

# CONSUMER LAW REFORM IN AUSTRALIA: CONTEMPORARY AND COMPARATIVE CONSTRUCTIVE CRITICISM

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*Nation-wide consumer law reform has finally emerged on Australia's legislative agenda. This article first introduces some broader context, advocating a comparative perspective that allows Australia to re-harmonise based on emerging global standards. Part II focuses on additional duties to notify regulators of serious product-related accidents. Part III presents a comparative analysis of new rules governing unfair terms for consumer contracts. Part IV responds to the Review of Statutory Implied Conditions and Warranties. Part V concludes with a response to the parallel reform underway for a National Consumer Credit Protection Act.*

After a long lapse, nation-wide consumer law reform has emerged on Australia's legislative agenda. The main aim is to re-harmonise consumer law around federal legislation (the *Trade Practices Act 1974* (Cth) or 'TPA'), updated for 'best practice' developments in State laws (mainly Fair Trading Acts) so that the states then 'apply' the revised federal legislation as State law. There would also be greater centralisation of enforcement powers, and a new nation-wide licensing regime specifically for consumer credit – a hot topic again along with broader reforms to financial markets regulations following the global financial crisis.

Such initiatives are a major step forward to Australia, which over the last decade has slipped from 'leader' to 'laggard' in substantive consumer law and its enforcement or redress mechanisms. However, it is essential that the current concerted effort reforms the system based on *global* best practice. Part I of this article therefore begins by introducing some broader background to Australia's current reform efforts.

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Part II then highlights, in particular, the need for Australia to join our major trading partners nowadays in requiring suppliers to notify regulators of serious consumer product related accidents. This responds to the government's February 2009 Consultation Paper proposing an 'Australian Consumer Law', also included in the more wide-ranging submission by the Consumer Law Roundtable.<sup>1</sup>

Part III presents a comparative analysis of new rules governing unfair terms for consumer contracts proposed, along with some other reforms including enforcement provisions, in the Trade Practices Amendment (Australian Consumer Law) Bill as presented to Parliament in June 2009.<sup>2</sup> That already differed significantly from the Exposure Draft included in the government's May 2009 Consultation Paper, and the government made changes to the Bill in October 2009 as well as deferring its proposed implementation from 1 January to 1 July 2010. The Australian Consumer Law proposals remained quite similar to a 1993 European Directive, but potentially less expansive than Japan's *Consumer Contracts Act* 2000.

Part IV responds to the Commonwealth Consumer Affairs Advisory Council's *Review of Statutory Implied Conditions and Warranties*, announced in July 2009.<sup>3</sup> One major argument is that at least some firms, for major problem products like whitegoods, should be required to restate in their written standard-form contracts at least the basic statutory warranties of merchantability and fitness for purpose. Choice, Australia's peak consumer non-governmental organisation (NGO), also recommends in its Fair Warranty Charter that such warranties be displayed at the point of sale, and it is encouraging members and the public to petition major retailers to adopt the Charter.<sup>4</sup> A second argument is to encourage groups like Choice and regulators themselves to bring 'test cases' on behalf of consumers when the statutory warranties are breached. We should also consider allowing regulators to impose sanctions if they are breached regularly or seriously. These could be escalating sanctions triggered beyond a certain level of claims, settlements or judgments. For example, sanctions could begin with warnings, then list repeat offenders online, then require firms to undertake TPA compliance programs, and finally involve monetary or other penalties.

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<sup>1</sup> Available via <<http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1484>> at 21 August 2009. On 16 November 2009 the government announced a further *Consultation Regulatory Impact Statement - Australian Consumer Law - Best Practice Proposals and Product Safety Regime*, available via <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1665>> at 1 December 2009. However the points made in part II remain valid, as explained in the author's submission on that consultation available also via <<http://blogs.usyd.edu.au/japaneselaw/lnot8458.html>> at 1 December 2009.

<sup>2</sup> Available via <[http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_consumer\\_law\\_09/index.htm](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_09/index.htm)> at 21 August 2009. For a brief update on subsequent developments regarding this reform proposal, and the consumer credit proposals described in part V of this article, see J Redfern, *Regulatory Update: Consumer Credit, Termination Payments and Unfair Contracts* (2009) Sparke Helmore Lawyers <[http://www.sparke.com.au/sparke/news/publications/regulatory\\_update\\_consumer\\_credit\\_terminati\\_on\\_payments\\_and\\_unfair\\_contracts.jsp](http://www.sparke.com.au/sparke/news/publications/regulatory_update_consumer_credit_terminati_on_payments_and_unfair_contracts.jsp)> at 1 December 2009. For more details on Japan's consumer contracts legislation and case law, see L Nottage, 'Consumer Rights' in P Haghairian (ed), *Japanese Consumerism* (forthcoming 2010).

<sup>3</sup> *CCAAC Review of Statutory Implied Conditions and Warranties* (2009) Australian Government: The Treasury <<http://www.treasury.gov.au/contentitem.asp?ContentID=1521&NavID=037>> at 21 August 2009.

<sup>4</sup> See *Your Legal Rights to a Warranty* (2010) Choice <<http://www.choice.com.au/Consumer-Action/Money-and-rights/Warranties/Warranty-rights-and-wrongs/page/Join%20our%20campaign.aspx>> at 26 February 2010.

Part V responds to the parallel reform underway for a *National Consumer Credit Protection Act*.<sup>5</sup> One key recommendation again lies in the crucial enforcement and redress stage, often overlooked in consumer law reform initiatives.<sup>6</sup> In particular, there is a need to improve certain aspects of industry-association based ‘ombudsman’ schemes. A second recommendation is to impose a duty on consumer credit suppliers to report to regulators when their services and/or marketing lead to abnormally serious outcomes for their customers (eg suicides or bankruptcies). This parallel to the duty on consumer product suppliers (proposed in part II) will provide early warnings and better information to regulators (and indirectly to consumers), essential to ‘responsive regulation’.<sup>7</sup>

The points raised in this article traverse many areas of consumer law, and are more normative than descriptive. This reflects the wide-ranging reform proposals on which the government has sought public comment since February 2009. And a theme reiterated throughout this article is the importance for Australia to keep undertaking broader comparative theoretical and empirical research into consumer law and policy. The government should be commended for updating the federal consumer law core in light of best practice developments in the states, for them then to apply nation-wide, but it also needs to monitor global developments that may not yet even be reflected in State law. To that end, responding to another Treasury consultation recently about consumer policy research and advocacy, Consumer Law Roundtable members have also proposed the establishment of the Australian Consumer Research Network (ACReN).<sup>8</sup>

## I AUSTRALIA’S LETHARGIC LAW REFORM: HOW (NOT) TO REVIVE CONSUMER SPENDING

In March 2009 the former Chair of the Australia Competition and Consumer Commission (ACCC), Professor Allan Fels, co-authored a column for the *Sydney Morning Herald* entitled ‘Rudd’s Consumer Activism Over the Top’.<sup>9</sup> Their title is misleading, although they raise some good points in response to Treasury officials’

<sup>5</sup> See the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) and related information available via <<http://www.treasury.gov.au/consumercredit/content/legislation.asp>> at 21 August 2009.

<sup>6</sup> L Nottage, ‘Consumer ADR and the Proposed “Consumer Law” in Australia: Room for Improvement’ (2009) *Sydney Law School Legal Studies Research Paper* No 09/10 <<http://ssrn.com/abstract=1370106>> at 24 February 2010; with an abridged and revised version published in this special issue.

<sup>7</sup> I Ayres and J Braithwaite, *Responsive Regulation* (Oxford University Press, 1992). See also L Nottage, ‘Shohiseikatsuyohin no ototeki Saikisei - Osutoraria to Nihon ni okeru Hado-ro to Sofutoro’ (2006) 7 *Soft Law Kenkyu* 111, based on: ‘Responsive Re-regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan’ (2006) *COESOFTLAW-2006-5 University of Tokyo Soft Law COE Discussion Paper* <<http://www.j.u-tokyo.ac.jp/coelaw/COESOFTLAW-2006-5.pdf>> at 21 August 2009.

<sup>8</sup> See C Bowen, *Consumer Voices: Sustaining Advocacy and Research in Australia's New Consumer Policy Framework* (2009) Australian Government: The Treasury <<http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1532>> at 21 August 2009; and *ACReN: Australian Consumer Research Network* <<http://acren.wordpress.com/>> at 22 February 2010.

<sup>9</sup> A Fels and F Brenchley, ‘Rudd’s Consumer Activism Over the Top’, *Sydney Morning Herald* (Online), 20 March 2009, <<http://business.smh.com.au/business/rudds-consumer-activism-over-the-top-20090320-94e0.html>> at 21 August 2009.

February 2009 consultation paper.<sup>10</sup> On its own terms – let alone compared to developments over recent years in the EU, Japan, and soon Canada – the paper and the Australian governments' current proposals remain quite a disappointment for Australian consumers.

Yet now should be a perfect opportunity, however belatedly, to implement a better consumer regulatory framework and thereby revive consumer trust. After all, partly through cash handouts to consumers, Australia is trying to spend its way out of a huge recession, itself caused (or at least exacerbated) by regulatory failures and increasingly blind faith in improperly regulated markets.

Fels does remark: 'Consumer activism by politicians is no bad thing. Consumer policy was understated in the Howard era'. And he should know, since he ran the ACCC from 1993 until 2005. But former PM Howard's Treasurer did eventually kick off the reform debate by getting the Productivity Commission (PC) to investigate improvements in Australia's consumer product safety regulation (2005 – February 2006),<sup>11</sup> and then consumer law and policy more broadly (2007 – April 2008).<sup>12</sup> A year after the latter, the Rudd government was still at the stage of a 'Consultation Paper' – proposing a more harmonised regime nation-wide to come into effect only from 2011. Australia's Constitution means that responsibility for consumer law is shared between federal and State governments, but this timeframe does not seem very 'activist'.

