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## **The Guarantee of Delivery of Goods under the Consumer Guarantees Act 1993 and its Implications for Australia**

The Australian Consumer Law (ACL) implemented a broad range of consumer guarantees modelled on New Zealand's Consumer Guarantees Act 1993 (CGA). After the ACL came into force the CGA was amended and a new guarantee for the delivery of goods was introduced. Prior to the change a consumer in New Zealand had little redress if damage was caused during the delivery of goods or if goods were delivered late or failed to arrive. This article examines the new guarantee of delivery of goods in New Zealand and argues that Australian consumers may not have the same level of protection as their New Zealand counterparts, therefore the ACL requires amendment with the introduction of an express delivery of goods guarantee.

### **Introduction**

Consumers are increasingly purchasing goods online. While some consumers will go to a physical store to pick the goods up, most consumers purchasing online choose to have the goods delivered to them. The goods are often delivered by a third party engaged by the supplier, rather than the supplier itself. The delivery process from the supplier (or a third party that is holding the goods) to the consumer unfortunately provides ample opportunity for the goods to be lost, delayed or damaged in transit.

In principle the method of delivery should not affect a consumer's rights. Indeed, the strength of the Consumer Guarantees Act (CGA) is that it is meant to apply across all goods and services<sup>1</sup> ordinarily acquired for the purpose of domestic and household use,<sup>2</sup> and consumers are, for example, provided with strong rights if goods they purchase are defective. Thus it stands to reason that if a consumer purchases goods which are delivered in a damaged state, the consumer would be protected under the CGA. Logically if the damage was caused by the supplier then the supplier would be liable under the CGA,

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<sup>1</sup> Albeit initially there was some confusion as to whether things supplied to consumers such as electricity, gas and even telecommunications were covered by the Consumer Guarantees Act 1993 (CGA). See, for example, *Electricity Supply Association of New Zealand Inc v Commerce Commission* (1998) 6 NZBLC 102,555 where the High Court held that electricity was not goods for the purposes of the Act. This confusion was rectified by s 3 of the Consumer Guarantees Amendment Act 2003 which inter alia amended the definition of goods in the CGA to include gas and electricity and "to avoid doubt, water and computer software".

<sup>2</sup> The definitions of consumer are slightly different in New Zealand and Australia. In Australia under the Australian Consumer Law (ACL), contained in schedule 2 of the Competition and Consumer Act 2010, the test is not focused solely on the normal use of the goods, for example, it can cover goods that were not of a kind ordinarily acquired for personal, domestic or household use or consumption if the price paid or payable for the goods did not exceed \$40,000 (s 3(1)).

alternatively if the carrier damaged, lost or delayed the delivery of the goods, the carrier would be liable.

However, as with much of law, there is almost always an exception.<sup>3</sup> As will be explained below, the CGA, as originally formulated, contained a large loophole as carriers were excluded from liability under the CGA.<sup>4</sup> The loophole meant that if the carrier lost or damaged the goods in transit, or delivered them too late, the carrier was not liable under the CGA. Instead the Carriage of Goods Act 1979 applied. In reality the operation of the Carriage of Goods Act meant little or no protection for consumers as it could be contracted out of and even if it was not contracted out of, a carrier's liability was capped. Moreover, suppliers escaped liability because of the intersection of the CGA and the Sale of Goods Act 1908.<sup>5</sup> The lack of protection for consumers did not go unnoticed in the most recent review of New Zealand's consumer law.<sup>6</sup> As a result of the review the delivery of goods guarantee was created.<sup>7</sup> The name of the guarantee is a little misleading, however. The delivery of goods guarantee imposes liability on the supplier for damage that occurred during delivery and is not limited merely to the timing of the delivery or the loss of goods during delivery.<sup>8</sup> Therefore now in New Zealand a supplier is liable under s 5A of the CGA for the loss, damage or delay in delivery of goods caused by a carrier.

