Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism

Associate Professor Luke Nottage
Sydney Centre for International Law
Faculty of Law, The University of Sydney

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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 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 1 of this paper therefore begins by introducing some broader background to Australia’s current reform efforts.

Part 2 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 is based on my Submission 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. After further lobbying including Choice (Australia’s peak NGO for consumers), the NSW Minister of Consumer Affairs subsequently confirmed that this extra duty remains part of the reform package, but is subject to further regulatory impact assessment including opportunities for further public consultation.

1 Associate Professor, Sydney Law School; Program Director (Comparative and Global Law), Sydney Centre for International Law; Co-Director, Australian Network for Japanese Law. Thanks especially to members of the Consumer Law Roundtable, and Professor Michelle Tan. This paper complements our Powerpoint slides for the ‘19th Annual SOCAP Australia International Symposium - The Changing Face of Consumer Affairs’, Sydney, 25-7 August 2009. Those are appended to this paper along with my own Powerpoints for a presentation at the inaugural Sydney Law School / National University of Singapore symposium held in Sydney on 31 July 2009.


Part 3 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. The Bill was presented to the Senate in June 2009, and differs significantly from the Exposure Draft included in the government’s May 2009 Consultation Paper. It remains quite similar to a 1993 European Directive, but potentially less expansive than Japan’s Consumer Contract Act 2000. Further perspectives on unfair terms regulation are in the Consumer Law Roundtable’s Submission to the February 2009 Consultation Paper.

Part 4 is based on my Submission to the Commonwealth Consumer Affairs Advisory Council’s Review of Statutory Implied Conditions and Warranties, announced in July 2009. 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 also suggests that such warranties be displayed at the point of sale. 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 involving listing repeat offenders online, then require firms to undertake TPA compliance programs, and finally involve monetary or other penalties.

Part 5 concludes with my Submission on the parallel review underway for a National Consumer Credit Protection Act. One key recommendation again lies in the crucial enforcement and redress stage, often overlooked in consumer law reform initiatives. In particular, we need to improve certain aspects of industry-association based ‘ombudsman’ schemes. My 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 2) will provide early warnings and better information to regulators (and indirectly to consumers), essential to ‘responsive regulation’.

As the paper emphasises throughout, it is important for Australia to keep undertaking comparative theoretical and empirical research into consumer law and policy. To that

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6 This Part is based on: http://blogs.usyd.edu.au/japaneselaw/2009/08/unfairterms.html
end, Sydney Law School will host the 4th Consumer Law Roundtable on 4 December 2009. And in another Treasury consultation recently about consumer policy research and advocacy, Roundtable members have also proposed the establishment of the ‘Australian Consumer Research Network (ACReN), partly inspired by the flexible cross-institutional Australian Network for Japanese Law.’

Part 1: Australia’s lethargic law reform: how (not) to revive consumer spending

In March 2009 the former Chair of the Australia Competition and Consumer Commission, Professor Allan Fels, co-authored a column for the Sydney Morning Herald entitled ‘Rudd’s Consumer Activism Over the Top’. Their title is misleading, although they raise some good points in response to Treasury officials’ Consultation Paper, ‘An Australian Consumer Law: Fair Markets, Confident Consumers’. 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 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), and then consumer law and policy more broadly (2007 – March 2008). A year after the latter, the Rudd Government was still at the stage of a ‘Consultation Paper’ – proposing a more harmonized 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 doesn’t seem very ‘activist’.

12 http://www.law.usyd.edu.au/caplus/events.shtml
14 www.law.usyd.edu.au/anjer
Further, the Consultation Paper’s focus is very much on one aspect of the PC’s recommendations: reducing transaction costs through harmonization. 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. I can certainly see major benefits from simplification. Accumulated legislation and case law creates a legal morass – as Jocelyn Kellam and I found when analysing Australia’s product liability law and practice in 2007, and when updating in 2008 the more wide-ranging CCH Australian Sales and Fair Trading Reporter looseleaf/online service. In addition, the Consultation Paper does propose ‘trading up’: using the federal Trade Practices Act 1974 (TPA, possibly renamed the Competition and Consumer Law) as the core, but updated for ‘best practice’ developments enacted in state Fair Trading Acts since the late 1980s. So, for example, the Paper proposes a nation-wide version of Victoria’s regime to control proliferating unfair contract terms, in force since 2002 but based on a European Directive dating back to 1993 (discussed further in Part 3 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 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? There is a real risk that the wheel we end up with won’t be ‘fit for purpose’, as the Consumer Law Roundtable in effect pointed out in our Submission regarding the Paper.