Further, the consultation paper highlights one aspect of the PC's recommendations: reducing transaction costs through harmonisation. This was a major component of the PC's estimate that reforming consumer law could generate net economic benefits of A\$1.5-4.5 billion. There are certainly major benefits from simplification. Accumulated legislation and case law creates a legal morass.<sup>13</sup> In addition, the consultation paper does propose 'trading up':<sup>14</sup> using the TPA as the template nation-wide, but updating it for 'best practice' developments enacted in State Fair Trading Acts since the late 1980s. For example, the paper proposes a nation-wide version of Victoria's regime to control proliferating unfair contract terms, in force since 2003 but based on a European Directive dating back to 1993 (part III below).

Yet the consultation paper seems to be re-opening a debate about the contours of such controls that should have been settled by the PC's Inquiry. The EU model is working

<sup>10</sup> Australian Government - The Treasury, *An Australian Consumer Law: Fair Markets - Confident Consumers – Consultation Paper* (2009) <<http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1484>> at 21 August 2009.

<sup>11</sup> Australian Government - Productivity Commission, *Review of the Australian Consumer Product Safety System: Research Report* (2006) <<http://www.pc.gov.au/projects/study/productsafety/docs/finalreport>> at 21 August 2009.

<sup>12</sup> Australian Government - Productivity Commission, *Review of Australia's Consumer Policy Framework: Inquiry Report* (2008) <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>> at 21 August 2009. See generally L Griggs, 'Productivity Commission, Review of Australia's Consumer Policy Framework: Cautiously Moving Forward' (2008) 16 *Competition and Consumer Law Journal* 137.

<sup>13</sup> See J Kellam and L Nottage, 'Happy 15<sup>th</sup> Birthday, Part VA TPA! Australia's Product Liability Morass' (2007) 15 *Competition and Consumer Law Journal* 26, <<http://ssrn.com/abstract=988595>> at 24 February 2010; and their 2008 updates to the CCH *Australian Sales and Fair Trading Reporter* looseleaf/online service.

<sup>14</sup> Compare with generally D Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1995).

well, so is the Victorian variant, and Japan's *Consumer Contracts Act 2000* is also making a significant difference. Why does Australia feel the need continually to reinvent the wheel?<sup>15</sup> There is a real risk that the wheel we end up with will not be 'fit for purpose'.

An even bigger problem lies in the consultation paper's focus on harmonising nationally, rather than internationally. For example, it omits any reference to recommendations by the PC (in 2006, and again in 2008) to require suppliers to notify regulators about serious product related accidents. Yet another EU Directive enacted this duty in 2001, Japan added a variant in 2006, and another is currently before the Canadian Parliament. The US has also had stricter rules since 1990, even though the uniquely high levels of product liability claims quickly inform the public of potential safety risks anyway. So here is a global standard, which Australia should be catching up to (part II below). If this does not happen in the present round of reforms, it probably cannot be achieved for another decade.

Anyway, Australian exporters to the EU, Japan, or Canada are increasingly likely to be required to monitor and report safety risks, under contracts with importers in those countries who themselves have reporting requirements to their own regulators. Why shouldn't Australian exporters also disclose such information to Australian regulators? If the latter collaborate, informally or preferably formally, with regulators abroad, this could even directly assist exporters who take product safety risks seriously. Even Fonterra's voluntary disclosure to the New Zealand government in 2008 belatedly helped to address the Sanlu milk products disaster in China.<sup>16</sup>

So Australia should at least 'trade up' in its consumer law to meet current global standards, not just local ones. But the nation should also push the envelope and help create some new global standards – as it helped do with its TPA, back in the 1970s. Fels highlights the consultation paper's proposal to concentrate power over consumer credit regulation in Canberra, suggesting that the ACCC should be the regulator rather than the Australian Securities and Investment Commission (ASIC) ('with its noted lack of consumer zeal to date'). However, of greater interest are some new *substantive* rules (part V below). Australia definitely needs nation-wide 'suitability rules' for at least some types of consumer credit – unsecured or secured – which require lenders to assess borrowers' ability to repay. Japan enacted such rules in 2006, and similar protections are increasingly available for investors in other financial products world-wide. But why not try a 'world-first' – requiring suppliers of unsecured credit to inform regulators when their products are linked to abnormally high levels of financial distress (insolvencies, even suicides)? After all, an explosion of unsecured consumer lending

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<sup>15</sup> L Nottage, *A New Consumer Agency for Japan? Consumer Redress, Contracts and Product Safety* (2008) East Asia Forum <<http://www.eastasiaforum.org/2008/10/30/a-new-consumer-agency-for-japan-consumer-redress-contracts-and-product-safety/>> at 22 August 2009. On the EU and Victoria 'law in action', see also F Zumbo, 'Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria' (2007) 13 *Trade Practices Law Journal* 84.

<sup>16</sup> L Nottage, *Consequences of Melamine-Laced Milk for China, NZ, Japan and Beyond* (2008) East Asia Forum <<http://www.eastasiaforum.org/2008/10/14/melamine-laced-milk-in-china-nz-japan-and-beyond/>> at 22 August 2009.

was linked in the US and elsewhere to booms (and now busts) in home mortgage lending, property prices, securitisation and other markets.<sup>17</sup>

Instead, the Australian government seems to be losing sight of the bigger picture. It took a long time for public debate to emerge, for example, about the grant of at least A\$14 000 handed out to first home buyers. In January 2009, such grants accounted for 26.5 per cent of the A\$8 billion in new home lending. But the CEO of the Commonwealth Bank has now drawn a parallel with the US subprime housing loans debacle that triggered the current global crisis, pointing out that: ‘All of us have to make sure we’re lending responsibly to first-home buyers’.<sup>18</sup> It is certainly tempting for governments to try anything in the short term to revive spending, including such measures to make credit *more* readily available. Yet a key lesson from the present economic debacle is worth remembering. Market participants often suffer from ‘over-optimism bias’ and other irrational impulses, as well as raw greed, which can lead to enormous and widespread adverse consequences over the long term.<sup>19</sup>

Lastly, if the Rudd government really wants to be ‘activist’, it should indeed also consider – as Fels points out – ‘creating a separate consumer agency’<sup>20</sup>. Once again, Australia does not need to reinvent the wheel; a similar debate has recently taken place in Japan, for example.<sup>21</sup> A separate agency might help generate more comprehensive, careful and expeditious ongoing reforms to Australia’s consumer law – now in mid-life crisis. Policy-makers must respond to the current economic meltdown with more innovative and energetic proposals that promise long-term socio-economic benefits, not just short-term ones.

## II PRODUCT SAFETY REGULATION IN THE NEW *AUSTRALIAN CONSUMER LAW*

In the February 2009 consultation paper developed by the Standing Committee of Officials of Consumer Affairs (SCOCA),<sup>22</sup> chapter 8 on ‘A national regulatory regime for product safety’ (contained in part II – ‘Agreed Reforms’) begins:

In May 2008, [Ministerial Council on Consumer Affairs (MCCA)] agreed to a new model for the regulation of product safety in Australia. This model was endorsed by COAG at its July 2008 meeting. The new model will be underpinned by national application legislation.

The Council of Australian governments communiqué of 3 July 2008 mentions only that:

<sup>17</sup> L Nottage, *Consumer Over-Indebtedness in Japan, Australia and the US* (2008) East Asia Forum <<http://www.eastasiaforum.org/2008/07/08/consumer-over-indebtedness-in-japan-australia-and-the-us/>> at 22 August 2009.

<sup>18</sup> Cited in D John, ‘Pros and Cons of Granting a Fiscal Favour’, *Sydney Morning Herald* (online), 21 March 2009, <<http://business.smh.com.au/business/pros-and-cons-of-granting-a-fiscal-favour-20090320-94eg.html>> at 22 August 2009.

<sup>19</sup> See also now I Verrender, ‘Feeling Woozy from a Decade Out on the Town’, *Sydney Morning Herald* (online), 8 August 2009, <<http://business.smh.com.au/business/feeling-woozy-from-a-decade-out-on-the-town-youre-not-alone-20090807-ed05.html>> at 22 August 2009.

<sup>20</sup> Above n 9

<sup>21</sup> Nottage, *A New Consumer Agency for Japan? Consumer Redress, Contracts and Product Safety*, above n 15.

<sup>22</sup> Australian Government: The Treasury, *An Australian Consumer Law*, above n 10.

COAG today took a significant step in streamlining the processes associated with ensuring the safety of consumer products. COAG has agreed that the Commonwealth will assume responsibility for the making of permanent product bans and standards under the *Trade Practices Act 1974*. States will retain powers to issue interim product bans.<sup>23</sup>

The Ministerial Council on Consumer Affairs (MCCA) communiqué of 23 May 2008 adds to this:

- The Australian Competition and Consumer Commission and the State and Territory offices of fair trading will share responsibility for enforcement of the product safety law.
- Any jurisdiction may refer a proposal for a permanent ban or standard to the ACCC and there will be requirements for the ACCC to communicate its assessment to the Commonwealth Minister and to MCCA.<sup>24</sup>

The next section of the MCCA communiqué, entitled 'Review of Australia's Consumer Policy Framework', appears to commit the Ministers to developing a new nation-wide regime based generally on the March 2008 final report of the PC, while undertaking further assessment (through SCOCA) and stakeholder consultation regarding its specific features. However, this section does not clearly commit to implementing even all the recommendations contained in the PC's final report regarding consumer product safety. Nor does the 17 February 2009 consultation paper pick up on all those original recommendations.

In particular, the PC's final Report had stated (emphasis added):

Recommendation 8.2

*Consistent with the recommendations in the Productivity Commission's Review of the Australian Consumer Product Safety System [2006], Australian Governments should:*

- develop a hazard identification system for consumer product incidents;
- introduce mandatory reporting requirements for voluntary product recalls; and
- *require suppliers to report products associated with serious injury or death or products which have been the subject of a successful product liability claim or multiple out-of-court settlements.*

...

