

# Chapter 4

## Consumer Guarantees

4.1 Under current legislation, consumers rely on implied conditions and warranties in consumer contracts to protect them with respect to the title and quality of goods they purchase.

4.2 Evidence presented by Treasury in support of this bill suggests Australian consumers' awareness of their rights under the implied warranties regime is very low - only 29 per cent, compared to 67 per cent in a similar survey in New Zealand.<sup>1</sup> The complexity of the implied warranties regime, which requires a consumer have some knowledge of contract law, may contribute to Australian consumers being less likely to assert their rights at the point of sale or pursue breaches of implied warranties.

### **The New Zealand model of consumer guarantees**

4.3 Treasury describes the object of the bill's provisions on consumer guarantees as increasing consumer awareness and simplifying the rights to which consumers are entitled.

4.4 The new consumer guarantees regime is a single national law which will replace the various implied statutory conditions and warranties provisions in the TPA and in a large number of state and territory laws. It is designed to express in plain language consumers' current rights. It also sets out, for the first time, the remedies that consumers have where a guarantee is breached and does not require consumers to rely on unstated common law remedies.<sup>2</sup>

4.5 The bill introduces guarantees to consumers for the first time in Australia.<sup>3</sup> The jurisprudence from New Zealand courts is relevant to these new provisions in the Australian context.<sup>4</sup>

### *Consumer guarantees for goods*

4.6 The bill would give consumers a guarantee to title, undisturbed possession and ensure goods are supplied unencumbered.<sup>5</sup> Significantly, this bill introduces a statutory basis upon which to seek remedy where the goods are not of an 'acceptable quality'. Currently, consumers have an implied warranty that goods are of

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1 Treasury, *Submission 46*, pp. 21-22.

2 Treasury, *Submission 46*, p. 22.

3 *Explanatory memorandum*, p. 177

4 *Explanatory memorandum*, p. 178

5 Sections 51 to 54.

'merchantable quality', which has a common law meaning that has been developed through high volumes of litigation. 'Acceptable quality' now has a clear meaning under the bill, which reads:

- (a) fit for all the purposes for which goods of that kind are commonly supplied; and
- (b) acceptable in appearance and finish; and
- (c) free from defects; and
- (d) safe; and
- (e) durable.<sup>6</sup>

4.7 An exemption from the guarantee of acceptable quality of goods is available only in exceptional circumstances, where the goods are used abnormally, such as a mobile phone dropped into a full bathtub or a television broken by an object hitting the screen.<sup>7</sup>

4.8 Legal experts, including the Law Council of Australia, were supportive of the introduction of the 'acceptable' threshold for product quality:

The adoption of the New Zealand formulation for 'acceptable quality' rather than 'merchantable quality' is to be much applauded. You have disagreement amongst lawyers as to what 'merchantable quality' means and 'acceptable quality' is a better definition.<sup>8</sup>

4.9 In relation to the delivery of goods, consumers have a guarantee that goods will correspond with the description, or where relevant a demonstration model, and that requisite spare parts are available when repair is necessary.<sup>9</sup>

4.10 The Committee heard evidence from consumer advocates that there is much confusion on the part of consumers about what rights they enjoy under statutory warranties and what they pay for with additional manufacturers or extended warranty schemes.<sup>10</sup> Section 59 states:

...there is a guarantee that the manufacturer of the goods will comply with any express warranty given or made by the manufacturer in relation to the goods.

4.11 While this may provide some relief, consumer advocates also argued that without adequate information that is easily understood, the change in drafting would be ineffectual:

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6 Section 54(2).

7 *Explanatory memorandum*, p. 187.

8 Mr Lynden Griggs, *Submission 7*; p.2; Mr Stephen Ridgeway, Law Council of Australia, *Proof Committee Hansard*, 28 April 2010, p. 48.

9 Sections 56 to 58.

10 Choice, *Submission 20*, p. 6.

...warranties continue to raise serious problems. For many consumers, paying for an extended warranty on a large purchase seems to make good sense because it offers peace of mind but in many cases that sense of security is an illusion. It is based on a danger that does not exist because the statutory implied warranties offer as good or better protection. Nevertheless, under the old system of contract based remedies, consumers may have seen some value in paying to avoid the hassle of trying to enforce these warranties. With the move to consumer guarantees, CHOICE calls on the Senate to ensure that consumers receive adequate information about their rights before entering into extended warranties. This should be done through a compulsory disclosure at the time the extended warranty is offered so that consumers can judge for themselves whether the warranty offers any additional protection and, if so, whether it is worth the price.<sup>11</sup>

4.12 The intent of section 59 of the bill is that consumers are not paying for a warranty they already enjoy under the statutory protections, but can continue to purchase other benefits, including warranties conferring rights which exceed the statutory minimum. The Committee is concerned that there is some confusion on the part of consumers about the difference between various types of warranties. To counter this confusion, the Committee considers that it would be useful for the regulator to introduce positive disclosure obligations at the 'point of sale' for retailers to provide information to consumers, detailing the rights available under each type of warranties available and the relative value of purchasing additional warranties.

