

消費者保護法

第二次檢討報告－指出澳洲消費者保護法律之 歧異、差異及重疊部份

1997年9月

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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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消費者保護法檢討——第二次報告

本文係探討澳大利亞洲消費者保護法律之歧異、差異及重疊部份之檢討系列的第二次報告。檢討之目的為辨明九套不同消費者保護法之歧異部份，並促進考慮一項較統一的立法規劃(scheme)是否帶給消費者更佳的保障，並降低企業界遵循之成本。

在售後消費者保護方面，企業須應付交易中被默示納入的不同措辭的條件與保證，及其在不同的轄區(jurisdictions)間排除或限制這些條件運作之能力的重大差異。由於售後保護缺乏一致性所造成的不確定性，亦為消費者的問題，這些消費者就相同的交易，在不同的轄區可能享有不同程度的保護，對相關法律缺乏瞭解被認為是消費者追求權利：獲得適當救濟的重大障礙。

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This Report reflects the law
as at 31 August 1997

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.

1976年，交易行為檢討委員會(Trade Practices Review Committee)承認與這方面法律有關的問題，並指出許多將默示條款納入消費者契約的州、領地及聯邦法律為造成澳大利亞企業發生費用及混淆的來源。該委員會認為「這方面法律的一致性極為重要」，及「1974年交易行為法所納入默示條款之內涵應為聯邦及州部長(minister)合作並達成協議的首要事項」。1983年，消費者事務管理委員會(Ministerial Council on Consumer Affairs)(當時為消費者事務部長常務委員會(Standing Committee of Consumer Affairs Ministers))提出統一法律之承諾，並同意反映交易行為法為達成統一的最佳基礎。

本報告檢討於購買商品或服務後，保護當事人的法律條文，例如商品應具有適銷品質或以適當注意與技巧提供服務之規定。本報告提供聯邦、州及領地有關這方面的主要條文的簡短調查(這些條文見於交易行為法，各商品銷售法，以及各領域內之其他立法範圍)，本報告之重點為指出法律差異以及考慮這些差異的法律效果。本文中的問題提出癥結所在供考慮。

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.

若對本報告所提問題有任何意見，請交：

澳洲工業科學
觀光部消費局
法律處處長
坎培拉第 9839 號信箱
截止日期：1997 年 11 月 28 日

本報告接續1997年2月發表的第一次報告，該報告檢討「消費者」之定義及交易行為法與州及領地公平交易法中不公平行為條文，並發現有相當程度差異，特別是有關「消費者」之定義，現正準備提出改革建議供消費者事務行政委員會考慮。

第一章 前言

本次報告所檢討之交易行為法(Trade Practice Act)消費者售後服務保護條款，參見該法第五節第2篇及第2A篇。第2篇中包括以契約為基礎之方案，在供應商與消費者間有關商品或服務契約納入特定條款(「條件」或「保證」)。倘供應商未能遵守任一條款，消費者得主張契約法之權利。

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

The Director
Consumer Law Section
Department of Industry, Science and Tourism
GPO Box 9839
CANBERRA ACT 2601
by 28 November 1997

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.

第2A篇不採契約模式，而對商品之製造商課以類似義務。未能遵守任一法定保證即為違反法定義務，消費者或權利繼受人得請求賠償。

商品或服務購買人受保護之程度依特定基礎而產生，不成文法中之「買方小心」原則盛行至由英國商事法所發展出一系列條件及保證條款編入(英國)1893年商品銷售法(Sales of Goods Act,)為止。澳洲之各州及領地嗣後訂定各自之商品銷售法，其條款幾乎完全相同，並包含構成商品銷售契約中默示條款之法定架構之「核心」默示條件及保證。各轄區間之歧異係由交易行為法第75條所推動，該條款保留各州或領地法律，使其與交易行為法同時運作。

交易行為法之第五節第2篇係就消費者與供應商就商品或服務所簽訂之合約引據商品銷售法規定。交易行為法與商品銷售法最重要的差異為其默示條款不得被排除。有些轄區以立法補充商品銷售法，禁止「以契約排除」與特定「消費者」交易相關之默示條款。許多轄區以交易行為法第五節第2A篇之相同方式，放棄契約途徑，將消費者對商品製造商之訴訟權延伸至其權利繼受人。第4頁的表中簡單說明本報告所檢討的顧客售後服務保護立法的全國性「規劃(scheme)」。

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

在澳洲，交易行為法可視為顧客售後服務之最高「層」立法，然而關於提供商品或服務之契約的重要部份被排除在其範圍之外。例如，非法人之供應商不被包含在內，除非該供應商在該法第 6(2)項的延伸適用範圍內。又，倘接受供應之人並非交易行為法所定義的「消費者」，其契約亦不適用交易行為法。在這些情況下，第二層的州及領地立法得適用於特定「消費者」的交易。不過，依第二節之分析，由於各轄區對「消費者」交易之定義並不一致，此種立法的涵蓋範圍差距頗大。交易行為法及特定之消費者立法均不適用的契約，由商品銷售法及不成文法所組成的最後一層立法所管轄，附件 A 敘述各立法的範圍。

請注意本報告並未檢討諸如送達戶銷售法(Door to Door Sales Acts)或汽車銷售法(Motor Vehicle Sales Acts)等較特殊的州及領地立法。本報告沿用第一次報告的檢討方式，以交易行為法(第五節第 2 篇及第 2A 篇)為準比較各州或領地立法。許多章節中並以表列方式強調主要的歧異。

廣義而言，本報告所述之「售後服務」權包括：

'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:

- 商品或服務符合供應商所被告知之某一特定目的；
- 商品具有「適銷品質」；
- 商品或服務符合樣本、說明或示範；
- 供應商可將商品完整所有權移轉；
- 將依合理注意及技術提供服務；以及
- 製造商應合理供應備用零件及維修設備

第二節逐一檢討上述各項權利，指出提供這些權利的轄區或立法，並評估各差異間之法律效果。報告中發現，雖然所有轄區對於上述各項的某些部份都有某些保護形式，立法上的「規劃」卻不完整。第三節檢討適用問題，並進一步強調差異部份。

報告中述及之某些重要問題包括：

- 默示條款是否得延伸適用至服務。例如交易行為法，維多利亞、南澳、西澳及北方領地將應符合某一特定目的之默示條件，亦引用於服務合約。其他轄區則僅在商品方面才規定符合某一特定目的的條件。
- 消費者或權利繼受人是否有對抗商品製造商的一整套法定權利。昆士蘭、塔斯瑪尼亞(Tasmania)、維多利亞及西澳就此議題並無特殊立法；其他轄區則對消費者提供

- 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

不同程度之保護；以及

- 定義上的歧異是否引發任何問題。此一問題包括「消費者」一詞之定義(於第一次檢討報告中述及)，以及「商品」及「服務」等其他基本概念。例如交易行為法採用「服務」之廣義定義，維多利亞則採取較為狹義而規範性(prescriptive)的方式。

本報告指出最大的歧異為供應商限制或排除適用條件或保證之能力並以高等法院 Esanda Ltd. v Clark (1986) ATPR40-665 案突顯此一說法。該案中，Esanda 為賣方，以分期付款(hire-purchase)方式供應卡車給 Clark。Esanda 的定型化契約試圖配合交易行為法以及州立法中默示條件之運作。結果，其中一項條款，試圖在交易行為法許可的最大範圍內否定卡車目的適當性之默示條件，被宣告未能符合州立法之嚴格規定。雖然自該案後，該項州立法(NSW 1960 年分期付款法)即遭廢止而代之以消費者信用法(Consumer Credit Code)，該案仍顯示出不論是否引用交易行為法，企業於所有交易引用同一標準條款之困境。尤其必須注意，對該方面法律之錯誤陳述可能違反交易行為法第53(g)項(或公平交易法中之對應條款)。

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 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

本報告與第一份檢討報告採相同觀點，認為一致性只是追求單純化的一個要素，而非目的。唯有能證明降低企業遵循成本(business compliance costs)並增進消費者和企業界對法律之瞭解時，才值得追求一致的目標。對本報告有特殊重要性者為就不一致而引發實際問題的情形所提出的見解。本報告並就如何簡化或改進本報告中所論述之條款以增進消費者及企業體之福利徵求意見。

本報告所檢討對顧客售後服務保護之立法規劃：

	核心條款	有關「消費者」之特殊條款	對製造商起訴權利之延伸
聯邦	—	交易行為法第五節第2篇	交易行為法五節第2A篇
新南威爾斯	商品銷售法	商品銷售法第八節「消費者出售」，加入了1974年商業交易法（其他規定）	商品銷售法第64(5)項
維多利亞	商品法	商品法第四節「部份銷售及租賃之默示條件與保證」，加入了1981年商品法（銷售/租賃）	—

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

	Core provisions	Special provisions re 'consumers'	Extension of rights of action against manufacturers
C'th	-	TPA Part V Division 2	TPA Part V Division 2A
NSW	SGA	SGA Part 8 '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	-

昆士蘭	商品銷售法	—	—
南澳	商品銷售法	1972 消費者交易法	1974 年製造商擔保法
西澳	商品銷售法	1987 年公平交易法第三節「消費者交易之條件與保證」	—
塔斯瑪尼亞	商品銷售法	—	—
ACT	商品銷售法	—	1977 年法律改革（製造商之擔保）法
北方領地	商品銷售法	1990 年消費者事務及公平交易法第五節第 2 篇「商品或服務契約之默示條件與保證」	1990 年消費者事務及公平交易法第五節第 3 篇

索引

第二章 默示條款及法定保證

1. 目的適當性

71.(2) 一公司於業務過程中提供消費者商品(非以拍賣銷售方法供應)，且消費者明示或暗示使該公司或先前進行協商之人知悉其獲取該商品之任何特殊目的時，即構成依商品供應契約供應之商品合理符合該項目的之默示條件，不論該目的是否為該等商品一般供應之目的，惟情況顯示消

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 II - 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

費者不信賴該公司或該協商者之技術或判斷或消費者之信賴不合理者，不在此限。

交易行為法

交易行為法默示規定商品應適合消費者所告知之任一特定目的。公司於業務過程中供應商品時，消費者(以明示或暗示)使該公司得知其購買該項商品之特定目的，即構成默示條件。但消費者不信賴供應商之技術或判斷或其信賴不合理時，不構成默示條件。

除非商品並非通常取得供個人、家務或家庭使用，否則不得以契約排除該默示條款。在此情形下，得在公平合理的範疇內，將責任限制於商品之維修或更換費用。

交易行為法將目的適當性之默示條款延伸至提供服務的契約。如同商品之情形，公司於業務過程中提供服務時，消費者(經由明示或暗示)使該公司得知需求該服務之特定目的，即構成默示條件。但消費者不信賴供應商之技術或判斷或其信賴不合理時，不構成默示條件。任何與服務相關而提供之材料，亦需合理適合該特定目的。即使未指定特定目的，第74(1)項規定任何

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 judgement 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

因服務而提供之材料需合理適合提供該服務之特定目的之默示保證（詳細討論見第 2 章）。

消費者告知公司其希望服務所達成之結果時，則默示條件為該服務及附帶提供之材料應具備其被合理期待獲致該成果的性質及品質。就服務而言，目的適當性的默示條款是保證而非條件（此一區分的重要性於第 10 章討論）。

交易行為法提出許多與服務相關而排除在目的適當性默示條款外的例外規定，包括由合格建築師或工程師提供之專業性服務，以及依商業性運輸／倉儲合約或保險合約所提供的服務。保險被排除的原因，係認為 1984 年保險契約法已提供足夠之保護；至於商業貨物之運送／倉儲，工業保險慣例亦有良好的規定。

