

Consumer Law

Introduction

During the twentieth century, consumer protection has become increasingly necessary as the number of goods and services available has grown dramatically. The common law, which has operated in the area of contracts and torts for hundreds of years, offers some protection to consumers. State and federal legislation in this area has also been passed and consumers are well protected against unfair business practices and faulty goods and services. Consumers also protect themselves by being aware of their rights and by seeking advice before making large transactions. The legal system provides organisations that can help consumers if a problem occurs. The legal system also regulates the behaviour of those who supply goods and services in an effort to avoid disputes.

What is a Consumer?

There is no single common law definition of a consumer. Generally, a consumer is a person who purchases a product or service for private (non-commercial) use. There are many different laws relating to consumers and they differ in the way they define a consumer.

Some laws include small businesses that acquire products for their business, while other laws excluded these.

The Trade Practices Act definition of a consumer is the one most commonly used: **'a consumer is a person who obtains goods of a type ordinarily used for personal, household or domestic use or consumption'**.

Historical Overview

Australian consumer law developed out of English law. To examine the origins of our laws, we have to look to England.

1. Pre-industrial age (before 18th century):

Before the Industrial Revolution in the eighteenth and nineteenth centuries, few large cities existed; most people lived in a **rural subsistence society**. Most people provided their own goods and services. People consumed far fewer goods than they do today and there were not very many products to choose from.

The situation was one of **caveat emptor** - let the buyer beware. Laws to protect purchasers were few and regulated simple matters such as weights and measures. Protection was largely through self-help and self-regulation by shop owners and guild craftsmen. People produced and sold their own goods; their customers personally knew them and they would go out of business quickly if they offered poor service or goods.

2. Industrial Revolution (18th century):

Technological developments led to growth in large-scale manufacturing of cheap goods. Labour-saving machines caused lack of work in rural areas. With the Industrial Revolution, people shifted to towns, as they become centres of industry. They worked in factories and no longer supplied their own essential needs. Instead, they manufactured products and received wages, which were then used to buy goods or services people had previously supplied themselves, such as vegetables, meat and clothing. People had to rely on goods produced by individuals or companies they didn't know and which were often produced in factories miles away from the place of purchase. Also, a wide range of new products became available.

3. Industrial society (19th century):

Large manufacturers replaced individual craftsmen and fanners. The population changed from subsistence to a **mass consumption society**, where virtually all goods had to be bought. In these circumstances, it became easier for consumers to be misled or to be sold an inferior or defective product. The concept of **caveat emptor** (let the buyer beware) operated. This meant that if a consumer was treated unfairly by a seller, there was very little he/she could do about it. This led to unjust results.

There was no government interference in the deals made between buyers and sellers. The philosophy that governments should not interfere in private negotiations between people is termed **laissez faire**.

The merchant class who made their fortunes from the new markets that mass production had created, disapproved of government intervention in the market place and campaigned against any form of regulations. Instead, they preferred to rely on the free market economy based on the laws of supply and demand. .

The theory was that 'market forces' would regulate the quality of goods and the price of goods fairly. Due to the inequality in bargaining power between manufacturers and individual consumers, this did not happen.

Gradually the law recognised the injustice that existed in applying the principle of caveat emptor as this put the consumer at a great disadvantage. In 1893, the **Sale of Goods Act** was passed in Britain.

4. Mass consumption society (20th century):

Since the Second World War, there has been massive growth in retail chains, advertising and use of credit. This has led to a consumer revolution with extensive variety of goods and services available to consumers.

During the late 1950's-60's, people became more aware of their rights as consumers. This was partly due to people such as Ralph Nader who challenged the safety of some consumer goods eg cars from General Motors. In 1959 the Australian Consumer Association was founded to provide greater bargaining power for consumers.

Consumers only became aware of their rights with the Trade Practices Act 1974. The act provided for a broad range of remedies for consumers including fines and injunctions. It also had a greater impact on business practices than any previous legislation.

The 20th century has also seen growth of consumer groups, government and non-government organisations to protect consumer rights.

Twentieth Century Consumers

Features of Modern Consumer Society	Consequences for consumers
a) Increase in choice of goods and services	Difficulty in assessing the quality of similar goods.
b) Transactions are more remote	Consumers will not always deal directly with the manufacturer of goods. This may cause difficulties in seeking remedies if problems arise.
c) Advances in technology	Difficulty in assessing quality and value for," money.
d) Availability of credit	Increased capacity to incur debts. Consumers ought to consider the added cost of using credit.
e) Advertising	Increasingly goods and services represent status and image. This increases the temptation to spend and incur debts.