Recommendation 8.3

*Drawing on the mechanisms proposed in recommendation 8.2 and on the baseline study examining product related accidents prepared for the Ministerial Council on Consumer Affairs, Australian Governments should monitor trends in product safety, including any impacts of the civil liability reforms, with a view to assessing whether the incentives to supply safe products continue to be adequate.*<sup>25</sup>

<sup>23</sup> Council of Australian Governments, *Communique* (2008) 3 <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/docs/communique20080703.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/communique20080703.pdf)> at 22 August 2009. Regrettably, the COAG website does not yet have any subject heading for 'consumer law' or 'consumer product safety': compare with *Subject Index* (2009) Council of Australian Governments <[www.coag.gov.au/coag\\_meeting\\_outcomes/issues\\_by\\_subject.cfm](http://www.coag.gov.au/coag_meeting_outcomes/issues_by_subject.cfm)> at 22 August 2009.

<sup>24</sup> Ministerial Council on Consumer Affairs, *Joint Communique* (2008) 2 <[http://www.consumer.gov.au/html/download/MCCA\\_Meetings/Meeting\\_19\\_23\\_May\\_08.pdf](http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_19_23_May_08.pdf)> at 22 August 2009.

<sup>25</sup> Australian Government - Productivity Commission, *Review of Australia's Consumer Policy Framework*, above n 12, vol 2, 188 (also in summary in vol 1).

### A *Supplier's Duty to Notify if Serious Injury*

Even if the Australian governments do plan still to add into the new generic Consumer Law a notification duty on suppliers, the last bullet point in the PC's recommendation 8.2 is quite ambiguous. At first blush, it seems to envisage two duties, triggered simply by (a) knowledge of products associated with serious injury or death, *and* (b) products involved in a successful product liability claim or multiple settlements. But this recommendation is supposed to be consistent with the PC's 2006 review<sup>26</sup> recommendations (and in its 2008 report the PC noted that the latter 'was not a supplementary review of Australia's product safety arrangements').<sup>27</sup> The 2006 review in fact recommended a notification duty triggered by (a) knowledge of products associated with serious injury or death, *or – only 'if that should not be adopted' –* (b) products involved in a successful product liability claim or multiple settlements.<sup>28</sup>

At a minimum, Australian governments should include a duty triggered by (a) knowledge of products associated with serious injury or death, as in Japan since late 2006.<sup>29</sup> We should also consider a duty triggered when the supplier *ought to have known* about a serious product related accident, not just when it had actual knowledge. By contrast, a duty triggered solely by (b) seems pointless. There have been only a few dozen product liability judgments under part VA of the TPA since 1992 (with many proving unsuccessful anyway).<sup>30</sup> 'Tort reforms' since 2002 have further reduced personal injury filings, and hence the chance for multiple settlements.<sup>31</sup> Even a settlement, let alone a judgment, may take years to eventuate. A duty to notify should be triggered much earlier, so firms (in question and in the relevant industry), regulators and then consumers can work to prevent injury ever arising.

However, there is an argument for setting a *second* duty to notify regulators triggered by a successful product liability claim or settlement. This is because not all such cases necessarily involve personal injury. Consumers can claim under TPA part VA for example solely for consequential loss to other products ordinarily for personal or

<sup>26</sup> Australian Government - Productivity Commission, *Review of the Australian Consumer Product Safety System: Research Report*, above n 11.

<sup>27</sup> Australian Government - Productivity Commission, *Review of Australia's Consumer Policy Framework: Inquiry Report*, above n 12, 186.

<sup>28</sup> *Ibid.* See also, recommendation 9.3, discussed at 217-26. That text shows that the PC's original discussion draft had favoured (a), but by the final review it had been persuaded by submissions and further analysis that net benefits were likely to come instead from (b). Note also that the PC considered 'serious' injury to involve hospital admission. Fortunately, the Treasury's consultation on a regulatory impact statement announced on 16 November 2009 (Australian government, *Consultation Regulatory Impact Statement - Australian Consumer Law - Best Practice Proposals and Product Safety Regime*, above n 1) does propose a duty triggered by (a) and not by (b). Unfortunately, the deadline for public submissions was tight (30 November 2009) and not widely publicised (not even at <<http://www.treasury.gov.au/consumerlaw/content/consultation/default.asp>> at 1 December 2009), and many several other comparative points made in this article's part II are not reflected adequately or at all in the Treasury's paper.

<sup>29</sup> L Nottage, 'Product Liability and Safety Regulation' in Gerald McAlinn (ed), *Japanese Business Law* (2007) 221; L Nottage, 'Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?' (2008) *Yearbook of Consumer Law/Sydney Law School Legal Studies Research Paper* No 07/28 <<http://ssrn.com/abstract=986528>> at 24 February 2010.

<sup>30</sup> Kellam and Nottage, above n 13.

<sup>31</sup> Australian Government - Productivity Commission, *Review of the Australian Consumer Product Safety System: Research Report*, above n 11, recommendation 9.3 had added the requirement of a 'verifiable initiating action to commence litigation' leading to settlement.



household use. But because such liability is triggered only by an unsafe or defective product, it can also serve as an early warning signal about possible future personal injury from such a product.

There are some parallels in longstanding multiple duties to notify under s 15(b) of the *Consumer Product Safety Act* (US).<sup>32</sup> New legislation presently before the Canadian Parliament also provides for a dual notification requirement.<sup>33</sup> Under cl 14(2) of its Consumer Product Safety Bill:

A person who manufactures, imports or sells a consumer product for commercial purposes shall provide the Minister and, if applicable, the person from whom they received the consumer product with all the information in their control regarding any incident related to the product within two days after the day on which they become aware of the incident.

Clause 14(1) defines ‘incident’ to include (emphasis added):

- (a) *an occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury;*
- (b) *a defect or characteristic that may reasonably be expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury;*

Incidentally, the reporting duty on Australian suppliers should similarly extend to injuries arising outside Australia – or at least in any countries with which Australia concludes a Free Trade Agreement.<sup>34</sup>

The EU’s Product Safety Directive (revised in 2001)<sup>35</sup> offers an alternative formulation that also captures situations of both actual and likely injury. This deserves serious consideration in this country too, as it also influenced reform discussions for example in Canada. Article 5(3) of the Directive imposes a duty to notify triggered if the supplier knows *or ought to know* that there are *risks* of their products proving unsafe, as defined in art 3(2).

<sup>32</sup> As noted already in the PC’s 2006 Review, Australian Government - Productivity Commission, *Review of the Australian Consumer Product Safety System: Research Report*, above n 11, one duty is triggered if the product contains a defect which could create a substantial product hazard to consumers; another, if it creates an unreasonable risk of serious injury or death.

<sup>33</sup> Bill C-6 2009 had its first reading in the House of Commons on 29 January 2009: House of Commons of Canada, *Bill C-6 (2009)* <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3633883&Language=e&Mode=1&File=53#8>> at 22 August 2009. Only minor amendments were recommended in a report back from the Standing Committee on Health, presented 8 June 2009. It passed its third reading in the House of Commons on 12 June 2009 and in the Senate on 15 December 2009: see information including link to the Parliament’s website at Health Canada, *Bill C-6 - Canada Consumer Product Safety Act (2009)* <[http://www.hc-sc.gc.ca/cps-spc/legislation/acts-lois/bill\\_c6-loi/index-eng.php](http://www.hc-sc.gc.ca/cps-spc/legislation/acts-lois/bill_c6-loi/index-eng.php)> at 26 February 2010.

<sup>34</sup> Nottage, *Consequences of Melamine-Laced Milk for China, NZ, Japan and Beyond*, above n 16. See also L Nottage, ‘Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era’, Sydney Law School Research Paper No 09/125 (2009) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1509810](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509810)> at 22 February 2010.

<sup>35</sup> *Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety (2001)* EURLex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0095:EN:HTML>> at 22 August 2009.

## B *GSP and Regular Reviews*

Article 3(1) of that Directive goes on to require suppliers not to supply unsafe goods – a ‘general safety provision (GSP)’. The Canada Consumer Product Safety Bill also provides for a GSP. Under cl 7(a), ‘no manufacturer or importer shall manufacture, import, advertise or sell a consumer product that ... is a danger to human health or safety.’ Under cl 8(a), ‘no person shall advertise or sell a consumer product *that they know* ... is a danger to human health or safety’.<sup>36</sup>

In its 2006 review,<sup>37</sup> the PC decided that there was insufficient evidence that the benefits of imposing this extra duty outweighed its costs. Three years later, it is time for Australian governments to reconsider that view, considering many subsequent product safety failures (for example, involving goods from China) and reform debates within other major trading partners.

At the least, Australia’s new legislation should include a provision requiring regular (at least five-yearly) governmental reviews of key features of product safety trends and legislation in our major trading partners, such as the need for a GSP. Formal ongoing reviews are a common practice in the EU, and increasingly in Japan.<sup>38</sup> Recall also that recommendation 8.3 of the PC’s final report (cited above) called for monitoring of product safety trends, including impact of the tort reforms. Such reviews will be greatly facilitated by a duty to notify regulators about serious product-related accidents, as proposed by the PC and elaborated above.

Australian consumers live in a similarly open economy and deserve equal treatment to counterparts in our major trading partners. And better information flows are a basic premise for more legitimate and efficient ‘responsive regulation’.<sup>39</sup> Fortunately, we still have time to get these aspects right, and finally get an updated product safety regime that goes *beyond* the TPA and State/Territory legislation dating back to the 1970s and 1980s, and which adopts *global best practice* in the 21<sup>st</sup> century.

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<sup>36</sup> Bill C-6 (2009) (Canada). Clause 2 defines such a danger as ‘any unreasonable hazard - existing or potential - that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause the death of an individual exposed to it or have an adverse effect on that individual’s health - including an injury - whether or not the death or adverse effect occurs immediately after the exposure to the hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health.’