最後，交易行為法亦將商品目的適當性之默示條款延伸至非契約性關係，例如消費者或權利繼受人與商品製造商或進口商間之關係。74B 條授與消費者及其權利繼受人就商品未能合理

consumer does not rely, or it is not reasonable for the consumer to rely, on the supplier's 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

外國消費者保護法(八)

適合特定目的所致損失或損害的求償權利，得向商品製造商提起訴訟，如製造商在澳洲無營業處所，得向進口商提起訴訟。消費者以明示或暗示，直接或間接方式將商品應具有之特定目的告知製造商，即發生該權利，不論該目的是否為該等商品一般供應之目的。商品因製造商之受僱人或代理人以外之人的行為而不適合該目的，且商品已脫離製造商之控制時，則不發生該權利。消費者不信賴或消費者對其信賴為不合理時，亦不發生該權利。

與交易行為法之歧異

所有轄區都有某些形式之目的適當性默示條款。不過，各州及領地之規定與交易行為法模式都有重大差異：

- 有些要求商品或服務屬於供應商於業務過程中所供應的某一種類。此一衡量標準較交易行為法嚴格，該法僅規定商品或服務係於業務過程中供應；
- 有些要求買方證明其真正信賴供應商之技術或判斷。在這方面交易行為法較為寬鬆，除非供應商提出相反證明，或證明消費者對供應商技術或判斷之信賴為不合理，否則該法認定消費者之信賴。

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 judgement 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 judgement 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

- 有些允許供應商排除該條件之適用(operation)；
- 有些不將默示條款延伸至服務。至於將條款延伸至服務者，亦有將條款視為條件或保證之差異或例外情形；以及
- 有些不將義務延伸至商品之製造商。至於將義務延伸至商品製造商者，義務適用的情況亦有所不同。

下表簡述各轄區之差異，其後之內容則詳細說明該等差異。

目的適當性之默示條款－主要歧異

相關要素	交易行為法 ／北方領地	新南威爾斯	維多利亞	昆士蘭／塔 斯瑪尼亞	南澳	西澳	ACT
-於業務過程中 供應	X		X			X	
-屬於賣方進行 業務時供應的 種類		X		X	X		
-不適用於信賴 於供應商之技 術及判斷為不 合理時	X		X			X	
-供應商得排除 或變更適用 (operation)				X			X

- to rely on the skill or judgement 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/NT	NSW	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

-供應商得限制 違約責任	X*			X		X	X
-延伸至服務**	X		X		X	X	
-明示排除運輸 /倉儲，保險 ，以及建築師 /工程師	X		X			X	
-明示排除家庭 建築工程					X		
-延伸至製造商	X						X
-商品脫離製造 商控制後之原 因所致者除外	X						

* 某些情況下適用，參見交易行為法第 68A 條，第九章。

** 在維多利亞為默示條件，其他轄區則為保證。

西澳及北方領地

西澳將交易行為法第71條及第74條相關於商品或服務之目的適當性默示條款反映在其 1987 年公平交易法第 38 條及第 40 條。倘商品不符合一特定目的，並無任何條款賦與對抗製造商之權利。北方領地真確地將交易行為法中之相關條款，包括製造商之責任，反映於其 1990 年消費者事務及公平交易法第 64 條、66 條及 73 條。然而，由於對「消費者」等基本概念的定義不同，其適用上的差異於焉產生(此問題請參見第三節，第一次檢討報告則有更廣泛的討論)。

-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 manufacturer's 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 III, and more extensively in the First Report of the

南澳

1972年消費者交易法就目的適當性規定消費者明示或暗示使一公司知悉商品所需求之特殊目的時，即發生默示條件。該商品需屬於供應商於業務過程中供應之種類，且消費者必需表明其對供應商之技術或判斷之信賴。該默示條件適用於銷售及租賃，不得以契約排除。

關於服務契約，消費者交易法有類似交易行為法之默示保證條款，亦即是：

- 伴隨服務而供應之材料合理符合其所以被供應之目的之保證；
- 服務及隨同服務而供應之材料應合理符合向供應商表明之特殊目的之保證；以及
- 服務及隨同服務而供應之材料之性質及品質合理符合已向供應商表明之預期效果之保證。

上述保證與交易行為法有兩項不同。第一，商品或服務係屬於供應商於業務過程中供應之種類，交易行為法則只要求商品或服務係在業務過程中供應。其次，在消費者交易法中，倘消費者並不信賴供應商之技術或判斷，則不適用該等默示條款。交易行為法則似乎較為廣泛地將責任置於供應商，由其證明消費者不

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

信賴供應商之技術和判斷或其信賴為不合理。消費者交易法禁止任何契約排除、限制或修改這些條款的適用(詳細討論見第9章)。保險、運輸或倉儲合約，或是由合格建築師或工程師提供之專業性質服務亦不例外。不過，家庭建築工程契約並不適用該等條款，而係由其他特定州立法所涵蓋。

1974年製造商擔保法要求商品之製造商或進口商亦應提供某些法定擔保，類似商品買賣法中消費者與供應商間契約所默示的某些基本條款。但是製造商擔保法並無關於特定目的適當性之法定保證，因為製造商與消費者之間通常不會有直接連繫。

維多利亞

1958年商品法第四節(第90條)就商品銷售之消費者契約規定特定目的適當性之默示條件。賣方在業務過程中銷售商品，且買方明示或暗示使賣方知悉獲取該商品之特殊目的，即發生默示條件。買方不信賴供應商之技術或判斷或其信賴為不合理者則不發生默示條件。本條款與交易行為法相同，包括供應商得就為個人、家務或家庭而取得之商品或服務限制責任。於商品之租賃，亦有該默示條件之規定。

Transactions Act where the consumer has not relied on the supplier's 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

商品法第92條就服務契約亦規定相同的特殊目的適當性之默示條件。此外，倘消費者已表明其所欲達成之結果，即發生「得合理預期該服務能達致該成果」之默示條件。本條款之文字與交易行為法之條款略有不同，該法要求服務具備可合理預期達成該結果的「性質及品質」。目前還很難確定此一差異在實務上是否縮小了默示條款之範圍。比較重要的是，不像交易行為法的相同條款，這些條款被視為條件而非保證。保險、運輸或家庭建築工程契約均不例外。不過，維多利亞之立法對「服務」之限制性定義的確侷限了默示條款之適用(參見第13章)。

維多利亞條款與交易行為法之另一歧異為，關於服務所提供材料之處理。交易行為法特別規定必須保證隨同服務而供應之材料應能合理符合該特殊目的，且即使未明定一特殊目的，因服務而提供之材料應能合理符合其所以被供應之目的。相反的，維多利亞的立法則規定因販售服務而供應之材料，應視為商品之銷售。

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

維多利亞之立法不提供消費者或其權利繼受人對抗商品製造商或進口商之權利。

其他轄區(商品銷售法)

其他轄區(新南威爾斯、昆士蘭、塔斯瑪尼以及 ACT)之基本默示條款和條件則係以商品銷售法為主。商品銷售法之默示條件為，倘買方已明示或暗示表明獲取商品之特殊目的，該等商品應能合理符合該特殊目的。買方必須證明其信賴賣方之技術或判斷，且商品應屬賣方於業務過程中供應之種類。倘商品係以其專利或商標名稱指定，則無默示條件。如同依商品銷售法所默示之其他基本條件和保證，本條件亦得以明文約定、以當事人間之交易過程、或以用途予以「否定或變更」。商品銷售法未就服務契約規定默示條款，亦未規定應經由製造商之法定擔保以保障消費者或權利繼受人之權利。

新南威爾斯

新南威爾斯以規定特殊目的適當性以及對「消費者」之銷售不得排除或限制賣方違反該目的之責任，補充本基本商品銷售法之規劃(第 64(1)項，見第 11 章「消費者」之定義。)

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 'negatived 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

ACT

ACT 在 1977 年法律改革(製造商之擔保)法規定製造商之法定擔保規劃，其保證條款與交易行為法之條款類似。倘消費者直接或經由賣方使製造商明白知悉其購買該商品之特殊目的，則產生該等商品應合理符合該目的之保證，不論該目的是否為該等商品一般出售之目的。保證不適用於消費者不依賴製造商之技術或判斷或其信賴為不合理之情形。與交易行為法不同的是，對於因製造商之員工或代理人以外之人之行為或不行為以致商品無法符合一特殊目的，及商品已脫離製造商之控制之情形，製造商不得免除其責任(不過，在產品應具適銷性品質之保證契約中，製造商得免除其責任)。倘違反保證，消費者或自消費者取得產品所有權之個人，得訴請製造商賠償損失。製造商不得排除或限制其違反保證之責任。

1. 條件是否應僅適用於屬於供應商業務過程中所供應之種類之商品？或是只要是在業務過程中供應之商品即足

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

夠？

2. 買方對供應商技術或判斷之信賴是否應以「合理性」檢驗？
3. 供應商是否得排除或變更條款，或限制其違反之責任？
4. 目的適當性條款是否應延伸至服務契約？該條款應視為條件或保證較妥當？應有何例外？
5. 目的適當性條款是否應延伸至製造商？答案如果是肯定的，是否適用於商品已脫離製造商控制之情形？

2. 適銷品質

71.(1)一公司於業務過程中提供消費者商品(非以拍賣銷售方法供應)時，即發生依供應商品契約提供之商品具有適銷品質之默示條件，但有本節所述之情形者，不發生該條件：

- (a)在簽訂契約以前即特別使消費者注意之瑕疵；或
- (b)消費者於訂約前檢查商品者，於檢查時應發現之瑕疵。

交易行為法

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

交易行為法第71(1)項就一公司於業務過程中提供消費者之商品，默示規定產品之適銷品質條件。該條件不適用於消費者於訂約前已檢查商品，且該檢查應可發現之瑕疵；或訂約前特別使消費者注意之瑕疵。

第66(2)項載明，「倘商品就其使用之說明、售價(如果有關)、及其他相關情況，能符合合理預期之該類商品之一般購買目的」，則該商品有適銷品質。該商品必須合理符合一般購買該類商品之所有目的。

服務之供應商亦須擔保所提供之任何與該等服務有關之材料均合理符合供應目的〔第74(1)項〕。此與交易行為法要求服務具適銷品質之規定極為相近(服務之目的適當性所作討論，參見第1章)。

第2A篇第74D(1)項賦予消費者或權利繼受人對抗商品製造商之權利。該條款規定倘商品不具適銷品質，製造商有法定義務賠償消費者或後繼之所有權人。

但商品品質因下列原因而不適合銷售時，製造商得免除其責任：

- 於商品脫離該公司之控制後，因製造商或其受僱人或代理人以外之人之行為或不行為；或非人力所能控制之因

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/ agent of the manufacturer), or a cause independent

素；或

- 在訂約以前即特別使消費者注意之瑕疵；或
- 消費者於訂約前檢查商品，而檢查時應發現之瑕疵。

與交易行為法之歧異

所有轄區都有某些形式之適銷品質條款，但在適用情形上有相當程度的差異。諸如：

- 「適銷品質」由立法或不成文法定義；
- 該定義要求商品應符合一般購買該產品之所有目的，或僅須符合其中一項目的；
- 商品是否須依其種類向經營該種類商品之賣方購買；
- 買方對瑕疵之主觀認知是否與默示該條件有關；
- 供應商對瑕疵之客觀認知是否與默示該條件有關；
- 供應商是否得排除該條件之適用，或限制其於違反該條件時之責任，及其得排除或限制之範圍；
- 該條款是否延伸至服務；以及
- 該條款是否延伸至製造商。

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.

