

CONSUMER GUARANTEES IN AUSTRALIA: PUTTING AN END TO THE BLAME GAME

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I INTRODUCTION

The focus of this article is on the proposed consumer guarantees component of the Australian Consumer Law. The Productivity Commission (PC), in its review of Australia's Consumer Policy Framework, noted that it had not 'undertaken the detailed analysis necessary to reach a judgment on the adequacy or otherwise of the existing regulation in this area, or the merits of alternative models such as those adopted in countries such as New Zealand'.¹ Accordingly, it recommended that: 'The adequacy of existing legislation related to implied warranties and conditions should be examined as part of the development of the new national generic consumer law'.²

On 12 March 2009, the Australian government announced that a review of the Australian law of implied terms would be undertaken by the Commonwealth Consumer Affairs Advisory Council (CCAAC).³ On 26 July 2009, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP released an Issues Paper on behalf of CCAAC. The Issues Paper examined the adequacy of the existing laws on implied terms and the need, if any, for amendments.⁴ A parallel consultation process was conducted with the states and territory consumer agencies.

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

² Ibid 176.

³ The function of CCAAC is to 'consider reports and papers referred to CCAAC by the Minister and report to the Minister on their likely consumer impacts; identify emerging issues impacting on consumers and draw those to the attention of the Minister; and investigate and report to the Minister on consumer issues referred to CCAAC by the Minister.' See the CCAAC website at: <<http://www.directory.gov.au/osearch.php?ou%3DCommonwealth%20Consumer%20Affairs%20Advisory%20Council%20Cou%3DOther%20Portfolio%20Bodies%5C%2C%20Committees%5C%2C%20Boards%20and%20Councils%2Co%3DTreasury%2Co%3DPortfolios%2Co%3DCommonwealth%20of%20Australia%2Cc%3DAU&changebase>> at 28 February 2010.

⁴ The reports are available on the Australian Government, the Treasury's website, *CCAAC Review of Statutory Implied Conditions and Warranties* (2009) <<http://www.treasury.gov.au/contentitem.asp?NavId=059&ContentID=1586>> at 20 February 2010.

Based on the 33 written submissions received by CCAAC in response to the Issues Paper, there were interviews in Canberra and Melbourne with interested parties and additional teleconferences in September 2009. CCAAC also had discussions with the New Zealand Ministry of Consumer Affairs, ASIC and the ACCC on the adequacy and effectiveness of the existing implied terms regime. On 30 October 2009, CCAAC presented its report, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties* to Minister Emerson.⁵

While CCAAC was conducting its review, the National Education and Information Advisory Taskforce (NEIAT)⁶ commissioned Latitude Research, together with On Track Research, to conduct a baseline study to generate robust data from consumers and traders in relation to statutory warranties and refunds in three markets, whitegoods, electronic goods and mobile phones, (the target goods).⁷ The baseline research was conducted during July and August 2009.

On 4 December 2009, the Ministerial Council on Consumer Affairs (MCCA) met in Perth.⁸ In relation to consumer guarantees:

Ministers noted the comprehensive studies of the law on consumer rights and the effectiveness of existing laws undertaken by the Commonwealth Consumer Affairs Advisory Council (CCAAC) in its Report *Consumer rights: Reforming statutory implied conditions and warranties* and the SCOCA's National Education and Information Taskforce (NEIAT) in its *Baseline Study for Statutory Warranties and Refunds*. Ministers thanked CCAAC and NEIAT for their impressive contributions to the understanding of these laws and the needs of consumers and businesses, and further noted the publication of these reports.

Ministers noted the findings of the NEIAT study to the effect that many consumers and businesses have little, if any, awareness of consumer rights and that a significant contributor to this is the current legal framework.

Informed by the NEIAT study, CCAAC has recommended that the existing system of statutory implied conditions and warranties in consumer contracts be replaced with a system of statutory consumer guarantees. Ministers share CCAAC's view that such a system will be a significant enhancement of the law and will be more readily understood by consumers and businesses.

MCCA agreed, as part of the development of the Australian Consumer Law, to improve the legal framework for consumer rights that apply to the acquisition of goods and services. This will be a single national law guaranteeing consumer rights in relation to their acquisition of

⁵ The reports are available on the Australian Government, the Treasury's website, *Consumer Rights – CCAAC Report on Statutory Implied Conditions and Warranties* (2009) <<http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=1682>> at 20 February 2010.

⁶ NEIAT was established in 2007 by the Standing Committee of Officials of Consumer Affairs (SCOCA), composed of the senior officers of consumer policy and enforcement bodies in Australia and New Zealand, to help identify, develop and implement strategies to empower consumers to make informed and timely market place decisions. NEIAT's strategic agenda is available at: *Ministerial Council on Consumer Affairs Strategic Agenda* (2008) Consumer.gov.au Official Site of the Ministerial Council on Consumer Affairs <<http://www.consumer.gov.au/html/download/Strategic%20Agenda%202008.pdf>> at 20 February 2010.

⁷ NEIAT, *National Baseline Study for Statutory Warranties and Refunds*, Research Paper No 2 October 2009 (NEIAT Baseline Study) available at: <http://www.treasury.gov.au/documents/1666/PDF/National_Baseline_Study_Warranties_and_Refunds.pdf> at 20 February 2010.

⁸ MCCA comprises Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading, consumer protection laws, trade measurement and credit laws. More information can be obtained from its official site at: Consumer.gov.au Official Site of the Ministerial Council on Consumer Affairs <<http://www.consumer.gov.au/>> at 20 February 2010.

goods and services. They will be based on existing implied conditions and warranties, which will be simplified and streamlined.

