A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions Are Consumer Transactions

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The Trade Practices Act 1974 (Cth) from its inception recognised that consumers need special protection in their transactions and thus mandated certain non-excludable implied terms in consumer contracts. The technical definition of 'consumer' in section 4B is critical to the determination of whether an acquirer is to be classified as a consumer. Consumers need to be aware of the application of these statutorily conferred contractual rights. Equally, suppliers need to be aware of their liabilities. This paper argues that the definition of consumer is unclear and uncertain, and only sometimes redresses inequalities between buyer and seller. In addition, the definition fails to fulfil its own policy objectives of protecting small business. The solution suggested is the elimination of the definition and the application of the implied terms to all transactions.

DIVISION 2 of Part V of the Trade Practices Act (TPA) enacted in 1974 by the Commonwealth Parliament, was, at the time, the only part of that Act which was exclusively concerned with the direct protection of consumers.[1] Now, as then, it implies into contracts for the supply of goods or services to consumers, conditions and warranties which are non-excludable. The conditions relate to the supplier's obligations in relation to passing title in the goods,[2] the need for correspondence of

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1. Although Part V of the TPA is headed 'Consumer Protection', the majority of its provisions allowed any person aggrieved the possibility of redress. Consumers were indirectly protected because competition was protected. The provisions of Div 2A, which deal with the liability of manufacturers to consumers, were enacted in 1978; s 52A, inserted in 1986, introduced a statutory duty to trade fairly with consumers by proscribing unconscionable conduct. This was renumbered as s 51AB in 1992.
2. TPA s 69(1)(a).

the goods with their description,[3] the requirement that the goods be of merchantable quality,[4] that the goods be fit for their purpose[5] and that in a sale by sample, the bulk of the goods should correspond with the sample.[6] The warranties relate to the consumer's right to enjoy quiet possession of the goods supplied,[7] as well as freedom from unknown encumbrances.[8] In a contract for the supply of services to a consumer, there is an implied warranty that the services be rendered with due care and skill and any materials supplied be reasonably fit for their purpose.[9] These implied terms were drawn from those in the Sale of Goods legislation, originally enacted in England in 1893.[10]

With the recognition that there was often an imbalance in the bargaining power of the contracting parties came the idea, inter alia, that the implied terms should not be capable of exclusion in certain circumstances, namely in the context of consumer transactions.[11] This is clearly set out in section 68, which declares any clause void that purports to exclude, restrict or modify the application of Division 2:

> **Section 68(1)**
> Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:
> (a) the application of all or any of the provisions of this Division;
> (b) the exercise of a right conferred by such a provision;
> (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
> (d) the application of section 75A;
> is void.

It was this non-excludability which made the operation of the implied terms in Division 2 different from the operation of those in the sale of goods legislation and

3. TPA s 70.
4. TPA s 71(1).
5. TPA s 71(2).
6. TPA s 72.
7. TPA s 69(1) (b).
8. TPA s 69(1) (c).
9. TPA s 74.
10. There have been Sale of Goods Acts enacted in all states and territories of Australia, the USA, Canada, Hong Kong, etc. The implied terms were refined in the Supply of Goods (Implied Terms) Act 1973 (UK) and it is from there that, in many cases, the expanded text of the implied terms in the TPA was drawn.
11. Much earlier the hire-purchase legislation introduced by the Australian states between 1959 and 1961 generally provided that any provision in a hire-purchase agreement which excluded the operation of implied terms (which mirrored those in the sale of goods legislation) would be void. Prior to the enactment of the TPA and s 68 in particular, the curious anomaly existed that a cash purchaser of goods was in a much weaker position than one buying on hire-purchase. See GQ Taperell, RB Vermeesch & DJ Harland *Trade Practices and Consumer Protection* 3rd edn (Sydney: Butterworths, 1983) 812-813.

clearly marked this part of the TPA as not merely a statutory reflection of mercantile custom but as operating directly on behalf of consumers.[12] Indeed, in the case of *Truck Wreckers (1979) Pty Ltd v Waters*,[13] Yeats J highlighted the difference between the two types of legislation, emphasising that the purpose of the Fair Trading Act 1987 (WA)[14] equivalent of Division 2 was remedial, giving consumers rights and protections previously unavailable whereas the primary purpose of the sale of goods legislation was to regulate commercial dealings *between merchants*.[15]

The relevance of the consumer definition is thus obvious. It is important for consumers to be aware of the rights that Division 2 confers. Equally, it is important for suppliers to know to whom they are liable. Any definition should, as far as possible, be clear and free from ambiguity.

The definition could take many forms: it could refer simply to the end user of any goods or services; it could exclude buyers who use the goods or services acquired, in a business context; it could include small, as contrasted with large, business users of the goods and services acquired; it could include small, as contrasted with large, business whose business is supply of the goods and services acquired; it could exclude all users of certain types of goods or services acquired .[16] There is no universally accepted definition of consumer.

THE CURRENT STATUTORY DEFINITION

The current definition of consumer in the TPA is found in section 4B. It replaced the original definition[17] and was a direct result of the Swanson Committee's

12. In 1962, the UK Committee on Consumer Protection (the Molony Committee) recommended that all consumers needed the protection of the implied terms in all transactions involving the acquisition of goods: *Final Report of the Committee on Consumer Protection* (Cmnd 1781, 1962).
13. (1994) 10 SR (WA) 32.
14. The Fair Trading Acts of the states generally mirror TPA, Pt V.
15. *Truck Wreckers v Walters* above n 13, 36-37.
16. Rumble suggests that the factors used for determining an acquirer's eligibility for protection could be based on: (i) the status of the acquirer; (ii) the objective nature of the goods or services; (iii) the acquirer's purpose; and (iv) the scale of the transaction: GA Rumble 'Eligibility for Consumer Contract Protection under the Trade Practices Act' (1978) 9 Fed L Rev 463-464.
17. This was contained in s 4(3):
    For the purposes of this Act, unless the contrary intention appears –
    (a) A person who acquires goods shall be taken to be a consumer of the goods if the goods are of a kind ordinarily acquired for private use or consumption and the person does not acquire the goods or hold himself out as acquiring the goods for the purposes of resupply; and
    (b) A person who acquires services shall be taken to be a consumer of the services if the services are of a kind ordinarily acquired for private use or consumption and the person does not acquire the services for the purposes of , or in the course of, a profession, business, trade or occupation or for a public purpose.

