

A Model Australian Consumer Code Relating to Defective Goods

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Abstract

Australian consumer law gives inadequate protection to consumers who have purchased defective goods. Surveys show that there is widespread lack of awareness of consumer rights. Detriment is caused to consumers by uncertainty and inadequacies in the law. Most significantly, because the law determines the period for which goods must be durable by applying a test of reasonableness, there is uncertainty about how long particular types of goods should last and, because consumers lack the money, time and persistence to take such matters to court, suppliers are effectively left free to determine the duration of warranties. The paper examines data obtained from consumer surveys and the recommendations contained in the recent Commonwealth Consumer Affairs Advisory Council report. It ends with a proposed model code which would contain a provision imposing on all consumer contracts an implied guarantee that goods were of satisfactory quality. The code would define 'satisfactory quality' as including a requirement of durability. Where a consumer brought an action against a supplier for breach of the implied term, the onus would be on the supplier to prove that it was unreasonable for the goods to be durable for the period as the consumer asserted they should be. By imposing the burden of litigation on suppliers wanting to prove the inapplicability of the guarantee (rather than, as at present, placing the burden on consumers to prove that it was reasonable for goods to be durable for a specific period), the law would alter the behaviour of suppliers by extending the period during which they would be prepared to give redress to consumers in order to avoid litigation.

Keywords: Consumer Law, Warranties, Guarantees, Contract, Sale

1. Introduction

In May 2008 the Ministerial Council on Consumer Affairs (Note 1) initiated a comprehensive review of the efficacy of the law on consumer guarantees – that is, of the laws relating to the remedies available to consumers who purchase goods and services. As part of this process, the Commonwealth Minister for Competition Policy and Consumer Affairs asked the Commonwealth Consumer Affairs Advisory Council (CCAAC) to examine existing law on implied conditions and warranties under the *Trade Practices Act 1974* (Cth) and equivalent State and Territory fair trading and sale of goods legislation. The CCAAC was also asked to suggest such reforms that might be necessary to better protect consumers. The CCAAC published its final report in October 2009 (hereafter referred to as the CCAAC report). (Note 2) In response, the Ministerial Council has announced that a new uniform Australian Consumer Law will be introduced into the Commonwealth, State and Territory legislatures to give effect to recommendations contained in the report.

This paper examines the issue of consumer remedies for defective goods. It does not examine the issue of remedies relating to sub-standard services. Part 2 of the article gives an overview of the current statutory framework relating to consumer remedies. Part 3 discusses empirical research carried out using data relating to complaints concerning defective goods made to consumer bodies in New South Wales and Victoria. Part 3 also discusses data contained in the August 2009 National Education and Advisory Taskforce Baseline Study on Warranties and Refunds (hereafter referred to as the NEIAT study), (Note 3) which was commissioned by consumer protection agencies across Australia, and which was used by the CCAAC in drafting its report. Part 4 of the paper discusses shortcomings in the law, and comments on whether those shortcomings are adequately addressed by the recommendations contained in the CCAAC report. Part 5 contains a model code which, it is suggested, best balances the rights of consumers and suppliers. Part 6 contains a conclusion which discusses the way forward in view of the Commonwealth government's plan to introduce legislation to give effect to the CCAAC recommendations.

2. The statutory framework

2.1 Commonwealth law

The law in Australia relating to consumer remedies for defective goods is confusing and inconsistent. The need for a uniform approach was one of the key recommendations contained in the CCAAC report (CCAAC, 2009, pp. 19 and 21). At Commonwealth level, consumer protection is provided by the *Trade Practices Act 1974* (Cth). The Act depends for its constitutional validity on the power to enact laws relating to corporations contained in s 51(xx) of the Commonwealth Constitution. The Act therefore does not govern contracts entered into by non-corporate entities. Notwithstanding this, the Act covers the vast majority of consumer contracts, as over 97 % of business in Australia, as measured by turnover, is conducted by corporations.

Consumer protection for defective goods is found in s 71(1) of the Act, which provides that in every contract for the supply of goods to a consumer there is an implied condition that the goods are of merchantable quality. A 'consumer' is defined in s 4B as someone who acquires goods for up to \$ 40 000, or if for an amount in excess of \$ 40 000, who acquires goods which were of a kind ordinarily acquired for personal, domestic or household use or consumption, or which were a commercial vehicle, and which were not acquired for purposes of re-supply or transformation in business. 'Merchantable quality' is defined in s 66(2) as follows:

Goods of any kind are of merchantable quality... if they are as fit for the purpose or purposes for which goods of that kind are commonly bought *as is reasonable to expect* having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

The condition does not apply to defects specifically drawn to the consumer's attention before the contract is made (s 71(1)(a)) or, in circumstances where the consumer examines the goods before the contract is made, as regards defects which the examination ought to reveal (s 71(1)(b)).

