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Submission - Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

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1 Overview

The ACL is an extremely important initiative. The objective of reforming consumer protection law by enacting uniform legislation is without doubt of benefit to the community as a whole.

The question whether, at the same time, the Bill should substantially modify the current law to give effect to concerns in relation to the operation of the TPA and the fair trading legislation is more complex. A key feature of the Bill is the replacement of the current implied terms provisions of Part V Division 2 of the TPA with a scheme of 'consumer guarantees'. In our view it was inappropriate to introduce such reforms in Parliament without prior exposure of draft legislation to legal, consumer and commercial interests. The Report — on which submissions were not invited — did not include specific proposals, let alone draft legislation, on the reforms to be implemented by the Bill.

We have five major concerns with the Bill:

- From the perspective of the principal intended beneficiaries of the ACL, namely, consumers of goods and services for personal use, it is too complex. That is especially true of the consumer guarantees provisions which are designed to displace the condition-warranty regime of Part V, Division 2 (see further in particular sections 2.1, 2.7, 3 and 6 of our Submission).
- Reliance on criminal and quasi-criminal enforcement is greatly increased. The enforcement regime available to the ACCC (and ASIC) does not always seem proportionate to the seriousness of the conduct which engages the regime. That is particularly true of the enforcement regimes for the misleading or deceptive conduct and unconscionable conduct prohibitions (see further section 6 of our Submission).
- The use of a number of different concepts of ‘consumer’ does not provide the optimal way of delivering consumer protection to Australians who acquire goods and services for personal use. A recurring theme in this submission is that there is an overwhelming case for narrowing the definition of consumer (see further section 2 of our Submission).
- Small business suppliers and consumers are not best served by the Bill. In our view, the time has come to provide protection to small business. The current regime (and that proposed in the Bill) treats small business consumers and substantial corporations in the same way as ordinary consumers. That is not, in our view, an appropriate feature for a consumer protection regime (see further in particular section 2 of our Submission).
- The drafting of the mandatory reporting provisions is in our view inadequate. We propose that the term ‘associated with’ should be replaced with the language of causation (see further section 7 of our Submission).

We would be pleased to provide detailed submissions in respect of all of the above. However, many of these concerns are addressed in the more specific submissions which appear below.

Unless otherwise indicated, references to section numbers are references to those proposed by the Bill.

2 The concept of ‘consumer’

- The existence of multiple variations on the concept of ‘consumer’ will be confusing for consumers.
- Limiting the concept of ‘consumer’ by reference to whether the goods or services supplied are of a kind ‘ordinarily acquired for personal, domestic or household use or consumption’ will lead to a lack of clarity and a loss of some existing consumer rights.
- The application of the ACL to commercial consumers in some instances, devalues the consumer protection regime.
- The application of the ACL to small business does not have logical outcomes.
- The concept of 'consumer’ in the definition of ‘consumer contract' in the unfair terms regime should be adopted as the principal concept of ‘consumer’ in the ACL.

2.1 Variations on the concept of ‘consumer’ will be confusing for consumers

The concept of 'consumer' for the purposes of the TPA has been debated on many occasions. The Bill fails to unify the concept for the purposes of the ACL.

The result is an array of concepts which are likely to be confusing to consumers:

(1) under section 3, a person is taken to have acquired goods or services as a ‘consumer’ if the goods or services were ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’;

(2) in section 23 (for the purpose of the unfair terms provisions) a 'consumer contract' is a contract for a supply of goods or services …. ‘to an individual whose acquisition is wholly or predominantly for personal, domestic or household use or consumption’;

(3) in section 2, 'consumer goods' for the purposes of the product safety provisions in Part 3.3 are defined as 'goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption, and includes any such goods that have become fixtures since the time they were supplied if the subject of a recall notice or voluntary call';

(4) in sections 21 and 22 the words 'consumer' and ‘business consumer’ are used for the purposes of the unconscionable conduct provisions.

Some very fine distinctions are drawn, for example, between:

> goods 'of a kind ordinarily acquired for personal, domestic or household use or consumption'
>
> and
>
> goods 'that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption'.

There are also no links between concepts. For example, a 'consumer contract' is not a contract entered into by a person who is a 'consumer', and goods supplied to a person who is a 'consumer' are not necessarily 'consumer goods'.

It is difficult, as a matter of principle, to understand why, in a Bill which makes fundamental changes to Australian law, the decision was not also taken to rationalise this central concept of consumer.

2.2 Good or services of a kind ordinarily acquired etc is uncertain

The Bill proposes that the definition of 'consumer' for the purposes of the consumer guarantee provisions should revolve around the concept of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. The only major exception is where the goods are acquired for resupply.

There have been many cases interpreting this concept and it is impossible to find a clear scheme in the decisions. In particular, the concepts of 'kind' and 'ordinarily acquired' have proved to be elusive. Examples of decisions on the expression are included in Attachment 1.

2.3 Loss of current consumer rights

Defining 'consumer' principally by reference to whether the goods or services acquired are ordinarily acquired for personal, domestic or household use or consumption will lead to a loss of existing consumer rights.

Under the TPA, where a person acquires goods or services for personal use, the position is that the person will be a consumer if the price does not exceed $40,000. Whether the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption is not relevant.

However, anomalies arise under the current law. For example, if an airconditioning unit of a type ordinarily acquired for industrial use is acquired by a home owner for use in the home at a price of $41,000, the question of whether the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption is crucial.

Although the monetary ceiling will disappear under the ACL, the problem will not. Indeed, the problem will be exacerbated under the ACL because an acquisition of goods which are **not** of a kind ordinarily acquired for personal, domestic or household use or consumption will not be an acquisition by a consumer even if the price is, say, $100.