recommendations[18] which required it to fulfill three criteria: to be certain, to redress the inequality of bargaining power between suppliers and consumers and to provide protection for small business. The definition is in the following terms:

Section 4B: Consumers

(1) For the purposes of this Act, unless the contrary intention appears:
  (a) a person shall be taken to have acquired particular goods as a consumer if, and only if:
    (i) the price of the goods did not exceed the prescribed amount; or
    (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;

  and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and
  (b) a person shall be taken to have acquired particular services as a consumer if, and only if:
    (i) the price of the services did not exceed the prescribed amount; or
    (ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

In relation to goods, the primary test is framed with reference to price: a person acquires goods as a consumer if the price of the goods does not exceed the prescribed amount (now $40 000).[19] Only if the price exceeds the prescribed amount is there an inquiry into the nature of the goods: they must be of a kind ordinarily acquired for personal, domestic or household use or consumption – an objective test based on

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There was considered to be some ambiguity in the word 'private': possible meanings were that 'private' purposes referred to direct use by the acquirer, purposes other than public or governmental or, most likely, the goods or services had to be of a kind ordinarily acquired for non-commercial use. There was also a difference in approach depending on whether a consumer was acquiring goods or services: to be a consumer of services, the services could not be acquired in the course of a business etc; a person could be a consumer of goods even if the goods were acquired in the course of a business as long as they were the sort of goods ordinarily acquired for private use, and were not acquired for the purposes of re-supply. Taperell, Vermeesch & Harland above n 11, 577-579.

18. Trade Practices Act Review Committee *Report to the Minister for Business and Consumer Affairs* (Canberra, Aug 1976).

19. S 4B(2)(a).

the nature of the goods, not the purpose for which they are acquired. In both cases the goods must not be acquired for 'resupply or for the purpose of using them up or transforming them … in the course of a process of production … or of repairing other goods'.[20]

A person acquires services as a consumer if the price does not exceed the prescribed amount; or if the price does exceed it, the services are of a kind ordinarily acquired for personal, domestic or household use or consumption. This definition is based solely on an objective test.[21]

The criteria for a consumer of goods or a consumer of services appear certain and easily ascertainable because of their general objectivity. Both supplier and consumer should be in no doubt about the operation of their respective liabilities and rights. Protection is provided not only for small business, but for businesses of any size in that they will be consumers in relation to any goods or services acquired under $40,000 even if intended for business use irrespective of their nature[22] and in relation to goods or services of unlimited value, as long as they are of a domestic nature.

The apparent certainty of this definition of consumer is deceptive. It is potentially unclear and uncertain. Further, it only sometimes redresses inequalities between buyer and seller. Finally, it fails to live up to expectations that it would provide protection for small business. In sum, the definition fails to satisfactorily fulfil the policy that was behind its enactment.

THE LACK OF CLARITY AND CERTAINTY IN THE DEFINITION

There are two main problems with the formulation of the definition : first, the uncertain level of generality of categorising goods or services as being 'of a kind', and second the meaning of 'ordinarily acquired for personal, domestic or household use or consumption'.

Goods of a kind

Some goods or services commonly used in a domestic setting have a more specialised form when used commercially. A problem of classification of this more specialised

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20. S 4B(1)(a). This qualification introduced a subjective element. The inclusion of a commercial road vehicle is also subjective since its definition relates to its intended rather than ordinary purpose. See s4B(4): a commercial road vehicle is a vehicle or trailer acquired for use principally in the transport of goods on public roads.
21. It replaces the previous definition, which excluded as consumers those who acquired services for business purposes.
22. The 'resupply' exclusion as well as the 'using them up or transforming them' exclusion applies irrespective of the size of the business and thus has the effect of disqualifying the most modest business operation along with the multinational corporation when goods are acquired for such purposes.

form of goods or services exists and that is whether they should be broadly or narrowly classified. The level of generality of the classification is crucial. It will in many cases determine whether a person satisfies the consumer criterion. It will determine when someone who pays more than $40 000 for goods or services is a consumer. Is a window cleaning service that exclusively provides for the cleaning of the windows of sky scrapers (with all the necessary specialised equipment), still to be described simply as a window cleaning service and therefore a service which householders utilise? Conversely, is a Commander phone system installed in a private house still to be classified simply as a phone?

The authors of *Benjamin's Sale of Goods* identify this definitional problem in the context of the English Unfair Contract Terms Act 1977. In that Act, in a consumer transaction, 'goods … are of a type ordinarily supplied for private use or consumption'.[23] They comment on the difficulties which may arise where private persons buy goods of a type or packaged in quantities appropriate to commercial use This would include people who buy commercial size deep freeze units and large quantities of frozen goods and bulk buys . If the word 'type' (or kind) is taken to refer to the nature of the actual commodity, then bulk sales of goods commonly sold for consumer purposes in small quantities will be consumer sales and the only sales excluded will be those where goods are ordinarily bought for commercial use – for example, commercial weed killer, beer pumps, furniture van, etc.

If 'type' includes packaging, bulk purchases may not be included in consumer transactions. It may be held, for example, that a box containing 144 toilet rolls is not 'goods of a type ordinarily bought for household use or consumption'.[24]

Although there have been few cases where this concept has been the subject of judicial determination those decisions have evidenced an inconsistency of approach. In *Carpet Call v Chan*,[25] the defendants acquired a quantity of carpet for their nightclub from the plaintiffs. The carpet was commercially rated and heavy duty. The defendants claimed that the plaintiffs had breached section 71(2) of the TPA and that the carpet was not reasonably fit for its purpose. This was evidenced by its staining by patrons of the nightclub. If section 71(2) was to be implied into the contract, Chan had to fulfill the criteria of a consumer.[26] Thomas J held that although the carpet was commercially rated for use in a nightclub and may have 'last[ed] longer than other carpet normally supplied for use in a domestic setting',[27] it was

23. TPA s 12(1).
24. AG Guest (ed) *Benjamin's Sale of Goods* 4th edn (London: Sweet & Maxwell, 1992) 13-069.
25. (1987) ATPR (Digest) 46-025.
26. The contract had purported to exclude all implied terms. Such a clause would be invalid if Chan were a consumer.
27. *Carpet Call v Chan* above n 25, 46-025.

still regarded as carpet, a commodity of a kind ordinarily acquired for personal, domestic or household use.