This new system of consumer guarantees, supported by effective redress, will foster a greater ability to inform and educate all Australian consumers and businesses about their rights and obligations, and will reduce the compliance burden for businesses, particularly those that operate in more than one state or territory.⁹

This article falls broadly into four parts. The first part will summarise key findings of the NEIAT survey. One of the principal findings of the NEIAT study was that the current law allows retailers and manufacturers to play the ‘blame game’. The ‘blame game’ refers to a situation where the consumer bears the onus of proving which firm in the supply chain (retailer or manufacturer) was responsible for the fault, and unless the consumer can do so neither party accepts responsibility.

The second part will focus on CCAAC’s recommendations to reform the law, and put an end to the ‘blame game’. CCAAC’s principal recommendation was to replace implied terms with consumer guarantees which the consumer can enforce against the retailer or the manufacturer, without having to prove which of them was responsible for the fault.

The third part examines what the new consumer guarantees will mean for consumers and traders in Australia by reference to defects in the quality of electricity supplied, where it is unclear whether the outage or fluctuation was the responsibility of the retailer or the lines distributor. CCAAC considered that the statutory consumer guarantees ‘should apply to all products and services supplied to domestic consumers, including electricity, gas and telecommunications’.¹⁰ The decision of Miller J of the New Zealand High Court in *Contact Energy Ltd v Jones*¹¹ provides some guidance as to how the law might apply in Australia.

The fourth part will examine how the proposed consumer guarantees regime will fit with the existing consumer protection provisions in the *Trade Practices Act 1974* (Cth) (TPA) in relation to the supply of faulty goods and services using the supply of electricity as an example. Finally, the article considers the Small Compensation Claims Regime of the second exposure draft of the National Energy Customer Framework. It appears that the consumer guarantees regime may not apply to the supply of electricity as CCAAC recommended. Thus, while the marketing rules for electricity will align with the Australian Consumer Law, the Government proposes to establish a separate compensation regime for damages suffered by residential customers from fluctuations in electricity supply.

II NEIAT BASELINE STUDY: PRINCIPAL FINDINGS

Until the NEIAT study, very little research had been undertaken in Australia to quantify the extent of the consumer detriment flowing from faulty consumer goods and services.

The NEIAT study found that 93% of all Australians aged 16 and over were recent buyers of the target goods, and that 51% (8.5 million people) had experienced problems with the target goods within the two year period preceding the survey.

⁹ The *MCCA Joint Communique* (2009) is available at: <http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_22_4_Dec_09.pdf> at 20 February 2010.

¹⁰ CCAAC, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*, above n 5, 122.

¹¹ [2009] 2 NZLR 830.

In the case of electronic goods and mobile phones the goods in question were less than two years old; in the case of white goods, they were less than 5 years old. Most of the faults occurred within three to four months of purchase. The average consumer faced 2.5 problems during the two year period with a total of 18 million problems with the target goods over the two year period.

The NEIAT study estimated that the direct out-of-pocket cost of replacement items, repairs, and follow-up costs to be \$1.9 billion over the two year period.¹²

In addition to the direct costs, it was estimated that consumers spent on average 5.7 hours attempting to resolve each problem with the target goods, or 100 million hours over two years. The total indirect cost to consumers was a further \$2.4 billion over the two year period.¹³ The total consumer detriment was estimated to be more than \$4.3 billion in relation to the target goods over the two year period.¹⁴

The NEIAT Baseline Study found that most consumers encountered problems soon after buying the product and that 70% of products were still under manufacturer's warranty when the problem occurred and may also have been covered by statutory warranties.¹⁵

While 25% of problems were resolved immediately by replacement, repair or refund. The Study found:

almost one in five consumers said they were 'fobbed off' – told to contact the manufacturer or end/drop off the product to them, or simply told that there was nothing wrong and they (the consumer) should sort it out themselves. This was more likely to happen with higher valued products, and particularly large electrical goods.¹⁶

Only 3% of consumers who did not obtain redress contacted fair trading or consumer affairs agencies.¹⁷

The NEIAT Baseline Study concluded that there are four principal barriers to consumers exercising their statutory rights under pt V div 2 of the TPA. They are:

- lack of awareness of the law on the part of consumers, retailers and manufacturers was found to be the primary barrier for both consumers and traders, when consumers sought to exercise their rights;
- lack of clarity as to the meaning and scope of the existing law;
- lack of cost effective dispute resolution mechanisms for consumers; and
- lack of incentives for suppliers to comply.

The primary reason for the existing laws being ineffective was lack of awareness. Consumers, retailers and manufacturers only had a limited understanding of their rights and obligations under existing law. The NEIAT study found that 57% of retailers and 47% of manufacturers/importers were unaware that consumers are entitled to remedies for breaches

¹² NEIAT, above n 7, 20.

¹³ Ibid 21.

¹⁴ Ibid 22.

¹⁵ Ibid 39.

¹⁶ Ibid 42.

