

# **Danish Product Safety Act**

## **Part 1**

### **Scope of Act etc.**

1.
  - (1) This Act shall apply to any product which is placed on the market,  
Furthermore, the Act shall apply to services related to a product.
  - (2) This Act shall apply no matter whether the product or the service is offered for a consideration or not.
  - (3) This Act shall not apply to products or services which private individuals provide to each other or which are manufactured or provided exclusively for use in the production of a business enterprise.
  - (4) Furthermore, this Act shall not apply to second-hand movables supplied as products to be repaired or reconditioned prior to being used, provided that the acquirer has been notified hereof in writing, nor shall it apply to antiques.
  - (5) This Act shall not apply to the extent provisions have been laid down by or in accordance with other legislation to implement specific union rules concerning aspects of product safety or categories of risk for the product concerned.

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- (1) This Act shall apply to all products and services which are manufactured, offered for sale, sold, offered or provided in this country or which are intended for export to another EU country.
- (2) This Act shall not apply to products and services exported to a country outside the EU unless otherwise provided for by international agreement or by regulations laid down by the Minister of Industry and Coordination.

## **Part 2**

### **Definitions**

#### **Product**

3. A product shall mean movables of any kind whether it is a raw material or a natural product- Moreover, a product shall mean real property, excluding the site, as well as component parts of and appurtenances to such real property.

#### **Producer**

4.
  - (1) Producer shall mean
    - (a) the manufacturer of the product or a component part;

- (b) the person placing a raw material or a natural product on the market;
  - (c) the person presenting him or herself as the manufacturer by affixing to the product his or her name, trade mark or other distinctive mark;
  - (d) the person who reconditions the product.
- (2) In addition, producer shall mean the manufacturer's representative as stated in subsection (1) if the manufacturer is not established in the EU and there is no representative of the producer established in the EU, the importer of the product shall be deemed to be producer.
- (3) Other professionals in the supply chain shall be deemed to be producers, insofar as their activities affect the safety properties of a product.

### **Distributor**

- 5.
- (1) Distributor shall mean any professional in the supply chain whose activity does not affect the safety properties of a product.
- (2) Anyone placing a product on the market shall likewise be deemed to be a distributor.

### **Safe product**

- 6.
- (1) A product shall be deemed to be safe if it does not present any risk to the health and safety of persons or property when used for the assumed purpose or in a way in which it is expected to be used.
- (2) A product shall not be considered dangerous for the sole reason that it is possible to obtain higher levels of safety or because another and safer product is available.
- (3) Subsections (1) and (2) shall apply correspondingly to services.
- 7.
- (1) To the extent a product is designed and manufactured or a service is provided in accordance with the health and safety requirements laid down by law, the product shall be deemed safe in relation to these safety aspects.
- (2) Where no health and safety requirements are laid down by law, the safety of a product or a service shall be assessed having regard to
- (a) a Danish standard giving effect to a harmonised European standard or Community technical specifications or, failing these, to
  - (b) a Danish standard or, failing this, to
  - (c) the state of the art and technology and to the safety which consumers may reasonably expect; or, failing this, to
  - (d) codes of good practice in the sector concerned.
- (3) To the extent harmonised safety requirements have been laid down by

Community law or in pursuance thereof in respect of products or services, these shall replace the corresponding safety requirements laid down in the provisions of subsections (1) and (2).

### **Part 3**

#### **Marketing and manufacture**

8.
  - (1) Only safe products may be placed on the market, and only safe services may be provided.
  - (2) Within the limits of his or hers activities anyone placing or having placed a product on the market shall take all reasonable measures to prevent danger to persons or property. This shall also apply to services.
9.
  - (1) Anyone placing a product on the market or providing a service shall in a suitable manner provide information on any possible risk of danger and on how to take precautions against those risks. Such information shall not in itself exempt any person from compliance with the other requirements laid down by this act.
  - (2) Within the limits of their respective activities the producer and the distributor shall adopt the necessary measures to avoid the marketing of dangerous products. Such measures may include marking of the product, sample testing of marketed products and investigating complaints made and passing on information on product dangers.
  - (3) If measures adopted under subsections (1) and (2) are not adequate, the producer and the distributor shall within the limits of their respective activities withdraw the product from the market.

### **Part 4**

#### **Monitoring of the market**

10. The monitoring authority shall supervise the safety of products and services. Any professional in the supply chain shall, to the extent it is necessary, cooperate in the monitoring.
11. If a product which has not yet been placed on the market or a service which has not yet been provided constitutes a health or safety risk, the monitoring authority may determine
  - (1) that a product may only be placed on the market or a service may only be provided together with specified information about the dangers which the product or the service may present;

- (2) that a product or a product batch may not be placed on the market or a service may not be provided if they present a danger unless specified requirements regarding the product or the service are satisfied;
- (3) temporarily to prohibit, for the period required to carry out controls, anyone from offering, supplying or exhibiting a product or product batch or a service whenever danger arises therefrom;
- (4) that a product may not be placed on the market or a service may not be provided if the product or the service presents a danger and information or requirements under paragraphs (1), (2) or (3) must be considered inadequate.

12.

- (1) If a product or a service which presents a danger is placed on the market or provided, the monitoring authority may order that anyone who placed the product on the market or provided the service shall within the limits of the activities of the person concerned forth-with or within a specified time-limit
  - (a) subsequently provide information on the danger of the product or the service and on how to take precautions against such danger;
  - (b) remedy matters which are the cause of the danger;
  - (c) withdraw the product;
  - (d) destroy the product under appropriate conditions.
- (2) Anyone who has been a professional in the supply chain from the time when the danger arose may be required to cooperate in action taken to implement a requirement relating to a product or a service which has been imposed on another professional in the supply chain under this provision.
- (3) In cases where a product is required to be withdrawn in pursuance of paragraph (3) of subsection (1) or to be destroyed in pursuance of paragraph (4) of subsection (1), the time limits set out in sections 54 and 83 of the Danish Sale of Goods Act shall not apply.

13.

- (1) Whenever it is deemed necessary, the monitoring authorities may prohibit by executive order the sale and advertising of products and services which are not safe.
- (2) In connection with any requirement or prohibition made or issued in pursuance of section 12(1) or section 13(1), the monitoring authority may determine that the owner of a product shall cooperate in a specified manner in the action taken to have the product repaired or withdrawn.
- (3) If the product or the service is deemed by the monitoring authority to present a risk to health or safety, no matter whether it satisfies the requirements of section 7(1) and (2), the authority may determine that the product shall not be

placed on the market or the service not be provided or that this may only take place under certain conditions or that the product shall be withdrawn.

14. The monitoring authorities may whenever necessary inform the public of the danger of a product or a service.

## **Part 5**

Safety requirements for toys and products which due to their outer appearance may be mistaken for foodstuffs

15. The Minister of Industry and Coordination may lay down rules on safety requirements for toys and products which due to their outer appearance may be mistaken for foodstuffs and thus present a danger to the health or safety of consumers.
16. Furthermore, in rules issued in pursuance of section 15, rules may be laid down on
- (1) prohibitions of manufacture and supply, including prohibition of imports into Denmark;
  - (2) requirements concerning manufacture in accordance with standards, concerning type approvals and concerning labelling;
  - (3) payment of a fee for type approvals;
  - (4) payment of costs connected with the monitoring carried out by the authorities if it is ascertained in connection with such monitoring that the toys do not satisfy material safety requirements or have not been made in accordance with the standards or an approved prototype;
  - (5) the issue of repurchase orders.

## **Part 6**

### **Administration of the Act**

- 17.
- (1) The monitoring authority shall be responsible for monitoring the safety of products and services under this Act.
  - (2) The National Consumer Agency of Denmark shall handle the function of monitoring authority under this Act unless otherwise provided by section 18. Moreover, the Agency shall be responsible for coordinating the work of the monitoring authorities.
- 18.
- (1) If provisions are laid down by or in accordance with other legislation concerning prevention of the danger of special products or services, the authority responsible for ensuring compliance with such legislation shall moreover exercise the powers as monitoring authority under this Act as

regards these products or services. The minister whose sphere of activity covers such other legislation may lay down rules concerning case administration and right of complaints which differ from the provisions of this Act.

- (2) Unless safety provisions are laid down by special legislation, the Minister of Industry and Coordination may after consultation with the authorities affected delegate powers under this Act to another authority by executive order.

19.

- (i) The supervisory, approval and monitoring measures set out under Part 5 shall be carried out by central or local government authorities or private enterprises authorised for the purpose by the Minister of Industry and Coordination.
- (2) Prohibitions and orders under Part 5 shall be issued and made by the National Consumer Agency of Denmark. The Council may authorise the authorities mentioned in subsection (1) to issue or make prohibitions or orders.

20.

- (1) The monitoring authority may of its own motion or based on a notification take up a matter for consideration. The monitoring authority may determine that a notification shall not be considered if, in the opinion of the authority, there are no grounds for considering the notification.
- (2) The rules laid down by the Danish Public Administration Act concerning consultation of the relevant parties shall apply to measures covered by this Act. If because of the urgency of the measures to be taken the monitoring authority takes action without having consulted the party affected, such party shall be given an opportunity to submit its views as soon as possible after the measure concerned has been implemented.

21.

- (1) The monitoring authority may demand all information that is deemed to be necessary for the activity of the authority, including its decision as to whether a matter comes within the provisions of the Act.
- (2) The Danish Open Files Act shall not apply to information obtained
- (a) for use for the authority's control on the control carried out by the enterprises themselves;
  - (b) through the public control corresponding hereto; or
  - (c) concerning the quality certification of the enterprises.

22.

- (1) The monitoring authority shall be entitled, free of charge, to take samples of products or components thereof with a view to examinations and tests. The monitoring authority shall against due proof of identity have access without a

court order to the manufacturing, sales and storage premises etc. as well as means of transportation belonging to anyone covered by sections 4 and 5.

(2)The police shall assist the monitoring authority. The Minister of Justice may after consultation with the Minister of Industry and Coordination lay down more detailed rules thereon.

(3)The monitoring authority shall pay the cost of obtaining expert opinions which are deemed necessary by the authority to determine whether a requirement or prohibition shall be made or issued. The authority may demand that the cost thereof shall be reimbursed by anyone on whom a requirement or prohibition has been imposed.

23.

(I )The decision of a monitoring authority under this Act cannot be brought before any other administrative authority, cf., however, section 18.

(2)Any requirements or prohibitions made or issued in pursuance of sections 12 and 13 shall without undue delay be brought before the courts of law by the monitoring authority if an objection is made by the person to whom the prohibition or requirement is addressed.

(3)The court may determine that any action brought as mentioned in subsection (2) shall have suspensive effect.

24. The National Consumer Agency of Denmark shall forthwith be notified by the monitoring authority of any significant product safety measures adopted in pursuance of paragraphs (2)-(4) of section 11, paragraphs (2)-(4) of section 12(1) and subsections (1) and (3) of section 13 of this Act or any other legislation. The National Consumer Agency of Denmark shall notify the Commission of the European Union of measures adopted in pursuance of the Act to the extent required by Council Directive 92/59 EEC.

25.

(1)The Minister of Industry and Coordination shall lay down detailed rules concerning the administration of the Act, including, after consultation with the ministers affected, rules on how to coordinate the efforts of the monitoring authority.

(2)The Minister of Industry and Coordination may delegate the powers under subsection (1) to the monitoring authority.

(3)Moreover, the Minister of Industry and Coordination may lay down the rules required for the future implementation or application in this country of the legal documents of the European Union concerning product safety. As regards, legal documents which concern products coming within the spheres of other ministries, the minister in question shall lay down the rules.

## **Part 7**

### **Court proceedings**

26.

- (1) Cases covered by this Act shall be heard by the city court. If, however, detailed knowledge of product safety matters is deemed to be of significance to decide the case, the case shall be heard by the Maritime and Commercial Court in Copenhagen.
- (2) If proceedings are brought before the Maritime and Commercial Court in Copenhagen by reason of infringement of legislation, cf. subsection (1), the prosecution of the offence may be delegated to the National Consumer Agency of Denmark. cL section 105(3) of the Danish Administration of Justice Act.

## **Part 8**

### **Penalty provisions etc.**

27.

- (1) Unless the offence carries a more severe penalty under any other legislation, anyone who wilfully infringes section 8(1) shall be liable to a fine.
- (2) Unless the offence carries a more severe penalty under any other legislation, anyone who wilfully or through gross negligence or repeatedly fails to comply with any requirement or infringes a prohibition under sections 11 and 12 shall be liable to a fine.
- (3) Failure to supply the monitoring authority with any information requested under section 21 shall be punishable by fine.
- (4) In regulations issued by the Minister of Industry and Coordination in pursuance of sections 13 and 15, fines may be imposed for infringement of the provisions of such regulations.

28. Where an offence is committed by a company, an association, an independent institution, a foundation or the like, liability to pay a fine may be imposed on the legal person as such. If the offence is committed by the Danish government, a local authority or a joint municipal enterprise, cf. section 60 of the Local Government Act, liability to pay a fine may be imposed on the Danish government, local authority or joint municipal enterprise.

29. The Danish Administration of Justice Act, cf. Consolidated Act No. 905 of 10 November 1992, as amended by Act No. 469 of 30 June 1993, shall be amended as follows:

Section 105(3) shall be drafted as follows:

- (3) The Danish Minister of Justice may appoint the Consumer Ombudsman and

employees of the National Consumer Agency of Denmark to prosecute any offence before the Maritime and Commercial Court and the city courts in cases concerning the Danish Marketing Practices Act. Employees of the National Consumer Agency of Denmark may be appointed to prosecute offences before the Maritime and Commercial Court in cases concerning the Danish Product Safety Act.

## **Part 9**

### **Commencement and transitional provisions**

30.

(1) This Act shall come into operation on 15 June 1994.

(2) At the same time, sections 12a and 12b as well as section 15(2) and (3) and section 19(6) of the Danish Marketing Practices Act, cf. Consolidated Act No. 594 of 27 June 1992, shall be repealed.

(3) The provisions laid down in pursuance of section 12 a of the Danish Marketing Practices Act shall remain in force until repealed or replaced by provisions laid down in pursuance of this Act.

31 This Act shall not extend to the Faroe Islands and Greenland. Given at *Czristiansborg Castle this 18th day of May 1994*

Under Our Royal Hand and Seal

In the Name of the Queen:

FREDERIK Crown Prince

[Mimi Jakobsen

## **The Danish Marketing Practices Act**

WE MARGRETHE THE SECOND, by the Grace of God Queen of Denmark, hereby make known: Foilcetinget has passed and We have provided the following Act with Our Royal Assent:

### **Good Marketing Practices**

1. This Act shall apply to private business activities and to similar activities undertaken by public bodies. Such activities shall be carried on in accordance with good marketing practices.

### **Misleading Information, Derogatory Statements, etc.**

2.
  - (1) It shall be an offence to make use of any false, misleading, or unreasonably incomplete indication or statement likely to affect the demand for or supply of goods, real or personal property, and work or services.
  - (2) The provisions of the preceding subsection shall apply also to indications or statements which, because of their form and reference to irrelevant matters, are improper in relation to other persons carrying on a trade or business or to consumers.
  - (3) It shall be an offence to make use of any misleading practices affecting demand or supply in the manner stated in subsection (1) hereof or practices of corresponding effect, if, because of their special form or reference to irrelevant matters, such practices are improper in relation to other persons carrying on a trade or business or to consumers.
  - (4) It shall be possible to substantiate the correctness of indications or statements on actual facts.

### **Instructions**

3. At the time of the making of an offer, the conclusion of a contract or, where appropriate, the delivery of goods or the supply of services, proper information or instructions shall be provided according to the nature of the goods or services, where such information or instructions are of importance in the evaluation of the nature or quality of the goods or services, especially including fitness for purpose, durability, the nature of any risks involved, and information as to maintenance -

### **Guarantees**

4. A guarantee, warrant or declaration of a similar nature shall be given to consumers only when such guarantee, warrant or declaration affords the consumer a considerably better legal position than otherwise provided by existing legislation.

### **Distinctive Business Marks**

5. No person carrying on a trade or business shall make use of any trade mark or other distinctive business mark to which he is not legally entitled or make use of his own distinctive business marks in a manner likely to cause such marks to be confused with those of other traders.

### **Collateral Gifts**

6.

- (1) Where a person carrying on a trade or business sells goods or real property to consumers or performs work or provides services for consumers, he shall not provide any collateral gift or similar inducement, unless such gift or inducement is of negligible value. The advertising of any such gift or inducement other than a gift or inducement of negligible value shall similarly be prohibited.
- (2) A benefit of exactly the same kind as the principal benefit rendered shall be deemed not to be a collateral gift or similar inducement.
- (3) Notwithstanding the provision of subsection (1) hereof, a person carrying on a trade or business subject to a licence granted pursuant to section 75(1) and (2) of the Danish Aviation Act may provide a collateral gift or inducement upon sale of flights and services related hereto provided that this is done in connection with an air bonus scheme as referred to in subsection (5) hereof. Other persons carrying on a trade or business may provide a collateral gift or inducement in the form of free trips, hotel accommodation and car rental provided that this is done in connection with an air bonus scheme.
- (4) A holder of such permission or other persons carrying on a trade or business may provide a collateral gift or inducement in connection with an air bonus scheme without being subject to the restrictions referred to in subsection (3) hereof if another holder of such permission who is competing with the former holder of permission grants such a gift or inducement in his air bonus scheme. Where collateral gifts or inducements are provided pursuant to the 1st paragraph of this subsection, this shall be notified to the Consumer Ombudsman.
- (5) The air bonus scheme shall be offered internationally and shall by a holder of permission be established as part of his usual business or trade. The most important element of the scheme in this country shall be the provision of a collateral gift or inducement upon sale of flights. If the holder of a permission cooperates with other persons carrying on a trade or business, the scheme shall also cover the provision of collateral gifts or inducements upon sale of hotel accommodation and car rental.

- (6)The provisions laid down in subsections (3)-(5) hereof relating to holders of permission shall also apply to persons carrying on a trade or business with a licence issued by a EU Member State pursuant to Council Regulation (EEC) No. 2407/92 of 23rd July, 1992 on licence to air carriers or by a country which upon agreement with the EU has acceded to this regulation.
- (7)The Minister of Industry and Coordination may permit that other enterprises, subject to similar international competition, may provide a collateral gift or inducement to a specified extent. The permission may be granted for a limited period of time.

### **Quantitative Restrictions**

7-

- (1)A retail business shall not be entitled to set any ceiling on the number of goods which any individual customer is allowed to buy. Moreover, sale to specific buyers may not be denied.
- (2)The provisions laid down in subsection (1) hereof shall not apply to goods sold on bargain sales.

### **Trading Stamps, etc.**

8.

- (1 )No discount must be allowed nor any other benefit be provided in the form of stamps, coupons or the like, which have been made available by persons carrying on a trade or business prior to the purchase of an article or on performing work or providing services.
- (2)Notwithstanding the provisions of the preceding subsection, persons carrying on a trade or business may upon sale of goods and on performing work and providing services allow a discount or provide any other benefit in the form of stamps, coupons or the like for encashment at a later date, provided that each stamp is provided with a clear indication of the identity of the issuer and of its value in Danish currency. The issuer of such stamps, coupons or the like shall exchange them for cash in this country at their nominal value at the time when stamps in an amount to be determined by the Minister of Industry and Coordination are required to be exchanged for cash.
- (3)Subsections (1) and (2) hereof shall not apply in connection with the air bonus schemes referred to in section 6(3)(6) of this Act or in connection with the permissions referred to in section 6(7) of this Act.

### **Drawing of Lot and Prize Competitions**

9.

- (1)No attempts shall be made to promote sale to consumers of goods or

services offering them the possibility of a prize if they participate in the drawing of lot, prize competition or any other arrangement where the results are wholly or partly dependent on chance, provided that such participation is conditional upon purchase.

(2) The provision laid down in subsection (1) hereof shall not apply if the amount of the individual prize and the total value of prizes are within the limits as fixed by the Minister of Industry and Coordination. Such limits may be fixed according to product and group of recipients.

(3) The publisher of a periodical shall be permitted to arrange for the drawing of lots for the distribution of prizes awarded in connection with prize competitions.

### **Trade Secrets and Technkal Drawings**

10.

(1) No person employed by, co-operating with, or performing work or providing services for a commercial enterprise shall, in an improper manner, acquire or attempt to acquire knowledge or possession of the trade secrets of such enterprise.

(2) Where such person has lawfully acquired knowledge or possession of the trade secrets of the enterprise, he shall not, without proper authority, disclose or make use of such secrets. This provision shall apply for a period of three years after the termination of the employment or of the period of co;Xoperation or the completion of the work or of the provision of the services, as the case may be.

(3) Where a person for the purpose of performing work or for any other business purpose has been entrusted with technical drawings, descriptions, formulae, patterns, models or other information, he shall not, without proper authority, make use of or allow others to make use of such knowledge, information or material.

(4) No person carrying on a trade or business shaU make use of a trade secret where knowledge or possession of such trade secret has been acquired in contravention of the preceding provisions of this section.

### **Labelling and packaging**

11.

(1) The Minister of Industry and Coordination may, after consultation with the central organizations of Danish trade and industry and with the consumer organizations, by regulations provide that certain goods sold by retail (sale to consumer) shall be sold or offered for sale only where it is stated whether the goods are Danish or foreign or where the goods bear an indication of the

place of origin or production. The Minister of Industry and Coordination may specify the manner in which the said indication or statement shall be affixed to or marked on the goods and how the expression >>place of origin or production<< shall be interpreted in each case.

(2) The Minister of Industry and Coordination may, after consultation with the central organizations of Danish trade and industry and with the consumer organizations, by regulations provide-

(a) that certain trade descriptions or symbols shall be reserved for or applied to goods that comply with certain specified requirements; and

(b) that certain goods shall be sold or offered for sale only where such goods or their wrapping or packaging are, in a manner prescribed by the Minister, provided with information relating to the contents and composition relating to the contents and composition of the goods, their durability, directions for use and other properties.

12. The Minister of Industry and Coordination may, after consultation with the central organizations of Danish trade and industry and with the consumer organizations, by regulations provide restrictions of the right to purchase, sell, and use such packaging or parts thereof as are, in a prescribed manner, either marked with the name or trade mark of any commercial enterprise registered in this country or are marked in a manner reserved exclusively for the packaging of goods of a specific kind. The Minister of Industry and Coordination may similarly prohibit wilful destruction of or damage to such packaging.

### **Injunctions, Orders and Liability for Damages**

13.

(1) The court may issue injunctions prohibiting acts done in contravention of the provisions of this Act. In this connection or at a later date the court may make such orders as it considers necessary to ensure

(a) that an injunction is complied with, including a decision to the effect that agreements concluded in contravention of an injunction shall be void;

(b) restoration of the conditions existing prior to the illegal act, including destruction or withdrawal of products and publication of information or correction of indications or statements.

(2) Any person acting in contravention of the provisions of this Act shall be subject to liability for damages pursuant to the general provisions of Danish law to this effect.

### **The Maritime and Commercial Court**

14.

- (1) Civil proceedings for the decision of which the application of this Act is of material importance shall be brought before the Copenhagen Maritime and Commercial Court, unless otherwise agreed by the parties.
- (2) Public prosecution for an offence under this Act shall be brought before the Copenhagen Maritime and Commercial Court unless detailed knowledge of marketing practices is considered to be of immaterial importance to the decision of the case.

### **The Consumer Ombudsman**

15.

- (1) It shall be the duty of the Consumer Ombudsman to see that the provisions of this Act are not contravened, especially considering the interests of the consumers.
- (2) The Consumer Ombudsman may require all such information as he considers necessary for the performance of his functions including information considered necessary to decide whether a matter falls within the scope of this Act.
- (3) The Consumer Ombudsman shall possess the qualifications and fulfil the general conditions necessary for appointment as a judge.
- (4) Decisions made by the Consumer Ombudsman under this Act cannot be made the subject of an appeal to any other administrative authority.
- (5) The Minister of Industry and Coordination shall be empowered to make regulations specifying the functions of the Consumer Ombudsman.

### **Principle of Negotiation**

16.

- (1) The Consumer Ombudsman shall by negotiation endeavour to induce persons carrying on a trade or business to act in accordance with the principles of good marketing practices and with the provisions of this Act in general.
- (2) If a person carrying on a trade or business fails to fulfil a commitment given to the Consumer Ombudsman after negotiations conducted pursuant to subsection (1) hereof, the Consumer Ombudsman may issue such orders to the person concerned as may be deemed necessary for ensuring the fulfilment of such commitment.

### **Guidelines**

17. After conducting negotiations with the relevant trade and consumer organizations, the Consumer Ombudsman shall endeavour to influence the conduct of the persons carrying on a trade and business by drawing up and publishing marketing guidelines within specified areas considered important,

especially to the interests of the consumers.

### **Advance Statement**

18.

- (1) The Consumer Ombudsman shall, upon request, give his opinion on the legality of contemplated marketing initiatives unless such opinion gives rise to any particular doubt or special circumstances exist. An advance statement shall not imply that an actual decision has been taken with respect to the legality of the initiative concerned.
- (2) Where the Consumer Ombudsman has given an advance statement to a person carrying on a trade or business to the effect that a contemplated initiative will be legal in the opinion of the Consumer Ombudsman, the Consumer Ombudsman may not on his own initiative intervene with respect to an initiative covered by the advance statement and implemented within a reasonable time after the issue of such advance statement.
- (3) The Minister of Industry and Coordination may lay down specified rules governing fees for the issue of advance statements.

### **Legal Proceedings, etc.**

19.

- (1) Any person with a legal interest herein may institute legal proceedings with respect to injunctions, orders or liability for damages pursuant to section 13 of this Act. The Consumer Ombudsman may institute legal proceedings with respect to injunctions and orders pursuant to section 13 (1) of this Act.
- (2) If a charge is brought against a person for contravention of this Act, the execution of such charge shall be left to the Consumer Ombudsman if he so requests.

### **Actions for Damages**

20. If, in connection with a contravention of the provisions of this Act, a plurality of consumers has uniform claims for damages, the Consumer Ombudsman may, upon request, recover the claims collectively.

### **Interlocutory Injunction**

21.

- (1) The Consumer Ombudsman may issue an interlocutory injunction where there is a reasonable possibility that the object of an injunction referred to in section 13 (1) of this Act may not be achieved if the decision of the court has to be awaited. An action to confirm the injunction shall be brought not later than the next following weekday. The provisions of paragraph (I) of section 648 (i) sections 648 (2), 649, 650 and 651 of the Danish Administration of Justice Act shall apply correspondingly and the provisions

of sections 628 (1), 629, 633, 634 (2) and (5), 636 (1), 639 and 640 (1) shall apply with the necessary modifications.

- (2) Where judgment in a case to confirm an injunction under the provisions of subsection (1) hereof cannot be given before the expiration of five weekdays after the institution of proceedings, the court may, in the course of the preparatory stages of the case before the expiry of the said period, order that the injunction shall continue. Before such a decision is made, the court shall, as far as possible, give the parties an opportunity to make representations. If the injunction is not confirmed before the expiry of the said period, it shall lapse.