Therefore, the impact of the ACL is to deny consumer protection currently enjoyed under Part V Division 2 to some consumers who acquire goods or services for personal use:

If, for example, A hires a cement mixer to construct a driveway at his or her home, A has the protection of the TPA. Under the Bill, A will not be regarded a consumer unless the cement mixer can be categorised as goods of a kind ordinarily acquired for personal, domestic or household use or consumption. The same is true if A is a small business acquirer who acquires the goods for commercial use.

Two further anomalies under the ACL may be noted. These also involve the removal of current consumer protection rights.

- The sale of goods legislation does not apply to contracts for the supply of goods by way of licence, hire or lease, or to contracts for the supply of services. If a consumer hires goods which are **not** of a kind ordinarily acquired for personal, domestic or household use or consumption, the consumer will be relegated to the common law regarding implied terms of the contract. By contrast, under the TPA, provided the contract price does not exceed $40,000, and provided the acquisition is not for the purpose of resupply, the implied terms referred to in Part V Division 2 of the TPA would operate. It is, moreover, the same if A is a small business acquirer who acquires the goods for commercial use.
- The second anomaly arises from the decision not to include a provision equivalent to section 68A of the TPA. Since that provision does not apply in relation to a supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, it has no role to play under the ACL. To take again the example of A's hire of a cement mixer to construct a driveway at his or her home, the supplier would not be prevented from including in the contract an exclusion of implied terms. It would, of course, be open to A to rely on the unfair terms regime to establish any exclusion as an

unfair term. But that protection would only be available if the supply occurred under a standard form contract. From the perspective of the supplier, the anomaly is that the certainty which the TPA formerly provided, in permitting (subject to the question of reasonableness) the limitations of liability referred to in section 68A of the TPA, will disappear. With it will go the ability to rely on section 26(1)(c), referring to terms expressly permitted by a law of the Commonwealth where it supplies under a 'consumer contract'.

We cannot see the policy basis for depriving such a consumer of the benefit of the consumer guarantees regime. However, we do not support use of the monetary ceiling. It is sufficient to adopt the concept of consumer (contract) used in the unfair terms regime for the purposes of the consumer guarantee regime.

2.4 Anomalies in the application of the ACL to commercial consumers

Consumer protection regimes around the world do not generally offer the same protective measures to persons who enter into contracts in the course of a business as are offered to consumers. The reason is that consumer protection regimes are special regimes having particular features designed to protect those who acquire goods and services for personal use.

In relation to contracts, the principal purpose of a consumer protection regime is to provide to consumers:

(1) guaranteed minimum standards of performance from the supplier; and

(2) guaranteed rights in relation to suppliers who supply goods or services which do not measure up to the minimum standards of performance guaranteed under the legislation.

From that perspective, a system of consumer guarantees makes sense. What does not in our view make sense is for parties who acquire goods and services in the course of a business to obtain exactly the same protection. 'Consumer protection' is, in that context, a misnomer.

Because commercial consumers buy in bulk for commercial purposes, the whole contractual structure – including the price of the goods or services – differs markedly from a standard retail consumer purchase. Liability structures differ accordingly and it is simply impossible to equate commercial consumers and domestic consumers. Nearly all the examples in the EM are of contracts with consumers who acquire goods or services for personal use. There is no attempt to explain the ramifications of the ACL for commercial buyers and suppliers. Nor were they explored in the Report.

An approach which grants commercial and domestic consumers the same rights in some situations undermines the policy of the legislation by failing to treat consumers as a special class of contracting party deserving of a unique protection. It therefore devalues the consumer protection regime. Extending the legislation to commercial contracts affects the freedom to negotiate those contracts on terms which parties think fit. Such freedom is vital to the economy and competition between suppliers. It is necessarily in the interests of consumers. We do not believe this to be a controversial point.

Additionally, the exclusions to this definition of consumer (section 4B of the TPA and section 3 of the Bill) create two classes for 'commercial consumers' of goods:

(1) those who acquire for resupply — who will **not** obtain the protection of the ACL; and

(2) those who do not who acquire for resupply — who will obtain the protection of the ACL.

It is difficult to see the logic of this. A largely circumstantial distinction achieves a profound legal distinction. Clearly, any objective of ensuring that defective goods do not circulate in the community is not served by this division of 'commercial consumers'.

2.5 Small business consumers

In our view, the only justification for extending a consumer protection regime to business consumers could be to protect small business. However, because of the two classes of commercial consumers which will be created by the ACL, small business acquirers will not be protected if they acquire goods for the purpose of resupply, except to the extent that the indemnity from the manufacturer under Part 5.4 Division 3 is applicable in respect of a consumer claim against the supplier. Nor will they be protected unless they acquire goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

Therefore, in so far as the ACL seeks to protect small business acquirers of goods or services, the protection is generally limited by circumstantial distinctions between:

(1) acquisition of goods for use in a business and acquisition for resupply; and

(2) acquisition of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption and acquisition of other goods and services.

Although these distinctions currently exist under the TPA, small business acquisitions of goods (for use in the business) or services not of a kind ordinarily acquired for personal, domestic or household use or consumption are protected — up to the $40,000 ceiling.

Restricting the concept of consumer to that stated in the ACL for the purposes of the unfair terms regime would, of course, leave small business acquirers without the protection of consumer guarantees. However, that can be addressed. Moreover, it can be addressed in terms which also protect small business acquirers who acquire goods or services for resupply.

2.6 Small business suppliers

Where a small business acquires goods of a kind ordinarily acquired for personal, domestic or household use or consumption for resupply, it is not a consumer under the ACL. However, in an on-supply contract (of the same goods) with an end-user which is a commercial entity, that entity will be a consumer.

It seems to us counter-intuitive that if a small business supplier supplies goods or services to another commercial entity, that second commercial entity (big or small) should be treated as a consumer with the same rights as a person who acquires the goods or services for personal use.

Subject to the prohibitions on unconscionable conduct (which also protect the business consumer), the small business supplier seems to have the worst of both worlds:

- in relation to its acquisition from a business supplier it is subject to the superior bargaining position of the business supplier; and
- in relation to its supply to a business consumer it has only limited freedom of contract because the business consumer is a 'consumer'.

