is to establish a dispute resolution body.
	6.14	Believes there is no need for a lemon law. If one is to be implemented, the limited scope should be clearly set out in the legislation, for example, a motor vehicle is said to be faulty if there is a problem with the mechanics of the vehicle but not if there is a problem with the 'extras' (additional features or add-ons).
	7.5	Hunt & Hunt found that consumers are aware of and commonly exercise their cancellation rights and right to return defective goods to the supplier in relation to online sales. They support the requirements of online sellers to supply customers with the total purchase price, including postal charges, cancellation rights and the seller's contact details (consistent with Victorian FTA 'non-contact' sales agreement provision).
	7.5	In relation to cooling-off rights: consumers are aware shopping online carries a greater degree of risk-assessed in light of convenience and price; s71 of the Victorian FTA does not require the purchaser to give any reasons for returning goods during the cooling-off period — this is effectively a right to refund for change of mind which is a right that does not apply to consumers at physical stores. Additionally, the relationship between lay-buy sales and cooling-off rights needs to be clarified.
IC Frith (confidential)		
Jenny Buchan, University of NSW	Other	Comments confined to franchisees as business consumers.
Lynden Griggs, University of Tasmania	2.1	Education campaigns, information at physical shopfront and online, statutory warranties compulsorily incorporated in the written contract, statutory warranties detailed on the receipt, are all methods which could improve the supply of information to consumers.
	3.1	All transactions should be made consumer based.
	3.2	'Merchantable quality' is an archaic term. Recommends redesigning 'fitness for purpose' to include a temporal/durability element, as well as incorporating what traditionally would be seen as non-purpose related elements.
	4.2 & 4.4	A remedial smorgasbord should be made available to the regulator, as well as allowing consumer advocacy groups to take action on behalf of consumers. Also recommends federally funded consumer advice bureaus.
	6.14	Recommends a widely drafted and non-item specific lemon law applying to both new and used goods. Believes that few consumers have the capacity to identify a poor quality electronic/electrical good prior to purchase. 'Acceptable quality' definition may be used to establish if a 'lemon' exists — may be necessary to define for each particular category of goods.
	7.2	Include implied warranties in relation to auctions.
Madeline Kingston	Other	State and national levels appear to hamper rather than aid access to justice. Breach of implied warranty should be claimable for those who are unilaterally and unfairly imposed with contractual status where no service can properly be deemed to be delivered.
Motor Trades Association of Australia	6.2	From 1 million vehicles sold in NSW, 410 applications to Consumer Trader and Tenancy Tribunal (CTTT), and only three were deemed by the CTTT to not be of merchantable quality (2004-2005 to 2007-2008).
	6.3	Believe that a concept of reasonableness in terms of consumer expectation must be taken into consideration when deeming fitness for purpose.
	6.8	The CTTT in NSW is able to make a determination on a vehicle in terms of 'merchantable quality' and 'fit for purpose'.
	6.14	Introduction of 'lemon laws' is not only unnecessary but detrimental to motor vehicle dealers. No evidence to support the introduction of lemon laws.
	6.15	Any action for compensation under any proposed lemon law must give regard to the supplier/manufacture.
	Other	There is an issue about the quality of engine components used in repair or reconditioning — there is no method by which a component might be visibly determined to be 'fit for service' or of 'merchantable quality' or 'fit for purpose'.

Stakeholder	Issue number	Key points
	Other	Some after-sales service and parts are not always available, there is a requirement of a 'manufacturer' of a good sold in Australia to have available the necessary after-sales service and parts.
Motor Trades Association of Queensland	2.1	Before any enhancement of regulatory regimes, comprehensive programs to educate and inform both consumers and suppliers should be undertaken.
	3.2	Obligations and liabilities in respect of implied conditions and warranties should not be transferred to other participants in the value chain — ensuring equity is maintained. The period that a consumer has product recourse is an issue needing clarity.
	4.1	There is an absence of mechanisms to address evasion in the instance of a manufacturer ceasing business or when the manufacturer no longer has capacity to honour warranties.
	Other	Happy to cooperate to deliver information programs to automotive industry members and non members.
Mr Nick Guden	6.14	Supports the introduction of Lemon Laws.
Retail Traders Association of WA inc.	7.2	Auction sales should be subject to the same warranties as other purchases.
	Other	Current distribution, awareness processes and methods have failed conclusively to provide a workable solution. Major challenge in the retail industry is the high staff turnover. The challenge is how to embed consumer information throughout the industry.
Royal Automobile Club of Queensland Limited	6.14	Supports the introduction of lemon laws. Attached a paper ' <i>A Case For Consumer Motor Vehicle Lemon Laws in Queensland</i> '. Raises issues such as defining a lemon-related defect and period of cover.
Royal Automobile Club of Victoria	6.1	The following should be used as a guide to determine a vehicle's 'lemon' status: three repair attempts — or one involving significant safety defects, 10 cumulative days out of service, for a new vehicle within in two years after purchase or 40,000km, whichever comes first. Additionally, claims made outside the specified kilometre limits may still succeed up to four years after purchase if it has been subject to a continuing number of repair attempts.
	6.9	Recommends the development of a dispute resolution process in conjunction with the proposed changes to the Fair Trading Act.
	6.16	Recommends a program to educate consumers on good practice record keeping. Consumers should also be allowed access to service histories and warranty repair records.
	Other	Manufacturers should be entitled to a deduction from the refund price to offset the use of the vehicle and it should be based on the purchase price and the distance travelled.
	Other	Consumers should not be given the option to waive the lemon cover as this would discredit the value of the proposed process.
The Retailers Association (confidential)		
The Trade Practices Committee of the Business Law Section of the Law Council of Australia	3.1	Focus of inquiry should be on education, rather than regulation. Sections 52, 53 (g) and 75AZC(1)(k) provide adequate protection to consumers and if the civil penalty provisions currently before Parliament are introduced, consumer agencies will face no significant barriers to taking appropriate enforcement if they so wish.
	3.2 & 3.4	There is scope to clarify the definition of 'merchantable quality' to include a concept of durability. It would not be appropriate for the concepts in the provisions to be redefined in any prescriptive manner. A preferable approach may be for consumer agencies to publish guidelines on the interpretation of specific implied terms, such as the meaning of 'merchantability' for different products, rather than significantly overhauling underlying legislation. The regime should be made consistent across jurisdictions.
	4.1	Existing remedies are adequate. Amend section 75A to extend the right of rescission. Rescission should not be a right which is extended indefinitely, but should only be made available within specified parameters. Remedies available under sections 80 and 87 of the TPA are inappropriate and unnecessary for breach of statutory implied terms. Pecuniary penalties and punitive orders are inappropriate as well.