適銷性品質之默示條款－主要歧異

相關要素	交易行為法 ／北方領地	西澳	昆士蘭／塔 斯瑪尼亞	新南威爾斯	維多利亞	南澳	ACT
「適銷品質」 之法定定義	X	X		X	X	X	X*
-商品必須符合 其一般供應之 所有目的（較 為嚴格）	X	X		X	X		
-賣方必須經營 該種類之商品			X	X			X
-買方對瑕疵之 主觀認知有關	X	X		X	X		
-供應商對瑕疵 之客觀認知有 關						X	
-供應商得排除 或變更適用			X				X
-供應商得限制 除供個人、家 務或家庭使用 以外之商品責 任	X	X	X		X		X
-供應商得限制 其對二手商品 之責任			X	X**			X
-延伸至服務***	X	X			X	X	
-延伸至製造商	X			X		X	X

* 僅與製造商之保證相關【1977年法律改革（製造商之擔保）法】

** 在新南威爾斯，責任得限於現金數額

*** 僅適用於交易行為法、西澳、北方領地、及南澳，因服務而供應之材料

Implied terms as to merchantable quality

-Main points of inconsistency

Relevant elements	TPA/NT	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 (stricter)	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 Warranties) 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

西澳和北方領地

西澳將交易行為法中與商品適銷品質及因服務而供應之物質相關之條款反映於 1987 年公平交易法第 38(1)及 40(1)項。但是並未如交易行為法第 74D 條，將條款延伸至商品製造商。北方領地仿照交易行為法模式，納入製造商責任條款(見 1990 年消費者事務及公平交易法，第 64(1)項、66(1)項及第 75 條)。

昆士蘭和塔斯瑪尼亞(商品銷售法)

這些轄區對適銷品質之默示條件係依商品銷售法。該默示條件之範圍較交易行為法小，規定商品應按其種類向經營該種類商品之賣方購買(有關依種類銷售部份，見第 3 章)。由於很難闡釋「依種類銷售」之概念，促使其他轄區自適銷品質條款中刪除此一要求。

適銷性之默示條件不適用於買方已檢查商品，而瑕疵應於檢查時發現之情形。不過，不像交易行為法，本條款並未明白述及買方知悉瑕疵之情形。因此，倘買方已知悉一(在合理檢查下並不明顯之)瑕疵，是否仍得適用適銷品質之默示條件，仍有疑問。

商品銷售法與交易行為法之另一歧異為並未定義「適銷品質」一詞。很多評論者注意到交易行為法與不成文法間之定義很

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 1 987, 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 1 990, subsections 64(1), 66(1), and section 75).

Queensland and Tasmania (SGA)

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

相似，但並非完全相同。比方說，不成文法中商品只要符合購買該等商品之一般目的範疇中的一項目的即適合銷售，該定義較交易行為法對不具適銷性之認定為狹隘，交易行為法規定商品須符合一般購買該等商品之所有目的。

商品銷售法允許排除默示條件或限制違反責任，且未將其延伸至服務或製造商。

新南威爾斯

雖然新南威爾斯以商品銷售法之基本條款為依據，但在1923年商品買賣法第八節中擴展其範疇，禁止排除適銷品質之默示條件，及禁止試圖限制違反之責任。不過對於二手商品，除雙方另有約定外，賣方之責任僅限於該商品之現金數額。

第八節新增一條款〔第64(4)項〕述及買方知悉瑕疵的問題，規定買方已知悉之瑕疵，不得適用本默示條件；同時，亦包含一與交易行為法模式極相似之「適銷品質」之法定定義，要求商品須符合一般購買該等商品之所有目的。

第八節規定商品製造商之有限責任。第64(5)項規定，倘爭議中之商品於交付買方時似乎不具適銷品質，法庭有權決定將商品之製造商作為訴訟程序之一方當事人。製造商或需補正瑕疵；或需支付買方相當於預估補正瑕疵所需之金額；或遵守其他法院

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

認為適當之補助命令(ancillary order)。製造商之責任並未延伸至權利繼受人。此係針對製造商之默示條款之最有限延伸。

維多利亞

維多利亞並未以產品銷售法條款為基準，而於其1958年商品法第四節採納自行規定之條款，與交易行為法模式非常近似，包括得限制責任之規定。不過，維多利亞並未排除買方注意到瑕疵之情形(交易行為法之模式)，而是更寬大地排除買方知悉瑕疵之情形〔第89(3)項〕。

至於服務方面，維多利亞就適銷品質之默示條件最為廣泛〔見第91(b)項，其他轄區無相同之條款〕。交易行為法及其他類似條款僅延伸至因服務而供應之材料應具適銷品質，維多利亞則含默示條件，要求於業務過程中銷售之服務必須：

就該服務之價格、銷售條款及其他相關情況，能符合合理預期之該類服務之一般購買目的。

上述並非適銷品質之明示條件，不過，其與本章所討論之適銷品質之定義非常近似。第5章中對維多利亞銷售服務契約之

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 manufacturers' 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

默示適銷品質之進一步條件有更詳細之說明。

南澳

南澳依1972年消費者交易法默示規定供應商於業務過程中供應商品之適銷品質條件。該法對適銷品質之定義並不明確，可能採類似交易行為法或商品銷售法之解釋。商品有以下性質者，為具備適銷品質：

符合合理預期之該類商品通常使用之目的．．．

如該等商品通常使用之目的不止一項，其可能需符合所有通常目的(交易行為法)，或僅需符合一項(商品銷售法)。

南澳條款中最獨特的部份是，將供應商對適銷品質默示條件之客觀認知考慮在內。簽約時供應商無法合理知悉之瑕疵不適用該條件。此一限制排除簽約時潛在瑕疵之適用而縮小適銷品質默示條件之範圍。本條款不得排除或更改。

本法與以南澳條款為基礎之交易行為法第74(2)項類似，亦將適銷品質條件延伸至因服務所提供之材料。1974年製造商擔保法中規定之製造商責任，與交易行為法第74D(1)項內容近似。不過，和交易行為法不同的是，本法並未提及在簽約前即特

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

別使消費者注意之瑕疵，或是消費者已於簽約前檢查商品，而應於檢查時發現瑕疵之情形如何適用本條款。南澳立法就「製造商品」之定義而對本條款之適用之進一步限制，參見第 13 章。

ACT

ACT和昆士蘭及塔斯瑪尼亞一樣皆以商品銷售法為依據，不過在 1977 年法律改革(製造商之擔保)法中加入了製造商之法定擔保規劃。該法第 4(1)項採交易行為法對適銷之定義，要求製造商擔保商品之適銷品質。如同交易行為法之規定，製造商對以下狀況不必負責：商品係於脫離製造商控制後，因他人之行為或非人力所能控制之因素而不適於銷售；簽約前已特別使消費者注意之瑕疵；或是消費者已於簽約前檢查商品，而應於檢查時發現之瑕疵。倘違反擔保，消費者或取得商品所有權之人，得向製造商訴請賠償。製造商不得排除或限制其違反擔保之責任。

6. 是否應於立法中定義「適銷品質」？
7. 為被視為具有適銷性，商品應符合一般購買該類商品之

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

所有目的，或僅需符合其中一項目的？

8. 本條款是否僅得在供應商經營該類商品時適用？
9. 買方對瑕疵之主觀認知是否相關？
10. 供應商對瑕疵之客觀認知是否相關？
11. 供應商是否得排除或變更條款，或限制其違反責任？如是，得在何時適用？
12. 適銷品質條款是否應延伸至服務？
13. 適銷品質條款是否應延伸至製造商？

3. 符合說明

70.(1) 一公司於業務過程中約定依說明供應(非以拍賣銷售方式供應)商品予消費者，即發生商品將符合說明之默示條件，且商品之供應涉及樣本又涉及說明，則商品正貨符合樣本而不符合說明時，尚不足夠。

- (2) 商品之供應並不能只因其陳列出售或出租供消費者選擇，而免於成為前項所述之依說明之供應。

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

交易行為法

依交易行為法，一公司於業務過程中依說明供應商品時，發生該商品將符合說明之默示條件。

倘銷售引用樣品及說明，第70(1)項規定，商品正貨符合樣品而不符合說明時，還不足夠。依樣品銷售之詳論見第4章。

70(2)項規定，商品不因「為出售或出租而陳列」時為消費者所選擇而免於成為依說明而銷售。例如，即使消費者係在如超級市場之一系列展示貨物中選擇商品，該銷售仍可能依說明為之。

倘一法人製造商(包括進口商)係經由中間商間接供應商品給消費者，74C條規定與70條類似之法定擔保，要求商品須符合說明。如消費者或向消費者取得該等商品之人，因製造商違反此規定而受有損失或損害，製造商應負責賠償。不過，該說明須為製造商或製造商之代理人使用於商品，或經其明示或默示之同意。

至於其他方面之製造商擔保，倘商品已脫離製造商之控制，而商品之所以不符合說明，係因製造商或其代理商以外任何人之行為或不行為，或非人力所能控制之因素所致，則製造商不

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

負擔保責任。

與交易行為法之歧異

所有轄區都有某些形式之符合說明條款，其主要歧異在於：

- 商品是否須於業務過程中供應；
- 供應商是否得排除默示條款，或限制違反之責任；
- 該義務是否延伸至製造商；以及
- 倘延伸至製造商，其適用之情形。

符合說明之默示條款 - 主要歧異

相關要素	交易行為法 ／北方領地	ACT	西澳	昆士蘭／塔 斯瑪尼亞	新南威 爾斯	南澳	維多利亞
- 商品必須於業務過 程中供應	X		X		X		
- 供應商得排除適用		X		X			
- 供應商得限制責任	X*	X	X*	X			X*
- 延伸至製造商	X	X					
- 不適用於非製造商 所能控制之情況	X	**					

* 僅限於特定狀況，參見交易行為法第 68A 條，討論見第 9 章

**僅限於說明係由製造商以外的人所為之情形

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	TPA/NT	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	**					

* 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

西澳及北方領地

此二轄區將交易行為法關於商品供應商之條款，反映於其 1987 年公平交易法第 37 條，以及 1990 年消費者事務及公平交易法第 63 條。然而，二者對「消費者」之定義不同(參見第 11 章，更詳細討論參考第一次檢討報告)，結果該默示條款之適用亦有不同。僅北方領地仿照交易行為法第 74C 條而規定製造商須擔保產品符合說明。

南澳

1972 年消費者交易法與交易行為法模式極為相近，但未要求供應契約須於業務過程中完成。該法第 10 條禁止排除、限制或修改該條件。該條件未延伸至製造商。

昆士蘭和塔斯瑪尼亞(商品銷售法)

該等轄區依商品銷售法默示產品應符合說明之條件。本質上該條款與交易行為法相同，但是，商品不須於業務過程中供應。更重要的是，供應商得否定或變更默示條款之適用。

新南威爾斯

新南威爾斯以商品銷售法為依據。但第八節(由 1974 年商業交易法(其他條款)加入)規定於消費者之銷售(第 64(1)條)不得排除或限制該條件。

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 negate 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)).