What then is the relevance of the delivery of goods guarantee to Australia? In 2011 the Australian Consumer Law (ACL)<sup>9</sup> effectively incorporated the CGA guarantees into the ACL.<sup>10</sup> However, because the guarantee of delivery of goods was not part of the CGA at the time the guarantees were incorporated into the Bill that subsequently became the ACL,<sup>11</sup> the ACL contains no express guarantee for the delivery of goods. In contrast, there is a "guarantee as to reasonable time for supply" of services in the ACL.<sup>12</sup> The difference in treatment between goods and services can be explained by the fact that the importation of the guarantees from the CGA occurred at a time before the delivery of goods guarantee was thought of in the

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<sup>3</sup> For example in New Zealand the new unfair contracts terms law applies to all standard form consumer contracts, with the one exception of insurance contracts which have largely been carved out of the unfair contract terms law, see Fair Trading Act 1986, s 46L(4) and (5).

<sup>4</sup> See below.

<sup>5</sup> See below.

<sup>6</sup> Ministry of Consumer Affairs, *Consumer Law Reform – A Discussion Paper*, June 2010, at 82 – 84.

<sup>7</sup> Consumer Guarantees Amendment Act 2013, s 7.

<sup>8</sup> See, below nn 38 – 40.

<sup>9</sup> The ACL is contained in sch 2 of the Competition and Consumer Act 2010.

<sup>10</sup> See, for example, Australian Consumer Law, s 54 (Guarantee as to acceptable quality), and see Jeannie Marie Paterson, 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35 Melbourne University Law Review 252 at 259 "the CGL [the Australian Consumer Guarantees Law] is based on the New Zealand Consumer Guarantees Act 1993".

<sup>11</sup> Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

<sup>12</sup> ACL, s 62.

CGA and the CGA at that time contained a guarantee for the reasonable time for the supply of services.<sup>13</sup>

This article explains the development of the delivery of goods guarantee in New Zealand and argues that Australian consumers are not protected to the same extent as their New Zealand counterparts. Therefore the ACL requires amendment by the insertion of a delivery of goods guarantee.

## **The non-protection of consumers under the CGA**

Carriers in New Zealand were excluded from the operation of the CGA by the operation of s 6 of the Carriage of Goods Act 1979. Section 6 provided that:

“Notwithstanding any rule of law to the contrary, no carrier shall be liable as such, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by him except—

- (a) in accordance with the terms of the contract of carriage and the provisions of this Act; or
- (b) where he intentionally causes the loss or damage.”

The Carriage of Goods Act, in keeping with its time, was not a consumer protection statute: instead it sought to protect carriers at the expense of consumers and others engaging their services. For example, while there was no limit to the potential liability of a supplier under the CGA,<sup>14</sup> the Carriage of Goods Act limited the carrier’s liability to \$1,500.<sup>15</sup> To be sure, s 20 permitted consignees to bring an action against the carrier for loss or damage of the goods; however, contracting out of s 20 (and many other sections<sup>16</sup>) was permitted<sup>17</sup> and contracting out was standard practice.<sup>18</sup> Thus the carrier often faced no liability under the Carriage of Goods Act as the consumer was not able to pursue a claim against the carrier.

What of the supplier’s liability under the CGA? If goods were damaged in transit by a carrier, it is arguable that the goods may not have been of an acceptable quality when the consumer received the goods.<sup>19</sup> It is here, however, where the Sale of Goods Act 1908 (SGA) intersects with the CGA. However, before looking at New Zealand’s SGA and the Sale of Goods legislation in Australia the position of consumers under the ACL for loss, delay or damage caused by carriers will be addressed.

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<sup>13</sup> CGA, s 30. Albeit the name of the guarantee under the CGA is “guarantee as to time of completion”.

<sup>14</sup> Consequential loss is also available for a breach of guarantees by suppliers, see CGA, s 18(4) (for goods) and s 32(c) (services).

<sup>15</sup> Carriage of Goods Act 1979, s 15(1). (The limit on a carrier’s liability was raised to \$2000 by the Carriage of Goods Amendment Act 2013, s 4.)

<sup>16</sup> Carriage of Goods Act 1979, ss 10 and 18-27, and see s 7.

<sup>17</sup> Carriage of Goods Act 1979, s 7.

<sup>18</sup> Ministry of Consumer Affairs, *Consumer Law Reform Additional Paper – Carriage of Goods*, February 2011, at [46].

