

SENATE STANDING COMMITTEE ON ECONOMICS

INQUIRY INTO THE TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (NO.2) 2010 (CTH)

SUBMISSION

Introduction

1. This submission addresses one important issue that arises in relation to the Australian Consumer Law (ACL) contained in Schedule 2 of the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (the Bill) namely, the meaning of 'due care' in s60 of the Bill, and whether it is intended to reflect the common law standard of 'reasonable care', or to impose a more stringent standard, in the same way the new standard of 'acceptable quality' in relation to goods is more stringent than the current standard of 'merchantable quality'.
2. The objectives of the proposed new law are: to make the law more certain and more readily enforceable from the consumer's point of view; and to raise awareness of consumers and suppliers of their rights and responsibilities.
3. The Consumer Guarantees regime is contained in Part 3-2, Division 1 of the ACL. The consumer guarantees provisions in the ACL will replace the TPA and State and Territory fair trading and sale of goods laws dealing with implied conditions and warranties in consumer contracts.
4. According to the Explanatory Memorandum accompanying the Bill, the provisions set out in Part 3-2, Division 1 of the ACL are couched in terms broadly similar to those used in the New Zealand *Consumer Guarantees Act 1993* (NZ CGA) and 'the jurisprudence applicable to that Act is of relevance to those provisions.'
5. The consumer guarantees regime also employs some of the language of the TPA in relation to statutory implied terms in consumer contracts, and State

and Territory fair trading and sale of goods laws dealing with implied conditions and warranties in consumer contracts.

Guarantee of acceptable quality in relation to goods

6. Part 3-2, Div 1, Sub-div A imposes nine guarantees in relation to the supply of goods. Perhaps the most important guarantee is the guarantee of acceptable quality imposed by s 54(1) which provides:
 - (1) If:
 - (a) a person supplies, in trade or commerce, goods to a consumer; and
 - (b) the supply does not occur by way of sale by auction;there is a guarantee that the goods are of acceptable quality.
7. Sections 54(2) and (3) define 'acceptable quality'. They provide:
 - (2) Goods are of acceptable quality if they are:
 - (a) fit for all the purposes for which the goods of that kind are commonly supplied; and
 - (b) acceptable in appearance and finish; and
 - (c) free from defects;
 - (d) safe; and
 - (e) durableas a reasonable consumer fully acquainted with the state and condition of the goods, (including any hidden defects of the goods), would regard as acceptable, having regard to the matters in subsection (3).
 - (3) The matters for the purposes of subsection (2) are:
 - (a) the nature of the goods; and
 - (b) the price of the goods (if relevant); and
 - (c) any statements made about the goods on any packaging or label on the goods; and
 - (d) any representation made about the goods by the supplier or manufacturer of the goods; and
 - (e) any other relevant circumstances relating to the supply of the goods.
8. What is acceptable quality is to be determined in accordance with the expectations of a hypothetical reasonable consumer who is full acquainted with the state and condition of the goods including any hidden defects. The question is: would a reasonable consumer knowing all these things about the goods at the time of supply regard them as acceptable?
9. The test is objective, but it is to be applied to the particular goods and circumstances at issue. It is a question of fact and degree. Some relevant considerations include:

- as regards the nature of the goods, the uses to which the goods in question are commonly put which will have an impact on their durability;
- as regards the state and condition of the goods, the nature and extent of the risk posed by the fault, and the extent to which safety may be compromised;
- the cause of the fault is relevant but not determinative: the reasonable consumer would not expect the supplier to manage force majeure events, or other extraordinary circumstance that could not have been foreseen and guarded against;
- the price of the goods is relevant because a reasonable consumer would expect fewer (or no faults) for high priced goods; and
- the nature of goods is relevant in the case of second hand goods are covered by the guarantee of acceptable quality but a reasonable consumer will have regard to their age, price and condition.

10. The test of acceptable quality in the s 54 of the ACL is more stringent than the implied condition of ‘merchantable quality’ in s 71(1) of the TPA in at least three important respects.

11. First, as the New Zealand Court of Appeal observed in *Nesbit v Porter*, goods are of merchantable quality, if they are ‘...of use for *any* purpose for which goods which complied with the description under which they were sold would normally be used; if fit for any such purpose they are regarded as saleable...’: [2000] 2 NZLR 465 at 478 [52]. However, to be of acceptable quality, s 54(2)(a) expressly provides that they must be fit for *all of the purposes* for which goods of that type are commonly supplied.

12. The second significant difference between the standard of merchantable quality and acceptable quality relates to whether merchantability extends to cosmetic or minor defects or is confined to workability. Sections 54(2)(b) and (c) of the ACL provide that the goods must be acceptable in appearance and finish and free from defects. Presumably, this means all defects, including minor defects in the case of goods that are new. A new motor vehicle is likely to be of merchantable quality despite some scratches on its body work; however, it would not be of acceptable quality under the ACL.

13. The third significant difference between the two standards relates to durability. Under the merchantable quality standard it is unclear whether and to what extent there is a durability requirement. For how long after

purchase must goods remain fit for purpose and not break down? For the supplier to be liable under the merchantability standard, the goods must have been defective when delivered even though this may not manifest itself for some time. Under the guarantee as to acceptable quality, they may not be defective when delivered; however, they will not be of acceptable quality unless they remain free from defects for a reasonable period after purchase, even in the case of second-hand goods.