Given the above, it is a matter of high priority for a Government concerned to protect small business that something be done to remove the 'consumer' protection afforded to those who acquire goods or services in the course of a business. We do not believe that it would be difficult to draft an appropriate regime and we would be pleased to offer suggestions as to how it might be achieved. The first step is to limit the application of the definition of consumer in accordance with the definition of 'consumer contract' used for the purposes of unfair terms (section 23(3)).

2.7 The case for a unified concept of 'consumer'

Whatever the merits of the definition of 'consumer' in section 4B of the TPA, the enactment of the unfair terms regime and the replacement of Part V Division 2 with

consumer guarantee provisions necessitated a fresh look at the concept. There is a very strong case for the ACL to use a single concept of consumer, at least in relation to contract regulation.

Given that the unfair terms regime employs a specific definition of consumer (contract) which is a highly appropriate statement of who should be regarded as a consumer for the purposes of consumer protection legislation, it should be adopted for the purpose of consumer guarantees.

That case is based primarily on the following:

(1) **intelligibility** — very few non-lawyers will appreciate the subtleties of the distinctions drawn in the ACL;

(2) **internal coherence** — adoption of the concept of 'consumer contract' in the unfair terms regime would promote internal coherence:

- 'consumer contracts' would always be contracts with 'consumers', and the risk that a particular consumer would not be a party to a 'consumer contract' is eliminated; and
- there would be a clear contrast between the unconscionable conduct prohibitions in sections 21 and 22;

(3) **uniformity across regimes** — it would achieve substantial uniformity with the criteria for application of the consumer credit regime and the UN Convention:

- the test for identifying credit to which the National Credit Code (NCC) and under the National Consumer Credit Protection Act 2009 (NCCPA) will apply is substantially the same as under the test for application of the unfair terms regime of the Bill because the credit must be provided wholly or predominantly for personal, domestic or household purposes (although the NCC and the NCCPA also extend to certain financings by individuals in connection with residential property for investment purposes); and
- the UN Convention does not apply to 'goods bought for personal, family or household use'.

(4) it would **remove the uncertainties** which exist in other concepts of ‘consumer’, including in section 21;

(5) it would **restore freedom of contract** to suppliers who supply goods and services to persons who acquire such goods or services in the course of a business;

(6) it would **provide a principled basis** on which to deal with the needs of small business; and

(7) it would **remove several of the anomalies** which currently arise under the TPA and would otherwise continue under the ACL.

3 Consumer Guarantees

- The introduction of a framework of consumer guarantees in the ACL is a major reform, the content and application of which should have been debated.
- The ACL will overlap with other legislation such as the sale of goods legislation. and questions will arise concerning the extent to which such legislation should operate in conjunction with the ACL.
- The ACL consumer guarantee provisions are less 'self-executing' than the TPA – and much more complex.

- The right of a consumer to reject goods is an essential concept in a consumer protection regime. This right is narrower under the ACL in some circumstances.
- Consumers are unlikely to benefit significantly in practice from the right to damages in the case of defective goods.
- The ACL provisions relating to express warranties (section 59) will be detrimental to commercial suppliers of goods ordinarily acquired for personal, domestic or household use or consumption, will affect the relationship between the price of goods and the warranties offered in relation to such goods and will create uncertainty.
- The ACL rules concerning assessment of damages involve a rejection of the fundamental rule of contract damages, as expressed in the decision in *Hadley v Baxendale*.
- The RIS included in the EM does not take the impact of the new consumer guarantee provisions into account.

3.1 Introduction

The replacement of the implied terms regime of the TPA with the consumer guarantees proposed for the ACL raises several problems. Given the time frames which the Government has set itself, it is easy to see why technical problems were not fully anticipated. But our fundamental difficulty with the regime is that it will not be easy for consumers to understand. It does not fulfil the objective identified in the Report, namely, self-executing protection. We deal with that issue later.

There is no RIS in relation to the consumer guarantee regime in the Bill. The RIS included in the EM is based on a different legislative scheme from that proposed by the Bill. That is because the RIS assumes that the consumer guarantee regime would replicate Part V Division 2 of the TPA with minor amendments to reflect simpler wording and 'best practice' from fair trading legislation. The consumer guarantee regime goes far beyond that, particularly in relation to express warranties. It therefore seems clear that the impact of the consumer guarantee regime on business has not been considered. Moreover, all of the examples are of contracts with consumers who acquire goods or services for personal use. There is no consideration of the impact for commercial buyers and suppliers.

3.2 Business to business contracts

Removal of the condition-warranty distinction is a major step. As noted above, commercial parties who do not acquire goods for the purpose of resupply will often be treated as consumers under the ACL. Whether or not the condition-warranty distinction is an appropriate mechanism through which to provide consumer protection, it has played a key role in commercial contracting for 150 years. The case for its abolition in the commercial context has not been debated.

One goal of a major reform of consumer protection should be to remove uncertainty and complexity. Equally, in the commercial context, circumstantial differences between contracts should not lead to materially different rights. Revisions to the Bill are necessary to achieve those goals.

One of the unfortunate features of the TPA has been to make unduly complex the position of parties to commercial sale of goods contracts. Because of uncertainties in relation to the concept of goods of a kind ordinarily acquired for personal, domestic or household use or consumption, consideration has to be given both in drafting and enforcing contracts to two legislative schemes — the sale of goods legislation and the TPA. This has made contract drafting and litigation unnecessarily complex, uncertain and expensive.

Having regard to the discussion below of the sale of goods legislation, there is a potential for major and unacceptable overlap between that legislation and the ACL for certain goods and services. Bearing in mind that many commercial transactions involve the supply of various types of goods, the position is exacerbated by the variable application of the ACL and the sale of goods legislation according to what goods happen to be at issue.