<sup>19</sup> CGA, s 6.

## The Position under the ACL

As discussed in the introduction, when the consumer guarantees from the CGA were transposed into the ACL, the delivery of goods guarantee did not make its way into the ACL because that guarantee did not exist at the time in the CGA. On the other hand, there was no statutory bar in Australia, unlike in New Zealand, on consumers accessing the benefits of the ACL in respect to damage, loss or delivery in the delivery of goods by carriers. However, the liability of carriers under the CGA and the ACL is different because of the definition of supplier in the respective Acts. The definition of supplier is very wide under the CGA. A supplier is defined as *inter alia* meaning a person who in trade “supplies services to an individual consumer or a group of consumers (whether or not the consumer is a party, or the consumers are parties, to a contract with the person)”,<sup>20</sup> thus in New Zealand it did not matter that the contract was between the supplier of the goods and the service provider (albeit the Carriage of Goods Act prevented the consumer from claiming under the CGA against the carrier). In Australia, in contrast, supplier is defined as:<sup>21</sup>

"supply " , when used as a verb, includes:

...

(b) in relation to services--provide, grant or confer;

and, when used as a noun, has a corresponding meaning, and supplied and supplier have corresponding meanings.

The result of the definition of supply under the ACL means that the carrier will not be treated as a supplier as the consumer was not a party to the contract of carriage, unless it was the consumer who engaged the carrier to deliver the goods, which will rarely be the case. Even if an expansive view of supplier was taken and a carrier was deemed to be a supplier, despite the absence of a contract between the consumer and carrier, in practice the and would not accord with the consumer’s expectations that she was entering into a single transaction. Moreover, from a practical standpoint it would be difficult for the consumer to prove who had caused the damage. Were the goods damaged before the carrier picked the goods up from the supplier, or was it the carrier that damaged them? An added complication would arise when more than one carrier company was involved in the delivery. Making the supplier liable is an elegant and economically efficient solution to an otherwise potentially complex situation.

It may be argued, however, that s 36(4) of the ACL arguably makes the supplier liable for the non-delivery of goods:

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<sup>20</sup> CGA, s 2.

<sup>21</sup> ACL, s 2.

“A person who, in trade or commerce, accepts payment or other consideration for goods or services must supply all the goods or services:

(a) within the period specified by or on behalf of the person at or before the time the payment or other consideration was accepted; or

(b) if no period is specified at or before that time--within a reasonable time.”

The history of s 36(4) and its placement within the ACL demonstrates, however, that the section does not appear to impose a guarantee of delivery of goods upon the supplier. Section 36(4) of the ACL replaced the narrower s 58 of the Trade Practices Act 1974 (TPA). Section 58 of the TPA provided that:

“A corporation shall not, in trade or commerce, accept payment or other consideration for goods or services where at the time of the acceptance it intends-

(a) not to supply the goods or services; or

(b) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted.”

In the Explanatory Memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 it was believed that if s 58 of the TPA was kept it would harm Victorian consumers as it would limit their rights to situations where the supplier intended not to supply the goods in contrast to the more extensive protection of consumers in Victoria than under the TPA.<sup>22</sup> For example: the Victorian section<sup>23</sup> had no intent requirement; it covered the failure to supply goods or services within the period specified by the supplier or if no period was specified, within a reasonable time, and it also covered situations where the supply of goods and services were materially different from the goods or services to which the agreement related.

Section 36(4) of the ACL thus imposes strict liability and does not rely on the supplier’s intent.<sup>24</sup> The question, however, is whether that strict liability extends to the supplier being held liable for the actions of third parties, such as carriers, over whom the supplier has no control? The Explanatory Memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 makes no mention of loss caused by third parties. Indeed the examples used are when the supplier had no intention to supply, or in the Victorian case of *Cousins v Merringtons*<sup>25</sup> an optometrist provided proscriptio glasses that were not suitable for the customer despite complaints from the customer that the glasses were unsuitable.

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<sup>22</sup> Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, at [23.450] and [23.467].

<sup>23</sup> Fair Trading Act 1999 (Vic), s 19.