<sup>37</sup> Bill C-6 (2009) (Canada) ch 5.

<sup>38</sup> See already, for example, a January 2009 report on implementation of the revised Directive, which was to be implemented in all EU member states by 2004: *Report from the Commission to the European Parliament and to the Council on the Implementation of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety* (2009) <[http://ec.europa.eu/consumers/safety/prod\\_legis/docs/report\\_impl\\_gpsd\\_en.pdf](http://ec.europa.eu/consumers/safety/prod_legis/docs/report_impl_gpsd_en.pdf)> at 22 August 2009.

<sup>39</sup> Ayres and Braithwaite, above n 7. More generally on the comparative history, policy rationales and forms of product safety regulation (compared eg to product liability regimes and market incentives), see L Nottage, ‘Product Safety’ in G Howells, I Ramsay and T Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) – and manuscript available on request.

### III UNFAIR CONSUMER CONTRACTS LAW REFORM IN AUSTRALIA (AT LAST), JAPAN AND EUROPE

Regarding unfair contract terms regulation, antipodean commentators are increasingly extending their gaze to the EU as the inspiration for reforms in Victoria, which has eventually prompted nation-wide reform proposals for Australia that are already being closely monitored from New Zealand. Adopting an even broader perspective, compared to current Australian and New Zealand legislation, Japan's *Consumer Contracts Act 2000* has maintained quite narrow restrictions on the bargaining process leading up to the conclusion of contracts between consumers and commercial suppliers.<sup>40</sup> But it adds a 'general clause' regulating unfair contract terms, voiding those that 'impair the interests of consumers unilaterally against the fundamental principle' of good faith under Civil Code art 1(2),<sup>41</sup> as well as targeting some specific types of terms. The *Consumer Contracts Act* also extends to all types of contracts (except employment contracts),<sup>42</sup> and defines 'consumer' broadly as any individual not contracting for a business purpose.<sup>43</sup>

This definition is similar to that of the 1993 EC Directive on unfair terms (93/13/EEC),<sup>44</sup> which provided a major impetus to enactment in Japan (as did the 1985 Directive for Japan's *Product Liability Act 1994*). However, art 4(2) of the 1993 Directive excludes terms relating to 'the definition of the main subject matter of the contract' or 'the adequacy of the price and remuneration ... in so far as these terms are in plain intelligible language', with the preamble specifically mentioning insurance contract premiums. The annexed indicative 'grey list' of clauses that may prove unfair also suggests that certain terms found in financial services contracts are likely to be acceptable. Article 3(1) voids 'any contractual term which has not been individually negotiated ... as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.

Article 7 adds an important obligation on European member states to provide 'adequate and effective means' to prevent usage of unfair terms, including injunctions. Consumers were unable to obtain such provisions in Japan's original Act, but they were added in 2006 and are already having some impact.<sup>45</sup> By contrast, the EU was slower than Japan in harmonising controls focusing solely on the contract negotiation process. These came only in the 2005 Unfair Commercial Practices Directive (2005/29/EC). But that now includes quite general clauses prohibiting misleading conduct vis-à-vis consumers.<sup>46</sup>

<sup>40</sup> L Nottage, 'Nihon-Nyujirando Shohishakeiyakuho [Consumer Contract Law in Japan and New Zealand]' (2000) 1620 *Toki no Horei* 4-5. For a recent New Zealand perspective, see K Tokeley, 'Rationalisations and Proposals for a Prohibition on Unfair Contractual Terms' (2009) *New Zealand Universities Law Review* forthcoming.

<sup>41</sup> L Nottage, 'Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts' (1996) 26 *Victoria University of Wellington Law Review* 247, also at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=842684](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=842684)> at 24 February 2010.

<sup>42</sup> *Consumer Contracts Act 2000* (Japan) art 48.

<sup>43</sup> *Consumer Contracts Act 2000* (Japan) art 2. Semi-official translation available via *Japanese Law Translation* (2009) Ministry of Justice <<http://www.japaneselawtranslation.go.jp>> at 22 August 2009.

<sup>44</sup> Available via *Homepage* (2009) European Commission <<http://ec.europa.eu/>> at 22 August 2009.

<sup>45</sup> Nottage, *A New Consumer Agency for Japan? Consumer Redress, Contracts and Product Safety*, above n 15.

<sup>46</sup> *Unfair Commercial Practices Directive* (2005/29/EC) arts 6, 7.

What about Australia? The TPA included a very broad prohibition on misleading and deceptive conduct in trade,<sup>47</sup> which competitor firms as well as individual consumers and regulators could invoke. Part V div 2 also voids attempts by corporations to limit specific statutory warranties (merchantable quality, fitness for purpose notified before supply, etc) when supplying goods and services to ‘consumers’ as defined (eg for goods) in s 4B(1):

- (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 [\$40,000]; or
  - (ii) where that price exceeded[\$40,000] 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.

In addition, for transactions under \$40 000 suppliers can limit (but not exclude totally) liability if this is ‘fair and reasonable’ and the goods are not ordinarily for personal use.<sup>48</sup> Further, the obligation to take due care when providing services,<sup>49</sup> always excludes ‘(a) a contract for or in relation to the transportation or storage of goods<sup>50</sup> for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or (b) a contract of insurance’.<sup>51</sup> And the fitness for purpose obligation is excluded for ‘services of a professional nature provided by a qualified architect or engineer’.<sup>52</sup>

The scope of application for these consumer protection provisions is therefore very convoluted and seemingly quite arbitrary, partly reflecting the lobbying power of certain professional groups in obtaining exclusions from TPA obligations. And the mandatory statutory warranties have been displaced in practice by retailers increasingly selling ‘extended warranties’, even though the mandatory warranties often would or should provide similar coverage anyway. Retailers and consumers also tend now to believe that the only really important thing is express warranties provided by manufacturers, even though the latter also owe statutory warranties similar to those of retailers.<sup>53</sup> This confusion is not helped by the fact that there is no statutory requirement that such express voluntary warranties be in plain intelligible language, as under the 1999 EC Consumer Guarantees Directive (1999/44/EC). Such problems are highlighted in a review of statutory implied terms and warranties initiated in late July 2009 by the Commonwealth Consumer Affairs Advisory Council (CCAAC).<sup>54</sup> This is another part

<sup>47</sup> *Trade Practices Act 1974* (Cth) s 52.

<sup>48</sup> *Trade Practices Act 1974* (Cth) s 68A.

<sup>49</sup> *Trade Practices Act 1974* (Cth) s 74(1).

<sup>50</sup> But not, for example, a contract for a tug to tow a ship that is transporting goods: *PNSL Berhad v Dalrymple Marine Services Pty Ltd* [2008] 1 Qd R 511.

<sup>51</sup> *Trade Practices Act 1974* (Cth) s 74(3).

<sup>52</sup> *Trade Practices Act 1974* (Cth) s 74(2).

<sup>53</sup> See *Trade Practices Act 1974* (Cth) pt V div 2A, added in 1986.

<sup>54</sup> See part IV of this article below. Australian Government - The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties*, above n 3.

of the Australian government's review of consumer law and policy overall since February 2009, following a detailed report of the PC released in April 2008.<sup>55</sup>

Australia's legislation may become even more complicated after the federal Parliament enacts the Trade Practices Amendment (Australian Consumer Law) Bill, introduced on 26 June 2009.<sup>56</sup> This laudably adds a long-overdue missing link in Australia's consumer protection regime: broader restrictions on all unfair terms. These follow the lead of amendments to Victoria's *Fair Trading Act* in 2002, in turn based on the 1993 EC Directive. The Bill likewise applies to a 'consumer contract' defined as supply 'to an individual whose acquisition .... is wholly or predominantly for personal, domestic or household use or consumption' (that is, a non-business purpose).

This is a partial throwback to a more subjective test than in the current TPA. But the latter's original definition (in 1974, before an amendment in 1977 generating s 4B above) had asked whether goods or services were ordinarily used for 'private use'. Even under the present s 4B(4), 'commercial road vehicle' is defined more subjectively to the user: 'vehicle or trailer acquired for use principally in the transport of goods on public roads'. Further, some courts have restricted the ability of consumers to claim relief for unconscionable conduct under s 51AB, by interpreting its reference to goods or services ordinarily for personal use as excluding services received but intended to advance someone else's business venture.<sup>57</sup>

The *Contracts Review Act 1980* (NSW) can offer relief from an 'unjust' contract in such cases, for individuals (but not corporations).<sup>58</sup> The exception, clearly directed at the actual intended purpose, is expressed more narrowly 'in so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on *by the person* or proposed to be carried on by the person, other than a farming

<sup>55</sup> Australian Government - The Treasury, *An Australian Consumer Law: Fair Markets - Confidential Consumers - Consultation Paper*, above n 10.

<sup>56</sup> Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) Oddly, this first Bill was introduced without the Regulatory Impact Statement consultation required for consumer product safety and other matters (Australian government, *Consultation Regulatory Impact Statement - Australian Consumer Law - Best Practice Proposals and Product Safety Regime*, above n 1) sought to be included in the second Bill in early 2010. This is despite the arguably far-reaching implications of adding unfair terms regulation. The latter has been urged by consumer law academics for many years: see for example L Griggs, 'The (Ir)Rational Consumer and Why We Need National Legislation Governing Unfair Contract Terms' (2005) 13 *Competition and Consumer Law Journal* 4; and F Zumbo, 'Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?' (2005) 13 *Trade Practices Law Journal* 70; J Davidson, 'Unfair Contract Terms and the Consumer: A Case for Proactive Regulation?' (2007) 15 *Competition and Consumer Law Journal* 74; and (regarding software contracts) D Clapperton and S Coronas, 'Unfair Terms in "Clickwrap" and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152.