¹⁷ Ibid 45.

of statutory implied terms.¹⁸ It also found that consumer awareness of statutory warranties was very low, with 80% of consumers being unaware that they had any statutory rights implied into their sale contract with the retailer. Most believed they only had rights if the manufacturer provided an express warranty.¹⁹

This lack of awareness of existing implied rights may be driving the demand for extended warranties. Extended warranties are separate contracts entered into at the same time or soon after the purchase of a product under which the warranty provider agrees for a term, to repair or replace the product in the event of a failure or defect occurring during the warranty period. The NEIAT survey found that 38 % of consumers had purchased extended warranties at some stage of their life, generally for white goods and large electrical items which consumers intended to keep for longer periods because extended warranties offered consumers 'peace of mind'.²⁰

Lack of awareness of rights was only part of the problem. A second barrier identified by the NEIAT survey was ambiguity and lack of clarity: as to the nature and content of consumers' rights and traders' obligations.²¹ As the NEIAT study noted under the heading 'ambiguous law': '[t]he law cannot empower consumers if there are grey areas'.²²

Under the current conceptual framework, consumers' rights are based on terms that are implied into the contract between the trader and the consumer. The current regime is a regulatory maze with 15 different Commonwealth, State and Territory statutes that establish generic statutory implied terms regimes. This creates a compliance nightmare for businesses that trade across more than one jurisdiction.

There are two tiers of implied terms, conditions and warranties, with different remedies attaching to their breach. Breach of condition entitles the consumer to a right of termination and a right to damages, whereas a breach of warranty only entitles the consumer to a right to damages. In order to be entitled to return the goods, a consumer must rescind the contract under s 75A of the TPA. This requires proof that the supplier has breached a condition rather than a warranty.

There are no statutory remedies for breach of the implied terms. In order to obtain a remedy a consumer must commence a civil action for damages for breach of contract.

For example, under the Commonwealth regime pt V div 2 of the TPA: implied terms include a condition that goods sold must be of merchantable quality. The term 'merchantable quality' is general and vague.²³ The goods must be durable for a period of time that is reasonable in light of the circumstances of the sale. The elusive question is: for how long must the goods remain durable?

¹⁸ Ibid 52.

¹⁹ Ibid 50.

²⁰ Ibid 47.

²¹ Ibid 68; table 3, 69.

²² Ibid table 3, 69.

²³ *Trade Practices Act 1974* (Cth) s 66(2), TPA merchantable quality is defined to mean: '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 other relevant circumstances'.

As regards the question of ‘durability’, products are referred to as ‘dead on arrival’ (DOA) if they have a major fault at the time of purchase, or a major failure soon after purchase. The NEIAT study found that traders took a restrictive view of DOA. Most retailers considered that it extended to no more than two weeks after purchase.²⁴

Consumer expectations regarding their rights to have goods repaired at no cost to them varied, with 54% nominating 6-12 months or 1-2 years. However, 18 % saw the entitlement as extending for up to a month, and 12%, only 1-2 weeks to get free repairs.²⁵

About 40% of retailers viewed 12 months as the limit for their responsibility to provide repairs; however, 18% of retailers considered that they had no responsibility at all and that manufacturers were primarily liable.²⁶

A third barrier to consumers exercising their statutory rights identified in the NEIAT study was the lack of effective dispute resolution mechanisms for consumers. Consumers perceived the exercise of their statutory rights as involving a ‘lengthy process that is unlikely to result in a positive outcome’.²⁷

The current remedies available for breach of implied terms are an action for damages for breach of contract, or for termination under s 75A for breach of condition. Civil litigation is expensive. The limited dollar value of most consumer claims means that consumers are unlikely to seek redress through the courts.

A fourth barrier to consumers exercising their statutory rights was the lack of incentives to comply. Currently, the only incentive for a recalcitrant supplier to comply is the threat of civil actions by individuals. There is no scope for action by regulators on behalf of consumers. Recalcitrant suppliers are aware that consumers are unlikely to litigate in the event of a dispute; so they have little incentive to comply. The result is that ‘retailers and manufacturers play the “blame game” with neither party prepared to take responsibility’.²⁸

III CCAAC FINDINGS IN RELATION TO THE REFORM OF THE LAW

CCAAC’s starting point was that consumers’ reasonable expectations should be met, and that they should be entitled to get what they pay for. It examined ways to reduce this detriment, principally by reducing the barriers indentified in the NEIAT Study that prevent consumers having recourse to retailers and manufacturers for faulty goods and services.

CCAAC’s findings fall into three broad categories:

- the need to clarify the law ;
- the need to raise awareness amongst consumers, retailers and manufacturers; and
- the need to provide more effective dispute resolution mechanisms.

²⁴ NEIAT, above n 7, 59.

²⁵ Ibid chart 39, 60.

²⁶ Ibid 61.

²⁷ Ibid table 3, 69.

²⁸ Ibid.

IV CONSUMER GUARANTEES

In order to clarify the law CCAAC recommended replacing the current implied terms regime with a new statutory scheme that stands independently of the law of contract. It recommended that the Australian consumer law should include a single set of statutory consumer guarantees along the lines of those contained in the *Consumer Guarantees Act 1993* (NZ) (CGA). The CGA resulted from a Report prepared by Professor David Vernon at the request of the Minister for Justice, the Rt Hon Geoffrey Palmer. The Vernon Report recommended that the interference with the functioning of the free market should be minimal and only to the extent to provide consumer protection.²⁹

The rationale for eliminating privity and imposing liability on both the manufacturer and the retailer of goods was explained by Professor Vernon in terms of a ‘single enterprise theory’, according to which consumer sales are made possible by the cooperative efforts of everyone in the distribution chain and accordingly they should be jointly responsible:

Some retailers may object to shouldering the responsibility for defects. They may perceive their role simply as a conduit of a product manufactured and packaged by others in the distribution chain. Since these retailers play no role in creating the product, they may view themselves as blameless when the goods or services turn out to be badly designed or produced. In a very real sense, they are blameless unless they had reason to know of the defect prior to sale. Accepting as fact the retailers’ claim that they neither created the defect nor had any way of knowing prior to sale that it existed does *not* lead to the conclusion that they should be exempted from responsibility to consumers for the defect. It leads only to the conclusion that they should be reimbursed for their outlay by others in the distribution chain or that it is merely another cost of doing business.

