Short Digest of Bill

Purpose

To provide for consumers a right of recovery against the manufacturer or importer of a defective motor vehicle within twelve months of its acquisition, where the manufacturer or importer or an authorized service agent has failed to remedy the defect.

Background

The motor vehicle is among the most ubiquitous of modern appliances, and one on which the operation of the economy is heavily dependent. The significance of its reliability is enhanced by the absolute magnitude of costs associated with unreliability, while the principle of insurance is well applied in spreading the risk of third party injury and accidental property damage over all users. The social costs of unreliable vehicles are not always visited on the private purchaser, as is illustrated should a mechanical breakdown block a traffic lane. In contrast, legislative requirements for the use of safety devices can, through economies of scale, turn expensive safety options into less costly standard equipment, and avoid the social costs of more prevalent or more serious injury.

Standards for the functionality, and reliability of some car components are prescribed, including door latches, steering columns, emission control etc. The Australian Design Rules for motor vehicles are referred to in State legislation, such as the Victorian Motor Car Regulations 1966.

These regulations leave considerable scope for mechanical unreliability to render a vehicle unusable. Unreliability may be more difficult to compensate in respect of used car purchases, where the chequered career of some vehicles on offer makes "caveat emptor" a still appropriate rule.
The terms implied in a contract of sale by sale of goods legislation developed in the U.K. during the 19th century were susceptible to waiver. The problem of exclusion clauses was considered in the U.K. during the 1960s and 1970s, the Law Commissions recommending that in contracts with "consumers" it not be possible to contract out of terms as to merchantability, fitness for purpose etc. implied by statute or the common law.[1] The law was amended in New South Wales in 1974 and in 1981 in Victoria.[2]

Difficulties of proof can arise, particularly because the requirement for servicing and repairs of even a recent model car are a function of the manner in which it has been driven. The fact that repairs are required is therefore less probative that the car is not of merchantable quality. A 1983 survey of car reliability found that the average number of days off the road for the 62 types of car surveyed ranged from .29 days per 12 months to 3.24 days per 12 months. The average number of breakdowns per vehicle ranged from .05 times per year to 1.14 times per year. The figures are standardized for car age.[3] No observable correlation was found between car "lemons" and such factors as the size or type of car, or its country of origin.

A high proportion of consumer affairs complaint involve motor vehicle dealers. The Victorian Consumer Affairs Council, in its 1973/74 report, noted that the increasing number of serious complaints by buyers of new vehicles was of "extreme concern"[4]. Complaints relating to used cars has led in most Australian jurisdictions to special legislation for motor vehicle dealers. This legislation is aimed principally at the used car market and grants guarantees in respect of vehicles in some cases. Dealer licensing is also provided for.

In NSW and the ACT, a guarantee granted in respect of new vehicles requires the dealer to repair or make good "defects" (a term not defined) appearing within 12 months and 20,000 kilometres of sale. For a consumer or prospective consumer this statutory remedy may prove of greater benefit than to sue on the manufacturer's warranty. Even in respect of proof, the existence of a "defect" is more readily shown than that a warranty has been breached by the manufacturer.

The Australian Constitution provides that the Commonwealth Government may legislate with respect to specified matters, and that such legislation overrides any State legislation on the point. The Trade Practices Act 1974 derives constitutional validity principally from the corporations power throughout Australia, while section 6
provides for application to trade and commerce generally within the Territories, or between a State and the Territories.

The Trade Practices Act 1974 is drafted to in general preserve remedies available under concurrently operable State legislation (section 75). Part V, to which the saving provision applies, relates to consumer protection. Conditions and warranties implied by Division 2 are similar to those provided by sale of goods legislation.

Division 2A (sections 74A to 74L) was added to the Act in 1978 and differs from earlier legislation based on "sale of goods" type warranties. The Division provides a statutory remedy for "consumers" to whom goods are supplied by a "corporation". It overcomes legal problems involved where there is an intermediate retailer. At common law the consumer could recover in contract only from parties to the contract, so that a manufacturer's default may have proved not compensable. The new primary remedy is also provided against the importer where the goods are not manufactured in Australia. The importer is deemed to be the manufacturer in such a case.

The remedy provided by Division 2A is compensation for loss or damage. Section 74L limits the liability where goods are of a kind other than goods ordinarily acquired for personal, domestic or household use or consumption. A further limitation is that "consumer" is defined in terms to exclude purchases of goods of that kind costing $15,000 or more.

The present Bill adds to Division 2A a new section 74GA, providing specific remedies for consumers purchasing a motor vehicle or motor cycle with an "express warranty", (defined in section 74A) from the manufacturer, deemed in subsection 74A(4) to include an importer.

Since some motor vehicles will be purchased for more than $15,000, the question as to whether a particular motor vehicle constitutes goods of a "kind ordinarily acquired for personal, domestic or household use..." may arise[5].

Main Provisions

The Bill would commence on a date fixed by Proclamation and apply to motor vehicles first acquired on or after that date (Clause 2).

Clause 3 inserts new section 74GA in the Trade Practices Act 1974. Subsection 74GA(4) provides during the
first twelve months a remedy of a new vehicle of the same type, or a cash payment of the vehicle's fair depreciated value, where a service agent authorized by the manufacturer to effect repairs has failed to correct a defect on four separate occasions, or the motor vehicle has been out of service for more than 30 days in total by reason of the defect. The manufacturer may choose between the alternative remedies.

Under subsection 74GA(2), the section applies to motor vehicles, including motor cycles, acquired with an express warranty by the manufacturer. The section relates to defects within the terms of the warranty.

"Acquire" is defined in section 4 of the Trade Practices Act to include acquisition on hire-purchase. Subsections (8) and (9) are intended to transfer proprietary rights should the manufacturer or agent choose to substitute a new vehicle.

Car vehicle registration does not show legal ownership. Subsections (6) and (7) permit payment into Court, and application to the Court by interested parties, should the alternative remedy of a cash payment be availed of by the manufacturer.

For further information, if required, contact:

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References

2. e.g. subsection 64(1) of Sale of Goods Act 1923, inserted by Commercial Transactions (Miscellaneous Provisions) Act 1974, section 7.