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, as I urge in my Submission on the Paper (Part 2 below). If this doesn’t happen in the present round of reforms, it probably won’t happen for another decade.

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Anyway, Australian exporters to the EU, Japan, Canada or the EU 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.22

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’). But I am more interested in some new substantive rules (discussed further in Part 5 below). For example, why not a nation-wide ‘suitability rule’ for at least some types of consumer credit – unsecured or secured – requiring 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. And 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)?23 After all, an explosion of unsecured consumer lending was linked in the US and elsewhere to booms (and now busts) in home mortgage lending, property prices, securitisation and other markets.24

Instead, the Australian government seems to be losing sight of the bigger picture. At long last some debate is now emerging, for example, about the grant of at least A$14,000 being 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. In the same section of the Sydney Morning Herald (‘Pros and cons of granting a fiscal favour’, p. 6), the CEO of Australia’s Commonwealth Bank recently drew 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’.25 This echoes something I’ve been thinking and saying privately for months regarding this grant. It is tempting for governments to try anything in the short term to revive spending, including such measures to make credit more readily available. But a key lesson from the present mess 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.

23 See further Part 8 below.
Lastly, if the Rudd government really wants to be ‘activist’, it should also consider – as Fels points out – ‘creating a separate consumer agency’. Once again, Australia doesn’t need to reinvent the wheel; a similar debate has recently taken place in Japan, for example. A separate agency might help generate more comprehensive, careful and expeditious ongoing reforms to Australia’s consumer law – now in mid-life crisis. Policymakers 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.

Part 2: Product Safety Regulation in the proposed Australian Consumer Law: Proper Disclosure Please

Although it is difficult to work out the Australian Governments’ position from its February 2009 Consultation Paper and related documents, there appears to be a major gap in the proposed new consumer product safety regime. There needs to be a clear commitment to updating the TPA and State/Territory regimes, which date back to the 1970s and 1980s, to reflect current best practice in other similar industrialised democracies. At the least, Australia should add a duty on suppliers to inform the ACCC if they become aware of a serious product related accident – as in the US, the EU, Japan and (soon) Canada. Australia should also now reconsider adding a General Safety Provision (GSP), or at least add into the new legislation a commitment to regular reviews of product safety trends and evolving global standards.

Where Does Australia Really Now Stand?

In the 17 February 2009 consultation paper entitled An Australian Consumer Law and developed by the Standing Committee of Officials of Consumer Affairs (SCOCA), Chapter 8 on “A national regulatory regime for product safety” (contained in Part II – “Agreed Reforms”) begins:

‘In May 2008, 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:

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‘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.’

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.’

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 Productivity Commission (“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.’

**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 recommendations (and at p 186 of its 2008 Report the PC noted that the latter “was not a supplementary review of Australia’s product safety arrangements”). 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.

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. 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 Trade Practices Act since 1992 (with many proving unsuccessful anyway). “Tort reforms” since 2002 have further reduced personal injury filings, and hence the chance for multiple settlements. 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 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 s15(b) of the Consumer Product Safety Act in the US. New legislation presently before the Canadian

32 2008 Report, p 186. See also Recommendation 9.3 of the PC’s 2006 Review, op cit, discussed at pp 217-26 of the latter. 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.
35 Recommendation 9.3 of the 2006 Review, op cit, had added the requirement of a ‘verifiable initiating action to commence litigation’ leading to settlement.
36 As noted already in the PC’s 2006 Review (op cit), one 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.
Parliament also provides for a dual notification requirement. 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”. Cl 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.

The EU’s Product Safety Directive (revised in 2001) 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 Article 3(2).