4.13 There are other provisions in the bill (such as prohibitions of misleading conduct and unfair contract terms) which may prevent some warranties being sold where they do not extend consumers' rights. The evidence suggests that informing consumers so they may exercise greater choice between warranties may better address the issue. One way may be to use new 'display notices' powers of the Minister and the regulator.

#### *Display notices*

4.14 It is proposed by the Commonwealth Consumer Affairs Advisory Council (CCAAC) that Australian shop owners be encouraged to participate in a voluntary scheme to provide a notice of consumer rights to consumers. If this fails to enhance awareness of consumers of their rights under the bill, the relevant Minister is to determine that the notice must be displayed in all shops nationally. The Minister is also able to prescribe the content of any notice mandated for suppliers of goods and services.<sup>12</sup> Completing a transaction without the required notice displayed can result in a maximum penalty of \$30,000 for a company; and \$6000 for an individual.<sup>13</sup>

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11 Mr Christopher Zinn, Director, Communications and Campaigns, CHOICE, *Proof Committee Hansard*, 28 April 2010, p. 7.

12 Section 66.

13 Section 133F.

4.15 This will be more effective if consumers can readily comprehend the benefits they would received from buying an additional warranty.

## **Recommendation 2**

**4.16 The Committee recommends that the Minister look at requiring plain English explanations be provided to consumers of the additional benefits, or otherwise, of any extended warranty beyond existing statutory rights.**

### *Consumer guarantees for services*

4.17 The bill provides guarantees for consumers where services are not rendered with due care and skill or not provided within a reasonable time.<sup>14</sup>

4.18 The bill replaces an implied warranty in the TPA with a guarantee that the supply of services, and products resulting from services, are 'fit for a particular purpose'.

## **Recommendation 3**

**4.19 The Committee notes the low rate of Australian consumers' awareness, compared with that of New Zealand consumers, of their statutory rights when purchasing goods and services, particularly in relation to warranties. The Committee recommends the Government introduce a programme to educate Australian consumers about their statutory rights in relation to express warranties and other consumer guarantees. The programme should particularly aim to educate consumers about the guarantee that goods must be of "acceptable quality", which may offer protection above that included in manufacturers or extended warranty contracts.**

4.20 Section 61 has proven to be a controversial inclusion in the regime of consumer guarantees, as the scope for liability for suppliers under this provision is very wide. The section reads:

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

(a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) If:

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14 Sections 60 and 62.

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- (a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and
  - (b) the consumer makes known, expressly or by implication, to:
    - (i) the supplier; or
    - (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;
      - the result that the consumer wishes the services to achieve;
- there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

(3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.

4.21 The inclusion of this guarantee in the bill means a number of industries, some currently exempt under the TPA, will experience a change to their exposure to liability. A number of stakeholders provided evidence to the Committee of the implications of a universal 'fitness for purpose' guarantee and the merits of exempting industries from this section. A discussion of exemptions is contained later in this chapter.

4.22 Service providers cannot avoid the obligations guaranteed to consumers in this bill by contracting out of them. Section 64 also prevents suppliers from displacing consumer guarantees by specifying that some other law, such as the jurisdiction where the supplier is based, applies to the contract instead. Telstra submitted that:

...suppliers be able to nominate where customers must direct their notice of intention to terminate a contract for breach of a consumer guarantee, provided that the nominated contact be readily available to consumers;<sup>15</sup>

4.23 Telstra's recommendation appears to limit consumers' ability to access a remedy. This would be invalid, given the scope of section 64 of the bill, which stipulates that any such term of a contract would be void where it 'purports to exclude, restrict or modify the consumer guarantees or a consumers' ability to seek remedy under the guarantees'.

### ***Support for reforms***

4.24 Most submissions and witnesses were supportive of the changes relating to consumer guarantees. Mr Lynden Griggs, a Lecturer in Law, commented that the changes:

... mooted in Part 3-2 represent a considerable improvement on the current regime.<sup>16</sup>

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15 Telstra, *Submission 11*, p. 3.

