



Australian Government
The Treasury



Consumer rights

Statutory implied conditions and warranties

Issues paper

July 2009

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FOREWORD

The Commonwealth Consumer Affairs Advisory Council (CCAAC) is examining the existing laws on implied warranties and conditions in the *Trade Practices Act 1974* and state and territory fair trading and goods law. CCAAC's work will inform the development of the Australian Consumer Law led by the Ministerial Council on Consumer Affairs.

Consumer wellbeing is enhanced through markets that support fair trade between suppliers and consumers. Ready access to clear and accurate information about products and services encourages active and confident participation by consumers. This includes information about the type of warranties and remedies available to consumers when they experience product failure. Greater competition, variety and complexity, as well as technological change, have led to significant changes in consumer markets and have raised concerns about the adequacy of existing legislation on implied conditions and warranties.

Australia's consumer agencies receive many complaints and enquiries about problems that consumers have in exercising their rights to a refund or to have a product replaced or repaired where it is faulty. It is one of the largest categories of consumer complaints received each year. This paper seeks to gather views on a range of issues relating to this field and will draw on the work of the National Education and Information Advisory Taskforce, which is currently researching the impact of implied conditions and warranties as experienced by consumers.

This consultation will explore the adequacy of the current laws on implied conditions and warranties and the need, if any, for amendments to improve existing laws and to empower regulators to ensure compliance with these laws. This consultation will also consider some of the 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 warranties; and other possible means to improve the operation of the existing laws on implied warranties in Australia.

The purpose of this review is not simply to recommend legislative change, but to find the best ways — both regulatory and non-regulatory — to address problems in this area. I am pleased to release this issues paper as an important step in the CCAAC review. It is intended to provide information on specific elements being examined and to stimulate discussion. This consultation will assist the reform process to develop a new national consumer law for Australia — the Australian Consumer Law.

I offer my thanks to CCAAC for the preparation of this paper. I welcome the views of all those interested in, and concerned with, consumer policy in Australia.



Colin Neave
Chairman, Commonwealth Consumer Affairs Advisory Council

THE COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL (CCAAC)

CCAAC terms of reference

CCAAC is an expert advisory panel, which provides advice to the Minister for Competition Policy and Consumer Affairs on consumer policy issues.

CCAAC's terms of reference are to:

- consider issues, reports and papers referred to it by the Minister and report to the Minister on their consumer policy implications, and in doing so take account of the need for well-functioning markets with confident consumers;
- identify emerging issues affecting Australian markets and consumers and draw these to the attention of the Minister; and
- when considering consumer policy issues, take account of their competition and other relevant economic implications.

Membership

The membership of CCAAC consists of:

- Mr Colin Neave (Chair);
- Ms Carolyn Bond;
- Professor Stephen Corones;
- Ms Deborah Healey;
- Mr Michael Malone;
- Ms Robynne Quiggin;
- Mr Gordon Renouf;
- Mr Ray Steinwall; and
- Mr Peter Kell (*ex officio*).

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REQUEST FOR COMMENTS

The Commonwealth Consumer Affairs Advisory Council has developed this issues paper, *Consumer rights: statutory implied conditions and warranties*, to:

- raise issues about the Australian law in relation to implied conditions and warranties; and
- seek public and stakeholder comments in relation to these issues.

Responses are requested by 5:00pm on Monday 24 August 2009 and can be submitted to:

CCAAC@treasury.gov.au

or

CCAAC Review of Conditions and Warranties
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

Phone: 02 6263 2111

Fax: 02 6263 3964

Confidentiality

It will be assumed that submissions are not confidential and may be made publicly available on the Treasury website (<http://www.treasury.gov.au>). If you would like your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982* for a submission marked confidential to be made available will be determined in accordance with that Act.

GLOSSARY OF TERMS

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 of a State or Territory
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
PC	Productivity Commission
SGA	Sale of Goods Act of a State or Territory
TPA	<i>Trade Practices Act 1974</i>

CHAPTER 1

INTRODUCTION

About the review

In its 2008 *Review of Australia's Consumer Policy Framework* the Productivity Commission (PC) recommended¹ 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 national generic consumer law.

In 2008, the Ministerial Council on Consumer Affairs (MCCA) decided that the Australian Government would initiate a review of the relevant provisions of the *Trade Practices Act 1974* and state and territory fair trading and goods legislation with the aim of developing clear codified law to be applied nationally and, further, that the review should include a consideration of 'lemon laws'.

On 12 March 2009, the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, announced a review of the Australian law on implied terms by the Commonwealth Consumer Affairs Advisory Council (CCAAC).

CCAAC, under its terms of reference, will examine the existing laws on implied terms in the *Trade Practices Act 1974* and state and territory fair trading and goods legislation and, in particular, consider:

- the adequacy of the current laws on implied terms;
- the need for any amendments to the current laws on implied terms 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 terms; and
- other means for improving the operation of existing statutory conditions and warranties in Australia.

1 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, vol. 1, recommendation 8.1.

In conducting the review, CCAAC is to:

- perform a review of existing Australian literature, including conclusions and recommendations made in relevant Australian reviews;
- consider relevant international research and models for implied terms 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 (COAG) on 2 October 2008.

Consultation process

CCAAC is seeking the views of interested stakeholders on the adequacy of the current laws on implied terms in both federal and state and territory legislation.

This issues paper is intended to highlight some of the key issues to assist organisations and individuals preparing submissions. However, submissions are welcome on any issues relevant to statutory terms, including those not explicitly covered in this paper.

CHAPTER 2

WARRANTIES

Consumers play a vital role in promoting well-functioning markets. They send signals to suppliers through purchasing decisions and suppliers then compete for business on cost, quality and innovation. Responses to consumer signals by suppliers generally 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 key contributor to consumer confidence is ready access to clear, accurate information about the characteristics of the products and services consumers want to purchase. In this respect, a goal of consumer policy is to overcome significant information failures.

In situations where information asymmetries result in an imbalance between buyers and sellers, government intervention may be warranted. Suppliers generally have better information than consumers about the quality of the goods and services that they offer for sale.

For more than a century State and Territory governments have had provisions in their Fair Trading Acts (FTAs) and Sale of Goods Acts (SGAs) that imply terms into contracts for the sale of goods, which give basic warranties and rights to purchasers. Nationally, the *Trade Practices Act 1974* (TPA) also includes these fundamental rights. Over the past 35 years, significant changes have occurred in consumer markets through greater competition, variety and complexity, as well as technological change. Therefore, it is timely to reassess the warranties available to ensure that they contribute to MCCA's national consumer policy 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’.²

Types of warranties

There are three types of warranty that consumers can rely on to protect themselves if they have a problem with the goods or services they buy. These are a manufacturer's voluntary warranty, an extended warranty and a statutory warranty. Historically, the common law has also implied terms into contracts, but these will not be considered as part of this paper.

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

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 is at the manufacturer's discretion. However, if provided, a voluntary warranty forms part of the contract between the buyer and the seller and a buyer has the right to take legal action against the seller if the warranty is not honoured.

Extended warranties

Some businesses also offer consumers the option of purchasing an extended warranty. Extended warranties are usually service or insurance contracts and, under specified conditions, will cover the costs of product repairs or replacement for a set period beyond the expiration of any voluntary warranty offered by the manufacturer. The terms and conditions of extended warranties are at the discretion of the organisation supplying the warranty.

Statutory warranties

Regardless of whether a voluntary or extended warranty is available, the TPA, FTAs and 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.

Supply of goods

In contracts for the supply of goods, the statutory conditions in the TPA require that:

- goods must be of merchantable quality — they must meet a level of quality and performance that would be reasonable to expect, given their price and description. They should also be free from defects that were not obvious at the time of purchase;
- goods must be fit for their intended purpose — they should be suitable for any particular purpose the buyer made known to the seller;
- the goods must match the description given to the consumer, or the sample shown; and
- a consumer must receive clear title to the goods — that is, the seller must be entitled to sell the goods and consumers can expect to own the goods outright.

The statutory warranties in the TPA require that:

- the consumer will enjoy quiet possession of the goods; and
- the goods are free from any charge or encumbrance not disclosed or known to the consumer.

Supply of services

All contracts for services contain a number of statutory warranties. The TPA requires that:

- any service must be carried out with due care and skill;
- any materials supplied in connection with the service must be reasonably fit for the purpose for which they are supplied; and
- the service, and any materials supplied in connection with the service, should be reasonably fit for any particular purpose the consumer made known to the seller.

Application

Statutory rights apply whether the goods are new, 'seconds' or second-hand. However, clearly a second-hand good may not be expected to last as long, or perform to the same standard, as a new one. So, in regard to 'merchantable quality' for example, the level of quality and performance that would be reasonable to expect might be lower than for a new good.

Apart from implied rights in relation to clear ownership rights, the statutory rights (outlined above) do not cover goods bought at auction.

Remedies

If goods or services do not meet any one of the statutory implied terms, it is a breach of the contract between the seller and the consumer, and the consumer is entitled to a remedy from the seller. The type of remedy depends on the circumstances but may include repair or replacement of goods, compensation for loss or damage, a refund, or having a service performed again.

Statutory rights have no set time limit — depending on the price and quality of goods, consumers may be entitled to a remedy after any manufacturer's or extended warranty has expired. However, it should be noted that limitation periods do apply to actions for breach of contracts (6 years in most jurisdictions).