<sup>24</sup> See, for example, Treasury, *An Australian Consumer Law: Fair Markets – Confident Consumers*, February 2009, at 88, where the Victorian section is described as being one of “strict liability”.

<sup>25</sup> [2007] VSC 542.

Moreover, s 36(4) of the ACL lies within Division 1 “False or Misleading Representations” which itself is within Part 3-1 “Unfair Practices” of the ACL. The other sections within that division are: “false or misleading representations about goods or services”;<sup>26</sup> “false or misleading representations about sale etc. of land”;<sup>27</sup> “misleading conduct relating to employment”;<sup>28</sup> “offering rebates, gifts, prizes etc.”;<sup>29</sup> “misleading conduct as to the nature etc. of goods”;<sup>30</sup> “misleading conduct as to the nature etc. of services”;<sup>31</sup> “bait advertising”;<sup>32</sup> “wrongly accepting payment”;<sup>33</sup> “misleading representations about certain business activities.” The position of s 36(4) within the false or misleading representations division suggests that it remains aimed at situations where the supplier has engaged in underhanded tactics.

Even if a court were to take an extreme purposive construction and ignore the positioning of s 36(4) within the unfair practices part of the ACL, and extend liability to suppliers when goods are not delivered or are not delivered in time by errant third party carriers, s 36(4) does not cover damage done to goods during the delivery process.

## **Sale of Goods Legislation**

Section 22 of the New Zealand SGA provides that:

“Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not.”

The question of who bears the risk therefore depends on the time at which the property was transferred to the buyer and the time when the damage occurred. Section 19 of the SGA provides the answer as to the timing of when the property was transferred to the buyer:

“(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.”

While s 19 does not provide a clear answer as to when property is transferred, s 20, rule 1, does provide a rule:

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<sup>26</sup> ACL, s 29.

<sup>27</sup> ACL, s 30.

<sup>28</sup> ACL, s 31.

<sup>29</sup> ACL, s 32.

<sup>30</sup> ACL, s 33.

<sup>31</sup> ACL, s 34.

<sup>32</sup> ACL, s 35.

<sup>33</sup> ACL, s 36.

“Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed.”

The contract is formed before the goods are shipped and as almost all goods that a supplier sells online will be in a deliverable state, the risk in the goods lies with the consumer. Thus the SGA provides that the buyer bears the risk of damage, late or non-delivery of the goods. The one exception relates to those goods that the supplier delivers to the consumer, that is, without using a third party carrier. Section 22 of the SGA provides that nothing in that section affects the duties or liabilities of either the seller or buyer as a bailee of the goods. Thus if the supplier delivered the goods to the consumer, rather than contracting with a carrier to deliver the goods, the supplier would be a bailee and would have to take reasonable care of the goods during transit.

Section 22 of New Zealand’s SGA which provides that unless there is an agreement to the contrary, the risk passes to the buyer whether delivery has occurred is repeated in the sales of goods legislation in all the states with the exception of Victoria.<sup>34</sup> In *Symes v Laurie*<sup>35</sup> the court made it clear that under ss 20 and 21 of Queensland’s Sale of Goods Act 1896 once the contract was concluded the risk of damage passed to the purchaser of the goods.<sup>36</sup> It did not matter whether the seller was the one undertaking the delivery or a third party. Similarly sections 19 and 20, rule 1, are also repeated in state legislation.<sup>37</sup>

Victoria’s slightly more modern sale of goods legislation under the Goods Act 1958 (Vic) provides that:

“Delivery to carrier

- (1) Where in pursuance of a contract of sale the seller is authorized or required to send the goods to

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<sup>34</sup> Sale of Goods Act 1923 (NSW), s 25; Sale of Goods Act 1895 (SA), s20; Sale of Goods Act 1972 (NT), s 25; Sale of Goods Act 1954 (ACT), s 25; Sale of Goods Act 1986 (Tas), s 25; and Sale of Goods Act 1895 (WA), s 20; Sale of Goods Act 1896 (Qld), s 20.

<sup>35</sup> (1985) 2 QD R 547.