3.3 Operation of the sale of goods legislation

It is unclear whether State and Territory legislatures will amend their sale of goods legislation to accommodate the fact that some contracts regulated by that legislation will also be regulated by the ACL. It is clearly impossible to repeal the legislation because it deals with matters such as the passing of property in goods. Nor is it possible to repeal the implied terms provisions of the sale of goods legislation. They must be retained for the benefit of buyers who are not consumers for the purposes of the ACL.

The important question — one which is vital in the commercial context — is the extent to which the sale of goods legislation should operate in conjunction with the ACL. This matter does not seem to have been considered in detail prior to the drafting of the Bill.

When the implied terms provisions of the TPA were drafted, they were expressed in language that was intended to make it easier for consumer buyers to establish the implication of the terms. Subsequent amendments continued that process. However, the sale of goods legislation remains substantially in the form in which it was originally enacted. Therefore, where the sale of goods legislation is the only source of implied terms, it is more difficult for the buyer to establish that the terms form part of the contract.

Two things follow from this. First, it is important that only commercial buyers be required to rely on the implied terms of the sale of goods legislation. Second, circumstantial anomalies in the application of the sale of goods legislation to commercial buyers must be removed.

The sale of goods legislation may be the exclusive legislative source of implied obligations for the following categories of buyers:

(1) small business buyers of goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption;

(2) other commercial buyers of goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption;

(3) small business buyers of goods for resupply;

(4) other commercial buyers of goods for resupply;

(5) commercial buyers of goods at a sale by auction;

(6) consumer buyers of goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption; and

(7) consumer buyers of goods at a sale by auction.

Categories (2) and (4) do not call for comment. Nor do categories (5) and (7) — a sale of goods by auction falls into a special category.

The ACL does not protect small business buyers of goods for resupply (category (3)), except to the extent that the manufacturer's indemnity in Part 5.4, Division 3 is relevant and applicable. They are therefore in the same position as buyers in category (4). The anomaly, however, is that a buyer for resupply must rely on the sale of goods legislation whereas a commercial buyer for business use may rely on the ACL. There is a circumstantial anomaly which is particularly hard on a small business supplier to a large corporation.

In addition, for consumers in categories (1) and (6) to have to rely on the sale of goods legislation for the implied terms seems anomalous.

In sum, the interaction between the ACL and the sale of goods legislation is more than simply untidy. The interaction is unnecessarily complex and potentially unjust. However, the relationship would be both tidy and just if:

- the ACL were limited to consumer contracts as defined for the purposes of the unfair terms regime; and
- a regime to protect small business was put in place.

3.4 Utility of 'consumer guarantee' as a concept

In our submission on the Issues Paper we made the suggestion that the regime replacing the implied terms regime of Part V Division 2 should be 'self-executing'. A consumer protection regime is 'self-executing' only if failure to comply with a mandated requirement automatically confers rights on the consumer. That suggestion was supported in the Report. However, effect is not given to the suggestion in the Bill. There are two points.

The first is that the 'consumer guarantees' effectively take effect as 'consumer warranties'. In other words, although not drafted as implied terms, that is the effect of the consumer guarantees. There are also minor points in relation to which we are uncomfortable. The principal significance of 'guarantee' is the undertaking of a third person to be responsible for the debt of another. In addition, one meaning of 'warrant' is 'To guarantee (goods, an article sold or made) to be of the quality, quantity, etc specified' (*Oxford English Dictionary*, 2nd ed, OUP, Oxford, 1989). That would also seem to confirm that the 'consumer guarantees' are 'consumer warranties'.

The second point is that in order for a consumer to determine his or her rights under the consumer guarantees regime it is not sufficient for the consumer merely to determine that a supplier has failed to comply with a consumer guarantee. The rights of a consumer depend not only on proof of a failure to comply but also on an evaluation of the seriousness of the failure. As explained below, as a regime which secures the right to reject goods for breach of a consumer guarantee, the ACL is if anything less 'self-executing' than the TPA. In addition, although the consumer guarantees are not described as implied terms, the right to compensation conferred by the regime is assumed to arise from a breach of contract. That would also seem to be the consequence of treating express 'warranties' as 'consumer guarantees'. Not only is the regime less 'self-executing' than the TPA, it is also much more complex. It is without doubt well beyond the understanding which could be expected of the reasonably well-educated consumer.

3.5 Rights to reject goods

Where a supplier fails to comply with a consumer guarantee, the right of a consumer to reject goods under the ACL is also a complex matter, depending on proof not only of the failure of goods to comply but also the extent of the failure. This does not sufficiently protect consumers.

From the perspective of drafting, the complexity of Part 5-4, Division 1 is, again, in our view far too great to be understood by the reasonably well-educated consumer.

From the perspective of consumers who seek to enforce their rights, the ACL may provide even more scope than the TPA for suppliers to fob consumers off with the statement that it is a matter for the manufacturer to deal with. Section 259 states:

> (1) A consumer may take action under this section if:
>
> > (a) a person (the **supplier**) supplies, in trade or commerce, goods to the consumer; and
> >
> > (b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is not complied with.

> (2) If the failure to comply with the guarantee can be remedied and is not a major failure:
>
> > (a) the consumer may require the supplier to remedy the failure within a reasonable time; or
> >
> > (b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time — the consumer may:
> >
> > > (i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or
> > >
> > > (ii) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.

Consider, for example, a consumer who returns a television set to a retailer and asks for a refund on the basis that the television does not work properly. Neither the consumer nor the retailer is likely to know why it does not work properly. What is the consumer to do if the retailer says 'it is probably a loose connection. The manufacturer will repair it'? Whether or not the statement is correct will not be known to the consumer. Nor should it matter.

In this respect, the ACL operates too narrowly. Under the TPA, any breach of condition was sufficient. Under the ACL, some former breaches of condition will take effect as minor failures which the supplier is entitled to repair. This is in our view an extremely significant point.