Refunds

Consumers are entitled to receive a refund for goods where there has been a breach of a statutory condition (but not a statutory warranty). That is, the consumer may be entitled to a refund if the goods they purchased:

- are or become faulty through no fault of the consumer;
- are not fit for a stated purpose or a purpose the consumer made known to sales staff at the time of purchase;
- do not match the description or sample shown to the consumer ; or

- have defects that were not obvious or not shown to the consumer before they purchased.

The goods must be returned within a reasonable period and proof of purchase may be required. Further, the consumer must have taken reasonable care of the goods and not have damaged the goods by using them in a way they were not meant to be used. Consumers may only be entitled to a partial refund if the fault develops after they have enjoyed some use of the good.

Given that there are no statutory implied conditions in relation to services under the TPA, there is no statutory right for consumers to receive a refund, even if the services were not carried out properly or if the materials used are faulty.

Other types of remedies

If a good does not meet a statutory implied term after a consumer has owned it for some time or used it a lot, it is still a breach of contract. However, in these cases the consumer may not be entitled to claim a refund, but may still be entitled to another form of remedy from the seller for the breach of contract, such as:

- the replacement of the goods, or the supply of equivalent goods; or
- repair of the goods, or paying for the cost of repair.

Impact and nature of common problems with implied terms

The problems consumers experience in exercising their rights to a refund, or to have a product replaced or repaired if it is faulty or breaks down, is one of the largest categories of consumer complaints received by consumer affairs agencies. It generates considerable levels of consumer detriment each year in Australia and is a significant issue in both Australia and overseas.

Size of the consumer detriment

There has been little research in Australia quantifying the impact of statutory conditions and warranties and the consumer detriment resulting from problems with the current approach to implied terms. Each year, consumer affairs agencies alone receive around 50,000 enquiries and complaints on issues related to warranties and refund claims³ and these are likely to be only a small fraction of the total problems faced by consumers. For example, a 2001 Victorian study indicated that only nine per cent of people approach a consumer affairs or fair trading agency when they have a problem.⁴ Almost a third of all complaints and enquiries come from the whitegoods, electronic goods and mobile phones sectors.⁵

While it is difficult to measure accurately the size of consumer detriment, it is estimated that the problems related to warranties and refunds, such as defective or substandard goods or

³ National Education and Information Advisory Taskforce 2008, *Warranties and Refunds*, Melbourne, p 11.

⁴ Sweeney Research 2001, *Consumer and Business Affairs Victoria, Consumer Awareness Survey*, Melbourne, p ii. A NSW study suggested that this figure is likely to be much higher, but the results in the study were heavily qualified: Ipsos 2007, *New South Wales Office of Fair Trading: Service Delivery Research Report*, Sydney, p 11.

⁵ Consumer Affairs Victoria 2009, *Warranties and refunds in the electronic goods, white goods and mobile telephone industries*, Melbourne, p 1.

services, or difficulty getting faults repaired, could cost Australians around \$12 billion each year.⁶

Further to its earlier research in this field, the National Education and Information Advisory Taskforce (NEIAT) is now undertaking a baseline study into the specific problems and behaviours identified in the secondary research. Specifically, the national baseline study will:

- further explore and expand on information provided in the secondary research;
- check the perceptions and assumptions reported in the secondary research to see if they accurately reflect traders' and consumers' true attitudes and behaviour;
- quantify the size of the problem by measuring consumer detriment via a statistically representative sample; and
- test what types of communication and enforcement strategies are most likely to reduce consumer detriment.

The results of the NEIAT work will feed into CCAAC's review.

Information failures

Lack of awareness of the statutory regime

It is clear from studies over the past two decades that the key problem with the current statutory implied terms regime is a lack of awareness by consumers, retailers and, to a lesser extent, manufacturers of their legislated rights and responsibilities.

To help consumers understand their warranty rights and obligations, consumer protection agencies in Australia, such as the Australian Competition and Consumer Commission (ACCC) and the state and territory offices of fair trading, maintain websites and produce publications outlining the different types of warranties that exist and explaining when consumers have the right to seek a refund, exchange or repair.⁷ Agencies also work with industry to help retailers better understand their responsibilities.

In its 2008 *Review of Australia's Consumer Policy Framework*, the PC concluded that 'most consumers are not fully aware of the protections and redress options available under the implied warranty provisions'⁸. It recommended that consumer regulators in Australia 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'⁹. This conclusion has been drawn consistently in studies and research at the national and state level.

The ACCC 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

6 Deborah Cope 2008, *Warranties and Refunds*, prepared for the National Education and Information Advisory Taskforce, Pirac Economics, Melbourne. Based on an extrapolation of the consumer detriment to Victorians in the 12 months to March 2006.

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

8 PC 2008, vol. 1, p 36.

9 PC 2008, vol. 1, recommendation 8.1.

implied conditions and warranties. However, the continued level of complaints and inquiries suggests the lack of consumer awareness remains an issue.

A number of the problems outlined throughout this paper stem from lack of awareness — especially on the part of consumers — of their rights under this law.

Issue

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?

Is there additional information that could assist consumers to understand the time period within which their statutory rights may be exercised for different products?

Misinformation

As well as a general lack of awareness, consumers demonstrate three major areas of misinformation.¹⁰ First, consumers may believe that the manufacturer's voluntary warranty is their entire legal protection, not recognising that they may have other rights beyond this. Secondly, some consumers may believe they have a statutory right to a refund if they change their mind. Finally, manufacturers and retailers may actively (either intentionally or inadvertently) mislead consumers about their rights.

Manufacturers' voluntary warranties and extended warranties

It is often the case that, where manufacturers offer voluntary warranties, both consumers and traders operate as if the manufacturer's warranty — or any extended warranty the consumer may have purchased — are the only warranty rights available. This is characterised in a number of ways¹¹ and can result in significant confusion for the consumer.

- Retailers and their staff may not deal with the issue, passing it on to the manufacturer and failing to facilitate resolution of the problem.
- Manufacturers may heavily influence the warranty claims process, requiring faulty goods to be sent for inspection before a refund or exchange is allowed, or requiring repair to be attempted, even if the product is virtually brand new.
 - In many instances, refunds are a last resort with the trader seeking to repair first, replace and only then agree to a refund.
- Manufacturers' warranties may include limitations (for example, voiding the warranty for events which are possibly beyond the control of the consumer).

Overreliance on manufacturers' warranties is a symptom of the lack of knowledge of consumer rights in the market. However, other factors which may be relevant include lack of clarity in the law, the relationship between retailers and manufacturers, and lack of pressure on retailers and manufacturers to comply with the law or honour their contractual

¹⁰ NEIAT 2008, p 14.

¹¹ NEIAT 2008, p 16.

obligations. There may also be situations where consumers are actively misled about their rights under the statutory regime (discussed below).

Issue

Does existing consumer information about implied terms provide consumers with enough support to take action?

Refunds

Due to a lack of awareness of the statutory provisions relating to implied terms, some consumers may believe they are entitled to a refund for change-of-mind. While some retailers choose to offer such refund policies, not all consumers are aware that there is no statutory obligation on stores to do so.

On the other hand, stores that explicitly advertise that they will not provide a refund under any circumstances (not just in the case of change-of-mind) are misleading consumers. For example, consumers may be led to believe they have no rights in relation to goods which are not fit for purpose or do not comply with a description or sample.

Misleading information

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. An example of this could be claims by the 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 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; and
- '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.

Other misleading claims may include:

- 'no responsibility for loss or damage';
- 'goods left for repair at your own risk'; and
- 'all care but no responsibility'.

Unlike the implied terms, misleading or deceptive conduct and false or misleading representations are breaches of the TPA and the ACCC can take court action against businesses that mislead or deceive consumers about their rights.

CHAPTER 3

CURRENT AUSTRALIAN LAW

All Australian jurisdictions have laws which provide consumers with basic protections in relation to the goods and services they acquire. While there is some variation in these laws, there is general consistency in their operation. However, some of the variations between jurisdictions may have consequences for consumers. Further, in some jurisdictions, the implied terms can be modified or excluded by the supplier, denying consumers access to redress.

The Trade Practices Act 1974

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 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.

Application of Divisions 2 and 2A

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

A person is defined in section 4B of the TPA to be a consumer if either:

- the goods or services have a value of \$40,000 or less; or
- the cost of the goods or services exceeds \$40,000 but they are of a kind ordinarily used in or purchased for personal, domestic or household use or consumption (or, in the case of vehicles, the vehicle is acquired primarily for use in the transport of goods on public roads);

and, in the case of goods, they are not purchased either for re-supply (further defined in section 4C) or for the purpose of using them up or transforming them in business in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

Section 6 of the TPA extends the operation of Part V Divisions 2 and 2A to include individuals supplying goods in the course of a business if they are involved in overseas trade or commerce or trade or commerce with a Territory, between a State and a Territory or between two territories.

Part V does not apply to the supply or possible supply of financial services (defined in section 4).¹² Mirror provisions in Part 2 Division 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) apply the consumer protection provisions to financial

¹² Section 51AF of the TPA.

services. The Australian Securities and Investments Commission (ASIC) can delegate to the ACCC the exercise of authority in relation to breaches of the equivalent consumer protection provisions of the ASIC Act.