<sup>36</sup> See also: Sale of Goods Act 1923 (NSW), ss 22 and 23; Sale of Goods Act 1895 (SA), ss 17 and 18; Sale of Goods Act 1972 (NT), ss 22 and 23; Sale of Goods Act 1954 (ACT), ss 22 and 23; Sale of Goods Act 1986 (Tas), ss 22 and 23; and Sale of Goods Act 1895 (WA), ss 17 and 18.

<sup>37</sup> Sale of Goods Act 1908, s 19 is repeated in Sale of Goods Act 1923 (NSW), s 22, Sale of Goods Act 1895 (SA), s 17; Sale of Goods Act 1972 (NT), s 22; Sale of Goods Act 1954 (ACT), s 22; Sale of Goods Act 1986 (Tas), s 22; Sale of Goods Act 1895 (WA), s 17; Sale of Goods Act 1896 (Qld), s 20. Sale of Goods Act 1908, s 20, rule 1, is repeated in Sale of Goods Act 1923 (NSW), s 23, rule 1; Sale of Goods Act 1895 (SA), s 18, rule 1; Sale of Goods Act 1972 (NT), s 23, rule 1; Sale of Goods Act 1954 (ACT), s 23, rule 1; Sale of Goods Act 1986 (Tas), s 23, rule 1; Sale of Goods Act 1895 (WA), s 18, rule 1; Sale of Goods Act 1896 (Qld), s 21, rule 1.

the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

- (2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.
- (3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so the goods shall be deemed to be at his risk during such sea transit.”<sup>38</sup>

Even with the increased protection of buyers and therefore consumers in Victoria, the Victorian legislation provides specially that the delivery of goods to the carrier is deemed to be the delivery of goods to the buyer.

The ACL is therefore silent upon the rights of consumers against suppliers when a third party carrier has lost, delayed delivery or damaged goods. This being so, notwithstanding the logic that the supplier ought to be liable for ensuring that the goods arrive safely in the hands of the consumer, the state’s sale of goods legislation provide otherwise.

The Ministry of Consumer Affairs in New Zealand, the Ministry responsible for consumer law in New Zealand,<sup>39</sup> was clear that the operation of the SGA meant that a consumer who purchased from a supplier who in turn sent the goods via a carrier would have concluded the contract with the supplier prior to the goods being sent. Therefore it was the consumer that bore the risk of damage, loss or delay in delivery of the goods.<sup>40</sup> The consumer would be reliant on the supplier to pursue the carrier under the contract between the supplier and carrier, although the supplier would be under no legal compulsion to do so.<sup>41</sup> The Ministry of Consumer Affairs was understandably concerned with the law as it stood: “There are no policy reasons why there should not be consumer protections at least as good as the service guarantees under the CGA when carrier services are supplied to consumers.”<sup>42</sup>

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<sup>38</sup> Goods Act 1958 (Vic), s 39.

<sup>39</sup> The Ministry of Consumer affairs is part of the super Ministry of Business, Innovation and Employment (MBIE).

<sup>40</sup> Ibid, at [21].

<sup>41</sup> Ibid.

<sup>42</sup> Ibid, at [23].

Are Australian consumers in a similar vulnerable situation as New Zealand consumers were prior to the introduction of the delivery of guarantee in the CGA? The answer would appear to be yes. Australian consumers were unable to pursue the carrier as they had no contract with the carrier and the risk of damage, loss or delay had, courtesy of the sale of goods legislation, passed from the supplier to the consumer on the formation of the contract between them.

### **The Ministry of Consumer Affairs attempts to protect consumers**

The Ministry of Consumer Affairs, cognisant of the large carve out of liability for carriers under the CGA, recommended changes to the law. The recommendations were:<sup>43</sup>

- a Service guarantees at least as good as these under the CGA should apply for the benefit of consumers when they are supplied carrier services in the same way as the service guarantees apply when other services are provided to consumers.
- b The carrier's liability for loss or damage to goods through the CGA service guarantee should not be restricted by a contract of carriage under the Carriage of Goods Act unless the contract of carriage imposes a stricter liability on the carrier, or provides a more advantageous remedy to the consumer than is otherwise available under the CGA.

In other words, s 7 of the Carriage of Goods Act should specifically not allow for the contracting out of the CGA's obligations except as provided for in s 43 of the CGA.