In *Begbie v State Bank of NSW Ltd*,[28] the State Bank of New South Wales provided loan funds of $250 000 to a company for a range of business purposes. The loan had been secured by a mortgage over Mrs Begbie's property which she claimed was a result of the bank's unconscionable conduct. Mrs Begbie, as well as relying on equitable unconscionability, sought relief under section 52A of the TPA (re-enacted later as section 51AB), that section of the TPA which targets unconscionable conduct directed against consumers. According to section 51AB(5), the unconscionable conduct must be in connection with the supply of goods or services which are of a kind ordinarily acquired for personal, domestic or household use or consumption. In categorising the provision of the loan, Drummond J stated that it was necessary to go beyond the activity and look to the purpose for which the activity was intended. It was insufficient to categorise the service as simply the provision of loan funds; rather its classification had to take account of its purpose. As its purpose was business related, it was not the kind of service referred to in section 51AB (5).

Begbie is in direct contrast to *Carpet Call* where the classification of the kind of goods was made without regard to purpose. Commentators have highlighted this problem of classification: Taperell, Vermeesch and Harland speculate on the consequences if the classification of services were to be based on the experience and skill required in the provision of them.[29] A contract for the design and construction of a family home would, on this basis, be regarded as a domestic service and therefore a consumer transaction, whereas a contract for the design of an office building would be a commercial transaction. The authors are uneasy with their suggested basis, noting that the distinction may not always be easy to draw: is painting the interior of a home a different kind of service from painting the inside of a commercial building?[30] They ultimately reject it as a departure from the clear and literal meaning of the statutory provision, commenting that to import a consideration of actual purpose into the statutory notion of consumer constitutes a misinterpretation of the definition which omits any reference to actual, as opposed to ordinary, purpose. It imports a subjectivity which was deliberately superseded in the amended definition.[31]

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28. (1994) ATPR 41-288.
29. Taperell, Vermeesch & Harland above n 11, 587-588.
30. Heydon advocates the application of a purpose approach to the definition: see JD Heydon *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* (Sydney: Law Book Co, 1989-) 715.
31. Taperell, Vermeesch & Harland above n 11, 587. Subjectivity does remain in relation to goods in ascertaining whether or not they are bought for resupply, etc. A supplier will often need to enquire as to the acquirer's particular purpose.

Ordinarily acquired for personal, domestic or household use or consumption

This criterion is an objective one with the word 'ordinarily' used in contrast to 'actually'. Nevertheless, it is not clear what degree of frequency is indicated by 'ordinarily'. On a literal reading it could require that the majority of the goods or services supplied be for personal, domestic or household use, or merely that they be commonly supplied for such use.[32] Difficulties are highlighted in the following example. Hypothetically, suppose that empirical evidence over a certain time period showed that 90 per cent of sales of salt were made to businesses which used the article for commercial purposes, and 10 per cent to households. If the 'ordinarily equates with mostly' test is used, sales of salt over the prescribed amount would be excluded from the operation of the consumer definition.[33]

According to this test, there would need to be evidence brought in each case of the proportion of goods or services acquired for personal use before a determination could be made as to whether the acquirer of such goods or services over $40 000 was a consumer. In *Crago v Multiquip*,[34] the court accepted that goods may be of a kind ordinarily acquired for personal, domestic or household use or consumption, even if goods of that same kind are in many, or even a majority of cases, acquired for business use. In the New Zealand case of *Nesbit v Porter,*[35] this theory was tested. A purchasing profile, showing the breakdown of business and domestic buyers was presented as evidence. In this case the definition of consumer in the Consumer Guarantees Act 1993 (NZ) was considered. That Act defines a consumer as a person who acquires goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.[36] In *Nesbit v Porter,* the issue was whether the purchaser of a double-cab Nissan Navara 720 four-wheel drive utility was a consumer. There was evidence that 60 to 80 per cent of sales had been to business purchasers but that a significant number had been sold to purchasers who intended them for personal use. The New Zealand Court of Appeal defined 'ordinarily' as 'a matter of regular practice or occurrence' or 'in the ordinary or usual course of events or state of things'.[37] The fact that around 20 per cent of buyers had acquired the vehicles for private use amounted to a regular practice or occurrence of such vehicles being

32. It has been suggested that 'commonly' is the appropriate meaning of 'ordinarily': see Guest above n 24, 13-069. Taperell, Vermeesch & Harland, above n 11, suggest that goods which are quite frequently purchased for private use would not satisfy this part of the definition if that is not the normal or most frequent purpose for which the goods are acquired.
33. J Goldring, LW Maher, J McKeough & G Pearson *Consumer Protection Law* 5th edn (Sydney: Federation Press, 1998) 28.
34. (1998) ATPR 41-620. This case involved a claim brought under Div 2A of the TPA against manufacturers of ostrich egg incubators. This Division is only relevant if the goods are of a kind ordinarily acquired for personal, domestic or household use and consumption: s 74A(2)(a).
35. [2000] 2 NZLR 465.
36. There are three exceptions: use in business for resale, manufacture or repair.
37. *Nesbit v Porter* above n 35, para 29.

purchased for private use. Importantly, the Court of Appeal confirmed the New Zealand High Court's view that items (and services) may be acquired for personal use as well as being ordinarily acquired for business use; that is, they were not mutually exclusive categories. Only if the acquisition for private purposes could be said to be an 'idiosyncratic choice' would the goods or services not be regarded as being ordinarily acquired for personal, domestic or household use.[38]

This approach overcomes the difficulties with the 'ordinarily equates with mostly' test but problems still remain in deciding when a purchase is idiosyncratic. What is the minimum number required for acquisitions to be significant? If five per cent of purchases of Nissan Navaras had been for private purposes would this have been idiosyncratic? What about 10 per cent? Or 15 per cent?