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.¹³

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 goods, Division 2 provides for the following 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 (paragraph 69(1)(b));
- a warranty that the goods are free from encumbrance (paragraph 69(1)(c));
- a condition that goods supplied by description will correspond with the description (subsection 70(1));
- a condition that goods are of merchantable quality (defined in section 66 as fit for the purpose for which goods of that kind are commonly bought), including where the actual purpose is made known by the purchaser, the goods are fit for that purpose (section 71); and
- a condition that goods supplied by sample will correspond with the sample (section 72).

In relation to services, the TPA provides for:

- a warranty that services will be rendered with due care and skill (subsection 74(1));
- a warranty that any goods supplied with services will be fit for purpose (subsection 74(1)); and
- a warranty that, where the actual purpose is made known by the purchaser, the services and any goods supplied with them will be fit for that purpose (subsection 74(2)).

¹³ See Chapter 7.

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. Section 75A also allows that, where a corporation breaches a condition implied into a contract for the supply of goods by Division 2, the consumer can rescind the contract by serving a notice on the supplier or returning 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 (that is, by including a choice-of-laws clause in a contract and choosing that the law of another country is to apply). If Division 2 would apply in the absence of the 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 modify or exclude any part of Division 2, or the exercise of any right, or the liability of a corporation for breach. The only exception allows state and territory law to limit or preclude liability for a breach of the warranties in relation to services (subsection 74(2A)).

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.

Limitation of liability

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:

- 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:
 - the 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)).

Section 68B provides that a corporation may exclude, restrict or modify the warranties — or the exercise of any right, or the liability of a corporation for breach — in relation to the supply of services (section 74) as they apply to recreational services. The exclusion, restriction or modification must be limited to liability for death or personal injury (defined in subsection 68(2)). Recreational services is defined in subsection 68(2) to mean sporting activities or other activities that involve a significant degree of physical exertion or physical risk undertaken for recreational 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.

Part V Division 2A

Part V Division 2A imposes certain obligations on manufacturers and importers 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 a manufacturer (or importer) in the case where there is a reseller interposed between the manufacturer and the consumer.

Rights of action

Division 2A provides for causes of action (which are similar to the terms implied under Division 2) in respect of:

- unsuitable goods (that is, goods which are not reasonably fit for the purpose for which they were supplied) (section 74B);
- goods which do not correspond with the descriptions (section 74C);
- goods of unmerchantable quality (section 74D);
- goods which do not conform to a sample (section 74E);
- failure to provide facilities for repairs or parts (section 74F); and
- non-compliance with an express warranty (section 74G).

Under section 74H, a seller liable to pay compensation to a consumer for a breach of a condition or warranty implied by a provision of Division 2 is also given the right to recover against the manufacturer or importer of the product.

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.

Section 74J also imposes a limitation period on the actions under Division 2A, which is three years.

State and territory legislation

Implied terms laws across Australian jurisdictions are either based on the TPA or are to the same effect. A comparison of implied terms provisions across Australia is in Appendix A.

Remedies

As with the implied terms in the TPA, the remedy for breach of these provisions in state and territory legislation is a claim for damages of a breach of a term of a contract rather than damages for a contravention of the provisions of the legislation.

Variation across jurisdictions

Although state and territory laws on implied terms appear broadly similar, the application of the statutory conditions varies across jurisdictions. Some of the main differences relate to:

- whether the conditions and warranties are excludable;
- the definition of ‘consumer’ and variations in purchase value and use thresholds for eligibility;
- whether the supply of services is subject to conditions or warranties;
- factors to be considered in determining whether the provisions apply (for example, price, terms of supply and condition of goods);
- obligations on the buyer to examine goods prior to purchase;
- the extent to which the skill or judgment of the supplier is relevant; and
- whether the supplier could reasonably be aware of the defect or whether the defect was brought to the attention of a consumer.

Excludability

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

Only NSW, Victoria, WA, SA and the NT have introduced explicitly non-excludable warranties in their respective FTAs (the *Consumer Transactions Act 1972* in SA).

The ACT and Tasmania do not cover warranties and refunds in their consumer legislation. The ACT is covered by the TPA. In Tasmania, the SGA includes some warranties and refunds provisions but it allows contracts to vary the statutory warranties relating to clear title and for manufacturers' voluntary warranties to explicitly override a statutory warranty in relation to fitness for purpose. In Queensland, the same provisions exist in the SGA as in Tasmania, but the FTA prohibits manufacturers' voluntary warranties from overriding statutory warranties.

Application

While there is similarity in the value and use of goods covered by statutory implied terms in different jurisdictions — for example, all jurisdictions cover consumer goods (goods normally used for personal or household use) that are purchased for personal use, regardless of the value of the goods — there are differences in the treatment of business goods (goods normally used for a business purpose) purchased for personal use and any type of goods (consumer or business) purchased by businesses.

Table 1 — Coverage of statutory conditions and warranties¹⁴

	TPA	NSW	QLD	VIC	WA	SA	TAS	NT	ACT
Goods for personal use									
Consumer goods under \$40,000	ü	ü	ü	ü	ü	ü	ü	ü	ü
Consumer goods over \$40,000	ü	ü	ü	ü	ü	ü	ü	ü	ü
Business goods under \$40,000	ü	0	ü	ü	ü	ü	ü	ü	ü
Business goods over \$40,000	0	0	ü	0	0	0	0	ü	ü
Goods for business use, excluding goods used for resupply, in production or manufacturing process, to repair other goods or fixtures to land									
Consumer goods under \$40,000	ü	ü	ü	ü	ü	ü	ü	ü	0
Consumer goods over \$40,000	ü	ü	0	ü	ü	ü	ü	ü	0
Business goods under \$40,000	ü	0	ü	ü	ü	ü	ü	ü	0
Business goods over \$40,000	0	0	0	0	0	0	0	ü	0

As with the TPA, the statutory implied terms in other jurisdictions require:

- the consumer to have clear title to the goods (that is, the supplier has a right to sell the goods, the consumer has the right to enjoy quiet possession of the goods, and the goods are free from encumbrance);
- the goods to be of merchantable quality;

¹⁴ NEIAT 2008, p 8.

- the goods to be fit for purpose (including where the actual purpose is made known by the purchaser, fit for that purpose); and
- the goods to match any description or sample.

Other issues

Part V Division 2A of the TPA enables consumers to take action against manufacturers or suppliers of goods that are not fit for purpose, and not just the retailer. Only NSW and the Northern Territory include similar provisions in their FTAs.

There are other differences across jurisdictions, including for example:

- requirement for goods to comply with a sample — for example, in Victoria the statutory warranty applies only if the buyer is shown a sample of the goods and is induced by the sample to buy the goods or goods of a similar kind;
- rescission of contract — SA includes additional provisions that allow a consumer, on writing to the supplier, to rescind a contract for the supply of goods within seven days if those goods do not meet the statutory warranties;
- choice of redress — consumers are generally entitled to their choice of a refund, replacement or repair if the good does not meet a statutory condition, but may only be entitled to repair (or pro rata refund) once they have accepted the good and used it for some time.

Issues

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?

Are the terms used in these provisions (for example, ‘merchantable quality’) — and the way the terms are defined — clear and appropriate?

Are there particular elements of state and territory implied terms legislation which work well for consumers?

Lack of clarity in legislation

While manufacturers’ voluntary warranties usually explicitly state the manufacturer’s obligations, the consumer’s rights and how long those obligations and rights last, the rights and obligations conferred by the statutory implied terms in consumer legislation are less clear. It could be that one of the reasons consumers and traders rely so heavily on voluntary and extended warranties is that the rights conferred by the legislation are unclear.

Consumer Affairs Victoria (CAV) has identified the following issues (in the context of the Victorian FTA) as being contributing factors¹⁵:

¹⁵ Consumer Affairs Victoria 2009, p 14.

- Consumer legislation relies on extraneous materials from contract law and sale of goods legislation and does not expressly set out all the consequences of a breach of an implied condition. For example, it does not clarify that it is not for the seller to elect the remedy, which has encouraged a widespread belief that the seller can select a refund, repair or replacement.
- The critical terms regarding fitness for purpose depend on what level of fitness is 'reasonable' to expect, and that will depend on the circumstances of each case.
- It is unclear to what extent the fitness for purpose terms are limited in time and whether and to what extent there is a durability requirement.
- It is unclear whether the merchantability term extends to cosmetic or minor defects or is confined to simple workability.
- The question of who pays for any costs of return or pick-up of defective (or allegedly defective) goods is not addressed, 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.

Issue

Are the statutory implied terms in the TPA and state and territory legislation clear?

CHAPTER 4

ENFORCEMENT

A breach of a statutory implied term is a breach of the contract concerned, not of the Act which creates the condition or warranty. Breaches of these implied terms are generally, therefore, enforced in the same way as any other breach of contract. However, the provisions of Part V Division 2A of the TPA may provide consumers with a direct right to compensation, rather than relying on the law of contract.

Remedies for breach of contract

When a contract is breached, this will generally entitle the party not responsible for the breach to sue for damages when his or her side of the bargain has been carried out (for example, by providing payment for a product). Where the breached term is a 'condition' of the contract — that is, is a fundamental part of the bargain which goes to the root of the contract — the innocent party may be entitled to terminate the contract. In some cases, there may be a right to rescind a breached contract.

Damages

Damages are the usual remedy sought when a party breaches its obligations under a contract. In most cases, the suffering caused by the breach of a contract can be remedied by the payment of money. Where the breach is of a statutory condition or warranty, the money compensates the consumer for the loss they have suffered, and is calculated based on the discrepancy between the utility the consumer would have experienced had the condition or warranty not been breached and the actual utility experienced by the consumer as affected by the breach.