維多利亞

維多利亞依其商品銷售法之附則，即第四節（由1981年商品(銷售及租賃)法加入），默示應符合說明之條款(第87條)。該條款與交易行為法或商品銷售法都不全然相同。商品不須於業務過程中供應(如同商品銷售法)，且在某些情況下允許限制責任(如同交易行為法)。第87條亦未提到依樣品或說明之銷售，商品之正貨應符合說明(參見上述第70(1)項，以及1958年商品法第18條)。這可能暗示加重賣方之責任以確保所有商品符合樣品及說明。

ACT

對賣方之規定，ACT以商品銷售法標準為準。以1977年改革(製造商之擔保)法之單獨立法將義務延伸至製造商。該項要求製造商擔保商品符合說明之條款與交易行為法第74C條近似。不過，在較有限的情況下，ACT之擔保不適用(第4(6)項)。交易行為法中不適用保證之情形，為商品不符合說明係因與製造商無關之他人所引起，或商品脫離製造商後因非人力所能控制之因素所引起者。在ACT，倘說明係由製造商以外的人所為，製造商即不須負責。

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. 本條款是否只適用於業務過程中供應之商品？
15. 供應商是否得排除或變更條款，或限制其違反應負之責任？
16. 該條款是否應延伸至製造商？如是，是否適用於商品已脫離製造商控制之情況？

4. 符合樣品

72. 一公司於業務過程中提供消費者商品(非以拍賣銷售方法之供應)契約中之一條款，明示或默示商品係依樣品供應時：

- (a)即默示商品正貨之品質符合樣品；
- (b)即默示消費者有合理機會比較商品正貨與樣品；及
- (c)即默示商品無任何使商品不適銷，且合理檢查樣品時非明顯可見之瑕疵。

交易行為法

上述條款之三項條件彼此間相當獨立，只要違反其中一項，買方即有權退回商品，並視該商品契約為終止。比方說，如果其中兩項條件皆已符合，但賣方拒絕給予買方一合理機會以比較商品正貨與樣品，買方即有權拒絕該商品。

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

交易行為法第 74E 條將責任延伸至製造商(包括進口商)，倘商品係依樣品間接供應(透過諸如零售商之中間人)。但，並無相當於交易行為法第 72(b) 項之保證。製造商得以下列方式免除責任：

- 證明樣品非其所提供，或依樣品銷售未經製造商明示或暗示之同意；
- 證明商品正貨不符合樣品或瑕疵之存在發生於商品脫離製造商之控制後，因第三人或非人力所能控制之因素所致；或
- 證明商品正貨不符合樣品或瑕疵之存在係因不可預見之非製造商所能控制之情形所致。

與交易行為法之歧異

各轄區間之主要歧異（均有某些類似符合樣品之規定）類似有關符合說明之歧異（第 3 章）：

- 商品是否須於業務過程中供應；
- 是否所有商品或僅有商品之「正貨」須符合樣品，是否應給予買方合理機會將所有商品或僅有商品之「正貨」與

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

樣品比較：

- 買方對於潛在瑕疵的認知是否有關聯；
- 供應商是否得排除默示條款，或限制違反之責任；
- 該義務是否延伸至製造商；及
- 倘延伸至製造商，其適用之情形。

符合樣品之默示條款－主要歧異

相關要素	交易行為法／ 北方領地	ACT	西澳	昆士蘭／ 塔斯瑪尼亞／ 南澳	新南威爾斯	維多利亞
- 商品必須於業務過程中供應	X		X		X	
- 商品之正貨必須符合樣品 (非全部商品)	X	X	X	X		
- 關於潛在瑕疵，買方之認知 有關聯						X
- 供應商得排除適用		X		X		
- 供應商得限制責任	X*	X	X*	X		X*
- 延伸至製造商						
- 非因製造商之受僱人／代理人所致者，不延伸至製造商	X	**				

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 elements	TPA/NT	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	**				

* 僅限於特定情況，見交易行為法第 68A 項，討論見第 9 章。

** 僅限於非製造商所能控制及非可合理預見之情形。

西澳及北方領地

此二轄區以交易行為法中有關供應商符合樣品之義務為範本（1987 年公平交易法第 39 條及 1990 年消費者事務與公平交易法第 65 條）。交易行為法第 74E 條中製造商之保證僅於北方領地採納。

昆士蘭、南澳及塔斯瑪尼亞(商品銷售法)

此二轄區依商品銷售法默示銷售契約中應符合樣品之條件（1972 年(南澳)消費者交易法通常不述及此默示條件）。此條款關於供應商幾乎與交易行為法完全一致，雖然未規定商品應於「業務過程中」供應。主要歧異仍在於商品銷售法允許供應商否定或變更默示條款之適用。

新南威爾斯

新南威爾斯再度以商品銷售法為依據，但與該法不同之處在於規定該條件不得於消費者之銷售中排除或限制。

維多利亞

1958 年(維多利亞)商品法之用辭與其他轄區有幾點不同。首先，符合樣品之默示條款於賣方「向買方出示商品之樣品，且

* in limited circumstances, set out in section 68A of the TPA, 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 negate 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

買方受該出示樣品之誘引而購買該商品或同類商品時」，始能適用。對於契約中具明示或暗示條款說明商品係參照樣品供應即構成暗示條款之其他轄區，前開條款對此一衡量標準之澄清是否有助益並不清楚。對於向買方出示樣品而誘引其購買商品等於依樣品銷售之契約默示條款，仍有爭議。

另一歧異與第三種情形有關(「商品無任何使該商品不適銷、且合理檢查樣品時非明顯可見之瑕疵」)。維多利亞增加一項額外規定：

— 且買方於銷售時不知悉(之瑕疵)。

此項加入買方的主觀認知為默示條件之規定，改變了條款的範圍。在實務上，該增加規定似乎減少了適用符合樣品之默示條件之情況。例如，依維多利亞條款，只要能證明買方實際上知悉該瑕疵，即無默示條件之適用，而在交易行為法中，買方之認知並無關聯。

ACT

關於賣方，ACT以前述商品銷售法為依據。然而，1977年法律改革(製造商之擔保)法再度延伸默示條件於製造商。該項要求製造商擔保商品符合任何樣品之條款與交易行為法第 74E

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

項非常近似。不過，ACT 的版本漏掉了相當於交易行為法第 74E(2)(c)(i) 目之條文。這似乎給予 ACT 條款比交易行為法更大的範圍。例如，倘商品不符合樣品係因為除了製造商之受僱人或代理人以外之任何人之行為或不行為所致，製造商依交易行為法可免除責任。依 ACT 條款，製造商在這些情況下，須證明其他人之行為或不行為非製造商所能控制，且不可預見，始能免除責任。

17. 本條款是否只適用於業務過程中取得之商品？
18. 本條款應否規定正貨或全部商品須符合樣品？
19. 買方對潛在瑕疵之認知是否應為默示條款之相關因素？
20. 供應商是否得排除或變更條款或限制違反之責任？
21. 該條款是否應延伸至製造商？如是，倘不符合之原因係第三人所致，是否仍應適用？

5. 符合示範

維多利亞為唯一規定應符合示範的轄區。1958 年商品法第 93 條規定：

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

93. 銷售服務時－

(a) 倘

(I) 賣方，或

(II) 在先前協商時，經銷商或代表賣方之人向買方示範服務或服務達成之結果，買方受該示範或其顯示之結果之誘引而購買該類服務；或

(b) 該銷售有一明示或暗示條款，其意為該項銷售係屬於向買方示範之該類服務之銷售，或達成向買方展示之特殊結果之服務之銷售，則構成－

(c) 該等服務符合示範之服務之性質及品質或符合達成該結果之服務之品質之默示條件；且

(d) 該等服務無使其不符合通常購買該類服務之目的、於合理檢查該示範之服務或該類服務達成之結果時並不明顯，且買方於銷售時不知悉之瑕疵之默示條件。

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.

服務符合示範或其達成之效果之默示條件，類似產品符合樣品之默示條件。和依樣品銷售不同之處為不具備買方有比較服務與示範的合理機會之默示條件（或許是因為實際上不可行之故）。

如同第二章所討論，維多利亞有一特別之處，即其就服務有類似適銷品質之規定【91(b)條】。倘一人於業務過程中銷售服務，且服務之品質係按服務之價格與銷售之條件等因素衡量，則在該銷售中有默示之條款。此點不同於以示範提供服務之適銷品質【見前述第93(d)條】，後者對於不論是否於業務過程中提供之服務均有其適用，且不明示以服務之價格或銷售條件為適用之參考。

默示條件不得被排除、限制、或修改，雖然商品法規定賣方得限制其違反第93條之責任為重新提供服務，或支付重新提供服務之費用。該項限制僅於服務非通常取得供個人、家務、或家庭使用或消費時，才能許可，而賣方對限制責任條款的倚賴，是公平、合理的。

22. 符合示範的默示條款，對服務是否有必要？

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

6. 所有權、設定負擔與和平持有

69.(1)除第(3)項適用之契約外，在公司供應商品予消費者之每一契約中，

- (a) 倘係透過銷售而供應，則包含供應商有權出售商品之默示條件；倘係銷售合約或分期付款合約，則包含供應商於移轉商品時，有權予以出售之默示條件；
- (b) 含有消費者將和平持有商品之默示保證，但得受供應商或在訂約前已透露或告知消費者得享有負擔利益之第三人合法干擾；
- (c) 倘係商品供應契約，而所有權依約將移轉或可能移轉予消費者之情形，則含有所有權於移轉之前商品並未設定任何未於契約前透露予或告知消費者之責任或負擔之默示保證。

交易行為法

在公司供應商品予消費者之契約中，交易行為法就供應商移轉有效所有權（good title）之能力，規定若干默示條款，即：

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:

- 供應商有權銷售商品之條件；及
- 消費者收到之商品並無任何未經透露之請求權之保證。這包括商品未設定任何未經透露之責任或負擔(浮動擔保除外)之保證，以及消費者除了已透露之合法請求權利外，得和平持有商品之保證。

這些默示條款不得被排除、限制或修改（第 68 條），且責任不得予以限制（第 68A 條）。不過，契約的情況可能表示供應商僅移轉有限的商品所有權之意思，在此情況下，得適用以上保證。

與交易行為法之歧異

所有轄區均有與所有權、負擔與和平持有有關之默示條款的基本規定，雖然其間存有若干歧異：

- 將默示條款視為條件或保證之不同待遇；
- 在有些轄區，至所有權移轉時始發生默示條款。交易行為法適用於契約訂定時；
- 有些要求就在違反某一條件而行使契約解除權之前，給予賣方補救有瑕疵所有權之合理機會；

- 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 TPA

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;

- 和平享有條款之適用可能以買方「無違約」而定；
- 在文字敘述方面有些微小差異，例如「設定予第三人」之責任或負擔。

關於所有權、負擔及和平持有之默示保證－主要歧異

相關要素	交易行為法 ／西澳／北 方領地	維多利亞	南澳	新南威爾斯／昆士蘭 ／塔斯瑪尼亞／ACT
－負擔條款為默示保證*	X		X	X
－負擔條款似於所有權移轉時，而非契約訂定時適用		X	X	
－因違反所有權／負擔條款而解除契約前，給予供應商補救有瑕疵所有權之合理機會		X		
－只要買方未違約即享有和平持有之權利			X	

* 其他轄區為條件

- 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	TPA/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

西澳及北方領地

1987年公平交易法第36條及1990年消費者事務及公平交易法第62條完全反映交易行為法第69條。

維多利亞

1958年維多利亞商品法中，最值得注意的歧異為將免於責任及負擔條款視為條件而非保證。其結果為，發現其所購商品被設定未經透露之責任及負擔之消費者有權解除契約，並請求違反契約條件之損害賠償，而非僅請求違反保證之賠償。雖然這一條款在這方面為較強勢之規定，但由於此一條件似乎適用於所有權即將移轉時，而非契約訂定時，因此較交易行為法更受限制。

這些條款的適用不得被限制、修正、或排除，賣方亦不得限制違反之責任。不過，當事人得約定僅移轉有限度的所有權，在此情況下，類似的條件及保證仍然適用。賣方實際上被要求向買方透露所有已知利益，質權、責任或負擔。賣方違反這些條件之一時，買方於給予賣方提供完整所有權或除去商品上之任何責任或負擔之合理機會前，不得解除契約。

南澳

1972年消費者交易法要求商品應免於對第三人設定之責任

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

或負擔。很難想像加入「對第三人設定」具有法律效果之情況(例如：已對買方設定負擔，但買方卻不知情之情形)。雖然文字上並不清楚，但已透露之責任之保證似乎發生於商品所有權即將移轉時(「商品將免於任何責任或負擔…」)。