DEVELOPMENT OF CONSUMER PROTECTION

Why is regulation necessary to protect consumers?

It became evident that the notions of *caveat emptor* and *laissez faire* did not provide sufficient protection to consumers in the marketplace, and gradually laws were developed that prevented unfair business practices.

The merchant class was very wealthy and powerful, able to influence the government. By way of contrast, individual consumers had relatively little power in the market place and in parliament. The common law provided minimal consumer protection through the law of contract. The principle that ran through the common law was that of ***caveat emptor*** (let the buyer beware).

CAVEAT EMPTOR

Caveat emptor means 'Let the buyer beware'. That is, if the buyer makes a bad choice then the buyer has to put up with the consequences of his or her poor decision. This idea was based on the assumption that buyers and sellers were in equal bargaining positions.

The government did not interfere in deals between buyers and sellers as they were seen as private negotiations (***laissez-faire***).

Common law principles developed to fill the vacuum in consumer protection left by government inaction. Chiefly these were the extension of the tort of negligence and a more balanced interpretation of the law of contract.

The philosophy of *laissez faire* no longer applies. Today, the law has restricted the idea of *caveat emptor* and protects consumers.

As parliaments in Australia and England became more representative, they began to reflect the interests of the majority of people: some consumer protection laws were passed.

After the Second World War, governments in both countries became more socially conscious and introduced comprehensive consumer protection statutes (e.g. the ***Trade Practices Act 1974***) and government bodies (e.g. Department of Consumer Affairs).

How fair is the notion of *caveat emptor*?

The law has restricted *caveat emptor* because of societal changes.

Changes in the economic structure of society and vast technological changes in the last century have meant that:

- People buy most goods and services rather than producing them themselves;
- There is a huge choice of goods available;
- Buyers no longer know sellers and producers personally.

For these reasons, consumers are **no longer in an equal position with sellers**, and thus need to be protected from faulty products and 'sharp' selling practices.

The theory of *caveat emptor* expects that a purchaser will be able to consider the risk of purchasing sub-standard goods able to fully enquire about the good before purchase and to bargain with the seller to obtain a good price. The retailer of mass produced goods is advantaged in terms of resources and information technical knowledge.

Early Consumer protection laws

Nineteenth Century

Both **common law** and **statute law** gradually recognised the necessity of protecting consumers from unfair business practices.

Back in **19th century** the, societies were evolving from agrarian to industrial, and the *laissez faire* economic philosophy flourished. The law of tort or negligence hadn't developed at that stage as it was in its infancy.

The philosophy of course in those days was one of individualism, and the basic maxim was ***caveat emptor*** (let the buyer beware), so that consumers were expected to look after themselves. It was thought as a matter of philosophy that their remedies should be limited to those in contract rather than in tort.

Gradually the change in society showed us that wasn't really practical, it wasn't sufficient for the consumer to look after himself or herself.

At this time, consumerism as a concept was many, many years away and the concept of having a duty which flows from a right really hadn't been established.

There was no established legal right to a safe product or a right to a safe service. The suppliers of goods very much controlled the marketplace, and the consumers of goods were very much at the risk and the peril of the marketplace.

Courts were really not well placed to be the developers of public policy in relation to that. Common law did not protect the consumer and most cases favoured the merchant. It was the law of Equity that recognised the unfair situation.'

The result of one famous case showed a short toward protection of consumers;

Carlill vs. Carbolic Smoke Ball Co [1893] QB 256

Carbolic Smoke Ball Co was an English company, which manufactured an influenza remedy. In an advertisement it offered 100 pounds to anyone who contracted influenza after using the product as directed. Mrs Carlill faithfully used the product in accordance with directions, but still contracted influenza. She sought payment of the 100 pounds. The company argued that there was no contract between Mrs Carlill and itself, because she had not communicated her acceptance of its offer to the Company. The court found in favour of Mrs Carlill.

The concept of the **parliament** taking a broader public policy role and legislating for the good of all had not been established.

Twentieth Century

Entering the 20th century with lots of cars on the road, there's lots of ways that people without a contract with others can hurt each other; human beings are having a bigger impact on each other than ever before, and technology has assisted that.

However, there was a huge reluctance to change: tort was based on moral duties and the courts were very reluctant to open up the floodgates to allow greater and greater claims to arise from finding these innovative duties, especially duties that spread across to **consumers generally**.

It really took a very pioneering decision by the English courts at that time to really the stage for the development of consumer protection law for much of the rest of the 20th century. It was the famous English House of Lords decision.