Remedies for breach of the implied condition as to merchantable quality derive from the common law and from s 75A of the Act. Under the common law, where a condition of a contract has been breached, the plaintiff is entitled to claim either specific performance (that is, seek an order that the defendant perform as required under the contract) or exercise a right to terminate the contract. Irrespective of the choice made between specific performance and termination, if the breach has caused consequential loss damages can also be recovered. In the case where a consumer is satisfied to have faulty goods repaired or replaced, the common law remedy of specific performance will be adequate. However, a consumer who wishes to terminate a contract under the common law faces the difficulty that, once each party has performed, termination does not give rise to a right to receive a refund. (CCAAC, 2009, p. 64 fn 99). It is for this reason that the remedy in s 75A is useful, as it provides that where a condition of a contract (such as the implied condition relating to merchantable quality) has been breached, the consumer has a right to rescission. One shortcoming in s 75A is however s 75A(2)(a), which provides that a consumer loses the right to rescind if the right is not exercised within a reasonable time of having had an opportunity of inspecting the goods. This is a serious flaw, because in practice it means that the consumer will lose the right a very short time after receiving the goods and, in many cases, will have lost the right long before any latent defect manifests itself.

2.2 State and Territory law

Consumer protection legislation varies widely between the States and Territories. (Note 4) In most cases State and Territory legislation re-enacts the provisions of the *Trade Practices Act 1974* (Cth). Because State and Territory Parliaments have plenary powers, their legislation extends to cover all contracts entered into by consumers, not just those entered into between consumers and corporations. Some of the States and Territories confer jurisdiction over consumer law to specialist tribunals, which provide consumers with an avenue for redress which is quicker, less formal and less costly than that provided by the courts. This is an aspect where State and Territory law enjoys an advantage over Commonwealth law, as the separation of power requirements of Chapter III of the Commonwealth Constitution prohibit the conferral of Commonwealth judicial power on bodies other than courts.

State and Territory law evinces a wide variety of provisions governing consumer rights. In some, the legislation adopts the *Trade Practices Act 1974* (Cth) definition of 'merchantable quality', (Note 5) and provides an implied condition that goods meet that standard, (Note 6) unless the consumer examined the goods before purchasing them and the defect was one which the examination ought to have revealed, (Note 7) or unless the defect was specifically drawn to their attention. (Note 8) In these jurisdictions consumers have a right to rescind goods for breach of the condition, (Note 9) however, except in the case of Victoria, (Note 10) the right is lost if the consumer has had the goods long enough to be able to inspect them – in the case of South Australia the

legislation specifies seven days. (Note 11). In three jurisdictions the legislation *excludes* any general implied condition relating to merchantable quality. (Note 12) In addition to these differences in relation to rights and remedies, there are differences between the States and Territories in relation to how they define consumer contracts. (CCAAC, 2009, p. 157) The lack of standardisation of consumer rights across Australia adds to the general confusion on the part of consumers and suppliers as to what their respective rights and obligations are.

3. Consumer experiences

A feature of the current state of consumer protection in Australia as revealed by the NEIAT study is widespread lack of knowledge on the part of consumers as to what their remedies are. (NEIAT, 2009, pp. 8-9) Only 13% of consumers questioned in that study were aware of a statutory right to rescission separate from whatever manufacturer's warranty they may have had. (NEIAT, 2009, p. 50) Suppliers (which essentially means retailers) also appear to be ill-informed of the provisions of the law, with 22% of those surveyed believing that consumers have no statutory right to a refund (NEIAT, 2009, p.53) and 49% believing that a consumer has no remedies once the manufacturer's warranty has expired. (NEIAT, 2009, p. 54). When asked what form they would like information to be in, 81% of consumers said that their rights should be presented in a simple one-page document, (NEIAT, 2009, p 73) and 61% said that that document should be available from suppliers. (NEIAT, 2009, p 73) In its report, the CCAAC recommended that suppliers should be encouraged to display such a statement of consumer rights at their places of business – although rather generously to suppliers, the report recommended a voluntary scheme which would become mandatory if not successful. (CCAAC, 2009, p. 59)

Even when consumers are aware of their rights, it is clear that they often experience difficulty in vindicating those rights against suppliers. This is evident from a survey of data from the New South Wales Office of Fair Trading and Consumer Affairs Victoria, covering the most recent reporting periods of 2007-08 and 2008-09, which appears in Table 1 at the end of this article. The data indicates that complaints about the quality of goods comprise nearly one in five of complaints received by the consumer reporting agencies in Australia's two most populous States. The data also indicates that the absolute number of complaints is rising. Clearly consumers are experiencing difficulty in enforcing their rights.

4. Shortcomings in the law and the CCAAC's response

This Part of the article discusses the most important shortcomings in Australian consumer law, and examines the extent to which the CCAAC report proposed solutions to them. The CCAAC report summarises succinctly what the policy underlying consumer law should be (CCAAC, 2009, p. 127):

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

To what extent does the law achieve that objective, and what reforms are required?

4.1 Definition of a 'consumer'

Section 4B of the *Trade Practices Act 1974* (Cth) and equivalent State and Territory legislation define 'consumer' as someone who acquires goods for up to \$ 40 000 or, if for an amount in excess of \$ 40 000, who acquires a commercial vehicle or goods of a kind ordinarily acquired for personal, domestic or household use or consumption but which were not acquired for purposes of re-supply or transformation in business. Thus a business can be a consumer, depending on how it uses the goods it acquires.