In some cases, the courts have been able to make a determination about whether a person acquiring goods is a statutory consumer without any evidence being adduced that the goods are normally bought for commercial use. In *Jillawara Grazing Co v John Shearer*,[39] an air seeder was simply accepted by the court to be a good which was not of a kind ordinarily acquired for use or consumption in connection with the home;[40] in *Atkinson v Hastings Deering (Qld) Pty Ltd,*[41] the same approach was made in relation to a tractor; in *Four Square Stores (Qld) Ltd v ABE Copiers Pty Ltd*,[42] the court concluded, without any need for discussion, that a reduction photocopier was a good not of a kind ordinarily acquired for personal, domestic or household use or consumption.

In *Carpet Call v Chan*, no evidence was brought to prove that carpet was ordinarily acquired for domestic use; rather the court regarded it as an obvious fact. In *Crago v Multiquip,* the court held it was not common knowledge that ostrich egg incubators were ordinarily acquired for personal, domestic or household use (unlike carpet), but conceded that evidence was admissible to prove this. This raises the problem that *Nesbit v Porter* left unsolved: what evidence of acquisition for personal use is required before the goods or services can be said to be ordinarily acquired for personal, domestic or household use? Must there be a critical number of domestic acquirers before this classification can be made? Lehane J in *Crago v Multiquip* thought that one or two eccentric people was an insufficient number (ie, they were idiosyncratic). Apart from this, no judicial guidance has been given on this question.

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38. G Churchill 'Consumer Goods' [2001] NZ Law J 138.
39. (1984) ATPR 40-441.
40. Citing Phillimore J in *Metropolitan Water Board v Colleys Patents Ltd* [1911] 2 KB 38, 40, Toohey J concluded that domestic means something to do with occupying or using a house or dwelling and this did not extend to an airseeder. (The bias of the definition against rural consumers was pointed out to me by a student whose family were small country farmers; air seeders were as commonplace an item to farmers as any typical household appliance would be to an urban dweller.)
41. (1985) ATPR 40-625.
42. (1981) ATPR 40-232.

The definition's apparent objectivity turns out to be deceptive since it is in fact underpinned by subjective analysis. Clearly, suppliers need to know which of their transactions are consumer transactions so as to be aware of their legal obligations and to be able to allocate cost and risk. The difficulties and ambiguities inherent in the definition of 'consumer' detract from the certainty of this knowledge. Consumers too need this knowledge for an awareness of their rights, they face the same uncertainty. The definition needs to be made clearer in the interests of both parties.

It is true that this exercise of classifying the goods or services is most relevant when their price exceeds $40 000. Further, it will be inter-business transactions, where the prescribed amount will be most often exceeded, and where this problem will occur most frequently. These business transactors will also obviously include small business, which may in, many cases, ironically lose the statutory protection intended for it by the Swanson Committee's recommendations, on the basis of an arbitrary classification of goods or a particular region's buying habits.

In addition to transactions over $40 000, the statutorily mandated classification process is relevant to the operation of section 68A, which limits the liability of a supplier in the case of a consumer transaction where the goods or services are *not* of a kind ordinarily acquired for personal, domestic or household use. Thus, to qualify as a consumer transaction, the price of these goods or services must be less than $40 000.[43]

A POSSIBLE SOLUTION TO THE DIFFICULTIES: A 'PURPOSES' INCLUSION?

From the foregoing discussion, it may be thought that some of the problems and ambiguities in the second part of the consumer definition could be overcome by amending the provision and basing that part of the definition on the actual purpose of acquisition.

The first part of the definition would be retained according to which any goods or services under the prescribed amount would qualify as the subject of a consumer transaction. This part is self-evidently objective and certain, and provides protection for small business (or any business for that matter) as long as the goods are not acquired for resupply, etc.

Where the goods or services are over the prescribed amount, instead of having either to correctly, in a legal sense, classify the nature of the goods or services or

43. See below pp 127-128. The need for classification is also relevant for the application of Div 2A, the Division relating to manufacturers' liability. For a manufacturer to be liable to a consumer or one deriving title through a consumer, the goods must be able to be classified as 'of a kind ordinarily acquired for personal, domestic or household use or consumption': see below n 44.

conduct a wide-ranging survey into the buying habits of the public, the enquiry could be based on the purpose of the particular transaction in question. That part of the definition would thus read 'goods (or services) *are* acquired for personal, domestic or household use or consumption'. It could be argued that this imposes an unnecessarily heavy onus on the supplier who will need to ascertain the particular purpose of acquisition in each case. However, as the definition currently stands, purpose already has to be ascertained: the supplier, in the case of goods, needs to know if the goods are being acquired for resupply etc, in which case the acquirer will not be a consumer. There is already a need for a purpose-based enquiry from the supplier and the supplier will not always be aware of this simply from the nature of the transaction.[44]

It could also be argued that because goods and services are often acquired for both business and personal use, it will be too difficult for the supplier to ascertain purpose. This problem could be overcome by including the words 'wholly or predominantly' after 'acquired'. This is the case with the Consumer Credit Code, which, according to section 6(1)(b) requires 'credit [to be] provided or intended to be provided wholly or predominantly for personal, domestic or household purposes', to attract the protection of the Code.

Section 6(5) defines the predominant purpose for which credit is provided to be the purpose for which more than half of the credit is intended to be used or if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

The presumption should remain that the acquirer is a consumer unless the contrary is established.[45] Therefore, in those cases where the purpose of the acquisition is not obvious, it will be in the supplier's interest to have the acquirer sign a business purposes declaration. There is provision for such a declaration in the Consumer Credit Code where credit is not predominantly provided for personal, domestic or household purposes.[46]

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44. John Carter in his article on the proposed Article 2B of the Uniform Commercial Code questions why commercial purchasers should get the benefit under the TPA of a complete prohibition on the contractual exclusion of the implied terms if the goods are of a kind ordinarily acquired for personal, domestic or household use (s 68) and a limited contractual exclusion if they are not (s 68A). He contrasts the essentially objective approach to consumer transactions in the TPA with the subjective classification in Article 2B where a consumer – in the context of software licences – is a licensee of information or informational rights that are intended by the individual to be used primarily for personal, family or household purposes. Carter is critical of the lack of internal consistency in the TPA's characterisation of consumer transactions as well as its lack of harmony with popular perception: JW Carter 'Article 2B: International Perspectives' (1999) 14 JCL 54, 63.
45. TPA s 4B(3).
46. See Consumer Credit Code s 11(2). A declaration that the goods were not acquired for resupply, etc, would also be helpful.