Donoghue vs. Stevenson [1932] AC 562

In this particular case there was a manufactured article, a bottle of ginger beer that had been purchased by May Donoghue. The bottle contained the decomposed remains of a snail which could not be detected because the contents of the bottle had not been consumed and as the bottle was opaque, it was impossible to actually see the snail inside. Mrs Donoghue suffered quite substantial nervous shock and gastroenteritis. The stomach complaint that she had was quite serious and it went on for quite a substantial period of time. It was a classic case of a small consumer against a much larger manufacturer.

It seems from reading extracts of the case that there was a bit of a legal stoush going on among the best legal minds in England at the time. In fact one of the really strong arguments against Mrs Donoghue, was that if you let someone like her recover damages, then you'd be opening up the floodgates and everybody who ever had any slight injury would be able to take action in the courts demanding a remedy.

There was clear resistance and up until that point, it was unknown to English law to **imply duty so widely**.

So how important was this 1932 case of *Donoghue vs. Stephenson*?

This is a famous case in the development of the common law, which recognised that manufacturers have a **duty to consumers** to provide goods of a certain quality.

Donoghue v Stephenson was of great significance marking a very considerable change in the law of negligence. It really might be said to be the basis of the modern law of negligence.

Grant vs. Australian Knitting Mills [1936] AC 85

In 1936, an Australian, Dr Grant, received damages for dermatitis he got from wearing woollen long johns which he hadn't washed. The manufacturer had left some chemicals in the underpants.

Donoghue vs. Stephenson had limited effect until after the Second World War. There wasn't as much **insurance** in those days, so that in some cases it mightn't have been worth suing a person who would have been liable.

Things changed significantly after the Second World War. Society has become more litigious and people saw that they had rights and wanted to enforce them.

As technology advanced, advertising grew, because of the new methods available to sell products; such as cinema, radio and telephone. These changes led to increased use of credit, and consumers were exposed to new hazards involving harsh credit arrangements.

After 1945 consumer law, litigating and the law of negligence developed.

The consumer rights revolution. When did rights become the focus of consumer law?

From the 1940s, America was leaping ahead in consumer protection and by the 1960s it was really a **rights-based** approach. That resulted in high levels of claims and awards in the United States.

In the 1960s, protection of consumers became a matter of concern to many ordinary citizens. A grass-roots self-help consumer movement developed, as many western consumers became dissatisfied with inferior and unsafe products. In the USA and Britain in particular, the call for consumer protection from ordinary people was strong. Ralph Nader's book *Unsafe at Any Speed* 1964, USA, and the effects of the drug thalidomide sparked similar calls from Australians. About 1962, John F. Kennedy set out a series of fundamental rights for consumers, for example, the right to safety, the right to information.

This worldwide movement led to the establishment of consumer groups such as the **Australian Consumer Association** in 1959 and the **International Organisation of Consumer-Unions (IOCU)**, established in 1960 by the USA, Australia, the UK, Belgium and the Netherlands. It is now called **Consumer International**.

What was happening in Australia?

The Americans had a very litigious society. In Australia, consumer protection was enshrined in our law, in our **statutory law**.

The modern consumer movement led to international recognition of consumer rights as well as to more extensive laws to protect consumer rights in Australia. These laws included the **Trade Practices Act 1974 (Cth)** and the **Consumer Protection Act 1969 (NSW)**.

The Trade Practices Act for the first time set out in the most specific way, mechanisms to deal with the concepts of unfair trade practices, which were rife at the time. Despite their growing efforts to expand consumer protection at the time, the courts had not actually addressed these issues.

The Trade Practices Act and many of the Acts that followed covered the concept of ***manufacturers having liability to consumers, implying promises into consumer transactions, that goods must be of reasonable quality, that they must be fit for their purpose and that products must be safe.***

So the US had its insurance crisis in the late 1970s, prompted by high claims and awards by juries. Despite our more legislative approach, the same crisis is now facing manufacturers, doctors and public authorities in Australia.

There has been a gradual expansion of the scope of the law of negligence.

In one case a tree fell and injured somebody in a public wilderness area. There was evidence that had the council inspected the tree it would have found it was likely to fall (as some gum trees do when they've got a fungus inside them). It was held that the council was liable because this tree fell on the passer-by. That would have startled a 19th century lawyer.

The law in practice is going too far, because doctors have hanging over their heads, the threat of **litigation**. Unfortunately there are some firms of solicitors who will sue if they see the slightest opportunity.

Someone, who is truly negligent and causes damage, should pay for the damage. But, doctors now of course, are obliged to explain to patients all the possible adverse consequences that might result from a particular procedure.

Class actions or representative proceedings were introduced in Australia in the late 1980s, and we've seen a few in recent times on behalf of consumers of water, power, tobacco etc. Class actions involve a number of consumers banding together in court, to bring a case. In this way, they can have a large impact on a company (eg. silicon breast implants, cigarettes).

