

LEGAL STUDIES

Consumers Assessment

Previous to the twentieth century the philosophy of *laissez-faire*, defined as 'allow to do,' was the notion that government was not to interfere with private negotiations. Linked with the concept of *Caveat Emptor* – 'let the buyer beware' – it was established that it was the consumer's responsibility to establish suitability and quality of goods. However, overtime governments have become more involved in consumer goods and service contracts and have diverged from *laissez-faire* in a number of ways. These include regulation of advertising and marketing, occupational licensing, implying standards within contracts, regulation of exclusion clauses and privity of contract, unfair contracts, protection of minors and the prevention of discrimination. Through government intervention, the relationship between manufactures and consumers has become balanced and increased the rights of consumers.

Laissez-faire existed successfully previous to the industrial revolution as it was appropriate for village markets and allowed consumers to inspect products themselves. However the advent of mass production, which emerged as a result of the Industrial Revolution, resulted in *laissez-faire* being no longer adequate in its protection of consumers. Unethical business could mislead or deceive consumers whom were unprotected as the moral expectation of a 'general standard' diminished. Mass production also resulted in a dislocation between the manufacturer and consumer, resulting in a greater difficulty in seeking remedy for faulty or non merchantable goods. Although gradual, the introduction of statutes and precedent has created reform as an attempt to allow consumers to gain necessary rights to be balanced with corporations.

Advertising is used as a means of informing consumers of products and services. Due to packaging, consumers must now rely on advertising and marketing to determine the suitability and quality of a product. Legislation is used as a means of regulating merchants and protecting consumers from misleading advertising. The Trade Practices Act 1974 (Cwlth) and Fair Trading Act 1987 (NSW) were introduced to apply enforceable standards, dissimilar from the previous moral expectation of 'general standards' associated with the *laissez-faire* principle. Under section 52 of the Trade Practices Act misleading, deceptive or unconscionable behaviour in advertising or marketing is prohibited. In the case of Eveready Australia Pty Ltd v Gillette Australia Pty Ltd [1992] it was established that the claim in the Duracell advertisement that the batteries last "up to four times longer" would lead consumers to believe that it would last four times longer than competitor's batteries of the same size. Furthermore, it was established in independent testing that Duracell never lasted four times longer. This infringed the Trade Practices Act under section 52, and section 53 – which prohibits false representation about the quality or benefits of goods.

The historical case of Carlill v Carbonic Smoke Ball Company (1893) set precedent. Claims were made by the company that by using the smoke ball as directed a person would not catch influenza, or was entitled to a one hundred pound "reward." When Carlill contracted influenza after using the smoke ball she attempted to claim the reward. The company argued it was not enforceable, however, the courts agreed that the promise was part of a legally binding contract and the 'reward' was consideration in the contract the Carbonic Smoke Ball Company and Carlill had entered into. This demonstrated that advertising 'puffery' may be perceived as a condition of a contract and be therefore binding. The principle of what may be determined as misleading or deceptive conduct was established with Taco Co of Australia v Taco Bell Pty Ltd (1982). The principles state that the relevant section of the public must be identified, and all people included whether intellectual, educated or uneducated, if there is evidence that someone was misled it is relevant however not conclusive, or essential. It also states that if misconception occurs, it must be determined whether or not it was the result of business' conduct. Through the Trade Practices Act and Fair Trading Act protection for consumers has increased as a conviction as a result of a breach of the law leaves companies liable to punishments ranging from fines to corrective advertising.

Occupation licensing is a permit to practise in a particular profession and is used to protect consumers against sub-standard professionals and tradespersons. The licensing exists in two forms – state regulation and self regulation – or a combination of both. State regulation exists for motor car dealers under the Motor Dealers Act 1974 (NSW) and repairers under the Motor Vehicle Repairs Act 1980 (NSW). As a result of legislation a business must hold an occupational license to legally work in a particular area. As a result of the Motor Vehicle Repairs Act the 'Motor Vehicle Industry Repair Council' was established to protect consumers from dishonest or incompetent workers. A similar system operates from travel agents whom must be licensed under the Travel Agents Act 1986 (NSW). Sydney Morning Herald *Money* article 'Packing a Punch' (30/6/10) discusses the difficulty of state regulators "to get banks to change a lot about their contracts" however the introduction of the National Consumer Credit Protection Act 2010 aims to nationally apply to business and thus better regulate through a "stricter licensing regime."