4.25 The consumer organisation, CHOICE believe the bill achieves its aim:

...we are delighted to see that the bill moves away from some of the musty legalese that infected the existing regime of implied warranties and conditions. A rose by any other name may smell as sweet, but a name for a consumer guarantee that means nothing to the average consumer effectively just stinks. We are pleased that the Office of Parliamentary Counsel has taken the opportunity to simplify the consumer guarantees...<sup>17</sup>

4.26 The Committee heard evidence from a significant number of witnesses who suggested that the change in wording, and explicit definitions on the face of the bill, would provide the foundation for better informed consumers in Australia and, where matched with the requirements for points of sale to display notices of consumer rights, consumer awareness may rise to levels seen in New Zealand.<sup>18</sup>

4.27 To assist business to prepare for the regulatory and other changes involved in the consumer guarantees scheme, Telstra submitted that:

...the ACCC and consumer regulators should issue national guidance in relation to the new consumer guarantees to ensure regulators, consumers and businesses have a consistent understanding of the new rights and responsibilities created under this regime.<sup>19</sup>

4.28 Given the size and scope of this bill and the changes its implementation will involve, the Committee agrees with this suggestion and other suggestions by stakeholders which will improve the awareness of business and consumers of the rights and responsibilities under the scheme.

#### **Recommendation 4**

**4.29 The ACCC and consumer regulators should issue national guidance in relation to the new consumer guarantees to ensure regulators, consumers and businesses have a consistent understanding of their new rights and responsibilities.**

#### ***Remedies for breaches of consumer guarantees***

4.30 The bill enables consumers to take action against a supplier of goods if:

(a) goods are supplied in trade or commerce; and

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16 Mr Lynden Griggs, *Submission 7*, p. 2.

17 Mr Christopher Zinn, *Proof Committee Hansard*, 28 April 2010, p. 8.

18 Mr Lynden Griggs, *Submission 7*; p. 2; see also Dr Stephen Corones, 'Consumer Guarantees in Australia: Putting an End to the Blame Game', *Queensland University of Technology Law Journal* (2009) 9(2) 137; Treasury, *Submission 46*; Law Council of Australia, *Submission 18*, p. 7; CHOICE, *Submission 20*, p. 3.

19 Telstra, *Submission 11*, p. 16.

- (b) there is a breach of any of the guarantees that relate to goods.<sup>20</sup>

4.31 The bill entitles consumers to a refund, replacement or repairs from the supplier if the standards required under the guarantee are not met. The remedy is based on the specific guarantee with which the supplier has not complied.

4.32 The type and severity of penalties depends on the severity of the breach of a consumer guarantee. A major failure is taken to have occurred where:

- (a) A reasonable consumer would not have acquired the goods if he or she knew about the nature and extent of the problem;
- (b) the goods depart significantly from their description or a sample of the item;
- (c) goods cannot be remedied to make them fit for purpose within a reasonable time; or
- (d) the goods are unsafe.

4.33 Where there is a major failure to comply with a guarantee, the consumer may reject goods and choose between a refund and replacement goods. The same guarantees apply to the replaced goods as applied to the goods originally supplied.

4.34 For a lesser failure the usual remedy will be for a consumer to require the supplier to address the problem. This remedy must be made available within a reasonable time, which will vary according to the nature of the goods provided.

4.35 While submissions and evidence received by the Committee were generally supportive of the inclusion of the remedies available to consumers for a suppliers' breach of a guarantee, a number cautioned that the:

... distinction that is drawn between major and minor repairs may well add a layer of complexity that is not warranted.<sup>21</sup>

4.36 Telstra also recommended in its submission that:

...there be greater clarity of new and unfamiliar terms (such as "major failure").<sup>22</sup>

4.37 Mr Lynden Griggs suggested best practice standards may have been more helpful to consumers than a 'major' and 'minor' distinction. Mr Griggs submitted that

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20 Section 258.

21 Mr Lynden Griggs, *Submission 7*; p.2; Telstra, *Submission 11*, p. 15.

22 Telstra, *Submission 11*, p. 3.

'lemon laws',<sup>23</sup> as introduced in the United States provide specific guides to consumers on how to differentiate between major and minor failures in products.<sup>24</sup>

4.38 While the Committee agrees with the CCAAC finding that lemon laws are not necessary in Australia at this stage due to the heavy burden they place on suppliers – in particular motor vehicle manufacturers - the Committee agrees with Mr Griggs' recommendation that the ACCC:

...monitor and undertake a detailed analysis (after...two years) of the effectiveness of the major/minor distinction in remedial relief..<sup>25</sup>

4.39 This would allow consideration of a more interventionist approach if the proposed approach is not proving effective. The Committee recognises, however, that a period of consumer education is required before consumers would make use of the measure and therefore a trend might not be observable within two years.