<sup>57</sup> *Begbie v State Bank of New South Wales* [1993] FCA 579, [55]; followed in *State Bank of New South Wales v Sullivan* [1999] NSWSC 596 (Unreported, Supreme Court of New South Wales, James J, 14 July 1999). A wife securing a husband's business debts, for example, also could not invoke s 51AC (or its s 12CC equivalent in the *ASIC Act 2001*) because that required her to be acting 'in trade or commerce'. For such cases of 'sexually transmitted debt', this left only s 51AA (or *ASIC Act 2001* s 12CA), triggered by the equitable principles governing unconscionable bargains restated primarily in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. Compare more generally New South Wales Law Reform Commission, *Guaranteeing Someone Else's Debts*, Report No 107 (2006) <[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_r107toc](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r107toc)> at 22 August 2009.

<sup>58</sup> *Contracts Review Act 1980* (NSW) s 6(1).

undertaking'.<sup>59</sup> In interpreting the Bill's new provisions focused primarily on unfair terms themselves, Australian courts and others may also be able to draw on similar wording delimiting the applicability of consumer credit legislation (itself under revision since 2009).<sup>60</sup> Indeed, the Bill's definition of 'consumer' may yet displace at least some definitions within the existing TPA, such as pt V div 2.<sup>61</sup> In the ongoing reforms to create the Australian Consumer Law, it remains unclear what will happen to the definitions on unconscionable conduct in the TPA, let alone the *Contracts Review Act*.

In addition, the Bill includes financial services but specifically excludes charter parties and contracts for marine salvage, towage, carriage of goods by sea, and the constitution of a company, managed investment scheme or other kind of body. It also excludes a consumer contract term that 'defines the main subject matter of the contract, or sets the upfront price payable'. So this is likely to exclude insurance contract premiums, as under the 1993 EC Directive.<sup>62</sup> The Bill is also similar in applying only to standard-form contract terms. This restriction reflects a strong outcry from business interests when the Treasury released a consultation paper in May 2009 containing an exposure draft providing for coverage not limited to standard form contracts (coverage also not being limited in Japan, similar to the traditional approach in French law).

Thus, like the 1993 Directive, the Bill reflects partly still a 'procedural justice' model of consumer law, focused on transparency and the need to safeguard some consent, particularly with standard-form contracts. But the Bill also partly adopts a 'commutative justice' model, which focuses on substantive balance or fairness.<sup>63</sup>

The most obvious difference with the Directive, and Japan's *Consumer Contract Act*, lies in the definition of an 'unfair' term. Section 3(1) of the proposed Australian

<sup>59</sup> *Contracts Review Act 1980* (NSW) s 6, emphasis added.

<sup>60</sup> See part V of article below.

<sup>61</sup> Otherwise, what will happen if the goods or services are for more than \$50 000 but not ordinarily for personal use, and the supplier has included a 'fair and reasonable' limitation of div 2 liability pursuant to *Trade Practices Act 1974* (Cth) s 68A? If they are nonetheless for an individual consumer's non-business purpose, can that person still claim that the limitation clause is an 'unfair term' under this new part of the legislation? This possibility could be expressly excluded under further legislation, or *Trade Practices Act 1974* (Cth) div 2 could be amended so that it only applies vis-à-vis individual consumers' standard-form contracts (like the new part on unfair terms).

<sup>62</sup> Indeed, although there is express reference in the Bill itself to insurance contracts, the accompanying Explanatory Memorandum (available via the Senate website, above n 2) states (at 2.100):

Section 15 of the *Insurance Contracts Act 1984* provides that a contract of insurance (as defined by that Act) is not capable of being made the subject of relief under any other Commonwealth Act, a State Act or an Act or Ordinance of a Territory. In this context 'relief' means relief in the form of:

- the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or

- relief for insureds from the consequences in law of making a misrepresentation,

but does not include relief in the form of compensatory damages. The effect of section 15 is to mean that the unfair contract terms provisions of either the ACL or the *ASIC Act* do not apply to contracts of insurance covered by the *Insurance Contracts Act 1984*, to the extent that that Act applies.

This risks significantly undermining the gains from adding a new harmonised regime directed at unfair terms. One solution is to amend the *Insurance Contracts Act*, so that claims that terms themselves are unfair are dealt with only under the ACL or *ASIC Act* provisions.

<sup>63</sup> T Wilhelmsson and C Willett, 'Unfair Terms and Standard Form Contracts' in G Howells, I Ramsay and T Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing, 2010).

Consumer Law,<sup>64</sup> rules the term to be unfair if: ‘(a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and (b) it is not reasonably necessary to protect the legitimate interests of the party who would otherwise be advantaged by the term’. Subsection 3(2) then required the courts to consider at least these factors: ‘(a) the extent to which the term would cause, or there is a substantial likelihood that it would cause, detriment (whether financial or otherwise) to a party if it were to be applied or relied on; (b) the extent to which the term is transparent; (c) the contract as a whole’. However, in response to concerns raised by business interests, the government subsequently removed reference to ‘substantial likelihood’ of causing detriment – noting that this would more closely align the test with the Victorian FTA. The latter also mirrors art 3(1) of the Directive in referring simply to ‘detriment of the consumer’. Article 10 of Japan’s *Consumer Contract Act* voids terms that one-sidedly impair the interests of consumers, contrary to the good faith principle enshrined in Civil Code Art 1(2) as compared with its usual default rules – commentators do not distinguish, as in the debates about Australia’s Bill, between actual or likely impairment or detriment.<sup>65</sup>

The Australian Consumer Law also follows the Victorian Act after the latter’s amendment in 2009, by avoiding any reference to ‘good faith’. That choice follows a recommendation 8.22 from the 2005 report of the English and Scottish Law Commissions regarding implementation of the Directive into their national law. The choice is also related to current confusion in Australian (commercial) contract law about the content (and applicability) of a generalised duty of good faith.<sup>66</sup> Yet TPA provisions on broader ‘unconscionable conduct’ still list good faith as a factor.<sup>67</sup> And its excision from the Bill means that Australia will miss out on an opportunity to learn from how civil law tradition countries in Europe and Japan have developed this good faith principle to balance the various social interests involved when providing the (scarce) resources of the State to enforce contracts, especially now those involving consumers.

However, the Bill does give more bite back to enforcement proceedings. Where a term is declared unfair by a court, or proscribed by the Minister (by Regulation – but none

<sup>64</sup> New sch 2 pt 2 of the *Trade Practices Act 1974* (Cth).

<sup>65</sup> See Redfern, above n 2; Supplementary Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) [12-17]; and Keizai Kikakucho Kokumin Seikatsukyoku, *Chikujō Kaisetsu – Shohisha Keiyakuho [Article-by-Article Commentary on the Consumer Contracts Act]* (Shoji Homu Kenkyukai, Tokyo, 2000) 174-81. Another difference is that a *supplier* seemingly can impugn a term contained in a standard-form contract that may have been preferred by the individual consumer, because an unbalanced term is ‘unfair’ if ‘not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term’. This wording dates back to the exposure draft in the original consultation paper (May 2009), which had pointed out that ‘there are circumstances where it is the ‘consumer’ in a transaction who provides and insists on the use of a standard-form contract’ (above n 10, 9). However, as noted above, that draft had envisaged these provisions basically applying to all standard-form contracts (even between firms). Now that the Bill is limited to B2C contracts, unfair terms should only be void where unnecessary to protect the legitimate interests of the supplier, as in Europe and Japan.

<sup>66</sup> See LAW COM No 292; SCOT LAW COM No 199 via <<http://www.lawcom.gov.uk/docs/lc292.pdf>> at 22 February 2010; and E Peden, ‘When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability’ (2005) 21 *Journal of Contract Law* 226; *Sydney Law School Legal Studies Research Paper* No 06/57 <<http://ssrn.com/abstract=947361>> at 24 February 2010. Compare J M Paterson, ‘The Elements of a Prohibition on Unfair Terms in Consumer Contracts’ (2009) 37 *Australian Business Law Review* 184, 191-2.

<sup>67</sup> *Trade Practices Act 1974* (Cth) pt IV.A, specifically s 51AC.

were proposed along with the Bill), the regulator (the ACCC) can bring injunction proceedings that also seek further orders against corporations using such terms, in favour of those not party to the original proceedings. These orders can include refunds for them, for example, but not full damages. This is a welcome amendment to the narrow scope of TPA s 87 (limiting orders to parties alone), as interpreted in *Medibank Private v Cassidy*.<sup>68</sup> But the ACCC had been pushing for it for the last 7 years, pointing out for example that the securities regulator (ASIC) has long had such broader powers.

This particular reform of the TPA's enforcement regime confirms the present author's impression about Australia's 'lethargic' attitude to consumer law reform since the 1990s. So does the fact that the unfair terms rules were only to come into effect at the federal level from 1 January 2010, to be applied by states in their legislation from 1 January 2011.<sup>69</sup> Part of the backdrop is Australia's complex constitutional system, but the original timeframe also reflects a lack of political will – compared for example to Europe nowadays, and arguably also Japan.

#### IV CONSUMER RIGHTS – STATUTORY IMPLIED CONDITIONS AND WARRANTIES

The Issues Paper with this title released by the CCAAC in July 2009<sup>70</sup> raises another topic that is particularly ripe for reform in Australia. Manufacturers and especially retailers – even some of the largest, who theoretically should be most concerned about their reputations – no longer take seriously enough their statutory and common law duties. This is well-documented by many of the hundreds of submissions to the various inquiries mentioned above, and by research for example by Choice as well as Consumer Affairs Victoria.<sup>71</sup>

##### A *Information about Statutory Warranties (Issues Paper – p 8)*

Collective action problems generally make it more efficient for organisations, not individual consumers, to understand, communicate and act upon information about warranties. Generally, therefore, firms should restate TPA warranties in their standard-form contracts and/or (perhaps especially) in notices at the point-of-sale. Something like the latter is already required for internet sales under the EU Distance Selling Directive (and UK Regulations) and Canada. The concept should be extended, to prevent Australian suppliers filling up standard-form contracts with all sorts of rights that detract from TPA and other statutory warranties (which can later scare off consumers with legitimate complaints), merely adding a small disclaimer stating these are 'subject to any statutory rights' (to protect themselves from contravening the TPA, but which consumers cannot reasonably see or comprehend the significance of).