Self regulation exists where an industry is responsible for their own regulation through the adoption of codes of practice and standards of expectation. Demonstrated through the medical industry's 'Australian Medical Association' ('AMA'), self regulation is used to ensure members of a particular standard. Self regulation, however, may become monopolised by placing the interests of the professionals above the interests of society and the individual. Evident in the case of Qidwai v Brown (1984), where Dr Qidwai was brought before the Medical Disciplinary Tribunal and fined. On appeal the NSW Supreme Court Huntly J established that it "cannot be said that one who acts on the minority view is guilty of professional misconduct." This indicates how the legal status of professional tribunals is not recognised under the law and may be overturned in court. This could cause concern for consumers whom may feel unprotected as a result of loosely regulated industries which may be vulnerable to corruption. Independent bodies, although somewhat overseen by government, work separately and often without co-operation. The focus of these bodies is more centrally the protection of professionals and may be at the cost of consumer protection.

Through common and statute law, standards concerning goods and services have been implied. The Sale of Goods Act 1923 (NSW) established a standard that applies to goods, however excluded consumer contracts which concerned services and property. The standards established through the Sale of Goods Act cannot be excluded from a contract. The standard established that a person supplying products has a right to do so. It also concluded the standard of a quality good - which must match its description, be of merchantable quality, fit for its purpose and conform to the display sample. In common law, the standard was established from the case of Donoghue v Stevenson [1932]. Donoghue consumed a partially decomposed snail which was in a bottle of ginger ale bought by Stevenson and fell ill. However as Donoghue had not purchased the product, the manufacturer had no contractual obligations to remedy the situation under common or statute law. Despite this, it was established by Lord Atkin that an implied contract was in existence and that a 'reasonable person' would expect a merchantable quality product that would be safe to consumer. Through this concept, privity of contract was ended, and 'duty of care' standard was recognised.

Governments prevented manufacturers and retailers from exempting harm to an individual from liability through regulating exclusion clauses and conditions of a contract. Through stating a term of a contract, a party may limit a claim against it. However, exclusion clauses may only apply if they are not unnecessarily harsh or oppressive, do not exempt a party's fundamental right, the clause was brought to the attention of the party before they signed the contract and the exclusion was at the knowledge of the party from previous contracts. In addition, if the exemption clause is deemed ambiguous – known as the *contra proferentum* rule - it is unlikely to withstand in court. This is evident in Thorton v Shoe Lane Parking Ltd (1971) where liability was excluded on the back of the parking ticket where the company's terms and conditions were displayed. When Thorton injured himself as a result of negligence that was partially at the fault of the Shoe Lane Parking company, Thorton brought a claim for damages. Although the 'personal injury' exemption clause existed, it was 'so wide and destructive of rights' and was not displayed in a 'reasonable location.' In this manner, common law may be used to override exemption clauses to protect consumers. The doctrine of 'privity' address the main principle that rights and liabilities within a contract belong only to the

parties whom signed the contract. Due to privity, if a third party was injured they could not seek remedies for injustice. However Donoghue v Stevenson [1932] established the law of torts which allowed a person to seek remedies without being a party to a contract as a result of the implied 'duty of care.' This therefore protects consumers even if they were not the purchaser of a product.