The retailer, who sells the goods or services in an effort to make a profit, should not be permitted to retain the profit while rejecting responsibility for the very thing that produced it. Indeed, no entity in the chain should be permitted to shelter itself from its obligation to the ultimate consumer by pointing a finger at someone else in the chain. It is beyond argument that all in the chain are engaged in a single enterprise. Since the enterprise functionally is a separate unit, the fault of one is functionally the fault of all.³⁰

The consumer guarantees will apply to all jurisdictions imposing strict liability on both retailers and manufacturers for goods, in the sense that they may be breached without negligence. The absence of a contract will not be a barrier to recovery by the consumer against the manufacturer; the statutory causes of action will exist independently of contract. The existing two tiers of conditions and warranties will also be abolished.

CCAAC recommended that the manufacturer and retailer should assume joint responsibility for the quality of the goods they release into the market place. Consumers should not be forced to identify the cause of the fault and prove which firm in the supply chain was responsible for it. Imposing strict liability on both the manufacturer and the retailer will obviate the ‘blame game’ identified by the NEIAT study as a cause of consumer detriment.

²⁹ D Vernon, *An Outline for Post-Sale Consumer Legislation in New Zealand: A Report to the Minister of Justice* (1987) 8 (Vernon Report). For a commentary on the Vernon Report see D Harland, ‘Post-Sale Consumer Legislation for New Zealand – A discussion of the Report to the Minister of Justice by Professor David H. Vernon’ (1988) 3 *Canterbury Law Journal* 410.

³⁰ Vernon, above n 29, 17.

CCAAC recommended that the terminology in the new statutory consumer guarantees needs to be simplified and that a guarantee of durability should form part of the guarantee of acceptable quality.

Finding 5.3 by CCAAC recommended that the Australian Consumer Law should include a single set of consistent statutory consumer guarantees that are simple and clear and that at a minimum should include:

In respect of goods:

- a guarantee that the supplier has the right to sell the goods;
- a guarantee that the goods are free from any undisclosed security;
- a guarantee that the consumer will have undisturbed possession of the goods;
- a guarantee that goods are of ‘acceptable quality’ which would replace the concept of ‘merchantable quality’, and which includes a detailed definition of ‘acceptable quality,’ so that goods are:
 - : fit for the purposes for which the goods are commonly supplied;
 - : acceptable in appearance;
 - : free from both major and minor defects;
 - : safe; and
 - : durable; and
 as a reasonable consumer fully acquainted with the state and condition of the goods, including hidden defects, would regard as acceptable, having regard to:
 - : the nature of the goods;
 - : the price (where relevant);
 - : any statements made about the goods on any packaging or label on the goods;
 - : any representation made about the goods by the supplier or manufacturer/ importer; and
 - : all other relevant circumstances of the supply of the goods;
- a guarantee that the goods are fit for a particular purpose made know to the supplier by the consumer;
- where goods are sold by description, a guarantee that goods will comply with that description;
- where goods are sold by sample, a guarantee that the goods comply with that sample;
- where goods are first supplied to a consumer in Australia, a guarantee that the manufacturer/ importer will take reasonable action to ensure that facilities for repair of goods and supply of parts for goods are reasonably available for a reasonable period after goods were supplied;

These guarantees should be enforceable against both the manufacturer/importer and the retailer of any goods supplied.

In respect of services:

- a guarantee that they will be carried out with reasonable care and skill;
- a guarantee that, where the actual purpose of the services and any associated goods is made clear to the seller, the goods and services are fit for the particular purpose; and
- a guarantee that the services will be completed in a reasonable time, unless otherwise addressed by the contract for the supply of those services.’³¹

These guarantees mirror those contained in ss 5-12 of the CGA in relation to goods, and ss 28-30 of the CGA in relation to services.

³¹ CCAAC, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*, 51-2.

The definition of ‘acceptable quality’ provides greater certainty than the term ‘merchantable quality’ currently used in the implied terms regime in pt V div 2, and the statutory causes of action regime in pt V div 2A of the TPA.

For example, the circumstances in which the standard of ‘merchantable quality’ may be satisfied where goods are subject to a defect caused otherwise than through the fault or negligence of the supplier is an uncertain and undecided area of the law. The definition of ‘merchantable quality’ in s 66(2) of the TPA require the court to consider ‘all other relevant circumstances’.

The issue was raised in *Electricity Supply Association Ltd v ACCC*³² where the parties expressed different views as to electricity suppliers would be liable for damages for breach of implied terms under the TPA as a result of ‘brown outs’ and ‘power surges’ the result of force majeure such as lightning strikes, or actions such possums or birds contacting overhead wires. Finn J did not have to decide the question but the views of a number eminent counsel are canvassed in the reasons for judgment.³³

What will be the position if electricity and gas are subject to the new consumer guarantees regime of the Australian consumer law?

