Piper Alderman

Consumer guarantees under the ACL – some key changes

On 1 January 2011, the name of the Trade Practices Act 1974 (TPA) will change to the Competition and Consumer Act 2010 (CCA). The CCA contains the new Australian Consumer Law (ACL), which has been described as "the most comprehensive changes to the Trade Practices Act since its inception in 1974."Included in those changes is the replacement of the existing implied terms regime with a new Consumer Guarantees regime. Dispute Resolution Lawyer Stephen Morrissey discusses two of the key changes.

On 12 March 2009, the Australian government announced that a review of the Australian law of implied conditions and warranties would be undertaken by the Commonwealth Consumer Affairs Advisory Council (CCAAC). On 26 July 2009, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Emerson MP, released an Issues Paper on behalf of the CCAAC, which examined the adequacy of the existing laws on implied conditions and warranties and the need, if any, for amendments to the existing law.

The CCAAC received some 33 written submissions in response to the Issues Paper, whilst at the same time conducting discussions with various interested parties, as well as the New Zealand Minister of Consumer Affairs, in respect of the adequacy of the existing implied terms regime.

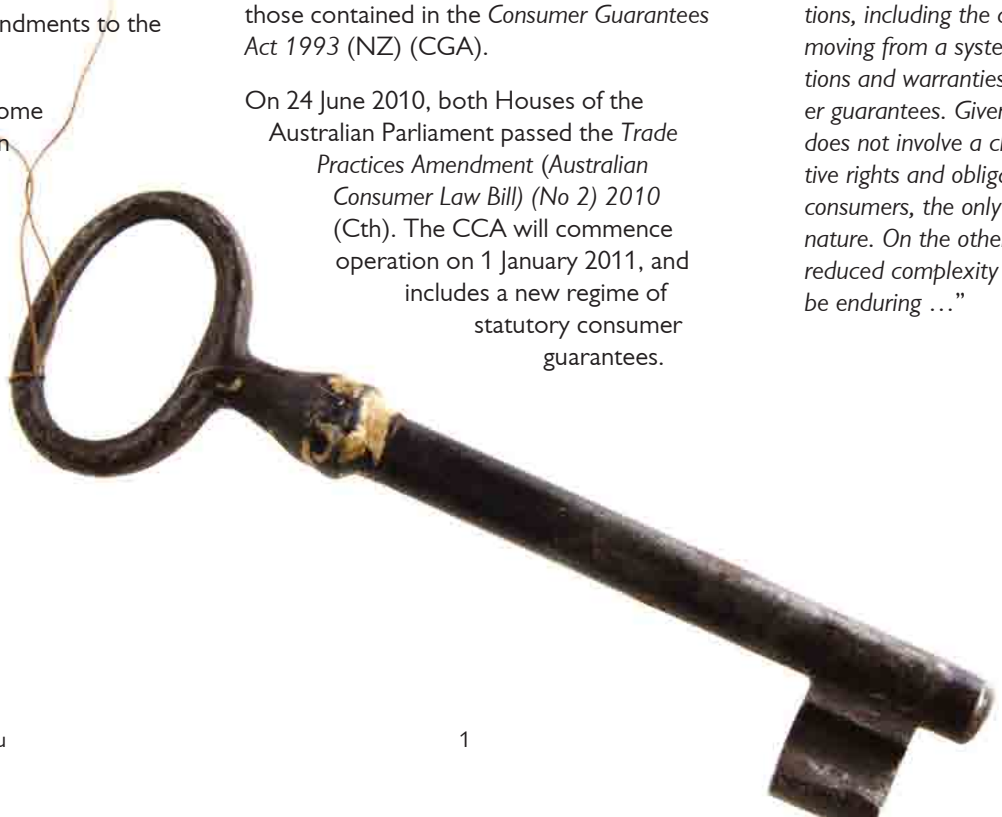
This process culminated with the release of the CCAAC's report, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*, on 30 October 2009.

In order to clarify the law, the CCAAC recommended that the existing implied terms regime be replaced with a new statutory scheme that stands independently of the law of contract. It recommended that the new scheme include a single set of statutory guarantees in similar terms to those contained in the *Consumer Guarantees Act 1993* (NZ) (CGA).

On 24 June 2010, both Houses of the Australian Parliament passed the *Trade Practices Amendment (Australian Consumer Law Bill) (No 2) 2010* (Cth). The CCA will commence operation on 1 January 2011, and includes a new regime of statutory consumer guarantees.

The Explanatory Memorandum to the second reading of the *Trade Practices Amendment (Australian Consumer Law Bill) (No 2) 2010* (Cth) describes the basis upon which the Regulatory Impact Statement was prepared in relation to the replacement of the implied conditions and warranties with consumer guarantees:

> "*The RIS discusses the impact of implementing the [Commonwealth Consumer Affairs Advisory Council] recommendations, including the costs and benefits of moving from a system of implied conditions and warranties to statutory consumer guarantees. Given that the proposal does not involve a change in the substantive rights and obligations of businesses or consumers, the only cost is transitional in nature. On the other hand, the benefits of reduced complexity and uncertainty will be enduring …*"



According to the Explanatory Memorandum, compliance costs for businesses are expected to be reduced under a national system of consumer guarantees, as compared to the existing laws that imply conditions and warranties which vary slightly across each jurisdiction in Australia.