## **Recommendation 5**

**4.40 The Committee recommends that an appropriate agency monitor and, as soon as practicable after 1 July 2013, provide a comprehensive report on:**

- (a) the application of the distinction in Part 5-4 of the bill between major and minor failure based on consumer behaviour (with a view to ascertain whether improved definitions are required or amendments are warranted); and**
- (b) consumers' behavioural awareness of consumer guarantees and use of remedial relief.**

## **Exemptions to consumer guarantees**

### *Committee view*

4.41 The Committee accepts the policy intent implicit in the consumer guarantee scheme: that the national economy derives efficiencies from consumers with a robust

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23 "In the US, all states have 'lemon laws', which give consumers the right to get their money back or a new replacement car if they buy a 'lemon'. There, a car qualifies as a lemon if the same defect can't be repaired in a certain number of attempts, and/or if the car has spent a certain amount of time in the workshop over a 12–24-month period while still under warranty. The problems must be due to a manufacturing fault rather than a design fault present in all models of a batch (which would be covered by a model recall) or a fault of the dealer." CHOICE, *Your rights when you buy a used car*, Online article, accessed 12 May 2010, <http://www.choice.com.au/Reviews-and-Tests/Travel-and-Transport/Cars/Buying/Car-lemon-laws/Page/Car%20lemon%20laws.aspx>. (last updated 6 May 2006).

24 Mr Lynden Griggs, *Submission 7*, p. 2.

25 Mr Lynden Griggs, *Submission 7*, p. 2.



knowledge and pursuit of their rights based on a nationally consistent standard for business conduct.

4.42 Similarly, the Committee accepts the policy intent of the guarantee embodied in section 61, giving specific protection to consumers that 'services, and any product resulting from the services, will be reasonably fit for that purpose'. Consequentially, each 'carve out' or exemption from a guarantee diminishes the economic efficiencies produced by a nationally consistent, all-industry law and undermines both the consumer confidence and business certainty objectives of the bill.

4.43 The Committee agrees with a general recommendation expressed by CHOICE in its submission that:

...the Australian Consumer Law should be applied as minimum, uniform standard across both states and industries. Any existing exemptions or exceptions under the *Trade Practices Act 1974* should be subject to debate before being adopted in the new law.<sup>26</sup>

4.44 Any industry seeking an exemption should bear the onus for demonstrating the public good derived from their exclusion, and should demonstrate why a service or product that is not *reasonably* fit for a particular purpose ought to be outside the scope of liability.

4.45 As a general proposition, the Committee finds that the threshold for applying such an exemption ought to be that:

- the nature of the service provided is so vulnerable to third parties or other elements who may affect supply of that service or product so as to alter either the nature of the product, or prevent the service provider from managing the expectations of the consumer; or
- the 'purpose' of the product cannot be ascertained through competent due diligence, consultation and professional advice by the supplier to the consumer; or
- the service or product supplied is so unique in its nature that it cannot conceivably have a purpose that is reasonably understood.

4.46 Three specific sectors seeking exemptions - electricity and gas suppliers; telecommunications suppliers; and architects and engineers – are discussed.

***Electricity and gas supplies exemption from 'fitness for purpose' guarantee***

4.47 Section 65 of the bill provides an exception from the guarantee that the service supplied be fit for a particular purpose for the suppliers of gas, electricity and telecommunications in certain instances.

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26 *Submission 20*, p. 2.

4.48 Energex submitted that the electricity supply in Australia is unique, warranting an exemption:

Given the unique nature of electricity and manner in which it is supplied, in the event of a failure, it is difficult to determine the cause of the failure. In many cases, the failure is due to circumstances beyond the reasonable control of the distributor. Electricity specific laws at national and state level make adequate provision for consumer protection.<sup>27</sup>

4.49 With respect to telecommunications and other utilities, Treasury stated that:

As gas, electricity and telecommunications are supplied through an interconnected system of wires or pipes, a disruption to supply can affect many consumers. Losses can also be substantial for each consumer since these goods and services are crucial to many areas of human activity. These factors point to a potential need for industry-specific regulation that deals with mass claims in an efficient way and also limits the risk that mass claims will lead to the collapse of businesses that provide essential goods and services to consumers.<sup>28</sup>