Stakeholder	Issue number	Key points
	4.3 — 4.8	Substantial information and economic barriers exist that prevent customers from enforcing their rights under statutory implied terms. Barriers to enforcement need to be lowered so that consumers can take advantage of their rights, for example lower litigation costs. The Law Council of Australia does not believe it necessary for consumer agencies to be able to bring action on behalf of consumers. Consumer agencies could be used to facilitate communication for similarly affected consumers to instigate class actions.
	5.3	Additional regulation of extended warranties is not necessary; problems could be addressed by publicity and education. Compulsory information disclosure requirements are inappropriate.
	6.14	Lemon laws are unnecessary in Australia. The existing implied terms of merchantable quality and fitness for purpose provide appropriate protection against so-called lemons. If a customer expects a good to be of higher standard than one of merchantable quality, it is the responsibility of the customer to undertake enquiries before purchasing the good; they then may be protected by the implied terms of fitness for purpose.
	7.2	Consumers do not understand they do not have access to statutory implied terms when purchasing goods at auction. Statutory implied terms should extend to auctions.
	7.3	The ability for the supplier to limit its liability in relation to the supply of goods or services is crucially important in ensuring sufficient certainty in business transactions.
	7.4	It may be appropriate to review not just the definition of recreational services in section 68B, but also the broader question of whether exclusions allowed by this section are unnecessarily wide or remain necessary at all. Suggests the current definition may be amended so as to capture only inherently risky activity.
	7.5	Online transactions do not need to be regulated separately.
	7.7	Does not believe the Victorian 'non-contact' sales provisions reflect best practice regulation for the purpose of adoption on a national level.
Veda Advantage	6.16	Buyers are at a disadvantage when buying a second-hand car as they cannot gain access to a car's history. Facts about a car's history disappear when re-registering it interstate.
	Other	As a priority the Australian Government should work with State governments to open up access to non-personal vehicle data, on commercial terms, for the purposes of developing consumer information products on second-hand vehicles.
Victorian Automobile Chamber of Commerce	6.14	Opposed to the introduction of lemon laws. Considers that consumers are already well protected and suggests there is little evidence justifying the introduction of such laws. Questions their applicability to privately sold vehicles. Raises the following questions: What recourse is available to the retailer against the supplier? Refund of stamp duty paid to the government? Used vehicles are unique - it would be hard to replace them. What happens to unremovable extras and the cost of these?
Wesfarmers (confidential)		

F AUSTRALIAN STATUTORY CONDITIONS AND WARRANTIES PROVISIONS

	Cth	NSW	Qld	Vic	WA	SA	Tas	NT	ACT
	TPA	FTA	SGA	FTA	FTA	CTA	SGA	CAFTA	SGA
Implied conditions and warranties									
Right to sell the goods, the goods are unencumbered and the consumer has the right to quiet enjoyment	69	40O	15	32G 32GA	36 12 (SGA)	6	17	62	17
Goods will comply with their description	70	40P	16	32H	37 13 (SGA)	6(3)	18	63	18
Goods will be of merchantable quality and fit for the purpose	71	40Q	17	32I 32A	38 14 (SGA)	6(4)	19	64	19
Goods will comply with a sample	72	40R	18	32HA	39 15 (SGA)	6(4)(b)	20	65	20
Services will be rendered with due care and skill and goods supplied with the service will be fit for purpose; services will be fit for the purpose	74	40S	-	32J 32JA	40	7	-	66	-
Exclusion of implied terms									
Choice of laws clause; laws of other jurisdictions	67	-	-		4(3)	3	-	-	-
Contract terms that attempt to exclude, restrict or modify the application of implied conditions and warranties	68	40M	-	32L	34	8	-	68	-
Limited liability for breach of certain conditions or warranties	68A	-	-	32MA	35	-	-	69	-
Limited liability in relation to supply of recreational services	68B	40M(3)	-	32N	-	-	-	68A	-

	Cth	NSW	Qld	Vic	WA	SA	Tas	NT	ACT
	TPA	FTA	SGA	FTA	FTA	CTA	SGA	CAFTA	SGA
Rights of action against manufacturers and importers									
Actions in respect of unsuitable goods	74B	40U	-	-	-	-	-	73	-
Actions in respect of false descriptions	74C	40V	-	-	-	-	-	74	-
Actions in respect of goods of unmerchantable quality	74D	40W	-	-	-	-	-	75	-
Actions in respect of non-correspondence with samples	74E	40X	-	-	-	-	-	76	-
Failure to provide facilities for repairs or parts	74F	40Y	-	-	-	-	-	77	-
Non-compliance with express warranty	74G	40Z	-	-	-	-	-	78	-
Right of seller to recover against manufacturer or importer	74H	40ZA	-	-	-	-	-	79	-
Time for commencing actions — three years	74J	40ZB	-	-	-	-	-	80	-
Application of Division cannot be excluded	74K	40ZC	-	-	-	-	-	81	-
Limitation of liability of manufacturer to seller	74L	-	-	-	-	-	-	82	-

CTA: *Consumer Transactions Act 1972* (SA)

G COMPARISON OF AUSTRALIAN CONDITIONS AND WARRANTIES PROVISIONS

	Cth	NSW	Qld	Vic	WA	SA	Tas	NT	ACT
	TPA	FTA	SGA	FTA	FTA	CTA/MWA ²⁸⁴	SGA	CAFTA	SGA
Terms can be excluded	x	x	✓	x	x	x	✓	x	✓
Liability can be limited	✓	x	✓	✓	✓	✓	✓	✓	✓
The provisions apply to all sellers or suppliers (regardless of whether corporation or natural person)	x	✓	✓	✓	✓	✓	✓	✓	✓
The provisions apply to sale by auction	x	x	✓	✓	x	x	✓	x	✓
The provisions apply to private sales ²⁸⁵	x	x	✓	✓ ²⁸⁶	x	✓	✓	x	✓
The provisions apply for the benefit of all buyers	x	x	✓	x	x	x	✓	x	✓
The provisions are limited to 'consumer' goods or consumers ²⁸⁷	✓	✓	x	✓	✓	✓	x	✓	x
The provisions apply to commercial road vehicles	✓	x	✓	x	✓	✓	✓	✓	✓
The provisions apply to supply of goods by lease, hire or exchange	✓	✓	x	✓	✓	✓	x	✓	x

284 Includes *Manufacturers' Warranties Act 1974* (SA), which specifically provides for non-excludable manufacturer warranties.