Implied conditions and warranties (which are currently contained in some 17 separate pieces of legislation across Australia) are thought to be difficult for both consumers and business to understand. This leads to confusion, an increased number of disputes and increased compliance and enforcement costs.

The Consumer Guarantees regime

The Consumer Guarantees regime contained in Ch 3, Part 3-2, Div 1 of the ACL creates a number of minimum standards or obligations (known as "guarantees"), which apply where goods or services are supplied to a consumer. These guarantees replace the statutory implied conditions and warranties contained in the repealed Part V, Div 2 of the TPA and the various State and Territory Fair Trading Acts. It is unclear, at this stage, as to what will become of the various Sale of Goods Acts. If the implied terms provisions of the Sale of Goods Acts are not repealed, this will inevitably frustrate a fundamental aim of the ACL, being the reduction of complexity for consumers and businesses.

Two significant changes introduced by the ACL Consumer Guarantees regime are particularly noteworthy:

1. The replacement of the implied condition of "merchantable quality" with the guarantee of "acceptable quality", and

2. The replacement of contract-based remedies with statute-based remedies.

Acceptable quality

The intended benefit of the replacement of the implied condition of 'merchantable quality' with the guarantee of 'acceptable quality' is described in a submission to the Senate Economics Legislation Commission by L. Griggs as follows:

> "*...the introduction of the term 'acceptable quality', [and] the extinction of the antiquated phrase 'merchantable quality' and the statutory definition associated with acceptable quality to include appearance, finish, safety and durability, should lead, at the substantive level to a level of legal protection that consumers would reasonably expect*. "

The guarantee of 'acceptable quality' under section 54 of the ACL is in the following terms:

"54(1) [**Guarantee that goods are of acceptable quality**] if:

a) a person supplies, in trade or commerce, goods to a consumer

b) the supply does not occur by way of sale by auction.

(2) [**Definition: acceptable quality**] Goods are of *acceptable quality* if they are as:

a) fit for all purposes for which goods of that kind are commonly supplied

b) acceptable in appearance and finish

c) free from defects

d) safe

e) durable,

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).

(3) [**Relevant matters**] The matters for the purposes of subsection (2) are:

a) the nature of the goods

b) the price of the goods (if relevant)

c) any statements made about the goods on any packaging or label on the goods

d) any representation made about the goods by the supplier or manufacturer of the goods

e) any other relevant circumstances relating to the supply of the goods."

What a reasonable consumer can expect from goods in terms of 'acceptable quality' varies based on the factors set out in subsection 54(3).

For example, the appearance and durability that a reasonable consumer would expect of a 5 year old washing machine would be of a much lower standard than would apply to a new washing machine.

However, as price is a relevant consideration, goods which may appreciate with age, such as vintage motor vehicles, may still be held to a high standard despite their age.

Statutory remedies

The remedies applicable to the Consumer Guarantees regime are set out in section 259 of the ACL. Under the current system of implied conditions and warranties, businesses and consumers require an understanding of remedies under the law of contract in order to effectively enforce their rights. The introduction of statute-based remedies is intended to reduce complexity and costs for businesses and consumers in this regard.

The ACL envisages that a consumer's primary remedy will vest against the person who supplied the goods, however, the ACL provides that a consumer may also seek a remedy directly from the manufacturer of the goods. This, according to an article by S. Corones in the QUTLJJ, prevents suppliers and manufacturers from playing the "blame game" in order to avoid liability.

The remedies available depend on whether a fault constitutes a "major failure" within the meaning of section 260 of the ACL. If a "major failure" occurs, which cannot be remedied within a reasonable time, the consumer can either reject the goods and get a refund or replacement, or keep the goods but ask for compensation to make up the difference in value caused by the failure. If the failure to comply with the guarantee can be remedied and is not a "major failure" within the meaning of section 260, the consumer may require the supplier to remedy the failure within a reasonable time.

In all cases, that is, whether or not a "major" failure has occurred, a consumer has an additional right to sue for damages for consequential loss.

It is important to note that, unlike the existing implied terms regime, these statutory causes of action arise independently of the law of contract.

Whether or not the statute-based remedies will, in fact, reduce complexity for consumers and businesses, it is at this stage unclear. Arguably, the "major failure" concept under the ACL is just as complex and confusing as the condition-warranty distinction which exists under the implied terms regime, if not more so.

Practically speaking, the introduction of the "major failure" concept may result in limiting a consumer's right to reject goods, in circumstances where he or she may well have done so under the existing implied terms regime. In this regard, the ACL may, in effect, deprive consumers of the only right about which they are truly concerned: the right to reject defective goods.