The CCAAC report recommended the removal of the \$ 40 000 limit, stating that it would be preferable were the definition of 'consumer' and / or 'consumer contract' to depend on the nature of the goods and the purpose for which they are acquired, rather than on a monetary limit. (CCAAC, 2009, p. 45) The report also recommended the adoption of the definition of 'consumer' contained in s 2 of the *Consumer Guarantees Act 1993* (NZ), which contains no monetary limit and defines a consumer as any person who acquires goods of a kind ordinarily acquired for personal, domestic, or household use or consumption and who does not acquire them for the purpose of resupply, for consumption in the course of manufacture or production, or for the repair or treatment of other goods.

4.2 Examination of goods before purchase

One of the areas which creates uncertainty, and thus potentially undermines consumer remedies, is the issue of when a consumer is deemed to have examined goods. Under s 71(1)(b) of the *Trade Practices Act 1974* (Cth) and equivalent State and Territory provisions, the implied condition as to merchantable quality does not if the consumer examined the goods before entering into the contract and the defect was one which ought to have been

revealed by the examination. This raises two problems: First, suppliers sometimes include in contracts of sale terms to the effect that the consumer agrees that he or she has examined the goods. Consumers may accept such terms even if, in fact, they have not examined the goods, as will usually be the case when goods are supplied in a box or other packaging. Second, even where goods *have* been examined, it is not clear what is meant by defects 'which that examination ought to reveal'. Although academic commentators say that only defects that were actually discovered would be covered by the exclusion, (Griggs, Webb and Freilich, 2008, p. 144) it would be preferable if the statutory provision made it clear that only defects that were obvious to sight at the time of purchase were excluded – whether or not an examination has taken place or the consumer has agreed that an examination has taken place. Thus, to take a practical example, a consumer who purchases a car with a cracked windscreen would have no remedy, whereas one who purchased a car with a boot-lock that did not open properly would have a remedy if they had not checked the boot when purchasing the vehicle. The only circumstance in which a latent defect should not give rise to a remedy is where it has specifically been brought to the consumer's attention.

The CCAAC report said that consumer's should be entitled to expect that goods are of satisfactory quality 'unless defects have been brought specifically to their attention or they have had the opportunity to examine the item for (non-hidden) defects'. (CCAAC, 2009, p. 38) The report also recommended that any revised consumer law should be re-worded so as to replace the archaic and confusing warranty of 'merchantability' with the 'guarantee of acceptable quality' used in s 7 of the *Consumer Guarantees Act 1993* (NZ), to the effect that goods are fit for the purpose for which the goods are commonly supplied, acceptable in appearance, free from both major and minor defects safe and durable to the extent that a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to the nature of the goods, the price (where relevant), statements about the goods on packaging, representations concerning the goods and all other relevant circumstances of the supply of the goods.

Various aspects of this recommendation will be discussed at different points in this article. So far as the issue of pre-purchase inspection is concerned, it could be argued that the reference to a guarantee that there are no 'hidden defects' by implication protects consumers from all defects other than patent ones. However, in the interests of certainty, it would be preferable if a new consumer guarantee law expressly used the term 'latent defect' and defined it to mean 'any defect other than one that is obvious to sight'.

4.3 Inspection of goods after purchase

The rights of consumers are limited by provisions in some jurisdictions (Note 13) by the fact that the statutory right to rescind a contract for breach of the implied condition as to merchantable quality is lost if the consumer has had a reasonable opportunity of inspecting the goods after taking delivery. In those circumstances, the statutes provide that the consumer's rights are limited to those available for breach of a warranty that is, specific performance and damages. The effect of such provisions is that because only a brief period is needed for a consumer to inspect goods after having received them, consumers will lose the right to rescission in cases where defects manifest themselves after that period, which in effect means that the right will be lost in the vast majority of cases.

This issue was not addressed in the CCAAC report. While the best interpretation would be that the absence of any discussion meant that the Council was of the view that an exclusion on grounds of opportunity to inspect should not be included in any new consumer law, it would clearly be better if a new law were expressly to state that the fact that a consumer had had the opportunity to inspect goods after receiving them did not limit their rights.

4.4 Confusion over who consumer remedies are enforceable against

A consistent complaint among consumers is uncertainty as to who they should approach when they wish to vindicate their statutory remedies. Many report being shunted between supplier and manufacturer, with each denying responsibility for product defects and referring the consumer to the other, with the result that the consumer obtains no remedy at all. (CCAAC, 2009, pp. 4-5) The problem is rooted in the fact that where consumers are provided with a warranty, the warranty is described as a 'manufacturer's warranty' – that is, one that avails against the manufacturer. From a doctrinal perspective, a question may arise as to whether a warranty provided by a manufacturer to a consumer is contractually binding, given that the consumer's contract is with the supplier. Some authorities argue that the warranty may form a so-called 'collateral contract' between the manufacturer and the consumer, in terms of which the manufacturer gives the warranty in consideration for the consumer buying the manufacturer's goods from the supplier. (Sutton, 1995, p. 350). It could also be argued that manufacturers are liable to consumers in circumstances where the supplier is acting as an agent for the

manufacturer. In addition, failure by a manufacturer to comply with its warranty obligations would constitute misleading and deceptive conduct, for which consumers could recover damages under s 52 of the *Trade Practices Act 1974* (Cth). Whatever the legal status of a manufacturer's warranty, such arrangements cannot change the fact that, as a matter of law, the consumer has a contract with the supplier and is therefore entitled to enforce statutory remedies against the supplier and ought not to be directed by the supplier to take the complaint (and sometimes the goods, at the consumer's expense) to the manufacturer (CCAAC, 2009, p. 58). Of course, this is not to reject the idea of giving the consumer a right of action against manufacturers in *addition* to rights of action against suppliers.