285 The implied terms of title, encumbrance and quiet enjoyment still apply to private sales in jurisdictions where the other warranties do not.

286 In the *Fair Trading Act 1999* (Vic), the implied terms of quality and fitness and regarding service need to be in the course of business, otherwise the implied terms will apply to private sales.

287 Under the TPA and the state and territory legislation, the provisions implying terms are either limited to 'consumers' or to certain types of contracts. In the TPA and WA legislation a 'consumer' is a buyer of goods and services the price of which does not exceed \$40,000 or (if the price exceeds \$40,000) where the goods or services are of a kind ordinarily acquired for personal, domestic or household use. In Victoria, the implied terms apply to certain contracts but the effect of their application is the same as under the TPA. In NSW the implied terms only apply to goods or services of a kind ordinarily acquired for personal, domestic or household use and in SA the provisions apply to contracts for the supply of goods and services which do not exceed \$40,000. In the NT, the definition of 'consumers' is broad but the implied terms cannot be excluded, limited or restricted in the case of goods or services of a kind ordinarily acquired for personal, domestic or household use.

	Cth	NSW	Qld	Vic	WA	SA	Tas	NT	ACT
	TPA	FTA	SGA	FTA	FTA	CTA/MWA ²⁸⁴	SGA	CAFTA	SGA
The provisions are limited to 'consumer' services or consumers	✓	✓	✗	✓	✓	✓	✗	✓	✗
The implied terms apply (or cannot be limited) in relation to:									
(a) services provided by qualified architects or engineers	✗	✗	-	✗	✗	✗ ✓ ²⁸⁸	-	-	-
(b) recreational services	✗	✗	-	✗	✗	✗	-	✗	-
(c) services in respect of insurance, transport and storage for business	✗	✓	-	✗	✗	✓	-	-	-
There is a statutory remedy for breach	✓	✓	✗	✓	✓	✓	✗	✓	✗
There is direct liability against manufacturers	✓	✓	✗	✗	✗	✗ ✓ ²⁸⁹	✗	✓	✗

288 The CTA and Regulations list certain services that are captured by the CTA, however, not all services of qualified architects or engineers may be captured.

289 The MWA includes direct liability against manufacturers, but the CTA does not.

H INTERNATIONAL APPROACHES

NEW ZEALAND

Relevant legislation

The Consumer Guarantees Act 1993 (CGA) introduced a new regime of consumer rights and remedies greater than those available under the SGA 1908 (NZ).

It sets out a number of statutory guarantees or obligations that suppliers must meet, and provides rights of redress against suppliers and manufacturers where they are not met.

The legislation does not allow for enforcement under the CGA to be carried out by the Commerce Commission or any other government or third party agency. The consumer may initiate civil legal action if the remedies are not followed through. The Disputes Tribunal, District Court or High Court may hear claims for costs, damages, or a refund payable under the CGA.

The scope of the CGA

The CGA sets out statutory guarantees that goods and services must meet when supplied to a consumer and prohibits contracting out.

In *Contact Energy Ltd v Jones*, Miller J observed:

Liability is strict, in the sense that it is no defence for the retailer to show that a manufacturer or other supplier was at fault, or that the retailer could not have detected or prevented the defect.²⁹⁰

A consumer is defined as a person who:

- acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption; and
- does not acquire the goods or services for the purpose of resupplying them in trade, or consuming them in the course of a process of production or manufacture, or, in the case of goods, repairing or treating in trade other goods or fixtures on land.²⁹¹

In *Nesbit v Porter*²⁹² the Court of Appeal had to consider whether the purchase of a four-wheel drive Nissan Navara utility motor vehicle was a 'consumer' contract. The Court

²⁹⁰ *Contact Energy Ltd v Jones* [2009] 2 NZLR 830 at [2].

²⁹¹ Subsection 2(1) CGA.

²⁹² *Nesbit v Porter* [2000] 2 NZLR 465.

considered that 'ordinarily' was used in the sense of 'as a matter of regular practice or occurrence' or 'in the ordinary or usual course of events or state of things'.²⁹³

There was evidence that about 20 per cent of buyers of Navaras acquired them exclusively for private use and that therefore there was a regular practice or occurrence of such vehicles being used for private use.

In 2003, the CGA was amended to apply to the provision of electricity.²⁹⁴ This amendment was made as a result of the finding by Neazor J in *Electricity Supply Association of New Zealand v Commerce Commission* that electricity did not constitute 'goods'.²⁹⁵ The CGA does not cover goods bought by auction or by tender²⁹⁶ or goods bought from a private seller.²⁹⁷

Statutory guarantees — goods

The CGA sets out the following main implied guarantees into consumer contracts for supply of goods:

- that the supplier has a right to sell the goods, the goods are free from any undisclosed security, and the consumer has the right to undisturbed possession of the goods;
- that goods supplied to a consumer are of 'acceptable quality'. Goods are of acceptable quality if they are as:
 - fit for all purposes for which those type of goods are commonly supplied; and
 - acceptable in appearance and finish; and
 - free from minor defects; and
 - safe; and
 - durable

as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to:

- the nature of the goods;
- price (where relevant);
- any statements made about the goods on any packaging or label on the goods;
- any representation made about the goods by the supplier or the manufacturer; and

293 *ibid.* at 473 [29] (Blanchard J, who delivered the judgment of the Court).

294 Consumer Guarantees Amendment Act 2003 (NZ).

295 (1998) 6 NZBLC 102 at 555.