The disadvantage of this approach is that it is administratively cumbersome and time consuming. If the declaration is not signed, the supplier may be unsure of its obligations and therefore vulnerable; there may be cases where it is signed in error. Further, some effort will need to be expended to ensure acquirers understand the meaning and implication of the declaration.[47]

THE IMPLICATIONS OF THE 'RESUPPLY ... USING ... UP OR TRANSFORMING' EXCEPTION

The statutory requirement that the goods must not be bought for resupply, using up or transforming will prevent most business transactions from being classified as consumer ones: large businesses acquiring large quantities of goods to sell, from a manufacturer, will not be covered by the definition, but neither will small business. A modest hardware shop that buys 20 hammers from a manufacturer/wholesaler will not enjoy the protection of the definition. Small business, where it is most vulnerable, is let down by the definition.

At the same time, a large business which expends a considerable amount of money on furniture for its offices, computers or cars for its employees, will fall within the consumer definition. A small business doing something similar, albeit on a smaller scale, would likewise fall within the definition.

Thus, the definition makes no distinction between big and small business in some contexts but fails to protect small business in the context where it may be most vulnerable.

THE ELIMINATION OF THE STATUTORY DEFINITION

In light of the problems with the existing definition (and the problems with the proposed change), a solution may lie in eliminating the statutory definition entirely and treating all transactions as consumer transactions; that is, the implied terms in

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47. A business purposes declaration in the context of obtaining credit under the Consumer Credit Code would tend to be more acceptable to borrowers of money than acquirers of goods, given the relative infrequency of the former and the fact that the declaration would just be another form amongst statutorily mandated substantial paperwork.

    The definition of commercial road vehicle is already purpose-based and the method of ascertaining whether a vehicle qualifies under this definition is analogous to the process of clarifying the purpose of acquiring credit under the Consumer Credit Code. As with credit providers, it may also be in the interests of car dealers to require a declaration as to the purpose for which the vehicle is required. The same administrative inefficiencies apply. According to s 4B(4), a commercial road vehicle means a vehicle or trailer acquired for use principally in the transport of goods on public roads.

Division 2 (and provisions of Division 2A)[48] will potentially apply to all transactions and will not be able to be excluded. 'Consumer' will be understood in its widest possible sense. Anyone who acquires goods or services will be regarded as such. A consumer can already be an entity which acquires goods or services for business purposes whether the price is under or over the prescribed amount.[49] This is already removed from the conventional lay notion of consumer, as well as affording, in some cases, protection to very big business. Regarding all transactions as consumer ones is therefore arguably more an incremental than substantive change.[50]

The stated aims of the current classification of consumer transactions are thus revealed as largely thwarted.[51] First, the definition is exposed as uncertain in its application and second it fails to redress adequately the imbalance in bargaining power between contracting parties. In particular, small business may not receive the statutory protection necessary for it to deal with large business. There is a sound case for the elimination of the definition and the application of Division 2 to all transactions.

This will not mean that all the implied terms will automatically be incorporated into every contract for goods or services; further, if and when they are, they may have an attenuated application. The implied terms, historically a reflection of mercantile custom, now an instrument to protect a certain technical class of acquirers, have always been and continue to be based largely on the *expectations* of acquirers as created by suppliers.[52] Their application has always depended on an enquiry into the circumstances of the transaction. To this extent there has always been some inevitable uncertainty of outcome of each transaction This will necessarily continue with the elimination of the consumer definition and the application of the provisions of Division 2 to all transactions. Importantly, the definitional uncertainty will have been removed.

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48. There is an inexplicable anomaly in Div 2A in that for manufacturers to be liable under its provisions, the goods must be of a kind ordinarily acquired for personal, domestic or household use or consumption: s 74A(2)(a). Why this restriction on the type of goods is required for manufacturers but not for retailers is mystifying. The Division is made more confusing by the fact that the acquirer of the goods is described as a consumer, leaving open the question of the relevance of the s 4B definition.
49. Even where the goods or services are ordinarily acquired for personal, domestic or household use, they may still be acquired for use in a business (eg, expensive purchases of artwork as part of office furnishings). As long as the acquisition is not for resupply, etc, the transaction will be a consumer one.
50. Removal of the purpose criteria in 1978 was a more radical step than the one proposed in this paper.
51. See above pp 110-112.
52. As was said by Cooper J in *Cavalier Marketing(Aust)Pty Ltd v Rasell* [1991] 2Qd R 323, 348: 'The … provisions [of merchantable quality] of the TPA … focus on the reasonable objective expectations of a consumer'. In *Christopher Hill Ltd v Ashington PiggeriesLtd* [1972] AC 441, 506 Lord Diplock stated that 'the key to both [the implied terms of fitness for purpose and merchantable quality] is reliance'.

Application of implied terms

1. Acquisition of goods

(a) Fundamental implied terms: title and description

It is arguable that some implied terms are so fundamental to any transaction that the expectations of an acquirer would always be that they be implied. This is the case with the supplier's obligations in relation to title and description of the goods.[53]

At common law, the mere act of selling goods did not carry with it a warranty that the seller had title to the goods or a right to sell them. Such a warranty had either to be express or raised by usage of trade.[54]

Section 69 contains implied undertakings relating to the most elemental of rights a consumer buyer has on acquisition of goods: the right to title, the right to undisturbed possession of the goods after sale, and the right to be free from any encumbrance in favour of a third party of which the buyer is unaware. As with the other implied terms, the seller is strictly liable, knowledge and fault being irrelevant.[55]

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53. See s 70(1) below n 60.
54. There was an implied undertaking that the seller did not know he had no right to sell.
55. S 69(1): In every contract for the supply of goods by a corporation to a consumer, other than a contract to which subsection (3) applies, there is:
    (1) (a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;
    (b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and
    (c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer – an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.
    (2) A corporation is not, in relation to a contract for the supply of goods, in breach of the implied warranty referred to in paragraph (1)(c) by reason only of the existence of a floating charge over assets of the corporation unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.
    (3) In a contract for the supply of goods by a corporation to a consumer in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the supplier should transfer only such title as he or she or a third person may have, there is:
    (a) an implied warranty that all charges or encumbrances known to the supplier and not known to the consumer have been disclosed to the consumer before the contract is made; and
    (b) an implied warranty that:

According to section 69(1)(a), where goods are supplied to a consumer there is an implied condition in the case of a sale that the supplier has the right to sell the goods, and in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass.