The CCAAC report considered the issue of enforceability of remedies at some length. Its conclusion was that any reformed consumer law give consumers the right to choose whether to proceed against the supplier or the manufacturer. (CCAAC, 2009, p. 49) This is the ideal position, as it gives the consumer the option of proceeding against the supplier who sold the goods or the manufacturer who may have provided a warranty.

A related issue to the identity of the proper defendant in consumer cases is the cost of bringing legal actions. The CCAAC recommended that the States and Territories develop a uniform approach to the jurisdiction that small claims courts and other tribunals have in consumer matters. (CCAAC, 2009, pp 72-3) The benefit of such tribunals is that they offer consumers whose claims fall within the jurisdictional limit a no-cost forum within which to pursue their remedies. The CCAAC also recommended that Commonwealth, State and Territory consumer protection agencies also be given the jurisdiction to pursue cases on behalf of consumers. This would be particularly useful where the claim was in excess of the jurisdiction of small claims courts or where there was a systemic failure by a supplier or an industry to respect consumer rights. (CCAAC, 2009, pp 68-9)

4.5 Durability

Undoubtedly the key shortcoming in all statutory regimes is uncertainty as to what extent the concept of 'merchantable quality' includes a requirement of durability. Although academic commentators agree that merchantable quality includes some requirement of durability, (Griggs, Webb and Freilich, 2008, p. 144) the key question is how durable is it reasonable to expect any particular product to be? As stated in Part 2 above, the test of 'merchantable quality' in s 66(2) of the *Trade Practices Act 1974* (Cth), adopted in equivalent State and Territory legislation, requires that goods be

...as fit for the purpose or purposes for which goods of that kind are commonly bought *as is reasonable to expect* having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. (Emphasis added)

In applying the test of reasonableness the courts must decide, in relation to each different type of goods, how long they could be reasonably expected to last. Critically, the onus rests on the consumer who alleges a breach of the statutory warranty to prove that it was reasonable to expect the particular type of type of goods to last longer than they did.

A further difficulty faced by consumers arises from the fact that the statutory provisions regarding merchantable quality are interpreted as requiring the consumer to prove that the goods had a defect *at the time they were purchased*. (Kapnoullas and Clarke, 1999, pp. 159-61) Apart from the fact that in many cases it will be impossible to prove that a latent defect existed, but had not manifested itself, at the time of purchase, a limitation of the consumer's remedy to defects that existed at the time of purchase strips the concept of durability of all meaning. It is precisely in relation to those defects that arise *during the life* of the product that consumers need a remedy. However, an interesting argument on this issue appears in the 1987 report into sale of goods legislation, (Note 14) by the United Kingdom Law Commission, which stated as follows (Note 15)

Our view is that the durability requirement should bite at the time of supply. Whether goods last a reasonable time is, apart from any unusual event after delivery, essentially a question of their original condition on delivery. Perhaps the design was defective so that some part was not strong enough to withstand normal use for a reasonable time; perhaps some part was not properly manufactured or fitted; whatever the nature of the malfunction, it must have had a cause, *and such a cause must have existed at the time of delivery* unless it occurred subsequently. Goods break or fail either because they were initially not able to withstand the strains of ordinary use or because some untoward event occurred. In the former case the goods were not durable; in the latter case they were reasonably durable and the seller could not be said to be in breach of contract. (Emphasis added).

Although this statement would seem to deny consumers a remedy for defects which arise during the life of a product, in fact it provides support for the view that *all* defects (other than those caused by some 'untoward

event' after purchase) were latent at the time of purchase, because when goods break it is because a part was insufficiently durable. In order to ensure that this was how consumer guarantees were interpreted, the UK Parliament inserted s 48A into its *Sale of Goods Act 1979* (UK), creating a presumption that if goods do not conform to the contract at any time within the first six months after purchase (that is, if the consumer proves that they do not meet the standard of reasonable quality, implied by s 14(2)(a) of the Act), the goods are presumed not to have conformed at the time of sale. The supplier may rebut the presumption during the first six months by proving that the goods were satisfactory at the time of sale. After the six months have elapsed, the onus is reversed, and the consumer has to prove that the goods were defective at the time of sale. It is however important to note that the presumption operates only if the first hurdle has been overcome – that is, the need to prove under s 14(2)(a) that it was reasonable to expect the product to be sufficiently durable so as not to fail at the time that it did. (CCAAC, 2009, p. 42).