關於和平持有之保證，不像交易行為法，消費者交易法對已透露之請求，並無例外規定，相反的，該法規定只要這些請求不違反契約，消費者即享有和平持有之權利，如同交易行為法但不同於商品銷售法，該項保證適用於租賃商品的契約以及銷售商品的契約。消費者交易法暗示之條款不得以契約排除、限制、或修正(第10條)。

新南威爾斯、昆士蘭、塔斯瑪尼亞及ACT(商品銷售法)

其他轄區均依商品銷售法之規定。除有不同的意思表示外，這些條款均暗示於銷售契約中。和平持有之保證在已透露之責任的情形，並無任何例外規定，關於責任或負擔之保證亦包括「對第三人設定」之引述，其似適用於所有權移轉之時，雖然並非明文規定(不似交易行為法)。商品銷售法有關所有權、負擔、及和平持有之條款可以「除契約之情形顯示不同之意思外」之敘述，或另外規定該等條款得「以明示協議、雙方之交易方式、或對契約雙方有拘束力之慣例而否定或變更」而有效排除。

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

23. 這些條款中，哪些應視為條件，哪些應視為保證？
24. 關於負擔的保證應於所有權移轉時或契約訂立時發生？
25. 在買方基於供應商違反有關所有權及負擔之保證而享有契約解除權以前，是否應給予供應商一合理機會補救所有權上的瑕疵？
26. 有關和平持有之保證是否應明訂買方並未違約之但書？

7. 適度注意與技巧

74.(1)公司於業務過程提供服務予消費者的每一契約中，含有將以適度注意及技巧提供服務，與因該等服務而提供之任何材料將合理符合其供應目的之默示保證。

交易行為法

交易行為法本項規定，將不成文法中應以合理技巧與注意執行工作(workmanship)的立場條文化。倘有違反默示保證之情形，消費者有權就發生之任何損失請求損害賠償(詳細討論見第10章)。該條款第二部份有關材料合理符合其目的之規定，於第

terms to be 'negatived 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

2 章探討。

「服務」在交易行為法中有非常廣泛的定義，包括任何於交易或商業中提供的任何權利、利益、特權或便利。第74(3)項限制有關適度注意與技巧的定義，將基於運輸或倉儲的商業契約及保險契約所提供之服務，排除在外。

與交易行為法之歧異

西澳及北方領地反映交易行為法條款。僅有二個轄區－南澳及維多利亞，加入類似的合理注意及技巧條文。主要歧異為：

- 服務是否須於業務過程中提供；
- 該條款為條件或保證；
- 供應商可否限制責任；
- 是否有任何例外情形；
- 「服務」之定義如何。

適度注意及技巧之暗示條款－主要歧異

相關要素	交易行為法 ／西澳／北 方領地	南澳	維多利亞
－條件			X
－保證	X	X	

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
-condition			X
-warranty	X	X	

- 業務過程中提供之服務	X		
- 供應商得限制責任 *	X		X
- 明示排除運輸／倉儲及保險契約	X		
- 明示排除家庭建築工程		X	
- 「服務」之規範性定義		X	X

* 僅限於特定狀況，參見交易行為法第 68A 條，討論見第 9 章。

西澳及北方領地

1990年北方領地消費者事務及公平交易法(第66條)與1967年西澳公平交易法(第40條)仿照交易行為法條文。

維多利亞

在維多利亞，商品法第91(a)項默示規定於銷售中應以適度注意及技巧提供服務之條件。由於此為條件，若有任何違反，消費者有權視該銷售為被拒絕接受，該銷售不必發生於業務過程中。商品法包含相當於交易行為法第 68A 條之條款，使賣方於某些情況得限制責任。

雖然適當注意與技巧的條文非常類似交易行為法的模式，由於「服務」的不同定義方式，使該條文的適用範圍有所差異。交易行為法的定義是廣泛的，而商品法對「服務」則賦與極度狹隘的意義：

-services supplied in the course of a business	X		
-supplier can limit liability*	X		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':

「服務」係指藉由下列方式提供之服務－

- (a) 建造、維護、修繕、處理、加工、清潔或改變商品或土地定著物；
- (b) 改變土地實際狀況（physical state）；
- (c) 運輸商品，但為執行或從事商業、貿易、專業、職業等目的之人運輸商品之行為不在此限。

南澳

包含於消費者交易法第 9(1)項的默示保證適用於提供服務之契約，同樣的，不必於業務過程中提供。「服務」之定義亦極為狹隘(雖不及維多利亞狹隘)，包括該法第 2 條的六項清單，以及同法附表一的 25 項規定，雖然這些條文涵蓋廣泛的服務範圍，但諸如法律或醫療意見之項目，以及美容處理(bauty treatment)等個人服務項目均被省略。「服務」的不同定義於第 13 章有更詳細的討論。

- 27. 該條款是否僅應適用於業務過程中所提供之服務？
- 28. 該條款應為條件或保證(見第 10 章)？
- 29. 供應商可否排除或變更該條款，或限制違反之責任？
- 30. 對某些類型之契約，例如運輸／倉儲、保險、家庭建築

'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.

工程，是否應有例外規定？

8. 備用零件與修理設施

74.F.(1)倘：

- (a) 貿易或商業公司將其製造之商品(除以拍賣方式出售者外) 供應予消費者；或
- (b) 貿易或商業公司將其製造之商品供應予取得該商品供轉供應之人，且一人（不論是否自公司取得該商品之人）供應商品（除以拍賣方式出售者外）予消費者；

及

- (c) 在消費者取得商品之時間（本條稱為「相關時間」）：
 - (i) 商品需要修理，但消費者或自消費者取得商品，或透過消費者或在消費者之下取得商品所有權之人，並無可合理獲得之修理設施；或
 - (ii) 商品需要零件，但消費者或自消費者取得商品，或透過消費者或在消費者之下取得商品所有權之人，無法合理取得零件；
- (d) 公司不合理地未保證消費者或該其他人於相關時間可合理獲得修理商品之設施或零件；

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,

- (e) 消費者或該其他人因公司未保證消費者或該其他人於相關時間可合理獲得修理商品之設施或零件而遭受損失或損害；

則公司應負責賠償消費者或該其他人之損失或損害，或消費者或該其他人得向具管轄權之法院對公司提起訴訟，取得賠償之金額。

(2)公司採取合理行動保證取得商品之消費者於其取得商品時或之前，可獲得下述通知者，不適用第(1)項：

- (a) 公司不承諾可獲得修理商品之設施或商品之零件；或
- (b) 公司不承諾於一指定期間之後可獲得修理商品之設施或商品之零件，而該期間係於相關時間之前屆滿者。

交易行為法

交易行為法第74條要求製造商盡合理之努力保證消費者可合理獲得其商品之備用零件及修理設施。倘消費者或其他人因製

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

造商不能合理供應備用零件及修理設施，致遭受損失或損害，製造商應負責賠償因而發生的損失或損害。於決定製造商是否採合理行動時，法院應特別斟酌使備用零件或修理設施無法供應之非製造商所能控制之情形。

製造商採取合理行動保證向消費者發出不能供應備用零件或修理設施(於特定期間內或完全不能供應)之通知者，不適用法定義務。

與交易行為法之歧異

僅有其他三個轄區有類似條款：北方領地、南澳及ACT。北方領地反映交易行為法之模式，其餘轄區則有若干歧異：

- 提供修理或服務設施之要求；
- 商品應屬於可能需要修理或維護之種類。交易行為法並無此種門檻規定；
- 製造商需採取符合義務之努力；及
- 製造商不必負責之情況。

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.

供應備用零件及修理設施之法定保證－主要歧異

相關要素	交易行為法 ／北方領地	南澳	ACT
－供應備用零件之義務			
－供應修理／服務設施之義務			
－商品須屬於「可能需要修理／維護之種類」			
－須「可合理獲得」			
－須於「合理期間」可獲得			
－製造商須已「合理地採取行動」(與決定非製造商所能控制之情況有關)			
－製造商不能合理預見無法取得時，就備用零件無保證			
－不可合理預見之情形包括產業停工 (stoppage)			
－明示排除拍賣銷售			

* 指「零售」銷售

北方領地

1990年消費者事務及公平交易法第77條完全反映交易行為法第 74F 條某些情況下適用，參見交易行為法第 68A 條，第 9 章。

南澳

1974年製造商擔保法要求倘商品屬於可能需要修理或維護

Statutory guarantee of provision of spare parts and repair facilities -
Main points of inconsistency

Relevant elements	TPA/NT	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/maintenance'		X	X
-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

之種類，製造商應保證於製造日期後一段合理期間內可獲得備用零件。與交易行為法不同之處，在於未提及修理設施之供應。由於此項保證僅適用於可能需要修理或維護之商品，其範圍比較狹窄。備用零件僅需「於製造日期後一段合理期間內」可獲得，而非「可合理獲得」。

倘製造商不能合理預見無法取得備用零件之情形，該製造商不必負擔保證責任。製造商亦可於採取合理步驟對零售消費者發出就備用零件不予承諾之通知時，排除責任。在交易行為法方面，消費者及透過消費者取得所有權之人，皆有權對抗商品製造商或進口商（製造商在澳洲無營業處所之情形）。

ACT

1977 年法律改革(製造商之擔保)法就屬於可能需要修理或維護之商品，規定於製造日期後一段合理期間內，應可獲得備用零件及修理設施之法定擔保。製造商於不可合理預見無法取得之情形，不必負擔備用零件之擔保責任，該情形包括產業停工。此項限制不適用於修理設施之擔保。製造商於採取合理步驟對消費者發出就備用零件或修理設施不予承諾之通知時，亦不必負責，不論係就全部或特定備用零件或修理，或就特定期間。責任不得以其他方式限制或排除。消費者及從消費者取得所有權之人均得

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

對抗製造商及進口商（製造商在澳洲無營業處所之情形）。

31. 應否規定製造商以合理之努力保證可合理獲得備用零件及修理設備？
32. 該條款應否僅適用於可能需要修理或維護之商品之情形？
33. 在何種情況下，製造商可避免責任？

索引

第三章 適用問題

9. 以契約排除

68.(1)契約中的任一條款(包含未在契約本文中列出，卻藉其他條款包含在契約內的條款)若旨在排除、限制或修改(或有上列三種效果)下列事項，則此條款無效：

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?