296 Subsection 41(3) CGA.

297 Subsection 41(1) CGA.

- all other relevant circumstances of the supply of the goods.²⁹⁸
 - There is an exception in relation to notified defects.²⁹⁹ If defects are specifically drawn to the consumer’s attention before the supplier agreed to supply, the goods may still meet the guarantee of acceptable quality despite those defects.
 - There is also an exception in relation to unreasonable or excessive use.³⁰⁰ This excludes from the guarantee goods that have been used in a manner, or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods.
- that the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer.³⁰¹ There is an exception where the circumstances show that the consumer does not rely on the supplier’s skill or judgment or it is unreasonable for the consumer to rely on the supplier’s skill or judgment.³⁰²
 - that where goods are supplied by description to a consumer, there is a guarantee that the goods correspond with the description.³⁰³
 - that the goods correspond with the sample or demonstration model in quality and the consumer will have a reasonable opportunity to compare the goods with the sample.³⁰⁴
 - that where goods are supplied to a consumer, the consumer is not liable to pay more than a reasonable price for the goods in any case where the price for the goods is not:
 - determined by the contract;
 - left to be determined in a manner agreed by the contract; or
 - left to be determined by the course of dealing between the parties.³⁰⁵
 - that the manufacturer will take reasonable action to ensure that facilities for repair of the goods, and supply of parts for the goods, are reasonably available for a reasonable period after the goods are supplied.³⁰⁶

Statutory guarantees — services

The CGA provides implied guarantees that services must be:

- provided with reasonable care and skill³⁰⁷;

298 Section 7 CGA. See *Stephens v Chevron Motor Court* [1996] DCR 1; *Norton v Hervey Motors Ltd* (1996) 5 NZBLC 104, 204; and *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170.

299 Subsection 7(2) CGA.

300 Subsection 7(4) CGA.

301 Section 8 CGA.

302 Subsection 8(2) CGA.

303 Section 9 CGA.

304 Section 10 CGA.

305 Section 11 CGA.

306 Section 12 CGA. Note the exception in section 42 CGA.

- reasonably fit for any particular purpose the consumer conveys to the supplier³⁰⁸;
- completed within a 'reasonable time' (where the time has not been fixed by the contract, left to be fixed in a manner agreed by the contract, nor left to be determined in the course of dealing)³⁰⁹; and
- provided for a reasonable price (where the price has not been fixed by the contract, left to be fixed in a manner agreed by the contract, nor left to be determined in the course of dealing).³¹⁰

Remedies

The CGA requires the retailer who supplied the goods to resolve any problems. This means a retailer cannot tell a consumer to take the problem to the manufacturer. In some cases, the consumer can choose whether to seek a remedy for the problem from the trader or the manufacturer.³¹¹ This avoids placing an onus on consumers to prove which firm in the supply chain is responsible for the defect. The consumer is free to claim against either the retailer or the manufacturer; the retailer and the manufacturer are then left to resolve liability between them.³¹²

Remedies for breach of implied guarantees with respect to goods (where the failure can be remedied) include:

- requiring the supplier to remedy the failure.³¹³ The supplier must choose between repairing the goods, replacing the goods or providing a refund; and
- If the trader refuses to remedy the failure or takes more than a 'reasonable time' to do so, the consumer can reject the goods (asking for either a refund or replacement). Consumers can also take the goods elsewhere to be fixed and ask the supplier to pay for the cost of repair.³¹⁴

If the problem is serious (the goods are unsafe, substantially do not meet acceptable quality, fitness for particular purpose, description or sample), consumers can choose to:

- reject the goods (either seek a refund or replacement)³¹⁵; or
- keep the goods and have the price reduced to make up for their reduction in value.³¹⁶

The supplier will not be liable if a guarantee has been breached as a result of an event outside of their control.

307 Section 28 CGA. See Fraser, 'The Liability of Service Providers under the Consumer Guarantees Act' (1994) 16 NZULR 23.

308 Section 29 CGA.

309 Section 30 CGA.

310 Section 31 CGA.

311 Sections 25 and 26 CGA.

312 *Contact Energy Ltd v Jones* [2009] 2 NZLR 830 at [73] (per Miller J).

313 Paragraph 18(2)(a) CGA.

314 Paragraph 18(2)(b) CGA.

315 Paragraph 18(3)(a) CGA.

316 Paragraph 18(3)(b) CGA.

Where a supplier fails to comply with a guarantee relating to services, the consumer may require the supplier to remedy the failure within a reasonable time. If the supplier refuses to remedy the failure or takes more than a reasonable time to do so, the consumer can:

- arrange for someone else to rectify the failure and claim the cost from the supplier; or
- cancel the contract for the service and refuse to pay for the work done.³¹⁷

If the problem is serious, consumers can choose to:

- cancel the contract; or
- seek damages in compensation for any reduction in value of the product of a service below the charge paid for the service.³¹⁸

In addition to these remedies, consumers may also claim for any reasonably foreseeable extra loss resulting from the fault (consequential loss).³¹⁹ Compensation for consequential loss must put consumers in the position they would have been in if the goods or service was not faulty.

Manufacturers and importers

If there is a breach of the statutory guarantees, consumers may be able to complain to the manufacturer if it has an office in New Zealand, or where the goods are imported, to the importer or distributor.

Where there has been a breach of relevant provisions of the CGA, manufacturers and importers are obliged to:

- pay compensation, and/or pay for any loss in value; and
- honour any express warranty they gave which gives the consumer greater protection than in the Act.

UNITED KINGDOM

Relevant legislation

British law on sale of goods is principally set out in the SGA 1979 (UK) which has been amended by the Sale and Supply of Goods Act 1994 (UK) and more recently by the Sale and Supply of Goods to Consumers Regulations 2002 (UK) (collectively, the SG Act).

The Supply of Goods and Services Act 1982 (UK) (SGSA) applies similar remedies to those in the SG Act, where the seller installs the goods or a contract is agreed for goods to be manufactured or produced. The SGSA Act and the Supply of Goods (Implied Terms) Act

317 Paragraph 32(a) CGA.

318 Paragraph 32(b) CGA.

319 Sections 18(4), 27(1(b), and 32(c) CGA.

1973 (UK) (SGIT Act) provide protection for those who hire goods, or acquire them under hire purchase, or conditional sale agreements.

In May 1999 (when the UK became part of the European Union) the EU Consumer Sales Directive (99/44/EC) (CSD) was introduced. In 2002, changes were made to the SG Act and the SGSA Act in an attempt to transpose the CSD into the domestic law.

Definition of 'consumer'

All buyers are entitled to remedies under legislation. However consumers are entitled to a greater range of remedies.

'Consumers' are defined as persons who buy for purposes not related to their trade, business or profession. A consumer's rights in relation to the sale and supply of goods cannot be curtailed by a term in the contract. However, certain limitations of liability are available in business-to-business contracts subject to the Unfair Contract Terms Act 1977 (UK) (UCT Act).