Thus, one still needs to resolve the question of what is reasonable durability in relation to each product. Uncertainty surrounding this issue effectively enables suppliers to determine what remedies they will give consumers, leaving dissatisfied consumers with the task (which suppliers know few of them have the time, finances or energy to pursue) of taking the matter to court and discharging the burden of proving what level of durability should reasonably be expected in relation to the product in question. In practice what most suppliers do is refund the price of goods if they cease working within the first two weeks (the so called 'Dead on Arrival' situation), (NEIAT, 2009, pp. 59 and 65) and to offer only to repair or replace goods if the defect manifests itself during the rest of the period of the manufacturer's warranty (assuming that one has been given). After expiry of the warranty, most suppliers and manufacturers refuse to assume any responsibility at all. These practices short-change the consumer in three ways: by limiting access to the statutory right to rescission to the brief 'Dead on arrival' period; by providing no remedy after the 'Dead on Arrival' period if no manufacturer's warranty has been given; and by ignoring the fact that, as a matter of law, durability as an aspect of merchantable quality may, depending upon the type of goods involved, be reasonably expected to persist even *after* the manufacturer's warranty has expired.

The critical determinant of the efficacy of a consumer protection law is the duration of the protection it gives to consumers. The NEIAT study found strong support among consumers for a minimum warranty for all products, along with an expectation of longer warranties in relation to more expensive products. The study showed that 83% of consumers believed that all goods should have at least some warranty. An overwhelming majority of consumers (75%) also felt that the duration of a warranty should depend on the type and cost of the goods involved. (NEIAT, 2009, pp. 63-4) Thus, for small electrical and electronic products costing more than \$ 50 they expect a 12 month warranty, for mobile phones 1-2 years, for CD and DVD players, computers and printers 1-5 years and for white goods a minimum of 5 years. (NEIAT, 2009, pp. 63-4) As one consumer stated (NEIAT, 2009, p. 62):

The ATO has depreciation schedules. Computers are depreciated at one third per year owned. This implies a three-year 'asset life'. Maybe this could / should be used (or perhaps a fraction of it). This would put the onus back on the manufacturer to ensure there is enough design / build quality to make the product last.

The NEIAT study also found that 25% of problems with goods occur within the first week, 49% within the first three months, 66 % during the first six months and 83 % within the first year (NEIAT p. 33). In other words it is clear that the standard 'Dead on Arrival' policy of replacement only during the period of one to two weeks after purchase comes nowhere near addressing the realities of problems faced by consumers.

Unsurprisingly, strong resistance was encountered from suppliers to the suggestion that a right to a refund should be extended beyond the two-week 'Dead on Arrival' period, their argument being that a longer period would drive up costs. (NEIAT, 2009, p. 65) This exposes an economic reality underlying the debate about consumer warranties: Suppliers seek to increase sales by dropping prices, to drop prices they drop quality, and to limit the impact of the resulting consumer claims they limit the circumstances in which they will grant remedies to consumers. Clearly if consumer guarantees were given real force, the nature of the market would change: Suppliers would sell fewer goods of better quality at a higher price, rather than operating on the basis that consumers buy products which will last only a short period, and will then purchase a replacement product of the same kind because a claim that the original product was not reasonably durable is too onerous to pursue.

Notwithstanding consumer preference for fixed warranties applicable to various categories of goods, such an approach would founder because, as was stated in the CCAAC report, 'it would not be feasible to draft such a provision (or provisions) that covered the vast array of goods and services currently on offer in the marketplace'. (CCAAC, 2009, p. 68) The report therefore recommended that the issue of fitness of goods continue to depend

on a criterion of reasonableness. (CCAAC, 2009, pp. 41-2 and 51) However, I would argue that the CCAAC's failure to recommend any change to the law in relation to warranties is, with respect, the most significant shortcoming in its report, because without reform in this area consumers will continue to be inadequately protected. As stated above, the requirement that, in order to actuate the implied term of merchantable quality, consumers must prove that it was reasonable for goods to last for a particular period means that suppliers *de facto* control the availability of consumer remedies, as few consumers have the money or, even where they can have a case heard in a no-cost jurisdiction, the time and energy to pursue claims.

4.6 Reversal of onus

It is therefore clear that the key impediment to consumers' ability to enforce the statutory warranty relating to merchantability is the fact that they bear the onus of proving that goods were not reasonably durable. I would suggest that the solution to this problem lies in a reversal of onus, and that the law should require the *supplier* to prove that it is *not* reasonable for goods to be expected to be durable for the period claimed by the consumer, having regard to the nature of the goods, the price at which they were sold, and any other relevant circumstances. In other words, *suppliers* should be required to expend their resources if they wish to prove that it would be unreasonable for the guarantee of durability to apply to a particular product given the time that has elapsed since purchase, rather than, as at present, consumers having to prove that it was reasonable to expect the goods to be durable for that time. As a corollary of this, the law should also provide that where defects manifest themselves, a presumption (rebuttable by the supplier) should operate that the defect existed at the time the goods were purchased. This would mirror s 48A of the *Sale of Goods Act 1979* (UK), discussed above. There are certain circumstances in which it would be unjust to suppliers or impractical to have a guarantee of durability apply - second-hand goods, perishable goods and goods which are ordinarily purchased for the purpose of being consumed or used up being obvious categories.