### **Prosecutions and Penalties**

22.

- (1) Any person guilty of breach of an injunction or non-compliance with an order issued by the court or by the Consumer Ombudsman pursuant to section 16 (2) hereof shall be liable to a fine or to mitigated imprisonment. However, noncompliance with an order to repay money received shall not be subject to penalty.
- (2) Any person who fails to give such information as is required of him under section 15 (2) of this Act or, in matters falling within the scope of this Act, gives false or misleading information to the Consumer Ombudsman shall be liable to a fine, unless the offence carries a more severe penalty under any other enactment.
- (3) Any person who is guilty of an offence under sections 2(1)- (3) or 6-9 of this Act or who wilfully contravenes the provisions of section 5 of this Act shall be liable to a fine, unless the offence carries a more severe penalty under any other enactment. Offences under subsections (2) and (3) of section 2 of this Act consisting in injurious statements made in respect of a person carrying on a trade or business or in respect of any other matters particularly relating to such person shall be a cause for private prosecution.
- (4) Any person guilty of an offence under section 10 of this Act shall be liable to a fine or to mitigated imprisonment or to ordinary imprisonment for a term not exceeding 2 years. Proceedings may be instituted only at the request of the injured party.
- (5) In regulations made under sections 11 and 12 of this Act, fines may be prescribed as the penalty for offences committed under these regulations.
- (6) Where the offence is committed by a limited liability company, co-operative society or other corporate entity, the company, society or corporate entity as such shall be liable to a fine. Where the offence is

committed by a central government or local authority or corporation, the central government or local authority or corporation shall be liable to a fine.

### **Free Legal Aid**

23. Consumers who comply with the provisions laid down in section 330 (1) (item 2) of the Danish Administration of Justice Act shall be granted free legal aid in cases of repayment of money covered by an order issued by the court or the Consumer Ombudsman.

### **Delegation of Powers**

24. The Minister of Industry and Coordination may delegate his/her powers under this Act to the National Consumers Agency of Denmark. This shall not apply to the powers laid down in section 15 (5) of this Act. If the Minister of Industry and Coordination delegates his/her powers to the National Consumers Agency of Denmark, the Minister may lay down rules governing the access to make complaints, including rules to the effect that complaints may not be brought before another administrative authority.

### **Commencement**

25. This Act shall come into operation on 1st October, 1994. At the same time the Danish Marketing Practices Act, cf. Consolidated Act No. 594 of 27th June, 1992, shall be repealed.

### **The Faroe Islands and Greenland**

26. This Act shall not extend to the Faroe Islands and Greenland.

Given at Christiansborg Palace on 1st June 1994

Under Our Royal Hand and Seal

MARGRETHE R.

[Mimi Jakobsen

# **Ministry of Industry and Coordination**

## **Consolidated Payment Cards etc. Act**

This is an Act to consolidate Act No. 284 of 6 June 1984 as amended by Act No. 162 of 23 March 1988, section 4 of Act No. 818 of 19 December 1989, Act No. 184 of 23 March 1992 and Act No. 426 of 1 June 1994.

### **Part 1**

#### **Scope of Act**

1.

(1) This Act shall apply to payment systems with payment cards and payment systems equivalent thereto which are offered or can be used in this country.

(2) Except for sections 13, 15, 18, 21 and 25, the Act shall apply correspondingly to payment systems without payment cards but with codes or any other similar proof of identity if the system is offered or can be used in this country, cf., however, subsections (3) and (4), Part 6 a shall only apply to these payment systems.

(3) If the systems mentioned in subsection (2) are offered for both business and non-business use, Parts 4, 5 and 6 a shall not apply to the relationship between the system provider and the individual user if the system provider proves that in the affiliation agreement the user has undertaken to use the payment system for business or businesslike purposes only. If, however, the user uses the payment system in contravention thereof, the Parts concerned shall apply unless it is proved that the system provider neither knew nor ought to have known that the system was being used in an unauthorized manner.

(4) This Act shall not apply to payment systems as mentioned in subsection (2) if the system is exclusively offered and affiliation is only possible for business use, unless the system provider makes an agreement for or subsequently accepts a different use of the system.

(5) The Minister of Industry and Coordination may determine that payment systems, cf. subsections (1) and (2), shall be exempt from the provisions of this Act in whole or in part.

2.

(1) 'Payment cards' means cash withdrawal cards as well as proprietary, credit and debit cards used for payment purposes so that the cardholder can

acquire goods or services, arrange for transfers of payment. withdraw money or make similar transactions by using the card.

(2) However, cash withdrawal cards which can only be used to withdraw money at the card issuer shall only be subject to the provisions of Part 5.

(3) Payment systems as mentioned in section 1(2) means electronic systems providing the user with the ability to make the transactions mentioned in subsection (1) without any personal contact.

3. Issuers of payment cards shall have their place of business in this country unless otherwise provided in international agreements or rules laid down by the Minister of Industry and Coordination.

4. Repealed.

5. Repealed.

## **Part 2**

### **Notification**

6.

(1) Any card issuer shall be notified to the Consumer Ombudsman.

(2) If several card issuers are affiliated to the same payment system and to a great extent apply the same business conditions, the Consumer Ombudsman may permit or order joint notification.

7.

(1) The notification shall contain:

(a) The name, place of business and organization of the card issuer.

(b) A description of the payment system, including administrative procedures and payment routines.

(c) The information supplied in pursuance of section 13 (1).

(d) Any other business conditions and terms and conditions of agreement.

(2) Any change in matters notified shall be notified within eight days after an agreement for such change has been entered into or the change has been made.

(3) The Consumer Ombudsman shall lay down rules concerning notification in accordance with subsections (1) and (2),

(4) A payment system shall not be put into operation until notification in accordance with subsection (1) has been made.

(5) Notification in accordance with subsection (1) shall not imply approval of the contents of the notification.

8. Repealed.

9. Repealed.

## **Part 3**

### **Administration of the Act**

10.

- (1) The Consumer Ombudsman shall have a supervising function to ensure that this Act or provisions laid down in pursuance hereof is not contravened.
- (2) The Consumer Ombudsman may demand all such information as is found to be necessary for his function, including information enabling him to decide whether a matter comes within the provisions of this Act.
- (3) The Consumer Ombudsman may make use of the services of experts to the extent this is deemed necessary.
- (4) The Minister of Industry and Coordination shall lay down rules on administration of the Act.

11. Repealed.

12. Repealed.

## **Part 4**

### **General provisions**

12. a

- (1) Payment card systems shall be designed and operate so as to ensure users transparency, voluntariness and protection against misuse.
- (2) If a payment system has not been adequately designed in the respects set out in subsection (1), for example because
  - (a) the necessary control, security and correction procedures have not been established;
  - (b) the business conditions of a card issuer, cf, In this connection section 13 (1), or the business conditions of a payee in relation to the cardholder one-sidedly consider the interests of the card issuer or payee or are otherwise unreasonable; or
  - (c) the business conditions of a card issuer or payee onesidedly consider the interests of either of the parties; or
  - (d) the provisions of this Act are otherwise not complied with, the Consumer Ombudsman shall try to change the situation by negotiation.
- (3) If a change as mentioned in subsection (2) cannot be made by negotiation, the Consumer Ombudsman may issue an order to this effect.

13.

- (1) When contacting individual persons and companies and when replying to enquiries concerning payment cards, the card issuer shall deliver written

material containing information about:

- (a) The applications of the card.
- (b) Conditions attached to the possession and use of the card, including information about how often the cardholder will receive statements of account.
- (c) Costs in connection with the acquisition and use of the card, including any credit costs calculated as the annual costs expressed as a percentage.
- (d) The procedure adopted for any assessment of creditworthiness.
- (e) Use, keeping and disclosure of personal information and information about purchases etc.
- (f) The procedure of warning in case the card or any related authorization (PIN code or similar) is lost, misused or in the possession of any unauthorized person.

(2) Before making any agreement concerning acquisition of a payment card, the card issuer shall supply the cardholder with the information set out in subsection (1) in writing.

(3) The Consumer Ombudsman may lay down rules concerning the content and presentation of the information mentioned in subsection (1) and (2), including rules concerning the statement and calculation of credit costs.

14.

(1) Payment cards may only be delivered on request.

(2) If a request for payment cards is refused, the card issuer shall on request give reasons for such refusal.

15.

(1) In any payment card transaction the cardholder shall be entitled to a receipt.

(2) The Minister of Industry and Coordination may grant exemption from the provision of subsection (1).

16. The cardholder and the payee shall be entitled to terminate the agreement with the card issuer concerning affiliation to the payment system without notice.

17. Repealed.

18.

(1) The payee shall be obliged to accept cash payment within normal business hours in settlement of payment obligations which could be incurred and settled by means of payment cards.

(2) The Minister of Industry and Coordination may grant exemption from the provision of subsection (1).

19. Use of payment cards as proof of identity may not be demanded except

where they are used in connection with payment transactions with payment cards and as cash withdrawal cards, cf., however, section 19a.

19a.

- (1) Payment cards must not be combined
  - (a) with functions other than payment card functions;
  - (b) with services not relating to the payment card function; or
  - (c) with discount schemes or any equivalent schemes.
- (2) Subsection (1) shall not apply if the mentioned functions, services or discount schemes are also offered without payment cards.
- (3) The marketing of the functions, services or discount schemes mentioned in subsection (1), separately or in combination with payment cards, shall be on equal terms.

20.

- (1) The card issuer's expenses in connection with the operation of the payment system shall not be charged to the payee.
- (2) The fee covering the cardholder's use of payment cards shall be fixed independently of the circumstances of the payee.

## **Part 5**

### **Rules limiting liability and losses**

21

- (1) The cardholder shall be liable for up to DKK 1,200 of any loss arising from any other person's unauthorized use of the payment card if the related personal secret code has been used. However, this shall not apply where subsections (2) or (3) provide otherwise,
- (2) The cardholder shall be liable, subject to no limitation on the amount, for any loss arising from any other person's unauthorized use of the payment card and the related personal secret code if the card issuer proves that the cardholder has disclosed the code to the person making such unauthorized use of the card.
- (3) Unless subsection (2) provides for more extensive liability, the cardholder shall be liable for up to DKK 8,000 of any loss arising from any other person's unauthorized use of the payment card if the card issuer proves
  - (a) that the cardholder has entrusted the card to the person making such unauthorized use of the card;
  - (b) that the cardholder or any person to whom he has entrusted the card made the unauthorized use possible through his grossly irresponsible conduct; or

(c) that the cardholder or any person to whom he has entrusted the card has failed to inform the card issuer as soon as possible after having learned that the card is lost.

(4) The cardholder shall only be liable under subsections (1)-(3) if the transaction has been correctly registered and entered in the books, cf. section 22.

(5) The card issuer shall be liable for any unauthorized use that takes place after the card issuer has been notified that the card is either lost or in the possession of an unauthorized person. However, this shall not apply if the payee is liable under subsection (7). Receipt of such notification that the card is lost shall be acknowledged by the card issuer to the cardholder as soon as possible. Such acknowledgement shall be in writing and state the time of receipt of notification.

(6) Unless otherwise provided by subsections (1)-(3) and (7), the card issuer shall be liable for any loss arising from any unauthorized use of payment cards.

(7) Notwithstanding subsections (1)-(3), the payee shall be liable for any loss if the payee knew or ought to have known that the user was not authorized to use the card.

(8) To the extent it is justified by the price development, the Minister of Industry and Coordination may change the amounts set out in subsections (1) and (3).

22.

(1) The card issuer shall be liable for any loss suffered by the cardholder and the payee arising from errors in registration and posting, technical break-down or any other similar circumstances even if the error is fortuitous. If the cardholder has contributed to the error with intent or through gross negligence, any compensation payable to the cardholder may be reduced or cease to be payable. The card issuer shall not, however, be liable for any loss suffered by the payee arising from the circumstances of the payee.

(2) In case of non-payment or overdue payment under circumstances as mentioned in the first clause of subsection (1), no remedies for breach of contract shall be available in relation to the cardholder, except for a claim to interest. If, however, a withdrawal has been made from the cardholder's account, payment to the cardholder's discharge shall be deemed to have been effected.

(3) 11, pursuant to subsection (1), the card issuer shall be liable to indemnify

the cardholder for any loss suffered by the cardholder arising from the circumstance of the payee, the card issuer may claim that the compensation shall be paid by the payee.

- (4) The card issuer shall have the burden of proof that payment transactions did not arise from the circumstances mentioned in the first clause of subsection (1).

## **Part 6**

### **Registration, use and disclosure of information**

23. Unless otherwise provided by this Act, the Private Registers Act shall apply to registers kept for use in connection with payment systems under section 1,

24.

- (1) Registration shall only be allowed in respect of such information about the cardholders use of the card for payment card functions, cf. section 2, as is necessary to make payment transactions and to prevent misuse.

- (2) Information about the cardholder's use of the card for payment card functions, cf. section 2, may be used and disclosed only when it is necessary to make and undertake payment transactions, corrections and legal enforcement or when it is provided by law. Any information about misuse may be disclosed only to the extent it is necessary to prevent misuse.

- (3) Any information about the payee's turnover, number of payment transactions, amounts and similar matters at the payee may be registered, used and disclosed only when it is necessary to make and undertake payment transactions, corrections and legal enforcement. Otherwise information shall not be disclosed except as provided by other legislation.

- (4) Subsections (1) and (2) shall not apply to any cash withdrawal transactions made at the card issuer or to any information which cannot be traced back to natural or legal persons.

- (5) For research purposes the Minister of Industry and Coordination may grant exemption from subsections (1)-(3).

25. Payment cards shall not contain information about the cardholder's civil registration number (>>CPR-number<<).

26. After having obtained the opinion of the Danish Data Protection Agency the Minister of Industry and Coordination shall lay down rules to the effect that any information concerning the affairs of persons resident in this country may only be registered or subjected to data processing in this country.

## **Part 6a**

### **Electronic payment systems without payment cards but with codes**

26a.

System provider means:

- (1) Anyone making an agreement with the user concerning use of the electronic payment system.
- (2) Anyone making an agreement with the payee concerning affiliation to the system so that the user can use the system to acquire goods or services, arrange for transfers of payment, withdraw money or make similar transactions at the payee.

26b.

- (1) When contacting individual consumers and when replying to enquiries concerning electronic payment systems the system provider shall deliver written material containing information about:
  - (a) The applications of the system.
  - (b) Conditions attached to the keeping and use of the code and user number, including information about how often the owner of the code will receive statements of account and whether the system provides the capability of revoking an order.
  - (c) Costs in connection with the affiliation to and use of the system, including any credit costs computed as the annual costs expressed as a percentage.
  - (d) The procedure adopted for any assessment of creditworthiness.
  - (e) Use, keeping and disclosure of personal information and information about purchases, etc.
  - (f) Technical requirements with respect to the user's communication equipment.
  - (g) The procedure of warning in the case of irregularities or faults in the communication equipment if the code or any other proof of identity is lost, misused or in the possession of an unauthorized person.
- (2) Before making any agreement concerning affiliation to the system, the system provider shall supply the user with the information set out in subsection (1) in writing.
- (3) The Consumer Ombudsman may lay down rules concerning the content and presentation of the information mentioned in subsections (1) and (2), including rules concerning the statement and calculation of credit costs.

26c.

- (1) In any payment transaction the user shall be entitled to receive a receipt

unless the payment system provides other facilities making it easy for the user to learn and procure documentation of what orders have been placed and whether they have been executed.

(2) The Consumer Ombudsman may determine that in other cases too a receipt need not be given.

26d.

(1) Section 19 a shall not apply to services, functions or discounts offered in connection with the business carried on by banks and savings banks.

26e.

(1) The user of the electronic payment system shall be liable for up to DKK 1,200 of any loss arising from any other persons unauthorized use of the payment system if the user's personal secret code has been used, cf., however, subsections (2) or (3).

(2) The user shall be liable, subject to no limitation on the amount, for any loss arising from any other person's unauthorized use of the payment system if the system provider proves that the user has intentionally disclosed the code to the person making such unauthorized use of the system and this took place under circumstances where the user realised or ought to have realised that there was a direct risk of misuse.

(3) The user shall be liable for up to DKK 8,000 of any loss arising from any other person's unauthorized use of the payment system if the system provider proves

(a) that the user or any person to whom the user has disclosed his personal secret code has made the unauthorized use possible through his grossly irresponsible conduct; or

(b) that the user or any person to whom the user has disclosed his personal secret code has failed to inform the system provider as soon as possible after having learned that the code has become known to the unauthorized person; or

(c) that the user has disclosed his personal secret code to the person making such unauthorized use without this coming within subsection (2).

(4) The user shall only be liable under subsections (1)-(3) if the transaction has been correctly registered and entered in the books.

(5) The system provider shall be liable for any unauthorized use that takes place after the system provider has been notified that the code has become known to an unauthorized person. Receipt of such notification that the code has become known to an unauthorized person shall be acknowledged by the system provider to the user as soon as possible. Such

acknowledgement shall be in writing and state the time of receipt of notification.

(6) Unless otherwise provided by subsections (1)-(3), the system provider shall be liable for any loss arising from any unauthorized use of the system.

(7) Notwithstanding subsections (1)-(3), the payee affiliated to the system shall be liable for any loss in relation to the user if the payee knew or ought to have known that the person concerned was not authorized to use the system.

(8) To the extent it is justified by the price development, the Minister of Industry and Coordination may change the amounts set out in subsections (1) and (3).

26f.

Before the Consumer Ombudsman makes any decision concerning matters relating to security and technical aspects of electronic payment systems without payment cards, but with codes, within the banking sector, the opinion of the Danish Financial Supervisory Authority shall be obtained.

## **Part 7**

### **Court proceedings**

27.

(1) Decisions made by the Consumer Ombudsman under this Act cannot be brought before any other administrative authority.

(2) Repealed.

28.

(1) Any orders issued in pursuance of section 12a(3) shall without undue delay be brought before the courts of law by the Consumer Ombudsman if the party against whom the order is issued makes any objections.

(2) The court may determine that the proceedings as mentioned in subsection (1) shall have suspensive effect.

29.

(1) Civil proceedings to whose outcome the application of this Act is of great significance and to which the Consumer Ombudsman is a party shall be brought before the Maritime and Commercial Court in Copenhagen unless otherwise agreed by the parties.

(2) Criminal proceedings for contravention of this Act shall be tried by the Maritime and Commercial court in Copenhagen if a more detailed knowledge of payment systems covered by this Act is deemed to be essential to the determination of the case, Otherwise the rules laid down in

- section 105(3) and Part 63 of the Administration of Justice Act shall apply.
- (3) In proceedings brought before the Maritime and Commercial Court in Copenhagen in pursuance of subsection (1) and the first clause of subsection (2) the rules of the second clause of section 9a(7) and the third clause of section 94(1) shall apply correspondingly.

## **Part 8**

### **Penalties and proceedings etc.**

30.

- (1) Unless the offence carries a more severe penalty under any other legislation, anyone who
- (a) contravenes section 3, section 6(1), section 7(1), (2) and (4), section 13(1) and (2), section 14(1), section 18, section 19a, section 24, section 25 and section 26b(1) and (2);
  - (b) fails to comply with any orders issued in pursuance of section 6(2) and 12a(3);
  - (c) fails to supply any information required under section 10(2);
  - (d) supplies incorrect or misleading information in a notification under section 6, cf. section 7;
  - (e) supplies the Consumer Ombudsman with incorrect or misleading information in matters otherwise covered by this Act shall be liable to a fine.
- (2) In regulations issued in pursuance of section 7(3), section 13(3) and section 26 fines may be imposed for contravention of the provisions of such regulations.
- (3) Where the offence is committed by public limited liability company, a private limited liability company, a cooperative society or the like, liability to pay a fine may be imposed on the company etc. as such.

31.

Anything that experts and their assistants may learn through their activities for the Consumer Ombudsman shall be deemed to be a secret.

32.

- (1) Anyone carrying on business within payment cards/or contributing thereto may by a sentence for a criminal offence be deprived of the right to continue to carry on the business concerned or to carry it on under certain forms or to contribute thereto if the offence gives grounds to expect a direct risk of misuse in connection with the carrying on of the business. Section 79(3) and (4) of the Criminal Code shall apply correspondingly.

(2) Any claim for deprivation of the right as set out in subsection (1) shall be made by the prosecuting authority at the request of the Consumer Ombudsman.

(3) Anyone who carries on business in respect of which he has been deprived of the right as set out in subsection (1) or who in his business allows anyone deprived of the right hereto to participate in the business as mentioned in subsection (1) shall be liable to a fine unless the offence carries a more severe penalty under section 131 of the Criminal Code. If the business is carried on by a public limited Liability company, a private limited liability company, a cooperative society or the like, liability to pay a fine may be imposed on the company etc. as such.

33.

(1) The provisions of sections 14, 15, 16, 19 and 20(2) as well as sections 21, 22, 26c and 26e cannot be departed from by prior agreement to the detriment of the cardholder or the user of an electronic payment system without payment cards.

(2) Section 16 and section 20(1) as well as sections 21, 22 and 26e cannot be departed from by prior agreement to the detriment of the payee.

34,

The Minister of Industry and Coordination may determine that section 20 and Part 6 shall not apply in whole or in part to such payment systems under section 1 as must be regarded as international.

## **Part 9**

### **Fees, commencement, transitional and revision provisions**

35.

(1) The costs of administration of this Act shall be charged to notified card issuers in proportion to the turnover of the payment system.

(2) The Minister of Industry and Coordination shall lay down rules on the determination of the fee and on the Consumer Ombudsman's collection thereof.

(3) The fees shall be subject to a right of execution.

36.

(1) This Act shall come into operation on 1 January 1985.

(2) If the payment system has been put into operation before 1 April 1985, the card issuer shall on or before that date:

(a) make notification in accordance with section 6, cf. section 7 and section 8(1); and

(b) supply those who were cardholders on 1 January 1985 with the information mentioned in section 13(1).

(3) Any contravention of subsection (2) shall be punishable by a fine. Section 30(3) shall apply correspondingly.

(4) Section 8(2) and (3) shall only apply if the payment system has not been put into operation on 1 January 1985.

37.

Proposals for revision of this Act shall be placed before the Folketing in the sessional year of the Folketing 1997-98.

38.

This Act shall not extend to the Faroe Islands and Greenland, but may be brought into force by Royal Assent for these parts of the country, with such departures as might be required in view of the special circumstances prevailing in the Faroe Islands and Greenland.

Act No. 162 of 23 March 1988 was promulgated in the Lovtidende (the Danish Law Gazette) on 30 March 1988.1)

Act No. 818 of 19 December 1989 contains the following commencement provisions:

9.

This Act shall come into operation on 1 January 1990.2)

Act No. 184 of 23 March 1992 contains the following commencement provisions:

2.

This Act shall come into operation one week after its promulgation in the Lovtidende (the Danish Law Gazette). However, the provisions of paragraph (14) of section 1 shall not come into operation until 1 January 1993.3)

Act No. 426 of 1 June 1994 contains the following commencement provisions:

2.

(1) This Act shall come into operation on 1 July 1994.

(2) If an electronic payment system covered by section 1(2) has been put into operation before the coming into operation of the Act, the system provider shall on or before 1 October 1994 (a) make notification in pursuance of section 6, cf. section 7; (b) supply those who were users on 1 July 1994 with the information mentioned in section 26b.

(3) Any contravention of subsection (2) shall be punishable by a fine. Section 30(3) shall apply correspondingly.

1. Act No. 162 of 23 March 1988 concerns section 37. Section 37 has been amended

by Act No. 184 of 23 March 1992.

2. Section 4 of Act No. 818 of 19 December 1989 concerns section 11(2). Section 11 has been repealed by Act No. 184 of 23 March 1992.
3. Concerns section 13(1)(3). The Act shall come into operation one week after its promulgation in the Lovtidende (the Danish Law Gazette). However, the provisions of paragraph (14) of section 1 shall not come into operation until on 1 January 1993.

Ministry of Industry and Coordination, of 12 September 1994 MIMI JAKOB SEN

/Jytte Olgaard

# **ORDER ON SAFETY REQUIREMENT FOR TOYS AND PRODUCTS WHICH DUE TO THEIR OUTWARD APPEARANCE MAY BE MISTAKEN FOR FOOD**

Pursuant to Sections 15, 16, 25-(3) and 27-(-4) of Act no. 364 on Product Safety of May 18, 1994, the following is stipulated by agreement with the Ministry of Housing, the Ministry for the Environment and Energy, and the Ministry of Health:

## **Chapter 1**

### **Scope**

1.
  - (1) With the exception of Chapter 7, this Order shall apply to products clearly designed or intended for use in play by children of less than 14 years of age.
  - (2) The provisions of Chapter 7 shall apply to products which due to their outward appearance may be mistaken for food and therefore jeopardize the safety or health of users.
2. The products listed in Annex 1 shall not be regarded as toys for the purposes of this Order.
3. In this Order, >>placing a product on the market<< refers to the offering, sale or distribution of the product in the EU for payment or free of charge by the first production or sales link in the EU.

## **Chapter 2**

### **Safety requirements for toys**

4.
  - (1) Toys may not be placed on the market if they jeopardize the safety or health of the users or other parties when used as intended or in a foreseeable way, bearing in mind the normal behaviour of children. This applies even where the toys are designed and manufactured in accordance with Section 5.
  - (2) Toys must comply with the safety and health requirements laid down in Annex 2 for their normal foreseeable lifetime.
5.
  - (1) Toys may be placed on the market only where they

- (a) are designed and manufactured in accordance with the harmonized standards issued pursuant to Council Directive 88/378/EEC on the approximation of the laws of the Member States concerning the safety of toys, or
  - (b) are designed and manufactured in accordance with a prototype which has been granted type approval by a body approved for the purpose by the authorities of an EU Member State.
- (2) Annex 3 sets out the references for the harmonized standards referred to in Section 5.1 and the Danish standards, etc. issued for the implementation thereof.
- (3) Annex 3 will be amended by notices published in the Danish Official Gazette. (Statstidende) and the Danish Standards Associations publication >>DS-S standardnyt<<.

## **Chapter 3**

### **Type approval**

6.
  - (1) The Minister for Business and Industry shall authorize one or more laboratories as approving bodies to grant type approval of toys according to the provisions of this Chapter.
  - (2) Authorization is conditional upon the laboratory being certified as meeting European Standard EN 45001 by Dansk Akkreditering (DANAK) or an equivalent foreign certification body.
7. The type approval procedure is initiated by the lodging of a written application for type approval which contains the information laid down in Annex 4.
8.
  - (1) Type approval will be granted provided that the toy meets the requirements laid down in Section 4, cf. Annex 2. In assessing whether a prototype meets the requirements laid down in Annex 2, the approving body is to follow the procedure laid down in Annex 4.
  - (2) Type approval will lapse should the product be altered.
  - (3) Type approval may be withdrawn by the authorities responsible for inspection should it subsequently become evident that the prototype does not after all meet the essential safety requirements laid down in Annex 2.
9. For processing an application for type approval a fee is charged. This fee is set by the approving body such that it covers all costs incurred in relation to the application.
- 10.