When goods are faulty, buyers can generally only obtain a legal remedy against the retailer. Consumers may have additional rights under any guarantee supplied with goods.

Implied terms in sale of goods

The SG Act sets out implied terms that require that goods conform with the contract, and in particular:

- Goods should match any description given to them.
- Goods should be of satisfactory quality (that is, they should meet the standard a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances).
 - The quality of goods includes their state and condition, and the following (among others) are, in appropriate cases, aspects of the quality of goods:
 - : fitness for all the purposes for which goods of the kind in question are commonly supplied;
 - : appearance and finish;
 - : freedom from minor defects;
 - : safety; and
 - : durability.
- Goods should be reasonably fit for any particular purpose that was made known to the retailer (unless the retailer disputed their appropriateness for that purpose at the time).

Implied terms in supply of services

The SGSA Act requires a supplier of services acting in the course of business in England, Wales and Northern Ireland (and, in part, Scotland) to carry out services:

- with reasonable skill and care;
- for a reasonable price (unless a price has been agreed); and
- within a reasonable time (unless time is made of the essence).

These terms apply unless they have been excluded, and there are strict limits on the circumstances in which an exclusion or variation will be effective. The common law in Scotland has similar effect to the SGSA Act in those areas not covered by the Act.

Rights and remedies

There are effectively two legal regimes relating to the breach of an implied term – the traditional UK remedies and remedies based on the CSD.

Under the traditional UK remedies for sale of goods, the consumer is essentially entitled to reject faulty goods and terminate the contract. The consumer may refuse to pay for the goods, or (if they have paid already) claim a full refund. However, consumers must act quickly, as the right to reject is lost once the consumer is deemed to have accepted the goods, which may happen ‘after the lapse of a reasonable time’. Thereafter, the consumer is entitled only to damages.

If an item has a fault that is present at the time of sale, the consumer can take action once it is discovered. However, consumers do not have a legal remedy where goods have faults they knew about before the sale or which should have been evident on reasonable inspection.

There are four new remedies under the CSD, organised into two tiers – (1) repair or replacement and (2) rescission or reduction in price. Section 48A of the SG Act creates a presumption that where goods do not conform to the contract at any time within the first six months, they are presumed not to have conformed at the time of sale.

Consumers must begin by asking for a first-tier remedy. In theory, consumers may choose whether to ask for a repair or a replacement, but the trader may decline either of these remedies and provide an alternative if the requested remedy is impossible or ‘disproportionately costly’.

If neither repair nor replacement is realistically possible, consumers can request partial or full refund depending on what is reasonable in the circumstances. If the consumer has enjoyed some benefit from the goods before the problem appeared, they may be entitled to a partial refund proportionate to the benefit of the goods enjoyed up to the date the fault or defect was discovered.

Retailers are required to carry out a remedy within a ‘reasonable time’ and without ‘significant inconvenience’ to the consumer. Consumers can switch between certain remedies if required to achieve a timely outcome, provided they give the retailer a ‘reasonable time’ to honour their initial request.

As the law currently stands, the consumer may choose either regime.

If the consumer returns the goods in the first six months from the date of the sale, they do not have to prove the goods were faulty at the time of the sale. If the seller does not agree, it

must prove the goods were satisfactory at the time of sale. For goods returned after six months, the consumer must demonstrate they were faulty when sold.

Dispute resolution

The Small Claims Court procedure provides the means for consumers to bring a claim for damages up to £5,000 (in England and Wales). This is generally at moderate cost and without need for a solicitor.

However, court action is rare and, in the vast majority of cases, the buyer and retailer are able to reach a satisfactory solution without any need to consider going to court by engaging in an alternative dispute resolution procedure or trade association scheme.

Other relevant legislation

There are a number of other pieces of legislation in the United Kingdom which are also relevant to the law in this area:

- Unfair Contract Terms Act 1977 – restricts a trader’s ability to rely on contract terms to limit liability otherwise imposed by law.
- Consumer Transactions (Restrictions on Statements) Order 1976 – makes it a criminal offence to restrict the consumer’s statutory rights by means of a notice, statement or documents (for example, a notice that states ‘No Refunds’).
- Misrepresentation Act 1967 – provides a party who has relied on the misrepresentation with a remedy ranging from the contract being rescinded to the payment of damages, depending upon whether the misrepresentation was made falsely, negligently or innocently.

EUROPEAN UNION

Relevant legislation

The law with respect to implied conditions and warranties into contracts for supply of consumer goods is set out in the CSD.

The CSD applies to contracts for the sale of consumer goods by a seller to a consumer. These definitions describe the scope of the CSD, although few Member States have restricted their implementing legislation to the exact scope specified by the CSD and most go beyond its scope in some respects.

Consumer goods

Consumer goods are defined as any tangible movable item, with the exception of:

- goods sold by way of execution or otherwise by authority of law;
- water and gas where they are not put up for sale in a limited volume or set quantity; and
- electricity.

Member States may exclude from this definition second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person. However, the CSD applies to contracts for the supply of consumer goods to be manufactured or produced.

Conformity with contract

Consumer goods must be in conformity with the contract of sale. Goods are deemed to be in conformity with the contract if, at the moment of delivery to the consumer:

- they comply with the description given by the seller and possess the qualities of the product which the seller has held out to the consumer as a sample or model;
- they are fit for the purposes for which goods of the same type are normally used;
- they are fit for any particular purpose for which the consumer requires them and which was made known to the seller at the time of conclusion of the contract, and accepted by the seller; and
- their quality and performance are satisfactory, given the nature of the goods and taking into account the public statements made about them by the seller, the producer or their representative.

The seller is liable to the consumer for any lack of conformity which exists when the goods are delivered to the consumer and which becomes apparent within a period of two years unless, at the moment of conclusion of the contract of sale, the consumer knew or could not reasonably have been unaware of the lack of conformity.

If the goods are not in conformity with the public statements made by the producer or their representative, the seller will not be liable to the consumer if they show that:

- they did not know and could not reasonably know the statement in question;
- they corrected the statement at the time of sale; or
- the decision to buy the goods could not have been influenced by the statement.