Index

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) 本篇條文之全體或局部之適用
- (b) 此條文所賦予權利之行使
- (c) 廠商違反此條文所默示要求的條件或保證之責任；或

(d) 第 75A 條的適用

- (2) 契約中的條款不得用來排除、限制或修改本篇條文或 75A 條之適用，除非該條款明白表示其意圖為此或其和上述條文或條款不相容。

供應商能否將默示條款自契約中排除，乃不同轄區間重大差異之一。「以契約排除」一語在本文中包含了排除、限制或修改默示條款或限制違反該條款之責任。

交易行為法

交易行為法禁止使用條款以排除、限制或修改第五節第 2 篇和 2A 篇中的默示條款和法定保證，或排除、限制或修改違反上述條文之責任。而關於條件、品質保證、擔保、權利或救濟之存在、排除或效力為不實或誤導性之陳述，不僅被視為無效，也構成犯罪。(第 53(g) 項)。

第 68A 條是對第 68 條的一個例外。第 68A 條允許公司在所提供商品或服務通常不是做為個人、家務或家庭用途，且廠商依

- (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

賴此種責任限制並非不公平或不合理時，廠商可僅負擔修理或替換物品或再次服務之所需費用。此例外見於1977年對交易行為法之修正中。因(澳洲)政府認為在商用物品、服務之商業交易中，允許契約各方自行協定違約後所產生之間接損害責任分擔乃為合理。此例外不適用於對所有權、設定負擔與和平持有之默示保證，因政府認為供應商對商業界以及一般民衆均應保證商品確實為其所有。

與交易行為法之歧異

- 有些轄區允許供應商排除、限制或修改條款。
- 有些轄區允許供應商在任何情況下均可限制違反條款後的責任負擔；又
- 有些轄區訂立特別規則排除對某些條款的適用或對(違約)責任之限制。例如，二手商品之適銷品質，或和所有權、設定負擔與和平持有相關之條款。

下列表格簡介以契約排除默示條件和保證之主要差別。

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:

以契約排除 – 主要歧異點

有關要素	交易行為法／西 澳／北方領地／ 維多利亞	南澳	新南威 爾斯	昆士蘭／塔 斯瑪尼亞／ ACT
不得排除、限制或修改 條款*	X	X	X	
不得限制違約後之責任	X		X	
責任限制之例外	X		X	
非消費性商品或服務 (但不關於所有權)	X			
和所有權有關之默示條 款等			X	
二手商品之適銷品質			X	

* 製造商之保證見於交易行為法、北方領地、ACT和南澳，此保證不可被排除。

** 南澳法律中沒有明確談到責任限制。

西澳、北方領地和維多利亞

1987年公平交易法(西澳)，1990年消費者事務及公平交易法(北方領地)和1958年商品法的第四節(維多利亞)和交易行為法在以契約排除方面相符合。然而，如本報告第二章所言，西澳和維多利亞之規定和交易行為法之第五節第2A篇不同。

昆士蘭和塔斯瑪尼亞(SGA)

另一方面，商品銷售法廣泛允許以契約排除默示義務：

在買賣契約中因法律暗示而生之權利、義務或責任得

Contracting out - Main points of inconsistency

Relevant elements	TPA/WA/NT/Vic	SA	NSW	Qld/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 goods			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 IV 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 (SGA)

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

以契約雙方明示協議、雙方之交易方式或對契約雙方均有拘束力之慣例而予以否定或改變。

上開條文允許使用排除條款。在此條款下，賣方能排除在默示條款下所有之責任，或限定所負擔之責任為雙方同意之金額。不成文法已修正這項主張，因此賣方不能逃避違反「基本條款」之責任。例如，當所售商品不符合契約中之說明時，賣方必須負責。而欲以契約排除之意圖也可以從雙方的交易方式或慣例（人們對相同行為或事由的一致行動）中推論得來。其他轄區有另外立法來補充商品銷售法。而昆士蘭、塔斯瑪尼亞和ACT就不適用交易行為法之契約則繼續依賴商品銷售法作為默示條款之主要來源。

南澳

1972年的消費者交易法禁止排除、限制或修改該法默示要求之條件和保證（此和交易行為法第五節第2篇類似）。至於限定供應商違反條件或保證後之責任之協議是否也在禁止之列則可說是不清楚。此分別並不明顯，但我們應注意其他轄區似乎明白地區分限制此等條款之適用和限制違反此等條款後之責任。南澳法律未提及責任，這是否會有重大之法律效果值得考慮。南澳消費者和商業事務處將此法律詮釋為「實際上以和其他轄區大致相似之方式禁止供應商限制自身之責任」。

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

關於製造商的法定保證，1974年製造商擔保法禁止製造商排除或限制在明示或法定保證下之責任。有一例外是關於零件之保證，即製造商已採取合理之步驟通知購買者關於零件之提供沒有提供保證。(1977年交易行為法已採取此一規定)。

新南威爾斯

1923年商品銷售法第八節規定，此法律默示要求之條件和保證在牽涉消費者之銷售中不得被排除或限制。賣方亦不得限制違反默示條款之責任。任何意圖達到上述目的之消費者銷售契約條款將被視為無效。但有二個例外：

- 關於所有權、設定負擔與和平持有之條款得予排除或限制，違約之責任亦得限制(交易行為法明文禁止限制違反此等條款之責任)；與
- 賣方販售二手商品，違反適銷品質狀況之責任可限於商品本身之金額。

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.

維多利亞

1958年商品法第四節規定，旨在排除、限制或修改默示條款，或限制賣方違約責任之條款應為無效。賣方若將此條款置於契約中將遭受處罰(第 96 條)。如交易行為法一樣，當商品或服務通常並非做為個人、家務或家庭用途時，違約責任可被限制。責任負擔可限於修理或替換商品或重新提供服務之所需費用，只要如此做不會不合理或不公平(且和所有權、設定負擔與和平持有之保證無關)

ACT

雖然ACT依賴商品銷售法來制定關於基本默示條件和保證之法規(因此賣方排除或限制默示條款之權力很廣)，1977 年法律改革(製造商之擔保)法擴展保證制度至製造商。同南澳之立法和交易行為法一樣，製造商不得排除或限制在明示或法定保證下所定之責任。其例外則和零件或修理設備有關。若製造商採取合理之步驟通知購買者並不提供保證，則製造商可免除責任。

34. 供應商是否可排除、限制或修改任何或所有之默示條款？若可以，是在何種情況下？
35. 供應商是否可限制其違反任何或所有默示條款之責任？若可以，是在何種情況下？

Victoria

Part IV 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. 救濟措施

商品或服務之購買者所擁有之救濟方法，端賴一些因素而定。這些因素包括適用於某一特定交易之法規；此交易是牽涉商品或服務；購買者是否已「接受」商品；與是否此一救濟行動是針對供應商之違反默示條件或保證，抑或是針對製造商違反了法定保證。

交易行為法

交易行為法(第五節第2篇)將默示條款加入和供應商有關之契約。當這些條款被違反，便產生契約法上之權利。消費者可運用之救濟辦法將取決於是保證或條件被違反。此一分別表現於不成文法中。違反保證(乃一附屬於契約主要目的之協議)發生時，購買者可請求賠償損害，但無權利解除契約。而違反條件(契約中重要／基本之條款)時，買方可解除契約和請求賠償損害。由於與提供服務有關之默示條款是保證問題，因此服務契約並無契約解除問題。

解除契約之重要性在於買方能回到他在簽定契約前之狀況(因此除了能求償因對方違約所受之損失，他也許能得到所付貨品金額之退款)。

法律所賦予之解除契約權見於交易行為法之第75A條。在商品所有權移轉給消費者之情形下，此權利尤為重要。(見以下討論與此不同之銷售法)。消費者得以下列方法行使解除權：

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

- 給與供應商書面通知，詳列出違反契約的事實；或
- 退還商品給供應商，且舉出違反契約之事實。（口頭或書面）

若下列情形發生，則解除無效：

- 在有合理之時間檢視商品後，消費者未在合理時間內通知賣方其違約之事實或退還商品
- 在以通知解除契約之情況下，若商品在送達消費者後和在賣方收到通知前，遭到處分、遺失、毀壞、變得不適銷或因不正常使用受到損害；或
- 在以退還商品解除契約的情況下，若商品在消費者持有期間變得不適銷或因不正常使用受到損害。

在製造商違反保證之情形（第五節第2A篇），消費者有法定權利要求賠償其所受損失或損害。但任何行動必須在消費者或其權利繼受人已知或可得而知問題後之三年內採取。超過賣方首次提供商品之十年後，不得採取行動。

與交易行為法之歧異

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 TPA

所有州和領地之立法反映出條件和保證之區別。然而，在某些方面互有歧異：

- 有些轄區沒有法定解除權，在某些情況下限制了消費者可運用之救濟辦法。
- 如本報告第二章所示，有些轄區視默示條款為條件，有些則為保證。例如維多利亞服務契約中之默示條件會有當賣方已提供服務後，如何自始解除契約之問題。

西澳和北方領地

法定解除權見於西澳(1987年公平交易法、第41條)和北方領地(1990年消費者事務及公平交易法，第67條)。關於製造商違反保證，北方領地採用交易行為法給予請求賠償損失或損害之法定權利。

昆士蘭和塔斯瑪尼亞(商品銷售法)

另一方面，商品銷售法沒有法定解除權。一旦買方接受商品或商品之所有權已移轉給買方，任何條件之違反只可被視為違反保證。買方因此不得拒絕接受商品和不承認所定契約，而必須請求賠償其因賣方違反保證所受之損失。

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.

商品銷售法釐清在何種情況下，買方被視為接受商品：

- 除非並等到買方有合理機會檢視送達之貨物後，才可被視為接受了該商品。
- 當下列情況發生時，買方被視為接受商品：
 - 買方明白通知賣方其已接受商品；
 - 買方對商品採取和賣方所有權不相容之行動；或
 - 買方保有商品達一合理時間，且無通知賣方其拒絕該商品。

史旺森委員會(The Swanson Committee)建議加入交易行為法第 75A 條來克服商品銷售法所造成之問題。第 75A 條賦予消費者在有合理機會檢視商品後可解除契約，無論商品所有權是否已移轉給消費者或其已接受商品。

新南威爾斯

雖然1923年商品銷售法第八節關於消費者買賣擴大了商品銷售法之範圍，但它並沒有改變商品銷售法關於賠償之條文(即沒有法定解除權)。關於製造商責任方面，法庭有權要求製造商補救不適銷商品之瑕疵或要求其付等同補救此瑕疵所需的費用。這些救濟方法和交易行為法所賦予之賠償權相較顯得狹隘，即使法院有權做適當的附屬救濟命令。(第 64 條第(5)項)

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 8 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

維多利亞

1958年商品法第四節創立了法定解除權，並載有解除之程序和後果。影響買方解除商品銷售之主要因素是接受商品。如商品銷售法一樣，一旦買方接受了商品，任何條件方面之違反只可被視為違反了保證，不可做為解除契約之依據。商品銷售法中關於視買方已接受商品(如先前所列)之條文適用於此。再者，在下列情況下，買方不會僅因其保留商品達一合理時間或在合理時間內未通知賣方其拒絕商品而被視為已接受該商品：

- 商品送抵時已有瑕疵；
- 瑕疵在商品送抵後之一段合理時間內變得日益明顯；及
- 買方沒有做任何事來防止商品以和被送抵時大致相同之狀況被退回給賣方。

此一增訂條文大致上給買方在商品送抵後之一段合理時間內決定商品是否有瑕疵，並給與另外之時間來退回商品或通知賣方其欲拒絕該商品。因此關於「接受」之規定較商品交易法寬鬆。

買方可能要為某些其對商品造成之損失或傷害對賣方負責(第101條(1)項(d)款)，也可能要付賣方使用該商品之合理價格。

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

(第 101 條(1)項(g)款)。第 101 條(2)項則探討賣方不知下落之情況。

南澳

1972年消費者交易法規定法定解除權。消費者可因賣方違反該法默示條件而在合理時間內解除契約(不得超過商品送抵後七天)。解除行動必須以書面通知供應商。

下列情形，解除行動視為無效：

- 解除契約後之合理時間內，消費者未退還商品給供應商；
- 商品送抵後，因消費者不正常之使用使得商品變為不適銷或受損；或
- 法院宣布解除契約為不合適之救濟方法(經供應商申請)

關於製造商之義務，1974年製造商擔保法賦予消費者向違反法定保證之製造商要求賠償損失之權利。

ACT

關於供應商違反默示條款之責任方面，上述商品消費法之條文適用於 ACT。製造商之責任部份，1977 年的法律改革(製造商之擔保)法提供消費者要求賠償損害之權利。此一權利解釋上與契約中因違反保證而生之訴權相同。

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. 各轄區對默示條款應視為條件或保證之處理是否該一致？

37. 消費者售後保護立法是否該包含法定解除權？

11. 消費者

如在第一次檢討報告中（見第 12 頁以下）所見，對許多重要觀念如「消費者」等之歧異認定，構成了對達成統一性之最大挑戰。雖然第一份報告集中在交易行為法與各州和領地之各種公平交易法上，在檢閱商品銷售法和其他消費者售後保護立法時亦可發現在「消費者」定義上有類似歧異。