The law would also need to address the issue of what remedies would be available to consumers. Section 75A of the *Trade Practices Act 1975* (Cth) provides that where the implied condition that goods are of merchantable quality is breached, the consumer has a right to rescission. However that right is limited by s 75A(2)(a), which provides that a consumer loses the right to rescind if the right is not exercised within a reasonable time of having had an opportunity of inspecting the goods. In practical terms this means that the right endures for only a short time after purchase. Clearly there is a need to balance the rights of the consumer and of the supplier in determining the conditions under which the possible remedies - rescission, replacement or repair - will be available. As noted above, a shortcoming in the current position is that suppliers enjoy *de facto* control over what remedy to offer, and generally will not offer rescission (that is, will not accept return of the goods and give a refund of the price) beyond two weeks after purchase. This practice is generalised, across a wide range of goods, irrespective of their type and price. In some circumstances restricting the availability of rescission to a two-week period may, depending on the type of goods and their price, be reasonable, yet other circumstances it may not. A blanket approach is therefore bound to cause injustice in many - indeed most - cases. What is needed is an approach to remedies which gives the consumer the right to pursue the remedy they want, but which is flexible enough to take into account all relevant factors surrounding the contract and, where a dispute arises between consumer and retailer over what remedy the former should be given, which ultimately leaves it to the courts to determine what remedy is reasonable, having regard to all relevant circumstances.

The law ought therefore to make a range of remedies available to consumers. A useful model is provided by ss 18-22 of the *Consumer Guarantees Act 1993* (NZ), which provides consumers with a choice as to whether to seek rescission and a full or partial refund of the price (discussed in the next paragraph); reduction in price (where the consumer wants to retain the goods and obtain damages in compensation for the reduction in value of goods due to the defect); or replacement or repair of the goods.

In specific relation to rescission, the law should recognise that while many, and perhaps, consumers will seek rescission (as it is the remedy which is obviously of greatest benefit to them) the duration of time that has elapsed since the purchase of the goods, and the use the consumer has had of them, may make the granting of the remedy unfair to suppliers. The law ought therefore to allow the courts to take into account the elapse of time, and the use the consumer has had of the goods in determining whether to order full or partial refund of the price when it orders rescission. In accordance with general principles of law governing rescission, the remedy would also not be available where it was no longer possible to return the goods because they had been destroyed (except where the consumer could prove that the destruction was due to a defect in the goods), where the consumer was no longer able to return the goods because they had disposed of them, where the rights of a third party would be adversely affected by a rescission order or where the goods had been attached to other property and could not be removed without damage occurring to the goods or the other property. (Kapnoullas and Clarke,

1999, p. 171). Ultimately, discretion must rest with the courts in determining which remedy is fair in all the circumstances.

What would be the consequences of such a reform? Although it might be thought that the strengthening of consumer remedies would lead to an increase in litigation, this will not necessarily or, I would argue, even be likely, to be the case. Just as currently there is very little litigation in this area because consumers do not think it worthwhile to go to court to prove that goods were not reasonably durable, one could expect that if the onus was reversed, suppliers would be reluctant to go to court in order to prove why the guarantee of durability should not apply and, in order to avoid having to do so, would adopt refund, replacement and repair practices which were reasonable in the circumstances. In other words, the reversal of onus would affect supplier behaviour by extending outwards (as compared with the current situation) the period within which suppliers would be prepared to offer a remedy to consumers. Better consumer protection would be achieved without litigation necessarily becoming any more common, because commercial practices would change to take account of the new legal boundaries. Only where consumer demands were unreasonable would it be worthwhile for suppliers to have recourse to the courts.

4.7 Liability for transportation and inspection of defective goods

An area of uncertainty confronting consumers is the question of who should bear the costs for transportation and inspection of goods which consumers claim are defective. Suppliers often require consumers to transport goods to the supplier's premises and / or pay for technical inspection of the goods in order to determine whether the defect existed at time of sale. (CCAAC, 2009, p. 33)

The CCAAC noted that if goods are defective, costs of transportation in order to claim a remedy stand as a loss flowing from breach of contract by the supplier, and ought therefore to be borne by the supplier. (CCAAC, 2009, p. 50) However, apart from a general recommendation that consumers should be able to recover damages consequential upon the breach of the implied statutory guarantee, (CCAAC, 2009, pp. 50 and 52) it made no recommendation of a specific provision to address the problem of transportation and inspection. As a preliminary point it should be noted that, so far as costs of inspection are concerned, the relevance of that issue is directly affected by the stance the law takes in relation to durability: If, as was argued above, all product failure can logically be said to be due to causes inherent at the time of purchase, then inspection becomes moot – the fact that the product has proved not to be durable is the only evidence one requires of defect at the time of sale, and thus no inspection should be required before the consumer is granted his or her remedy. The only occasion on which inspection would be relevant is where the supplier, having received the goods, suspects that the failure may be due to misuse by the consumer. If, in that circumstance, the supplier discharges the onus of proving misuse, the costs of any inspection required to establish that fact would be recoverable from the consumer. A reformed statute should therefore provide that suppliers are liable for the cost of any transportation or inspection that may be required, except where the defect is proved to be the fault of the consumer.