4.50 Energex asks for further protection under the proposed regulations, recommending that the bill be amended to 'make it clear' that consumer guarantee provisions do not apply to the supply or connection of electricity services.<sup>29</sup> In their submission, Energex stated that introduction of the bill will:

...result in overlapping and potentially conflicting legislative regimes leading to unnecessary regulatory compliance burden.<sup>30</sup>

4.51 The Energy Retailers Association of Australia disagrees with the view put by Energex and in supporting the national regulation of electricity markets, recommends a corollary rescinding of state based regulation:

As most retailers operate in more than one retail market, the ERAA sees the use of generic consumer laws as being preferable to the implementation of state based regulations that differ across jurisdictions.<sup>31</sup>

As noted in previous submissions relating to the ACL, the ERAA remains concerned that there appears to have been little consultation with the officers working on the NECF [National Energy Customer Framework] in the framing of the ACL. While the Explanatory Memorandum makes

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27 Energex, *Submission 8*, p. 2; electricity specific laws referred in Submission 8 include the *Electricity Act 1994* (Qld) and *Electricity Regulations 2006*; *Electrical Safety Act 2002* (Qld) and *Regulations*; *National Electricity Law*; *Queensland Electricity Industry Code*; and *National Electricity Rules*.

28 Treasury, *Submission 46*, p. 24.

29 Energex, *Submission 8*, p. 2.

30 Energex, *Submission 8*, p. 2.

31 Energy Retailers Association of Australia, *Submission 9*, p. 4.

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reference to the NECF process, there appears to be little evidence as to how the ACL will align with the NECF.<sup>32</sup>

*Committee view*

4.52 The Committee notes that regulations created under section 65 limit the exemption of the utilities industries to situations of service failure such as unforeseeable weather events or phenomena or third party asset failures, as these exemptions can be justified. The Committee also notes that these industries are also subject to specific, additional regulation in some markets and where this does not conflict with the objective of the Australian Consumer Law, this is also appropriate and enhances consumer rights with regard to essential services.

***Telecommunications suppliers exemption from 'fitness for purpose' guarantee***

4.53 Australian Communications Consumer Action Network (ACCAN) provided five reasons that the consumers they represent disagreed with the policy of exemptions:

Firstly, this provision has come out of nowhere. Neither the Productivity Commission's inquiry into consumer protection nor the Commonwealth Consumer Affairs Advisory Committee investigation into warranties recommended that this carve-out be written into the new national Consumer Law. Secondly, this provision weakens the existing trade practices law, in our view creating greater confusion and fewer protections for consumers. Thirdly, the government has failed to be sufficiently clear about how this provision would be applied. The explanatory memorandum states that the carve-outs would only be applied in circumstances where the relevant minister is satisfied that other laws make adequate provision for consumer protection in relation to the relevant services, being telecommunications services. Yet this is not actually reflected in the bill itself. Next, there are no telco industry specific regulations that relate to consumer guarantees, nor are there any such plans to develop these rules—nor would we support that particular approach. Lastly, once created, exemptions such as these have proved notoriously difficult to reverse.<sup>33</sup>

4.54 Consumer advocates, CHOICE, agreed with the arguments and policy position of ACCAN.<sup>34</sup>

4.55 The *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)* (CPSS Act) provides for consumer protection in respect of telecommunication services. Part 5 of the CPSS Act provides for a Customer Service

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32 Energy Retailers Association of Australia, *Submission 9*, p. 4.

33 Ms Elissa Freeman, Director, Policy and Campaigns, Australian Communications Consumer Action Network, *Proof Committee Hansard*, 30 April 2010, p. 2.

34 Mr David Howarth, Legal Policy Officer, CHOICE, *Proof Committee Hansard*, 28 April 2010, p. 9.

Guarantee in respect of the supply of telecommunication services. To provide an efficient mechanism for dealing with mass claims, the CPSS Act allows for the Australian Communication and Media Authority specifying a scale of damages for contravention of service standards. For example, a payment of \$14.52 is specified for each of the first five days of delay in effecting a repair to a residential telephone service, followed by \$48.40 for each subsequent day. This approach allows consumers to avoid the cost and inconvenience of court proceedings to recover amounts lost as a result of the failure of a telephone service.