Section 69(1)(b) provides that there is an implied warranty that the consumer will enjoy quiet possession of the goods. It was originally thought that the warranty that the buyer shall have and enjoy quiet possession was redundant in view of the implied condition as to title.[56] Judicial decisions have shown that this warranty has a wider ambit than the implied condition as to title. In the case of *Microbeads AG v Vinhurst Road Markings Ltd,*[57] it was held that the warranty not only applied at the time of sale but subsequently (two years later in this case), whereas the implied condition as to title only applied at the time of sale.[58]

Where property is to pass to a consumer under a contract for the supply of goods, section 69(1)(c) mandates an implied warranty that the goods are free and will remain free from any charge or encumbrance, not declared or known to the buyer at the time the contract is made.[59]

Clearly, if a supplier transfers or agrees to transfer property in goods, it would invalidate the contract if at the same time, he or she was able to negate this undertaking by disclaiming his title obligations.[60] Section 69(3) refers to the possibility of circumstances of the contract which could show an intention to transfer a limited title only. If this is indicated by the context of the transaction, or by the words or conduct of the parties, then according to the sub-section it is these factors which will have the effect of modifying the implied condition as to title in section 69(1)(a). In such a case, the warranties of quiet possession and freedom from encumbrances

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(i) the supplier;
(ii) in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have—that person; and
(iii) anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made;

will not disturb the consumer's quiet possession of the goods.

56. KCT Sutton *Sales and Consumer Law in Australia and New Zealand* (Sydney: Law Book Company, 1983) 242.
57. [1975] 1 WLR 218.
58. In this case, at the time of the sale of a machine a patent application had been made by a third party, but both the buyer and the seller were unaware of this. Two years later, the patentee made a claim. The buyer was unable to rely on the implied condition as to title because it only had to be satisfied at the time of sale, but was successful in the plea of breach of implied warranty of quiet possession.
59. The need for this implied warranty is questionable given that it is difficult to envisage undisclosed charges or encumbrances that will not also involve interference with the buyer's quiet possession.
60. The contract would fail for want of consideration: see *Rowland v Divall* [1923] 2 KB 500.

are not excluded: section 69(3)(a),(b) and (c) provide implied warranties that all charges and encumbrances known to the seller have been disclosed to the buyer and that the buyer's quiet possession should not be disturbed by the seller, any third party or any person claiming under them.

There is no reason why the implied terms contained in this provision should ever be able to be excluded, regardless of the classification of the acquirer. The section itself makes provision for a modified application of them when circumstances require this.[61]

Similarly, inherently non-excludable is the implied term contained in section 70(1),[62] which provides that where there is a supply of goods by description, the goods must correspond with their description.[63]

Unlike the implied conditions of merchantable quality and fitness for purpose, correspondence with description is a fundamental obligation which will not easily be excluded even in a non-consumer contract. A supplier cannot promise to supply goods of a particular description but at the same time negate any liability for supplying non-conforming goods.[64] In most transactions, the description of goods will form an express term of the contract and will thus be non-excludable in both consumer and non-consumer contracts.[65] Where it is not express, it will form part of the non-negotiable factual matrix of the transaction.[66]

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61. S 6(1)(a) of the Unfair Contract Terms Act 1977 (UK) prohibits the exclusion of any of the implied undertakings in s 12 of that Act (these are similar to those in TPA s 69) in both consumer and non-consumer sales.
62. Div 2A, s 74C.
63. S 70(1): Where there is a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. (2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only being exposed for sale or hire, they are selected by the consumer.
64. *Vigers Bros v Sanderson Bros* [1901] 1 KB 608.
65. The parties need to contract by reference to a description of the goods, no matter how this is conveyed, whether it be by spoken or printed words: see *Australian Knitting Mills v Grant* (1933) 50 CLR 387; or conduct: *David Jones v Willis* (1934)52 CLR 110.
66. If there is no description of the goods and they are simply sold, for example as 'the stock of company X','lot 38', etc, the condition will not be implied as the goods themselves are undescribed and there is obviously nothing to which they can correspond. Although there is no reported case where description has been derived solely from conduct or context, Bridge gives the example of a diamond sold in a jewellery store, where no words are used, as a sale by description because of the context: see MG Bridge *Sale of Goods* (Toronto: Butterworths,1988) 436.

(b) Circumstantial implication: merchantable quality and fitness for purpose

The implied conditions of merchantable quality and fitness for purpose are both heavily dependent on the circumstances of the transaction as determinants of their application.

The merchantability condition requires acquired goods to conform to a quality that is satisfactory to the consumer.[67] If this condition were made statutorily non-excludable for all transactions, as the paper suggests, its non-exclusion would not be automatic in practice but rather determined by the elements of this provision as set out in section 71(1).[68] Most importantly, it would be the application of the definition of merchantable quality in section 66(2)[69] which would regulate implication as well as the content of the term implied.

(i) Implication

According to section 71(1)(a) and section 71(1)(b), any defects specifically drawn to the consumer's attention,[70] and any defects which ought to have been revealed by an examination undertaken by the consumer would negate the implication of the merchantable quality condition.[71] This would eliminate the application of this implied term from many contracts under which obviously damaged or faulty goods are purchased. This clearly applies to all contracts but may have particular relevance for commercial contracts where large volumes of damaged goods may be deliberately bought for resale at discounted prices. Where any damage or defect is unknown (to either party), the condition is properly implied.

(ii) Content

Even if the term is implied, the definition of merchantable quality takes account of the circumstances of each transaction, allowing the meaning of 'merchantable quality'

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67. S 71(1): Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:
    (a) as regards defects specifically drawn to the consumer's attention before the contract is made; or
    (b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.
68. Div 2A, s 74D.
69. See below n 69.
70. The meaning of 'specifically drawn to the consumer's attention' is uncertain. The provision does not make clear how much information about the defect needs to be communicated to the buyer or how much detail about the causes of the defect needs to be conveyed.
71. In *Frank v Grosvenor Motor Auctions* [1960] VR 607, the court made it clear that the relevant examination was the one actually conducted by the acquirer.

to vary with each new deal. It is based on the reasonable expectation of the acquirer as determined by the context.[72]

If the price of goods is much lower than the amount for which they are usually supplied, the quality entitled to be expected may be lower than normal.[73] Goods may be sold in a situation where it is obvious that a supplier is making no guarantees about their quality; for example, the sale of a heterogeneous quantity of undescribed stock from a bankrupt company; the sale of items from a deceased estate which have obviously not been inspected by the seller.