Termination

If a condition — including a statutory condition — of a contract is breached, then the consumer is entitled to regard the contract as having been terminated. This means the contract is no longer operable and the parties are no longer placed under any obligations according to the terms of the contract. So, for example, a consumer is no longer liable to pay any outstanding instalments on a product the contract for the sale of which has been validly terminated. Termination is not generally available for less important terms of a contract, such as warranties.

Equitable remedies

While the common law remedies described above deal largely with money, where money alone (or the end of an obligation to pay money) cannot adequately remedy a breach of contract, the law of equity may provide an appropriate remedy. Equitable remedies include specific performance — where a court orders a party to perform the obligations imposed by the contract — and injunctions.

In the context of statutory implied terms, specific performance might involve the court ordering a supplier to provide the applicant consumer with a product that complies with the description or sample provided to the consumer. However, specific performance is not available where damages would suffice as a remedy, or where forcing the supplier to comply with the order would cause undue hardship.

Rescission

Rescission involves winding back a contract as though it had never taken place, and has been used as a remedy in both common law and equity to provide a just outcome in certain contractual situations. For example, rescission has often been available as a remedy in cases of misrepresentation. However, it is generally only available when it is possible to return both parties precisely to the state of affairs they were in before the contract took place.

The TPA provides for a statutory right to rescission in certain circumstances in section 75A. Where a corporation breaches one of the statutory conditions in Part V Division 2 of the TPA, the consumer is entitled to rescind the contract by writing to the corporation advising of the breach, or returning the goods to the corporation and advising of the breach. This entitlement to rescind the contract is subject to various conditions, including conditions relating to timeliness of the rescission and consumer treatment of the goods.

Alternative remedies

Actions against manufacturers and importers of goods

While not technically statutory conditions or warranties, the provisions of Part V Division 2A of the TPA (and similar provisions in state and territory laws) impose certain liabilities on manufacturers and importers of goods. Consumers generally contract with suppliers of goods, rather than with manufacturers or importers. Since there is no contract between the consumer and manufacturer or importer, actions for breach of contract are unavailable, and these provisions provide a right to a remedy.

Division 2A provides a right of action in cases such as the supply of unsuitable or unmerchantable goods, or in respect of false descriptions or non-correspondence with samples. These provisions specify that the manufacturer and importer are liable to compensate the consumer in such cases, irrespective of any contractual rights.

Other remedies

The remedies currently available for breaches of the statutory implied terms provisions have been criticised as often being inadequate. For example, in submissions to the 1994 Australian Law Reform Commission inquiry into compliance with the TPA¹⁶, some argued for remedies similar to those under section 80 and 87 of the TPA (injunctions and other orders) while others argued that it would be sufficient if the current range of remedies was enhanced by introducing a right to a replacement good or service, including as an alternative to a refund under section 75A.

¹⁶ Australian Law Reform Commission 1994, *Compliance with the Trade Practices Act 1974*, Report No ALRC 68, Sydney.

Issues

Do existing remedies provide adequate redress to consumers harmed as a result of breaches of statutory implied terms?

What additional or alternative remedies might complement or replace existing remedies?

Possible barriers to enforcement

The provision of statutory implied terms creates contractual rights — or similar rights to compensation — which consumers can use to obtain redress. However, there may be some institutional and economic factors which prevent consumers from always obtaining the redress to which they are entitled.

Privity of contract and personal enforcement

It is a well established — if flexible — principle of the law of contract that a contract binds and is enforceable only by the parties to it. Since a statutory implied term is part of a contract between supplier and consumer, only the supplier and consumer can enforce it. It cannot be enforced by a government or a regulator. While ‘enforcement’ can mean anything from making a verbal complaint over the telephone to engaging in litigation to obtain redress, in all cases it is something for the consumer to pursue. The role of consumer affairs agencies, with respect to statutory implied terms, is limited to educating consumers about their rights and businesses about their obligations.

This situation is in contrast to many of the other consumer protection provisions of the TPA and equivalent state and territory legislation. As another example, the New Zealand model is also quite different, providing for a stand alone system of statutory consumer guarantees and enabling regulators in many instances to bring actions against businesses in response to breaches of the law. The regulator is able to enforce statutory guarantees against suppliers on behalf of consumers, including the guarantee that goods will be of ‘acceptable quality’, fit for purpose and will correspond with their description.¹⁷ The types of remedies which can be obtained for consumers include repairs, replacements, refunds and damages.

The resources and expertise of consumer agencies such as the ACCC can mean that, in many instances, it would be better equipped than individual consumers to investigate and take action in relation to contraventions of the warranty provisions. This is particularly the case where many consumers are affected by the conduct of one trader (or only a few traders).

Transaction costs and coordination problems

Consumers are likely to encounter costs associated with enforcing their rights under statutory implied terms. For example, if a consumer wishes to rescind a contract on the basis of a breach of a condition, they must serve a notice on the supplier in writing, with particulars of the breach, and arrange for the goods to be returned to the supplier. This can be a costly process.

¹⁷ Consumer Guarantees Act 1993 (NZ).

Even if a consumer only wants repair of the goods, there are costs associated with arranging for repair, as well as not being able to use the goods while they are being repaired. In cases where the costs of obtaining a remedy outweigh the likely benefit of having the problem remedied, there is no incentive for consumers to enforce their rights under statutory implied terms.

Where many consumers suffer similar detriment as a result of a common breach by a supplier, there may be incentives for consumers to band together in a common effort to obtain redress. This may take the form of a legal class action, or a concerted consumer campaign to pressure a supplier into establishing a system of redress. In this way the costs of obtaining redress are spread across a larger group of consumers, lowering costs for individual consumers and increasing incentives to seek redress.

However, it may be difficult for consumers to coordinate in this way. There may be no obvious mechanism for consumers to signal to each other that they are suffering similar detriment. Alternatively, the potential benefit available from coordinating may be different for each consumer, so only some consumers of the affected class may be willing to coordinate. This can limit the effectiveness of the coordination effort, and in turn reduce incentives for consumers to participate.

Availability of legal assistance

Section 170 of the TPA allows people to apply to the Attorney-General for a grant of legal assistance where they institute, or propose to institute, legal proceedings under certain provisions of the TPA. The provisions of Divisions 2 and 2A are not currently covered by section 170, although Part VA — which addresses the liability of manufacturers and importers for defective goods — is. Legal aid programs are offered by the States and Territories and may vary in their availability for contractual disputes. Generally speaking, legal aid is rarely provided in civil cases not involving family law issues.

There are a number of possible measures to improve access to remedies, particularly by avoiding recourse to the courts. The availability of tribunals like the Victorian Civil and Administrative Tribunal provides alternative means of dealing with disputes about the supply of goods and services.

Issues

Are there institutional, structural or economic barriers that prevent consumers from enforcing their rights under implied terms?

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)?

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?

What, if any, alternative dispute resolution forums should be available?

Should consumer agencies be able to take action in respect of breaches of implied terms?

Would retailers and manufacturers have a greater incentive to comply if the regulator could take action against them on behalf of the consumer?

Are existing processes and mechanisms for facilitating consumer access to remedies adequate?

Consumer confidence and redress

Therefore, consumers may be reluctant to take action to enforce rights under the statutory implied terms regime. A range of studies have summarised the reasons for this¹⁸:

- not knowing who to approach for assistance;
- believing that seeking assistance is too much trouble or would not warrant the cost;
- concerns about the cost of litigation;
- not having confidence that further action would solve the problem;
- being too busy to take further action;
- being too nervous or embarrassed; and
- seeking to upgrade or replace goods rather than pursuing their rights to repair or replace the faulty good, particularly young consumers buying high-tech products.

In many instances, consumers lack the expertise, resources and confidence to enforce their rights under the statutory implied terms regime. This is often exacerbated by the actions of traders, who make it more costly or difficult for consumers to take action or encourage consumers to replace or upgrade a product rather than pursuing their rights to repair or seek a refund.

Issue

Is the process for seeking redress for faulty goods clear and accessible to consumers?

¹⁸ Summarised in NEIAT 2008 14.

CHAPTER 5

EXTENDED WARRANTIES

What is an extended warranty?

Many people will be offered an extended warranty by a salesperson when they purchase a product. An extended warranty is an additional warranty some retailers sell to consumers to cover against product faults for a certain period of time. An extended warranty is a contract separate from the contract of sale for the product, which provides for the repair or service of the product. It is generally entered into at the same time, or very soon after, the contract for the sale of the product. A separate price or fee is payable for the extended warranty. Extended warranties are being offered for a wide range of products, including whitegoods, electrical goods and cars.

The extended warranty may provide for repair, replacement or refund subject to its implied terms. If the implied terms of the warranty have not been satisfied, the consumer may not be entitled to claim on the warranty. For example, the warranty may only be valid for a certain period after the date of purchase; it may not cover accessories; it may not cover the fair wear and tear of the product; special requirements may first need to be satisfied (for example, regular servicing or maintenance); additional charges may apply (for example, call-out fees, labour costs, costs for additional parts and freight charges); there could be a limit on the number of claims that can be made; and there could be other exclusions or restrictions.

The extended warranty may or may not be in addition to any manufacturer's warranty for the product. Neither an extended warranty nor a manufacturer's warranty can replace, restrict or modify the basic statutory warranties and remedies that are provided to consumers when purchasing goods and services.