4.8 Return of goods in packaging

It is common practice for suppliers to require consumers to return goods in their original packaging as a condition of performing under whatever warranty the consumer may have been given. This requirement does not appear in any of the statutory provisions, and ought to be explicitly prohibited in any reform of the law.

The CCAAC noted the obstacle posed to consumers by suppliers insisting that goods be returned in packaging, and affirmed that such a requirement ought not to be used to prevent consumers exercising their rights. (CCAAC, 2009, p. 58) However it did not go so far as to say that such conduct by suppliers should be prohibited in any new law. Clearly it would be beneficial if such a prohibition was contained in the law, as it would provide consumers with explicit protection against a common abuse.

5. A model consumer code for defective goods

In view of the analysis in Part 4, what ought a model consumer code provide? The following is a suggested draft code. It incorporates some of the recommendations found in the CCAAC report, but also goes beyond the recommendations in those instances where, as argued above, the report was deficient:

5.1 Definitions

In this Act the following definitions apply:

‘consumer contract’ means a contract for the supply to a person of goods ordinarily acquired for personal, domestic or household use or consumption, other than a contract where goods are acquired for the purposes of commercial resupply, consumption, processes of manufacture or the repair or treatment of other goods.

‘durable’ means free of defect for a period of time.

‘patent’ means obvious to sight.

‘rescission’ means a refund by the supplier of all or part of the price of the goods in exchange for return of the goods by the consumer.

‘second hand goods’ means goods previously supplied under a consumer contract.

5.2 Implied guarantee as to acceptable quality

(1) In every consumer contract there is an implied guarantee that goods are of acceptable quality, including that the goods are reasonably

- (i) fit for the purpose for which such goods are commonly supplied and
- (ii) durable.

(2) The guarantees in sub-section (1) of this section do not apply in cases where defects are patent or are specifically drawn to the consumer’s attention before the contract is made.

(3) The guarantee in relation to durability in sub-section (1)(ii) of this section does not apply to second-hand goods, perishable goods or goods that are usually purchased for the purpose of being consumed or used up.

(4) The guarantee in relation to durability in sub-section (1)(ii) of this section does not apply where the supplier proves

- (i) that it is not reasonable for the guarantee to apply either at all or for a particular length of time, having regard to the nature of the goods, the purpose for which they are commonly supplied, the price at which they were sold and all other relevant circumstances or
- (ii) that the defect that manifested itself in the goods was a consequence of damage or mis-use after purchase.

(5) Where a defect manifests itself in goods, there is a presumption, rebuttable by the supplier, that the defect existed at the time the goods were purchased.

5.3 Remedies

(1) Where an implied guarantee is breached, the consumer to whom the goods were supplied may, within a reasonable time, claim a remedy specified in sub-section (3) of this section from the supplier.

(2) Where a consumer claims a remedy under this section, the supplier must give the remedy within a reasonable time.

(3) The consumer may request rescission, monetary damages in compensation for reduction in value of the goods, replacement of the goods or repair of the goods.

(4) Where a consumer receives rescission or replacement of the goods, either with the agreement of the supplier or as a result of an order of court made under sub-section (7) of this section, the consumer must return the goods to the supplier.

(5) Where, after a consumer claims that a guarantee in section 2 has been breached, it is necessary to transport or inspect goods in order to return them to the supplier, to determine whether they are defective, to obtain a replacement for them or to have them repaired, the supplier shall be liable for the costs of transportation and inspection, unless the supplier proves that the failure of the goods to comply with the guarantee is due to damage to or misuse of the goods after purchase, in which case the consumer will be liable for the costs.

(6) The supplier from whom a consumer seeks a remedy may not impose as a condition of provision of any of the remedies a requirement that the consumer return the goods in their packaging.

(7) Where the supplier fails to provide the consumer with a remedy, or the consumer is dissatisfied with the remedy offered by the supplier, the consumer may within a reasonable time seek a remedy from a court of competent jurisdiction, and the court may grant such remedy as it deems fit, having regard to the nature of the goods, the price at which they were sold, the length of time for which the seller had use of the goods and all other relevant circumstances.

(8) A court shall not grant a refund of all or part of the purchase price in exchange for return of the goods where

- (i) the goods have been destroyed, except where the consumer proves that this is as a result of a defect in the goods,
- (ii) the consumer is no longer in possession of the goods,
- (iii) the rights of a third party in relation to the goods would be adversely affected by such an order or
- (iv) the goods have been attached to other property and the goods or the other property would be damaged if the goods were detached.

5.4 Non-exclusion of guarantee

The operation of these provisions may not be excluded from any consumer contract.

5.5 Display of information

All persons supplying goods to consumers under consumer contracts must display a prominent notice containing sections 1 – 4 of this Act at their place of business at every location where such contracts are entered into.