**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”.

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40 Op cit. Cl 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
In its 2006 Review,\textsuperscript{41} 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 (eg involving goods from China) and reform debates for example in Canada.

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.\textsuperscript{42} 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”.\textsuperscript{43} 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\textsuperscript{st} century. The 17 February 2009 consultation paper proposes this timetable:\textsuperscript{44}

\begin{itemize}
  \item ‘by 30 June 2009: finalisation of the Inter-Governmental Agreement (covering the Australian Consumer Law and including product safety);
  \item ‘by 30 June 2010: finalisation and agreement of the text of the legislation for the Australian Consumer Law, including the product safety reforms; and
  \item ‘by 31 December 2010:
    \begin{itemize}
      \item the Australian Parliament is to have passed legislation for the Australian Consumer Law (including product safety) and amend the TPA;
      \item the Parliaments of the States and Territories are to have passed application Acts to apply the Australian Consumer Law (including product safety) in their own jurisdictions; and
      \item commencement of the Australian Consumer Law in all Australian jurisdictions.’
    \end{itemize}
\end{itemize}

\textsuperscript{41} Op cit, chapter 5.
\textsuperscript{42} See already eg a January 2009 report on implementation of the revised Directive, which was to be implemented in all EU member states by 2004: http://ec.europa.eu/consumers/safety/prod_legis/docs/report_impl_gpsd_en.pdf.
\textsuperscript{44} Op cit, pp 11-12.
Part 3: Unfair Consumer Contracts Law Reform in Australia (at last), Japan and Europe

Compared to Australian and New Zealand legislation, Japan’s Consumer Contracts Act 2000 has quite narrow restrictions on the bargaining process leading up to the conclusion of contracts between consumers and commercial suppliers. 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), as well as targeting some specific types of terms. The Consumer Contracts Act also extends to all types of contracts (except employment contracts: Art 48), and defines ‘consumer’ broadly as any individual not contracting for a business purpose (Art 2).

This definition is similar to that of the 1993 EC Directive on unfair terms (93/13/EEC), 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. Art 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. 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 (Arts 6 and 7).

What about Australia? The Trade Practices Act 1974 (Cth) included a very broad prohibition on misleading and deceptive conduct in trade (s52), 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 s4B(1):

47 Semi-official translation available via http://www.japaneselawtranslation.go.jp
48 Available via http://ec.europa.eu/
50 Via www.austlii.edu.au
‘(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 (s68A). Further, the obligation to take due care when providing services (s74(1)) always excludes ‘(a) a contract for or in relation to the transportation or storage of goods51 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’ (s74(3)). And the fitness for purpose obligation is excluded for ‘services of a professional nature provided by a qualified architect or engineer’ (s74(2)).

The scope of application for these consumer protection provisions is therefore very convoluted and seeming 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 (see Part V Div 2A, added in 1986). 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.52

This is another part of the Australian government’s review of consumer law and policy overall since February 2009, following a detailed Report of the Productivity Commission released in April 2008.53

Australia’s legislation is likely to become even more complicated if the federal Parliament enacts the Trade Practices Amendment (Australian Consumer Law) Bill, introduced on 26 June 2009.54 This laudably adds a long-overdue missing link in Australia’s consumer

51 But not eg a contract for a tug to tow a ship that is transporting goods: PNSL Berhad v Dalrymple Marine Services Pty Ltd [2007] QSC 101.
53 http://www.treasury.gov.au/contentitem.asp?NavId=&amp;ContentID=1484
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’ (ie 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 s4B above) had asked whether goods or services were ordinarily used for ‘private use’. Even under the present s4B(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’. The Contracts Review Act 1980 (NSW) also does not provide for relief from an ‘unjust’ contract ‘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 undertaking’ (s6). Australian courts and others interpreting the Bill’s unfair terms provisions may also be able to draw on similar wording delimiting the applicability of consumer credit legislation (itself under review since 200955). The Bill’s definition of ‘consumer’ may also yet displace at least some definitions within the existing TPA, such as Part V Div 2.

In addition, the Bill includes financial services but specifically excludes charterparties 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. 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 (as still in Japan, following an older German law approach).