Statute and common law have been introduced in response to unfair contracts which are unfavourable to one party and cause them considerable disadvantage. Statute law has addressed the injustice of unfair contracts through the Contracts Review Act 1980 (NSW). This act determines whether or not a contract is unenforceable or unfair by considering the consumer's understanding of the contract and its terms. By assessing circumstances such as the bargaining power of parties, whether opportunity for negotiation occurred, the conditions which were complied with, the explanation of terms and conditions, the language of the contract and whether there was an opportunity for independent legal advice, it may be concluded whether or not a contract was fair. Courts may intervene where a contract lacks genuine consent exists due to evidence of duress, misrepresentation, unconscionability or undue influence. For parties with low literary levels a contract must be clearly read and explained to them, including obligations, terms and exclusion clauses or it may be overturned, even if the party has signed the contract. In the case of Commercial Bank of Australia ('CBA') v Amadio (1983), Mr and Mrs Amadio became guarantors for their son's business loan which was contracted with CBA. The bank failed to explain to Mr and Mrs Amadio the weak financial position of their son or the unlimited liability. The bank also failed to advise Amadio to seek independent legal advice. Subsequent to the bank trying to seek the assets of Amadio following the failure of the business, it was established by the High Court that CBA had undertaken unconscionable misconduct. Similarly, Barton v Armstrong (1976) established a contract made under duress may be rescinded, even if at the benefit of both parties. To remedy an unfair contract, a court may order damages, an injunction, restitution, recession or rectification as a means of restoring a damaged party to their position before the contract took place. This was as a result of Hadley v Baxendale (1854) which established that an injured party may recover 'reasonably considered' damages as a result of a breached contract.

Reform to address unfair contract law in July 2010 aimed to address the unbalance in 'standard form contracts.' The introduced laws added provisions to increase consumer protection and allow courts the power to more easily define a term as unfair and therefore declare it void. Lobbied for by groups such as the Australian Competition and Consumer Commission (ACCC) and Australian Securities & Investigation Commission (ASIC), the July 2010 *Money Magazine* article 'Unfair Trading: New Rules for Contracts' stated that terms would be "regarded as unfair if it causes significant imbalance in the parties' right and obligations." This aims to provide consistency in addressing unfair laws and consumer needs through encompassing watchdog agencies' power through the National Consumer Credit Protection Act 2010.

Under the Minors (Property and Contracts) Act 1970 (NSW) minors are not bound into a contract unless it will be of a benefit to them. This allows people under the age of 18 to be free from a contract which is unfair or exploitative. For a contract for a minor to be binding, it must have been freely chosen and made under market conditions. A minor may enter into a contract without being bound if they have sought permission from a court. However, due to court's leniency, many credit providers are reluctant to enter into a contract unless a guarantor is sought.

Discrimination is defined as the 'treatment of one person in a different manner to another in the same situation because of that person's membership in a particular group in society' and is illegal under federal and state law. The Anti-Discrimination Act 1977 (NSW) states that the supply of accommodation, goods and services must be free of discrimination. It also states that it is an illegal act to discriminate on the grounds of age, sex, race or ethnicity, religion, physical or intellectual impairment, marital status or sexuality. Through the Act, equality has been increased for minority or marginalised groups of society. This has brought greater equality for women whom may now more easily enter into a contract without the signature of their husbands. It also aims to address the increasing multicultural nature of Australian society, by obligating suppliers to adequately address the needs of individuals of different race or religion.