- (1) The approving body may arrange or may require the applicant to arrange the tests necessary for processing the application, or the appropriate tests may be arranged by the applicant.
  - (2) Where testing takes place in Denmark, it is to be carried out and reported as certified technical testing by a laboratory certified by Dansk Akkreditering (DANAK).
  - (3) Where testing takes place abroad, it is to be carried out by a laboratory which meets the requirements of European Standard En 45001 or the international guidelines ISO/TEC Guide 25 and is certified according to the provisions of EN 45002 or ISO/EEC Guide 58 by a body which meets the conditions of EN 45003 or ISO/IEC Guide 58.
  - (4) Type approval may be granted on the basis of testing carried out by authorities in another Member State.
- 11.
- (1) Should the approving body reject an application for type approval, the National Consumer Agency of Denmark and the Commission shall be informed immediately.
  - (2) Should the Commission, a Member State or a body authorized to grant type approval in another Member State so request, the approving body shall forward a copy of the type approval certificate. Following a reasonable request, a copy of the technical design data and the results of examinations and tests shall also be sent.
12. The holder of a type approval certificate must retain a sealed model of the approved toy design for 10 years after the last example of the product is placed on the market.

## **Chapter 4**

### **Submission and retention of documentation**

- 13.
- (1) Any party placing a toy on the market manufactured in accordance with the harmonized standards must possess and, when so ordered by the authorities responsible for inspection, submit documentation in the form of the information laid down in Annex 5.
  - (2) Any party placing a toy on the market manufactured in accordance with a type approved prototype must possess and, when so ordered by the authorities responsible for inspection, submit documentation in the form of the information laid down in Annex 6.
  - (3) Documentation is to be retained for 10 years after the last example of the

product is placed on the market.

## **Chapter 5**

### **Labelling**

14.

- (1) The CE marking is to be affixed to toys designed and manufactured in accordance with Section 5 before they are placed on the market.
- (2) The CE marking consists of the >>CE<< symbol in accordance with the model shown in Annex 7. The height of its constituent parts shall be at least 5 mm and the relative proportions of the model may not be altered.
- (3) The placer of the toy on the market shall be responsible for the CE marking.
- (4) The CE marking is the guarantee of the responsible party that the toy is manufactured in accordance with the harmonized standards or is type approved
- (5) The CE marking may be affixed only where the toy is manufactured in accordance with Section 5 and bears the information stated in this Chapter.

15.

- (1) Toys may not contain labels or inscriptions which may be mistaken for the CE marking or mislead with regard to its meaning and graphic design. Any other label may be placed on the toy, its packaging or a tag, provided that this does not reduce the visibility or legibility of the CE marking.
- (2) Where provisions have been laid down by or pursuant to legislation to implement EU regulations which regulate other aspects and which prescribe the CE marking, this marking shall indicate that the toy can also be assumed to meet the requirements of such provisions.
- (3) Where, during a transitional period, the party responsible for the CE marking may pursuant to the provisions stated in Section 15-(2) choose between several schemes, the CE marking indicates only that the toy meets the requirements of the scheme chosen by the party responsible. In such cases reference shall be made to the provisions governing the chosen scheme either in the required documents, guidelines or instructions which accompany the toy in question, or on its packaging.

16.

- (i) The name and/or tradename and address of the placer of the toy on the market must be affixed to such products.
- (2) The particulars stated in Section 16-(1) and Section 14-(2) shall be affixed either to the toy or its packaging such that they are visible, legible and

cannot be removed. In the case of small toys and toys consisting of small parts, these particulars may be affixed in the same way on a label or instructions for use.

(3) The particulars referred to in 16-(1) may be abbreviated provided that the abbreviation enables the manufacturer, the manufacturer's representative or the importer to the EU to be identified.

(4) Where the particulars stated in 16-(2) are not affixed to the toy itself, the user's attention must be drawn to the advisability of retaining them.

17.

(1) The hazards associated with use of a toy and how they may be prevented shall be stated on the toy, its packaging or accompanying instructions for use.

(2) Toys referred to in Annex 8 shall furthermore be furnished with the warnings and indications of safety precautions to be taken during use stated in that Annex.

(3) The information stated in Sections 17-(1) and 17-(2) must be in Danish.

## **Chapter 6**

### **Market inspections**

18.

(1) The National Consumer Agency of Denmark shall undertake inspection of the toys on the market for conformance with the regulations of this Order. cf. Section 18-(2), however.

(2) Inspection of the chemical and electrical properties of toys is to be carried out by the Ministry for the Environment and Energy and the Ministry of Housing respectively.

(3) The ministers responsible may delegate the task of inspection pursuant to this Order to government agencies, other state institutions or local government authorities and institutions, or private enterprises.

(4) The National Consumer Agency of Denmark shall coordinate the role of the authorities responsible for inspection.

(5) Where private laboratories are authorized pursuant to Section 18-(3) to carry out inspections, laboratories certified under Section 10-(2) should be used as far as possible.

19.

(1) The authorities responsible for inspection and those authorities and enterprises authorized under Section 18-(3) will conduct sample checks to verify that the toys on the market conform with the regulations of this

Order.

- (2)The authorities and enterprises stated in Section 19-(1) shall be granted access to all producers, distributors or marketers of toys, for the purpose of taking samples free of charge of the product or parts thereof for examination and testing.
- (3)The authorities and enterprises stated in Section 19-(1) shall without requirement of a court order be given access by all manufacturers, distributors or marketers of toys to places of manufacture, sale, storage, etc., to means of transport and to all information considered necessary, including the information referred to in Chapter 4.
- (4)The authorities responsible for inspection shall be assisted by the police.
- (5)The authorities responsible for inspection may request the submission of the information referred to in Chapter 4 within a stipulated time limit. The request is to be made of the party responsible pursuant to Section 14.
- (6)Should the party responsible for documentation not submit the information referred to in Chapter 4 within the given time limit or should the requirements for documentation clearly not have been met, the authorities responsible for inspection may, at the expense of the party concerned, check whether the toy conforms with the harmonized standards and the safety and health requirements laid down in Annex 2.
- (7)Any party offering, selling or distributing toys may be required to cooperate in the inspection.

20.

- (1)Any party offering, selling or distributing a product which does not conform with the safety requirements in Section 4 may be ordered, immediately or within a given time limit, to
  - (a)provide additional information on the hazards associated with the product and how they can be avoided
  - (b)remedy conditions giving rise to the hazards
  - (c) stop the sale of the product
  - (d)withdraw the product or re-purchase the product at a price which may not normally exceed the purchase price of an equivalent, safe product
  - (e)destroy the product in a responsible manner.
- (2)Where considered necessary, an order may be issued to prohibit the offering, sale and distribution of unsafe products.
- (3)Any party who has played a part in placing the product for sale from the date on which the hazard arose may be ordered to cooperate in executing an order concerning a product issued to another party under Section 20-(1).

- (4) The provisions of Sections 20-(1)-20-(3) shall apply even where the product is designed and manufactured in accordance with Section 5.
- (5) Should the toy not be labelled in accordance with Section 14 or labelled in accordance with Sections 16 and 17, or should it wrongfully bear the CE marking, the authorities responsible for inspection may order the party responsible to rectify the matter within a given time limit. Should this not be done, the authority responsible for inspection may order all those offering, selling or distributing the product, immediately or within a given time limit, to
- (a) stop the sale of the product
  - (b) withdraw the product.
- (6) Orders under Sections 20(1), 20-(3) and 20-(5) and prohibition orders under Section 20-(2) shall be issued by the National Consumer Agency of Denmark. The National Consumer Agency of Denmark may, however, delegate its powers to the authorities responsible for inspection under Section 18-(2). In such cases, the National Consumer Agency of Denmark is to be informed immediately of the measures taken by these authorities pursuant to Sections 20-(1)-20-(3) and 20-(5).
- (7) In cases where orders are issued to withdraw a product pursuant to 20-(1)(4), or destroy in pursuant to 20-(1)(5), the time limits in Sections 54 and 83 of the Danish Sale of Goods Act shall not apply.
- (8) In connection with orders pursuant to this provision, it may be decided that the owner of a product shall assist in a particular way in repairing or withdrawing the product.
- (9) The National Consumer Agency of Denmark shall inform the Commission of measures taken under Sections 20-(1) and 20-(2).
- 2L The authorities responsible for inspection may, where necessary, notify the public of the hazards associated with a product.
22. The authorities responsible for inspection may demand payment from the parties placing the product on the market for the costs incurred in connection with inspection, should the inspection find that the toy does not meet the essential safety requirements set out in Annex 2 or is not manufactured in accordance with the standards or an approved prototype.
23. Where an authority responsible for inspection carrying out equivalent checks on behalf of another Member State so requests, it is to be sent the information stated in Section 13.
24. Appeal may not be made to another administrative authority against decisions made by an authority responsible for inspection pursuant to this Order.

25. Every three years, the National Consumer Agency of Denmark shall submit a report to the Commission on the application of the Directive on the safety requirements for toys.

## **Chapter 7**

### **Food imitations**

26.

(1) Products may not be imported, manufactured or placed on the market which due to their outward appearance may be mistaken for food and thereby jeopardize the safety or health of the user, such that the products, although not food, by their shape, smell, colour, appearance, presentation, labelling, volume or dimensions may lead to the consumer, especially a child, mistaking them for food and therefore placing them in his or her mouth, sucking or swallowing them, thereby inviting choking, poisoning, perforation or blockage of the digestive tract.

(2) The rules in Sections 18, 19-(1)-19-(3), 19-(7), 20-(1)-20-(3), 20-(6)-20-(9), 24 30 and 32-34 shall equivalently apply to the products in Section 26-(1).

(3) The authorities responsible for inspection may order a party placing the product on the market to provide information on the manufacture of the product. The information must enable an assessment of the product's safety. The information must be submitted within a given time limit, normally 14 days.

27. The authorities responsible for inspection may demand payment from a party placing the product on the market for the costs incurred in connection with inspection, should the inspection find that products have been placed on the market which due to their outward appearance may be mistaken for food and thereby jeopardize the safety or health of the user, cf. Section 26.

## **Chapter 8**

### **Legal proceedings**

28.

(1) An order or prohibition order issued pursuant to Section 20 is to be brought before a court by the authorities responsible for inspection without undue delay, should it be appealed by a party against whom it is issued.

(2) The court may decide that the summons brought in Section 28-(1) is to have delaying effect.

29.

(1) Cases covered by this Order will be heard by the City Court. However,

where more detailed knowledge of the safety conditions of the product is considered essential to the ruling on the case, the case may be heard by the Maritime and Commercial Court in Copenhagen.

- (2) Should the defendant be charged with violation of this Order before the Maritime and Commercial Court, cf. Section 29;X (1), the charge may be prosecuted by the National Consumer Agency of Denmark, cf. the Danish Administration of Justice Act, Section 105-(3)

## **Chapter 9**

### **Penalties and entry into force**

30. Violation of Sections 4, 5, 14-11), 14-(5), 15, 16 and 26-C1) shall be subject to the penalty of a fine.

31.

- (1) Failure to comply with the orders of the authorities pursuant to Sections 13-(1), 13-(2) and 26-(3) shall be subject to the penalty of a fine.  
(2) Failure to provide documentation within the period stated in Section 13-(3) shall be subject to the penalty of a fine.

32. Failure to observe orders issued pursuant to Sections 19-(5), 20- (1), 20-(3) and 20-(5) shall be subject to the penalty of a fine. A similar penalty will be imposed on those who neglect to comply with the orders of the authorities responsible for inspection on cooperating in inspections pursuant to Sections 19-(1)-19-(3), cf. 19-(6).

33. Should this Order be violated by a company, association, independent institution, foundation or similar, the fine may be imposed on the legal entity in question. Should this Order be violated by the State, a local government authority or a local government association, cf. Section 60 of the Local Government Act, the fine may be imposed on the State, the local government authority or the local government association.

34.

- (1) This Order will enter into force on June 1, 1995.  
(2) Order no. 125 of March 6, 1991 on safety requirements for toys and products which due to their outward appearance may be mistaken for food shall be repealed, with the exception of the regulations on labelling, since pursuant to Article 14.21) of Directive no. 93/68 of July 22, 1993, products may be placed on the market which conform with the labelling regulations valid prior to January 1, 1995,

The National Consumer Agency of Denmark, May 23, 1995

NIELS ERIK D, JENSEN

/Lars Okjaer Jorgensen

1) Council Directive no. 93/68/EEC, Article 14.2 reads: >>The member States permit the marketing and taking into use of products conforming with the regulations on labelling valid prior to January 1, 1995, until January 1, 1997<<.P

## **ANNEX 1**

### **Products not regarded as toys pursuant to this Order**

1. Christmas decorations
2. Detailed scale models for adult collectors
3. Equipment intended to be used collectively in playgrounds
4. Sports equipment
5. Aquatic equipment intended to be used in deep water
6. folk dools and decorative dolls and other similar articles for adult collectors
7. >>Professional.cz< toys installed in public places (shopping centres, stations, etc.)
8. Puzzles with more than 500 pieces or without pictures, intended for specialists
9. Air guns and air pistols
10. Fireworks including percussion caps, with the exception of percussion caps specifically designed for use in toys
11. Slings and catapults
12. Sets of darts with metallic points
13. Electric ovens, irons or other functional products operated at a nominal voltage exceeding 24 volts
14. Products containing heating elements intended for use under the supervision of an adult in a teaching context
15. Vehicles with combustion engines
16. Toy steam engines
17. Bicycles, with the exception of bicycles regarded as toys, i.e. bicycles with a maximum saddle height of 635 mm
18. Video toys that must be connected to a video screen, operated at a nominal voltage exceeding 24 volts
19. Babies dummies
20. Faithful reproductions of real firearms
21. Fashion jewellery for children

## **AMUIX 2**

### **Essential safety requirements for toys**

#### **General principles**

1. In compliance with Section 4-(2) of this Order, the users of toys as well as

third parties must be protected against the health and safety hazards arising when toys are used as intended or in a foreseeable way, bearing in mind the normal behaviour of children. Such risks are those:

- (1) which are connected with the design, construction or composition of the toy
- (2) which are inherent in the use of the toy and which cannot be completely eliminated by modifying the toy's construction and composition without altering its function or depriving it of its essential properties.

2.

- (1) The degree of risk present in the use of a toy must be commensurate with the ability of the users and, where appropriate, their supervisors, to cope with it. This applies in particular to toys which, by virtue of their functions, dimensions and characteristics, are intended for use by children of under 36 months.
- (2) To observe this principle, a minimum age for users of toys and for the need to ensure that they are used only under adult supervision must be specified where appropriate.

3. Labels on toys and/or their packaging and the instructions for use which accompany them must draw the attention of users or their supervisors fully and effectively to the risks involved in using them and to the ways of avoiding such risks.

### **Particular risks**

1. Physical and mechanical properties

- (1) Toys and their parts and, in the case of fixed toys, their anchorages, must have the requisite mechanical strength and, where appropriate, stability to withstand the stresses to which they are subjected during use without breaking or becoming liable to distortion at the risk of causing physical injury.
- (2) Accessible edges, protrusions, cords, cables and fastenings on toys must be so designed and constructed that the risks of physical injury from contact with them are reduced as far as possible.
- (3) Toys must be so designed and constructed as to minimize the risk of physical injury which could be caused by the movement of their parts.
- (4) Toys, their component parts and any detachable parts of toys which are clearly intended for use by children under 36 months must be of such dimensions as to prevent their being swallowed and/or inhaled.
- (5) Toys and their parts and the packaging in which they are contained for retail sale must not present risk of strangulation or suffocation.
- (6) Toys intended for use in shallow water which are capable of carrying or

supporting a child on the water must be designed and constructed so as to reduce as far as possible, taking into account the recommended use of the toy, any risk of loss of buoyancy of the toy and loss of support afforded to the child.

- (7) Toys which it is possible to get inside and which thereby constitute an enclosed space for occupants must have a means of exit which the latter can open easily from the inside.
- (8) Toys conferring mobility on their users must, as far as possible, incorporate a braking system which is suited to the type of toy and is commensurate with the kinetic energy developed by it. Such a system must be easy for the user to operate without risk of ejection or physical injury for the user or for third parties.
- (9) The form and composition of projectiles and the kinetic energy they may develop when fired from a toy designed for that purpose must be such that, taking into account the nature of the toy, there is no unreasonable risk of physical injury to the user or to third parties.
- (10) Toys containing heating elements must be so constructed as to ensure that:
  - (a) the maximum temperature of any accessible surfaces does not cause burns when touched
  - (b) liquids and gases contained within toys do not reach temperatures or pressures which are such that their escape from a toy, other than for reasons essential to the proper functioning of the toy, might cause burns, scalds or other physical injury.

## 2. Flammability

- (1) Toys must not constitute a dangerous flammable element in the child's environment. They must therefore be composed of materials which:
  - (a) do not burn if directly exposed to a flame or spark or other potential source of fire, or
  - (b) are not readily flammable (the flame goes out as soon as the fire cause disappears), or
  - (c) if they do ignite, burn slowly and present a low rate of spread of the fire cause disappears), or
  - (d) irrespective of the toy's chemical composition, are treated so as to delay the combustion process. Such combustible materials must not constitute a risk of ignition for other materials used in the toy.
- (2) Toys which, for reasons essential to their functioning, contain dangerous substances or preparations as defined in Council Directive 67/548/EEC, in particular materials and equipment for chemistry experiments, model

assembly, plastic or ceramic moulding, enamelling, photograph or similar toys, must not contain substances or preparations which may become flammable due to the loss of non-flammable volatile components.

(3) Toys must not be explosive or contain elements or substances likely to explode when used as specified in Article 2(1) of the Toys Directive. This provision does not apply to toy percussion caps, for which reference should be made to point 10 of Annex 1 and the related footnote.

(4) Toys and, in particular, chemical games and toys, must not contain, as such, substances or preparations:

(a) which, when mixed, may explode:

-through chemical reaction or through heating

-when mixed with oxidizing substances

(b) which contain volatile components which are flammable in air and liable to form a flammable or explosive vapour/air mixture.

### 3, Chemical properties

(1) Toys must be so designed and constructed that, when used as specified in Article 2(1) of the Toys Directive, they do not present health hazards or risks of physical injury by ingestion, inhalation or contact with the skin, mucous tissues or eyes.

They must in all cases comply with the relevant Community legislation relating to certain categories of products or the prohibition, restriction of use or labelling of certain dangerous substances and preparations.

(2) In particular, for the protection of children's health, bioavailability resulting from the use of toys must not exceed the following levels per day:

0.2 mg for antimony

0.1 mg for arsenic

25.0 mg for barium

0.6 mg for cadmium

0.3 mg for chromium

0.7 mg for lead

0.5 mg for mercury

5.0 mg for selenium

or such other values as may be laid down for these or other substances in Community legislation based on scientific evidence.

(3) Toys must not contain dangerous substances or preparations within the meaning of Directives 67/548/EEC and 88/379/EEC in amounts which may harm the health of children using them. At all events, it is strictly

forbidden to include, in a toy, dangerous substances or preparations if they are intended to be used as such while the toy is being used.

However, where a limited number of substances or preparations are essential to the functioning of certain toys, in particular materials and equipment for chemistry experiments, model assembly, plastic or ceramic moulding, enamelling, photography or similar toys, they are permitted up to a certain maximum concentration level, This is to be defined for each substance or preparation by mandate to the European Committee for Standardization (CEN) according to the procedure of the committee set up by Directive 83/189/EEC. provided the permitted substances and preparations comply with the Community classification rules in respect of labelling, cf. Appendix 4 point 4, however,

#### 4. Electrical properties

- (1) Electric toys must not be powered by electricity of a nominal voltage exceeding 24 volts and no part of the toy may exceed 24 volts.
- (2) Parts of toys which are connected to or liable to come into contact with a source of electricity capable of causing electric shock, together with the cables or other conductors through which electricity is conveyed to such parts, must be properly insulated and mechanically protected so as to prevent the risk of such shock.
- (3) Electric toys must be so designed and constructed as to ensure that the maximum temperatures reached by all directly accessible surfaces are not such as to cause burns when touched.

#### 5. Hygiene

Toys must be so designed and manufactured as to meet the requirements of hygiene and cleanliness in order to avoid any risk of infection, sickness and contamination.

#### 6. Radioactivity

Toys must not contain radioactive elements or substances in forms or proportions likely to be detrimental to a child's health. Council directive 80/836/Euratom shall apply.

### **ANNEX 3**

## **References for official standards as**

of February 1, 1995

CEN no. EN71-1 DSIEN71-1 Toys, Safety requirements, Part 1:  
Mechanical and physical properties

CEN no. EN71-2 DS/EN71-2 Toys, Safety requirements, Part 2:  
Flammability

CEN no. EN71-3 DS/EN71-3 Toys, Safety requirements, Part 3:  
Migration of particular materials

CEN no. EN71-4 DS/EN71-4 Toys, Safety requirements, Part 4:  
Experimental sets for chemistry experiments and equivalent activities

CEN no. EN71-5 DS/EN71-5 Toys, Safety requirements, Part 5:  
Chemical toys (sets) other than sets for chemistry experiments

CEN no. EN71-6 DS/EN71-6 Toys, Safety requirements, Part 6:  
Graphic warning symbols concerning minimum ages

CENELEC HD 271 SI Heavy current regulations, Part C, Section  
134-2-22, Subsection 2: Special regulations for electric toys with  
safety voltages

Amendment 1: HD 271 SI, 1986

Amendment 2: HD271 SI. 1989

Amendment 3: HD 271 SI. 1989

## **ANNEX 4**

### **Procedure for type approval of toys**

Applications for type examination shall be lodged in writing by those placing the toy on the market, cf. Section 3. Applications shall be lodged with an approving body appointed by the Ministry of Business and Industry and shall include:

1. the name and address of the manufacturer, the manufacturer's representative or the importer into the EU
2. a declaration that the applicant has not applied to other appointed bodies in the EU
3. technical documentation.

The technical documentation must where necessary for the examination contain:

- (1) a general description of the type
- (2) construction and production drawings as well as lists of components, partial assemblies, circuits etc.
- (3) the descriptions and explanations necessary for the understanding of the function of the product
- (4) a list of the standards applied either in their entirety or in part and, where the standards have not been applied, a description of the solutions chosen to

comply with the requirements of the directive

(5) results of design calculations, controls, etc.

(6) any test reports.

The applicant shall provide one or more samples called type(s) which are representative of the planned production as agreed with the approving body.

The approving body

1. shall examine the technical documentation and check that the type is manufactured in accordance with the documentation, and shall determine which elements are designed in accordance with the standards and which are not
2. shall carry out or have carried out tests to ascertain, where the standards have not been applied, whether the manufacturers solutions comply with the essential requirements of the Order.
3. shall carry out or have carried out tests to ascertain whether the relevant standards have actually been applied by the manufacturer where the manufacturer states such to be the case
4. shall agree with the applicant as necessary where the required tests are to be carried out
5. may decide to have the tests carried out in another laboratory, in which case the permission of the applicants is required in advance.

The approving body must restrict conformity tests to those which are absolutely necessary.

## **MVWX 5**

### **Requirements for documentation of construction and manufacture in accordance**

#### **with the standards referred to in Section 5-(1X1) of the Order**

Any party who places toys on the market, cf. Section 3, shall affix the CE marking to the product as a guarantee that the product meets the requirements of the Order and thereby of the Toys Directive.

As confirmation the party who places toys on the market must hold technical documentation enabling the construction, manufacture and function of the product to be understood, and for its conformity with the requirements of the Order, and thereby the Toys Directive, to be assessed.

The documentation, which must be available at the request of the authorities responsible for inspection, shall include:

1. addresses of the places of manufacture and of storage
2. a general description of the product
3. construction and production drawings and lists of the materials, components, partial assemblies, circuits, etc. used.
4. the descriptions and explanations necessary for the understanding of the aforementioned drawings and lists and of the function of the product
5. a list of the standards applied
6. a description of the means by which conformity with the standards is ensured, including the results of design calculations, control checks, etc
7. any test reports.

## **AINMIx6**

### **Requirements for documentation of construction and manufacture in accordance**

**(with an approved prototype, cf. Section 5-(1X2) of the Order)**

Any party who places toys on the market shall affix the CE marking to the product as a guarantee that the product concerned conforms to the prototype described on the type approval certificate and meets the requirements of the Order and thereby of the Toys Directive.

The following documentation must be available at the request of the authorities responsible for inspection:

- (1) addresses of the places of manufacture and of storage
- (2) the type approval certificate with the relevant parts of the technical documentation
- (3) copies of the documents submitted to the approving body
- (4) a description of the means by which conformity with the approved prototype is ensured, including the results of design calculations, control checks etc.

## **ANNEX 8**

### **Special regulations on warnings and indications of precautions to be taken**

**when using toys, cf. Section 17-(2)**

1. Toys which might be dangerous to children under 36 months of age are to bear a warning to that effect, together with an indication of the specific risks calling

for this restriction. This provision does not apply to toys which, on account of their function, dimensions, characteristics, properties or other cogent grounds, are manifestly unsuitable for children under 36 months.

2. Slides, suspended swings, rings, trapezes, ropes and similar toys attached to a crossbeam are to be accompanied by instructions on correct assembly, including indication of those parts which can present dangers if incorrectly assembled. They must also be accompanied by instructions drawing attention to the need to carry out checks and maintenance of their main parts and to the risk of falls or overturning if this is not carried out.
3. Functional toys, which means toys having the same function as appliances and installations intended for adults, must bear a warning, either on the toy itself or on the packaging, stating that they are to be used under the supervision of an adult. In addition, these toys are to be accompanied by directions giving the precautions to be taken by the user and the risks the user would be exposed to, should these not be observed. It must also be indicated that functional toys are to be kept out of the reach of very young children.
4. Toys containing dangerous substances or preparations and chemical toys shall, unless otherwise laid down in Community directives on the classification, packaging and labelling of dangerous substances and preparations, bear an indication of the precautions and the specific risks as well as the first aid to be given in the event of accidents. It shall also be stated that such toys must be kept out of the reach of very young children. In addition, the packaging of chemical toys must bear a warning stating that the toy is intended for use only by children over the age laid down in the relevant standards and that it should be used under adult supervision.

In particular the following toys are regarded as chemical toys: chemistry sets, plastic embedding sets, ceramic, enamelling and photography sets and similar toys.

5. Skateboards and roller skates for children shall bear a warning stating that protective equipment must be worn. The instructions for use must draw attention to the fact that the toy must be used with care and directions are to be given concerning the recommended protective equipment.
6. Toys for use in water, cf. Annex 2, II-(l) (f), must, in accordance with DS/EN71-1, bear a warning and information stating that they may be used only under supervision and in water in which the child is within its depth.