Extended warranties in the marketplace

Extended warranties fall into three broad types and, depending on the category, may constitute a 'financial product' under the *Corporations Act 2001*. If an extended warranty is a financial product, a person who issues them and accepts the risk itself as an insurer, or acts as an agent on behalf of an insurer, will need to hold an Australian financial services (AFS) licence, or be an authorised representative of an AFS licensee.¹⁹

¹⁹ See frequently asked questions about financial services regulation, ASIC, *Do I need an AFS licence to issue or distribute extended motor vehicle warranties?* QFS 35. Available at: <http://www.asic.gov.au>.

Extended warranty as incidental product (Type 1)

The most common form of extended warranty is that entered into by a consumer with a retailer, distributor or dealer at the time that the goods are acquired. Under this type of warranty the retailer, as warranty provider, agrees for a term (the warranty period) to repair or replace the goods in the event of defects in, or the failure of, the goods during the warranty period.

This is not a contract of insurance, but is likely to be a facility for managing financial risk. It is likely to come within the 'incidental product' exemption in section 763E of the Corporations Act which would exempt it from being a 'financial product' if it is merely incidental to the sale of goods contract. There are no mandatory disclosure requirements to assist the consumer to make a decision about whether to acquire an extended warranty.

Extended warranty as insurance product (Type 2)

The second broad type of extended warranty is a form of insurance contract sold by the retailer or dealer as an agent or intermediary on behalf of an insurer. This type of extended warranty is a 'financial product' under the Corporations Act. It is a product through which consumers manage financial risk pursuant to sections 763A and 763C of the Corporations Act, or a general insurance product pursuant to paragraph 764A(1)(d) of the Corporations Act.

The insurer will require an AFS licence and the retailer, as the insurer's authorised representative, will be required to provide a Financial Services Guide to assist the consumer to decide if they need an extended warranty. A Product Disclosure Statement will also be included setting out the terms and conditions of the extended warranty together with information about its features, benefits and risks. The 'incidental product' exemption in section 763E of the Corporations Act will not apply.

Third party warranty providers (Type 3)

A third party warranty provider is a person who does not have an interest in the product sold by the retailer or dealer, or control over the quality of the product that is the subject of the extended warranty.

The extended warranty will not be covered by the 'incidental product' exemption in section 763E of the *Corporations Act 2001*. It is not merely incidental to the sale but is a separate financial product which will require the consumer to make a separate decision about whether to acquire it or not to manage their financial risk. The third party warranty provider will need to hold an AFS licence and provide a Financial Services Guide and Product Disclosure Statement to the consumer.

Some of these extended warranties are discretionary risk products. This means a consumer is entitled to have his or her claim for repairs assessed, but the provider is not obliged to accept all claims. Discretionary risk products involve a degree of risk for consumers. Their discretionary nature may not be apparent unless it is prominently displayed in the Product Disclosure Statement.

Part 2 Division 2 of the ASIC Act

Part V (Consumer protection) of the TPA does not apply to the supply, or possible supply, of financial services.²⁰ The ASIC Act contains a very broad definition of ‘financial service’ which is linked with the definition of ‘financial product’. In particular, section 12BAB of the ASIC Act defines a person as providing a financial service where they give advice about, deal in, or make a market for, a financial product.

A ‘financial product’ is defined in section 12BAA of the ASIC Act as a facility through which, or through the acquisition of which, a person makes a financial investment, manages financial risk and/or makes non-cash payments. This general definition of ‘financial product’ is then followed by a number of specific products that are included within the general concept, including a contract of insurance.

ASIC has taken the view that extended warranties — and particularly Types 2 and 3 extended warranties — are financial services since they are 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 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 he or she desires to achieve, there is an implied warranty that the service will be reasonably fit for that purpose.

Where a retailer represents during precontractual negotiations, or provides in the contract itself, that the extended warranty is in lieu of all other warranties, express or implied, consumers may be misled contrary to section 12DA (Misleading or deceptive conduct) of the ASIC Act.²¹

Consumers may also be misled where the protection provided by an extended warranty does not extend beyond the statutory warranties. For example, it may not cover all types of damage or defects. There may be other limitations in terms of the damages recoverable, for example, exclusions for consequential loss or damage which may be available for breach of a statutory warranty. Unless the extended warranty provides additional benefits, such as scope, recovery or convenience, consumers may be misled contrary to sections 12DA and/or 12DB (False or misleading representations) of the ASIC Act.

²⁰ Section 51AF of the TPA.

²¹ See *Australian Competition and Consumer Commission v LG Electronics* [2006] FCA 1118 (4 July 2006).

Inter-relationship between the TPA and ASIC Act

There is an interrelationship between the TPA and the ASIC Act with regards to the sale of goods, the acquisition of an extended warranty for those goods, and any advice given in relation to acquiring the extended warranty. For instance:

- the contract for the sale of goods is subject to the implied terms regime in Part V Division 2 of the TPA;
- the precontractual negotiations surrounding the sale of the goods are subject to the consumer protection provisions in Part V Division 1 of the TPA;
- the precontractual negotiations surrounding the acquisition of the extended warranty are subject to the consumer protection provisions of Part 2 Division 2 of the ASIC Act; and
- as it is a financial product, any advice given in relation to acquiring an extended warranty, is a financial service subject to the implied terms regime in section 12ED of the ASIC Act.

Issue

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?

Understanding extended warranties

Consumer awareness

The combination of statutory warranties, manufacturers' warranties and extended warranties can create some confusion for consumers as well as manufacturers and retailers. Not understanding what statutory rights they have and the differences between the different types of warranties could mean that consumers purchase extended warranties unnecessarily.

Statutory warranties are not limited to a set time period. For instance, in relation to the implied condition of merchantable quality, the period depends on the purpose(s) for which goods of that kind are commonly bought and what is reasonable to expect having regard to the product description, the price paid and all other relevant circumstances.²²

A consumer may be entitled to a remedy under a statutory warranty during the period of the manufacturer's warranty or the retailer's extended warranty, in which case it may not be apparent what additional protection is being provided by the extended warranty purchased. It is possible that, by offering an extended warranty, the retailer may be implying that the consumer is getting something of value that is over and above the protection afforded by the statutory warranties and any manufacturer's warranty.

Increasing awareness of the types of warranties and what they do can assist consumers to make informed choices when deciding if they need to purchase an extended warranty. To help consumers better understand their statutory and extended warranty rights, consumer

²² Subsection 66(2) of the TPA.

agencies have produced publications outlining the different types of warranties that exist and explaining when consumers have the right to seek a refund, exchange or repair. Some agencies also provide 'checklists' to assist consumers to decide if it is worthwhile to purchase an extended warranty. Agencies have also been working with industry to help retailers better understand their statutory and extended warranty responsibilities.

Issue

How does the availability of information about the three different types of warranties affect a consumer's choice of a warranty?

Information provided by retailers

Having enough and correct information about the details of an extended warranty allows consumers to make informed purchasing decisions. This can be influenced by the knowledge of the salesperson, the information they are prepared to share with the customer, and if they are able to provide sufficient explanation about how the warranty works. This includes information about the cost of the extended warranty, when it begins and ends, what it covers, what it excludes, how it differs from the manufacturer's warranty, and whether there are additional charges involved with making a claim. It is possible that consumers may end up disappointed when they do make a claim on their extended warranty only to find out there are exclusions, restrictions or additional fees which apply.

Overseas examples on information disclosure

The UK Supply of Extended Warranties on Domestic Electrical Goods Order 2005 (the Order) imposes an obligation on suppliers of domestic electrical goods who also offer extended warranties for those goods. It requires them to disclose to consumers before the sale of extended warranties the price and duration of the warranty alongside the price of the good in store, in advertising material and on the supplier's website. The Order also provides consumers with the right to cancel the warranty and, in certain circumstances, to receive a full refund on the warranty price.

In the United States, the Magnuson Moss Warranty Act 1972 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 Magnuson Moss Warranty Act are aimed at improving the adequacy of information that is available to, and to prevent the deception of, consumers and to improve competition in the marketing of consumer products.²³

Issue

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?

Purchasing extended warranties

Extended warranties are becoming more prevalent — they are widely offered by retailers, and many consumers are purchasing extended warranties on offer — even though most consumers in fact will rarely use them.²⁴ Consumers are buying extended warranties for higher priced items as well as inexpensive items and are paying a substantial amount of money for the extended warranty.²⁵ The more expensive extended warranties, however, are not always for the longest period or with the best terms.

Consumers may decide to buy extended warranties for various reasons. They may be worried that the product could break down, be concerned about high repair costs, have doubts whether the manufacturer's warranty is enough, or value peace of mind, particularly for expensive products.

While most retailers do not exert unfair influence on consumers to purchase an extended warranty, some consumers may feel pressured to purchase an extended warranty based on comments made by the salesperson about the product or the cost of repair.²⁶ Some of these comments may create concern in consumers that the product, particularly expensive items, may break down and the repair costs could be high.

Issues

Are there any other relevant factors that influence consumers when deciding to purchase an extended warranty?

Please provide any information/data available on:

- the take-up of extended warranties;
- the cost of extended warranties relative to the price of the product or profit margins on extended warranties;
- the number of claims on extended warranties; and
- commissions received for the sale of extended warranties.

²³ Section 2302 of the Magnuson-Moss Warranty Act 1972.

²⁴ CHOICE 2008, *Extended Warranties Project*, Final Report, Community Research, p 16.