<sup>68</sup> [2002] FCAFC 290.

<sup>69</sup> L Nottage, *Australia's Lethargic Law Reform: How (Not) to Revive Consumer Spending* (2009) East Asia Forum <<http://www.eastasiaforum.org/2009/03/25/australias-lethargic-law-reform-how-not-to-revive-consumer-spending/>> at 22 August 2009.

<sup>70</sup> Australian Government - The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties*, above n 3. Indeed, further debates in Parliament have resulted in implementation being pushed back by a further 6 months and various other changes to the Bill's provisions: see Redfern, above n 2.

<sup>71</sup> See Australian Government - The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties*, above n 3, 6; and also Australian Competition and Consumer Commission, 'Take That Faulty Phone Back' (2009) 26 *ACCC Update* 9.



A shift to actually spelling out TPA warranties cannot really be left to ‘the market’, because it has not yet produced this outcome even among large firms that publically profess corporate social responsibility. But if adding such a requirement ends up being politically unpalatable, at least it should be enforced for:

- large corporations (for whom the extra compliance costs will therefore be most limited); and/or
- products or services for which the most complaints are currently reported (particularly large-value items such as whitegoods, consumer electronics and some mobile phone services).<sup>72</sup>

In addition, regulators and peak consumer organisations (like Choice) should be encouraged to bring and publicise ‘test cases’, especially to determine (unavoidably general and evolving) questions like the statutory warranty’s time period for various types of products (especially such large-value, high-complaint items).

### B Adequate and Clear Warranties (*Issues Paper – pp 17-18*)

The existing terms are generally adequate. However, Australia could abandon the term of art ‘merchantable quality’, antiquated and odd for non-lawyers. Instead, for example, the term ‘acceptable quality’ could be used, the more modern and ordinary usage used already in s 7 of New Zealand’s *Consumer Guarantees Act*.<sup>73</sup> Australia also professes a commitment to consumer law harmonisation with New Zealand pursuant to their Closer Economic Relations Agreement and recently-renewed Memorandum of Understanding,<sup>74</sup> with the New Zealand Minister also on Australia’s Ministerial Council for Consumer Affairs.

We should also be less parochial by looking at how the law on implied terms has developed in other jurisdictions. In particular, Australia should be taking a recent decision by the House of Lords<sup>75</sup> a step further. Suppliers should be required to provide reasonable explanations about what has been repaired and why, pursuant to any prior warranty, if consumers reasonably so request. If explanations are insufficient, consumers should be able to terminate the contract or claim other relief (like damages for independent tests), even if it later turns out that the goods were properly repaired.

Although Australia’s present legislation does not necessarily make it completely clear, case law and general principles already do elaborate fairly well various points raised at page 18 of the issues paper. The consumer (not supplier) can elect which remedy to pursue, the supplier should pay for transport costs of defective goods (as within the scope of ordinary damages), durability is involved in ‘fitness for purpose’, and ‘merchantability’ extends beyond workability to ‘cosmetic’ matters.<sup>76</sup>

<sup>72</sup> Australian Government - The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties*, above n 3, 6.

<sup>73</sup> *Consumer Guarantees Act 1993* (2009) NZ.

<sup>74</sup> New Zealand Ministry of Foreign Affairs and Trade, *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2008) <<http://www.mfat.govt.nz/Foreign-Relations/Australia/1-CER/0--Reference/0-business-law-memo.php>> at 22 August 2009.

<sup>75</sup> *J & H Ritchie Limited v Lloyd Limited (Scotland)* [2007] 1 Lloyd's Rep 544.

<sup>76</sup> See, for example, *Blackpool Rock Co Pty Ltd & Blue Waters Pty Ltd v By Design Group Pty Ltd t/as*

### C *Counteracting an Emerging New 'Business Model'*

Thus, the turn to voluntary 'extended' warranties cannot be considered to be due to unclear statutory rights. On the contrary, quantitative empirical research would readily confirm that the median length of manufacturers' warranties has declined significantly. This would be so even for products not imported from countries like China, where some argument could be mounted that consumers knowingly trade off lower quality (and durability) for lower price – but, again, always subject to certain minimum merchantability requirements (eg safety) because consumers are worse placed to assess such risks. In other words, manufacturers have reduced the periods offered by their express warranties, even where there was no offsetting cost advantage to consumers, to maximise profits without consumers' informed consent.

Secondly, these reductions have allowed retailers – who sometimes also would be 'deemed' manufacturers under the TPA (eg involved in OEM manufacturing or selling products under their own brand name) – to develop a market for selling 'extended' warranties for the period that would have been covered (at least in part) by previous manufacturers' warranties. Further empirical research would probably confirm that the 'premium' consumers now bear for such extended warranties is very disadvantageous relative to both underlying risks and actual claim payouts.

Thirdly, the now-reduced manufacturers' warranties and even the 'extended' retailers' warranties (which few consumers probably take out for the maximum term offered) are now 'framing' what consumers, their advisors and potentially the courts are likely to expect to be the reasonable timeframe for the statutory warranties.

This new 'business model' is very good for suppliers overall, at the expense of consumers. What is needed, therefore, is for statute or case law to restore realistic time lengths and other minimum features for statutory warranties. That can then reframe expectations about manufacturers' and retailers' 'extended' warranties. Further countermeasures proposed especially for internet sales include displays of the warranty prices alongside the items advertised, warning statements (like a financial products disclosure statement), lengthy cooling-off periods and caps on warranty periods, followed by reminders.<sup>77</sup>

### D *Encouraging More Sustainable Consumption*

Such reforms, clearly re-stating or ratcheting back up minimum statutory warranties, would also dovetail with this government's broader commitment to reducing harm to the environment. It would also enable Australia's consumer law to resonate better with contemporary global expectations about sustainable consumption, reflected for example in revisions in 1999 to the 1985 United National Guidelines for Consumer Protection.<sup>78</sup>

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*BDG Machine Tools* 45 SR (WA) 88 (computer router failure after six months); *Penrith Automotive Pty Ltd t/as Penrith Mazda v Woollard* [2007] NSWSC 529 (Unreported, Supreme Court of New South Wales, Associate Justice Harrison, 28 May 2007) (blemished paintwork).

<sup>77</sup> See L Griggs, 'Extended Warranties and Internet Transactions' (2008) 16 *Competition and Consumer Law Journal* 279, 287.

<sup>78</sup> See, for example, arts 45 and 51, and further United Nations Department of Economic and Social Affairs, *Revision of the UN Guidelines for Consumer Protection* (2003) <<http://www.un.org/esa/sustdev/sdissues/consumption/cpp1225.htm>> at 22 August 2009 (for

Empirical evidence could easily confirm that erstwhile ‘durable’ goods are thrown away in ever-greater proportions nowadays, partly because they fail more quickly, generating invidious effects on the environment and attempts to address our contemporary climate change crisis. One reason is that mandatory warranty protection has been eroded, so (more environmentally-friendly) repairs become increasingly uncommon. And it is too much to expect voluntary ‘extra’ insurance to fill this gap, due to increasingly well-known heuristics and biases interfering with consumers’ decision-making, such as the over-optimism bias.<sup>79</sup>

E *Additional Remedies, Enforcement and Redress (Issues Paper – pp 20-3)*

It is extraordinary, and symptomatic of the low priority given to consumer law reform in Australia since the mid-1990s until recently, that there has not yet been any amendment to the TPA as recommended by the Australian Law Reform Commission Report.<sup>80</sup> Consumers obviously should have the extra option of obtaining replacement goods, rather than just rescission/refund or repair. That is also now provided under s 23(1) of the *Consumer Guarantees Act*.

Enforcement and redress impediments are the other major reasons behind the gradual erosion of minimum statutory rights. Access to courts has generally become prohibitively expensive since the 1990s, as evidenced by many inquiries by governments and law reform commissions, and statements by senior judges and other experts. Alternative Dispute Resolution (ADR) has not provided adequate substitutes, even for business-to-business disputes.<sup>81</sup>

Class actions are not functioning in this field. They have not been able effectively to aggregate small-value claims, as originally intended when introduced in 1992 (federally) and 2000 (in Victoria), especially in the consumer field. A major problem is retention of the ‘loser pays’ rule regarding legal fees: the representative parties have to pay reasonable lawyers’ costs of the winning defendant. In 2006, the High Court allowed ‘litigation funders’ to indemnify the losing parties, in exchange for a pure contingency fee (a proportion of damages awarded) if instead they win. However, many problems remain with the class action system, and even now defendant firms (unlike consumer claimants) enjoy the advantage of full tax-deductibility of any legal expenses incurred.

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example, ‘Reuse, Repair, Recycling and Waste Reduction’ discussion in the background report at United Nations Department of Economic and Social Affairs, *Consumer Protection and Sustainable Consumption: New Guidelines for the Global Consumer* (2003) <<http://www.un.org/esa/sustdev/sdissues/consumption/cppgoph4.htm>> at 22 August 2009).

<sup>79</sup> This well-established bias implies that even if provided with fuller information, consumers will tend to think they will ‘beat the odds’ and not benefit from taking out the extra insurance. See generally, with further references, S Kozuka and L Nottage, ‘The Myth of the Careful Consumer: Law, Culture, Economics and Politics in the Rise and Fall of Unsecured Lending in Japan’ in J Niemi-Kiesilainen, I Ramsay and W Whitford (eds), *Consumer Credit, Debt and Bankruptcy: National and International Dimensions* (2009); longer version as *Sydney Law School Legal Studies Research Paper No 09/50* <<http://ssrn.com/abstract=1413464>> at 24 February 2010.