Any lack of conformity resulting from incorrect installation of the consumer goods is deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under their responsibility. This applies equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

Any lack of conformity becoming apparent within six months of delivery will be presumed to have existed at the time of delivery, unless proof to the contrary is furnished or this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

Remedies for lack of conformity

When a lack of conformity is notified to the seller, the consumer will be entitled to ask:

- for the goods to be repaired or replaced free of charge within a reasonable period and without major inconvenience to the consumer; or
- for an appropriate reduction to be made to the price, or for the contract to be rescinded, if repair or replacement is impossible or disproportionate, or if the seller has not remedied the shortcoming within a reasonable period or without major inconvenience to the consumer.

The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

When the final seller is liable to the consumer because of a lack of conformity resulting from an act of commission or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller will be entitled to pursue remedies against the person responsible.

Implied warranties as to services

Implied warranties as to services are regulated by laws in force in each Member State of the EU. Otherwise, any services provided as part of a sale of goods are treated as part of the supply of goods and are subject to the CSD provisions.

UNITED STATES

Relevant legislation

American consumers are protected through a combination of national, state and local governmental and private agencies.

The principal, but not the only, US consumer protection agency at the federal level is the United States Federal Trade Commission (FTC). The FTC works alone, and in concert with other federal agencies, to administer a wide variety of consumer protection laws and it derives its consumer protection authority principally from subsection 5(a) of the Federal Trade Commission Act (15 USC) (FTC Act), which prohibits 'unfair or deceptive acts or practices in or affecting commerce'.

State governments act as both consumer law enforcement agencies and consumer advocates. In most states, state attorneys-general are charged with enforcing state consumer protection law. Each state has some form of consumer protection law, and numerous are modelled after the FTC Act and forbid 'unfair and deceptive' trade practices. In addition, state 'lemon laws' streamline the remedy procedure for consumers who purchase a defective new or used car.

At the state level, consumers may use both common law and statutory causes of action to seek redress. Present common law actions provide consumers protection through torts for deceit, fraud, misrepresentation, and breach of warranty. If successful in court, a consumer may receive damages for out-of-pocket losses, rescission of the transaction at issue, damages to ensure the consumer receives the benefit of the bargain, or even punitive damages.

Breach of implied warranties

When a product fails to meet a consumer's expectations, yet no misrepresentations about the product were made, the breach of warranty cause of action may protect the consumer from losses. Most states use the structure of the Uniform Commercial Code (UCC) to protect consumers through express and implied warranties. Express warranties are explicit promises that the manufacturer or seller will stand behind the product sold.³²⁰ These may be either written or oral. A more standard level of protection exists in the implied warranties of merchantability and fitness for a particular purpose.

For example, the UCC necessitates that all merchant-sold goods are, at a bare minimum 'fit for the ordinary purposes for which such goods are used'.³²¹ This protects consumers against product defects. In order to receive protection through an implied warranty of merchantability, the good in question must be purchased from a merchant, or someone with some level of expertise and skill with the product.

The implied warranty of fitness for a particular purpose is a promise by the seller that when the customer relies on the seller's advice that a product can be used for some specific purpose, it will be fit for that purpose.³²²

When a product fails to conform to an express or implied warranty, the consumer may either keep the product and seek damages or return the product for a refund. In most cases consumers choose the latter action. If a consumer retains the product, they may seek difference in value between the good in hand and the warranted good.

Magnuson-Moss Warranty Act

The federal government also affords consumers warranty protection through the Magnuson-Moss Warranty Act (15 USC § 2301 et seq) (MMWA). Although it does not require warranties for consumer products, the MMWA requires manufacturers and sellers to provide consumers with detailed information about warranty terms and conditions before they buy goods.

Such regulation is meant to reduce confusion about warranty terms while increasing warranty coverage transparency and clarity. It does not require manufacturers and sellers to offer written warranties, but if warranties are offered the manufacturer or seller must provide certain specified information about the warranty terms, such as whether it is a 'full' warranty or a 'limited' warranty.³²³ The MMWA promotes competition among suppliers in relation to the price, quality and service packages of warranties by enabling consumers to compare warranty terms and conditions before they decide to purchase, and to choose the product that offers the best combination of price, quality and warranty that suits their needs.

The MMWA is aimed at providing consumers with access to reasonable and effectual remedies where there is a breach of warranty on a consumer product. It provides for alternative dispute settlement procedures and for actions brought by the government and by private parties.

320 Section 2-313 UCC.

321 Section 2-314 UCC.

322 Section 2-315 UCC.

323 Section 103 MMWA.

Further, the federal government has the power to take injunctive action against a supplier or warrantor who fails to meet the requirements of the Act. Consumers may seek restoration in the courts for alleged violations of the MMWA. Consumers who have been injured by the noncompliance of a supplier may pursue their action in a state court if the amount in controversy is between \$25 and \$50,000, or by way of a class action in state court if the number of class plaintiffs is less than 100. One of the essential aids to the effectiveness of MMWA is that a prevailing plaintiff may recover reasonable costs of suit, including attorney fees.

Restrictions on disclaimers or modifications

No supplier may disclaim or modify any implied warranty to a consumer with respect to a consumer product if:

- the supplier makes any written warranty to the consumer with respect to the consumer product; or
- at the time of sale, or within 90 days thereafter, the supplier enters into a service contract with the consumer which applies to the consumer product.

Limitation on duration

Implied warranties may be limited to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set out in clear and unmistakable language and prominently displayed on the face of the warranty.

CANADA

Relevant legislation

There is separate legislation in each province of Canada regarding supply of goods and services to consumers. As an example, the relevant law in the common law province of Ontario – which typifies the approach taken in other common law provinces and territories – is discussed below. The only notable difference is the civil law system in Quebec. Québécois law recognises concepts of ‘latent’ or ‘hidden’ defects rather than distinguishing between ‘warranties’ and ‘conditions’. Quebec also imposes, on a professional seller, a presumption the defect was known by the seller at the time of the sale.³²⁴

Implied conditions and warranties under the SGA

By virtue of the Ontario Sale of Goods Act RSO 1990 Chapter S1 (Ontario SGA) and the Consumer Protection Act SO 2002 Chapter 30 (Ontario CPA), the following warranties are implied into consumer contracts:

- implied condition that the seller has the right to sell;

324 Kurer, M, Codoni, S, Gunther, K, Santiago Neves, J and Teh, L (eds.) 2002, *Warranties and Disclaimers: Limitation of Liability in Consumer-Related Transactions*, page 149. [check]

- implied warranty that the buyer will have quiet enjoyment of the goods and that goods will be free from encumbrance;
- implied condition that the goods will correspond to description;
- implied conditions as to quality or fitness. This condition will not apply unless:
 - the buyer expressly or impliedly makes known to the seller a particular purpose for the goods;
 - the buyer indicates they are relying on the skill or judgment of the seller;
 - the goods are normally supplied in the course of the seller's business; and
- implied condition that goods will correspond to sample and the buyer will have a reasonable opportunity to compare the bulk with the sample.