²⁵ CHOICE 2008, p 17.

²⁶ Taylor Nelson Sofres Mystery Shopping 2001, *Report into Extended Warranties*, United Kingdom.

CHAPTER 6

LEMON LAWS

CCAAC has been asked to consider the need for 'lemon laws' in Australia, particularly in relation to motor vehicles. Lemon laws are designed to provide a remedy where consumer goods repeatedly fail to meet expectations about performance or quality.

Lemons and lemon laws

A 'lemon' is a colloquial expression referring to a product that fails to live up to the reasonable expectations of the customer. It is a good that simply does not work the way it is supposed to work. The term is particularly associated with motor vehicles where it may be argued that they are of 'merchantable quality' in the sense that they are fit for the purpose of providing a means of transportation, but which break down continually and are off-road repeatedly for repairs, causing the consumer considerable inconvenience and financial loss. In its extended use it can cover goods and services of all sorts, from toys or household goods to large-scale commercial products.

The terms of reference for this review focus particularly on motor vehicle lemons. A motor vehicle is often considered to be the second most significant purchase a consumer is likely to make, after a house. This can make the cost of repair or replacement more difficult to bear than for other goods consumers typically buy. The motor vehicle is also an item on which a consumer and their household tend to rely significantly. This can increase the opportunity costs associated with repairing or replacing the vehicle, as consumers suffer detriment when their vehicles are unavailable to them while being repaired, or while the process of obtaining a replacement vehicle is ongoing.

A motor vehicle, or any other good, may be faulty without being a lemon. If it is capable of immediate repair to the satisfaction of the consumer, it is unlikely to be considered a lemon. However, exactly what differentiates a lemon from a good that is simply faulty or defective is not entirely clear.

Lemon laws

A 'lemon law' is designed to provide assistance to those who purchase lemons. The exact form and effect of the law varies, and several examples of lemon laws from overseas jurisdictions are discussed below.

Broadly, a lemon law may be one of two kinds. It may operate to increase the information available to consumers in advance of the decision to purchase a good. A lemon law may simply ensure increased disclosure of known faults before a good is sold to a consumer. Or it may create an enhanced redress regime, providing rights to repair, replacement and refund to consumers who purchase goods that turn out to be lemons. The law may be directed at conduct that simply conceals faults, or at conduct that refuses to remedy identified faults.

Lemon laws may also cover different types of goods. They may apply only to a particular class of goods, such as motor vehicles, or to all goods made available to consumers. They may also apply only to new goods, only to used goods, or both, and vary in their effect depending on whether they are to apply to new or to used goods.

Issues

In what circumstances can a faulty or defective good be characterised as a lemon?

Are lemons particularly prevalent — or are they particularly problematic — in the market for motor vehicles? Are lemons a particular problem in any other market?

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?

Problems a lemon law might address

As with many statutory implied terms, lemon laws are chiefly designed to remedy information asymmetries between suppliers and consumers of goods about the quality or performance of those goods.

Lemons enjoy an honoured place in the development of the economics of information. In 1970, Nobel Laureate George Akerlof published his article ‘The Market for “Lemons”’, which discussed in detail the operation of markets with information asymmetries, using the market for motor vehicles as an example.²⁷

Information asymmetries often exist in markets for consumer goods. The seller of the goods is in a position to ascertain whether a good is a lemon or not, but the consumer very often is not. The consumer can only speculate about the likelihood of a particular good being a lemon, and there may be only limited steps open to the consumer to improve his or her understanding of that likelihood. Conversely, once a consumer has made a purchase and has identified the product as a lemon, it is difficult for the seller to ascertain which problems are a result of a defect in the product, and which may be the result of casual or deliberate misuse of the product by the consumer. This is particularly the case where a product fault is not readily repeatable on inspection but can only be demonstrated through regular use of the product.

This information asymmetry can lead to problems with incentives. A consumer who cannot be certain of the quality or safety of the goods is unlikely to want to engage with the market and buy those goods. Alternatively, they might settle for a product that is less than ideal, simply because they have more confidence in the performance of that product than of the performance of another product that better meets their needs. For businesses, there may be only limited incentives to confirm the existence of a lemon and remedy the situation. On the one hand, businesses have an interest in the reputation of their brands and in keeping their customers happy, and also have an incentive to replace an irreparable product rather than go through rounds of pointless repair. On the other hand, the costs associated with discovering

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

and remedying faults may act as disincentives to addressing consumer concerns in a way consumers might consider adequate.

So a dealer might opt to repair only immediately obvious faults in a motor vehicle because it has been unable to uncover sufficient evidence of an underlying problem, and this may happen several times before the dealer is definitively able to identify the vehicle as a lemon. This is more likely where the rights and responsibilities concerning repair and replacement are unclear. Under an express warranty, there may be incentives both to delay repairs beyond the warranty period and to insist on unnecessary repairs within the warranty period.

A lemon law might address these information and incentive problems by improving access to information about products, and improving incentives for buyers and sellers to meet each other's needs. A lemon law might also address concerns about the adequacy of existing consumer law provisions for dealing with the problems outlined earlier in this paper. These existing provisions are discussed in the next section.

However, there are ways to relieve information asymmetries in consumer markets without introducing laws. For example, some institutions offer services whereby a vehicle — new or used — may be examined thoroughly by a mechanic in advance of purchase. This can give consumers the opportunity to make a more informed assessment of the probability that any particular vehicle is a lemon, and can provide dealers with greater certainty about the nature of any faults in the vehicle.

Issues

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?

Are there any non-regulatory means available to consumers, industries or governments which might deal with asymmetries of information?

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?

Lemon laws in other jurisdictions

Lemon laws — particularly for motor vehicles — are a common feature of the commercial landscape in the United States where all 50 states have lemon laws. There, they are used primarily to supplement more general legislation — such as the Uniform Commercial Code and the Magnuson-Moss Warranty Act 1972 — with a specific warranty covering serious defects in motor vehicles which dealers and manufacturers are unable to repair. Generally, these laws provide that when a vehicle is identified as a lemon, the consumer is entitled either to a replacement vehicle from the manufacturer, or a refund of the purchase price. Laws tend to vary from state to state in how a lemon is identified.

The United States Federal Trade Commission also has a 'Used Car Rule' which requires dealers in used cars to display to consumers a 'Buyers' Guide' with certain information and

warnings about the purchase of used cars. At one time, it was envisaged that the Used Car Rule would require disclosure about the known faults or defects of a vehicle.²⁸

There are examples in the laws of several other overseas jurisdictions of provisions designed to address the presence of lemons in markets, in motor vehicle markets or more broadly. For example, section 6 of the Consumer Guarantees Act 1993 (NZ) provides that, where goods are supplied to consumers, there is a guarantee that the goods are of ‘acceptable quality’. Goods are taken to be of acceptable quality if they are fit for purpose, acceptable in appearance, free from minor defects, safe and durable.

Several jurisdictions, including New Zealand and Canada, have special dispute resolution mechanisms available to consumers of motor vehicles. The Canadian Motor Vehicle Arbitration Plan is a corporation made up of representatives of the automobile industry, the provincial and territorial governments and consumers. It is funded by industry, and is used to resolve disputes between consumers and manufacturers about defects in motor vehicles, or about the manufacturer’s management of a new vehicle warranty.

There are currently no specific laws addressing lemons in Australian jurisdictions, beyond the existing implied contractual terms. However, the Victorian Government has recently conducted public consultation on lemon laws with respect to motor vehicles, based on a proposal that the supply of a lemon might be deemed a breach of the implied term that goods supplied will be of merchantable quality²⁹. On 24 September 2007 the Victorian Government released an issues paper, entitled *Introducing Victorian motor vehicle lemon laws*, calling for public comment, and received a number of submissions from stakeholders. A report on the outcome of that consultation process was prepared by Ms Janice Munt MP and released in July 2008. These documents offer an analysis of lemon laws in the United States, and an insight into stakeholder views on the appropriateness of lemon laws in a Victorian context.

Issues

How do lemon laws in other jurisdictions identify a ‘lemon’ as distinct from a good which simply needs repair?

How effective have these laws been at addressing the existence of lemons in the market?

Are enhanced consumer warranties or new dispute resolution processes — or both — more effective means of addressing problems associated with lemons?

Is there a need for a lemon law in Australia?

Existing applicable provisions

Existing implied terms established by statute in Australia are discussed in Chapter 3, above. However, it is worth considering how those provisions apply to the case of lemons, and

28 See Nicks, SJ, ‘Speak no evil: known defects in the FTC’s Used Car Rule’, *Journal of Consumer Policy*, vol. 10, no. 1 (March 1987), pp 69-87.

29 The consultation documents in relation to a possible Victorian motor vehicle lemon law are available on the Consumer Affairs Victoria website, www.consumer.vic.gov.au.

whether they adequately address the problems associated with lemons. In particular, it is worth bearing in mind that, although the consumer has the benefit of the implied terms, these may not always be of practical benefit if the product purchased turns out to be a lemon. All the difficulties faced by the consumer (outlined in earlier chapters) — for example, requiring positive enforcement action by the consumer and being forced by the retailer to deal with the manufacturer — are likely to result in higher opportunity costs for motor vehicle problems than for other goods. For example, consumers face travel costs associated with finding alternative transport, time costs (including time lost from work) and forgone lifestyle due to lack of transport.