# STATUTORY INSTRUMENTS

1997 No. 2294

## CONSUMER PROTECTION

### **The Fireworks (Safety) Regulations 1997**

Made	23rd September 1997
Laid before Parliament	24th September 1997
Coming into force	
Regulations 3(2), 4(1)(b), 4(2)(f)	
and?	
	31st December 1997
Remainder	15th October 1997

Whereas the Secretary of State has, in accordance with section 11(5) of the Consumer Protection Act 1987<sup>1</sup>, consulted such organisations as appear to her to be representative of interests substantially affected by these Regulations, such other persons as she considers appropriate and the Health and Safety Commission:

Now, therefore, the Secretary of State in exercise of the powers conferred on her by section 11 of that Act hereby makes the following Regulations:

(a) 1987 c. 43

#### **Citation, commencement, revocation and extent**

1-(1) These Regulations may be cited as the Fireworks (Safety) Regulations 1997 and, except as provided for by paragraph (2) below, shall come into force on 15th October 1997.

(2) Regulations 3(2), 4(1)(b), 4(2)(f) and 7 shall come into force on 31st December 1997.

(3) The Fireworks (Safety) Regulations 1996<sup>2</sup> are hereby revoked.

(4) These Regulations shall not extend to Northern Ireland,

#### **Interpretation**

2-(1) In these Regulations

“aerial maroon” means a firework

(a) which is designed to be projected from a mortar;

(b) which contains a propellant charge and a bursting charge; and

(c) whose functioning involves ascent and report;

but, for the avoidance of doubt, shall not include a rocket;

“aerial shell” means a firework

(a) which is designed to be projected from a mortar;

- (b) which contains a propellant charge and a bursting charge;
- (c) which contains pyrotechnic units or loose pyrotechnic composition, or both pyrotechnic units and loose pyrotechnic composition; and

S.I. 1996/3200

- (d) whose functioning involves ascent and subsequent bursting of the firework case and ejection of any pyrotechnic units;

but, for the avoidance of doubt, shall not include a rocket;

“*air bomb*” means a Roman candle whose functioning comprises only the ejection of a single pyrotechnic unit, the principal effect of which is a report;

“*amorce*” means a firework which is a percussion cap designed for use in toys, which comprises a paper envelope containing a dot of impact-sensitive pyrotechnic composition and which forms part of a roll;

“*assembly*” means an assembly which includes any firework;

“*aural effect*” does not include any effect which is only incidental to a visual effect;

“*banger*” means a firework (other than an air bomb)

- (a) which comprises a tube which contains black powder and has a fuse; and

- (b) whose functioning principally involves report;

“*battery*” means an assembly which includes two or more fireworks of the same type, being a type listed in Schedule 3 to these Regulations, and which has one point of ignition;

“*black power*” means explosive composition which is an intimate mixture of carbon and either potassium nitrate or sodium nitrate, or a similar mixture also containing sulphur;

“*BS 7114*” means (subject to paragraph (4) below) the British Standard Specification comprising the following parts

- (a) BS 7114: Part 1: 1988, the British Standard Specification for classification of fireworks published on 30 November 1988:

- (b) BS 7114: Part 2: 1988, the British Standard Specification for fireworks published on 30 November 1988; and

- (c) BS 7114: Part 3: 1988, the British Standard Specification for methods of test for fireworks published on 30 November 1988;

and references to Parts 1, 2 and 3 of BS 7114 shall be construed accordingly:

“*cap*” means a firework (including, for the avoidance of doubt, an amorce) designed for use in toys which comprises a non-metallic envelope or cup containing a dot of impact-sensitive pyrotechnic composition, and which produces a report when it is hit;

“*category 1 firework*” means a firework classified as category 1 under Part 1 of

BS 7114 and includes any assembly so classified;

“category 2 firework” means a firework classified as category 2 under Part 1 of BS 7114 and includes any assembly so classified, and any reference to a particular firework or assembly being “in category 2” shall be construed accordingly;

“category 2 rocket” means a firework

(a) which comprises a tube containing pyrotechnic composition or pyrotechnic units (or both) equipped with a stick or sticks for the purpose of stabilising its flight;

(A) ISBN 0580 17026 8

(B) ISBN 0 580 17027 6

(c) ISBN 0580 17028 4

(b) which is designed so that, on functioning, it propels itself into the air; and

(c) which is a category 2 firework;

“category 3 firework” means a firework classified as category 3 under Part 1 of BS 7114 and includes any assembly so classified, and any reference to a particular firework or assembly being “in category 3” shall be construed accordingly;

“category 3 rocket” means a firework

(a) which comprises a tube containing pyrotechnic composition or pyrotechnic units (or both) equipped with a stick or sticks for the purpose of stabilising its flight; or with some other means for that purpose;

(b) which is designed so that, on functioning, it propels itself into the air; and

(c) which is a category 3 firework;

“category 4 firework” means a firework classified as category 4 under Part 1 of BS 7114 and includes any assembly so classified;

“combination” means an assembly, other than a battery, which includes two or more fireworks (both or all of which are listed in Schedule 3 to these Regulations) and which has one point of ignition;

“cracker snap” means a firework

(a) which comprises two overlapping strips of card or paper with a friction-sensitive explosive composition in sliding contact with an abrasive surface; and

(b) which produces a report when pulled apart;

“firework” means a device intended for use as a form of entertainment which contains, or otherwise incorporates, explosive composition or pyrotechnic composition (or both), and which, upon functioning, burns or explodes (or both) to produce a visual or aural effect (or both);

“firework of erratic flight” means a firework whose functioning involves it following a random trajectory or a random path along the ground, whether or not it

functions with in a pre-determined range;

“fountain” means a firework

- (a) which comprises a case containing pyrotechnic composition intended to produce sparks and flames;
- (b) which is designed to be placed on or fixed in the ground or fixed to a support prior to functioning; and
- (c) whose functioning involves the emission of sparks and flames, either with aural effect (other than report) or without aural effect;

“local authority” means

- (a) in relation to England, a county council, a district council or a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly;
- (b) in relation to Wales, a county council or a county borough council; and
- (c) in relation to Scotland, a council constituted under section 2 of the Local Government etc (Scotland) Act 1994;

“maroon-in-mortar” means

(a) 1987 c. 43

- (a) an assembly comprising an aerial maroon inside a mortar, from which the aerial maroon is designed to be projected: or
- (b) an assembly comprising two or more mortars one of which contains an aerial maroon, where the maroon is designed to be projected from the mortar;

“mine” means a firework

- (a) which comprises a tube containing a propellant charge and pyrotechnic units;
- (b) which is designed to be placed on, or fixed or partly buried in, the ground prior to functioning; and
- (c) whose functioning involves the ejection of all its pyrotechnic units in a single burst, producing a widely dispersed visual or aural effect in the air, or a combination of such effects;

“mini-rocket” means a firework which is designed so that, on functioning, it propels itself into the air and which comprises a tube

- (a) the outside diameter of which, at the point where that diameter is greatest, is less than 12.0 millimetres;
- (b) which contains pyrotechnic composition or pyrotechnic units;
- (c) which is equipped with a stick or sticks for the purposes of stabilising its flight; and
- (d) whose overall length (including the length of any stick or sticks) is no more than 300 millimetres;

“novelty match” means a firework comprising a match with a dot of pyrotechnic composition which is designed to be held in the hand while functioning and whose functioning involves report or the production of visual effects, or both;

“party popper” means a firework comprising a device

- (a) which is designed to be held in the hand while functioning;
- (b) which is operated by a pull-string with an abrasive surface in sliding contact with a friction-sensitive pyrotechnic composition; and
- (c) whose functioning involves report with the ejection of streamers or confetti, or both;

“primary pack” means a package of fireworks of the same type, all of which are either category 1 fireworks, category 2 fireworks or category 3 fireworks, which is intended to be offered for retail sale as a single unit;

“pyrotechnic composition” means a substance or a mixture of substances designed to produce an effect by heat, light, sound, gas or smoke or a combination of these as the result of non-detonative self-sustaining exothermic chemical reactions;

“rocket” means a firework

- (a) which comprises a tube containing pyrotechnic composition or pyrotechnic unit (or both) equipped with a stick or sticks for the purpose of stabilising its flight, or with some other means for that purpose; and
- (b) which is designed so that, on functioning, it propels itself into the air;

“Roman candle” means a firework

- (a) which comprises a tube containing alternate propelling charge or charges and pyrotechnic unit or units with one or more transmitting fuses; and
- (b) whose functioning involves the ejection of a pyrotechnic unit or of pyrotechnic units in succession, producing a visual or aural effect, or a series or combination of such effects, in the air;

“selection pack” means a package of fireworks of more than one type intended to be offered for retail sale as a single unit;

“serpent” means a firework comprising a pre-formed shape of pyrotechnic composition, with or without support, whose functioning involves the generation of expanded residue;

“set piece” means an assembly

- (a) which consists of tubes containing pyrotechnic composition linked by a pyrotechnic fuse;
- (b) which may or may not include one or more fireworks listed in Schedule 3 to these Regulations; and
- (c) which, by the emission of sparks or flames (or both), functions to create a picture (moving or otherwise), symbol, design or message;

“shell-in-mortar” means

- (a) an assembly comprising an aerial shell inside a mortar, from which the aerial shell is designed to be projected; or
- (b) an assembly comprising two or more mortars one of which contains an aerial shell, where the shell is designed to be projected from the mortar;

“smoke device” means a firework which comprises a pre-formed shape of pyrotechnic composition or pyrotechnic composition in a container and which, on functioning emits smoke;

“sparkler” means a firework comprising a rigid wire partially coated with slow-burning pyrotechnic composition, whose functioning involves the emission of sparks without report;

“supply” includes offering to supply, agreeing to supply, exposing for supply and possessing for supply, and cognate expressions shall be construed accordingly;

“table bomb” means a firework

- (a) which comprises a paper, cardboard or plastic tube with a firm base and closed top;
- (b) which contains a propellant charge and non-pyrotechnic objects; and
- (c) whose functioning involves report with the ejection of streamers or novelties, or both;

“throwdown” means a firework comprising impact-sensitive explosive composition and grains of inert material wrapped in paper or foil and which functions to produce a report when thrown onto the ground;

“Visual effect” does not include any effect which is only incidental to an aural effect; and

“wheel” means an assembly

- (a) which includes a tube or tubes containing pyrotechnic composition;
- (b) which is designed to be attached to a support and rotate about a fixed point or axis and which is provided with a means of attaching it securely to such a support so that it can so rotate; and
- (c) whose functioning involves rotation around a fixed point and the emission of sparks and flames, with or without aural effect.

(2) Subject to paragraph (4) below, any reference in these Regulations to BS 7114 is a reference to that standard as it has effect when these Regulations are made, provided that where that standard is amended or revised after these Regulations are made and the amendment or revision is approved by the Secretary of State, that reference shall be construed at any time after such approval as a reference to that standard as so amended or revised.

(3) Where BS 7114 (including Part 3 of BS 7114 when read in accordance with

paragraph (4) below) specifies relevant requirements by reference to another standard, that reference shall be construed as a reference to that other standard as it has effect when these Regulations are made, provided that where any such other standard is amended or revised after these Regulations are made and the amendment or revision is approved by the Secretary of State, that reference shall be construed at any time after such approval as a reference to that other standard as so amended or revised.

- (4) For the purposes of these Regulations, Part 3 of BS 7114 shall be read subject to the amendments set out in Schedule 1 to these Regulations.
- (5) Subject to paragraph (6) below, the requirements of regulations 3(1) and (2) and 7 below are satisfied if the firework or assembly in question conforms to any standard or specification recognised for use in a member State of the European Economic Community or any other State within the European Economic Area, provided that conformity to such a standard or specification provides a level of safety at least equivalent to that which would be provided by compliance with those requirements, and any reference to those requirements shall be construed accordingly.
- (6) For the avoidance of doubt, a standard or specification referred to in paragraph (5) above shall not be considered to provide at least an equivalent level of safety to the extent that it provides for labelling or marking in any language other than English.

### **Safety requirements for category 1, 2 and 3 fireworks and prohibitions on supply**

- 3-(1) Subject to paragraphs (3) and (4) and without prejudice to regulation 7 below, no person shall supply a category 1 firework, a category 2 firework or a category 3 firework which does not comply with the relevant requirements of Part 2 of BS 7114 when tested in accordance with the appropriate test method (if any) in Part 3 of BS 7114.
- (2) Subject to paragraph (4) and regulation 5 below, no person shall supply any firework or assembly referred to in Schedule 2 to these Regulations which contravenes the size or weight requirements specified for that firework or assembly in that Schedule,
- (3) Paragraph (1) above shall not prohibit the supply of any sparkler designed to be held in the hand which contravenes that paragraph by reason only that it is more than 450 millimetres in length, so long as it is not more than 470 millimetres in length.
- (4) For the purposes of paragraphs (1) and (2) above, no firework or assembly which would otherwise be a category 2 firework or a category 3 firework shall

be taken not to be a category 2 firework or a category 3 firework solely because its supply is prohibited by paragraph (2) above or by regulation 4(2)(a), (c), (d), (e) or (f) below.

**Prohibitions on supply of certain fireworks and assemblies**

- 4- (1) Subject to paragraph (3) below, no person shall supply
- (a) any firework of erratic flight; or
  - (b) any mini-rocket.
- (2) Subject to regulation 5 below, no person shall supply
- (a) any aerial shell, shell-in-mortar, aerial maroon or maroon-in-mortar or any assembly which includes one or more aerial shells or aerial maroons and which has one point of ignition;
  - (b) any category 4 firework other than one whose supply is prohibited by sub-paragraph (a) above or (c), (d), (e) or (g) below;
  - (c) any battery containing bangers;
  - (d) any combination (other than a wheel) which includes one or more bangers;
  - (e) subject to paragraph (4) below, any banger other than a banger which is a category 2 firework;
  - (f) subject to paragraph (4) below, any banger other than a banger whose supply is prohibited by sub-paragraph (e) above; or
  - (g) any firework or assembly which is not listed in Schedule 3 to these Regulations.
- (3) Paragraph (1) above shall not prohibit the supply of any firework of erratic flight or any mini-rocket to any person for use, in the course of a trade or business of his, for special effects purposes in the theatre, on film or on television.
- (4) Paragraphs (2)(e) and (f) above shall not apply to any banger supplied as part of a wheel.

**Exceptions to regulations 3(2) and 4(2)**

- (5) Regulations 3(2) and 4(2) above shall not prohibit the supply of any firework or assembly to
- (a) any person who is in business as a professional organiser or professional operator of firework displays;
  - (b) any person, being a person whose trade or business (or part of whose trade or business) is the supply of fireworks or assemblies, for the purpose of supplying them in accordance with the provisions of these Regulations;
  - (c) any local authority for the purposes of a firework display put on by that authority or for use by that authority at a national public celebration or a

- national commemorative event;
- (d) any person for use, in the course of a trade or business of his, for special effects purposes in the theatre, on film or on television;
  - (e) any local authority, enforcement authority or other body, where that authority or body
    - (i) has enforcement powers, conferred by or under any enactment, applying to the firework or assembly in question; and
    - (ii) before it purchases the goods, informs the supplier that the purchase is to be made for the purposes of ascertaining whether any provision made by or under any enactment and relating to the safety of the goods has been contravened in relation to those goods;
  - (f) any department of the Government of the United Kingdom for the purposes of a firework display put on by that department, for use by that department at a national public celebration or a national commemorative event or for use by that department for research or investigations purposes;
  - (g) any person who
    - (i) is in business as a supplier of goods designed and intended for use in conjunction with fireworks or assemblies; and
    - (ii) intends to use the firework or assembly in question solely for the purposes of testing those goods to ensure that, when used in conjunction with fireworks or assemblies of the same type, they will perform their intended function or comply with any provision made by or under any enactment and relating to the safety of those goods; or
  - (h) any establishment of the naval, military or air forces of the Crown for the purposes of a firework display or for use at a national public celebration or a national commemorative event.

**Prohibition on supply of fireworks and assemblies to persons apparently under the age of eighteen years**

- 6-(1) Subject to paragraph (2) below, no person shall supply any firework or any assembly to any person apparently under the age of eighteen years.
- (2) Paragraph (1) above shall not prohibit the supply of any cap, cracker snap, novelty match, party popper, serpent or throwdown.

**Additional marking requirements for certain fireworks and assemblies**

- 7-(1) No person shall supply
- (a) any firework or assembly whose supply would, but for regulation 5 above, be prohibited by regulation 4(2) above;

- (b) any firework or assembly listed in Schedule 2 to these Regulations which contravenes the size or weight requirements specified for that firework or assembly in that Schedule; or
  - (c) any firework of erratic flight or mini-rocket whose supply would, but for regulation 4(3) above, be prohibited by regulation 4(1) above; unless either the firework or assembly or, in the case only of a firework referred to in sub-paragraph (c) above, the packaging in which it is supplied is marked with the words This device must not be sold to, or used by, a member of the general public.
- (2) No person shall supply any sparkler unless the packet in which is contained is marked with the words "Warning: not to be given to children under 5 years of age".

**Prohibition on splitting up primary packs and selection packs**

8. No person who carries on a business involving, to whatever extent, the supply of fireworks by retail shall supply any firework which he has removed, caused to be removed, or knows to have been removed from a primary pack or a selection pack.

**Proceedings**

9. In England and Wales a magistrates' court may try an information in respect of an offence under section 12 of the Consumer Protection Act 1987 arising from a contravention of these Regulations if the information is laid within twelve months from the time when the offence was committed, and in Scotland summary proceedings for such an offence may be brought at any time within twelve months from the time when the offence was committed.

(a) 1987 c. 43

Nigel Griffiths.  
Parliamentary Under-Secretary of State for  
Competition and Consumer Affairs,  
Department of Trade and Industry

23rd September 1997

**SCHEDULE 1**

Regulations 2(4)

AMENDMENTS SUBJECT TO WHICH PART 3 OF BS 7114 IS TO BE READ  
FOR THE PURPOSES OF THESE REGULATIONS

Appendix A. Test paper

Substitute the following for Appendix A

## **A.1 Test paper**

### **A.1.1 Requirements**

When determined in accordance with BS EN ISO 536, after conditioning as specified in BS EN 20187, the grammage of the paper shall be 70g/m<sup>2</sup> ± 5g/m<sup>2</sup>.

(b) BS EN 150 536: 1997. the British Standard Specification for paper and board-determination of grammage, published on 15th February 1997. ISBN 058025355 4.

(C) BS EN 20187: 1993. the British Standard Specification for paper, board and pulp standard atmosphere for conditioning and testing and procedure for monitoring the atmosphere and conditioning of samples, published on 15 December 1993. ISBN 0580 21881 3.

### **A.1.2 Conditioning prior to use**

The test paper shall be conditioned at (20 ± 0.5) °C and (65 ± 5)% relative humidity for at least 24h immediately prior to use.

## **A.2 Flame witness paper**

The test paper shall comply with A.1.1 and shall also be subjected to the scorch test described in A.3 immediately prior to use. The highest sheet in the stack which shows no sign of discoloration after being subjected to the scorch test described shall be sheet 1, 2, 3, 4 or 5.

## **A.3. Scorch test**

### **A.3.1 Material**

**A.3.1.1** Cigarette(s), untipped, of length 70mm ± 4mm, diameter 8.0mm ± 0.5mm and mass 1.0g ± 0.1g, and having a smouldering rate of 12.0 min ± 3.0 mm over 50mm distance when determined in accordance with appendix D.

### **A.3.2 Apparatus**

**A.3.2.1** Metal plate, mass 225g ± 1g, dimensions as shown in figure A. 1, with a rectangular hole cut in the centre (as shown). The mass of the plate shall be reduced to 225g by drilling holes symmetrically around the plate as necessary.

NOTE. The four holes in figure A. 1 are shown as an example only.

### **A.3.3 Test specimen**

Take twelve sheets of the paper, each at least 205mm x 105mm, number them consecutively (for identification) and assemble them in a stack, with the malt surfaces (if any) uppermost and sheet 1 on the top.

### **A.3.4 Procedure**

**A.3.4.1** Place the test specimen (A.3.3) on a flat, smooth, wooden surface and place the metal plate (A.3.2.1) on top of the stack (La on top of sheet tl) so that the paper projects out around the edges- Light a cigarette (A.3.1.1) and allow it to burn at least 10mm along its length.

**A.3.4.2** Place the burning cigarette on the exposed paper in a position which is at least 10mm from any edge of the rectangular hole in the metal plate, and so that it will burn inwards, and then remove the cigarette after 60 s.

100 ;Xp MASS

ADJUSTMENT

z HOLES TO

ii ..- BE KEPT

ci 0 SYMMETRICAL

THICKNESS 2.45 MASS225g;ÓIg

Figure A. 1. Metal plate for scorch test, All dimensions are in mm

**A.3.4.3** Repeat the operations described in A.3.4.2 a further four times, each time selecting a different position which is at least 10mm from any edge and at least 10mm from any scorch mark. If the cigarette has burnt more than 40mm along its length, light a new cigarette, allow it to burn 10mm and then use in for the next position.

**A.3.4.4** Examine each sheet of paper and determine which is the highest sheet (i.e. that with the lowest number) which shows no sign of discoloration.;"

## Appendix D

**After Appendix C, add a new appendix as follows i§Appendix D. Method for determination of smouldering rate of cigarette**

Condition the cigarette for at least 16 h, immediately before the test, at a temperature of 20OC;Ó53C and a relative humidity of 50% ;Ó20%.

Mark the cigarette at 10mm and 60mm from the end to be lit. Ignite the cigarette and draw air through it until the tip glows brightly. Not less than 5mm and not more than 8mm of the cigarette shall be consumed in this operation. In draught-free air, impale the cigarette horizontally on a horizontal spike inserted not more than 13mm from the unlit end. Record the time taken for the cigarette to smoulder from the 6mm

mark to the 60mm mark.”

## **SCHEDULE 2**

Regulations 3(2) and 7(1)(b)

### **SIZE AND WEIGHT REQUIREMENTS FOR PARTICULAR FIREWORKS AND ASSEMBLIES**

Firework assembly	Size and weight requirements
1. Air bomb in category 2	inside body diameter not to exceed 20mm
2. Air bomb in category 3	inside body diameter not to exceed 30mm
3. Battery in category 2	gross mass (excluding any frame) not to exceed 1kg
4. Battery in category 3	gross mass (excluding any frame) not to exceed 10kg
5. Category 2	rocket gross mass not to exceed 150g
6. Category 3	rocket gross mass not to exceed 500g. Internal diameter of rocket motor not to exceed 25mm
7. Combination in category 2	gross mass (excluding any frame) not to exceed 1kg
8. Combination in category 3	gross mass (excluding any frame) not to exceed 10kg
9. Mine in category 2	gross mass not to exceed 125g
10. Mine in category 3	gross mass not to exceed 1.2kg
11. Roman candle in category 2	inside body diameter not to exceed 20mm
12. Roman candle in category 3	inside body diameter not to exceed 30mm
13. Wheel in category 2	gross mass (excluding any frame) not to exceed 100g
14. Wheel in category 3	gross mass (excluding any frame) not to exceed 1.5kg

## **SCHEDULE 3**

Regulation 4(2)(g)

### **FIREWORKS AND ASSEMBLIES REFERRED TO IN REGULATION 4(2)(g)**

1. Air bomb
2. Banger
3. Battery
4. Cap
5. Category 2 rocket
6. Category 3 rocket
7. Combination
8. Cracker snap
9. Fountain
10. Mine
11. Novelty match
12. Party popper
13. Roman candle
14. Serpent
15. Set piece
16. Smoke device
17. Sparkler
18. Table bomb
19. Throwdown
20. Wheel

## **EXPLANATORY NOTE**

(This note is not part of the Regulations)

These Regulations (which do not extend to Northern Ireland) revoke and re-enact with amendments the provisions of the Fireworks (Safety) Regulations 1996 and make other provision relating to the safety of fireworks and assemblies which include fireworks.

The Regulations provide that fireworks and assemblies classified as category 1, category 2 or category 3 under British Standard 7114 must comply with that Standard (regulation 3(1)). For these purposes, BS 7114 is to be read subject to certain modifications (regulation 2(4) and Schedule 1), and the Regulations provide a limited exception for certain sparklers (regulation 3(3)).

The Regulations also impose size and weight requirements for certain specified fireworks and assemblies which are in certain respects stricter than those contained in BS 7114. Subject to exceptions referred to below, the Regulations prohibit the supply of fireworks and assemblies which contravene these requirements (regulation 3(2) and Schedule 2).

The Regulations prohibit the supply of fireworks of erratic flight and mini-rockets, but provide an exception for supplies to any person for use, in the course of a trade or business of his, for special effects purposes in the theatre, on film or on television (regulation 4(1) and (3)),

The Regulations prohibit the supply of aerial shells, shells-in- mortar, aerial maroons and maroons-in-mortar and also certain assemblies which include these devices. They also prohibit the supply of bangers (including combinations and batteries containing bangers, but not wheels containing banger) and fireworks classified as category 4 under British Standard 7114 (regulation 4(2)). These prohibitions are subject to exceptions referred to below.

Further, the Regulations prohibit the supply of any firework or assembly which is not listed in Schedules 3 (regulations 4(2)(g)), again subject to exceptions referred to below.

The exceptions referred to above enable the fireworks and assemblies to which they relate to be supplied to

- (a) any person who is in business as a professional organiser or operator of firework displays;
- (b) any person whose trade or business, or part of whose trade or business, is the supply of fireworks or assemblies, for the purpose of supplying them in accordance with these Regulations;

- (c) local authorities, Government departments and naval, military and air force establishments, for the purposes of firework displays or for use at national public celebrations or commemorative events (or, in the case of Government departments, for research or investigations purposes);
- (d) any person for use, in the course of his trade or business, for special effects purposes in the theatre, on film or on television;
- (e) bodies with enforcement powers when they make certain test purchases; and
- (f) persons who supply goods for use with fireworks or assemblies and who intend to use the fireworks or assemblies to ensure that the goods they supply perform correctly or comply with safety legislation (regulation 5).

The Regulations prohibit the supply of fireworks and assemblies (other than caps, cracker snaps, novelty matches, party poppers, serpents and throwdowns) to persons apparently under the age of eighteen (regulation 6).

The Regulations also require specified fireworks and assemblies to be marked with the words "This device must not be sold to, or used by, a member of the general public" - Packets of sparklers must be marked with the words "Warning: not to be given to children under 5 years of age" (regulation 7).

Finally, the Regulations prohibit retailers from supplying any firework which they have removed, caused to be removed, or know to have been removed from a primary pack or a selection pack.

For the purposes of the requirement to comply with BS 7114, the size and weight requirements and the marking requirements, the Regulations allow for the supply of fireworks and assemblies which comply with any standard or specification recognised for use in a member State of the European Community or any other State within the European Economic Area, so long as that standard or specification provides an equivalent level of safety (regulation 2(5) and (6)).

Copies of British Standard 7114, and the British Standards referred to in it, are available from any of the sales outlets operated by the British Standards Institution (BSI), by post from BSI at 389 Chiswick High Road, London W4 4AL or from any of the bookshops operated by the Stationery Office Limited.