Except in cases where goods cause damage to the consumer or the consumer's property, consumers do not care about rights to damages. Nor are they impressed with a right to have new goods repaired. An automatic right to reject defective goods is an essential feature of a consumer protection regime. Although we do not suggest that every defect in goods should entitle the consumer to reject, a consumer regime is deficient if it does not secure that right as a mandated right for goods which do not comply with the regime.

Adoption of this approach promotes simple drafting. It would, indeed, be quite possible to draft the whole of the current implied terms provisions of the TPA in a very simple fashion. It is, in essence, not much more complex than a provision to the effect:

> If you purchase Defective Goods you may return the goods to the supplier and obtain a refund. Alternatively, you may ask the supplier to exchange the goods for goods which are not defective.
>
> Defective Goods are goods which ... .

3.6 Rights to damages

As indicated above, except where goods or services cause damage to the person or property of a consumer, we do not believe that the recovery of damages is a major consideration in a consumer protection regime. Indeed, there is much to be said for the view that a trade-off for the benefit of a clear right to reject goods, or to terminate a contract for the provision of services, is that the remedies of rejection and termination should in most cases be the only remedies available to the consumer.

3.7 Express 'guarantees'

Section 59(2) states that 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 supplier will comply with any express warranty given or made by the supplier in relation to the goods.

The purpose of the provision appears to be to ensure that an express warranty takes effect as if it were a consumer guarantee provided for by the ACL. It is unfortunate that, having removed the language of 'warranty' for the purpose of implied obligations, the ACL should reinstate the terminology in connection with express terms of a contract. Section 59(2) relates to warranties by the supplier. However, most consumers will assume that 'warranties' are given by manufacturers. It would, in our view, be much simpler to say that the supplier cannot exclude or limit liability for any obligation expressly stated in the contract.

However, in fact, section 59(2) has a broader purpose, namely, to deem as an express warranty any 'undertaking, assertion or representation' in relation to goods (see section 2, definition of express warranty). The consequences of this are far-reaching indeed. At no time in Australian consumer protection has it ever been suggested:

(1) that express warranties should take effect as mandated terms of the contract; or

(2) that a representation the 'natural tendency of which is to induce persons to acquire the goods' should be deemed to be a warranty.

Putting to one side for the moment the implications of this for commercial contracts, the origin of this provision is a provision in the *Consumer Guarantees Act 1993* (NZ). However, that is derived from section 6 of the *Contractual Remedies Act 1979* (NZ) which deems a representation which induces a contract to be a term of the contract. Given the different context of the *Consumer Guarantees Act 1993* (NZ), there is in our view insufficient justification for deeming any 'undertaking, assertion or representation' to be an express warranty.

Perhaps even more importantly, it is one thing to deem any 'undertaking, assertion or representation' which induced a contract to be a warranty, it is something quite different to deny to a supplier who in fact provides an express warranty of any right to limit liability. From a consumer protection perspective, such a major disincentive to giving an express warranty would necessarily have a prejudicial impact on consumer contracts.

It is also unclear why there is no corresponding provision in relation to services.

Whatever might be the merits of the reform in the context of a consumer acquisition of goods, section 59 has quite startling implications for commercial transactions. Perhaps more than any other provision of the consumer guarantees regime, section 59 underlines its unfortunate impact on commercial contracts.

There is a great deal which could be said. However, we would emphasise three points.

- Given the circumstantial operation of the concept of goods 'of a kind ordinarily acquired for personal, domestic or household use or consumption', section 59(2) will provide quite unwarranted benefits to commercial consumers of such goods. For the same reason, section 59 will be exceptionally detrimental to commercial suppliers of such goods, including small business suppliers.
- Part of the negotiation of any commercial contract is the relationship between price and the warranties which the supplier provides. If the supplier insists on liability for breach of express warranties being limited, its goods will command a lower price. However, the combined impact of section 59(2) and section 64 is that any limitations on the supplier's liability will be invalid. That will have a natural tendency to force prices upwards.
- Commercial parties value certainty. Provisions such as entire agreement clauses are designed to ensure that the written contract is the bargain. Permitting the commercial consumer to trawl through negotiations to conjure up express warranties out of representations will remove that certainty.

In our view there are quite overwhelming reasons for not applying section 59(2) to commercial contracts.

3.8 Assessment of damages

In addition to providing consumer guarantees, the Bill provides various express rights to claim damages. These raise a number of issues which we would be pleased to explain. However, the principal issue concerns the potential exposure of suppliers.

Section 259(4) states:

> The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

See also section 267(4) (services).

The criterion for damages, that is, the standard for remoteness of damage is expressed in terms of 'reasonably foreseeable' loss or damage. This involves a rejection of the fundamental rule of contract damages, as expressed in the decision in *Hadley v Baxendale* (1854) 9 Exch 341. Under that rule, a plaintiff is generally limited to the recovery of normal losses. That is a narrower concept than 'reasonably foreseeable' loss. See *Astley v Austrust Ltd* (1999) 197 CLR 1 at 23, 28. We recognise that this difference might be rationalised on the basis that the right which section 259 confers is a statutory rather than a contractual right. However, the provision is as much applicable to express warranties as statutory consumer guarantees.

Whatever may be said about the benefit of having a broader criterion for consumers of goods for personal use, section 259 will apply equally to commercial consumers. To confer rights of damages of that nature on commercial consumers will have very significant implications, particularly for small business. In short, the provision creates a completely different liability regime from that which applies to commercial contracts in general. Arrangements which suppliers have in place for insurance will be affected. Indeed, small business may find that their liabilities are not insurable at all. When it is also borne in mind that liability cannot be limited by agreement, business – particularly small business – will face unquantifiable and potentially unlimited liability regimes.

This also highlights the significant windfall benefits accorded to suppliers who fall within section 65 (see 5 below).