The consumer rights movement has contributed to a growth in litigation and this has led to **very strong statutory protection**. This has the effect of raising standards on the parts of manufacturers and retailers.

What consumers want is to make sure that businesses don't have to be sued in the first place because they've got it right. Preventative law is always much better, it's cheaper for the consumer, and it benefits not just the person who's undertaken the litigation but everyone who doesn't undertake litigation.

The legislature can always intervene; it can limit the right to sue in these cases. But legislatures are often slow to act in matters of that kind, and it's not altogether easy to devise the correct formula.

So what do consumer law advocates see for the future?

The US National Consumer Law Centre's Elizabeth Renuart.

"Clearly, consumers are better placed as we look towards the 21st century than consumers in the latter parts of the 19th century.

We have a strong **Trade Practices Act**, which gives strong and fundamental consumer rights.

At the Commonwealth level, we have the various **Fair Trading Acts** and **Sale of Goods Acts**; we have **licensing** regimes for professionals, and tradespeople; we have strong **Codes of Conduct** developing; we have various mechanisms for **dispute resolution**.

We've seen an enormous development in cheap, accessible justice for consumers: **Small Claims Tribunals** and those sorts of forums. I see many of those things as going forward, but I do see a disturbing trend.

There is a movement away from interventionist public policy theories by legislation; there is a movement away from regulation to self-regulation, and that self-regulation is very much based on one principle, and that is that the market delivers the most efficient and best practices for consumers. And I think 100 years of consumer movement development suggests that that probably isn't the case.

THE BASIS OF CONSUMER PROTECTION LAW TODAY:

COMMON AND STATUTE LAW

It is important to understand that both common law and statute law protect the consumer.

Avenues available to the consumer

Common Law	Statute Law
<p>Provides the consumer with a remedy against the seller</p> <ul style="list-style-type: none"> • Under contract law: • Under the law of torts: 	<p>Regulation can occur in a variety of ways including:</p> <ul style="list-style-type: none"> • General consumer protection laws at a federal level: <i>Trade Practices Act 1974</i> • General consumer protection laws at a state level: <i>Fair Trading Act 1987 (NSW)</i> • Specific legislation directed problem areas: <i>National Credit Code</i>

REGULATION AT COMMON LAW

Despite the number of statutes that exist to protect consumer the common law also plays an important part, particularly in the area of consumer contracts. Both common and statute law, for example, imply terms into contracts so that they are fair for consumers.

The Common Law has developed over many years as a result of case law. The common law regulates the contract between the seller and the buyer by implying a number of terms into the contract including the following:

- Fitness of purpose
- Merchantable quality

The Common Law by virtue of the law of torts imposes a duty on the manufacturer to exercise reasonable care in producing a good.

REGULATION BY STATUTE

The ways in which legislation provides protection includes the following:

- Prescription of standards for certain goods and services
- Providing a remedy for unsatisfactory goods and services
- The regulation of advertising
- The regulation of unfair and unconscionable contracts

State and federal governments act concurrently in the area of consumer protection. Thus statute Law dealing with consumer protection exists at both State and Federal levels. The **Australian constitution** limits the ability of federal government however to make laws in this area.

International consumer rights

The modern movement for consumer rights led to the establishment of a list of basic customer rights by the US President, John Kennedy, in 1962, which was later added to by the IOCU. These eight rights are:

1. the right to safety
2. the right to be informed
3. the right to choose
4. the right to be heard
5. the right to satisfaction of basic needs
6. the right to redress
7. the right to consumer education
8. the right to a healthy environment

The United Nations adopted these rights in the UN Guidelines for Consumer Protection in 1985.

The challenges of globalisation and technology

Globalisation refers to the process whereby goods and services available in one country are the same as those offered worldwide. Globalisation brings new challenges to consumer protection because many goods and services are now produced, marketed and distributed for a global market. The gap between the knowledge and power of consumers and of suppliers is even greater in a global market.

Recent advances in technology such as the Internet and genetically modified food today raise other challenges for consumers. Deregulation and growth in the services sector also have presented changes in the focus of consumer protection in recent years. The law is just beginning to deal with these new challenges.

STUDENT ACTIVITIES

1. Why do consumers today need more protection from the law than those before the Industrial Revolution?
2. How did the common law case of *Donoghue vs. Stephenson* [1931] change the way the law dealt with consumer issues?
3. Why did caveat emptor decline during the latter part of the 19th and during the 20th centuries?
4. What were the consequences for consumers of the development of a modern consumer society?
5. Describe the changing role of the state in consumer protection.