These Regulations were notified in draft to the European Commission in accordance with Council Directive 83/189/EEC (O.J. No. L109, 26.4.1983, p.8), as amended.

A compliance cost assessment is available, copies of which have been placed in the libraries of both Houses of Parliament. Copies are also available from the Consumer Affairs and Competition Policy Directorate of the Department of Trade and Industry, Room 4.H.3, 1 Victoria Street, London SW1H 0ET.

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Vorschlag für eine Richtlinie des Rates über  
die Haftung bei Dienstleistungen

KOM (90) 482 endg.-SYN 308

(Von der Kommission vorgelegt am 9. November 1990)

DER RAT DER EUROPÄISCHEN GEMEINSCHAFTEN --

gestützt auf den Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft,  
insbesondere auf Artikel 100a, auf Vorschlag der Kommission,

in Zusammenarbeit mit dem Europäischen Parlament, nach Stellungnahme des  
Wirtschafts- und Sozialausschusses, in Erwägung nachstehender Gründe:

Im Zuge der Neubelebung der Verbraucherschutzpolitik scheint es vordringlich - wie  
in der Entschließung des Rates vom 9. November 1989 betont wurde -, Maßnahmen  
einzuführen, welche die Dienstleistungssicherheit gemeinschaftsweit fordern.

Der Dienstleistungsmarkt umfaßt die gesamte Gemeinschaft.

Obwohl die Gesetzgebung und Rechtsprechung in allen Mitgliedstaaten, was die  
Haftung des Dienstleistenden für die durch seine Dienstleistungen verursachten  
Schaden betrifft, in einem verstärkten Schutz von Dienstleistungsempfängern und  
Dritten tendieren, unterscheiden sie sich doch nach Inhalt und Schutzzumfang. Diese  
(Unterschiede sind geeignet, den Handel zu behindern und ungleiche Bedingungen auf  
dem Dienstleistungsbinnenmarkt zu schaffen. Dies

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III;X7L7L Cnnfl

führt dazu, daß weder bei Personenschaden noch bei Schaden an beweglichen oder  
unbeweglichen Sachen, die durch eine Dienstleistung verursacht worden sind, den  
Verletzten bzw. Verbrauchern in gleichem Umfang Schutz gewährt wird.

Angesichts dieser Unterschiede und des gemeinschaftsweiten Charakters der  
Dienstleistungen erscheint es angezeigt, eine Maßnahme auf Gemeinschaftsebene zu  
ergreifen.

In Anbetracht des Schutzes, den das nationale Recht der Mitgliedstaaten gewährt,  
stellt die Umkehr der Beweislast für das Verschulden des Erbringers einer  
fehlerhaften Dienstleistung die geeignetste Lösung dar. Dieser Grundsatz existiert  
zwar schon in der Rechtsordnung und Rechtsprechung mehrerer Mitgliedstaaten; er  
sollte jedoch eine verbindliche Form erhalten und einheitlich angewandt werden.  
Aufgrund der Besonderheit von Dienstleistungen, die vor allem darin besteht, daß sie  
„einmalig“ und zuweilen nicht greifbar sind und daß die Dienstleistung im  
Augenblick des Schadenseintritts „verschwunden“ ist, sowie der Tatsache, daß der  
Geschädigte - im Gegensatz zum Dienstleistenden - nicht über einschlägige  
Fachkenntnisse verfügt, ist die Umkehr der Beweislast für das Verschulden des

Dienstleistenden zugunsten des Geschädigten gerechtfertigt.

Das Verschulden des dienstleistenden ist in der berechtigten Erwartung zu messen, daß die Dienstleistung weder die körperliche Unversehrtheit von Personen noch die Unversehrtheit beweglicher oder unbeweglicher Sachen einschließt diejenigen, die Gegenstand

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der Dienstleistung sind, beeinträchtigt.

Die Tatsache allein, daß es zum Zeitpunkt der Erbringung der Dienstleistung oder danach eine bessere Dienstleistung gab oder die Möglichkeit dazu bestand, begründet kein Verschulden.

In Anbetracht der Vielfalt der Dienstleistungen einerseits und der bereits bestehenden Richtlinie 85/374/EWG des Rates<sup>1</sup> über die Haftung für fehlerhafte Produkte andererseits empfiehlt es sich, den Begriff der Dienstleistung weit zu fassen und dabei die übliche Unterscheidung zwischen Dienstleistung und Herstellung von Gütern sowie zwischen Dienstleistung und Übertragung dinglicher Rechte zu berücksichtigen.

Wegen ihrer besonderen Eigenart müssen öffentliche Dienstleistungen zur Aufrechterhaltung der öffentlichen Sicherheit von dieser Richtlinie ausgeklammert werden. Das gleiche gilt für Dienstleistungen bei Pauschalreisen und Dienstleistungen im Zusammenhang mit Abfällen, für die es bereits einschlägige Gemeinschaftsvorschriften gibt, sowie für Schaden, bei denen die Frage der Haftung bereits durch internationale, von den Mitgliedstaaten oder der Gemeinschaft ratifizierte Vereinbarungen geregelt ist.

Der Grundsatz des Verbraucherschutzes und der Entschädigung von Personen, die durch eine fehlerhafte Dienstleistung einen Schaden erlitten haben, rechtfertigt keine Unterscheidung zwischen privaten und öffentlichen Dienstleistenden. Dagegen sollten nur die im Rahmen einer gewerblichen Tätigkeit und nicht die zwischen Privatpersonen erbrachten Dienstleistungen erfasst werden.

1 ABLEGNr.L210 vom 78. 985. S. 29.

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Der Schutz des Geschädigten erfordert die Wiedergutmachung von Schaden, die durch eine Beeinträchtigung der Gesundheit oder der körperlichen Unversehrtheit entstanden sind. Der Schutz des Verbrauchers erfordert auch den Ersatz von Schaden, die durch eine Beeinträchtigung der Unversehrtheit beweglicher oder unbeweglicher Sachen entstanden sind. Für alle sich aus einer solchen Beeinträchtigung ergebenden materiellen Schaden ist ebenfalls Schadenersatz zu leisten.

Es erscheint angezeigt, die Beweispflicht für den Schaden und den

Kausaizusammenhang zwischen dem Schaden und der Dienstleistung dem Geschädigten aufzuerlegen.

Angesichts der Lage der Parteien erscheint es gerechtfertigt, daß die Haftung des Dienstleistenden nicht gemindert wird, wenn der Schaden sowohl durch sein Verschulden als auch durch die Handlung eines Dritten verursacht worden ist, daß sich aber ein Mitverschulden des Geschädigten haftungsmindernd oder sogar haftungsausschließend auswirken kann.

Der Schutz des Geschädigten beinhaltet, daß der Dienstleistende seine Haftung diesem gegenüber weder begrenzen noch ausschließen kann.

Haften mehrere Personen für denselben Schaden, so erfordert es der Schutz des Geschädigten, daß alle gesamtschuldnerisch haften. Die Stellung des Verbrauchers gegenüber dem Franchisegeber, der dem Dienstleistungsunternehmen seinen Namen zur Verfügung stellt, und dem Franchisenehmer, an den er sich wendet, rechtfertigt eine gesamtschuldnerische Haftung des Franchisegebers, des Franchisenehmers und des Hauptfranchisenehmers.

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Diese Richtlinie bezieht sich nicht auf die Anwendung der Richtlinie 89/391/EWG des Rates vom 12. Juni 1989 über die Durchführung von Maßnahmen zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Arbeitnehmer bei der Arbeit<sup>2</sup> sowie der daraus resultierenden Einzelrichtlinien.

Die durch diese Richtlinie geschaffene Haftungsregelung und die Art der Dienstleistungen rechtfertigen relativ kurze, aber angemessene Fristen für die Verjährung der Ersatzansprüche und das Erlöschen der Haftung, ausgenommen bei Dienstleistungen im Zusammenhang mit der Planung und Errichtung von Gebäuden. HAT FOLGENDE RICHTLINIE ERLASSEN

Artikel 1 Grundsatz

1. Der Dienstleistende haftet für den Schaden, der durch sein Verschulden bei Erbringung der Dienstleistung an Gesundheit und körperlicher Unversehrtheit der Personen sowie an der Unversehrtheit beweglicher oder unbeweglicher Sachen, einschließlich solcher, die Gegenstand der Dienstleistung sind, verursacht worden ist.
2. Es obliegt dem Dienstleistenden, sein Nichtverschulden zu beweisen,
3. Bei der Beurteilung des Verschuldens ist zu berücksichtigen, ob das Verhalten des Dienstleistenden unter normalen und vorhersehbaren Bedingungen die Sicherheit gewährleistet, die berechtigterweise erwartet werden kann.

<sup>2</sup> AB1. EGNr. L 183 vom 29.6. 1989. S. 1.

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4. Die Tatsache allein, daß es zum Zeitpunkt der Erbringung der Dienstleistung oder

danach eine bessere Dienstleistung gab oder die Möglichkeit dazu bestand. begründet kein Verschulden.

#### Artikel 2 Definition der Dienstleistung

„Dienstleistung“ in Sinne dieser Richtlinie ist jede im Rahmen einer gewerblichen Tätigkeit oder eines öffentlichen Dienstes in unabhängiger Weise erbrachte entgeltliche oder unentgeltliche Leistung, die nicht unmittelbar und ausschließlich die Herstellung von Gütern oder die Übertragung dinglicher Rechte oder von Urheberrechten zum Gegenstand hat.

Die Richtlinie gilt nicht für öffentliche Dienstleistungen, die der Aufrechterhaltung der öffentlichen Sicherheit dienen. Sie gilt nicht für Pauschalreisen, noch für Dienstleistungen im Zusammenhang mit Abfällen.

Sie gilt ferner nicht für Schaden, bei denen die Frage der Haftung bereits durch internationale von den Mitgliedstaaten oder der Gemeinschaft ratifizierte Übereinkommen geregelt ist.

#### Artikel 3 Definition des dienstleistenden

1. Der Begriff „Dienstleistender“ bezeichnet jede natürliche oder juristische Person des privaten oder öffentlichen Rechts, die im Rahmen ihrer gewerblichen Tätigkeit oder eines öffentlichen Dienstes eine Dienstleistung nach Artikel 2 erbringt.

2. Eine Person gilt auch dann als Dienstleistender im Sinne dieser Richtlinie, wenn sie zur Erbringung ihrer Dienstleistung die Dienste

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eines Vertreters oder eines anderen rechtlich abhängigen Vermittlers in Anspruch nimmt.

3. Ist der Dienstleistende nach Absatz 1 jedoch nicht in der Gemeinschaft niedergelassen, so gilt - unbeschadet seiner Haftung

- der Vertreter bzw. der rechtlich abhängige Vermittler, der die Dienstleistung in der Gemeinschaft erbringt, als Dienstleistender im Sinne dieser Richtlinie.

#### Artikel 4 Definition des Schadens

Der Begriff „Schaden“ bezeichnet

1. den unmittelbaren Schaden, der durch den Tod oder irgendeine Beeinträchtigung der Gesundheit oder körperliche Unversehrtheit von Personen verursacht worden ist;

2. den unmittelbaren Schaden, der durch irgendeine Beeinträchtigung der Unversehrtheit beweglicher oder unbeweglicher Sachen, einschließlich Tieren, verursacht worden ist, sofern diese Sachen

(1) ihrer Art nach normalerweise zum privaten Gebrauch oder Verbrauch bestimmt sind und

(2) vom Geschädigten hauptsächlich zum privaten Gebrauch oder Verbrauch bestimmt oder verwendet worden sind;

3, alle finanziellen Schaden, die unmittelbar von den unter den Punkten 1. und 2, genannten Schaden herriihren.

#### Artikel 5 Beweise

Der Geschadigte hat den Schaden und den Kausaizusammenhang zwischen der Dienstleistnng und dem Schaden eu beweisen.

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#### Artikel 6 Handlung eines Dritten und initwirkendes Verschulden

1. Die Haftung des Dienstleistenden wird nicht gemindert, wenn der Schaden sowohl durch scm eigenes Verschulden als auch dutch die Handlung eines Dritten verursacht worden ist.

2. Die Haftung des Dienstleistenden kann gemindert oder sogar ausgeschlossen werden, wenn der Schaden sowohl durch scm eigenes Verschulden als auch ducht das des Geschadigten oder einer Person, fur die der Geschadigte haftet, verursacht worden ist.

#### Artikel 7 Haftungsausschlul3

Der Dienstleistende kann die Haftung, die ihm nach dieser Richtlinie obliegt, dem Geschadigten gegenLiber weder begrenzen noch ausschlieen.

#### Artikel 8 Gesamtschuldnerische Haftung

1. Haften nach die ser Richtlinie mehrere Personen fur denselben Schaden, so haften sie unbeschadet der nationalen Rechtsvorschriften uber den gegenseitigen Regre3anspruch der Dienstleistenden gesamtschuldnerisch.

2. Der Franchisegeber, der Hauptfranchisenehmer und der Franchisenehmer - gema den Definitionen der Verordnung (EWG)

Nr. 4087/88 der Kommission vom 30. November 1988 fiber die

Anwendung von Artikel 85 Absatz 3 des Vertrages auf Gruppen

von Franchisevereinbarungen3 - sind gesamtschuldnerisch haftende

ABI. EG Nr. L 359 vom 2& 12. 1988. S. 46,

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Personen im Sinne des Ahsatzes 1.

Der Franchisegeber und der Hauptfranchisenehmer konnen sich von der Haftung befreien, wenn sie nachweisen konnen, da3 der Schaden auf em Brzeugnis zurUckzufuhren ist, das sie gema3 der Verordnung (EWG) Nr, 4087/8 8 nicht selbst haben liefern oder vorschreiben konnen.

#### Artikel 9 Erloscheu der Anspruche

Die Mitgliedstaaten sehen in ihren Rechtsvorschriften vor, daI3, die dem Geschadigten aus dieser Richtlinie erwachsenden Anspruche nach Ablauf einer Frist von fUnf Jahren ab dern Zeitpunkt erloschen, zu dem der Dienstleistende die

schadensverursachende Dienstleistung erbracht hat, sofern der Geschädigte in der Zwischenzeit kein Gerichts- oder Schiedsverfahren gegen den Dienstleistenden angestrengt hat.

Bezieht sich die Dienstleistung jedoch auf die Planung oder Errichtung eines Gebäudes, so verlängert sich die Frist auf 20 Jahre.

#### Artikel 10 Anspruchserjahrung

1. Die Mitgliedstaaten legen in ihren Rechtsvorschriften fest, daß der in dieser Richtlinie vorgesehene Schadensersatzanspruch innerhalb einer Frist von drei Jahren ab dem Zeitpunkt verjährt, zu dem der Anspruchsberechtigte von dem Schaden, dem Dienst und der Person des Dienstleistenden Kenntnis erlangt hat oder hatte erlangen müssen.

Bezieht sich die Dienstleistung jedoch auf die Errichtung oder

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Errichtung eines Gebäudes, so verlängert sich diese Frist auf zehn

Jahre.

2. Die Vorschriften der Mitgliedstaaten über die Hemmung und Unterbrechung der Verjährung bleiben unberührt,

#### Artikel 11 Übergangsbestimmung

Diese Richtlinie gilt nicht für Dienstleistungen, die erbracht wurden, bevor die in Artikel 12 Absatz 1 genannten Vorschriften in Kraft getreten sind.

#### Artikel 12 Umsetzungsbestimmungen

1. Die Mitgliedstaaten erlassen die erforderlichen Rechts- und Verwaltungsvorschriften, um dieser Richtlinie bis zum 31. Dezember 1992 nachzukommen. Sie setzen die Kommission unverzüglich davon in Kenntnis. Wenn die Mitgliedstaaten diese Vorschriften erlassen, nehmen sie entweder in diesen selbst oder bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Sie regelt die Einzelheiten dieser Bezugnahme.

2. Die Mitgliedstaaten teilen der Kommission die nationalen Rechtsvorschriften mit, die sie auf dem unter diese Richtlinie fallenden Bereich erlassen

#### Artikel 13 Schlußbestimmung

Diese Richtlinie ist an alle Mitgliedstaaten gerichtet.

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**AUDIT OF CONSUMER PROTECTION LAWS**  
**Second Report identifying inconsistencies, gaps and overlaps in**  
**Australian consumer**  
**protection legislation**

September 1997

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This Report reflects the law as at 31 August 1997
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**Audit of Consumer Protection Laws - Second Report**

This is the Second Report in the audit series examining inconsistencies, gaps and unnecessary duplication in Australian consumer protection legislation. The aim of the audit is to identify areas of non-uniformity in the nine different sets of consumer laws, and promote consideration of whether a more uniform legislative scheme would deliver improved protection for consumers and reduced compliance costs for

businesses.

In the area of post-sale consumer protection, businesses must contend with differently worded conditions and warranties implied into transactions, and significant variations in their ability to exclude or limit the operation of these terms between jurisdictions. Uncertainty created by the lack of consistency in post-sale protections is also a problem for consumers, who may be entitled to varying degrees of protection in different jurisdictions with respect to the same transaction. Lack of understanding of the relevant law has been identified as a major obstacle to consumers pursuing their rights and obtaining appropriate redress.

Problems associated with this area of the law were recognised by the Trade Practices Review Committee (the Swanson Committee) in 1976. The multiplicity of State, Territory and Commonwealth laws implying terms into consumer contracts was identified as a source of cost and confusion to Australian businesses. The Committee's view was that 'uniformity in this area of the law is vital, and that 'the substance of the terms implied by the Trade Practices Act 1974 (TPA) should be the first area of cooperation and agreement between Commonwealth and State Ministers'. In 1983, the Ministerial Council on Consumer Affairs (then the Standing Committee of Consumer Affairs Ministers) stated its commitment to uniform legislation, and agreed that mirroring the TPA would provide the best basis for achieving uniformity.

This Report examines legislative provisions which are intended to protect parties after they have purchased goods or services, such as the requirement that goods are of merchantable quality, or that services are performed with due care and skill. The Report provides a brief survey of the principal Commonwealth, State and Territory provisions in this area, as found in the TPA, the various Sale of Goods Acts, and a range of additional legislation throughout the jurisdictions. The main focus of the Report is to highlight legislative differences and consider the legal effect of these differences. Questions throughout the text raise issues for consideration.

Comments are invited on the issues presented in this Report. Please forward submissions to:

<p>The Director Consumer Law Section Department of Industry, Science and Tourism GPO Box 9839 CANBERRA ACT 2601 by 28 November 1997</p>
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This Report follows the First Report, released in February 1997, which examined the definition of 'consumer' and the unfair practices provisions of the TPA and the State and Territory Fair Trading Acts. It found a significant degree of inconsistency, particularly in relation to the definition of a 'consumer', and recommendations for reform are currently being developed for consideration by the Ministerial Council on Consumer Affairs.

## **Part I Introduction**

The post-sale consumer protection provisions of the TPA examined in this Report are found in Part V Divisions 2 and 2A. Division 2 comprises a contract-based scheme, which implies certain terms (either 'conditions' or 'warranties') into contracts for goods or services between suppliers and consumers. Failure to comply with one of the terms gives rise to rights in contract law.

Division 2A departs from the contractual model by imposing on manufacturers of goods a similar set of obligations. Failure to comply with one of the statutory guarantees is a breach of statutory duty, for which a consumer or successor in title can recover compensation.

The extent of protection afforded to purchasers of goods or services has developed on an ad hoc basis. The common law principle of caveat emptor ('let the buyer beware') prevailed until a range of conditions and warranties evolved from English mercantile law and were codified in the Sale of Goods Act 1893 (UK). In Australia, each State and Territory subsequently enacted its own Sale of Goods Act (SGA), which are in almost identical terms and contain the 'core' implied conditions and warranties that form the statutory framework for implied terms in contracts for the sale of goods. Divergences between jurisdictions are promoted by section 75 of the TPA, which preserves State and Territory laws so that they operate concurrently with the TPA.

Part V Division 2 of the TPA draws on the SGA provisions, in relation to contracts between consumers and suppliers for goods or services. The TPA's most important departure from the SGA is that its implied terms cannot be excluded. Several jurisdictions have supplemented the SGA with legislation which also prohibits 'contracting out' of the implied terms in relation to certain 'consumer' transactions. A number of jurisdictions have also extended rights of action by consumers to their successors in title and against manufacturers of goods, by abandoning the contract approach, in the same way as Part V Division 2A of the TPA. The table at page 4 outlines the national scheme of post-sale consumer protection legislation examined in this Report.

The TPA can be seen as the top tier of post-sale consumer protection in

Australia; however, significant areas of contracts for the supply of goods or services are excluded from its scope. For instance, contracts involving non-corporate suppliers will not be covered, unless the supplier is within the extended operation of the Act (subsection 6(2)). Nor will the TPA cover contracts under which the person supplied is not a 'consumer' within the meaning of the Act. In these cases, the second tier of State and Territory legislation may apply to particular 'consumer' transactions. However, as the analysis in Part II demonstrates, the coverage of this legislation varies considerably among jurisdictions, frequently because the definition of what constitutes a 'consumer' transaction is not consistent. Contracts governed by neither the TPA nor specific consumer legislation will be covered by the final tier, comprising the SGA and the common law. Attachment A outlines the scope of each piece of legislation in general terms.

It should be noted that the Report does not examine more specific State and Territory legislation, such as Door to Door Sales Acts or Motor Vehicle Sales Acts- It takes the approach of the First Report in the audit, using the provisions of the TPA (Part V, Divisions 2 and 2A) as the model against which State and Territory provisions are compared. Tables are used in a number of chapters to highlight some of the main points of inconsistency.

Broadly, the 'post-sale' rights addressed in this Report include:

- that goods or services are fit for a particular purpose made known to the supplier;
- that goods are of 'merchantable quality';
- that goods or services will correspond with any sample, description or demonstration;
- that a supplier can pass good title to goods;
- that services will be performed with due care and skill; and
- that a manufacturer will make spare parts and repair facilities reasonably available.

Part II examines each of these rights, identifying under which jurisdictions and legislation they are available, and assessing the legal effect of any differences. The Report finds that although all jurisdictions have some form of protection in some of these areas, the legislative scheme is far from integrated. Part III examines application issues, and further highlights areas of difference.

Some of the main issues addressed in the Report are:

- whether the implied terms extend in application to services. For instance, in the case of the implied condition of fitness for a particular purpose, the TPA, Victoria, South Australia, Western Australia and the Northern Territory imply this term in service contracts. The remaining jurisdictions only have a

condition only have a condition of fitness for a particular purpose in relation to goods;

- whether a consumer or successor in title has a set of statutory rights against manufacturers of goods. For instance, Queensland, Tasmania, Victoria and Western Australia have no special legislation addressing this issue, while the remaining jurisdictions offer varying degrees of protection to consumers; and

whether problems are created by inconsistent definitions. This includes the definition of 'consumer' (addressed in the First Report), and other fundamental concepts such as 'goods' and 'services'. For instance, the TPA adopts a broad definition of 'services', while jurisdictions such as Victoria take a narrow, prescriptive approach.

The main inconsistency identified by this Report is a supplier's ability to limit or exclude the operation of the conditions and warranties, highlighted by the High Court in *Esanda Ltd v Clark* (1986) ATPR 40-

665. The case involved Esanda's supply of a truck on hire-purchase to Clark. Under the agreements signed, Esanda was the vendor of the truck. Esanda's standard form contract attempted to accommodate the operation of conditions implied by both the TPA and State legislation. As a result, a clause which attempted to negate the operation of the implied term of fitness for purpose of the truck to the extent possible under the TPA, was found to have not complied with the strict terms of the State legislation. Although the State legislation (the Hire Purchase Act 1960 (NSW)) has since been repealed and replaced by the Consumer credit Code, the case demonstrates the difficulties involved for businesses in using the same standard clauses for all transactions, regardless of whether the TPA applies. It should also be noted that an incorrect statement of the law in this area may contravene paragraph 53(g) of the TPA (and parallel provisions in the Fair Trading Acts).

As with the First Report, this Report recognises that uniformity is only one element in the pursuit of simplification, and should not be seen as an end in itself. The goal of uniformity should only be pursued if it can be demonstrated to show a reduction in business compliance costs and an enhanced understanding of the law for both consumers and businesses. Of particular interest to this Report are comments on situations where disuniformity creates real problems. Suggestions are invited on how the provisions outlined in this Report can be simplified or otherwise improved for the benefit of consumers and businesses,

Legislative scheme of post-sale consumer protection examined in this Report

		Special provisions re consumers	Extension of rights
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Cth	-	TPA Part V Division 2	TPA Part V Division 2A
NSW	SGA	SGA Part 5 'Consumer Sales', inserted by Commercial Transactions (Miscellaneous Provisions) Act 1974	SGA subsection 64(5)
Vic	GA	GA Part IV 'Implied Conditions - and Warranties in Certain Sales and Leases', inserted by Goods (Sales and Leases) Act 1981	-
Qld	SGA	-	-
SA	SGA	Consumer Transactions Act 1972	Manufacturers Warranties Act 1974
WA	SGA	Fair Trading Act 1987 Part 3 'Conditions and Warranties in Consumer Transactions'	-
Tas	SGA	-	-
ACT	SGA	-	Law Reform (Manufacturers Warranties) Act 1977
NT	SGA	Consumer Affairs and Fair Trading Act 1990 Part V Division 2 'Implied Conditions and Warranties in Contracts for Goods or Services'	Consumer Affairs and Fair Trading Act 1990 Part V Divisions 3

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## Part 11-Implied Terms and Statutory Guarantees

### 1. Fitness for purpose

71. (2) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where

the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the corporation or of that person.

### **Trade Practices Act**

The TPA implies a condition that goods will be fit for any particular purpose made known by the consumer. The condition is implied where the corporation supplies the goods in the course of a business, and the consumer makes known (express or implied) the particular purpose for which the goods are required. The condition is not implied where the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the supplier.

Contracting out of the provision is not permitted, except in the case of contracts for the supply of goods not ordinarily acquired for personal, domestic or household use. Here, liability can be limited to the cost of repair or replacement of the goods, provided it is not unfair or unreasonable to do so.

The implied term of fitness for purpose is extended in the TPA to apply to contracts for the provision of services. As with the term in relation to goods, the term in relation to services is implied where the corporation supplies services in the course of a business and the consumer makes known (express or implied) the particular purpose for which the services are required. It is not implied where the consumer does not rely, or it is not reasonable for the consumer to rely, on the suppliers skill or judgement. Any materials supplied in connection with the services must also be reasonably fit for the particular purpose. Even where a particular purpose is not specified, subsection 74(1) implies a warranty that materials supplied in connection with services will be reasonably fit for the purpose for which they are supplied (this is discussed in Chapter 2).

Where the consumer makes known to the corporation the result he or she desires the services to achieve, the implied term is that the services, and any materials supplied with the services, will be of such a nature and quality that they might reasonably be expected to achieve the result. In relation to services, the implied terms of fitness for purpose are warranties, not conditions (the significance of this distinction is discussed in Chapter 10).