If Australia adopts the New Zealand CGA consumer guarantees, electricity being goods for the purposes of the TPA, the generator and retailer will be strictly liable for supplying electricity of an acceptable quality based on an objective test of what a reasonable consumer who is fully acquainted with the nature of the product would regard as acceptable. The issue is explored further below in connection with *Contact Energy Ltd v Jones*.³⁴

In relation to the supply of electricity distribution services, the electricity distributor will be subject to a fault-based test. The consumer will need to demonstrate a lack of reasonable care and skill on the part of the distributor in supplying the services.

CCAAC considered that the statutory consumer guarantees ‘should apply to all products and services supplied to domestic consumers, including electricity, gas and telecommunications’.³⁵

The word ‘goods’ is currently defined in s 4 of the TPA to include ‘gas and electricity’.

V STATUTORY REMEDIES WILL REPLACE COMMON LAW REMEDIES

CCAAC recommended that:

Clear remedies for each statutory consumer guarantee, including a right to recover loss or damage suffered as a result of failure to comply with a guarantee, which distinguishes between:

- remedies for major and minor defects; and
- remedies against suppliers and manufacturers/ importers.³⁶

³² (2001) 113 FCR 230 (Finn J).

³³ Ibid 239-44.

³⁴ [2009] 2 NZLR 830.

³⁵ CCAAC, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*, 122.

³⁶ Ibid 52.

The CGA (NZ) provides for a hierarchy of remedies against suppliers including repair, replacement or refund depending on the nature of the defect. Section 18(2) provides that if the failure is minor and is capable of repair, the retailer is given the opportunity to remedy the failure within a reasonable time. Section 18(3) provides that if the failure cannot be remedied or is of a substantial character, the consumer may reject the goods or obtain from the supplier damages in compensation. A substantial failure is where the cost of repair is high compared to the overall price of the goods. A number of small faults, each of which is only minor, may together constitute a substantial failure.

A statutory remedy for consequential loss replaces the common law test. Section 18(4) of the CGA (NZ) provides that in addition to the remedies of repair, replacement or refund 'the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure ... which was reasonably foreseeable as liable to result from the failure'.

CCAAC made a recommendation that 'consumers may recover damages for any reasonably foreseeable loss or damage resulting from the failure'.³⁷

VI RESPONSIBILITY AS BETWEEN RETAILERS AND MANUFACTURERS

CCAAC recommended that the consumer should be able to proceed against either the retailer or the manufacturer for the full amount of the damage at the consumer's option. In effect the retailer and manufacturer will be jointly and severally liable to the consumer. Presumably, either the manufacturer or retailer will be able to seek contribution from the other. The existing proportionate liability provisions in Pt VIA only apply to causes of action under s 82 or 87 for contraventions of s 52, and will not apply to consumer guarantees unless they are amended.

However, CAAC recognised that in some circumstances it would be unreasonable to make the manufacturer jointly liable with the retailer.³⁸

Section 26 of the CGA (NZ) provides that there shall be no right of redress against the manufacturer in respect of goods which do not comply with the guarantee of acceptable quality only because of:

- An act or default or omission of, or any representation made by, any person other than the manufacturer; or
- A cause independent of human control, occurring after the goods have left the control of the manufacturer; or
- The price charged by the retailer being higher than the manufacturer's recommended retail price or the average retail price.

In relation to the third situation, price will often be a relevant factor in determining the level of quality that the consumer is entitled to expect, so that in determining the manufacturer's liability, it is the price recommended by the manufacturer that is relevant.

³⁷ Ibid 48.

³⁸ Ibid.

It might be thought to be unreasonable to make the retailer jointly responsible with the manufacturer, where the loss suffered is due to a manufacturing fault for which the retailer is not responsible.³⁹ However, in such circumstances, where the consumer elects to seek redress from the retailer, the retailer may pursue its cause of action against the manufacturer for supplying goods that are not of merchantable quality under the relevant Sale of Goods Act.

VII CASE STUDY: DEFECTS IN THE QUALITY OF ELECTRICITY SUPPLIED

The recent decision of Millar J in *Contact Energy Ltd v Jones*⁴⁰ provides a good example of how the new consumer guarantees regime might work in Australia.

In New Zealand, the Electricity and Gas complaints scheme was established to facilitate the resolution of consumer complaints about electricity and gas supply by the Electricity and Gas Complaints Commissioner (EGCC). If disputes cannot be resolved, the EGCC has the power to make recommendations that are binding.

Five complaints were made against five electricity generators and retailers for damage to electrical appliances and property such as furnishings caused by fluctuations in power supply as a result of incidents occurring in the distribution process.

Two examples will suffice. First, the Taylor complaint involved one of a series of unplanned outages which lasted around nine hours in an urban area. The electricity supplier was Genesis energy. The Genesis standard terms expressly provided that Genesis would not be responsible if voltage fluctuations damaged sensitive equipment. The Taylors had not installed surge protection equipment.

The outage was the result of overhead lines clashing. The lines company, United Networks Ltd, had been trimming trees as part of its regular maintenance program, but this left the trees more exposed to wind. As a result of the unplanned outage the freezer compartment of the refrigerator defrosted and leaked water over the floor, damaging a mat.

The EGCC concluded that the outage was not caused by force majeure or third party action, and proposed Genesis Energy pay \$200 compensation for the outages and \$976.88 for damage to the mat.

Secondly, the Latten complaint involved a power outage in a rural area. The electricity supplier was Empower. The most likely cause of the outage was a faulty insulator within the distribution network. The lines company, Orion, could not have foreseen the fault and had adequately maintained the lines and insulators. It was not in breach of its duty of care. As a result of the outage the Lattens suffered damage to household appliances, including a computer, amounting to \$1 462.60.