The description of the goods will be equally critical in the determination of merchantable quality: a car described as 'second hand with a defective clutch' was held not to be unmerchantable even though the clutch required replacement at substantial cost.[74] In such cases, although the term may still be implied, the level of quality (reasonably) expected by the purchaser will be significantly diminished because of the circumstances. If this expectation is met, the condition will still be implied but there will be no breach of it.

It is only fair that a buyer should be able to rely on a supplier to supply goods of a certain quality but this quality will be regulated according to the buyer's expectations which in turn must necessarily be the product of 'all the… relevant circumstances. These circumstances will dictate when this reliance will be qualified or unjustified. This condition should potentially be implied into *all* contracts of supply, but its application in practice will depend on the circumstances of the transaction.[75]

Goods must also fulfil the purpose for which they are acquired.[76]According to

72. S 66(2): 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 it is reasonable to expect having regard to any description applied to them, the price(if relevant) and all the other relevant circumstances. This definition is taken from the English Supply of Goods (Implied Terms) Act 1973.
73. In other words, the merchantable quality of the goods.
74. *Bartlett v Sydney Marcus Ltd* [1965] 1WLR1013.
75. There is no basis for rejecting a universal application of this implied term, or indeed any of the implied terms, on the ground that doing so would introduce a dimension of uncertainty which could, potentially, impede the efficiency of commercial transactions. The process of application of the term to consumer transactions has continued satisfactorily for over 30 years. In the small minority of cases where judicial determinations have been necessary, they have formed useful precedents. It is proposed that this same process be applied to all transactions
76. S 71(2): Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the corporation or of that person.

section 71(2),[77] where a consumer expressly or by implication makes known to a supplier the purpose for which the goods are being acquired there is an implied condition that the goods supplied will be reasonably fit for that purpose. As with the previous implied term, what underlies this condition is reliance and expectation[78] by the consumer on the supplier: either to supply goods which will conform to their normal purpose, or to supply goods which will fulfill an extra normal purpose in response to the particular stated requirements of the consumer.[79] Reliance is to be presumed unless the circumstances show either that the consumer does not rely or that it is unreasonable for the consumer to rely on the skill and judgment of the supplier.[80]

This condition, like the implied condition of merchantable quality, should be implied into all contracts for the supply of goods unless the circumstances of the transaction dictate otherwise. It will be these that will determine whether the condition should be implied and not the classification of the acquirer. In the case of the sale of obviously damaged goods, for example, sold at a price lower than normal, the element of reliance may be absent or unreasonable, and expectations, therefore, would, or should, be lowered about whether the goods could fulfil their normal purpose. The condition would not be implied in such circumstances.[81]

Fairness dictates that every acquirer should be able to rely on their supplier to supply goods that are suitable for their required purpose unless it is clear that it is unjustified in the circumstances.

(c) A hybrid implied term: sale by sample

The implied conditions relating to a sale by sample consist of both fundamental obligations and ones whose application is determined by the particular circumstances of the transaction.

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77. Div 2A, s 74B.
78. In her article on two judicial decisions concerning two implantable medical devices – a heart valve and a pacemaker – Gail Pearson highlights the role of consumer expectations in determining the fitness for purpose and merchantable quality of goods: G Pearson 'Consumer Expectations and Risk in Implantable Surgical Devices: *Courtney v Medtel and Carey-Hazell'* (2005) 13 CCLJ 139.
79. Case-law has established that 'particular purpose' does not mean only special purpose: see *Henry Kendall & Sons (a Firm) v William Lillico & Sons Ltd* [1969] 2 AC 31.
80. It was made clear in *Ryan v Great Lakes Council* (1999) ATPR (Digest) 46-191 that the issue is the reasonableness of the consumer's reliance, not the reasonableness of the supplier's (in that case manufacturer's) behaviour.
81. The reasons that negate the implication of the implied conditions of merchantable quality and fitness for purpose are similar to those reasons that explain the exclusion of auction sales from the application of the implied terms. The seller at auction is frequently unable to undertake that the goods will comply with the statutory implied terms; eg, in the case of a forced sale by a sheriff or bailiff. Further, at auctions, there is an element of speculation involved according to which risk of quality and fitness falls on the buyer.

Where it is clear that goods are supplied by sample, section 72 sets out three conditions that are implied: the bulk will correspond with the sample; the consumer will have a reasonable opportunity of comparing the bulk with the sample; and the goods will be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.[82] The first two conditions are unable to be excluded, whatever the nature of the transaction, on the grounds of common sense.

Section 72(2)(a) is as fundamental as section 70 and should never be able to be excluded: exclusion of this condition from a contract which is expressly one where goods are supplied by reference to a sample, is as logically inconsistent as any attempted exclusion of the implied condition that goods should correspond with their description. The exclusion of section 72(2)(b) would render sections 72(a) and (c) nugatory.[83] Section 72(2)(c) imposes a higher degree of care on a buyer where a sale is by sample than does the general implied condition of merchantable quality in section 71(1).Where a sale is by description, a buyer who does not examine the goods will not be prevented from relying on the implied condition of merchantable quality even if the goods have apparent defects. According to section 72(2)(c), it would seem that whether or not the buyer examines the goods, the implied condition of merchantable quality will not apply if there are defects in the goods which would be apparent on reasonable examination. It is clear from the wording of this provision that its applicability will be determined by the circumstances of the transaction, not the classification of the acquirer.