The TPA provides for a number of exceptions to the implied term of fitness for purpose in relation to services. These include services of a professional nature provided by a qualified architect or engineer, and services provided under commercial transport/storage contracts or contracts of insurance. The insurance exception was included because it was considered that adequate protection already existed in the form of the Insurance Contracts Act 1984. Industry insurance practices were also well-established in the transport and storage of commercial goods.

Finally, the TPA extends the implied term of fitness for purpose of goods to

non-contractual relationships, such as that between the consumer or successor in title and the manufacturer or importer of goods. Section 74B confers on consumers and their successors in title the right to recover compensation for loss or damage caused by goods that are not reasonably fit for a particular purpose. The right of action lies against the manufacturer or, if the manufacturer does not have a place of business in Australia, the importer of the goods. The right arises where the consumer makes known (express or implied, directly or indirectly) to the manufacturer the particular purpose for which the goods are required, regardless of whether it is a purpose for which such goods are commonly supplied. The right does not arise where the goods are not fit for the purpose due to the act of a person other than a servant or agent of the manufacturer and after the goods left the manufacturer's control. Nor will it arise where the consumer does not rely, or it would be unreasonable for the consumer to rely, on the skill or judgment of the manufacturer.

### **Departures from the TPA**

All jurisdictions have some form of implied term of fitness for purpose. However, there are significant departures from the TPA model among the State and Territory provisions:

- some require the goods or services to be of a description which it is in the course of the supplier's business to supply. This is a narrower test than the TPA, which only requires the goods or services to be supplied in the course of a business;
- some require the buyer to demonstrate actual reliance on the skill or judgment of the supplier. The TPA is broader in this respect, as it assumes reliance unless the supplier proves otherwise or shows that it was unreasonable for the consumer to rely on the skill or judgment of the supplier;
- some allow the supplier to exclude the operation of the condition;
- some do not extend the implied term to services. Among those that do, there are variations in the treatment of the terms as conditions or warranties, and any exceptions; and
- some do not extend the obligation to manufacturers of goods. Among those that do, there are variations in the circumstances in which the obligations apply.

The following table summarises the jurisdictional variations, and the subsequent text elaborates on these differences in more detail.

Implied terms as to fitness for purpose  
-Main points of inconsistency

Relevant elements	TPA/N T	NS W	Vic	Qld/ Tas	SA	WA	ACT
-supplied in the course of business	X		X			X	
-of a kind it is in the course of the seller's business to supply		X		X	X		
- not implied where unreasonable to rely on skill or judgement of supplier	X		X			X	
- supplier can exclude or vary operation				X			X
-supplier can limit liability for breach	X		X	X		X	X
-extend to services	X		X		X	X	
-express exception for transport/storage, insurance, and architect/engineer	X					X	
-express exception for domestic building work					X		
-extend to manufacturers	X						X
-exemption for causes occurring after goods have left the manufacturers control	X						

\* in certain circumstances, see section 68A of the TPA, see Chapter 9

\* \* implied condition in Victoria. warranties in remaining jurisdictions

### **Western Australia and Northern Territory**

The implied condition of fitness for purpose in relation to goods or services is reproduced in Western Australia (Fair Trading Act 1987, sections 38 and 40), which mirrors the TPA sections 71 and 74. There is no provision extending rights against manufacturers for goods unfit for a particular purpose. The Northern Territory (Consumer Affairs and Fair Trading Act 1990, sections 64, 66 and 73) literally mirrors the relevant TPA provisions, including the manufacturers' obligation. Inconsistencies

in application arise, however, because of differing definitions of fundamental concepts such as 'consumer' (this issue is addressed in Part I, and more extensively in the First Report of the audit).

### **South Australia**

The Consumer Transactions Act 1972 implies a condition relating to fitness for purpose, where the consumer makes known (express or implied) to the supplier the particular purpose for which goods are required. The goods must be of a description which it is in the course of the supplier's business to supply, and the consumer must show reliance on the supplier's skill or judgement. The condition is implied in leases as well as sales, and contracting out is not permitted.

In relation to contracts for services, the Consumer Transactions Act implies similar warranties as the TPA, ie:

- a warranty that materials supplied in connection with the provision of services will be reasonably fit for the purpose for which they are supplied;
- a warranty that services and materials provided in connection with the services are reasonably fit for a particular purpose made known to the supplier; and
- a warranty that services and materials provided in connection with the services are of such a nature and quality that they might reasonably be expected to achieve a desired result made known to the supplier.

The warranties differ from the TPA equivalents in two respects. First, the goods or services must be of a description which it is in the course of the supplier's business to supply, while the TPA only requires that the goods or services be supplied in the course of business. Second, the terms will not be implied under the Consumer Transactions Act where the consumer has not relied on the suppliers skill and judgement. The TPA test appears to be broader placing the onus on the supplier to show that the consumer has not relied, or it is unreasonable for the consumer to rely, on the supplier's skill and judgement. The Consumer Transactions Act prohibits any agreement to exclude, limit or modify the operation of these terms (discussed in greater detail in Chapter 9). There is no exception for insurance, transport or storage contracts, or services of a professional nature provided by a qualified architect or engineer. However, the provision does not apply to contracts for domestic building work, which are covered by other specific State legislation.

The Manufacturers Warranties Act 1974 requires certain statutory warranties to be provided by manufacturers or importers of goods, similar to some of the basic terms implied by the Sale of Goods Acts in contracts between consumers and suppliers. There is no statutory warranty relating to fitness for a particular purpose. This was not included in the Act because normally there is no direct contact between

manufacturer and consumer,

### **Victoria**

The fitness for a particular purpose condition is implied in consumer contracts for the sale of goods by Part IV of the Goods Act 1958 (section 90). The condition is implied where a person sells goods in the course of a business, and the buyer makes known to the seller (express or implied) the particular purpose for which the goods are required. It is not implied where the buyer does not rely, or it would be unreasonable for the buyer to rely, on the skill or judgement of the supplier. This provision is equivalent to the TPA, including the ability of the supplier to limit liability where the goods or services are not of a kind ordinarily acquired for personal, domestic or household use. The condition is also implied in relation to leases of goods.

In the case of contracts for services, section 92 implies the same condition of fitness for a particular purpose. In addition, where the consumer makes known the desired result, there is an implied condition that the services 'are such as might reasonably be expected to achieve that result'. The wording here varies slightly from the TPA, which requires the services to be 'of such a nature and quality' that they might reasonably be expected to achieve that result. Whether this variation in practice actually narrows the scope of the implied term is difficult to ascertain. Of greater significance is the fact that, unlike the TPA equivalents, the terms are considered conditions rather than warranties. There are no exceptions such as contracts of insurance, transport or domestic building work. However, the restrictive definition of 'services' in the Victorian legislation has the effect of limiting 'the application of the implied term (see Chapter 13).

Another inconsistency between the Victorian provisions and the TPA is the treatment of materials provided in connection with the provision of services. The TPA contains specific warranties that materials supplied in connection with services must be reasonably fit for the particular purpose, and that even where a particular purpose is not specified, any materials supplied in connection with services will be reasonably fit for the purpose for which they are supplied. Victoria, on the other hand, contains a provision which states that the supply of materials in connection with a sale of services is to be treated as a sale of goods.

Victoria has no legislation extending rights to consumers and their successors in title against the manufacturers and importers of goods.

### **Other jurisdictions (SGA)**

The remaining jurisdictions (New South Wales, Queensland, Tasmania and the ACT) rely on the SGA for their basic implied terms and conditions. The SGA implies the condition that goods will be reasonably fit for a particular purpose, where the buyer makes known (express or implied) the particular purpose for which the goods

are required. The buyer must demonstrate reliance on the seller's skill or judgement, and the goods must be of a description which are in the course of the seller's business to supply - The condition is not implied where the goods are specified by their patent or trade name. As with the other basic conditions and warranties implied under the SGA, this condition can be negated or varied by express agreement, by the course of dealing between the parties, or by usage. The SGA contains no provisions implying terms into contracts for services, nor do they extend rights to consumers and successors in title through manufacturers' statutory guarantees.

### **New South Wales New**

South Wales supplements this basic SGA scheme by providing that the implied condition of fitness for a particular purpose, and the seller's liability for breach of the condition, cannot be excluded or restricted in the case of consumer sales (subsection 64(1), see Chapter 11 on definitions of consumer)- It also extends obligations to manufacturers of goods in limited circumstances, but these do not include cases where the goods are not fit for a particular purpose, unless the goods are also unmerchantable (subsection 64(5)).

### **ACT**

Finally, the ACT has a manufacturers statutory warranty scheme in its Law Reform (Manufacturers Warranties) Act 1977, which contains warranties resembling those found in the TPA. Where the consumer expressly makes known to the Manufacturer, directly or through the seller, the particular purpose for which the goods are purchased, there is a warranty that the goods are reasonably fit for that purpose, regardless of whether or not it is a purpose for which the goods are commonly sold. The warranty does not apply where the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgement of the manufacturer. Unlike the TPA, there is no exemption for manufacturers where the goods are not fit for the particular purpose because of the act or default of a person other than a servant or agent of the manufacturer and after the goods have left the manufacturer's control (such an exemption does arise, however, in the context of the warranty of merchantable quality). Breach of the warranty entitles the consumer, or a person who derives title to the goods under the consumer, to sue the manufacturer for damages. The manufacturer cannot exclude or limit liability for breach of the warranty.

1. Should the condition apply only where the goods are of a description it is in the course of the supplier's business to supply? Or is it sufficient that the goods are supplied in the course of a business?
2. Should the buyer's reliance on the skill or judgement of the supplier be subject to a test of reasonableness?
3. Should the supplier be able to exclude or vary the term, or limit liability for

breach?

4 Should the fitness for purpose term extend to services? Is it more appropriate as a condition or warranty? What exceptions should apply?

5 Should the fitness for purpose term extend to manufacturers? If so, should it apply after goods have left the manufacturer's control?

## **2. Merchantable quality**

71. (1) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:

- (a) as regards defects specifically drawn to the consumer's attention before the contract is made; or
- (b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

### **Trade Practices Act**

Subsection 71(1) of the TPA implies a condition of merchantable quality in a contract for supply of goods to a consumer by a corporation in the course of a business. The condition is not implied where the consumer has examined the goods and that examination ought to have revealed any defect, or the defect is specifically drawn to the consumer's attention before the contract is made.

Subsection 66(2) states that goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. The goods must be reasonably fit for all the purposes for which goods of the kind are commonly bought.

Suppliers of services must also ensure that any materials provided in connection with services are reasonably fit for the purpose for which they are supplied (subsection 74(1)). This is as close as the TPA comes to requiring services to be of merchantable quality (fitness for purpose of services was discussed in Chapter 1).

The consumer or successor in title may also have rights against the Manufacturer of goods under subsection 74D(1) of Division 2A of the TPA. This provision imposes a statutory liability on the part of the manufacturer to compensate the consumer or subsequent owner if the goods are not of merchantable quality.

The manufacturer will not be liable where the goods are unmerchantable by reason of:

- an act or default of any person (not being the manufacturer or a servant or agent of the manufacturer), or a cause independent of human control, occurring after the

- goods have left the control of the corporation; or
- if defects are specifically drawn to the consumer's attention before the making of the contract; or
- if the consumer examines the goods before that contract is made, defects that the examination ought to reveal.

### Departures from the TPA

All jurisdictions have some form of merchantable quality provision, but there is a significant degree of variation regarding the circumstances in which it applies. These include:

- whether the term 'merchantable quality' is defined in legislation, or by the common law;
- whether the definition requires goods to be fit for all the purposes for which they are ordinarily acquired, or only one of the purposes;
- whether the goods must be bought by description from a seller who deals in goods of that description;
- whether the buyer's subjective knowledge of defects is relevant in implying the condition;
- whether the supplier's objective knowledge of defects is relevant in implying the condition;
- whether the supplier can exclude the operation of the condition, or limit liability for breach of the condition, and to what extent;
- whether the provision extends to services; and
- whether the provision extends to manufacturers.

### Implied terms as to merchantable quality

#### -Main points of inconsistency

Relevant elements	TPAJNT	WA	Qld/Tas	NSW	Vic	SA	ACT
- statutory definition of 'merchantable quality'	X	X		X	X	X	X
- goods must be fit for all the purposes for which they are ordinarily acquired (criterion)	X	X		X	X		
- seller must deal in goods of the description			X	X			X
- buyer's subjective knowledge of defect relevant	X	X		X	X		

- supplier's objective knowledge of defect relevant						X	
- supplier can exclude or vary operation			X				X
- supplier can limit liability for goods other than personal, domestic or household	X	X	X		X		X
- supplier can limit liability for second hand goods			X	X			X
- term extends to services***	X	X			X	X	
- term extends to manufacturers	X			X		X	X

\* only in relation to the manufacturers' warranty (Law Reform (Manufacturers Wan-antics) Act 1977)

\*\* in NSW, liability can be limited to the amount of the cash price

\*\*\* only the materials provided in connection with services in TPA, VVA, NT and SA

### **Western Australia and Northern Territory**

Western Australia mirrors the TPA provision relating to the merchantable quality of goods, and of materials provided in connection with services (Fair Trading Act 1987, subsections 38(1) and 40(1)). There is no provision extending the term to manufacturers of goods as section 74D of the TPA does. The Northern Territory replicates the TPA model, including the manufacturers' obligation (Consumer Affairs and Fair Trading Act 1990, subsections 64(1), 66(1), and section 75).

### **Queensland and Tasmania (S GA)**

These jurisdictions rely on the SGA for the implied condition of merchantable quality. The condition is implied in a narrower range of circumstances than the TPA, as the goods must be bought by description from a seller who deals in goods of that description (see Chapter 3 for information on sale by description). The difficulties associated with interpreting the concept of sale by description have prompted other jurisdictions to remove the requirement from the merchantable quality provision.

The implied condition of merchantability does not apply where the buyer examined the goods and should have detected the defect. However, unlike the TPA, the provision does not expressly address the buyer's knowledge of the defect. It is questionable whether a buyer who was found to have known about a defect (although it was not apparent on reasonable examination) would be entitled to rely on the implied condition of merchantable quality.

The SGA also differs from the TPA by not including a definition of

‘merchantable quality’. Although many commentators have noted the similarities between the TPA and the common law definition, they are not identical. For instance at common law, goods are merchantable if they are fit for any one of a range of purposes for which such goods are commonly bought. This creates a narrower test of unmerchantability than the TPA, which requires goods to be fit for all the purposes for which they are commonly bought.

The SGA allows the implied condition to be excluded or liability for breach limited. It does not extend to services, or manufacturers.

### **New South Wales**

Although New South Wales relies on the basic provision provided by the SGA, its scope is extended by Part 8 of the Sale of Goods Act 1923, which prohibits the exclusion of the implied condition of merchantable quality, or any attempt to limit liability for its breach. However, in relation to the sale of second-hand goods, the seller will only be liable for the amount of the cash price of the goods, unless otherwise agreed between the parties.

Part 8 adds a provision (subsection 64(4)) which addresses the issue of the buyer’s knowledge of defects, stating the condition will not be implied where defects are brought to the buyer’s attention. Also included is a statutory definition of ‘merchantable quality’ which is very similar to the TPA model, including the requirement that the goods be fit for all purposes for which they are commonly bought.

Part 8 provides for limited liability on the part of manufacturers of goods. Subsection 64(5) gives the court the discretionary power to add the manufacturer of the goods as a party to the proceedings, if it appears the goods in question were not of merchantable quality at the time of delivery to the buyer. The manufacturer may be liable to remedy the defect, to pay the buyer an amount equal to the estimated cost of remedying the defect, or be subject to any ancillary order which the court considers appropriate. The manufacturer’s liability does not extend to successors in title. This is the most limited extension of the implied terms to manufacturers.

### **Victoria**

Victoria does not rely on the standard SGA provision, adopting its own provision in Part IV of the Goods Act 1958, which is very similar to the TPA model, including the ability to limit liability. However, instead of excluding situations where a defect has been brought to the buyer’s notice (as in the TPA), the Victorian provision would appear to be broader, by excluding situations where the buyer is aware of the defect (subsection 89(3)).

In relation to services, Victoria has the most comprehensive implied condition of merchantable quality (paragraph 91(b), not found in other jurisdictions). While the

TPA and mirrored provisions only extend to the merchantable quality of materials provided in connection with services, Victoria implies a condition that services sold in the course of a business must be:

as fit for the purposes for which services of that kind are commonly bought as it is reasonable to expect having regard to the price of the services, the terms of the sale and all other relevant circumstances.

This is not an express condition of merchantable quality; however, it very closely resembles the definition of merchantable quality discussed in this Chapter. For an explanation of a further condition of merchantable quality implied in contracts for the sale of services in Victoria, see Chapter 5.

### **South Australia**

South Australia relies on the Consumer Transactions Act 1972 to imply a condition of merchantable quality where a supplier supplies goods in the course of a business. The drafting of the definition of merchantable quality in that Act is unclear, as it might be interpreted as resembling either the TPA model or the SGA model.

Goods are of merchantable quality if:

they are as fit for the purpose for which goods of that description are ordinarily used as is reasonable to expect...

If goods are ordinarily used for more than one purpose, they may need to be fit for all usual purposes (TPA), or only one (SGA).

The South Australian provision is unique in that it takes account of the supplier's objective knowledge in implying the condition of merchantable quality. The condition will not apply in respect of defects of which the supplier could not reasonably be aware at the time of the contract. This qualification reduces the scope of the implied condition of merchantable quality by rendering it inapplicable to goods with latent defects at the time of the contract. The provision may not be excluded or modified.

The Act also extends the merchantable quality condition to materials supplied in connection with services (resembling subsection 74(2) of the TPA, which was based on the South Australian provision). Manufacturers' liability is addressed by the Manufacturers Warranties Act 1974, which contains a provision similar to subsection 74D(1) of the TPA. However, unlike the TPA, there is no reference to the application of the provision in cases where defects are specifically drawn to the consumer's attention before the contract is made, or where an examination of the goods has occurred which should have revealed the defects. The more limited application of the South Australian legislation resulting from its definition of 'manufactured goods' is discussed in Chapter 13.

### **ACT**

The ACT is the same as Queensland and Tasmania (ie. reliance on the SGA),

with the addition of a manufacturers' statutory warranty scheme found in the Law Reform (Manufacturers Warranties) Act 1977. Subsection 4(1) requires the manufacturer to warrant that goods are of merchantable quality, adopting the TPA definition of merchantability. Like the TPA, a manufacturer is not liable where the goods are unmerchantable due to the act of another or a cause independent of human control occurring after the goods have left the control of the manufacturer; if the defects are specifically drawn to the consumer's attention before the contract is made; or where the consumer examines the goods before the contract is made and ought to have detected the defects. Breach of the warranty entitles the consumer, or a person who derives title to the goods, to sue the manufacturer for damages. The manufacturer cannot exclude or limit liability for breach of the warranty.

6. Should 'merchantable quality' be defined in legislation?
7. To be considered merchantable, should goods be fit for all the purposes for which they are ordinarily acquired, or is only one of the purposes sufficient?
8. Should the term only apply where the supplier deals in goods of that description?
9. Should the buyer's subjective knowledge of defects be relevant?
10. Should the supplier's objective knowledge of defects be relevant?
11. Should the supplier be able to exclude or vary the term, or limit liability for breach, and if so, when?
12. Should the merchantable quality term extend to services?
13. Should the merchantable quality term extend to manufacturers?

### **3. Correspondence with description**

70 (1) Where there is a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

#### **Trade Practices Act**

Under the TPA, where goods are supplied by a corporation in the course of a business by description, there is an implied condition that the goods will correspond with the description.

If the sale is by reference to a sample as well as by description, subsection 70(1)

provides that it is not sufficient that the bulk of the goods corresponds with the sample, if they do not also correspond with the description. Sale by sample is discussed in greater detail in Chapter 4.

Subsection 70(2) provides that a sale is not prevented from being a sale by description because the goods being exposed for sale or hire are selected by the consumer. For instance the sale may be by description even if a consumer selects goods from amongst a range of displayed goods, as for example in a supermarket.

Where goods are supplied by a corporate manufacturer (including an importer) indirectly to a consumer through an intermediary, section 74C provides a statutory guarantee of conformity with the description similar to section 70. The manufacturer is liable for any loss or damage suffered by the consumer or by a person who acquires the goods from the consumer, as a result of the breach. However, the description must have been applied to the goods by or on behalf of the manufacturer or with his or her express or implied consent.

As with other manufacturers guarantees, a manufacturer is not liable if the lack of conformity is due to the act or default of any person (other than the manufacturer or their agent), or to a cause independent of human control, which occurred after the goods left the manufacturer's control.

### Departures from the TPA

All jurisdictions have some form of correspondence with description term, the main differences being:

- whether the goods must be supplied in the course of a business;
- whether the supplier can exclude the implied term, or limit their liability for breach;
- whether the obligation extends to manufacturers; and
- the circumstances in which it applies, where it does extend to manufacturers.

#### Implied terms of correspondence with description – Main points of inconsistency

Relevant elements	TPAINT	ACT	WA	Qld/Tas	NSW	SA	Vic
- goods must be supplied in the course of business	X		X		X		
- supplier can exclude operation		X		X			
-supplier can limit liability	X*	X	X*	X			X*
- extend to manufacturers	X	X					

- doesn't apply in circumstances beyond manufacturer's control	X	**					
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\* in limited circumstances, set out in section 68A of the TPA, discussed in Chapter 9

\*\*only in the case of a description applied by a person other than the manufacturer

### **Western Australia and Northern Territory**

These jurisdictions have mirrored the TPA provision in relation to suppliers of goods, in the Fair Trading Act 1987 section 37, and the Consumer Affairs and Fair Trading Act 1990 section 63. Both jurisdictions however rely on different definitions of 'consumer' (discussed in Chapter 11, and in more detail in the First Report), resulting in variations in the application of the implied term. Only the Northern Territory reproduces section 74C of the TPA to provide a manufacturers' guarantee of compliance with description.

### **South Australia**

The Consumer Transactions Act 1972 is very similar to the TPA model, but does not require the contract for supply to be in the course of a business. Excluding, limiting or modifying the condition is prohibited by section 10. The condition does not extend to manufacturers.

### **Queensland and Tasmania (SGA)**

These jurisdictions rely on the SGA to imply the condition of correspondence with description. This provision is essentially the same as the TPA, although again the goods need not be supplied in the course of a business. More importantly, a supplier can negative or vary the operation of the implied term.

### **New South Wales**

The New South Wales provision is modelled on the SGA. However, Part 8 (inserted by the Commercial Transactions (Miscellaneous Provisions) Act 1974) provides that the condition cannot be excluded or restricted in consumer sales (section 64(1)).

### **Victoria**

Victoria relies on a supplementary part of its SGA, Part IV (inserted by the Goods (Sales and Leases) Act 1981), to imply the term of correspondence with description (section 87). The provision is not identical to the TPA or the SGA. It is not necessary for the goods to be supplied in the course of a business (like the SGA), and limiting liability is permitted only in certain circumstances (like the TPA)+ Section 87 also makes no reference to the bulk of the goods having to correspond with the

description in sales by sample as well as by description (see subsection 70(1) above, and section 18 of the Goods Act 1958). This might suggest a stricter obligation on the seller to ensure all of the goods correspond with the sample and description.

### **ACT**

In relation to sellers, the ACT relies on the standard SGA. However, the obligation is extended to manufacturers in separate legislation, the Law Reform (Manufacturers Warranties) Act 1977. The provision requiring the manufacturer to warrant that the goods will correspond with any description closely resembles section 74C of the TPA. However, there is a narrower range of circumstances in which the ACT warranty will not apply (subsection 4(6)). The guarantee does not apply under the TPA where non-compliance with the description is due to another person not connected with the manufacturer, or due to a cause beyond human control after the goods leave the manufacturer. In the ACT, the manufacturer is not liable where the description is applied to the goods by a person other than the manufacturer.

14. Should the term apply only where goods are supplied in the course of a business?

15. Should the supplier be able to exclude or vary the term, or limit liability for breach?

16. Should the term extend to manufacturers? If so, should it apply to circumstances beyond the manufacturer's control?

### **4. Correspondence with sample**

72. Where in a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample:

(a) there is an implied condition that the bulk will correspond with the sample in quality;

(b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and

(c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

### **Trade Practices Act**

The three conditions outlined in the section are quite independent of one another, so that if any one is breached, the buyer is entitled to reject the goods and treat the contract as at an end. For example, if the other two conditions were met, but the seller refused to give the buyer a reasonable opportunity of comparing the bulk with the sample, the buyer would be entitled to reject the goods.

Section 74E of the TPA extends liability to manufacturers (including importers) where the goods are supplied by sample indirectly (through an intermediary such as a retailer). However, there is no guarantee corresponding to paragraph 72(b) of the TPA. The manufacturer may escape liability

- by establishing that the sample was not supplied by the manufacturer or that the sale by sample is made without the manufacturer's express or implied concurrence;
- by proving that the failure of the bulk to correspond with the sample or the existence of the defect was due to a third party or a cause independent of human control, occurring after the goods left the manufacturer's control; or
- by proving that the failure of the bulk to correspond with the sample or the existence of the defect was due to other circumstances beyond the control of the manufacturer which could not reasonably have been foreseen.

### Departures from the TPA

The main differences between jurisdictions (all of which have some requirement relating to correspondence with sample) are similar to those relating to correspondence with description (Chapter 3):

- whether the goods must be supplied in the course of a business;
- whether all the goods or only the 'bulk' of goods need to correspond with the sample, and whether the buyer must be given a reasonable opportunity to compare all the goods with the sample, or only the bulk of the goods;
- whether the buyer's knowledge of latent defects is relevant;
- whether the supplier can exclude the implied term, or limit their liability for breach;
- whether the obligation extends to manufacturers; and
- where it does extend to manufacturers, the circumstances in which it applies.

Implied terms of correspondence with sample - Main points of inconsistency

Relevant element	TPAINT	ACT	WA	Qld/Tas/SA	NSW	Vic
-goods must be supplied in the course of business	X		X		X	
-bulk of goods must correspond with the sample (as opposed to all)	X	X	X	X		
-buyer's knowledge relevant in relation to latent defects						X
-supplier can exclude operation		X		X		

-supplier can limit liability	X*	X	X*	X		X*
-extend to manufacturers	X	X				
-not where caused by person other than a servant/agent of manufacturer	X	**				

\* in limited circumstances, set out in section 68A of the WA, discussed in Chapter 9

\*\* only if beyond the control of the manufacturer and not reasonably foreseeable

### **Western Australia and Northern Territory**

These jurisdictions model the supplier's correspondence with sample obligations on the TPA (Fair Trading Act 1987 section 39 and Consumer Affairs and Fair Trading Act 1990 section 65). The manufacturers' guarantee in section 74E of the TPA is only reproduced in the Northern Territory.

### **Queensland, South Australia and Tasmania (SGA)**

The SGA is relied upon to imply the condition of correspondence with sample in contracts of sale in these jurisdictions (the Consumer Transactions Act 1972 (SA) unusually makes no reference to this implied condition). This provision is almost identical to the TPA model in relation to suppliers, although there is no requirement that the goods be supplied 'in the course of a business'. Again, the main difference is that the SGA allows the supplier to negative or vary the operation of the implied term.