Company administrators, be warned: Seeking review of capped remuneration

Under section 449E(2) of the Corporations Act 2001 (Cth), the Court may review the remuneration of the administrator of a company on the application of the administrator. In the recent decision of Paul's Retail Pty Ltd v Morgan, the New South Wales Court of Appeal considered the issue of whether an administrator could be precluded from access to the abovementioned statutory provision for the review by the Court of remuneration already determined. Special Counsel, Malcolm Quirey and Dispute Resolution Lawyer, Garrett Williams review the decision.

The Facts

The Respondent (Mr Morgan) was the administrator of the First Applicant (Paul's Retail). The Second Applicant (Mr Dwyer) was the sole shareholder and sole director of Paul's Retail.

At the second creditors' meeting, resolutions were passed so as to ensure Mr Morgan's remuneration was capped. Prior to those resolutions being made, Mr Morgan had a conversation with Mr Vouris, an experienced insolvency practitioner hired by Mr Dwyer (and thus representing him), in which Mr Morgan had said words to the effect of "I will agree to fix my fees" and "I will agree to…cap my fees for future work".

Unexpectedly, the latter stages of administration became more time-consuming and, at subsequent meetings, Mr Morgan attempted to increase the cap. There was no seconder for the motions and they were defeated.

The Decision

The Court of Appeal held that the capping of an administrator's remuneration does not preclude the administrator seeking review of the remuneration so capped, although the cap must be taken into account in determining whether the remuneration is reasonable.

The Court also held that Mr Morgan was not estopped from seeking a review of his remuneration. Because the conversation was between two insolvency practitioners and, by reason of their positions, they both understood that a cap on remuneration could be subject to review, there were no grounds for estoppel.

What this means for you?

An administrator does not forfeit access to the remuneration review process simply because the quantum of remuneration has been capped. Nevertheless, it is imperative that administrators take care when negotiating or offering to fix their fees that they do not create an impression that a cap is final so as to create grounds for estoppel.

So as to avoid being estopped from invoking the remuneration review process set out in section 449E(2), administrators should not make any clear statements or representations to creditors that they will not seek to increase their remuneration above an agreed cap.

Record $14 million penalty for misuse of market power: *ACCC v Cabcharge*

The Federal Court has imposed a record penalty for misuse of market power, after the Respondent (Cabcharge) settled with the Applicant (ACCC) and was fined $14 million for contravening section 46 of the Trade Practices Act (TPA), as Special Councel, Malcolm Quirey and Dispute Resolution Lawyer, Garrett Williams, explain.

The Facts

Cabcharge is an ASX listed company and provides a number of services, including non-cash payment processing systems for taxi fares, payment processing systems for taxis and taxi meters.

The ACCC contended that Cabcharge breached section 46 of the TPA (the abuse of market power provision) by refusing to deal with certain firms and by engaging in predatory pricing.

Cabcharge did not deny having engaged in a number of the alleged contraventions, which included:

- Refusal by Cabcharge to allow competing suppliers of electronic payment processing services for taxis to process Cabcharge branded non-cash payment products, and
- Below-cost supply of Cabcharge taxi meters and associated fare schedule updates for an anti-competitive purpose.

The ACCC sought declarations of the above contraventions, the imposition of pecuniary penalties, a probation order that would require Cabcharge to establish a compliance program and a contribution to its costs.

The Penalty

Justice Finkelstein made declarations for each of the admitted contraventions of section 46 and ordered Cabcharge pay a pecuniary penalty of $14 million, allocated as follows:

- $9 million for refusing to deal with Mpos Australia Pty Ltd
- $2 million for refusing to deal with Travel Tab Australia Pty Ltd
- $3 million for predatory pricing between 2004 and 2007.

The parties agreed that Cabcharge ought to pay $1 million of the ACCC's costs of and incidental to the proceeding.

The Court also made an order requiring Cabcharge to implement a trade practices corporate compliance program at its own expense for 3 years.

What this means for you

This case clearly shows the ACCC's determination to seek substantially higher penalties for breaches of the TPA.

The record penalty imposed in this case is likely to revive the ACCC's desire to pursue section 46 claims arising out of unilateral conduct. Therefore, companies with significant market power should ensure that organisational structures are put into practice so as to minimise the risk of being found to have used its position for an anti-competitive purpose.


BUS
TAXI

Contact us

Sydney

Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
t + 61 2 9253 9999
f + 61 2 9253 9900

Melbourne

Level 24
385 Bourke Street
Melbourne VIC 3000
GPO Box 2105
Melbourne VIC 3001
DX 30829, Collins Street
t + 61 3 8665 5555
f + 61 3 8665 5500

Brisbane

Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
t + 61 7 3220 7777
f + 61 7 3220 7700

Adelaide

167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
t + 61 8 8205 3333
f + 61 8 8205 3300

enquiries@piperalderman.com.au
www.piperalderman.com.au