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 also partly a ‘commutative justice’ model, focused on substantive balance or fairness.56

The biggest difference with the Directive, and Japan’s Consumer Contract Act, lies in the definition of an ‘unfair’ term – 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’. The Victorian Act likewise has been amended this year to remove any reference to ‘good faith’. This follows a 2005 report of the English and Scottish Law Commissions, and also is related to current confusion in Australian (commercial) contract law about the content (and applicability) of a generalised duty of good faith.57 Yet TPA provisions on

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broader ‘unconscionable conduct’ still list good faith as a factor (Part IVA). 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 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 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 s87 (limiting orders to parties alone), as interpreted in Medibank Private v Cassidy [2002] FCAFC 290. But the ACCC had been pushing for it for the last 7 years, pointing out that the securities regulator (ASIC) has long had such broader powers.

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

To keep up momentum and make sure Australia maintains global standards, it will be important to fund better comparative and empirical research centred around consumer law specialists in Australian universities. To that end, Sydney Law School will host the 4th Consumer Law Roundtable on 4 December 2009. And in another Treasury consultation recently about consumer policy research and advocacy, Roundtable members have also proposed the establishment of the ‘Australian Consumer Research Network (ACReN), partly inspired by the flexible cross-institutional Australian Network for Japanese Law.

Part 4: Consumer Rights – Statutory Implied Conditions and Warranties

The Issues Paper with this title released by the CCAAC in July 2009 raises another topic that is especially overdue 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 research for example by Choice as well as Consumer Affairs Victoria (cited at p6).
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).

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: cf p6).

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).

The existing terms are generally adequate. However, we could abandon the term of art “merchantable quality”, antiquated and odd for non-lawyers. Instead, for example, we could use “acceptable quality”, the more modern and ordinary usage used already in s7 of New Zealand’s Consumer Guarantees Act. Australia also professes a commitment to consumer law harmonisation with New Zealand pursuant to their CER Agreement and recently-renewed MoU, with the NZ Minister also on MCCA.

We should also be less parochial by looking at how the law on implied terms has developed in other jurisdictions. In particular, Australia should taking a recent decision by the House of Lords 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.


J & H Ritchie v Lloyd (Scot) [2007] UKHL 9.
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 p18. 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.65

**Counteracting an emerging new “business model”**

Therefore I do not consider that the turn to voluntary “extended” warranties is due to unclear statutory rights. On the contrary, I think firstly that 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 we need 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.

**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.66

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65 See eg *Penrith Automotive Pty Ltd t/as Penrith Mazda v Woollard* [2007] NSWSC 529.
66 See eg Articles 45 and 51, and further http://www.un.org/esa/sustdev/sissues/consumption/cpp1225.htm (eg ‘Reuse, repair,
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.67

[p20-1 Issues – Additional remedies?] 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 (No ALRC 68, 1994 – cited at p20 n16). Consumers obviously should have the extra option of obtaining replacement goods, rather than just rescission/refund or repair. That is also now provided under s23(1) of the Consumer Guarantees Act.

[pp21-3 Issues – Enforcement and redress barriers] These 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.68

Class actions (p22) 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-deductability of any legal expenses incurred. The only


67 This well-established bias implies that even if provided with fuller information, consumers will tend to think they will ‘beat the odds’ and not have to take out the extra insurance. See, with further references, Kozuka, Souichirou and Nottage, Luke R., The Myth of the Cautious Consumer: Law, Culture, Economics and Politics in the Rise and Partial Fall of Unsecured Lending in Japan. CONSUMER CREDIT, DEBT AND BANKRUPTCY: NATIONAL AND INTERNATIONAL DIMENSIONS, J. Niemi-Kiesilainen, I. Ramsay, W. Whitford, eds. Hart Publishing: Oxford, 2009; Sydney Law School Research Paper No. 09/50. Available at http://ssrn.com/abstract=1413464

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.\(^69\)

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-contented matters like “going rates” for implied warranty time limits.