The implied term of particular relevance to lemons is the statutory condition that goods supplied are of merchantable quality, or are fit for the purpose for which the consumer has indicated they are buying the goods (for example, in section 71 of the TPA). Where a corporation supplies to a consumer a good that is not of merchantable quality, it breaches its contract with the consumer, and the consumer is generally entitled to recover any damages that flow from that breach.

Under section 75A of the TPA, the consumer is also entitled to rescind the contract by providing the corporation with written notice giving particulars of the breach, or returning the good to the corporation and informing the corporation of the breach. When the contract is rescinded, the corporation takes back legal ownership of the good, and the consumer is entitled to recover the money paid for the good.

If a consumer wishes to rescind the contract because the good is unmerchantable, they must do so within a reasonable time after having had an opportunity to inspect the goods. It may be that problems associated with lemons are not likely to be revealed to the consumer within a 'reasonable time'.

A consumer is not entitled to rescind a contract where they failed to take reasonable steps to prevent the goods from becoming unmerchantable, or where the goods were damaged by abnormal use. It may be difficult for both buyers and sellers to establish whether reasonable steps were taken, or whether any abnormal use was made of the goods, due to the information asymmetries discussed earlier.

Aside from statutory conditions and warranties, Australian consumers have legal protection against misleading and deceptive conduct. If a seller misleads or deceives a consumer about a known fault with a product, the seller will be in breach of the misleading or deceptive conduct provisions (such as section 52 of the TPA). Where the conduct is covered by the TPA, this may entitle the consumer to seek damages under section 82, appropriate injunctions under section 80, or declarations under section 87 that the contract of sale is void.

Issues

Are existing consumer protections well used in connection with lemons? Is their applicability to lemons well understood?

Do the remedies currently available provide adequate redress for consumers who purchase lemons?

Does the existing regime provide suppliers, manufacturers and importers with the

incentives necessary to respond to lemon problems in a timely and effective manner?

Does the existing regime give consumers sufficient confidence to engage with markets and buy the goods they desire?

Is additional regulation required?

Australian consumers have access to a wide range of remedies for common consumer problems. Both statutory implied terms and the consumer protection provisions of the consumer law allow consumers to access redress when they suffer as a result of unfair trading practices.

However, both consumers and the markets in which they operate are constantly evolving, and it is important that the consumer law provides effective means of redress when consumers suffer, for example, because of the presence of lemons in any market. For this reason, CCAAC is seeking views on whether there is a need for a dedicated lemon law in Australia and, if so, how a lemon law might best be framed.

Issues

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?

What kind of remedies might assist consumers who buy lemons? Could an alternative dispute resolution process assist those consumers? How might that process operate?

Are there any non-regulatory approaches that might address the problems associated with lemons?

CHAPTER 7

OTHER ISSUES

Exclusions and limitations in liability

Auctions

The TPA implied terms provisions — apart from section 69 relating to implied undertakings as to title, encumbrances and quiet possession — explicitly exclude sales by auction. In addition, all States and Territories (except Victoria) also exclude auction sales from the non-excludable implied terms provisions. Auctions therefore operate on the basis of ‘buyer beware’.

The exclusion of sales by auction arose because of the features of a traditional auction. Historically, almost all auctions were conducted in plain view, where there was opportunity to inspect the goods before making a bid. The good could be examined for quality and any confusion about descriptions could be cleared up beforehand. Traditionally, auctions were also a way to sell used goods.

However, it is not clear that the features of auctions are necessarily significantly different from other forms of in-person sales. In an environment where internet auction sales are growing rapidly in volume and value, and traditional ‘in-person’ auctions are frequently used for expensive goods like motor vehicles, artworks and collectables, it is timely to revisit the issue of whether statutory implied terms should exclude sale by auction. The specific issue of online auctions will be discussed below.

Issues

Is it clear that consumers do not have access to the statutory implied terms when purchasing goods through an auction?

Should the statutory implied terms apply to sales by auction? Why?

Some limitation of liability permitted

Section 68A of the TPA 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.

Where limitation is permitted, liability may only be limited to:

- the replacement, equivalent supply or repair of goods, or the payment of the cost of any of these (paragraph 68A(1)(a)); or

- the resupply or payment of the cost of resupply of services (paragraph 68A(1)(b)).

The limitation must be ‘fair and reasonable’, and if the consumer can establish that it is not fair and reasonable then subsection 68A(1) will not apply. In the equivalent provisions of the Victorian FTA³⁰, reliance on the limitation of liability is subject to it not being ‘unconscionable’. In determining whether the limitation is fair and reasonable, courts will have regard to all the circumstances of the case and, in particular, to a number of factors outlined in subsection 68A(3):

- the relative strengths of bargaining positions;
- whether the buyer received an inducement to agree to the term;
- whether the buyer knew of the existence and extent of the term; and
- whether goods were manufactured, processed or adapted to the special order of the buyer.

Issues

Do the ‘limitation of liability’ provisions in section 68A of the TPA remain appropriate?

Limitation for recreational services

As discussed in Chapter 3, 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)).

‘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.

³⁰ Section 32 MA of the Victorian FTA.

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 Act 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’.

In its submission to the 2002 review of the law of negligence, following the introduction of the Bill but prior to the section’s introduction, the ACCC expressed concern with the proposed provision.³¹ It highlighted the fact that the 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’.

Other submissions to the review — and subsequent critiques — have also expressed the view that the definition of recreational services is too broad.

Three other jurisdictions — NSW, Victoria and the NT — include provisions in their FTAs to limit liability in relation to the supply of recreational services. The provisions are all broadly similar but with some variation, including in the definition of recreational services.

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 his or her 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 written law of Victoria or the Commonwealth that establishes specific practices or procedures for the protection of personal safety (subsection 5N(6)).

‘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); and

31 ACCC 2002, *Submission to the principles based review of the law of negligence*.

- 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.

The exclusion only applies if the term contains the prescribed particulars and is in the prescribed form (or is exempted from these requirements under section 32NA); the supplier has not made a false or misleading statement as to a material particular in or in relation to the term; and the term was brought to the attention of the purchaser prior to the supply of the recreational services (paragraphs 32N(2)(c)-(e)). Further, subsection 32N(3) prevents an exclusion applying where the 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 FTA is to the same effect as subsection 68B(1) of the TPA.

However, 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(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 he or she understands and accepts the effect of the exclusion) or by a combination of the two.

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

This review does not encompass any consideration of tort law reform more generally.³² However, given the stated intention of section 68B (outlined in the Explanatory Memorandum extracted above), CCAAC is seeking views on the appropriateness of the definition of recreational services.

³² 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*, Canberra, and Australian Government 2004, *Reform of liability insurance law in Australia*, Canberra.

Issues

Is the definition of ‘recreational services’ appropriate in the context of section 68B? What, if any, changes should be made to this definition?

Online transactions

Internet-based shopping is now common and the internet is playing an increasingly important role in the way consumers approach their shopping decisions. It offers a convenient alternative to window shopping to compare prices, variety and quality in both the domestic and international markets. Consumers in more remote areas can also rely on the internet as a means of accessing products and services not available to them locally.

The benefits for consumers of buying online compared to traditional retail shopping include a greater choice of products and services than are available in any one place, having access to cheaper goods and services, the choice of alternative suppliers, and the convenience of buying from home at any time and on any day of the week.

Consumer protection online

Online shopping provides additional risks for consumers and can make it more difficult for consumers to obtain redress.³³

Consumer protection online is currently regulated by a combination of laws and industry self-regulation. The statutory implied terms — such as the right to expect that the goods supplied will correspond with their description and that they will be of ‘merchantable quality’ and fit for purpose³⁴ — apply in the same way to online transactions as they do to traditional ‘offline’ transactions that take place in-store. So, in the same way that these rights cannot be excluded or modified — and suppliers cannot limit their liability for breaching those rights³⁵ — in respect of in-person transactions, the same is true for online transactions. Accordingly, clauses on websites which try to exclude or vary these statutory rights may risk making false or misleading claims to consumers about what their rights are, contrary to the law.³⁶

The Victorian FTA provides specific protections for ‘non-contact’ sales agreements which include online transactions.³⁷ Under the Victorian FTA, sellers must provide certain information to consumers before a non-contact sales agreement can be made, including the total cost; any postal or delivery charges; any rights the consumer has to cancel the agreement, and how these rights can be exercised; and the full name and contact details of the supplier.³⁸

33 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.

34 Section 71 of the TPA.

35 Sections 68 and 68A of the TPA.

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

37 Part 4 Division 3 of the Victorian FTA.

38 Section 69 of the Victorian FTA.

Apart from legislation, there is also self-regulation of online trading in the form of business practices and standards set out in industry guidelines and codes. The Australian Government has developed a best practice model for businesses, *The Australian Guidelines for Electronic Commerce*, which provides guidance to businesses and consumers when transacting over the internet.³⁹ The Australian Direct Marketing Association (ADMA) has also developed a voluntary code of practice, *Direct Marketing Code of Practice*, which in part protects the interests of customers when transacting online.⁴⁰ Adherence to these is voluntary and self-enforced by the industry.

The European Union, the UK and Canada have mandatory disclosure requirements for online traders. The EU's Distance Selling Directive (2000/31/EC) requires member states to disclose certain information to consumers, including details of the terms for returning goods; deadlines for returning goods; general terms and conditions; arrangements for payment, delivery or performance; and whether there is a right of withdrawal.