4 UN Convention

The application of the UN Convention will in some cases mean that domestic commercial consumers will enjoy an advantage over consumers who acquire goods from overseas and that domestic suppliers will be subject to more onerous requirements than those applicable to international suppliers.

The UN Convention provides uniform rules that govern contracts for the sale of goods between people located in different countries. The terms of the UN Convention are set out in the uniform Sale of Goods (Vienna Convention) Acts passed in each State and Territory of Australia.

The UN Convention (Article 2) applies to a international contract for the sale of 'goods bought for personal, family or household use' if the seller of the goods neither knows or ought to know that the goods have been bought for such use.

The Bill (section 68) provides that the provisions of the UN Convention prevail over the consumer guarantee provisions of the ACL to the extent of any inconsistency.

It follows then that the UN Convention (and not the ACL) will apply to an international contract for the sale of goods 'of a kind ordinarily acquired for personal, domestic or household use or consumption' which are not in fact 'bought for personal, family or household use'. Although, of course, that might be said to be quite appropriate where the

buyer is a commercial entity, it does seem peculiar for commercial consumers who acquire from domestic suppliers to enjoy such an advantage over those who acquire goods from suppliers from other contracting states to the UN Convention, and for domestic suppliers to be subject to more onerous requirements than those applicable to international suppliers.

5 Supplies of gas, electricity and telecommunications

- The application of consumer guarantees to contracts for the supply of gas, electricity and telecommunications depends on the regulations.
- It is not clear why these potential exemptions have only been applied to supplies of gas, electricity and telecommunications.
- The approach is inconsistent with one of the principal objectives of the ACL, namely, to gather consumer protection law in the one place.

The Bill (section 65) provides for the regulations to exempt from the consumer guarantee regime specified supplies of gas, electricity or a telecommunications service.

The reasons given in the EM for the exclusion of these categories are the unquantifiable liability and the fact that failure may occur by reasons which are outside the control of the supplier (see para 7.65).

The EM states that this 'disapplying' of the consumer guarantees may be done if the Minister is satisfied that other laws make adequate provision for consumer protection in relation to those supplies (see para 7.67).

This means that basic supplies – to every Australian household – can be partially exempted from the operation of the ACL. Apart from the question whether Australian consumers are adequately protected, one of the chief objectives of the Bill is undermined because more than one piece of legislation has to be considered. Consumer protection for these goods and services may consist of whatever alternative legislation may be put in place and the ACL unfair contracts regime.

In addition, it appears that a somewhat arbitrary judgment has been made, and the privileged position is not enjoyed by, for example, suppliers of coal or water.

6 Unfair practices and criminal offences

- A prohibition on false or misleading representations concerning a requirement to pay for a contractual right should be limited in its application to 'consumer rights'.
- Suppliers will struggle to define the extent of the consumer guarantee provisions and will therefore find it difficult to ensure compliance with this new prohibition.

We also wish to draw attention to one of the new unfair practices which is also a strict liability offence.

The unfair practice, for which a pecuniary penalty is payable, is stated in section 29(n):

> A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
>
> ***

(n) make a false or misleading representation concerning a requirement to pay for a contractual right that:

(i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and

(ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

The corresponding strict liability offence is in section 151(1)(n).

In one sense, the prohibition is based on a misconception. Where goods or services are supplied to a consumer, and the consumer enjoys certain statutory rights, the consumer must pay for those rights because the calculation of the price of the goods or services necessarily takes account of the liability of the supplier under the contract. Indeed, one reason for not having overly extensive consumer rights is that, from the consumer's perspective, it has a detrimental impact on prices. These sections of the Bill therefore assume that there is a representation that the consumer must pay an additional sum for a right. If the provisions were restricted to cases where the false or misleading representation concerned a requirement to pay for a consumer right, they would have merit.

However, the provisions go far beyond that by prohibiting a representation in relation to a right which is 'wholly or partly equivalent to' a statutory right. The misconception here is that suppliers will understand the operation of the consumer guarantee provisions sufficiently well to be able to identify precisely where those rights begin and end. However, that is most unlikely. Even experts in the field of consumer protection will struggle to define the full extent of consumers' rights. In relation to express warranties, this is, in our view, a self-defeating proposition. How can a supplier offer an express warranty for a fee if the consumer guarantee provisions deem that warranty to be a consumer guarantee? To do so would expose the supplier to a criminal penalty.

There is a defence to section 151, namely, mistake of fact. However, the honest mistake which any supplier could quite easily make in situations such as those exemplified above is one of law, not fact.

Given that legal advice from experts in the field is very expensive, small business is likely to be prejudiced. Even more importantly, the most likely impact of these provisions is reduction in consumer choice.

7 Consumer product safety: mandatory reporting

- The phrase 'associated with' in these provisions is undesirable and should be replaced with the language of causation. The reporting obligation should arise where the goods in question may have caused or contributed to the death or serious injury or illness.
- The provisions are inconsistent as to whether the relevant inquiry is with goods or services supplied by the supplier, or with goods or services of the kind supplied. They should be made consistent so that the inquiry is with goods or services of the kind supplied.
- It is unclear what is intended to be caught by the definition of 'serious injury or illness'. The definition should be reconsidered.

The introduction of a requirement for suppliers to report products associated with death or serious injury was supported in Recommendation 9.3 of the Productivity Commission's report, *Review of the Australian Consumer Product Safety System* (January 2006), and in

Recommendation 8.2 of the Productivity Commission's report, *Review of Australia's Consumer Policy Framework* (April 2008).

We have serious concerns with the drafting of the provisions in the Bill which are proposed to give effect to these recommendations. The relevant provisions are sections 131 (consumer goods) and 132 (product related services). Those provisions are in almost identical terms.

7.1 'Associated with'

Our principal concern with the drafting of sections 131 and 132 relates to use of the phrase 'associated with'. That phrase was used in the Ministerial Council on Consumer Affairs' report, *Review of the Australian Consumer Product Safety System* (August 2004), which stated (at 8):

'The ability of the system to respond swiftly to product hazards could be strengthened by requiring businesses to monitor the ongoing safety of their products and report to governments about any products which: are under investigation for possible safety risks; have been associated with serious injury and death; or have been the subject of a successful product liability claim.'