Similar innovations are needed for industry association and even statutory ombudsman schemes.\(^70\) A further problem is that these apply only to services. We need more ombudsman schemes covering (major categories of) general consumer products, as suggested at one stage by the Productivity Commission. 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 (p21). So the regulator basically can only seek penalties or injunctions or bring representative actions (with consumers’ prior consent, under s87(1B)) if it can find instead some misrepresentation about the statutory warranties, broader (pre-contractual) misleading conduct, or unconscionability. The Issues Paper contrasts the situation under the Consumer Guarantees Act, where reportedly “the regulator is able to enforce statutory guarantees against suppliers on behalf of consumers, including the guarantee that goods will be of ‘acceptable quality’ …” (p21).\(^71\)

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\(^{71}\) This is not obvious to me from reading the Act. Nor eg from the NZ Ministry’s *International Comparison Discussion Paper* (May 2006), [http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/paper-two/paper-two-04.html#P127_20640](http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/paper-two/paper-two-04.html): “The legislation does not allow for enforcement under the CGA to be carried out by the Commerce Commission or any other government or third party agency. The consumer may initiate civil legal action if the remedies are not followed through. … There is one exception to the consumer-driven redress rule: if a trader attempts to contract out of the obligations imposed by the Act, they may be committing an offence under s 13(i) of the Fair Trading Act (for example, a sign in a shop that states that refunds are not available). The offending trader can then be prosecuted by the Commerce Commission. [see s43(4) of the CGA] …
As I have noted elsewhere recently,\(^72\) it seems anomalous for the ACCC already to be empowered to bring a representative action against the manufacturer (s75AQ) for a consumer harmed by an unsafe product, but not against the retailer for the same or similar unsafe (hence unmerchantable) product. 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, Braithwaite’s regulatory pyramid theory would generally expect the regulator to be able to achieve better outcomes by collaborating with suppliers at lower levels of enforcement activity.\(^73\) 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 “compliance program” beyond those specific fields to cover extensively their obligations under implied statutory warranties.

[pp26-8 **Issue - Extended warranties and applicable legislation**] It is very complicated, even for lawyers, to work out that:

- Extended warranties are dealt with under rules on pre-contractual negotiations and implied terms in the ASIC Act, rather than the TPA, and especially all the implications of those different regimes (eg whether both Acts’ definition of “misleading conduct” has been identically interpreted by the courts, or whether each regulator has different enforcement capacity); and
- Extended warranties supplied directly by suppliers are exempted from being a “financial product” under Corporations Act s763E, so there is no mandatory disclosure requirement.

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New Zealand consumer protection legislation relies to a large extent on consumers taking action for themselves. No enforcement agency is responsible for enforcing the CGA and while the Commerce Commission has enforcement responsibilities with respect to the FTA, it is only able to investigate a small percentage of the complaints it receives. When the Commerce Commission takes action against a trader, its primary goal may be not to secure redress for the individual consumers detrimentally affected by the breach. [fn 11: In a recent court case, however, the Commerce Commission dropped a prosecution after the company agreed to refund $54,000 to customers who were incorrectly billed.]

This Paper and forms part of the Ministry’s study into consumer protection law enforcement and redress undertaken over 2005-6: [http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/](http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/). Given the significant similarities between the NZ and Australian legislation, but NZ’s more centralised state, it would be useful to compare especially the two surveys (of consumers, and of businesses) that the Ministry says were undertaken – but which do not appear to be available through their website.

\(^{72}\) Above n 6.

The simplest solution is to have one piece of applicable legislation and one regulator, preferably the TPA and the ACCC. And there must always be at least a disclosure requirement, given the now quite well-established social psychology literature on heuristics and biases affecting individuals’ ability to assess such extended warranties (see also p30 Issues). For example, individuals often forge ahead by reasoning that otherwise their time etc previously invested will be wasted – even though standard economic rationality assumes that only the future costs/benefits should be evaluated.

[ch6 Issues – lemon laws] I would only add here that:

- These information asymmetry issues are not limited to (used) cars, although they have been the main focus due to the high costs of cars, potential for fraudsters in used-goods markets, and simply Akerlof’s famous article. Prime candidates in Australia would be high-value whitegoods and consumer electronics, both new and used (see my Appendix).
- Small but multiple breaches of contract regarding quality can amount to implied repudiation of contract, under the common law. But case law is sparse especially nowadays in consumer transactions, and rights to terminate are easily lost compared to statutory rights.

