

TERMS OF REFERENCE

REVIEW OF STATUTORY IMPLIED CONDITIONS AND WARRANTIES

The Commonwealth Consumer Affairs Advisory Council (CCAAC) is to undertake a review of the adequacy of existing laws on implied conditions and warranties in the *Trade Practices Act 1974* (TPA) and state and territory Fair Trading Acts (FTAs) and Sale of Goods legislation.

Context

The Productivity Commission (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 the Ministerial Council on Consumer Affairs (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 regulators 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, while there may be a legitimate role for extended warranties in the market place, “given the apparent lack of understanding by consumers of their statutory rights in relation to implied warranties and the proliferation of extended warranty offering across a broad spectrum of consumer goods, there could in future be a case for a stronger policy response”.

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 regulators 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 was 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.