*Committee view*

4.56 The Committee recommends caution in applying exemptions to telecommunications services, in particular telephone services, to remote areas and other types of connection problems in the ordinary course of business. Also, the Committee finds that products (such as handsets) used in conjunction with connection services should continue to be covered under the guarantee and that no regulation made under section 65 should limit any of the consumer guarantees relating to goods sold by telecommunications suppliers.

***Architects and Engineers exemption from 'fitness for purpose' guarantee***

*Background to the exemption*

4.57 Subsection 74(2) of the TPA currently provides consumers with an implied fitness for purpose warranty. In 1986 an amendment was made to this section giving engineers and architects a specific exemption from liability under this provision.

4.58 Treasury noted in its submission to the inquiry following the public hearings, that:

...this exemption was included by the government in 1986 in order to secure passage of the *Trade Practices Revision Bill 1986* through the Senate.<sup>35</sup>

4.59 In 1986, Senator Janine Haines of the Australian Democrats gave one particular reason that consumers who engaged architects and engineers not be able to seek remedy under this provision.

The issue with regard to architects and engineers is we believe that they fall into a special category as far as their relationship to their client is concerned; that is that, while they come up with designs, specifications and so on in accordance with whatever a particular client wishes, in the implementation of those specifications, designs, contracts and so on a fairly significant third party intervenes.<sup>36</sup>

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35 Treasury, *Submission 46*, p. 22, citing, The Hon. Mr L. F. Bowen, Attorney-General, *House of Representatives Hansard*, 2 May 1986, p. 269.

36 Senator Janine Haines, *Senate Hansard*, 30 April 1986, p. 2053 cited by Consult Australia, *Submission 14*, p. 6.

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*Reform proposed in the bill*

4.60 Section 61 of the bill does not contain the exemption from its parent provision in the TPA. Where a consumer, in negotiations to purchase the service or product, has expressed a desire for a particular result section 61 provides a guarantee that the services or product will be of such a 'nature, and quality, state or condition, that they might reasonably be expected to achieve that result'.

4.61 The section does not apply where it was unreasonable for the consumer to rely on the skill or judgment of the supplier, or the consumer chose not to rely upon their skill or judgment.

4.62 The explanatory memorandum gives an example of the intended operation of the provision:

...the installation of lighting that will allow a room to be used as a home office. If the electrician installs lighting that is too dull to allow reading of documents and books in that room, the guarantee as to fitness for a particular purpose has not been complied with.<sup>37</sup>

4.63 This use of a building services example demonstrates a deliberate policy decision taken by the Government to allow consumers to seek remedies from those providing professional services for the construction of a consumer's home.

*The merits of an exemption in a consumer guarantees scheme*

4.64 Engineering and architecture peak bodies<sup>38</sup> have asked the Committee to recommend the exemption previously included be reintroduced into the bill and provided a number of reasons in support of this recommendation.

4.65 Consult Australia, representing consulting companies that provide professional services to the built and natural environment, argued:

...If this exemption is removed it will create substantial adverse consequences for engineering and architectural professionals and businesses providing such services in Australia.<sup>39</sup>

4.66 The Australian Institute of Architects also argued that there is no reason to regulate their industry:

There is no evidence that an additional head of liability is necessary or that it addresses a systemic failure in the recourse consumers presently have for loss attributed to architects, through negligence, misleading and deceptive conduct under s.52 or s.51A of the TPA, and/or contractual claims.<sup>40</sup>

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37 *Explanatory memorandum*, p. 192.

38 Consult Australia, *Submission 14*; Australian Institute of Architects, *Submission 16*.

39 *Submission 14*, p. 3.

40 Australian Institute of Architects, *Submission 16*, p. 3.

4.67 This claim is difficult to assess as given the exemption there was no way for dissatisfied customers to take action. Removing the exemption is the only way to test the extent of customers who would like to take action.

4.68 Treasury argue that the starting point for considering exemptions to guarantees which protect consumers ought to be whether such an exemption is of public benefit, not whether there is a proven case for its removal from a previous bill.

4.69 Treasury referred to the recommendation made by the Commonwealth Consumer Affairs Advisory Council (CCAAC), which had consulted with professional architecture and engineering bodies:

CCAAC considered this issue and determined that the exemption should be removed. CCAAC noted that the same factors that apply to architects and engineers apply to many other service industries. CCAAC recommended that the exemption be removed ‘...in the interests of simplicity, uniformity and fairness.’ It should also be noted that there is no exemption for architects and engineers in relation to consumer guarantees in New Zealand’s *Consumer Guarantees Act*, which has been in place since 1993.<sup>41</sup>

4.70 Consult Australia argued in favour of maintaining the exemption, firstly, because consumers are adequately protected by other provisions in the current TPA (and proposed consumer guarantees) which form part of the bill, including the law of negligence and contractual terms and conditions.