Statutory control is created from common and statute law to protect consumers and allow them to obtain justice in contracts. Statutory control covers a number of consumer rights against suppliers, manufacturers and finance companies. The Trade Practices Act 1974 (Cwlth) and Trade Practices Act 1987 (NSW) entitle consumers to a refund if a product is faulty, unfit for purpose or does not comply with the promotional sample or description. It may allow a repair or replacement as an alternative remedy. Furthermore, this also allows for damages to be claimed against suppliers or manufacturers for misleading or deceptive conduct, harassment, coercion, or unconscionable conduct. Standards apply in statutory control to ensure quality products for consumers. Developed by *Standards Australia*, voluntary standards are not compulsory and therefore suppliers and manufacturers are not obliged to withhold. However, by complying with standards companies assure consumers of the products quality. Mandatory standards are compulsory under the Fair Trading Act and Trade Practices Act and mainly cover the areas of children's toys and sunglasses. Although originally voluntary, they have been transposed into binding statute law. Another main area of mandatory standard is food products which was standardised by *Australia New Zealand Food Authority* ['ANZFA']. Enforced by the ACCC through random market surveys, ANZFA responds to complaints and acts against offending suppliers. The Sydney Morning Herald article 'Shoppers Mislead at Online Checkout' (29 May 2010) concerns the ACCC investigation into Woolworths incorrect online unit pricing. The article demonstrates the role of the ACCC and CHOICE as regulation of suppliers, after laws required 'all major grocery chains to display pricing for a common measurement for a product as well as the total price.' The article also states that penalties for breaching unit price laws reach \$1.1million. CHOICE has also recommended an 'on-the-spot infringement notice ... [and] the federal government to create a supermarket ombudsman.'" The article demonstrates how independent groups monitor standards of corporations, as compiled under the Trade Practices Act. The Act also governs standards on spare parts and repairs. It requires spare parts to be reasonably available for the 'expected useful life' of a product. This is often less than ten years, but allows consumers to readily access repairs for purchased products during this time period.

Through changes from statutes and common law, the protection for consumers has somewhat improved. Effectiveness may be demonstrated through the increasing equality and accessibility of consumer law. The Anti-Discrimination Act 1977 demonstrates an increasing recognition that all people are equal before the law. The right for women to enter into contracts was granted under the Married Women's Property Act 1893 (NSW) whilst the right for women to sue and be sued was granted under the Married Persons (Property and Tenants) Act 1901 (NSW). This demonstrates a greater sense of equality regardless of gender, however did not necessarily balance the equality between the individual and corporations. The Trade Practices Act 1974 and the Contracts Review Act aimed to balance this power through regulation. Furthermore, as defined under law, a corporation is 'equal to' an individual, however, in regard to resource availability this is not the case. Increasing accessibility is demonstrated through the Federal Court Act 1976 (Cwlth) which allowed for class action law suits. This increased the accessibility and allowed groups of people with similar claims to undertake representative action, rather than individual action. This is an increase of resource efficiency and is cheaper for the individual.

The effectiveness of the law may also be demonstrated through its enforceability and resource efficiency. In addition to legislation and the role of the courts, consumer law is enforced by a number of bodies known as 'consumer watchdogs.' Bodies such as the ACCC, ASSC, CCC and Department of Fair Trading are enabled to enforce laws and may prosecute corporations for a breach of conduct. The establishments of tribunals such as the Consumer, Trader and Tenancy Tribunal ('CTTT') provide a more monetarily effective alternative to court proceedings. Furthermore, other alternative resolution methods such as mediation centres and the self-help available from ACCC and other bodies, provide a more effective use of resources and is more accessible for individuals. Despite this efficiency, the law is inadequate in its protection of e-commerce. This area lacks reform and the advent of the internet and online purchasing, has left potential for vulnerability of consumers. The Sydney Morning Herald article 'Victory for Online Buyer in Court Dogfight' (August 2007) set precedent by determining that the online auction site eBay sales could now be legally

binding. The Supreme Court case Smythe v Thomas 2006, which the article examines, ruled in favour of the purchaser of a \$150 000 WWII aircraft. Although this case demonstrates recognition for laws to adapt to technological change, this is yet to be enshrined in legislation. Furthermore, an inadequacy of protection also exists for privacy and self regulation.

The advent of new reforms has increased protection for consumers however it is argued by some manufacturers and suppliers that it is at the cost of their own rights. It has been disputed that the attempt to balance rights of individual and business has made manufacturers less profitable as a result of the costly restrictions and strict standards, whilst the introduction of tariffs and deregulation which may be beneficial for the society negatively impact suppliers and manufacturers. Despite this, the law encourages positive customer results for business, and law has also presents obligations for consumers, not solely business. Furthermore, manufacturers and suppliers are protected under the law just as consumers are, and due to the change from *lassiez-faire* to government intervention, the law is reasonably effective at balancing rights and providing equality between consumers and manufacturers.