Scope of the CPA

The Ontario CPA applies in respect of all consumer transactions.

Under section 1 of the Ontario CPA:

- 'consumer' is defined as an individual acting for personal, family or household purposes and expressly does not include a person who is acting for business purposes;
- a 'consumer transaction' means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement; and
- a 'consumer agreement' is an agreement between a supplier and consumer in which the supplier agrees to supply goods or services for payment.

Implied warranties under the CPA

Under subsection 9(1) of the Ontario CPA, the supplier is deemed to warrant that the services supplied under a consumer agreement are 'of reasonably acceptable quality'.

Implied warranties set out in the Ontario SGA are incorporated with respect to goods by subsection 9(2). Subsection 9(3) stipulates that clauses in any consumer contract attempting to negate or vary any implied condition are invalid.

Remedies under the SGA

Under the Ontario SGA, the remedy available to the buyer depends on whether the seller has breached an implied condition or warranty.

Where an implied condition is breached, as with the common law in Australia, the consumer may elect to affirm the contract and seek damages or treat the contract as at an end. Rescission is available in the case of a material misrepresentation.

Under subsection 12(3) of the Ontario SGA, breach of a condition is to be treated as breach of warranty where the buyer has accepted the goods or the property in the goods has passed to

the buyer. In that case, the buyer cannot reject the goods and treat the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

Under section 51 of the Ontario SGA, where there is a breach of warranty by the seller, the buyer is entitled to recover the breach of warranty in diminution or extinction of the price or maintain an action for damages for breach of warranty.

Damages are limited under subsection 51(2) to those flowing directly or naturally from the ordinary course of events from the breach of warranty. In the case of breach of warranty as to quality, under subsection 51(3), damages are limited to the difference between the value of the goods at the time of delivery to the buyer and the value they would have had, had they answered to the warranty. This limitation is rebuttable by evidence to the contrary.

Under subsection 51(4), a buyer can maintain an action for further damages in addition to any action for diminution or extinction of price.

Remedies under the Ontario CPA

Remedies with respect to sale of goods under the Ontario CPA are similar to those set out in the Ontario SGA. With respect to services, unless the breach of warranty is a major one, the vendor must be given a reasonable opportunity to rectify the breach. In addition to the Ontario SGA, where the consumer has purchased a faulty product, the consumer must return the product to the seller or to a repair facility, at the vendor's request.³²⁵

In addition, subsection 10(1) of the Ontario CPA provides that any estimate of charges in a consumer agreement must not be exceeded by 10 per cent, otherwise the consumer can demand that the supplier provide the goods or services at the estimated price (see subsection 10(2)). The consumer and supplier can agree to amend the estimate by subsequent agreement.

Under section 11 of the Ontario CPA, any ambiguities in interpretation of the consumer agreement are to be resolved to the benefit of the consumer.

SOUTH AFRICA

Relevant legislation

The South African Department of Trade and Industry initiated a review of the consumer legislative framework that culminated in the publication of the Draft Green Paper on the Consumer Policy Framework 09/04 (Green Paper) in 2004.

After extensive consultation, the Consumer Protection Bill was developed and introduced into the parliament with the objective to:

- promote a fair, accessible and sustainable marketplace for consumer products and services, responsible consumer behaviour, and a consistent enforcement framework relating to consumer transactions and agreements;

³²⁵ *Canadian Commercial Law Guide*, 1999 CCH Canadian Limited, page 3557. See also M, Kurer, S, Codoni, K, Gunther, F, Santiago Neves and L, Teh, at page 156.

- prohibit certain unfair marketing and business practices; and
- provide for improved standards of consumer information, harmonisation of laws relating to consumer transactions and agreements, and the establishment of the National Consumer Commission.

The Consumer Protection Act 2008 (South African CPA) was assented to on 29 April 2009. Among other things, it provides for some 'fundamental consumer rights'.

Fundamental consumer rights

The South African CPA provides for a range of consumer rights under Chapter 2 of that Act, falling into nine key categories:

- right of equality in consumer market (Part A);
- consumer's right to privacy (Part B);
- consumer's right to choose (Part C);
- right to disclosure and information (Part D);
- right to fair and responsible marketing (Part E);
- right to fair and honest dealing (Part F);
- right to fair, just and reasonable terms and conditions (Part G);
- right to fair value, good quality and safety (Part H); and
- supplier's accountability to consumers (Part I).

Within these Parts – and, in particular Part H – provision is made for implied conditions/warranties in relation to the supply of goods and services. These include:

- an implied provision that the seller has the right to supply goods, the consumer is entitled to quiet possession of the goods and the supplier is liable for any encumbrances (section 44);
- a right of consumers to timely performance and completion of services in a manner and quality that people are generally entitled to expect (section 54);
- a right of consumers to receive goods which are reasonably suitable for the purposes for which they are generally intended, are of good quality, in good working order and free of any defects, and will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply (section 55);
- a right of consumers to expect that goods are reasonably suitable for the specific purpose that the consumer has indicated (section 55); and

- a warranty on repaired goods, that every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, is under warranty for at least three months after the date of installation.

Remedies

If a supplier fails to perform a service to the standards contemplated in section 54, the consumer may require the supplier to either remedy any defect in the quality of the services performed or goods supplied; or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards of section 55, and the consumer can choose that the supplier either:

- repair or replace the failed, unsafe or defective goods; or
- refund to the consumer the price they paid for the goods.

If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must:

- replace the goods; or
- refund to the consumer the price they paid for the goods.

I **METHODOLOGY FOR THE NEIAT BASELINE STUDY OF STATUTORY WARRANTIES AND REFUNDS**³²⁶

The National Education and Information Advisory Taskforce (NEIAT)

NEIAT was established in 2007, comprising senior education and information staff from all jurisdictions, including the Commonwealth, to provide expert advice to MCCA and SCOCA on consumer education issues that require a national and coordinated approach.

