

When is Software a good?

Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd [2010] NSWSC 267

By James North and Johanna O'Rourke

James North is a Partner at Corrs Chambers Westgarth whose areas of practice include telecommunications, outsourcing, IT and strategic procurement contracting.

Johanna O'Rourke is a Senior Associate at Corrs Chambers Westgarth who practises in technology and intellectual property law and specialises in e-commerce, information technology, copyright, IT outsourcing and business process outsourcing transactions.

Who does this affect?

Consumers and businesses purchasing and supplying software through internet download delivery.

What does this mean for you?

- Software downloaded over the internet is not a good for the purposes of the Sale of Goods Act.
- The implied warranty that the software will be fit for purpose will not apply to software downloaded off the internet.
- There are currently no proposals to amend the Sale of Goods Act.
- The recently amended Australian Consumer Laws deem software to be a good under the Trade Practices Act 1974 (Cth) however the Trade Practices Act will not provide protection in all business transactions.

The New South Wales Supreme Court has recently clarified that software purchased and downloaded from the internet will not attract any implied warranties under the *Sale of Goods Act 1923* (NSW).

Curiously, it may seem that more caution must be taken by consumers and businesses when purchasing and downloading software online than when purchasing software in a tangible form. Accordingly, until parliament decides to tackle this anomaly and remove distinctions between the supply of what is essentially the same product delivered through different means, those purchasing software online by way of a digital download will need to ensure that they are adequately protected through online agreement terms and conditions.

The Case

Comrad Medical Systems Pty Ltd (**Comrad**) provided a software package designed to assist health care providers in managing patient registration, appointment, referral and Medicare claim services. Gammasonics, a provider of radiology services, purchased the software through a remote internet download onto its computer server. Gammasonics later repudiated the contract on the basis that Comrad had failed to:

- deliver a functioning software package;
- provide goods of a merchantable quality; and
- provide software fit for its intended purpose.

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Comrad successfully sued Gammasonics for damages resulting from Gammasonics repudiation of the contract in the local court.

Gammasonics appealed that decision in the Supreme Court of NSW on the basis that Comrad's software package was a "good" covered by the *Sale of Goods Act 1923* (NSW) (the **Sale of Goods Act**) and that it had validly terminated the contract with Comrad for Comrad's breach of the Sale of Goods Act's implied warranties to provide goods of merchantable quality that are fit for their intended purpose.

Decision

Justice Fullerton dismissed Gammasonics' appeal and ordered it pay Comrad's costs. In doing so, her Honour canvassed cases which considered software as a "good" including the NSW Supreme Court decision *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48, which held software, in the context of computer systems comprising of both hardware and software, is a "good" under the Sale of Goods Act. Her Honour also referred to a decision of the

United States Court of Appeals Third Circuit in *Advent Systems Ltd v Unisys Corp* (1991) 925 F 2d 670 that considered whether software should be classified "goods" under the Uniform Commercial Code, that distinguished software, as a computer program as a form of intellectual property from those placed on a disc or other medium making it tangible and "available in the marketplace".

Her Honour determined that the software was not a "good" and did not attract the implied warranties for goods under the Act as the software was purely in an electronic format on delivery, not on a physically tangible and moveable medium.

The judgment fell short of making software automatically covered by the Sale of Goods Act's implied warranties by mere virtue of it being in physical form capable of possession and rejected the notion that software did not cease to be a "good" merely because it is not "available in the marketplace".

What does this mean?

Consumers and businesses purchasing software or other online content will not benefit from the protection available under the Sale of Goods Act while those purchasing and receiving delivery of software through tangible means (eg on a CD, USB or other device) may.

As to the element of the judgment that the fell short of stating that software will be a "good", the new Australian Consumer Law which amended the Trade Practices Act as of 13 July 2010, expressly recognises computer software as a good in the amendment to the definition of "Good" in the Trade Practices Act. However, this will only protect consumers purchasing "goods and services ordinarily acquired for personal, domestic or household use or consumption" or those making acquisitions valued at \$40,000 or less.

That said, these amendments are inadequate protection for businesses downloading purchased software. As recognised by Justice Fullerton in her judgment, this is a legislative matter to be dealt with to ensure that consumers are protected for purchasing such products without discrimination between delivery methods. Accordingly, businesses will need to use contractual terms to obtain the protection that they require in terms of warranties and ensure that proper specifications and requirements of the software are specified in the software contract.