Empower's terms and conditions warned that supply might be interrupted by events beyond its control and urged its customers to install surge protection devices to protect sensitive equipment. It specified that it would not pay compensation for loss or damage to a computer,

³⁹ See s 74H of the *Trade Practices Act 1974* (Cth) which currently provides that a retailer who has been sued for breach of an implied term under pt V div 2 of the TPA had a right to claim compensation from the manufacturer.

⁴⁰ [2009] 2 NZLR 830.

and would not be liable for incidents beyond its reasonable control. The Lattens had not installed surge protection devices.

The EGCC concluded that while a reasonable consumer in a rural area would expect a lower standard of supply than in an urban area because the line supplying the property was longer, insulator failure was not a force majeure incident and Empower was liable under the guarantee of acceptable quality.

The five electricity retailers brought proceedings in the Wellington High Court seeking declarations as to the proper interpretation of the CGA (NZ).

VIII RETAILER'S GUARANTEE OF ACCEPTABLE QUALITY

The first issue was whether the retailer's guarantee of acceptable quality excluded liability for losses caused by distribution faults.

The retailers submitted that the CGA (NZ) contemplates that retailers will not be liable at all for faulty line function services. Providers of line function services are under fault-based liability, whereas retailers of electricity (goods) are under strict liability. The retailers argued that imposing strict liability on retailers for line faults cannot have been Parliament's intention, as retailers cannot manage the risk. Accordingly, for loss resulting from the provision of line function services, the retailers argued that the lines company was the relevant supplier. If the loss did not result from the provision of line function services, then the question was whether the supply of electricity met the acceptable quality guarantee.

Miller J did not accept this construction of the definition of 'supplier'. The terms 'electricity' and 'electricity line function services' are not defined in the CGA (NZ) which suggests that the Parliament did not intend to clearly demarcate between them. Rather, the clear policy of the CGA (NZ) was to allow the consumer to claim against either firm.

In support of this construction, Miller J referred to the Vernon Report:

The report ... concluded ... that as a matter of policy the retailer ought to be liable to the consumer for badly made goods, leaving the retailer to claim reimbursement from others in the supply chain, even where the retailer is ignorant of the defects. And in the context of electricity, the legislative history suggests strongly that Parliament wanted to ensure consumers do not labour under the onus of proving which firm – retailer or lines company – is responsible for a defect in the quality of electricity supplied; rather, the two firms should be encouraged to resolve liability between them, with the consumer free to claim against either.⁴¹

Miller J held that 'by insisting that electricity be defined as a good, the legislature opted for strict liability for retailers'.⁴² His Honour held that retailers can be liable to consumers for the supply of electricity that is below acceptable quality even though the faults occur in the distribution network.

As regards the expectations of the hypothetical reasonable consumer Miller J made a number of findings. First, his Honour noted that 'the test is objective, but it is applied to the particular

⁴¹ Ibid [73].

⁴² Ibid [101].

goods and circumstances'.⁴³ The question whether a given supply of electricity breached the acceptable quality guarantee is 'a question of fact and degree'.⁴⁴

His Honour identified the following, non-exhaustive list of things that the reasonable consumer must be taken to consider:

- The uses to which electricity is commonly put, including personal computers and other electronic consumer equipment.⁴⁵
- The nature and extent of the risk posed by the fault, and the extent to which safety may be compromised.⁴⁶
- The extent, duration, and frequency of the faults: one or more outages or voltage fluctuations may be acceptable, but not a series of outages including a nine hour outage as in the Taylor complaint.⁴⁷
- The point at which an outage or voltage fluctuation becomes unacceptable needs to have regard to the nature of the distribution system to which the consumer is connected (urban or rural environmental risks; overhead or underground lines) and any quality standards set by the regulator.⁴⁸
- The cause of the fault is relevant but not determinative: the reasonable consumer does not expect the retailer or lines company to manage force majeure events, including acts of God or other extraordinary circumstance that could not have been foreseen and guarded against, and third party damage; however, a reasonable consumer would expect them to protect against some third party damage where assets are exposed and or the consequence of failure very severe.⁴⁹
- The price of the service: if the cost of eliminating some interruptions completely is so high that consumers would not be prepared to pay the consumer must be taken to have accepted an outage or surge resulting from that cause.⁵⁰
- Information provided by the supplier as to the quality of the goods: information that surge protection equipment may protect against risks that the retailer cannot control may mean that the guarantee was not breached.⁵¹

Millar J concluded that taking all these factors into account could result in a retailer being liable for distribution faults even though the lines company was not at fault, as was the case with the Lattens' complaint.

IX DEFECTS SPECIFICALLY DRAWN TO THE CONSUMER'S ATTENTION

The second issue was whether the retailers were excused from complying with the guarantee of acceptable quality because they had expressly drawn the consumer's attention to the risks of outages and fluctuations in their standard terms and conditions of supply.

⁴³ Ibid [94].

⁴⁴ Ibid [102].

⁴⁵ Ibid.

⁴⁶ Ibid [103].

⁴⁷ Ibid [104].

⁴⁸ Ibid [105].

⁴⁹ Ibid [106].

⁵⁰ Ibid [107].

⁵¹ Ibid [108].

Section 7(2) of the CGA (NZ) provides:

Where any defects in goods have been specifically drawn to the consumer's attention before he or she agreed to the supply, then notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defect the goods will not fail to comply with the guarantee as to acceptable quality by reason only of those defects.