The UK's Consumer Protection (Distance Selling) Regulations 2000 require traders to disclose information such as the identity and contact details of the trader; the main characteristics of the product; any contractual right to cancel; any substitute for unavailable product; any after-sales service; and any guarantees. In 2001, Canada adopted a common internet sales template which requires suppliers to disclose, among other things, a fair description of the goods being sold, the supplier's cancellation restrictions and the limitations or conditions of purchase.⁴¹

Consumer awareness

With increasing use of the internet for shopping, it is important that consumers know and understand what their rights are when shopping online. Consumers have the same rights online as they do offline when buying goods or services from Australian suppliers. They are still entitled to expect that purchases will meet certain quality standards and will match the description given.

Consumer protection agencies in Australia have published information and fact sheets about online trading for both consumers and suppliers. The ACCC has been running education campaigns to make businesses and consumers more aware of their rights and obligations when trading online and outlining where consumers can turn to for consumer protection advice. It also monitors Australian trading websites and investigates appropriate cases.⁴² There are also websites such as 'Scamwatch'⁴³ dedicated to protecting consumers from cyberscams and rip-offs.

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

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

41 Available at <http://www.strategis.gc.ca>.

42 For instance, the ACCC conducted a survey of the top 1000 Australian consumer websites in 2003 to ascertain how well popular websites recognise consumers' rights.

43 <http://www.scamwatch.gov.au>.

Unique issues for consumers shopping online

Despite benefits which include greater choice and convenience, online shopping can also expose consumers to different risks that are not as apparent as with retail shopping in store. These risks can include uncertainty about the identity and location of the seller, the inability to inspect the goods before buying, concerns about payment security, privacy issues, worries about returning or repairing goods, and being able to access the seller's exchange and cancellation policies.

When shopping offline and in-store, consumers are able to examine the products before purchasing. They can also disclose to the salesperson the particular purpose for which they are buying the product and seek advice on the suitability of the product. Online, however, these opportunities do not exist and consumers are often relying on the information provided on the website or on a common understanding about the product.

To help address some of these issues, in the UK suppliers are required to provide consumers with clear information about the supplier, the goods or services and the sale before the consumer decides to buy. Consumers are also provided with a cooling off period of seven working days in which to withdraw from the contract and a right to cancel an order. This allows the consumer the opportunity to examine the goods or consider the nature of a service.

Information on websites

As consumers are faced with a greater range of products to choose from, the information provided on websites by online traders plays a central role in their purchasing decisions.

Online traders use various methods to disclose the terms and conditions of the sale to consumers. Some set out the terms and conditions on their website and require the user to agree to or accept the terms and conditions (for example, by clicking a button or checking a box) before consumers are able to purchase the good or service. Others set out the terms and conditions but do not require users to accept them before purchasing. Some have a link to the terms and conditions which the user may view, while others contain a mere statement that the transaction is subject to the trader's terms and conditions without stating where that information can be found.

However, there may also be some websites which misrepresent the rights of consumers, misleading consumers to believe they have far fewer rights than they actually have.⁴⁴ This includes trying to exclude or limit the statutory rights of merchantable quality and fitness for purpose.⁴⁵

The implied statutory condition of merchantable quality is of great importance to consumers who shop online, since they are unable to physically inspect the goods before buying. Similarly, the statutory condition that goods will match their description is particularly important where consumers cannot inspect the goods and are relying on the online trader to ensure that the information on the website is accurate.

⁴⁴ ACCC 2004, *Shopping online: rights and obligations when trading over the internet*, Canberra.

⁴⁵ Sections 68 and 68A of the TPA.

The statutory condition that goods purchased must be fit for their purpose (which includes the product being suitable for the ordinary and obvious purpose common to a product of that kind)⁴⁶ is equally important for consumers. This importance increases when they cannot examine the good before buying, and may be unable to contact the supplier to make inquiries.

Clauses used by online traders which try to exclude these conditions are likely to mislead consumers and be contrary to the law.⁴⁷ As well, clauses which state that the online trader cannot ensure and has no responsibility for the accuracy of the information on their website (including product descriptions) may be inconsistent with consumers' rights.⁴⁸

The UK and Canada have laws which require suppliers to provide a fair and accurate description of the product, including any technical or system specifications.⁴⁹ Where the supplier does not provide this information, or if the product purchased fails to comply with its description and specifications, then the supplier may be legally liable.

Resolving consumer problems

Accessing after-sales support can be a challenge for consumers who encounter problems with products that have been purchased online, for example, if the goods paid for have not arrived or arrive damaged or different to what was ordered. This is available to customers when returning goods to stores where refund policies are accessible in-store or on demand. Some online traders do have their refund and cancellation policies available to customers on their website. Some websites also have complaint-handling policies that are designed to help resolve consumer concerns.⁵⁰

Consumers can contact the ACCC or their state or territory office of fair trading for consumer protection advice. These agencies also publish information on the avenues available to consumers if they have problems.

Obtaining a refund or exchange on internet purchases can be complicated depending on who the seller is and where they are located, particularly if the trader is located overseas where different laws may apply to the transaction and the buyer may not be entitled to a refund.

Overseas purchases

The internet has dramatically widened consumer choice and enabled consumers to shop around for better bargains abroad and obtain products or services not available locally. For some consumers, the attractiveness of choice and the opportunities for online price savings could prompt them to purchase over the internet from another country. However, this can also present issues and concerns.

Buying from overseas has a degree of overlap with the general issues with shopping online, such as payment security, confidentiality and access to redress. However, these issues can be

46 Subsection 71(2) of the TPA.

47 Sections 52 and 68 of the TPA.

48 Sections 68 and 70 of the TPA.

49 <http://strategis.gc.ca>.

50 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.

aggravated and be more cumbersome, expensive or even impossible to remedy when buying from overseas. It can also be difficult for consumers to determine whether a foreign trader is trustworthy or not.

Where the seller is based overseas it can become more challenging to resolve disputes about consumer contracts. When buying from an overseas supplier, the consumer may not be protected by Australian consumer protection laws and may not enjoy the same consumer rights as they have in Australia. Australian consumer protection laws do not apply to overseas traders.

Consumers may need to contact the consumer protection agency in the other country for consumer protection assistance. The International Consumer Protection and Enforcement Network has set up a database for consumers to report internet shopping complaints where the supplier is from overseas and the dispute cannot be resolved, although there is no guarantee that individual complaints will be followed up.⁵¹

Online auctions

Online auction websites offer an (electronic) marketplace for goods to be sold and bought through a bidding process, in a similar way to traditional auction houses. For consumers, online auctions offer the chance to buy nearly any type of goods and often at bargain prices. Unsurprisingly, this has made online auctions an increasingly popular way to shop.

While Australian consumer protection laws provide implied rights to consumers for goods or services purchased online, as discussed earlier, these rights do not extend to auctions in general, including online auctions.⁵² Online auction sites could therefore be used to dispose of goods that are not of merchantable quality without being hindered by the implied terms.

The original policy grounds for excluding sales by way of auction from the implied terms regime in Part V Division 2 of the TPA may have been that the buyer was physically present at the auction and had an opportunity to inspect the goods prior to auction; however, this policy ground is not valid in the case of online auctions.

Australian internet auction websites must still ensure that the information posted is accurate and not likely to mislead consumers, for example, about the description of the product or what it can do.⁵³ However, online auctions can be more of a case of 'buyer beware' as many do not provide warranties or refunds for purchases. Further, many online auction sites have disclaimers excluding or limiting liability for the conduct of sellers or the condition of the goods being auctioned.

Some auction websites do provide safe trading guidelines and have buyer protection or complaint-handling policies designed to help resolve consumer concerns.

Australian consumer agencies in Australia have taken a range of actions to improve consumer awareness about the risks with online auctions and to improve sellers' awareness

⁵¹ Available at <http://www.econsumer.gov>.

⁵² Sections 70, 71 and 72 of the TPA.

⁵³ Section 52 of the TPA.

of their obligations. These include publishing education materials and conducting investigations.⁵⁴

Issues

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?

Have self-regulatory measures such as industry codes or sale templates been effective in helping to enforce online business best practice?

How well does the Victorian 'non-contact' sales agreement provision operate?

Should the implied terms regime in Part V Division 2 of the TPA apply to online auctions?

What specific issues do consumers face when participating in online auctions?

⁵⁴ In 2006, Consumer Affairs Victoria completed a market investigation of online auctions, which included examining complaints trends, existing consumer protection laws, information asymmetries and compliance and enforcement issues. Consumer Affairs Victoria 2007, *A submission from the Victorian Government to the PC's inquiry into Australia's consumer policy framework*, Melbourne.

APPENDIX A

COMPARISON TABLE OF CONDITIONS AND WARRANTIES PROVISIONS⁵⁵

	Cth	NSW	QLD	VIC	WA	SA	TAS	NT	ACT
	TPA	FTA	SGA	FTA	FTA	CTA	SGA	FTA	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	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	40	7	-	66	-
Exclusion of implied terms									
Choice of laws clause; laws of other jurisdictions	67	-	-		4(3)	6(1)	-	-	-
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	-

55 Corones, S and Christensen, S 2007, *Comparison of Generic Consumer Protection Legislation*, Brisbane.

Comparison table of conditions and warranties provisions (continued)

	Cth	NSW	QLD	VIC	WA	SA	TAS	NT	ACT
	TPA	FTA	SGA	FTA	FTA	CTA	SGA	FTA	SGA
Rights of action									
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 — 3 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)