4.71 Treasury agreed that these protections exist under the TPA, but submitted that the new drafting under the bill gives better protection by being easier for consumers to access and understand:

A significant benefit of the consumer guarantee is that it is written on the face of the law. As such, a statutory guarantee is more accessible to consumers compared to actions for negligence, which usually requires the services of a lawyer to understand. This is a different protection to the common law notion of negligence, which provides consumers with protection when services are provided in a way which does not meet the standard of care required. The consumer guarantee is directed to ensuring that the services are provided in accordance with the purpose expressed by the consumer. A particular service might be provided in a way that is not negligence but may, nevertheless, fail to achieve the purpose that a consumer made known to a supplier.<sup>42</sup>

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41 Treasury, *Submission 46*, pp 22-23. Treasury also cited: National Education and Information Taskforce, *National Baseline Study on Warranties and Refunds*, October 2009, p. 20; New Zealand Ministry of Consumer Affairs, *National Consumer Survey 2009*, A Colmar Brunton Report, pp. 3 and 5; See, for example, the New Zealand Ministry of Consumer Affairs website, <http://www.consumeraffairs.govt.nz/consumerinfo/cga/>.

42 Treasury, *Submission 46*, p. 22.

4.72 Treasury also rejected the notion that these protections are adequate for consumers who engage an architect or an engineer for what is often the biggest investment of their lives.

4.73 Treasury also argue that professional services which have subject elements are provided by a range of professionals who have always been liable under the TPA:

The argument has been made to the Committee that architectural services are substantially different to any other services due to their sometimes creative or prototypical nature. The existing law has applied to every other occupation in Australia for 24 years and many other occupations also involve elements of a creative or prototypical nature. For example, portrait artists, interior and exterior designers, landscape gardeners, cosmetic surgeons and event planners, along with the tradespeople they may work with, are all subject to the requirements of fitness for purpose currently provided in the TPA.<sup>43</sup>

4.74 Engineering and architecture industry representatives also submitted that building and construction projects involve (sometimes multiple) third parties to deliver the final product experienced by the consumer. They argued that this creates a number of difficulties in relation to guaranteeing the work of other parties, and a higher level of risk, leading to higher insurance costs.

4.75 The Australian Institute of Architects argued that the service provided by architects and engineers is 'unlike the provision of many professional services' because it 'almost always results in a physical product – a home'.<sup>44</sup>

4.76 It was also suggested by peak bodies that building projects change in scope over the course of a build, which peak bodies suggest is a significant driver of cost, partly due to litigation as a result. They argue that a guarantee as to the 'fitness for purpose' may allow a consumer to change their mind as to the 'purpose' of the design, or the time and cost constraints imposed on the professional even though these factors affect the service provided.<sup>45</sup>

4.77 Consult Australia stated in their submission:

Exposing engineers and architects to fitness for purpose warranties will only inflate the wastage further, driving competition out of the industry as many businesses will not survive in such circumstances. Removal for the exemption will particularly impact small businesses working in the residential sector because of increased risk, costs and disputation.<sup>46</sup>

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43 Treasury, *Submission 46*, pp. 22-23.

44 Australian Institute of Architects, *Submission 16*, p. 6.

45 Consult Australia, *Submission 14*, p. 5.

46 Consult Australia, *Submission 14*, p. 5.

4.78 They further argued that these changes could have a wider effect on housing affordability if the cost of professional services increases is compounded by reduced competition in the small business sector.

4.79 The New Zealand *Consumer Guarantees Act 1993* specifically excludes agreements between suppliers and consumer that acquire services for the purposes of a business. Consult Australia notes that this explicit exemption has not been carried across into the bill.<sup>47</sup> Such transactions, however, would be excluded on the basis that under section 3 a person is taken to have acquired particulars if the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption. Under subsection 3(2) subsection (1) does not apply if the goods are used in trade or commerce. This has the same effect as the New Zealand exemption.