消費者 - 主要歧異點

相關要素	交易行為法／維多利亞	西澳	北方領地	新南威爾斯	南澳	ACT
商品／服務價值 (例如美金四萬元)	X	X			X	X
商品／服務性質 (例如家務用途)	X	X	X	X	X**	X
購買目的(例如再供應)	X	X	X	X		X
購買人(例如在業務過程中)***		X	X	X	X	X

* 北方領地和南澳在製造商保證之條文部份反映出對「消費者」不同之定義

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. \$40 000)	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
Person acquiring (e.g. in course of business)***		X	X	X	X	X

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

** 古董(家具除外)和藝術作品被排除在商品外。

*** 此一廣泛項目包含以購買商品或服務之人來定義消費者之任何轄區。例如，北方領地和南澳要求從供應商購得商品或服務之人才可為消費者，而新南威爾斯則將在業務過程中購得商品之人排除在消費者之外。

交易行為法和維多利亞

交易行為法和1958年維多利亞商品法參考商品服務之價格和性質來定義「消費者」。若某人購買之商品或服務通常是做為個人，家務或家庭用途或消費；或其購買商品或服務之價格少於四萬美金（交易行為法）或二萬美金（維多利亞），則可被視為消費者。此定義也將購買商品之目的列入考慮（例如，作為再供應、加工、修理其他物品或土地定著物之購買者不被視為消費者。）

相關於第五節第2A篇，消費者的定義似乎為第74條(2)項(a)款所限制。該條文規定此節所稱之「商品」，除非有相反意思表示，乃指「通常做為個人，家務或家庭用途或消費之商品」。

西澳和北方領地

西澳1987年公平交易法訂立了和交易行為法第五節第2篇相同之條文(以參照1971年消費者事務法之方式)，增加交易行為法對消費者之定義，將在從事業務過程中或為了商業目的購買商品或服務之人排除於消費者外。

** 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).

即使北方領地採用了交易行為法中之默示條件和保證，他們對消費者之定義卻和交易行為法之規定不同。在1990年消費者事物及公平交易法之定義下，消費者乃向供應商購買商品或服務之人，但不包括為了再供應、消耗，在業務過程中將商品轉變為另一狀態，和生產或製造過程有關，或為修理或處理其他商品或土地定著物等目的購買商品或服務之人。在製造商保證之情形，消費者之定義參照以上規定，但附加一條件，即商品應通常做為個人、家務或家庭用途。

南澳

1972年消費者交易法將消費者契約定義為對價報酬少於四萬美金之交易，且排除了所有在業務過程中進行之買賣交易，此點與交易行為法不同。不像其它關於售後之立法，它明確排除法人組織於消費者行列外。而拍賣、競標購買或租賃商品；買方以貨抵購之契約；消費者在貿易或業務過程中進行之交易；土地占有契約和古董(家具除外)或藝術品之銷售或租賃皆被排除在外。

在1974年製造商擔保法下，消費者為任何以零售方式購買不超過一萬美金金額商品之人。

新南威爾斯

1923年商品銷售法第八節將消費者定義為買賣一般做為個

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 \$40 000 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

人使用或消費商品之人，不包括在業務過程中購買產品之人。(賣方必須在業務過程中販售該商品)。如同某些轄區一樣，此法特別排除拍賣。

昆士蘭，塔斯瑪尼亞(商品銷售法)

這些轄區依賴商品銷售法。商品銷售法沒有「消費者」之定義，因其廣泛適用於買方和賣方間商品銷售之契約。

ACT

1977 年的法律改革(製造商之擔保)法定義消費者為購買通常做為私人使用或消耗之商品，且此商品不是為了轉售之目的而購買。

38. 為了消費者售後保護之目的，「消費者」一詞是否該有一致之定義？如果是，有無一較好之範本可遵循？

12. 銷售商、供應商、及製造商

前面之章節突顯了對於「消費者」這重要觀念定義上之一些歧異。而在檢視對交易中其他各方－即銷售商、供應商和製造商之定義後，也發現某些程度之歧異性。以下是簡單的說明。

交易行為法

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 (SGA)

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 purchases 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

交易行為法第五節第2篇中默示要求之條件與保證也規範供應商，其意義可自第4條和第4C條裡廣泛地看出。關於商品，「供應」包含銷售、交換、租賃、租用或分期付款。關於服務，「供應」則包括提供，准許或授予。

第五節第2A篇之法定保證適用於製造商。第74A條對製造商有所規定。「經製造」包含了種植、取出、生產、處理和裝配。除了實際製造商品之公司外，在不同之情況下，一家公司也會被視為製造商之公司。例如，向大眾表示其為製造商之公司，或其進口商品，而真正之製造商在澳洲沒有營業場所之公司。同第2篇一樣，製造商保證條文之適用端賴是否有「供應」行為而定。

交易行為法之默示條款和法定保證不適用於拍賣，除非那些條款和所有權、設定負擔與和平持有有關。

西澳與北方領地

1987年西澳公平交易法之「供應」定義和廣義之交易行為法版本類似。它也明確地包括「為促銷之目的所做的捐獻」。雖然交易行為法沒有談到以捐獻而為供應，但解釋上可能包含此項(例如1981年克拉克對新觀念進口服務有限公司案中戴維斯法官之意見，刊載於ATPR 40-264)。

1990年北方領地消費者事務公平交易法採用了交易行為法中對供應商和製造商之定義。

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

昆士蘭和塔斯瑪尼亞(商品銷售法)

商品銷售法適用於銷售契約，藉此賣方移轉或同意移轉商品之所有權至買方以換取所謂價錢之金錢對價。賣方之定義為一販售或同意販售商品之人。因此商品交易法之範圍看起來較那些依賴「供應」而非「銷售」此一行為來默示要求契約條款之立法為窄。

維多利亞

1958年商品法第四節關於賣方之定義和商品銷售法之定義相同，但前者也適用於提供服務之賣方。這反映了維多利亞之默示條件和保證之適用範圍較廣。

維多利亞之立法也在第四節中包含了對出租人之定義，因為此節默示條件加入某些租約中。關於商品之租約，出租人意指在租約下將商品租予他人之人。

1923年新南威爾斯商品銷售法第八節也遵循產品銷售法之模式，只適用於銷售契約，在該契約中「賣方移轉或同意移轉商品所有權至買方以換取所謂價錢之金錢對價」。然而，該商品銷售法卻沒有製造商之定義。解釋上當實際製造者在澳洲無居所或營業處所時，進口商也被含括在製造商內。同交易行為法一樣，新南威爾斯之條文不適用於以拍賣所進行之銷售。

南澳

1972年消費者交易法對供應商有詳盡之定義。供應商乃指

TPA.

Queensland and Tasmania (SGA)

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

一從事商業活動之人，在營業過程中：

- (a) 其訂定消費契約；
- (b) 其協商導致消費契約之簽訂，不論其是否擁有或親自提供契約中所規範之商品或服務；或
- (c) 販售商品給他人，其(指商品販賣者)已於先前和消費者就商品進行協商，販賣者期待該他人將會和消費者訂定消費租約。

「消費契約」之定義包含租用商品或分期付款之契約，以及以其他辦法取得商品或服務的使用或利益之契約，而商品或服務的解釋可以很廣，但以拍賣進行之銷售明確地被排除在消費契約定義外。

在1974年之製造商擔保法下，製造商為有下列行為之人：製造或裝配商品；在大眾面前以製造者之身分出現；將他們的名字和產品相關連，因此他人會很自然地推論其為製造商；或進口在澳洲無營業處所之製造商的商品。租用契約也包括在內。製造商保證只適用於以零售方式進行的銷售。「零售」在此法內並無定義，但不包括拍賣。

ACT

1977年ACT法律改革(製造商之擔保)法規定製造商乃為：

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:

- 親自或由他人代表製造或裝配商品之人，
- 以自身為製造者之姿態出現於大眾面前之人，
- 促使或允許其名字和商品相關連的方式或形態，使得他人很自然地推論其為製造商之人；或
- 進口在澳洲無營業處所之製造商所生產之商品到澳洲之進口商。

這些條件的適用端賴是否有「銷售」行為而定。銷售包括分期付款和租期超過六個月之契約。由拍賣方式進行之銷售似乎也含括在內。

39. 默示條款和法定保證應否適用於：

- (i) 商品租約；
- (ii) 拍賣方式進行之銷售；或
- (iii) 禮物與捐獻？

13. 商品與服務

雖然交易行為法與各州和領地之立法，有明文列出某些默示條款和法定保證的例外(例如交易行為法第 74 條第(2)項關於建築服務之規定)，還有許多默示之例外係因「商品」與「服務」之嚴格定義而產生。

- 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'.

商品

交易行為法

雖然「商品」之各種定義並不統一，但此差別在關於默示要求條件與保證方面並未造成重大歧異。交易行為法採取了包括性的定義：

「商品」包括：

- (a) 船，飛機和其他車輛；
- (b) 動物，包括魚；
- (c) 礦物，樹木和穀物，不論其是在土地之上，之下或附著於表面；與
- (d) 天然氣和電

當然在第 11 章討論之必備資格(例如，商品必須通常供個人，家務或家庭之用)仍繼續適用。

西澳、北方領地和南澳

參照此定義之法律如下：北方領地(1990年消費者事務及公平交易法)，南澳(1972年消費者交易法、第(d)款除外；以及西澳(1987年公平交易法)，但新增一項：「(e)商品的組成部份或附件」。

其他轄區(商品銷售法)

商品銷售法，包括了新南威爾斯法之第八節和維多利亞法之第四節，也採取了較廣的定義：

「商品」包括所有除了請求權和金錢之外之動產，也包含了莊稼、工業化種植的穀物(只見於南澳、西澳、塔斯瑪尼亞和 ACT)，和定著在土地上構成土地之一部份，在銷售前或契約規定下會和土地分離之物品。

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

這些對「商品」的定義是含括性的，並沒有直接的歧異。關於製造商保證方面，ACT在1977年法律改革(製造商之擔保)法中參照了商品銷售法對商品之定義。而南澳在1974年製造商擔保法中採取了較不同的作法。在該法中，商品被定義成「為銷售或零售處分之目的而製造之物品，但不包括零售實價超過1萬美元之商品」。不同於其他的定義，此方法以價格而非種類來定義商品。實務上，一購買汽車之消費者或其權利繼受人，在交易行為法下能對製造商提起訴訟，但在南澳的立法下則不行。相反地，在南澳的立法下，辦公室碎紙機可算是商品，但在交易行為法第2(A)篇之規定下，則不行。

服務

交易行為法

「服務」之定義則有更多的問題。交易行為法之定義也很廣泛，包括：

「任何在或將在貿易或商業中被提供，應允或授予的權利(包含關於不動產或動產之權利和利益)、利益、特權或便利……」

上開定義提供一些不同型態之契約(例如：銀行業務)做為例子。

西澳和北方領地

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 goods 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

北方領地(1990年消費者事務及公平交易法)參照此一作法，西澳(1987年公平交易法)亦然，但另外增列了一個例子，係關於天然氣、電力、或其他形態能源之契約(除了包括天然氣和電力的商品定義之外)。

南澳和維多利亞

消費者交易法為該法目的明確規定何為「服務」。這些規定大多列於附件一。此一附件共有二十五項，包括的服務種類從清理地毯到滅除白蟻。商品法(維多利亞)也包括了排它性之「服務」定義：

「服務」指藉由下列方式提供之服務：

- (a) 建造、維護、修繕、處理、加工、清潔或改變商品或土地定著物；
- (b) 改變土地之實際狀況；或
- (c) 運輸商品，但為執行或從事商業、貿易、專業、職業等目的之人運輸商品之行為不在此限。

這是所有定義中最嚴格的，其他立法所含蓋之服務項目如倉儲服務，膳宿和旅遊服務，諮詢服務(例如財務顧問)和教學服務等，可能會被排除在外。

- 40. 對「商品」的定義何種方法較佳？不同的定義是否造成問題？
- 41. 以規範性的方法來定義「服務」是否會造成問題？

索引

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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附錄 A

消費者售後保護立法之範圍

1974 年交易行為法

當一公司在業務過程中，提供商品或服務給消費者，交易行為法會默示要求條件和保證，但以拍賣方式進行之交易不在此限。此法的依據乃澳洲聯邦之公司權（憲法第 51 條(XX)項），因為沒有特別的權力允許聯邦規範提供商品與服務之契約。交易行為法之消費者售後保護條文也擴大適用於發生在澳洲國內和國外；各州和領地間；或在一領地內的個人貿易或商業往來。

「消費者」乃指購買價錢低於四萬美元之商品或服務，或通常做為個人、家務或家庭使用、消費之商品或服務，或購買商用車輛之人。但購置商品之目的若為再供應，消耗或加工，從事貿易或商業，生產、製造或修繕、處分其他商品或地上定著物，則購買者不被視為消費者。第2A篇的法定保證只適用於通常做為個人、家務或家庭用途、消費之商品。

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.