Miller J did not accept that s 7(2) excused the retailers, 'merely because the consumer's attention has been drawn in very general terms to the risk of faults, the possibility of damage, and the availability of surge protection equipment'.⁵²

Section 7(2) required that the consumer be given sufficient information of any failure of the goods to comply with the guarantee so that the consumer can make an informed decision whether to take the goods and evaluate what precaution may be taken to avoid the risk of damage.⁵³

Miller J noted that the underlying premise of s 7(2) was that if a consumer is told in advance of the specific fault, the consumer can choose another good without the fault at a higher price. However, in the context of electricity this was not an option because all of the competing electricity generators were forced to use the same lines distributor.⁵⁴

X LOSS SHARING BETWEEN THE RETAILER AND THE CONSUMER

The third issue was whether the failure by the complainants to install surge protection equipment affected causation and damages.

Counsel for the retailers submitted that because a reasonable consumer would know that voltage fluctuations are inevitable and that surge protection devices can protect sensitive equipment, the loss should be apportioned between the retailer and the consumer where the loss results from both breach of the guarantee and the failure to employ appropriate surge equipment.

Section 18(4) of the CGA (NZ) provides that in addition to the remedies of repair, replacement or refund 'the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure ... which was reasonably foreseeable as liable to result from the failure'.

Miller J held that the language indicated that the Court's power to award the full loss was discretionary, and carried with it the power to award less, taking into account the consumer's contribution to the loss.⁵⁵ His Honour held that the language of s 18(4) 'evokes the common law, with its commonsense approach to causation and remoteness'.⁵⁶

⁵² Ibid [116].

⁵³ Ibid [114].

⁵⁴ Ibid [113].

⁵⁵ Ibid [131] by analogy with the Court of Appeal's ruling in *Goldsbro v Walker* [1993] 1 NZLR 394 where in relation to the *Fair Trading Act 1986* (NZ) Hardy Boys J held (at 406) that the power to order payment of the entire loss encompasses a discretion to award less taking into account the plaintiff's contribution to the loss.

⁵⁶ *Contact Energy Ltd v Jones* [2009] 2 NZLR 830, [133].

Miller J accepted that electricity retailing differed from other goods in that the retailer was not able to prevent or manage defects and that the consumer may be able to manage defects by installing surge devices.⁵⁷ Nevertheless, the consumer would be entitled to recover the full amount of the loss unless the retailer could establish that it was more likely than not that surge equipment would have avoided the loss.⁵⁸

There were insufficient facts regarding each claim to determine whether the retailers were liable. Miller J concluded that the EGCC's approach was mistaken in at least some respects and the EGCC was ordered to reconsider the five complaints.

XI CONSUMER GUARANTEES AND THE EXISTING CONSUMER PROTECTION PROVISIONS OF THE TPA

Some might argue that there is no need for a consumer guarantees regime and that it will result in consumers being faced with a complex smorgasbord of rights that will only confuse them. However, each liability regime serves a different purpose and all are necessary to provide the consumer with complete protection. This part will examine the different types of protection afforded by the existing laws and the proposed new laws so that the full picture under the Australian Consumer Law emerges.

First, in relation to the current law, the prohibitions in pt V div 1 against misleading conduct in relation to the supply of goods or services will be retained.⁵⁹ For example, if an electricity retailer advertises that it will supply a prospective customer with electricity at a discount of 2% below the regulated rate, and the contract eventually signed by the consumer specifies that supply is at the regulated rate, the retailer will be in breach of ss 52 and 53(e) of the TPA.

The prohibitions against unconscionable conduct in pt IVA will also be retained.⁶⁰ For example, if a retailer sends a door-to-door salesperson to the home of an elderly pensioner and it is apparent to the salesperson that the pensioner, as a result of age or infirmity, is unable to comprehend the terms of the supply contract being offered, the pensioner may be able to have the supply contract set aside on the ground that the conduct of the salesperson was unconscionable under s 51AB of the TPA.

Part VA which creates statutory causes of action where goods are defective, as opposed to being merely faulty, will also be retained.

The existing statutory implied terms regime in pt V div 2 of the TPA, equivalent generic regimes in the legislation of the States and Territories, and the statutory causes of action in pt V div 2A of the TPA will be repealed. Presumably, the State and Territory Sale of Goods Acts will be amended so that they only apply to non-consumer transactions.

In relation to the proposed new laws, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) was introduced into the House of Representatives on 24 June 2009. The Bill applies where the contract is a standard form contract,⁶¹ and the contract is for the supply

⁵⁷ Ibid [136].

⁵⁸ Ibid [137].

⁵⁹ *Trade Practices Act 1974* (Cth) ss 52, 53, 55A.

⁶⁰ *Trade Practice Act 1974* (Cth) s 51AB prohibits unconscionable conduct in relation to consumer transactions.

⁶¹ Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) cl 2(1)(b).

of goods or services to an individual whose acquisition is ‘wholly or predominantly’ for personal, domestic or household use or consumption.⁶²

A term in a standard form contract will be unfair if:

- (a) it causes a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary to protect the legitimate interests of the party to be advantaged by the term.⁶³

Examples of terms that might satisfy this definition in the context of electricity supply include:

- a term that permits the electricity supplier to terminate the supply of electricity at any time and for any reason;
- where the agreement is terminated before the expiry of a fixed term, a provision that imposes an early termination fee on the consumer that exceeds the supplier’ reasonable administration charges associated with the disconnection; and
- a term that purports to exclude all liability for any loss or damage arising from fluctuations or outages howsoever arising.