<sup>80</sup> *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994); Australian Government - The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties*, above n 3, 20 n 16.

<sup>81</sup> See, with further references, L Nottage, ‘Comparing ADR in Australia and New Zealand: Introduction and Update’ (Working Paper No 22, Sydney Centre for International Law, 2009) <[http://www.law.usyd.edu.au/scil/documents/2009/SCILWP22\\_Nottage.pdf](http://www.law.usyd.edu.au/scil/documents/2009/SCILWP22_Nottage.pdf)> at 26 February 2010.

The only category of cases where class actions now may be viable for plaintiffs' lawyers and litigation funders are those on behalf of investors, not consumers per se.<sup>82</sup>

Suppliers also are not readily deterred by Consumer Tribunals. The problems afflicting these in NSW are numerous, as shown by various legislative inquiries over recent years. More generally, precisely because lawyers are generally not allowed to appear before a Tribunal, their costs cannot be claimed against a defendant supplier even if it loses a case it never should have defended. This creates an incentive for suppliers to contest such cases. Another incentive is that even if a consumer perseveres in a claim, a Tribunal's ruling against the supplier is generally not reported. Therefore, to make suppliers take consumer claims more seriously in these forums:

- Tribunals should allow consumers (not suppliers) to claim reasonable legal fees (eg subject to caps, and only for preparatory work before hearings – leaving those themselves more informal); and/or
- Tribunals should publish more results (even in redacted form, omitting party names) especially regarding frequently-contested matters like 'going rates' for implied warranty time limits.

Similar innovations are needed for industry association and even statutory ombudsman schemes.<sup>83</sup> A further problem is that these apply only to services. More ombudsman schemes covering (major categories of) general consumer products are needed, as suggested at one stage by the PC. If industry associations are insufficiently funded or organised, the government can contribute funding or expertise.

However, the biggest problem is that breaching the statutory implied warranties is not interpreted as a 'contravention' of the TPA or similar State fair trading legislation.<sup>84</sup> So the regulator basically can only seek penalties or injunctions or bring representative actions (with consumers' prior consent)<sup>85</sup> if it can find instead some misrepresentation about the statutory warranties, broader (pre-contractual) misleading conduct, or unconscionability.

It seems anomalous for the ACCC already to be empowered to bring a representative action against the manufacturer<sup>86</sup> for a consumer harmed by an unsafe product, but not against the retailer for the same or similar unsafe (hence unmerchantable) product.<sup>87</sup> The solution is to allow the ACCC to bring representative actions for damages, injunctions preventing supply of goods likely to breach implied terms, or even impose penalties, at least for certain types of breaches (such as safety) or certain products (such as whitegoods). If the ACCC had access to a full gamut of enforcement possibilities, 'regulatory enforcement pyramid' theory would generally expect the regulator to be

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<sup>82</sup> See, with further references, P Cashman et al, in KE Lindgren (ed), *Investor Class Actions* (2009) via <<http://www.law.usyd.edu.au/parsons/publications/index.shtml>> at 22 August 2009.

<sup>83</sup> See, with further references, Nottage, 'Consumer ADR and the Proposed "Consumer Law" in Australia: Room for Improvement', above n 6.

<sup>84</sup> Australian Government - The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties*, above n 3, 21.

<sup>85</sup> *Trade Practices Act 1974* (Cth) s 87(1B).

<sup>86</sup> *Trade Practices Act 1974* (Cth) s 75 AQ.

<sup>87</sup> See, with further references, Nottage, 'Consumer ADR and the Proposed "Consumer Law" in Australia: Room for Improvement', above n 6.

able to achieve better outcomes by establishing collaboration with suppliers at lower levels of enforcement activity.<sup>88</sup> Also to that end, accredited consumer groups should also be able to get involved more easily in collective redress mechanisms, at least injunctions (as in the EU and Japan) and also representative claims for damages (also being explored now in those jurisdictions).

Anyway, the regulator should be expressly empowered to have a supplier found contravening certain other parts of the legislation (especially provisions on unconscionability, and from 2010 ‘unfair terms’), or who has settled proceedings, to extend any required TPA compliance program beyond those specific fields to cover extensively their obligations under implied statutory warranties.

F *Limiting Liability under TPA s 68A and s 68B (Issues Paper – pp 38 and 41)*

Section 68A is problematic, if only because there has been hardly any case law to clarify what might be ‘fair and reasonable’.<sup>89</sup> The biggest problem is that it has been added due to an expansive preliminary definition of ‘consumers’ in TPA s 4B – in particular, the latter’s coverage of most transactions where each contract price is (currently) less than \$40 000. These provisions reveal a distinctive Australian bias favouring the protection of ‘small business’, which may extend to very large inter-firm deals and which is actually of debatable merit for individual consumers.<sup>90</sup>

A simpler alternative would be the approach of the NZ *Consumer Guarantees Act*. ‘Consumer’ is defined in s 2(1) only in relation to goods being ordinarily for personal use (and not resupplied or consumed in manufacturing), and then parties can exclude warranties if the contract is for a ‘business purpose’. The simplest alternative is the 1993 EC Unfair Terms Directive (and other European Union consumer law) or Japan’s *Consumer Contracts Act 2000*. They only apply if the contracts are not for a business purpose.

The issue of s 68A therefore requires a broader policy debate about the extent to which Australia wishes to (a) keep diverging from the consumer legislation definitions of major trading partners, and (b) treating ‘small business transactions’ the same or similarly to transactions involving consumers with no business purpose or capacity whatsoever. The Trade Practices Amendment (Australian Consumer Law) Bill,

<sup>88</sup> Compare with generally NZ Ministry of Consumer Affairs, *Review of the Enforcement of Consumer Protection Law: An Initial Think Piece* (2005) <<http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/paper-one/>> at 22 August 2009.

<sup>89</sup> Exceptionally, see, for example, *Indico Holdings Pty v TNT Australia Ltd* (1990) 41 NSWLR 281. See also A Finlay, ‘Section 68A(2) Trade Practices Act 1974: Cinderella Section’ (1997) 5 *Competition and Consumer Law Journal* 22. Compare, however, some recent judgments from England: *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm) (*obiter* suggesting the exclusion clause was not ‘reasonable’, but no breach of implied terms anyway); and *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2007] 1 Lloyd’s Rep 8 (exclusion and limitation clauses reasonable except for a one-week time limit for reporting claims in respect of hidden defects).

<sup>90</sup> For example, why should a large company like Bunnings get mandatory statutory warranty protections as in *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479, where the roofing insulation was held ‘ordinarily for personal use’? The large supplier may need to raise its prices to cover this mandatory liability exposure, adversely affecting individual consumers. Compare now the definition of ‘consumer’ in the proposed unfair terms provisions: above part III.

introduced in June 2009, eschews small business protection and therefore begins to align us better with both the EU and Japan.

Finally, as for excluding liability under TPA s 68B, the problem is not just that the definition of ‘recreational services’ is too broad. It is also that the exclusion can be complete – as in other countries abroad (such as Japan’s Act), it should not be available for gross negligence or similar conduct.

## V RESPONSIBLE CONSUMER LENDING RULES FOR AUSTRALIA TOO

Australia also needs re-regulation of consumer credit markets, along the lines proposed in ‘The National Consumer Credit Reform Package’.<sup>91</sup> Some improvements that could be made regarding an External Dispute Resolution scheme are considered below. However, the first section outlines the benefits of a key improvement proposed in the National Consumer Credit Protection Bill - imposing responsible lending rules (focused on ‘suitability’ and repayment capacity) - drawing partly from knowledge of the Japanese legal experience.

### A *Suitability Rules*

Such rules have parallels with more longstanding fair trading legislation requirements on suppliers to provide goods that are both ‘fit for purpose’ and of general ‘merchantable quality’ (for example, not unsafe). In today’s increasingly service-based economy, the law should promote economic as well as physical security.<sup>92</sup> Restoring consumer confidence is particularly important during this recession in Australia and the world’s major economies, and underpins a parallel comprehensive revamp underway for other consumer law nation-wide (see parts I-IV above).

Imposing such ‘know-your-customer’ rules in consumer credit will bring Australia in line with other areas of law too, and with several other jurisdictions. They have long been found in legislation protecting those investing in securities. The rationale given is often the complexity of such products. Yet loan transactions are also complex for most individual consumers. So countries like Japan have now enacted such rules to restore confidence in both unsecured lending and sales credit markets.<sup>93</sup> More generally, suitability rules are now widely found in Organisation for Economic Co-operation and

<sup>91</sup> Australian Government - The Treasury, *Consumer Credit: Legislation* (2009) <<http://www.treasury.gov.au/consumercredit/content/legislation.asp>> at 22 August 2009. Note also now that:

The Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 was also introduced on 25 June 2009. As a result, providers of margin loans and associated advice will be required to be licensed, be members of an external dispute resolution scheme and comply with disclosure and notification requirements. Margin lenders will also be under the obligation to comply with responsible lending requirements.

<sup>92</sup> O Bar-Gill and E Warren, ‘Making Credit Safer’ (2008) 157 *University of Pennsylvania Law Review* 1 <<http://ssrn.com/abstract=1137981>> at 24 February 2010.

<sup>93</sup> S Kozuka and L Nottage, ‘Re-Regulating Unsecured Consumer Credit in Japan: Over-Indebted Borrowers, the Supreme Court, and New Legislation’ (2007) *Yearbook of Consumer Law; Sydney Law School Legal Studies Research Paper No 07/62* <<http://ssrn.com/abstract=1019392>> at 24 February 2010.

Development (OECD) member countries, through administrative/criminal law and/or private law.<sup>94</sup>

Such developments recognise pervasive and persistent market failures, especially information asymmetries and behavioural biases (such ‘over-optimism’ bias) favouring suppliers.<sup>95</sup> Problems are exacerbated in Australia after the GFC.<sup>96</sup> Competition has been drastically reduced in favour of its four big banks, which (ironically) have enjoyed large profits.