The phrase 'associated with' was also used in the two reports of the Productivity Commission referred to above and it has now found its way into the Bill. None of the reports has examined the meaning of the term. By way of contrast, the Productivity Commission's 2006 report noted (at 224) that '[a] further way this reporting requirement may impose a cost on business is through the uncertainty associated with determining what constitutes a "serious injury"'.

The meaning of the phrase 'associated with' is imprecise. The term does not have a commonly understood meaning in the context of product safety.

The definition of the word 'associate' in the *Oxford English Dictionary* (2nd ed, OUP, Oxford, 1989) is 'to join, combine in action, unite (things together, or one thing with another)'. In ordinary parlance, the term 'associated with' may have a very general connotation of 'being involved with' or 'having some connection with'. The phrase does not necessarily connote a causative relationship.

The use of the phrase in the Bill means that the reporting obligation will be enlivened if a supplier becomes aware that the consumer goods in question were in some way involved with or connected with a death or serious injury or illness. This will be so even if there is no suggestion or possibility that the goods caused or contributed to (in a legal sense) the death or serious injury or illness.

If the supplier does not report an incident to the Commonwealth Minister as required, the supplier will have committed an offence. Under section 202, a supplier is liable to a maximum fine of $16,650 (if it is a body corporate) or $3,330 (if it is not a body corporate) if it is required to give a notice and refuses or fails to give the notice as required.

In our view, the effects of the reporting requirement as drafted will be overly onerous to suppliers of consumer goods and product related services.

By way of example, suppose that a supplier of a product becomes aware that a consumer was seriously injured while engaging in some activity and at the same time using the product. In those circumstances, the terms of section 131 would require the supplier to give a notice to the Commonwealth Minister, as the goods 'have been associated with' the serious injury, even although the other activity may have been the cause of the injury.

Subsections 131(2)(a)–(b) would not assist the supplier in this situation. They provide that the reporting requirement does not apply if it is clear that the consumer goods in question were not 'associated with' the death or serious injury or illness, or it is very unlikely that they were.

Subsections 131(3) and 132(3) provide that the reporting requirement applies 'whether or not the consumer goods [to which the product related services relate] were being used

before or at the time the death or serious injury or illness occurred'. That is, the obligation arises whether or not the goods were being used contemporaneously with the death or serious injury or illness. All that is required is that the goods have been 'associated with' the death or serious injury or illness.

Having regard to these matters, it is submitted that the use of the phrase 'associated with' in these provisions is undesirable. It will have the consequence that, in order to strictly comply with the provisions, suppliers will be required to give a notice to the Commonwealth Minister where the goods in question have simply been involved with, or have had some connection with, a death or serious injury or illness, and regardless of whether the goods may have caused or contributed to the death or serious illness or injury.

In our view, it is not an answer to this to say that the provisions are not intended to have this effect, assuming this is how they will be interpreted by the courts. While it is open for government to develop guidelines in relation to the reporting requirement, it would have been more appropriate to clarify the drafting in the Bill.

Nor is it an answer to say that an 'oversupply' of notices to the Commonwealth Minister would be an acceptable price to pay for having dangerous consumer goods reported. That price will be borne by suppliers, and ultimately by consumers, and it will be borne unnecessarily if the drafting of the provisions might have been improved.

The reporting requirement should depend on causation. The concept of causation, while complex, is well known to the law. Replacing the term 'associated with' with the language of causation will make the application of these provisions more certain and workable for suppliers, consumers and government.

It is our view that the words 'have been associated with' in subsections 131(1) and 132(1) should be replaced with the words 'may have caused or contributed to'. Similarly, subsections 131(2)(a)–(b) and 132(2)(a)–(b) should be amended to provide that the reporting requirement does not apply if it is clear that the goods did not cause or contribute to the death or serious injury or illness, or it is very unlikely that they did.

These amendments will mean that the trigger for the reporting requirement will be appropriately set: the obligation will arise where the goods may have caused or contributed to the death or serious injury or illness. However, the amendments will also have the effect that there will be no obligation to report where there is a very low likelihood that the goods caused or contributed to the death or serious injury or illness.

There are two further concerns that we have with the drafting of these provisions.

7.2 Goods or product related services 'of a particular kind'

Subsections 131(1)(a) and 132(1)(a) impose a reporting obligation if the supplier, in trade or commerce, supplies consumer goods or product related services of a particular kind, and the supplier becomes aware that consumer goods of that kind, or consumer goods to which services of that kind relate, have been associated with a death or serious injury or illness.

However, subsections 131(2)(a)–(b) and 132(2)(a)–(b) provide that the reporting obligation does not arise if it is clear that the consumer goods supplied or the consumer goods to which the product related services relate were not associated with the death or serious injury or illness, or it is very unlikely that they were.

That is, the provisions are inconsistent as to whether the relevant inquiry is with goods or services supplied by the supplier, or with goods or services of the kind supplied. In our view, the reporting requirement should apply if goods of the kind supplied, or goods to which services of the kind supplied relate, may have caused or contributed to a death or serious injury or illness. It should not be necessary that the supplier supplied the very goods that caused or contributed to the death or serious injury or illness.

7.3 'Serious injury or illness'

The term 'serious injury or illness' is defined in the Bill as an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or nurse, but as not including 'an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)'. Similar wording has been used in other legislation.

It is to be noted that the *Oxford English Dictionary* (2nd ed, OUP, Oxford, 1989) defines the word 'ailment' as '[t]he fact of ailing; bodily or mental indisposition; disorder, sickness'.

The EM states: 'the injury or illness must not be a disease, which is defined to include an ailment, disorder or morbid condition which arises through sudden onset or gradual development'. However, the term 'disease' is not used at all in these provisions, and it is not defined in the Bill.