The other proposed new law to be included in the Australian Consumer Law is the consumer guarantees regime. As explained above, it applies where faulty goods or services are supplied independently of any misleading or unconscionable conduct that preceding the formation of the contract, and independently of any unfair terms in the contract itself.

XII CONSUMER GUARANTEES AND THE NATIONAL ENERGY CUSTOMER FRAMEWORK

The Ministerial Council on Energy (MCE) has established a Retail Policy Work Group (RPWG) to develop a new national regime regulating the retail distribution of energy (gas and electricity).

A second exposure draft of the National Energy Customer Framework (NECF2) was released on 2 November 2009.⁶⁴ It is envisaged that the operation of the NECF and the Australian Consumer Law will be consistent and complementary. The term ‘consumer’ under the Australian Consumer Law is not used in the NECF2. The equivalent term is ‘residential customer’ which is defined to mean ‘a customer who purchases energy principally for personal, household or domestic use at premises’.

The marketing rules under the NECF will align with the Australian Consumer Law. Part 7 of the NECF will establish a Small Compensation Claims Regime. Small claims are currently the subject of a range of different arrangements. Section 710 provides:

- (1) Compensation is payable under this Division to a small customer by a distributor under a claim for compensation properly made in respect of a claimable incident when—
 - (a) it is established that—

⁶² Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) cl 2(3).

⁶³ Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) cl 3(1).

⁶⁴ Available at: < <http://www.ret.gov.au/Documents/mce/documents/NECF%20Package%20-%20Second%20Exposure%20Draft.pdf> >at 28 February 2010.

- (i) the distributor provided customer connection services to the premises of the small customer at the relevant time; and
- (ii) the claimable incident occurred; and
- (iii) the claim is for a compensable matter arising from or connected with the claimable incident; and
- (iv) the amount claimed and the amount payable are within the range between the minimum amount and the maximum amount (inclusive of both amounts); and
- (b) any applicable requirements of this Division and the Rules are satisfied.
- (2) Compensation is monetary in nature.

An example of a 'claimable incident' would be a voltage variation. It is envisaged that the type of damage that may be compensated is minor property damage of the type suffered by the Taylors and the Lattens in *Contact Energy Ltd v Jones* considered above.

Upper limits as to the damage that may be claimed are to be set by regulation. If the elements of a claim based on s 710 are established the liability of a distributor is strict, in the sense that it arises independently of fault on the part of the distributor.

Section 711 provides:

- (1) Each distributor must develop and publish on its website—
 - (a) a summary of the small compensation claims regime in a form that will be readily understood by the average small customer; and
 - (b) a copy of a claim form that is able to be downloaded.
- (2) A distributor must, within 2 business days of a person making contact with the distributor in relation to a potential claimable incident—
 - (a) inform the person that a small customer affected by the incident may be entitled to compensation; and
 - (b) advise the person that the distributor's summary of the small compensation claims regime, and a copy of a claim form, is available on its website; and
 - (c) send to the person a copy of its claim form on request and at no charge.

It is unclear how the Small Claims Compensation Regime of the NECF will sit with the consumer guarantees part of the Australian Consumer Law. It appears that while the marketing rules for electricity will align with the Australian Consumer Law, the Government proposes to establish a separate compensation regime for damages suffered by residential customers from fluctuations in electricity supply.

The fundamental policy objective of the PC in its review of Australia's Consumer Policy Framework was to establish one generic consumer protection regime that applies across all sectors of the economy and jurisdictions. It appears that even before the new consumer guarantees Bill has been introduced into Parliament, a sector specific regime is being contemplated.

XIII CONCLUSION

The NEIAT study produced some surprising data about the statutory implied terms scheme. There is a widespread lack of awareness on the part of consumers, retailers and manufacturers that consumers are entitled to remedies for faulty goods and service. The scope of protection offered by the implied terms is unclear. The cost of litigating to enforce the statutory implied terms is prohibitive. The result is that retailers and manufacturers have no

incentive to comply with the current law and frequently play the ‘blame game’ with neither party prepared to take responsibility.

The CGA (NZ) has been described as a loss allocation mechanism.⁶⁵ Its policy is to avoid the ‘blame game’ by adopting a ‘single enterprise theory’ which allows the consumer to recover from the retailer without proof of fault, leaving the retailer to pursue any remedies of its own against the manufacturer or others. The adoption of the CGA (NZ) in Australia will provide greater clarity and certainty. If the law is known and understood by those it is intended to protect, it should lead to retailers and consumers settling disputes expeditiously. In the case of recalcitrant retailers, the ACCC should have the power to take action on behalf of consumers in respect of their statutory guarantee rights where such action would encourage compliance with the law.

On 15 August 2008, MCCA agreed to the following national consumer policy objective: ‘To improve consumer well being through consumer empowerment and protection fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly.’

The proposed consumer guarantees regime will go some way to achieving that objective. It is intended to prevent unfairness by ensuring that consumers’ reasonable expectations are met; to ensure that consumers get what they pay for; and to put an end to the blame game. The consumer guarantees regime appears to have worked well in New Zealand. Whether it thrives in Australian soil remains to be seen. Much work remains to be done, especially with regard to putting in place effective dispute resolution mechanisms for consumers.

⁶⁵ *Acquired Holdings Ltd v Turvey* (2008) NZBLC 102, 107.