2. Two Suggested Related Legislative Changes

(a) Auction Sales

The TPA specifically exempts auction sales from the operation of the implied terms. This is on the grounds of policy: a seller at an auction will frequently be unable to undertake that goods will comply with the statutory implied terms – the transaction

82. S 72: Where in a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample:
    (a) there is an implied condition that the bulk will correspond with the sample in quality;
    (b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
    (c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

83. According to Bridge above n 63, 519 this provision should be deleted altogether because there is no justification for a separate concept of sale by sample. Because of its separateness, Bridge maintains that it will not keep pace with the development of general sales law, noting that the sale by sample rules crystallised before the evolution of the general implied term of fitness for purpose, and therefore the fitness for purpose obligation is, illogically, not included in the provision.

could, for example, be a forced sale by a sheriff or bailiff. It may be more difficult for an auctioneer, than other sellers, to ascertain whether the buyer is a business buyer or a private purchaser and finally auction sales usually involve an element of speculation, making it undesirable to preclude sellers from contracting out.[84]

In the interests of simplicity and uniformity, it would be desirable if the statutory regime applied to all types of transactions, including auctions. As with the application of the implied terms to sales generally, these terms would not automatically be implied into every auction sale. It would be a matter of examining the circumstances of each transaction in order to determine their implication. It might, for example, be clear from the price range, the description, and the general explanation given by the auctioneer, that it would be unreasonable for the bidder/buyer to have any expectations about the quality or fitness for purpose of the goods.

(b) Section 68A

Section 68A operates by way of an exception to section 68. It allows suppliers of commercial goods which only technically are the subject of a consumer transaction because they are under $40,000, to limit their liability for consequential losses.[85]

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84. RM Goode *Commercial Law* (Harmondsworth: Penguin, 1986) 285.

85. S 68A: Limitation of liability for breach of certain conditions or warranties.
    (1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under s 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by s 69) to:
        (a) in the case of goods, any one or more of the following:
            (i) the replacement of the goods or the supply of equivalent goods;
            (ii) the repair of the goods;
            (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
            (iv) the payment of the cost of having the goods repaired; or
        (b) in the case of services:
            (i) the supplying of the services again; or
            (ii) the payment of the cost of having the services supplied again.
    (2) Subsection (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.
    (3) In determining for the purposes of subsection (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters:
        (a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this subsection referred to as *the buyer)* relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;
        (b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent

The section is complex and unnecessary. There is no logical reason why the implied terms should not apply to such transactions. If, for example, a relatively cheap component of a machine is sold to a manufacturer and it is defective, that is, not fit for its purpose or unmerchantable, the supplier should be liable for all contractual loss that is not too remote. The possibility that the amount of loss could be disproportionate to the cost of the component is irrelevant. If the supplier of the component part was aware of the type of consequence that could result from a breach,[86] the supplier will and should be liable (unless the circumstances of the transaction indicate otherwise).

Acquisition of services

The implied terms that relate to the acquisition of services are dependent on the parties' expectations as determined by the individual circumstances of the transaction. Sections 74(1) and (2) mandate warranties that will be implied into every contract for the supply of services to a consumer.[87]

Section 74(1) provides that there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with the services will be reasonably fit for the purpose for which they are supplied.

Allowing the exclusion of the first limb of this provision from a contract would render any contract for the supply of services nugatory. If the *expected* care is not

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goods or services from any source of supply under a contract that did not include that term;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and

(d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

86. As long as the supplier is aware of the *type* of damage that may result, this is sufficient even if the extent is unforeseen: see *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB791.

87. S 74(1): In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.

taken and the reasonably anticipated skill is not applied, there is a clear breach of contract.[88] Of course, if the circumstances indicate that a lesser standard of care and skill is expected and indeed delivered, the requirement of 'due care and skill' is satisfied.[89]

The second limb of section 74(1) relates to materials supplied in connection with the services. Like section 71(ii), it is based on an implied reliance and expectation. Circumstances and context will shape these determinants.

Section 74(2) provides that where a consumer makes known to a supplier any particular purpose for which the services are required, or the result desired to be achieved by the services, there is an implied warranty that the services and any materials supplied in connection with them will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to be so, except where the circumstances show the consumer does not rely or that it is unreasonable for him to rely on the supplier's skill or judgment.

This provision, redundant in light of section 74(1), is explicitly based on the reasonable expectations and reasonable reliance of the acquirer. It is these factors which will determine its implication.[90]

CONCLUSION

When the Sale of Goods Act was originally enacted in 1893, it reflected mercantile custom in implying certain terms into all sale of goods contracts. It also reflected the fact that contracting parties could agree to exclude these terms. Industrial, commercial (and political) change brought with it the idea that a certain class of acquirer – a consumer – was in need of special legal protection in the interests of fairness. A principal form of this protection was the statutory non-negotiable, non-excludability of these implied terms.

Over a hundred years later, this paper proposes an extension of this regime to all who acquire goods or services. The legislature has for some time been grappling

88. There could even be an argument that there has been a failure of consideration. See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 521 where the High Court pointed out that a failure of consideration could extend to a situation where a payment is made for a purpose that does not occur.

89. See *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 where the court held that due care and skill was such care and skill as was reasonable having regard to the degree of experience which the provider holds himself out as possessing.

90. Section 74(2) could also be interpreted as imposing a qualified liability on a service provider in contrast to the absolute liability imposed by s 74(1). As long as a supplier, for example, had a reasonable expectation that materials used were reasonably fit for their particular purpose (because, eg, they were obtained from a reputable supplier) there would be no liability under s 74(2). The supplier's liability for defective materials under s 74(1) is absolute.

with problems of artificially classifying types of transactions, and underpinning these classifications with definitions that are ultimately found to be uncertain in their application. It should abandon its quest for a perfect definition of consumer in contradistinction to other acquiring entities. Rather, all transactions should be regarded as consumer ones. All suppliers, be they manufacturers, wholesalers or retailers and all acquirers be they manufacturers, wholesalers, retailers or simply acting in a private capacity should therefore be subject to, and the beneficiaries of, the provisions of Division 2 and section 68.[91]

As well as eliminating the current definitional uncertainty, this measure would reduce the complexity of the relevant part of the Trade Practices Act 1974 (Cth). It would also put an end to the continuing debate about the need for the protection of small business, how small a business must be to qualify as a 'small business', etc. Law and society have evolved to the extent that the implied terms need to be applied in every contract, regardless of the size and nature of the contracting parties. Whether they ultimately form part of a particular contract should depend on all the circumstances of the transaction and not on the classification of the acquirer.

91. Manufacturers should be subject to the provisions of Div 2A, minus the qualification on the type of goods.