It is unclear what it is intended to be caught by the definition as presently drafted and that the definition should be reconsidered.

Freehills

23 April 2010

Abbreviations

Abbreviations

Abbreviation	Meaning
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001 (Cth)
Bill	Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010
EM	Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010
Issues Paper	Commonwealth Consumer Affairs Advisory Council, Issues Paper, *Consumer rights: Statutory Implied Conditions and Warranties*, Canberra, July 2009
Report	Commonwealth Consumer Affairs Advisory Council, Final Report, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*, Canberra, October 2009
RIS	Regulation Impact Statement
TPA	Trade Practices Act 1974 (Cth)
UN Convention	United Nations Convention on Contracts for the International Sale of Goods 1980

Attachment 1

Case law on the meaning of 'goods or services ordinarily acquired for personal, domestic or household use or consumption'

1 Federal court cases

(a) *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479 (supply of reflective foil insulation products – a supply of goods of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of ss 74B and 74D of TPA).

Legal principles

(1) 'First, the word 'ordinarily' means 'commonly' or 'regularly', not 'principally', 'exclusively' or 'predominately' [at 81].

(2) 'Second, it is preferable to pose the statutory question (ie the question whether the goods in issue in the particular case are goods of a kind ordinarily acquired for personal, domestic or household use or consumption) as a single composite question…This can be contrasted with a two-stage inquiry as to, first, the genus of goods in question, and secondly, whether that kind of goods is ordinarily acquired for personal, domestic or household use or consumption' [at 82].

(3) 'Thirdly, depending on the precise statutory question and the circumstances of the particular case, it will be relevant to inquire as to the essential character of the goods in question' [at 83].

(4) 'Fourthly, the question posed by s 74A(2)(a) is ultimately a question of fact and degree' [at 87].

(5) 'Beyond endorsing a commonsense approach, the cases that have been decided under s 74A(2)(a) or s 52A(5) of the TPA do not take the analysis much further' [at 88].

(b) *Crago and Anor v Multiquip Pty Ltd and Anor* (1998) ATPR 41-620 (supply of incubators and hatchers adapted to accommodate ostrich eggs – not a supply of goods of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of ss 74B and 74D of TPA).

Legal principles

(1) '…it must be clear…that goods may be of a kind ordinarily acquired for personal, domestic or household use or consumption even if goods of that same kind are in many cases, perhaps even a majority of cases, acquired for business use.'

(c) *Leitch v Gude Pty Ltd (Receiver and manager appointed) and Anors; Natwest Australian Bank Ltd (Cross Claimant)* (unreported) BC9502903 (supply of finance of more than A$10 million – not a supply of a service of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of section 52A of TPA).

(d) *Begbie v State Bank of New South Wales Ltd* (1994) ASC 56-254 (supply of $250,000 finance by way of an overdraft facility – not a supply of a service of a

kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of section 52A of TPA).

Legal principles

(1) 'The borrowing of funds, even substantial in amount, eg: the borrowing of funds by a person sufficient to enable that person to buy a private residence, can be a service of a kind [ordinarily acquired for personal, domestic or household use or consumption].'

(2) 'In order to determine whether the service in question in a particular case… [is of a kind ordinarily acquired for personal, domestic or household use or consumption it is necessary] ...to have regard not just to the activity, here the provision of loan funds, but also to the purpose that activity is intended, in the particular case, to serve.'

(e) *E v Australian Red Cross Society and Anor* (1991) 27 FCR 310 (supply of nursing services specifically a blood transfusion for less than $15,000 – a supply of services of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of sections 71 and 74 of TPA).

(f) *Atkinson v Hastings Deering (Queensland) Pty Ltd* (1985) 8 FCR 481 (supply of a Caterpillar tractor for $315,000 – not a supply of goods of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of the implied warranties in the TPA).

(g) *Jillawarra Grazing Co v John Shearer Ltd* (1984) ASC 55-307 (supply of airseeder – not a supply of goods ordinarily acquired for personal, domestic or household use or consumption for the purposes of sections 74B, 74F and 74G of TPA).

2 Supreme court cases

(a) *Barclay v English and Ors* [2009] QSC 258 (design and supply of a catamaran for $1,603,761 – a supply of a service of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of section 74 of TPA).

(b) *Minchillo and Anor v Ford Motor Company of Australia Limited* [1995] 2 VR 594 (supply of Ford prime mover under a lease for total rental of $211,627.20 and residual value of $48,600 – not a supply of goods of a kind ordinarily acquired for personal, household or domestic use or consumption for the purposes of sections 74B and 74D of TPA).

Legal principles

(1) 'Although the words 'domestic or household' have a similar connotation, 'personal' use is clearly intended to cover a wider filed, but the primary contrast intended to be drawn is with commercial or business use, whatever other personal activities a vehicle may be used for' [at p 617]

(c) *Comco Constructions Pty Ltd v Westminster Properties Pty Ltd* (1990) 2 WARJ 335 (erection of office building for $1,980,000 – not a supply of services that is ordinarily acquired for personal, domestic or household use or consumption for the purposes of section 52A of TPA).

Legal principles

(1) 'The use of the word 'acquired' underlines the personal nature of the service or goods to which the subs (5) refers' [at p 348].

(2) 'The use of 'acquired' restricts the operation of subs (5) beyond what it might have covered if the word 'used' had appeared instead' [at p 348].

(d) *Carpet Call Pty Ltd v Chan & Anor* (1987) ASC 55-553 (supply of carpet for a night club $68,839 – a supply of goods of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of section 71(2) of TPA).

(e) *Four Square Stores (Qld) Ltd v ABE Copiers Pty Ltd and Anor* (1981) ATPR 40-232 (supply of photocopier and reducer under a lease for total lease payments of $13,528.80 plus a residual value of $2,160 – not a supply of goods of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of section 71 TPA).