Consult Australia believes that there is no robust policy basis for removal of the exemption. Thirty three submissions were made to the CCAAC inquiry. Consult Australia understands that no objections were raised in the consultation process to the exemption for architects or engineers and that only Consult Australia (then ACEA and the Australian Institute of Architects) made mention of the exemption in subsection 74(2). Consult Australia also understands that further analysis into the effects of removal of the exemption has not been conducted.<sup>48</sup>

4.80 The Institute of Architects conceded that other professional services are captured by the guarantee under section 61:

Many of the arguments we will put for continuance of the exemption could equally be made for bringing other professional services providers within the exemption of the current s.74(2), or removing s.74(2) of the TPA and by inference s.61 of the Bill altogether.<sup>49</sup>

4.81 Ms Deborah Healey, an academic and consumer protection expert, responded to questions on whether the work of engineers or architects was too complex to be captured by the bill:

... these people are professionals and this is their job. They are significantly more trained than a person selling a toaster. It is something they are trained for. But, in any event, if an architect has done a reasonable job it does not necessarily have to satisfy all the whims of the customer. It is a matter of striking a balance. There are any number of things that are incredibly complex. If we sought to exclude all complex things from the ambit of this, we would just have toasters left!<sup>50</sup>

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47 *Submission 14*, p. 4.

48 Consult Australia, *Submission 14*, p. 5.

49 Australian Institute of Architects, *Submission 16*, p. 5.

50 Ms Deborah Healey, *Proof Committee Hansard*, p. 35.



4.82 Treasury responded to a question from the Committee in relation to the architects' and engineers' concerns:

The purpose of the guarantee is to set out in fairly clear language on the face of the statute what the required standard of business conduct is, so that services provided are fit for the purpose that was disclosed or are clearly implied from the interaction between the two parties. In that sense, if it encourages businesses to make much clearer the basis on which they are providing their service or the basis on which they might provide advice, that can only be a good thing. I do not think we accept the proposition that it is somehow a more nebulous concept than the law of negligence for a consumer. Few consumers would really have an appreciation of what the law of negligence is, given that it is a common law concept which has been developed over the past 90-odd years by the courts and given that this obligation applies to other professions, to other trades and to other businesses in relation to the services they provide, some of which are fairly clearly analogous to the sorts of situations that architects and engineers find themselves in.<sup>51</sup>

4.83 Treasury disagreed with Consult Australia, that architects and engineers may be held liable for work, product or conduct of other third parties, such as builders, as the guarantee applied to the services of the architect or engineers:

...later failures by a builder, plumber or carpenter, would give rise to liability of the builder or other party, not the architect or engineer. This has not created the sorts of problems, as claimed by representatives of architects and engineers, for other occupations in a similar position.<sup>52</sup>

4.84 Treasury likened the position of architects and engineers to other creative professionals and industries, such as an interior designer, landscape gardener, labourers or a fabricator, and argued that each provider is liable for their service, but:

...not the contractually unrelated services of another party. Further, section 267 of the ACL provides explicitly that action is not possible against a supplier of services if an act, default, omission or representation is made by any person other than the supplier or an agent or employee of the supplier.<sup>53</sup>

4.85 Treasury also commented that the merits of the 1986 amendment, when the statutory warranty was a new legislative concept and concerns about increased costs to consumers as a result of the warranty were untested, are no longer valid:

...the practical application of the statutory warranty has shown that such concerns have not been borne out with respect to all other occupational groups. Every other occupational grouping has been subject to fitness for

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51 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, p. 40.

52 Treasury, *Submission 46*, p. 23.

53 Treasury, *Submission 46*, pp. 22-23.

purpose warranties since 1986, without the effects that are claimed for architects and engineers.<sup>54</sup>

4.86 The provision has been read very broadly by the professional representatives, as relating to a large proportion of the work that architects and engineers do. Treasury sought to limit the exposure of liability, stating:

The guarantee only applies to services provided directly to consumers, not projects where a consumer contracts only with a developer for a whole package and the developer uses an architect or engineer, nor commercial projects involving business parties. Accordingly, the provision is targeted at providing protection for consumers who acquire services from engineers or architects.<sup>55</sup>

### ***Committee view***

4.87 The Committee does not find that the nature of the services rendered by engineers and architects, or the resulting product – their design concept - can be sufficiently distinguished from the professional advice, due diligence, project management and client communication duties of other professionals, such as plastic surgeons, interior designers, landscape gardeners or lawyers.

4.88 The Committee considers that the product received by the consumer from architects and engineers is a design concept rather than the building itself, which limits their exposure to liability for the purpose of the design, rather than interpretation or installation of the final construct. The designer of a product which is considered to have achieved a result of a kind *reasonably* required by the client would not be liable.

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54 Treasury, *Submission 46*, p. 23.

55 Treasury, *Submission 46*, p. 23.