There is also more awareness world-wide about the strong interrelationships among different financial markets nowadays, and between them and the real economy:

- In the US, burgeoning unsecured consumer debt (particularly through credit cards) was a major factor behind the growth in subprime mortgages, marketed as a means of lower-cost refinancing. This fuelled the boom in securitisation and other financial markets, followed by the inevitable bust.
- Australia was lucky – rather than deliberate – to have missed out on much growth in securitisation, although several non-bank institutions (now mostly bankrupt or bought out) did take advantage of the then booming markets in the US to secure low-cost funds for on-lending here. Relatedly, Australia also had less (clearly) subprime mortgage lending. But mortgage loans did balloon anyway, and (ironically) they are still being encouraged through ongoing ‘first home owner’ grants and other measures from both federal and State governments.<sup>97</sup> And behind this lies similar long-term growth in credit card debt, and increasing evidence of sharp practices in unsecured consumer credit markets more generally (as in debt collection<sup>98</sup> - see also some markets in New Zealand).<sup>99</sup>

The proposed Bill’s requirements for responsible lending are therefore well overdue. If they had been implemented earlier, as many have called for over the years, such a serious financial crisis might have been averted.

Comparing more closely Japan’s legislation enacted already in 2006, however, the following might be seriously considered for our own reform package.<sup>100</sup>

<sup>94</sup> Directorate for Science, Technology And Industry Committee on Consumer Policy, *The Report on OECD Member Countries’ Approaches to Consumer Contracts* (2007) OECD <<http://www.oecd.org/dataoecd/11/28/38991787.pdf>> at 22 August 2009.

<sup>95</sup> Elaborated further in Kozuka and Nottage, ‘The Myth of the Careful Consumer: Law, Culture, Economics and Politics in the Rise and Fall of Unsecured Lending in Japan’, above n 79.

<sup>96</sup> A Fels and F Brenchley, ‘Smash and Grab Days May be Over for the Big Banks’, *Sydney Morning Herald* (online), 16 May 2009, <<http://business.smh.com.au/business/smash-and-grab-days-may-be-over-for-the-big-banks-20090515-b61n.html>> at 22 August 2009.

<sup>97</sup> J Dart, ‘Rudd Advisers Criticise Home Buyers Grant’, *Sydney Morning Herald* (online), 16 May 2009, <<http://www.smh.com.au/national/rudd-advisers-criticise-home-buyers-grant-20090515-b62w.html>> at 22 August 2009.

<sup>98</sup> Australian Competition and Consumer Commission, ‘Debt Collection’ (2009) <<http://www.accc.gov.au/content/index.phtml/itemId/622458>> at 22 August 2009.

<sup>99</sup> L Nottage, *The Financial Crisis – and Loansharks in Japan and NZ* (2008) East Asia Forum <<http://www.eastasiaforum.org/2008/10/09/financial-crisis-and-loansharks-in-japan-and-nz/>> at 22 August 2009.

<sup>100</sup> Kozuka and Nottage, ‘Re-Regulating Unsecured Consumer Credit in Japan: Over-Indebted Borrowers, the Supreme Court, and New Legislation’, above n 93.

- A rule (or at least a presumption) that the consumer has ‘incapacity to repay’ when the proposed loan payments would exceed more than one-third (or some other clear percentage) of his or her net income;
- An interest rate cap (even if set at a high level), applied consistently across Australia (in contrast to the variable rates in some jurisdictions nowadays).<sup>101</sup>

We might also go a step further and require Australian credit suppliers to notify ASIC – as well as borrowers themselves – if they have actual or constructive knowledge that their products are associated with abnormally high levels of borrower stress (such as suicides or declared insolvency rates, compared to industry averages). The analogy here is with similar duties on suppliers of consumer goods to notify regulators of serious product-related accidents. That duty is imposed now in the US, the EU, Japan (since 2006), China (since 2007) and probably soon Canada. A variant was also recommended by our PC in 2008. Our Consumer Law Roundtable and Choice (Australia’s peak NGO for consumers) are also pressing for its inclusion in the proposed new nation-wide Consumer Law (see part II above). A similar notion, for similar policy reasons, can be extended to the National Consumer Credit Protection Bill.

### B *Improving Consumer Redress Mechanisms*

Lastly, the proposed Bill’s requirement (also long called-for) that mortgage brokers be properly regulated and that all Australian Credit Licences be required to be members of an external dispute resolution scheme (in the shadow of standards set by ASIC) is a welcomed change. Consumer ADR has been overlooked in Treasury officials’ parallel proposals to harmonise and improve other consumer law in Australia.<sup>102</sup>

However, experience from other industry ‘ombudsman’ schemes (for example, telecommunications) shows that to reduce disputing and poor customer relations, it is not enough for such schemes to be provided for ‘free’ to consumers. For the schemes to work, even though they do not (yet) involve court-like processes, it is often necessary for consumers to seek legal or professional help. But the schemes typically do not allow a wronged consumer to claim any expenses for such necessary assistance, in contrast to most courts. Suppliers know this, so they have incentives to not settle claims quickly or for amounts not reflective of the actual costs involved for consumers. A solution, which should be added to the Bill, is a requirement for the proposed scheme for Credit Licences to include a ‘consumer advocate’ service available to deserving consumer complainants, whose costs (borne otherwise by the scheme) could be claimed back from the service provider who is found to be at fault (either through a settlement reached, or a subsequent binding determination).

A second improvement for our legislation would be to clarify whether the scheme is based on administrative law, arbitration law, or contract law. The question has already led to litigation for other schemes. The answer has not yet emerged, but it has various implications (for example, the standards of ‘natural justice’ expected, whether

<sup>101</sup> The Australian governments have indicated they will be reviewing interest caps, but it seems unlikely they will agree on a uniform rate. Hence there are arguments to retain at least the present rates: N Howell, ‘National Consumer Laws, Financial Exclusion and Interest Rate Caps’ (2009) 17 *Competition and Consumer Law Journal* 212.

<sup>102</sup> Nottage, ‘Consumer ADR and the Proposed “Consumer Law” in Australia: Room for Improvement’, above n 6.



consumers or just industry members can complain about those, and whether there can be appeals to the courts for substantive errors of law).

In sum, not only for consumer credit but also for consumer law reform more broadly, Australia needs to clarify as many grey areas and to fill as many gaps as possible. If this unique opportunity is not seized now, there will be a long wait until another arises, and Australia may diverge ever-further from the consumer law regimes in its major trading partners.

## VI CONCLUSIONS

Unfortunately, it appears that the new consumer credit regime will be implemented nation-wide from 1 July 2010 without adding more wide-ranging reforms, such as elaboration of the nature of ombudsman schemes and details of responsible lending requirements, let alone a new reporting requirement on ‘unsafe’ credit suppliers.

Part of the problem lies in the segmentation of the various law reform proposals, arising out of different parts of the government and attracting attention or submissions from rather distinct groups. This makes it difficult to perceive how notification requirements in one field, such as credit services,<sup>103</sup> have potentially fruitful parallels with the notification requirements being proposed for consumer goods.<sup>104</sup> Links between broader new unfair terms regulations,<sup>105</sup> and existing mandatory statutory warranties,<sup>106</sup> also tend to be lost from view. Such fragmentation may be partly unavoidable, as various parts of the government (or even parts within Treasury) need to take charge of consumer law initiatives to bring about new legislation. But it would be helpful for all policy-makers to keep returning to basic principles like those set out in the PC’s Final Report of 2008, which also ‘covered the field’ and therefore made it easier to identify actual or possible links among various areas of law.<sup>107</sup> A more holistic view can also be promoted through studies like this article, which survey several main areas of contemporary consumer law reform, and especially through government support of a new ongoing organisation like the ACREn.<sup>108</sup>

Such efforts are particularly important given the quite rushed timelines for many of the reforms, particularly since February 2009. The new Rudd government is to be commended for achieving agreement of federal and State governments over 2008 following release of the PC’s Report, but tight deadlines for multiple consultations implemented by various parts of the government over 2009 have made it difficult for all stakeholders to provide full input. In particular, consumer law academics have made valuable individual contributions over many years to the literature on topics like those discussed in this article – limited space unfortunately precludes citing more in this article. Although many have added individual and joint submissions, the government

<sup>103</sup> *Trade Practices Act 1974* (Cth) pt V.

<sup>104</sup> *Trade Practices Act 1974* (Cth) pt II.

<sup>105</sup> *Trade Practices Act 1974* (Cth) pt III.

<sup>106</sup> *Trade Practices Act 1974* (Cth) pt IV.

<sup>107</sup> Australian Government - Productivity Commission, *Review of Australia’s Consumer Policy Framework: Inquiry Report*, above n 12.

<sup>108</sup> Australian Government - The Treasury, *CCAAC Review of Statutory Implied Conditions and Warranties*, above n 3; and especially the submission listed as from the ‘Roundtable on Consumer Law’ available via <<http://www.treasury.gov.au/contentitem.asp?ContentID=1501&NavID=>> at 1 December 2009.

could have involved such experts more by providing additional time and opportunities for their input. Such measures are important given the well-known imbalance between presentation of consumer and business interests to those developing public policy.<sup>109</sup>

The federal government may be keen to keep momentum so as to prevent foot-dragging particularly by certain business interests opposed to reform, but its agenda also appears driven by the prospect of the next election already due in 2010. Australia's three-yearly election cycle is another unavoidable factor but, along with the complication of its federal-state system, it does make it difficult to maintain a broader perspective when introducing and implementing consumer law reform. In particular, there are real risks in concentrating efforts on examining developments within Australia as the basis for a new harmonised nation-wide regime. As this article has attempted to show throughout, there is a bigger world out there and Australia needs to engage better with it in developing consumer law for the 21<sup>st</sup> century.

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<sup>109</sup> C Field, 'Reviewing Australian Consumer Protection' (2007) 35 *Australian Business Law Review* 46, 52.