NEIAT Baseline Study for Statutory Warranties and Refunds August 2009

In August 2008, NEIAT conducted a broad public information campaign for consumers, traders and manufacturers to inform them about the TPA and state/territory fair trading legislation. To enable NEIAT to select the behaviour most appropriate for initial targeting, a baseline research study by Latitude Research and On Track Research was commissioned to generate robust data from consumers and traders in relation to statutory warranties and refunds. Problems with warranties and refunds were found to be relatively high in three markets – whitegoods, electronic goods and mobile phones, upon which the baseline research focused.

Research objectives

The principal aim was to collect primary data from consumers and suppliers in relation to statutory warranties and refunds. Specific objectives were to:

- provide a national statistically representative assessment of consumer detriment across all warranties and refunds issues;
- provide a national statistically representative assessment of the level of consumer, manufacturer, and retailer understanding of the rights and obligations created by existing statutory warranties;
- identify differences in the incidence and level of detriment arising from warranty and refund issues experienced across consumer groups;
- assess reputational and business costs to traders with protracted disputes about warranty claims; and
- identify the barriers and triggers to changing marketplace behaviour for consumers, retailers, and manufacturers, including their responsiveness to messages.

³²⁶ The content of this Appendix is based on the National Education and Information Advisory Taskforce *Baseline Study for Statutory Warranties and Refunds*, August 2009.

Research method

The methodology was both qualitative and quantitative, and consequently conducted in two stages. An initial qualitative phase ensured coverage of target audiences. This made sure the quantitative phase was appropriately targeted and defined.

Qualitative phase

The qualitative research involved a series of group discussions, in-depth interviews and an online bulletin board.

Quantitative phase

The quantitative research involved a series of telephone surveys. Telephone was preferred to alternatives such as a mail-out survey (likely to achieve low response rates and result in high completion errors) or an online survey (for similar reasons, and also because of concerns about unrepresentative coverage of vulnerable and disadvantaged consumers with more limited Internet access).

Sample

Qualitative phase

The qualitative approach involved consultation with more than 100 consumers and a small sample of manufacturers and retailers, as follows:

- a series of five group discussions with consumers who have experienced faults with mobile phones, any whitegoods or any electrical/electronic goods;

Product	Specifications	Location
Mobile phones	Under 30yo M/F	Melbourne
White/Electronic goods	25+yo M/F	Melbourne
Mobile phones	25+yo M/F	Geelong
Mobile/White/Electrical goods	25+yo M/F	Kalgoorlie
White/Electrical goods	25+yo M/F	Perth

- an online bulletin board study involving 66 consumers nationally who have experienced faults with mobile phones, electrical goods or whitegoods in the past two years;
 - Sixty-six consumers participated for the entire duration of the study, comparing and contrasting their experiences with others, and answering a series of 15 questions over a 10-day period in July 2009.
- a small sample of qualitative depth interviews;
 - two in-depth interviews with indigenous consumers who have experienced problems; and
 - twelve in-depth interviews with manufacturers and retailers to fully explore barriers to behavioural change, and to cognitive-test parts of the quantitative survey.

Quantitative phase

The quantitative phase involved three separate surveys of consumers, retailers and manufacturers/importers of the target goods.

For the consumer survey, interviews were carried out nationally with 3,023 consumers aged 16 years and over, split into three separate groups of consumers:

- those who had experienced problems with mobile phones, electrical/electronic goods, or whitegoods in the past two years (five years for white goods). A total of 763 people were interviewed;
- those who had bought such goods within the past two years but had not experienced any problems. A total of 1,853 people were interviewed; and
- those who had not bought any such goods in the past two years. A total of 407 people were interviewed.

For the business component of the research, interviews were carried out with 623 business representatives – in each case the person within the organisation most responsible for handling product problems and warranty claims. The sample was split between two separate surveys:

- a national telephone survey of n=500 retailers who sell mobile phones, electrical/electronic goods, or whitegoods; and
- a national telephone survey of n=123 manufacturers/importers of mobile phones, electrical/electronic goods or whitegoods.

Weighting procedures

All three quantitative surveys were weighted to reflect the national distribution of each population.

For the consumer survey:

- 2006 census data on age, gender, state and capital/rest of state was adjusted to reflect ABS estimates of population growth by age and sex up to December 2008 – this provided the population matrix on which the weighting was based; and
- a rim weighting procedure was then applied to the survey data to yield weighted data that very closely matched the national population by age, gender and location.

For the retailer and manufacturer / importer surveys:

- ABS Establishments by Industry data for 2007 provided the basis for estimating the population matrix (state x employment size and capital city/balance of state);
- all four-digit ANZSIC classes relevant to the target goods were included, with each classified as 10 per cent, 25 per cent, 50 per cent or 100 per cent relevance; and
- applying these factors yielded estimates of the total population of retail and manufacturing/importing establishments in each state. This was then adjusted for capital/balance of state and formed the final matrix used.

Response rates

Response rates for the three surveys are outlined below.

- For the consumer survey, interviews were achieved with 15 per cent of finalised contacts (all those spoken to who were eligible to be interviewed):
 - 99,404 telephone numbers were attempted, of which 73,026 were invalid or business numbers (a typical result from random digit dialling);
 - of the remaining 26,378 numbers, 6,627 were unused at the end of the survey (no answer, engaged, quota full, or awaiting appointments); and
 - of the 19,751 numbers with a final resolution, 3,023 resulted in interviews and 16,728 in refusals. Those contacted were advised that the interview might last 20 minutes, a factor that always increases refusal rates considerably.
- For the retailer survey, interviews were achieved with 37 per cent of finalised contacts:
 - 4,172 numbers were attempted, of which 1,833 were found to be invalid (mostly because they were found not to be retailers of the target goods, or were not retailers at all);
 - of the remaining 2,339 numbers, 985 were unused at the end of the survey; and
 - of the 1,354 numbers with a final resolution, 500 resulted in an interview, and 854 in a refusal.
- For the manufacturer/importer survey, interviews were achieved with 26 per cent of finalised contacts:
 - 1,702 numbers were attempted, of which 1,220 were found to be invalid (mostly because they were found not to be manufacturers/importers of the target goods, or not manufacturers/importers at all);
 - of the remaining 482 numbers, 16 were unused at the end of the survey; and
 - of the 466 numbers with a final resolution, 123 resulted in an interview, and 343 in a refusal.

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