6. Conclusion – the way forward

At its meeting in December 2009, the Ministerial Council on Consumer Affairs agreed that the *Trade Practices Act 1974* (Cth) should be amended so as to replace existing provisions relation to consumer protection with a new Australian Consumer Law, covering a wide range of issues, including consumer guarantees. (Note 16) The new law would adopt the recommendations in relation to consumer guarantees contained in the CCAAC's report. The Australian Consumer Law will be a uniform, national law, and will thus also need to be enacted by the State and Territory legislatures. The Ministerial Council set 1 January 2011 as the intended commencement date of the new law. However, as of mid-2010, no legislation has been introduced into the Commonwealth Parliament or the State and Territory legislatures. Given that a federal election will be held in the second half of 2010, there is little likelihood that the January 2011 deadline will be met.

However, this may be a blessing in disguise. Although the CCAAC report contains many positive recommendations, its conclusion in relation to durability would not give consumers adequate protection. It is to be hoped that additional time to consider the form of the new Australian Consumer Law will result in a regime which offers stronger protection to consumers, consistent with the model outlined above.

References

CCAAC (2009). Commonwealth Consumer Affairs Advisory Council *Consumer Rights: Reforming statutory implied conditions and warranties – Final report*
www.treasury.gov.au/documents/1682/PDF/Report_CCAAC_091029.pdf

Griggs, L. Webb, E. and Freilich, A. (2008). *Consumer Protection Law*, Oxford University Press: South Melbourne.

Kapnoullas, S. and Clarke B. (1999). 'Countdown to Zero: the duration of statutory rights for unfit and unmerchantable goods' *Journal of Contract Law* 14, 154-172.

NEIAT (2009). National Education and Information Advisory Taskforce *National Baseline Study on Warranties and Refunds – Research Paper No. 2*.
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/National%20Baseline%20Study%20on%20Warranties%20and%20Refunds.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/National%20Baseline%20Study%20on%20Warranties%20and%20Refunds.pdf).

Sutton, K. (1995). *Sales and Consumer Law*, 4th ed, North Ryde: L.B.C Information Services

United Kingdom Law Commission. (1987). *Report into the Sale of Goods Act No 160*.

Notes

Note 1: The Council is an advisory body consisting of the ministers for consumer affairs of the Australian Commonwealth government, the governments of the Australian States and Territories and the New Zealand government.

Note 2: CCAAC, Commonwealth Consumer Affairs Advisory Council (2009). *Consumer Rights: Reforming statutory implied conditions and warranties – Final report* (2009)
www.treasury.gov.au/documents/1682/PDF/Report_CCAAC_091029.pdf

Note 3: NEIAT, National Education and Information Advisory Taskforce (2009). *National Baseline Study on Warranties and Refunds – Research Paper No. 2*. The study can be accessed at
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/National%20Baseline%20Study%20on%20Warranties%20and%20Refunds.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/National%20Baseline%20Study%20on%20Warranties%20and%20Refunds.pdf)

Note 4: The relevant Acts are the *Fair Trading Act 1987* (NSW); the *Sale of Goods Act 1896* (Qld); the *Fair Trading Act 1999* (Vic); the *Fair Trading Act 1987* (WA); the *Consumer Transactions Act 1972* (SA); the *Sale of Goods Act 1896* (Tas); the *Consumer Affairs and Fair Trading Act 1990* (NT) and the *Sale of Goods Act 1954* (ACT). In subsequent footnotes, the Acts are simply referred to by jurisdiction.

Note 5: NSW s 40L; VIC s 32I(2); WA s 33(3); SA s 6(5); NT s 61(2)(a).

Note 6: NSW s 40Q; VIC s 32I(1); WA s 38; SA s 6(4), NT s 64

Note 7: NSW s 40Q(1)(b); VIC s 32I(3)(b); WA s 38(1)(b); SA s 6(4)(b); NT s 64(1)(b).

Note 8: NSW s 40Q(1)(a); VIC s 32I(3)(a); WA s 38(1)(a); SA s 6(4)(a); NT s 64(1)(a).

Note 9: NSW s 40N(1); VIC s 32P; WA s 41; SA s 12(1); NT s 67(1).

Note 10: VIC s 32O.

Note 11: NSW s 40N(2); WA s 41(2)(a); SA s 12(1); NT s 67(2).

Note 12: QLD s 17; TAS s 19; ACT s 19.

Note 13: NSW s 40N(2); WA s 41(2)(a); SA s 12(1); NT s 67(2). However note that the right is not lost in such circumstances in Victoria under s 32O of the *Fair Trading Act 1999* (Vic).

Note 14: United Kingdom Law Commission (1987) *Report into the Sale of Goods Act* No 160.

Note 15: *Ibid*, para 3.54.

Note 16: Joint Communiqué of the Ministerial Council on Consumer Affairs Meeting, 4 December 2009. www.consumer.gov.au/html/download/MCCA.../Meeting_22_4_Dec_09.pdf

Table 1. Consumer complaints in New South Wales and Victoria, 2007-09.

JURISDICTION	YEAR	TOTAL CONSUMER COMPLAINTS	COMPLAINTS RELATING TO QUALITY OF GOODS	PERCENTAGE
NSW	2007-08	34 830	6 407	18.3%
	2008-09	38 260	7 525	19.6%
VIC	2007-08	12 144	2 645	18.2%
	2008-09	15 558	2 830	17.5%