Guarantee of 'due care and skill' in relation to services

14. Part 3-2, Div 1, Sub-div B imposes four consumer guarantees in relation to the supply of services. Section 60 imposes a guarantee that services will be rendered with 'due care and skill,' which is the counterpart of the guarantee of 'acceptable quality' in relation to goods.
15. While the ACL guarantee of acceptable quality in relation to goods is the same as that adopted in the NZ CGA, the standard adopted for services under the ACL differs from that adopted in the NZ CGA. Section 28 of the NZ CGA imposes a guarantee of 'reasonable care and skill' in relation to services supplied to a consumer. The intention of the New Zealand Parliament was not to change the common law of negligence.¹ For reasons of clarity and consistency it was decided to follow s 13 of the *Supply of Goods and Services Act 1982* (UK).² According to Hawes,

The requirement of reasonable care and skill in s 28 is the same as that found in s 13 of the Supply of Goods and Services Act 1982 (UK), of which has been said that the standard required would appear to be that which the common law demanded, and the statute codified the existing law. The case law indicates that the supplier must exercise the ordinary skill of an ordinary competent person exercising the particular art, the standard being an objective one.³

16. Section 13 of the 1982 Act was also intended to confirm and codify the existing common law position.⁴

¹ Report of the Department of Justice on the Consumer Guarantees Bill (1992), Part II.

² Section 13 provides:

In a contract for the supply of a service where the supplier is acting in the course of a business there is an implied term that the supplier will carry out the service with reasonable care and skill.

³ Hawes, in Borrowdale (ed), *Butterworths Commercial Law in New Zealand* (4th ed, Butterworths, Wellington, 2000), at [18.3.1].

⁴ See Woodroffe, *Goods and Services – The New Law* (Sweet & Maxwell, London, 1982) [6.19], p 104;

17. Section 60 of the ACL imposes a guarantee that services supplied to a consumer will be rendered with due care and skill. There is no definition of 'due care and skill' in the ACL.

18. According to the Explanatory Memorandum, two requirements must be met:

- first, the provider of the service must have 'an acceptable level of skill' in the area of activity covered by the service ; and
- secondly, the provider must exercise due care in providing the service.⁵

19. *What is an acceptable level of skill?*

Under this limb, the consumer would be able to cancel the contract, even before any work is performed, if the consumer discovers that the supplier is not properly qualified.

20. *What is meant by due care?*

In relation to the second limb, it seems clear that 'due care' is not intended to impose strict liability. Under a strict liability standard, service providers would be responsible for any loss or damage arising from the provision of services, whether caused by negligence or not; in other words, a standard of perfection.

22. It may be that the words 'due care' only impose a duty to avoid negligence. This would bring it into line with the position under the NZ CGA and the 1982 UK Act. If Parliament intends to adopt this approach and to codify the common law position it would be preferable to adopt the common law standard of 'reasonable care.'

23. On the other hand, if Parliament intends to impose a higher duty than that imposed by the law of negligence, the term 'due care' should be defined in the ACL to reflect that position.

24. The word 'due' is that adopted from the repealed s 74(1) of the TPA.

Lowe and Woodroffe, *Consumer Law and Practice*, (6th ed., Thomson Sweet & Maxwell, London, 2004), at p 91; and Harvey and Parry, *The Law of Consumer Protection and Fair Trading* (6th ed., Butterworths, London 2000) at pp 189-190.

⁵ Explanatory Memorandum at [7.59].

The Explanatory Memorandum accompanying the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 provides two fact scenarios as examples of the application of the guarantee of due care and skill.⁶

25. In the first fact scenario, *Mayne Nickless Ltd v Crawford*, the appellant installed an intruder alarm system in the respondent's shop. The alarm system failed to work during a burglary because the wiring between the system's control box and the Telecom cord was severed. A large quantity of the respondent's stock was stolen. The respondent successfully sued the appellant for breach of warranty implied by s 74 of the TPA. This case sheds no light on whether 'due care' sets a higher standard than 'reasonable care and skill' of the method of determining how the standard is complied with.

26. The second fact scenario, *Dillon v Baltic Shipping Co*, is also unhelpful in this regard, because of the admissions made by the defendant as to the cause of the casualty. In both cases the conduct of the respondents was so serious that the court in each case readily concluded that it fell short of the standard of due care and skill.

27. According to the Explanatory Memorandum, '[w]hilst the cases cited here were heard under the comparable implied warranty provision of the TP Act, the intention is that the guarantee applies to such services in a similar way.'⁷ However, it is unclear whether the intention is merely to restate the common law obligations in statutory form, or to impose a higher standard as was the case in relation to goods with the move from merchantable quality to acceptable quality.

28. It is submitted that the standard required by the guarantee in s 60 of the ACL should be that the supplier must exercise such care and skill as is necessary to complete the contract in an acceptable way. It should mirror the standard of acceptable quality imposed in relation to goods: a standard that a reasonable consumer would regard as acceptable having regard to the nature of the services, the cost of the services (if relevant), any statements made about the services, any representations made about the services by the provider and other relevant circumstances.

29. If this is what is intended the term 'due care' should be defined in the ACL to reflect the position. To leave the matter unresolved will mean that the

⁶ *Mayne Nickless v Crawford* (1992) 59 SASR 490, and *Dillon v Baltic Shipping Co* (1989) 21 NSWLR 614.

⁷ Explanatory Memorandum, [7.59].

application of s 60 of the ACL will be contentious, and contrary to the objective of the new law which is to make the law more certain.

29. The definition of 'due care' proposed in [28] would be in line with the policy objective which CCAAC had in mind for the Consumer Guarantees regime:

The fundamental principle underlying the law in this area should be that consumers are entitled to get what they pay for, in the sense that goods and services will do what they are supposed to do, thereby reducing the likelihood of consumer detriment and dissatisfaction.⁸

30. As suppliers of services generally take out insurance, and consumers do not, this would seem to be a fair allocation of the risks.

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30 April 2010

⁸ CCAAC Report, above n. 11, at p5.