「供應」包含藉由銷售、交換、租賃、租用或分期付款方式提供（與再供應）。

「商品」未能完全定義，但解釋上包括：

- a. 船、飛機和其他車輛；
- b. 動物，包括魚
- c. 礦產，林木及穀物，不論是在土地之上，之下或附著其上者；與
- d. 天然氣和電

「服務」的定義很廣，包括任何在貿易或商業中所提供，應允或授予之權利（包含不動產或動產方面）、利益、特權或便利。

各州和領地之立法不受憲法限制交易行為主要適用於公司活動之規定所影響。因此，州和領地之立法提到「人」而非「公司」。除非另有規定，「人」包括個人、合夥、商業和公司。

1972年消費者交易法（南澳）

消費者交易法將默示條件和保證加入「消費者」契約中。此種契約中係公司法人以外之人：

- 購買或租用商品，訂定契約以獲得他人之服務，或取得商品或服務之使用或利益；及
- 所付報酬少於四萬美金。

'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.

但下列交易除外：

- 以拍賣方式進行之銷售；
- 藉競標方式銷售或租賃商品；
- 關於買方以貨抵購之契約；
- 消費者在貿易或業務過程中所進行之交易；

- 為占有土地所訂之契約；與
- 古董（家具除外）或藝術品之銷售或租賃。

「商品」的定義係參照消費者信用法（南澳）。消費者信用法則採行了交易行為法的定義，除了(d)項的電力和天然氣。

此法的附件一，明示規定何為「服務」，其範圍從滅除白蟻到清洗地毯。

1923 年商品銷售法（新南威爾斯）第八節

商品銷售法本節將默示條件和保證加入「消費者」契約中。消費者契約乃指賣方在商業過程中販賣下列商品：

- a. 通常做為私人使用或消費之用途；
- b. 購買者不表示他是在業務過程中購買此商品。

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.

消費者銷售也包含了販售協議，但不包括以拍賣方式進行銷售。

「商品」之定義為除了請求權和金錢以外的所有動產。包括莊稼和附著於土地或本身即是土地的一部份，在銷售前或銷售契約之規定下會和土地分離之物品。

商品「銷售」指賣方移轉或同意移轉商品所有權至買方以換取金錢對價。

規範製造商責任的條文（賦予法院裁量權以決定是否要將製造商也列為訴訟之一方）範圍與上述同。

1958 年商品法（維多利亞）第四節

商品法第四節適用於「消費者」交易，指通常做為個人、家務和家庭用途、消費之商品與服務之銷售契約，或價值少於二萬美元者。該法也適用於上述商品之租賃，與提供此種商品和服務的協議。但第四節不適用於因再供應或為在貿易、商業中加工之目的而購買之商品，或提供給第三人的服務。

「商品」則是除請求權和金錢之外之所有之動產與可和不動產分離之定著物。

「服務」的定義較廣，乃指：

- a. 建造、維護、修繕、處理、加工、清潔或改變商品或地

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,

上定著物；

- b. 改變土地之實際狀況；或
- c. 運輸商品，但為執行或從事商業、貿易、專業或職業等目的之人運輸商品之行為不在此限。

在商品銷售（如新南威爾斯所定義）和商品租用契約（租約）中均有默示條款。

1987 年公平交易法（西澳）第三節

公平交易法之範圍和交易行為法相似，因其參照了聯邦法第五節第2篇之消費者售後保護條文。這些條款和條件被默示加入商品或服務價值少於四萬美元之消費者契約，或被默示加入通常被做為個人、家務或家庭用途之商品或服務契約內。商品不得被用來做再供應或加工等用途，且商品或服務不得在業務過程中或為了從事商業活動之目的而購買（1971年消費者事務法）。

「商品」的定義係參照交易行為法，但新增一項：

- (e) 任何商品的組成部份或附屬品。

「服務」的定義也和交易行為法相同，但新增一項規定服務包括由下列事項所提供、應允或授予之權利、利益、特權或便利：

- (a) 為了或關於下列事項之契約：

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-sale 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)為了或牽涉天然氣、電力或其他形態能源的提供所訂的契約。

這些例子並非要限制此定義的概括性。

「供應」之定義則和交易行為法相同，但也明示包括：

(a)關於商品－

... (ii) 為了買賣、交換、租賃、租用或分期付款、或為了廣告、製造或貿易等目的，所為之展示、陳列或占有。

...

(c)關於商品和服務－為促銷而為之捐獻。

1990年消費者事務及公平交易法（北方領地）第五節

雖然北方領地之默示條款參照了交易行為法中之條文，它對「消費者」的定義卻與交易行為法不同。當一人向供應商購買商品或服務時，均含有默示條件和保證，但為了或表示因下列目的而購得之商品不在此限：

- 再供應；
- 消耗或在業務過程中加工，或和製造、生產過程相關，或修繕、處理其他商品或地上定著物。

「商品」、「服務」和「供應」則依照交易行為法定義來界訂。

關於製造商的法定保證，所提供的保障會受到限制，因為商品侷限於通常做為個人、家務或家庭使用或消費之物品（參照交易行為法）。

... (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

商品銷售法

商品銷售法將默示條款加入商品銷售契約中，該契約之定義為「賣方移轉或同意移轉商品所有權予買方以換取稱為價格之金錢對價」。默示條款不限於消費者之銷售。「賣方」指一販售或同意販售商品之人，而「買方」則是購買或同意購買商品之人。商品銷售契約牽涉賣方移轉或同意移轉商品所有權予買方以換取金錢對價。

「商品」的定義很廣，包括除請求權和金錢之外所有之動產。包括莊稼、工業化種植之穀物(只有南澳、西澳、塔斯馬尼亞和 ACT)，和附著於土地或本身即是土地之一部份，在銷售之前或在契約規定下會和土地分離之物品。

1974 年製造商擔保法(南澳)

此法和 1972 年消費者交易法(南澳)範圍不同。法定保證適用於經零售方式購買製品之人(包括公司)或從此人得到商品所有權之情形。「製品」乃為零售製造之商品，但非指通常零售價格超過一萬美元之商品。「購買」或「販售」包括承租或出租。

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.

1977 年法律改革（製造商之擔保）法（ACT）

購買通常供私人使用、消費之商品且不再將其轉賣，與從此人得到商品所有權之人，能依賴這些法定保證。「商品」之定義和商品銷售法相呼應，除了請求權和金錢以外的所有動產皆包括在內。「購買」或「販售」包括承租或出租，但期限不得少於六個月。分期付款也包含在內。

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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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附錄 B

本報告所探討議題之摘要

1. 條件是否應僅適用於屬於供應商業務過程中所供應之種類之商品？或是只要是在業務過程中供應之商品即足夠？
2. 買方對供應商技術或判斷之信賴是否應以「合理性」檢驗？
3. 供應商是否得排除或變更條款，或限制其違反之責任？
4. 目的適當性條款是否應延伸至服務契約？該條款應視為條件或保證較妥當？應有何例外？
5. 目的適當性條款是否應延伸至製造商？答案如果是肯定的，是否適用於商品已脫離製造商控制之情形？
6. 是否應於立法中定義「適銷性品質」？
7. 為被視為具有適銷性，商品應符合一般購買該類商品之所有目的，或僅需符合其中一項目的？
8. 本條款是否僅得在供應商經營該類商品時適用？
9. 買方對瑕疵之主觀認知是否相關？
10. 供應商對瑕疵之客觀認知是否相關？
11. 供應商是否得排除或變更條款，或限制其違反之責任？

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. 適銷品質條款是否應延伸至服務？
13. 適銷品質條款是否應延伸至製造商？
14. 本條款是否只適用於業務過程中供應之商品？
15. 供應商是否得排除或變更條款，或限制其違反應負之責任？
16. 該條款是否應延伸至製造商？如是，是否適用於商品已脫離製造商控制之情況？
17. 本條款是否只適用於業務過程中取得之商品？
18. 本條款應否規定正貨或全部商品須符合樣品？
19. 買方對潛在瑕疵之認知是否應為默示條款之相關因素？
20. 供應商是否得排除或變更條款，或限制違反之責任？
21. 該條款是否應延伸至製造商，如是，倘不符合之原因係第三人所致，是否仍應適用？
22. 符合示範之默示條款，對服務是否有必要？
23. 這些條款中，哪些條應被視為條件，哪些該被視為保證？
24. 關於負擔的保證應於所有權移轉時或契約訂立時發生？
25. 在買方基於供應商違反有關所有權和負擔的保證而享有契約解除權以前，是否應給予供應商一合理機會補救所有權上的

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

瑕疵？

26. 有關和平持有之保證是否應明定買方並未違約之但書？
27. 該條款是否僅應適用於在業務過程中所提供之服務？
28. 該條款應為條件或保證？(見第 10 章)
29. 供應商可否排除或變更該條款，或限制違反之責任？
30. 對某些類型之契約，例如運輸／倉儲，保險、家庭建築工程，是否應有例外規定？
31. 是否應規定製造商以合理之努力保證可合理獲得備用零件和修理設備？
32. 該條款是否僅適用於可能需要修理或維護之商品？
33. 在何種情況下，製造商可避免責任負擔？
34. 供應商是否得排除、限制或修改任何或所有之默示條款？若可以，是在何種情況下？
35. 供應商是否得限制其違反任何或所有默示條款之責任？若可以，是在何種情況下？
36. 各轄區對默示條款應視為條件或保證之處理是否該一致？
37. 消費者售後保護立法是否該包含法定解除權？
38. 為了消費者售後保護之目的，「消費者」一詞是否該有一致

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 post-sale consumer protection legislation include a statutory right of rescission?
38. Should 'consumer' be defined consistently for the purposes of post-

的定義？

39. 默示條款與法定保證應否適用於：

- (i) 商品租約；
- (ii) 拍賣方式進行之銷售；或
- (iii) 禮物與捐獻。

40. 對「商品」的定義合種方法較佳？不同的定義是否造成問題？

41. 以規範性的方法來定義「服務」是否會造成問題？

如有意見請寄至下列地址：

澳洲工業科學觀光部消費者法律處處長
坎培拉第 9839 號信箱
截止日：1997 年 11 月 28 日

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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:

The Director
Consumer Law Section
Department of Industry, Science and Tourism
GPO Box 9839
CANBERRA ACT 2601
by 28 November 1997

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