[p37 Issues – auctions] Warranties should be extended to auctions, not just because of e-auctions, but also the very different physical auctions nowadays compared to a century ago when the exclusion was codified. It would be consistent also with NSW and now TPA legislative amendments to clean up other problems in auction markets, eg underquoting particularly in residential real estate sales.

[p38 Issue – limiting liability under TPA s68A] This provision is problematic, if only because there has been hardly any case law to clarify what might be “fair and reasonable”. The biggest problem is that it has been added due to an expansive preliminary definition of “consumers” in TPA s4B – 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.

A simpler alternative would be the approach of the NZ Consumer Guarantees Act. “Consumer” is defined in s2(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

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74 Exceptionally, see eg Indico Holdings Pty v TNT Australia Ltd (1990) 41 NSWLR 281. See also Finlay, ‘Section 68A(2) Trade Practices Act 1974: Cinderella Section’ (1997) 5 Competition and Consumer Law Journal 22-36. 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).

75 For example, why should a large company like Bunnings get mandatory statutory warranty protections as in Bunnings Group Ltd v Laminex Group Ltd [2006] FCA 682, 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.
Consumer Contracts Act 2000. They only apply if the contracts are not for a business purpose.

The issue of s68A 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. Rather unfortunately, the TPA Amendment Act introduced in June 2009 has largely prejudged point (b), because it regulates broader “unfair terms” in relation to any goods ordinarily for personal use.

[p41 Issue – excluding liability under s68B] 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, it should not be available for gross negligence or like conduct.

[p45 – overseas purchases] The TPA first needs to consider extending its scope to suppliers from overseas, at least for some causes of action (eg retail supplies of unsafe products). Australian courts and tribunals could also be given jurisdiction over such claims. Even so, any judgments against such traders would not usually be enforceable through their home courts (unless eg the trader had a corporate presence or contested the case here) or in Australia (unless they already had assets here).

Another solution may therefore be to add into our burgeoning Free Trade Agreements (or through separate treaties) obligations to:

- build up some similar consumer redress procedures (eg Tribunals) and facilities for “documents-only” cases;
- report to each other’s authorities scams or multiple breaches of similarly phrased implied terms.

Part 5: Responsible Consumer Lending Rules for Australia Too

I agree we need re-regulation of Australia’s consumer credit markets, along the lines proposed in ‘The National Consumer Credit Reform Package’.\textsuperscript{76} Below I focus on some improvements that could be made regarding an External Dispute Resolution scheme. But I begin by supporting a key improvement proposed in the National Consumer Credit Protection Bill: imposing responsible lending rules (focused on ‘suitability’ and repayment capacity), drawing partly on my studies of Japanese law.

\textbf{Suitability Rules}

\textsuperscript{76}Australian Government—The Treasury, ‘Consumer Credit: Legislation’, http://www.treasury.gov.au/consumercredit/content/legislation.asp. 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.
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.\(^7^7\) 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 1-4 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.\(^7^8\) More generally, suitability rules are now widely found in OECD member countries, through administrative/criminal law and/or private law.\(^7^9\)

Such developments recognise pervasive and persistent market failures, especially information asymmetries and behavioural biases (such ‘over-optimism’ bias) favouring suppliers.\(^8^0\) Problems are exacerbated in Australia after the GFC.\(^8^1\) 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 fueled 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) sub-prime mortgage lending. But mortgage loans did balloon anyway, and (ironically) they

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are still being encouraged through ongoing ‘first home owner’ grants and other measures from both federal and state governments.\textsuperscript{82} 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\textsuperscript{83} - see also some markets in New Zealand\textsuperscript{84}).

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, we might have averted such a serious financial crisis.

Comparing more closely Japan’s legislation enacted already in 2006, however, the following might be considered for our Bill:\textsuperscript{85}

- 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 nowadays).

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 Productivity Commission 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 2 above). I propose here to extend a similar notion, for similar policy reasons, to the National Consumer Credit Protection Bill.