### **New South Wales**

New South Wales again relies on the SGA for the implied condition, but varies the SGA by providing that the condition cannot be excluded or restricted in consumer sales.

### **Victoria**

The terminology in the Goods Act 1958 (Vic) is different to the other jurisdictions in a number of respects. First, the implied term of correspondence with sample is implied where the seller shows to the buyer a sample of the goods and the buyer is induced by the showing of the sample to purchase the goods or goods of the same kind. It is unclear how this adds to the test in other jurisdictions, where the term is implied when there is an express or implied term of the contract that the goods are supplied by reference to a sample. It is arguable that the showing of a sample to the buyer which induces the buyer to purchase the goods would amount to an implied term of the contract that the sale was by sample.

The other departure is in relation to the third condition (that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample). Victoria adds an extra requirement:

and of which the buyer is not aware when the sale is made.

This varies the scope of the term, by introducing the subjective knowledge of the buyer as a requirement for implying the condition. In practice, the additional requirement is likely to reduce the circumstances in which the implied condition of correspondence with sample applies. For instance, the condition won't be implied under the Victorian provision in cases where it can be established that the buyer was in fact aware of the defect, whereas the buyer's knowledge will not be relevant under the TPA.

### **ACT**

In relation to sellers, the ACT relies on the SGA provision outlined above. However, the Law Reform (Manufacturers Warranties) Act 1977 again extends the implied condition to manufacturers. The provision requiring the manufacturer to warrant that the goods will correspond with any sample closely resembles section 74E of the TPA. However, the ACT version omits an equivalent of subparagraph 74E(2)(c)(i) of the TPA. This would appear to give the ACT provision a slightly broader scope than the TPA. For instance, a manufacturer can avoid liability under the TPA where the non-correspondence with sample is due to the act or default of any person (other than a servant or agent of the manufacturer). Under the ACT provision, a manufacturer would only be able to escape liability in these circumstances if it could also be established that the act or default of the other person was beyond the control of the manufacturer and not reasonably foreseeable.

17. Should the term apply only where the goods are acquired in the course of a business?
18. Should the term require the bulk, or all, of the goods to correspond with the sample?
19. Should the buyer's knowledge of latent defects be a relevant factor in implying the term?
20. Should the supplier be able to exclude or vary the term, or limit liability for breach?
21. Should the term extend to manufacturers? If so, should it apply where the failure to comply is caused by a third party?

## **5. Correspondence with demonstration**

Victoria is the only jurisdiction with a provision addressing correspondence with demonstration. Section 93 of the Goods Act 1958 states:

93. In a sale of services-
  - (a) where

- (i) the seller; or
- (ii) in the course of any antecedent negotiations, a dealer or a person acting on behalf of the seller- shows to the buyer a demonstration of, or a result achieved by, services and the buyer is induced by the demonstration or by the showing of the result to buy services of that kind; or
- (b) in which there is a term express or implied to the effect that the sale is a sale of services of the kind that are shown to the buyer in a demonstration, or that achieve a particular result shown to the buyer- there is
- (c) an implied condition that the services will correspond in nature and quality with the services shown in the demonstration or will correspond in quality with the services that achieved that result; and
- (d) an implied condition that the services will be free from any defect rendering them unfit for the purposes for which services of that kind are commonly bought that would not be apparent on reasonable examination of the services shown in the demonstration or the result achieved by the services of that kind and of which the buyer is not aware when the sale is made.

The implied condition of correspondence with demonstration or result achieved in relation to services is similar to that of correspondence with sample in relation to goods. Unlike sale by sample, there is no implied condition that the buyer will have a reasonable opportunity to compare the services with the demonstration (perhaps because this may not be possible as a matter of practice).

As discussed in Chapter 2, Victoria is unusual in that it has a provision resembling merchantable quality in relation to services (section 91 (b)). The provision is implied in sales by a person who sells services in the course of a business, and the quality is measured by factors such as the price of the services and the terms of the sale. This differs from the merchantable quality of services supplied by demonstration (section 93(d) above), which applies regardless of whether the services are supplied in the course of a business, and is not expressly qualified by reference to the price of the services or the terms of the sale.

The implied conditions cannot be excluded, restricted or modified. although the Goods Act does provide that a seller can limit his or her liability for breach of section 93 to the supply of the services again, or the payment of the cost of having the services supplied again. Such a limitation is only permitted where the services are not of a kind ordinarily acquired for personal, domestic or household use or consumption,

and it is fair and reasonable for the seller to rely on the term that limits liability.

22. Is an implied term of correspondence with demonstration necessary for services?

## **6. Title, encumbrances and quiet possession**

69. (1) In every contract for the supply of goods by a corporation to a consumer, other than a contract to which subsection (3) applies, there is:

- (a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and
- (c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer - an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.

### **Trade Practices Act**

In contracts for the supply of goods by corporations to consumers, the TPA implies a number of terms relating to the supplier's ability to pass good title. These are:

- a condition that the supplier has a right to sell the goods; and
- warranties that the consumer will receive the goods free of any undisclosed claim. This comprises a warranty that the goods are free from any undisclosed charges or encumbrances (excluding a floating charge); and a warranty that the consumer will enjoy quiet possession of the goods except to the extent of any disclosed lawful claims.

These implied terms cannot be excluded, restricted or modified (section 68), nor may liability be limited (section 68A). However, the circumstances of the contract may indicate an intention that the supplier should transfer only a limited title to the goods, in which case the above warranties apply.

### **Departures from the ThA**

All jurisdictions have the basic provision implying terms relating to title, encumbrances and quiet possession, although some variations do exist:

- there is inconsistent treatment of the implied terms as conditions or warranties;
- in some jurisdictions the terms are not implied until the property passes. The TPA terms attach when the contract is made;
- some require the seller to be given a reasonable opportunity to remedy a defective title before the right to rescind a contract for breach of a condition can be exercised;
- the application of the quiet possession term may depend on the buyer not being 'in default'; and
- there are minor variations in wording, such as charges or encumbrances 'in favour of a third party'.

#### Implied undertakings as to title, encumbrances and quiet possession

##### - Main points of inconsistency:

Relevant elements	WA/WA/NT	Vic	SA	NSW/Qld/Tas/ACT
-encumbrances term an implied warranty	X		X	X
-encumbrances term seems to attach at the time the property passes, not when the contract is made		X	X	X
-supplier given reasonable opportunity to remedy defective title before rescission for breach of title/encumbrance term		X		
-quiet possession entitlement for so long as the buyer is not in default		X		

\* condition elsewhere

#### Western Australia and Northern Territory

Literal mirroring of section. 69 of the TPA is found in the Fair Trading Act 1987, section 36, and in the Consumer Affairs and Fair Trading Act 1990, section 62,

#### Victoria

In section 86 of the Victorian Goods Act 1958, the most notable divergence is the treatment of the term regarding freedom from charges or encumbrances as a condition rather than a warranty. As a result, a consumer who purchases goods only to find them subject to an undisclosed charge or encumbrance is entitled to rescind the contract and claim damages for breach of the contractual condition, rather than merely claim compensation for breach of warranty. Although a stronger provision in this respect, it

is more limited than the TPA in that the condition would appear to apply at the time the property is to pass, not at the time the contract is made.

The operation of these provisions cannot be limited, modified or excluded, nor may the seller limit liability for breach of the terms. However, the parties may agree to a transfer of only limited title, in which case similar conditions and warranties apply. The seller is effectively required to disclose all known interests, liens, charges or encumbrances to the buyer. Where a seller is in breach of one of the conditions, the buyer may not rescind the contract until the seller has been given a reasonable opportunity to provide good title or remove any charge or encumbrance on the goods.

### **South Australia**

The Consumer Transactions Act 1972 requires goods to be free from charges or encumbrances in favour of a third party. It is difficult to conceive of a situation where the inclusion of 'in favour of a third party' might have some legal effect (e.g. where there was already a charge in favour of the buyer, of which the buyer was not aware). The warranty of disclosed charges would appear to attach when the property in the goods is to pass ('the goods will be free from any charge or encumbrance...'), although the drafting is not clear.

In relation to the warranty of quiet possession, the Consumer Transactions Act makes no exception for disclosed claims, unlike the TPA. Rather, it states that a consumer is entitled to enjoy quiet possession for so long as they are not in default under the contract. Like the TPA, but unlike the SGA, this warranty applies to contracts for the lease of goods as well as contracts for the sale of goods. The terms implied by the Consumer Transactions Act cannot be excluded, limited or modified by agreement (section 10).

### **New South Wales, Queensland, Tasmania and ACT (SGA)**

The remaining jurisdictions rely on the SGA. The terms are implied into contracts of sale unless a different intention is shown. The warranty of quiet possession contains no exception in the case of disclosed charges. The warranty in relation to charges or encumbrances also includes reference to 'in favour of a third party'. It would appear to apply at the time the property passes, although again this is not made explicit (unlike the TPA). The SGA terms relating to title, encumbrances and quiet possession can be effectively excluded, as indicated by the phrase 'unless the circumstances of the contract are such as to show a different intention', as well as a separate provision which allows the terms to be 'negated or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract'.

23. Which of these terms should be treated as conditions, and which should be treated as warranties?

24. Should the undertaking as to encumbrances attach at the time the property passes, or the time the contract is made?
25. Should the supplier have a reasonable opportunity to remedy a defective title before a buyer is entitled to rescind a contract for breach of the undertakings as to title and encumbrances?
26. Does the undertaking as to quiet possession need to contain an express proviso that the buyer is not in default?

## 7. Due care and skill

74. (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

### Trade Practices Act

This provision of the TPA codifies the common law position that workmanship should be performed with reasonable skill and care. Breach of the implied warranty entitles the consumer to seek damages for any loss incurred (discussed in more detail in Chapter 10). The second part of the provision, that materials are reasonably fit for their purpose, is addressed in Chapter 2.

Service is defined very broadly in the TPA to include any rights, benefits, privileges or facilities that are provided in trade or commerce. Subsection 74(3) qualifies this definition in relation to the warranty of due care and skill, by excluding services provided under a commercial contract of transport or storage, and under a contract of insurance.

### Departures from the TPA

While Western Australia and the Northern Territory mirror the TPA provision, only two other jurisdictions - South Australia and Victoria - include a similar due care and skill term. The main inconsistencies are:

- whether the services need to be supplied in the course of a business;
- whether the term is a condition or a warranty;
- whether the supplier can limit liability;
- whether there are any exceptions; and
- how 'services' are defined.

#### Implied terms of due care and skill - Main points of inconsistency

Relevant elements	TPA/NVA/NT	SA	Vic
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-condition			X
-warranty	X	X	
-services supplied in the course of a business	X		
-supplier can limit liability*	X		
-express exception for contracts of transport! storage and insurance	X		
-express exception for domestic building work		X	
-prescriptive definition of services!		X	X

\* in limited circumstances, set out in section 68A of the TPA, discussed in Chapter 9

### **Western Australia and the Northern Territory**

The Northern Territory Consumer Affairs and Fair Trading Act 1990 (section 66) and the Western Australian Fair Trading Act 1987 (section 40) replicate the TPA provision.

### **Victoria**

In Victoria, section 91(a) of the Goods Act implies into a sale the condition that the services will be rendered with due care and skill. As this is a condition, a breach entitles the consumer to treat the sale as repudiated. It is not necessary for the sale to be in the course of a business. The Goods Act contains an equivalent provision to section 68A of the TPA, allowing a seller to limit liability in certain circumstances.

Although the terms of due care and skill provision are very similar to the TPA model, a different approach to the definition of 'services' results in variations in the scope of application of the provision. While the TPA definition is broad, the Goods Act attributes a very limited meaning to 'services': 'services' means services by way of -

- (a) the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or fixtures on land;
- (b) the alteration of the physical state of land; or
- (c) the transportation of goods otherwise than for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported.

### **South Australia**

The implied warranty, contained in subsection 9(1) of the Consumer Transactions Act, applies to contracts for the provision of services, again not necessarily in the course of a business. The definition of 'services' is again very prescriptive (although not as narrow as Victoria), comprising a list of six paragraphs in section 2 of the Act, as well as an additional twenty-five paragraphs in Schedule 1 of the Act- Although the paragraphs cover a wide range of services, items such as

legal or medical advice, and personal services such as beauty treatment, are omitted. The various definitions of 'services' are discussed in more detail in Chapter 13.

27. Should the term apply only when services are supplied in the course of a business?
28. Should the term be a condition or a warranty? (see Chapter 10)
29. Should the supplier be able to exclude or vary the term, or limit liability for breach?
30. Should there be exceptions for certain types of contract e.g. transport/storage, insurance, domestic building work?

## **8. Spare parts and repair facilities**

74F. (1) Where:

- (a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or
- (b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

and:

- (c) at a time (in this section referred to as the 'relevant time') after the acquisition of the goods by the consumer:
  - (i) the goods require to be repaired but facilities for their repair are not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer; or
  - (ii) a part is required for the goods but the part is not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer;
- (d) the corporation acted unreasonably in failing to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time; and
- (e) the consumer or that other person suffers loss or damage by reason of the failure of the corporation to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time.

the corporation is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the corporation in a court of

competent jurisdiction.

(2) Subsection (1) does not apply where the corporation took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when he or she acquired the goods that:

- (a) the corporation did not promise that facilities for the repair of the goods, or that parts for the goods, would be available; or
- (b) the corporation did not promise that facilities for the repair of the goods, or that parts for the goods, would be available after a specified period, being a period that expired before the relevant time.

### **Trade Practices Act**

Section 74F of the TPA requires manufacturers to take reasonable efforts to ensure spare parts and repair facilities for their goods are reasonably available to consumers. Should a consumer or other person suffer loss or damage due to the failure of the manufacturer to make spare parts and repair facilities reasonably available, then the manufacturer is liable to compensate for the loss or damage caused- In determining whether the manufacturer has acted unreasonably, the court will have particular regard to circumstances beyond the control of the manufacturer which prevented the spare parts or repair facilities being available.

The statutory obligation does not apply where the manufacturer takes reasonable action to ensure the consumer is given notice that spare parts or repair facilities will not be available, either for a specified time, or at all.

### **Departures from the TPA**

A similar provision is found in only three other jurisdictions: the Northern Territory, South Australia and the ACT. While the Northern Territory mirrors the TPA model, there are several differences in the other jurisdictions:

- the requirement of providing repair or service facilities;
- the goods should be of a kind likely to require repair or maintenance. No such threshold issue arises in the TPA;
- the efforts the manufacturer must take to comply with the obligation; and
- the circumstances in which the manufacturer will not be liable.

Statutory guarantee of provision of spare parts and repair facilities –

Main points of inconsistency

Relevant elements	TPAJNT	SA	ACT
-obligation of provision of spare parts	X	X	X
-obligation of provision of repair/service facilities	X		X
-goods must be of a kind likely to require repair/		X	X

maintenance;			
-must be 'reasonably available'	X		
-must be available for a 'reasonable period'		X	X
-manufacturer must have 'acted unreasonably' (circumstances beyond control of manufacturer relevant in determining)	X		
-no guarantee for spare parts where manufacturer could not have reasonably foreseen unavailability		X	X
-not reasonably foreseeable may include industrial stoppage		X	
-expressly excludes auction sales	X	X*	

\* refers to sales 'by retail'

### **Northern Territory**

Section 77 of the Consumer Affairs and Fair Trading Act 1990 literally mirrors section 74F of the TPA.

### **South Australia**

The Manufacturers Warranties Act 1974 requires the manufacturer to warrant that spare parts will be available for a reasonable period after the date of manufacture, in the case of goods of a kind likely to require repair or maintenance. Unlike the TPA, no reference is made to the provision of repair facilities. The warranty is also narrower because it only applies to goods of a kind likely to require repair or maintenance. Rather than being made 'reasonably available', the spare parts need only be available 'for a reasonable period after the date of manufacture'.

The manufacturer will not be made liable under this warranty where the unavailability of spare parts could not be reasonably foreseen by the manufacturer. The manufacturer can also exclude liability where reasonable steps are taken to notify the retail purchaser that no undertaking with regard to spare parts is given. As with the TPA, the rights attach both to consumers and those who derive title through the consumer, and lie against the manufacturer, or the importer of the goods where the manufacturer does not have a place of business in Australia.

### **ACT**

The Law Reform (Manufacturers Warranties) Act 1977 contains a statutory warranty that spare parts and repair facilities will be available for a reasonable period after the date of manufacture, where the goods are of a kind that are likely to require repair or maintenance. The manufacturer will not be liable under the spare parts warranty where the unavailability was not reasonably foreseeable, which may include

industrial stoppage. This qualification does not apply to the warranty as to repair facilities. The manufacturer is also not liable where reasonable steps are taken to notify the consumer that no undertaking with regard to the provision of spare parts or repair facilities is given, either at all or only in relation to specified parts or repairs or for a specified period of time, Liability cannot otherwise be limited or excluded. The rights lie against both manufacturers and importers (when the manufacturer has no place of business in Australia), and are available to both consumers and persons who derive title from consumers.

31. Should there be a provision which requires manufacturers to take reasonable efforts to ensure spare parts and repair facilities are reasonably available?
32. Should the provision only apply in the case of goods of a kind likely to require repair or maintenance?
33. In what circumstances should the manufacturer be able to avoid liability?

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## **Part III - Application Issues**

### **9. Contracting out**

68. (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:
- (a) the application of all or any of the provisions of this Division;
  - (b) the exercise of a right conferred by such a provision;
  - (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
  - (d) the application of section 75A;
- is void.
- (2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

The ability of the supplier to 'contract out' of implied terms constitutes one of the major differences among jurisdictions. The term 'contract out' is used in this context to encompass excluding, restricting or modifying the implied terms, or limiting liability for breach of the terms.

**Trade Practices Act**

The TPA prohibits the use of terms which exclude, restrict or modify the implied terms and statutory guarantees of Part V Divisions 2 and 2A, or terms which exclude, restrict or modify liability for breach of those provisions. Apart from such a provision being rendered void, it is an offence to make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (section 53(g)).

Section 68A creates one exception to section 68, allowing a corporation to limit liability to the cost of repair or replacement of goods or re-supply of services, in cases where the goods or services are not of a kind ordinarily acquired for personal, domestic or household use, and it is not unfair or unreasonable to rely on such a limitation. This amendment was made to the TPA in 1977, after the Government concluded that in commercial dealings in commercial goods or services, it is reasonable to allow parties to a contract to negotiate their own arrangements regarding liability for consequential damages flowing from a breach of the contract. This exception does not apply to the implied undertakings as to title, encumbrances and quiet possession, as the Government maintained that suppliers of goods should stand behind the title of those goods in their dealings with businesses as well as the public.

#### **Departures from the TPA**

- some jurisdictions allow a supplier to exclude, restrict or modify the terms;
- some jurisdictions allow a supplier to limit liability for breach of the terms in any circumstances; and
- some jurisdictions have special rules excluding the operation of, or limiting liability for, certain terms e.g. the merchantability of second hand goods, or terms relating to title, encumbrances or quiet possession.

The following table summarises the main differences in contracting out of implied conditions and warranties:

#### **Contracting out - Main points of inconsistency**

Relevant elements	TPAJWA/NT/Vic	SA	NSW	QId/Tas/ACT
- cannot exclude, restrict or modify term*	X	X	X	
- cannot limit liability for breach	X	**	X	
- exceptions to limiting liability:	X		X	
- non 'consumer' goods or services (but not re title)	X			
- implied terms relating to title etc			X	
- merchantability of 2nd hand			X	

\* manufacturers' guarantee exists and cannot be excluded in TPA, NT, ACT and SA

\*\* the South Australian Act does not expressly address limiting liability

### **Western Australia, Northern Territory and Victoria**

The Fair Trading Act 1987 (WA), the Consumer Affairs and Fair Trading Act 1990 (NT) and Part 1V of the Goods Act 1958 (Vic) are consistent with the TPA in respect of contracting out. However, as noted in Part 11, Western Australia and Victoria do not mirror Part V Division 2A of the TPA.

### **Queensland and Tasmania (S GA)**

At the other end of the scale, the SGA allows a great deal of scope to contract out of implied obligations:

Where any right duty or liability would arise under a contract of sale by implication of law it may be negated or varied by express agreement or by the course of dealing between the parties or by usage if the usage be such as to bind both parties to the contract.

This provision allows the use of exclusion clauses by which a seller can either exclude liability altogether under the implied terms, or limit liability to an expressly agreed amount. The common law has refined this proposition so that a seller cannot escape liability for breach of a 'fundamental' term of the contract (for instance where a seller supplies goods which do not comply with their contractual description). The intention to contract out of the implied terms can also be inferred from the course of dealing between the parties or usage (a uniformity of conduct of persons with regard to the same act or matter). While other jurisdictions have additional legislation which supplements the SGA, Queensland, Tasmania and the ACT continue to rely on the SGA as the main source of implied terms in contracts not covered by the TPA.

### **South Australia**

The Consumer Transactions Act 1972 prohibits the exclusion, limitation or modification of conditions and warranties (which resemble Part V Division 2 of the TPA) implied by that Act. It is arguably unclear whether an agreement to limit the liability of the supplier for a breach of one of the conditions or warranties is also prohibited. This may be a fine distinction to draw, but it should be noted that other jurisdictions appear to expressly differentiate between limiting the operation of the terms, and limiting liability for breach of the terms. It is worth considering whether the fact the South Australian Act does not refer to liability has any significant legal consequences. The South Australian Office of Consumer and Business Affairs interprets the Act as 'preventing suppliers for all practical purposes from limiting their liability in a manner broadly comparable to other jurisdictions'.

In relation to manufacturers' statutory guarantees, the Manufacturers Warranties

Act 1974 prohibits a manufacturer from excluding or limiting liability under an express or statutory warranty. An exception is created in relation to the guarantee of spare parts, where the manufacturer takes reasonable steps to notify the purchaser that no undertaking is given with respect to the provision of spare parts (the TPA provision, introduced in 1977, reflects this).

### **New South Wales**

Part 8 of the Sale of Goods Act 1923 provides that the conditions and warranties implied by the Act cannot be excluded or restricted in a consumer sale, nor may the seller limit liability for breach of an implied term. Any term of a consumer sale contract which purports to do this will be considered void. There are two exceptions:

- terms relating to title, encumbrances and quiet possession can be excluded or restricted, or liability for breach limited (the TPA expressly prohibits any attempt to limit liability for breach of these terms); and
- where the goods are second-hand, the liability of the seller for breach of the merchantable quality condition can be limited to the amount of the cash price of the goods.

### **Victoria**

Part 1V of the Goods Act 1958 (Vic) provides that a term which purports to exclude, restrict or modify the implied terms, or the liability of the seller for breach of the terms, is void. A seller will be subject to penalty if such a provision is included in the contract (section 96). Like the TPA, liability for breach can be limited in the case of goods or services not of a kind ordinarily acquired for personal, domestic or household use. Liability can be limited to the cost of repair or replacement of goods, or the cost of re-supplying the services, provided it is not unfair or unreasonable to do so (and not in relation to the undertakings as to title, encumbrances and quiet possession).

### **ACT**

Although the ACT relies on the SGA for the basic implied conditions and warranties (and the seller's ability to exclude or limit the terms is therefore very broad), the Law Reform (Manufacturers Warranties) Act 1977 extends the scheme to manufacturers. Like the South Australian legislation and the TPA, a manufacturer cannot exclude or limit liability under an express or statutory warranty. The exception is in relation to the warranty of spare parts and repair facilities, where the manufacturer can escape liability when reasonable steps are taken to notify the purchaser that no undertaking is given.

34. Should a supplier be able to exclude, restrict or modify any or all of the implied terms? If so, in what circumstances?

35. Should a supplier be able to limit liability for breach of any or all of the

implied terms? If so, in what circumstances?

## **10. Remedies**

The remedies available to buyers of goods and services depend on 2 number of factors, including the legislation which applies to the particular transaction; whether the transaction involves goods or services; whether the buyer has 'accepted' the goods; and whether the action is against a supplier for breach of an implied condition or warranty, or against a manufacturer for breach of a statutory guarantee.

### **Trade Practices Act**

The TPA (Part V Division 2) implies terms into contracts with suppliers. When these terms are breached, rights in contract law arise. The remedy available to the consumer will depend on whether a 'warranty' or 'condition' has been breached, a distinction which reflects the common law. Breach of a warranty (an agreement collateral to the main purpose of the contract) gives rise to a claim for damages, but not a right to rescind the contract. Breach of a condition (a fundamental term of the contract) allows the buyer to rescind the contract and claim damages. As the implied terms relating to the supply of services are warranties, the right of rescission will not arise in relation to contracts for services.

The significance of rescinding a contract is that the buyer can be returned to the position he or she was in prior to the contract (and therefore may be entitled to a refund of the purchase price), in addition to claiming damages for any loss suffered as a result of the breach.

A statutory right of rescission is provided by section 75A of the TPA, which is of particular importance in cases where the property in the goods has already passed to the consumer (see the contrasting SGA position discussed below). The consumer may exercise the right of rescission by:

- giving the supplier notice in writing of the particulars of the breach; or
- returning the goods to the supplier with particulars of the breach (oral or written).

The rescission is ineffective if:

- the notice is not served or the goods are not returned within a reasonable time after the consumer has a reasonable opportunity of inspecting them;
- in the case of rescission served by notice, after the goods are delivered but before the notice is served, the goods are disposed of, lost, destroyed, rendered unmerchantable or damaged by abnormal use; or
- in the case of rescission by return of the goods, while the goods are in the possession of the consumer, the goods become unmerchantable or are damaged by abnormal use.

In relation to breaches of the manufacturers' guarantees (Part V Division 2A),

consumers have a statutory right to compensation for loss or damage suffered. Any action must be commenced within three years of the date on which the consumer or successor in title became aware, or ought reasonably to have become aware, of the problem. The action cannot be commenced more than ten years after the date of first supply of the goods.

### **Departures from the TM**

All State and Territory legislation reflects the condition/warranty distinction. However, there are a number of areas of inconsistency:

- some jurisdictions have no statutory right of rescission, which in some circumstances limits the remedies available to consumers; and
- as noted in Part II of the Report, some jurisdictions treat implied terms as conditions where others treat the same terms as warranties. For instance, the Victorian conditions implied in contracts for services raise the question of how contracts are to be rescinded ab initio after services have been provided.

### **Western Australia and Northern Territory**

The statutory right of rescission is reproduced in Western Australia (Fair Trading Act 1987, section 41) and the Northern Territory (Consumer Affairs and Fair Trading Act 1990, section 67). In relation to breaches of manufacturers' guarantees, the Northern Territory mirrors the TPA's statutory right to compensation for loss or damage suffered.

### **Queensland and Tasmania (SGA)**

At the other end of the scale, the SGA contains no statutory right of rescission. Once a buyer has accepted goods or property in the goods has passed to the buyer, any breach of a condition can only be treated as a breach of warranty. The buyer is therefore unable to reject the goods and treat the contract as repudiated, and must claim damages for breach of warranty, measured in terms of the loss resulting from the breach.