**Improving Consumer Redress Mechanisms**

Lastly, I welcome the proposed Bill’s requirement (also long called-for) that mortgage brokers be properly regulated and that all Australian Credit Licencees be required to be members of an External Dispute Resolution scheme (in the shadow of standards set by ASIC). Consumer ADR has been overlooked in Treasury officials’ parallel proposals to harmonise and improve other consumer law in Australia.\textsuperscript{86}

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

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\textsuperscript{85} Kozuka and Nottage, op cit.

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

More sophisticated rules for such an Ombudsman scheme would be useful also for countries like Japan. One was proposed by Professor Tsuneco Matsumoto for Japanese banks over a decade ago, but was met by deathly silence. After all the other changes to Japan’s consumer law and policy framework, including now the establishment of a new independent Consumer Affairs Agency, the time may now have come.87

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### Consumer Law and Policy in the Asia-Pacific

- PM Rudd’s call (’08) for ‘East Asian Community’
- Drawing (loosely) from EU, why not harmonise beyond WTO or even FTAs, increasing efficiencies and legitimacy?
- Including consumer law, eg:
  - Product safety regulation (and PL backdrop)
  - Consumer credit (financial markets regulation)
  - Unfair contract terms generally
  - Consumer access to justice
- See my Blogs and papers on www.ssrn.com

### Consumer product safety

- WTO (eg GATT Art XX, TBT, SPS Agreements) allow restrictions to protect health, if not disguised trade barriers favouring domestic producers
  - Reproduced in burgeoning FTAs
- But why not also joint safety standard-setting?
  - Eg Australia-NZ re food (but not yet medicines!)
- And info sharing, with disclosure obligations:
  - US, then EU, Japan ’06, PRC ’07, soon Canada, not yet Australia!
- Why not broader harmonisation of background (‘private’, ex post) product liability rules?
  - Eg through expanding MCCA membership & agenda
  - Cf PL anomalies in Australia, & Asia-Pacific (Kellam et al x2)

### Consumer credit

- Financial services dereg through WTO and then FTAs: ‘market bias’ requires rethinking post-GFC
- Specifically, reduce consumer over-indebtedness, eg
  - Australia (PM Rudd’s essay last weekend: cf my Blog)
  - Even Japan (with Kozuka x2 on www.ssrn.com)
- Eg new ‘suitability rules’ [also Gail Pearson’s paper]
  - OECD consultancy, Japan ’06, Australian Bill now
- Eg disclosure to regulators if abnormal defaults etc
  - Like product accident disclosure requirements
- Eg even interest caps (Japan, few Oz states, not NZ)

### Consumer contract unfair terms

- PhD ch 3: formal Anglo-NZ vs substantive US, Japan
- Submissions Australian inquiries (Vic->NSW, PC)
  - Consumers often ‘don’t get past go’: traditional (English) common law focus first on ‘procedural’ unconscionability (even in statutes)
  - Even more multi-layered & complex than PL ‘morass’ (eg TPA and state FTAs, Contracts Review Act 1980 NSW)
- Breaking news: TPA Amendment Bill (June ‘09)
  - Not extended to ‘small business’ transactions (rightly, like Vic and [almost] EU/Japan)
  - Regulator can combine inj’n with refund order [cf Medibank]

### Access to justice

- (My parallel interests in international arbitration)
- Reports for EC ’06 & Japan’s Cabinet Office (’07 ‘08)
- Collective redress
  - Limits to class actions (’92, ’00 in V c), although now ‘litigation funders’ for (pure) contingency fees
- Consumer ADR: disparate, ‘under the radar’
  - Eg new schemes for home building disputes (& legal services)
  - Eg industry-based or statutory ‘ombudsman’ schemes: are they based on admin law, contract law, or arbitration? Ltd effect if can’t claim ANY legal fees even in egregious cases?)