The SGA clarifies the circumstances in which a buyer is deemed to have accepted goods:

- the buyer will not be deemed to have accepted goods unless and until they have had a reasonable opportunity of examining the goods after delivery; and
- the buyer is deemed to have accepted goods when:
  - the buyer intimates acceptance to the seller;
  - the buyer does any act in relation to them which is inconsistent with the ownership of the seller; or

- the buyer retains the goods for a reasonable time without intimating rejection to the seller.

The Swanson Committee recommended the introduction of section 75A of the TPA to overcome the problems created by the SGA. It gives a consumer the right to rescind the contract once the consumer has had a reasonable opportunity to examine the goods, regardless of whether the property in the goods has passed or the consumer has accepted the goods.

### **New South Wales**

Although Part S of the Sale of Goods Act 1923 expands the scope of the SGA in relation to consumer sales, it does not alter the remedy provisions of the SGA (i.e. there is no statutory right of rescission). In relation to manufacturers' liability, the court has a discretion to order a manufacturer to remedy a defect on unmerchantable goods, or to pay an amount equal to the cost of remedying the defect. These remedies are narrow when compared to the right to compensation conferred by the TPA, although the court may also make such ancillary orders as the court deems appropriate (subsection 64(5)).

### **Victoria**

Part IV of the Goods Act 1958 creates a statutory right of rescission, and prescribes a procedure for rescission and its consequences. The main factor affecting a buyer's right to rescind a sale of goods is acceptance of the goods. Like the SGA, once a buyer has accepted the goods, any breach of a condition can only be treated as a breach of warranty, and not a ground for rescinding the contract. The provisions of the SGA which deem a buyer to have accepted goods (outlined above) apply here. In addition, a buyer will not be deemed to have accepted goods by reason only that he or she retained the goods for a reasonable time or did not inform the seller of rejection within a reasonable period, where:

- the goods are defective at the time of delivery;
- the defect becomes apparent within a reasonable period after delivery; and
- the buyer has not done anything to prevent the goods being returned to the seller in substantially the same state they were in when delivered to the buyer.

This additional provision basically gives the buyer a reasonable period after delivery to determine whether the goods are defective, and a further period to return the goods or inform the seller of an intention to reject the goods. The rules relating to acceptance are therefore less strict than under the SGA.

The buyer may be liable to the seller for certain loss or damage caused to the goods (paragraph 101 (1)(d)), and may also be liable to pay the seller the fair value of the use of the goods (paragraph 101 (1)(g)). Subsection 101 (2) provides for cases

where the seller cannot be located.

### South Australia

The Consumer Transactions Act 1972 provides a statutory right of rescission. A consumer may rescind a contract for breach of a condition implied by the Act within a reasonable time (which is stated to be no more than 7 days after delivery). Rescission is to be performed by written notice to the supplier.

A purported rescission is said to be void where:

- the goods are not returned to the supplier within a reasonable time after rescission;
- the goods have been rendered unmerchantable or damaged by abnormal use after delivery to the consumer; or
- the court declares rescission to be an inappropriate remedy (on the application of the supplier).

In relation to manufacturers' obligations, the Manufacturers Warranties Act 1974 confers on consumers the right to recover damages from a manufacturer for breach of the statutory warranties.

### ACT

The provisions of the SGA outlined above apply to the ACT in relation to a supplier's liability for breach of the implied terms. In relation to manufacturers' liability, the Law Reform (Manufacturers Warranties) Act 1977 gives consumers the right to recover damages, which is said to be the same as an action for breach of warranty under a contract.

36- Should jurisdictions be consistent in their treatment of implied terms as conditions or warranties?

37. Should post-sale consumer protection legislation include a statutory right of rescission?

## 11. Consumers

As found in the First Report of the audit (at p.12 ff), variations in fundamental concepts such as the definition of 'consumer' create one of the most significant challenges in achieving uniformity. While the First Report focussed on the TPA and the various Fair Trading Acts of the States and Territories, a review of the SGA and additional post-sale consumer protection legislation reveals similar inconsistencies in the definition of 'consumer'.

Consumers - Main points of inconsistency\*

Relevant elements	TPA/Vic	WA	NT	NSW	SA	ACT
Value of goods/services(e.g. \$40000)	X	X		X**	X	

Nature of goods/services(e.g. domestic)	X	X		X	X	X**		X
Purpose of acquisition(e.g. re-supply)	X	X	X	X				X
Person acquiring (e.g. in course of business)***		X	X	X	X	X	X	

\* NT and SA divisions reflect different definitions of 'consumer' in manufacturers' guarantees provisions

\*\* goods excluded are antiques (other than furniture) or art

\*\*\* this broad category covers any jurisdiction which defines consumer in terms of the person acquiring the goods or services e.g. NT & SA require the person to acquire goods or services from a supplier, while NSW excludes purchases by persons in the course of a business.

### TPA and Victoria

The TPA and Victorian Goods Act 1958 define 'consumer' by reference to the value and nature of the goods and services. A person is a 'consumer' if the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, or are less than \$40 000 in value (TPA) or \$20 000 in value (Victoria). The definitions also take into account the purpose for which goods are acquired (e.g. goods acquired for the purpose of re-supply, transformation, or repairing other goods or fixtures on land are excluded).

In relation to Part V Division 2A, it would appear that the definition of 'consumer' is limited by paragraph 74(2)(a), which states that a reference in the Division to 'goods' shall, unless the contrary intention appears, be read as a reference to 'goods of a kind ordinarily acquired for personal, domestic or household use or consumption'.

### Western Australia and Northern Territory

In Western Australia the Fair Trading Act 1987, which reproduces Part V Division 2 of the TPA, adds to the TPA definition by excluding purchases of goods or services in the course of, or for the purpose of, carrying on a business (by reference to the Consumer Affairs Act 1971).

The Northern Territory also departs from the TPA's definition of consumer despite reproducing the TPA's implied conditions and warranties. A consumer under the Consumer Affairs and Fair Trading Act 1990 is a person who acquires goods or services from a supplier, excluding those acquired for the purpose of re-supply, or using up or transforming in the course of a business, or in connection with a process

of manufacture or production, or the repair or treatment of other goods or fixtures on land. The definition for the purposes of the manufacturers' guarantees qualifies the above by requiring that the goods are of a kind ordinarily acquired for personal, domestic or household use.

### **South Australia**

The Consumer Transactions Act 1972 defines 'consumer' contracts as those involving consideration of less than 540 000 and, unlike the TPA, excludes all transactions entered into by a person in the course of business. Unlike other post-sale legislation, it expressly excludes bodies corporate from the definition of 'consumer'. It also excludes sales by auction; sale or lease of goods by tender; contracts for goods the buyer 'trades' in; transactions entered into by a consumer in the course of a trade or business; contracts for the occupation of land, and the sale or lease of antiques (other than furniture) or art.

Under the Manufacturers Warranties Act 1974, a 'consumer' is any person, who purchases by retail, goods not normally offered for retail sale above \$10 000.

### **New South Wales**

Part 8 of the Sale of Goods Act 1923 defines consumer sales as those involving the sale of goods of a kind commonly bought for private use or consumption, and not acquired by a person in the course of a business (the seller must sell the goods in the course of a business). As with some other jurisdictions, it specifically excludes auction sales.

### **Queensland, Tasmania (S GA)**

These jurisdictions rely on the SGA, which contains no definition of consumer as the SGA terms apply broadly to contracts between buyers and sellers for the sale of goods.

### **ACT**

The Law Reform (Manufacturers Warranties) Act 1977 defines consumers as persons who purchase goods of a kind ordinarily purchased for private use or consumption, and where the goods are not purchased for the purpose of re-sale.

38. Should consumer' be defined consistently for the purposes of post-sale consumer protection? If so, is there a preferable model to follow?

## **12. Sellers, suppliers and manufacturers**

The previous chapter highlighted some inconsistencies in the definition of the fundamental concept of 'consumers'. An examination of how other parties to the transaction - sellers, suppliers and manufacturers - are defined also reveals a degree of inconsistency. A brief overview follows.

### **Trade Practices Act**

The TPA's implied conditions and warranties of Part V Division 2 are

enforceable against suppliers, the meaning of which can be derived broadly from sections 4 and 4C. In relation to goods, 'supply' includes sale, exchange, lease, hire or hire-purchase, In relation to services, it includes provide, grant or confer.

The statutory guarantees of Part V Division 2A apply to manufacturers, which are described in section 74A. 'Manufactured' includes grown, extracted, produced, processed and assembled. Apart from a corporation actually manufacturing goods, a corporation will be deemed a manufacturer in a variety of circumstances, including where it holds itself out to the public as the manufacturer, or where it imports the goods and the actual manufacturer has no place of business in Australia. As with Division 2, the application of the manufacturers' guarantees provisions relies on an act of 'supply'.

The TPA's implied terms and statutory guarantees do not apply to sale by auction, with the exception of the terms relating to title, encumbrances and quiet possession.

### **Western Australia and Northern Territory**

The Western Australian Fair Trading Act 1987 definition of supply resembles the broad TPA version, It also expressly includes 'donate for promotional purposes'. Although the TPA does not refer to supply by donation, it is likely to be included (see for instance Davies J in *Clarke v New Concept Import Services Pty Ltd* (1981) ATPR 40-264).

The Northern Territory Consumer Affairs and Fair Trading Act 1990 mirrors the definitions of supplier and manufacturer found in the TPA.

### **Queensland and Tasmania (S GA)**

The SGA applies to contracts of sale, whereby the seller transfers or agrees to transfer the property in the goods to the buyer for money consideration called the price. A seller is defined as a person who sells or agrees to sell goods. The SGA would thus appear to be narrower in scope than legislation which relies on the act of supply rather than sale to imply terms into contracts.

### **Victoria**

The definition of seller in Part IV of the Goods Act 1958 mirrors the SGA, except that it also applies to sellers of services. This reflects the wider application of Victoria's implied conditions and warranties.

The Victorian legislation also includes a definition of lessor in Part IV, since the Part implies conditions in certain leases. In relation to a lease of goods, lessor means the person who hires the goods to another person under the lease.

New South Wales Part 8 of the Sale of Goods Act 1923 also follows the SGA model by applying only to sale contracts 'whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money, consideration called the

price;|. In relation to manufacturers, there is no definition, however, it is said to include an importer where the actual manufacturer has no residence or place of business in Australia. Like the TPA, the New South Wales provisions do not apply to sales by auction.

### **South Australia**

The Consumer Transactions Act 1972 has a detailed definition of supplier, which means a person carrying on a business in the course of which:

- (a) the person enters into the consumer contract;
- (b) negotiations leading to the formation of the consumer contract are carried out whether or not the person owns or personally supplies the goods or services subject to the contract; or
- (c) the person sells the goods to another person with a view to that other person entering into a consumer lease with a consumer with whom the person (the vendor of the goods) has previously conducted negotiations in relation to the goods.

The definition of 'consumer contract' encompasses contracts for the hire or hire-purchase of goods, and contracts under which a person 'acquires by other means' the use or benefit of goods or services, which could be quite broad in its interpretation. It expressly excludes sales by auction.

Under the Manufacturers Warranties Act 1974, a manufacturer is any person who manufactures or assembles goods; holds themselves out to the public as the manufacturer of goods; causes their name to be connected with the goods so that it is reasonable to infer [that the person is the manufacturer; or imports the goods where the manufacturer does not have a place of business in Australia. Contracts for hire are also included. The warranties only apply to sales 'by retail', which is not defined and may not include sales by auction.

### **ACT**

The ACT Law Reform (Manufacturers Warranties) Act 1977 states that a manufacturer is:

- a person by whom, or on whose behalf, goods are manufactured or assembled;
- a person who holds himself or herself out to the public as the manufacturer of goods;
- a person who causes or permits his or her name to be connected with the goods in a manner or form that leads reasonably to the inference that he is the manufacturer of the goods; or
- an importer of the goods where the goods are imported into Australia and the manufacturer does not have a place of business in Australia.

The application of the provisions depends on an act of 'sale'. This includes hire purchase, as well as contracts for hire of more than six months' duration. Auction sales would also appear to be included.

39. Should the implied terms and statutory guarantees apply to:

- (i) leases of goods;
- (ii) auction sales; or
- (iii) gifts and donations?

### **13. Goods and services**

Although the TPA and the various State and Territory legislation have express exceptions to some of the implied terms and statutory guarantees (e.g. architecture services under subsection 74(2) of the TPA), there are many other implied exceptions which arise because of restrictive definitions of terms such as 'goods' and 'services'.

#### **Goods**

##### **Trade Practices Act**

The various definitions of goods, although not uniform, do not appear to create significant inconsistencies in relation to the implied conditions and warranties. The TPA adopts an inclusive definition:

'goods' includes -

- (a) ships, aircraft and other vehicles;
- (b) animals, including fish;
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity

Of course the qualifications discussed in Chapter 11 (e.g. goods must be of a kind ordinarily acquired for personal, domestic or household use) continue to apply.

##### **Western Australia, Northern Territory and South Australia**

This definition is followed in the Northern Territory (Consumer Affairs and Fair Trading Act 1990), South Australia (Consumer Transactions Act 1972), with the exception of paragraph (d); and Western Australia (Fair Trading Act 1987) with the addition of one paragraph: '(e) any component part of, or accessory to, goods'.

##### **Other jurisdictions (SGA)**

The SGA, including Part 8 of the New South Wales and Part IV of the Victorian Acts, also adopts a broad definition:

'goods' includes all chattels personal other than things in action and money and also includes emblements, industrial growing crops (SA, WA, Tas and ACT only), and things attached to or forming part of the land, which are to be severed

before sale or under the contract of sale.

These definitions of 'goods' are inclusive and do not contain direct inconsistency. In relation to manufacturers' guarantees, the ACT follows the SGA definition of goods in its Law Reform (Manufacturers Warranties) Act 1977, while South Australia takes a more divergent approach in its Manufacturers Warranties Act 1974. There, goods are defined as 'goods manufactured for sale or disposal by retail but does not include goods that are normally offered for sale by retail at a genuine retail price in excess of ten thousand dollars'. Unlike the other definitions, this approach defines good by reference to their price, and not their type. In practice, a consumer or their successor in title who purchases a motor vehicle may have rights of action against the manufacturer under the TPA, but not under the South Australian legislation. Conversely, an office paper shredder may fall within the definition of 'goods' under the South Australian legislation, but not for the purposes of Division 2A of the TPA.

## **Services**

### **Trade Practices Act**

The definitions of 'services' present more scope for problems. The TPA definition is again broad, and includes:

any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce...

A number of different types of contract (e.g. banking) are given as examples.

### **Western Australia and Northern Territory**

The Northern Territory (Consumer Affairs and Fair Trading Act 1990) follows this approach, as does Western Australia (Fair Trading Act 1987) with an additional example of contracts for the provision of gas, electricity, or any other form of energy (this is in addition to the definition of 'goods' which includes gas and electricity),

### **South Australia and Victoria**

The Consumer Transactions Act (SA) expressly prescribes 'services' for the purpose of that Act. These are mostly listed in Schedule 1, which contains twenty-five paragraphs covering services ranging from carpet cleaning to termite treatments, The Goods Act (Vic) also contains an exclusive definition of 'services':

'services' means services by way of -

- (a) the construction, maintenance, repair treatment, processing, cleaning or alteration of goods or fixtures on land;
- (b) the alteration of the physical state of land; or
- (c) the transportation of goods otherwise than for the purposes of a business,

trade, profession or occupation carried on or engaged in by the person for whom the goods are transported.

This is the most limited of all definitions, and might exclude services covered by the other legislation, such as storage services; accommodation and travel services; advisory services (e.g. financial); and tuition services.

40. What is the preferable approach to defining 'goods'? Do the different definitions create problems?

41. Does a prescriptive approach to defining 'services' create problems?

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## Attachment A

# Scope of post-sale consumer protection legislation

## Trade Practices Act 1974

The TPA implies conditions and warranties where a corporation supplies goods or services in the course of a business to a consumer, otherwise than by auction. The Act is based on the corporations power of the Commonwealth (Constitution s51 (xx)), as there is no specific power which allows the Commonwealth to legislate in the area of contracts for the supply of goods and services. The application of the post-sale consumer protection provisions of the TPA also extends to individuals where the trade or commerce takes place between Australia and a place outside Australia; among the States and Territories; or within a Territory.

A consumer is a person who acquires goods or services of less than \$40 000 in value, or goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, or a commercial road vehicle. A person is not a consumer if they acquire goods for the purpose of re-supply, using up or transforming, in trade or commerce, in the process of production or manufacture or of repairing or treating other goods or fixtures on land. The statutory guarantees of Division 2A only apply to goods of a kind ordinarily acquired for personal, domestic or household use or consumption.

'Supply' includes supply (and re-supply) by way of sale, exchange, lease, hire or hire-purchase. 'Goods' is not exhaustively defined, but is said to include:

- a. ships, aircraft and other vehicles;
- b. animals, including fish;

- c. minerals, trees and crops, whether on, under or attached to land or not; and
- d. gas and electricity.

“Services” is defined very broadly, and includes any rights (including in relation to real or personal property), benefits, privileges or facilities that are provided, granted or conferred in trade or commerce.

The legislation of the States and Territories is not affected by the constitutional limitations which restrict the operation of the TPA predominantly to the activities of corporations. As a result, State and Territory legislation refers to “persons” rather than “corporations”. Unless otherwise specified, “persons” includes individuals, partnerships, businesses and corporations.

### **Consumer Transactions Act 1972 (SA)**

The CTA implies conditions and warranties into “consumer” contracts. These are contracts under which persons (other than bodies corporate):

- purchase or hire goods, contract for the performance of services, or otherwise acquire the use or benefit of goods or services; and
- the consideration paid is less than \$40 000.

Excluded are:

- sales by auction;
- sale or lease of goods by tender;
- contracts for goods the buyer “trades” in;
- transactions entered into by a consumer in the course of a trade or business;
- contracts for the occupation of land; and
- the sale or lease of antiques (other than furniture) or art.

“Goods” are defined by reference to the Consumer Credit (SA) Code, which reflects the TPA definition, with the exception of (d) electricity and gas.

“Services” are expressly prescribed in Schedule 1 of the Act, the list ranging from termite treatment to carpet cleaning.

“Sale” or “supply” are both used in the Act. The definition of “consumer contract” encompasses contracts for the purchase of goods or services, contracts for the hire or hire-purchase of goods, and contracts under which a person “acquires by other means” the use or benefit of goods or services.

### **Sale of Goods Act 1923 (NSM Part VIII)**

This Part of the SGA implies the conditions and warranties into “consumer” sales, which means a sale of goods by a seller in the course of a business where the goods:

- a. are of a kind commonly bought for private use or consumption; and
- b. are sold to a person who does not hold themselves out as
- buying in the course of a business.

A consumer sale also includes an agreement to sell. It does not include sale by auction.

§Goods is defined as including all chattels personal other than things in action and money. It also includes emblements and things attached to or forming part of the land which are agreed to be severed before the sale or under the contract of sale.

A §sale of goods involves a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration.

The manufacturers' liability provision (giving the court discretion to add the manufacturer of goods as a party to proceedings) has the same scope.

### **Goods Act 1958 (Vic) Part IV**

Part IV of the GA applies to §consumer transactions, involving contracts for the sale of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption, or of less than \$20 000 in value. It also applies to leases of such goods, and agreements to provide such goods and services. It does not apply where goods are bought for the purpose of re-supply or transformation in trade or commerce, or when services are to be provided to a third person.

§Goods is defined as including all chattels personal and fixtures severable from the realty other than things in action and money.

§Services has a more expansive definition, meaning:

- a. the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or fixtures on land;
- b. the alteration of the physical state of land; or
- c. the transportation of goods otherwise than for the purposes of a business, trade, profession, or occupation carried on or engaged in by the person for whom the goods are transported.

The terms are implied into both contracts for the sale of goods (defined as for NSW), and contracts for the hiring of goods (leases).

### **Fair Trading Act 1987 (WA) Part**

The scope of the FTA resembles that of the TPA, as it mirrors the post-size consumer protection provisions of Part V Division 2 of the Commonwealth Act. The terms and conditions are implied in contracts with consumers, which involve goods or services of less than \$40 000 in value, or goods or services of a kind ordinarily acquired for personal, domestic or household use. Goods must not be acquired for the

purpose of resupply or transformation, and goods or services must not be purchased in the course of, or for the purpose of, carrying on a business (Consumer Affairs Act 1971).

¶Goods¶ follows the definition of the TPA, with an additional paragraph:

(e) any component part of, or accessory to, goods.

¶Services¶ also reproduces the TPA definition, but again adds a paragraph which states that the definition includes any rights, benefits, privileges or facilities that are to be provided, granted or conferred under:

(a) a contract for or in relation to -

...(ii) a contract for, or involving, the provision of gas or electricity or the provision of any other form of energy

The examples are not intended to limit the generality of the definition.

¶Supply¶ reflects the TPA definition, but also expressly includes:

(a) in relation to goods -

...(ii) exhibit, expose or have in possession for the purpose of sale, exchange, lease, hire or hire-purchase or for any purpose of advertisement, manufacture or trade.

(c) in relation to both goods and to services - donate for promotional purposes.

## **Consumer Affairs and Fair Trading Act 1990 (NT) Part V**

Although the Northern Territory's implied terms reflect those found in the TPA, its definition of ¶consumer¶ is different. The conditions and warranties will be implied where a person acquires goods or services from a supplier, excluding goods acquired, or held out as being acquired, for the purpose of:

- re-supply
- using up or transforming in the course of a business, or in connection with a process of manufacture or production, or the repair or treatment of other goods or of fixtures on land.

¶Goods¶, ¶services¶ and ¶supply¶ are defined according to the TPA definition.

In relation to manufacturers' statutory guarantees, the scope of the protections is limited by the fact that references to ¶goods¶ are limited to goods of a kind ordinarily acquired for personal, domestic or household use or consumption (reflects the TPA).

## **Sale of Goods Acts**

The SGA implies terms into contracts for the sale of goods, which are defined as ¶contracts whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price¶. The implied terms are not

limited to consumer sales. The 'seller' is a person who sells or agrees to sell goods, while the 'buyer' is a person who buys or agrees to buy goods. A contract of sale of goods involves the seller transferring or agreeing to transfer the property in the goods to the buyer for a money consideration.

'Goods' are defined broadly as including all chattels personal other than things in action and money. It includes emblements, industrial growing crops (SA, WA, Tas and ACT only), and things attached to or forming part of the land, which are to be severed before sale or under the contract of sale.

### **Manufacturers Warranties Act 1974 (SA)**

This Act is different in scope to the Consumer Transactions Act 1972 (SA). The statutory warranties will apply where a person (including a body corporate) purchases manufactured goods by retail, or derives title to the goods from such a person.

'Manufactured goods' are goods manufactured for retail sale, but not goods normally offered for retail sale above \$1 0 000. 'Purchase' or 'sell' includes to take or let out on hire.

### **Law Reform (Manufacturers Warranties) Act 1977 (ACT)**

These statutory warranties may be relied on by persons who purchase goods of a kind ordinarily purchased for private use or consumption and not resale, and persons who derive title from such a person. The definition of 'goods' corresponds to the SGA, by including all chattels personal, other than things in action and money.

'Purchase' or 'sell' include to take or let out on hire, but not for less than six months. Hire purchase is also included.

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## **Attachment B**

### **Summary of issues raised in the Report**

1. Should the condition apply only where the goods are of a description it is in the course of the supplier's business to supply? Or is it sufficient that the goods are supplied in the course of a business?
2. Should the buyer's reliance on the skill or judgement of the supplier be subject to a test of 'reasonableness'?
3. Should the supplier be able to exclude or vary the term, or limit liability for breach?
4. Should the fitness for purpose term extend to services? Is it more appropriate as a condition or warranty? What exceptions should apply?
5. Should the fitness for purpose term extend to manufacturers? If so, should it apply

after goods have left the manufacturer's control?

6. Should 'merchantable quality' be defined in legislation?
7. To be considered merchantable, should goods be fit for all the purposes for which they are ordinarily acquired, or is only one of the purposes sufficient?
8. Should the term only apply where the supplier deals in goods of that description?
9. Should the buyer's subjective knowledge of defects be relevant?
10. Should the supplier's objective knowledge of defects be relevant?
11. Should the supplier be able to exclude or vary the term, or limit liability for breach?
12. Should the merchantable quality term extend to services?
13. Should the merchantable quality term extend to Manufacturers?
14. Should the term apply only where goods are supplied in the course of a business?
15. Should the supplier be able to exclude or vary the term, or limit liability for breach?
16. Should the term extend to manufacturers? If so, should it apply to circumstances beyond the manufacturer's control?
17. Should the term apply only where the goods are acquired in the course of a business?
18. Should the term require the bulk, or all, of the goods to correspond with the sample?
19. Should the buyers knowledge of latent defects be a relevant factor in implying the term?
20. Should the supplier be able to exclude or vary the term, or limit liability for breach?
21. Should the term extend to manufacturers? If so, should it apply where the failure to comply is caused by a third party?
22. Is an implied term of correspondence with demonstration necessary for services?
23. Which of these terms should be treated as conditions, and which should be treated as warranties?
24. Should the undertaking as to encumbrances attach at the time the property passes, or the time the contract is made?
25. Should the supplier have a reasonable opportunity to remedy a defective title before a buyer is entitled to rescind a contract for breach of the undertakings as to title and encumbrances?
26. Does the undertaking as to quiet possession need to contain an express proviso that the buyer is not in default?
27. Should the term apply only when services are supplied in the course of a business?
28. Should the term be a condition or a warranty? (see Chapter 10)

29. Should the supplier be able to exclude or vary the term, or limit liability for breach?
30. Should there be exceptions for certain types of contract e.g. transport/storage, insurance, domestic building work?
31. Should there be a provision which requires manufacturers to take reasonable efforts to ensure spare parts and repair facilities are reasonably available?
32. Should the provision only apply in the case of goods of a kind likely to require repair or maintenance?
33. In what circumstances should the manufacturer be able to avoid liability?
34. Should a supplier be able to exclude, restrict or modify any or all of the implied terms? If so, in what circumstances?
35. Should a supplier be able to limit liability for breach of any or all of the implied terms? if so, in what circumstances?
36. Should jurisdictions be consistent in their treatment of implied terms as conditions or warranties?
37. Should postsale consumer protection legislation include a statutory right of rescission?
38. Should 'consumer' be defined consistently for the purposes of post sale consumer protection ? If so, is there a preferable model to follow?
39. Should the implied terms and statutory warranties apply to:
  - i. leases of goods;
  - ii. auction sales; or
  - iii. gifts and donations?
40. What is the preferable approach to defining 'goods'? Do the different definitions create problems?
41. Does a prescriptive approach to defining 'services' create problems?

Please forward comments to:

<p>The Director Consumer Law Section Department of Industry, Science and Tourism GPO Box 9839 CANBERRA ACT 2601 by 28 November 1997</p>
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