### Conclusions

- Locate consumer law more broadly:
  - CSR and corporate governance backdrop
    - eg my new co-edited book comparing Japan; paper on Australia via www.ssrn.com)
  - Political economy and methodology/ideology:
    - Eg Rudd’s ‘new deal’ manifesto vs ‘market fundamentalism’
    - Eg-Japan’s ‘deregulation’ and ‘judicial reform’ vs neo-communitarianism – Tanase (trans & ed) Law and Community (this year), Wolff/Anderson/Nottage (eds) Who Judges Japan? Popular Participation in the Legal Process
Overview

Compare Australia, Japan, Asia-Pacific, EU
- Consumer law, policy & admin
- Product liability vs safety regulation
- Consumer credit vs safety regulation
- Collective redress (class actions)
- Consumer ADR

Consumer Law & Policy Reform

- Australia: Vic-NW (unfair terms), PC ('06 product safety, '08 overall), MCCA/Treasury '09 (+ consumer credit)
- Japan: Cabinet Office -Consumer Affairs Agency '09, greater importance for soft law mechanisms e.g. internal complaints handling standards, codes,
- EU as backdrop, especially for Japan

Product safety

- Significant but small impact of strict-liability PL Law reforms since 90s in Asia-Pacific (also following EU lead):
  - '92 in Australia, '94 in Japan
  - Kellam/Nottage survey via www.ssrn.com
- Successive product safety failures
  - Eg ABCDEs in Japan: asbestos, buildings, consumer electronics, dumplings, elevators
  - Eg Chinese toys etc recalled

Product Safety Re-regulation

- 'vertical' (sector-specific), but also 'horizontal' eg (stricter or new) duty to disclose serious product related accidents:
  - EU from '04 (US from '90)
  - Japan from '06 (injuries, or fires = risks)
  - PRC from '07
  - Canada from '09
  - Australia - PC recommended '06 ... still waiting

- Sometimes (eg Canadian) importers need to disclose info about accidents even overseas (eg Australia)
  - So those importers may (re)negotiate contracts with exporters to get info
  - But why not then simply require exporters (and all firms) to disclose also to their own governments?
  - And then have governments sharing info, eg under an FTA?

- Recall already the Sanlu milk products debacle in China: addressed after the NZ joint venture partner raised concerns with the NZ gov't, which told Beijing, which told local gov't!
**Consumer credit**

- Overindebtedness lay behind the GFC
- See PM Rudd in SMH, and Nottage’s blog at www.eastasiaforum.org
- Australia’s new Bill includes a ‘suitability’ rule
- Japan has had one since ‘06, but also still relies on interest rate caps
- The latter only in some Australian states, rejected in UK and now NZ; broader EU?
- Shouldn’t this field be harmonised too?

**Unfair contract terms**

- Australia belatedly getting nation-wide legislation (TPA Amdt Act, June ‘09)
- Debate over scope: all standard forms, then exceptions, now: goods’ ordinary use (cf EUJ: non-commercial purpose)
- Japan’s Consumer Contracts Act 2000
- Terms contrary to ‘good faith’; and bargaining process (but not as broad as TPA s52, or recent EU Directive)

**Collective Redress**

- Left out of Japan’s PL Law (‘94), Civil Procedure Code reforms (‘96), Consumer Contracts Act (‘00) - BUT
- Injunction suits by accredited consumer groups re unfair terms (since ‘06), and
- Expanded to include deceptive trading practices and advertising in 2009(Apr)
- Japanese Gov’t now investigating damages claims
- Depends partly on ongoing EU debate
- And N.B. UK gov’t has just rejected (opt-out) class action proposal in Jackson LJ report
- Cf Australia: hitherto mainly ACCC injunctions

**Consumer ADR**

- Too often downplayed in reforms in Aust.
- c.f. Role of ADR via Consumer Centers to be expanded in Japan under current reforms
- Hardly mentioned by Treasury (cf PC)
- But meanwhile, interesting innovations:
  - Eg industry ombudsman schemes - but are they based on admin, contract or arb law?
  - Eg legal services commissioner in NSW
  - Home building claim mediation, pre-CTTT

**Conclusions**

- Things are evolving fast in our region, propelled partly by EU developments, driven by globalized trade and increasing demands by consumers for corporate accountability
- Already Australian firms may be impacted by reforms overseas (and broader public/media interest in consumer affairs)
  - Eg product accident disclosure
  - Some may be entrenched by treaties