- c The rights under the CGA of consignees who own the goods being carried and who are consumers should not be affected by contracts of carriage between carriers and consignors under the Carriage of Goods Act.
- d Carriers should be required to offer the limited liability carrier's liability option under the Carriage of Goods Act when they offer carriage services to any consignor.
- e The amount of the carriers' liability under the Carriage of Goods Act should be increased in line with inflation from \$1,500 to \$2,500, and future increases should be able to be made by Order in Council.
- f The Ministry of Consumer Affairs should publicise the value and intention of the limited carrier's liability to provide as much information as possible for consumers, particularly consignees."

The resulting Consumer Law Reform Bill<sup>44</sup> proposed greater protection for consumers. The proposed law was, in truth, a half-way house, as it would not apply the standard law under the CGA to carriers. Under the Bill consumers would be granted some protection under the CGA, but equally carriers were permitted to limit their liability. That is, while the CGA would

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<sup>43</sup> Ministry of Consumer Affairs, above n 18, at 12.

<sup>44</sup> The Consumer Law Reform Bill (287-1) was subsequently split into a number of Bills, which included the Consumer Guarantees Amendment Bill (287-3B).

apply to carriers, the carrier was obliged to offer a term that limited its liability to “carriage at limited carrier’s risk” up to \$2,000 or an agreed value above that amount.<sup>45</sup> On the other hand, greater liability was imposed on the carrier than under the CGA if the consumer chose the limited carrier’s risk. Under the CGA a supplier—which the carrier would be treated as—would be liable only if the consumer was able to show that the carrier failed to carry out the service with reasonable care and skill.<sup>46</sup> Whereas with the limited carrier’s risk the carrier was strictly liable for loss, damage or delay in transit.<sup>47</sup>

Not surprisingly carriers opposed the proposed changes—despite consumer transactions only estimated to amount to one to five percent of the carriage of goods industry.<sup>48</sup> The arguments were numerous. First, insurance costs would rise and were too uncertain: the carrier companies did not know the value of what they were carrying. Second, it was claimed that there were only a tiny number of complaints from consumers so there was no need to change the law.<sup>49</sup> Third, the fault based system under CGA would cause problems determining who caused damage if multiple carriers were used to deliver the goods. Fourth, damage could be caused by poor packaging, in which case the fault lay with the supplier or another third party, not the courier. Fifth, suppliers and consumers should bear the consequences of choosing a lower cost (and lower protection) contract of carriage option.

The arguments were not particularly convincing. The cost of insurance is a red herring: carriers are in a much better position to secure insurance at a lower cost than consumers can obtain individually. The small number of complaints reported by carriers does not indicate that in general there are very few issues with damaged goods or the non-delivery of goods. Indeed, New Zealand’s two largest consumer organisations, the Citizens Advice Bureau and Consumer NZ, identified that they received many enquires and complaints about carriers,<sup>50</sup> with the Citizens Advice Bureau estimating that it received about 600 enquiries a year about carriers.<sup>51</sup> Moreover, the number of people that complain will be a fraction of the number of people who experience problems with the delivery of goods by carriers. The third argument was perhaps the strongest: if more than one carrier carried the goods it would be difficult to determine which carrier damaged or even who lost the goods, but again the carrier’s insurance could deal with such issues.

## **The Ministry’s proposed amendments to the Bill**

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<sup>45</sup> Consumer Law Reform Bill (287-1), cl 62.

<sup>46</sup> Consumer Guarantees Act 1993, s 28.

<sup>47</sup> See Carriage of Goods Act 1979, ss 8, 9, and 15. But note: there are narrow exceptions to strict liability under s 14 including where loss or damage resulted directly and without fault on the carrier’s part from *inter alia* seizure under legal process.

<sup>48</sup> Ministry of Consumer Affairs, *Briefing for Commerce Committee on Consumer Law Reform Bill: Carriage of Goods*, 12 June 2012, Document MED 010, at [5].

<sup>49</sup> *Ibid*, at [13].

<sup>50</sup> *Ibid*, at [12].

<sup>51</sup> *Ibid*, at [12].

In a surprise move, the Ministry, at the request of the then Minister of Consumer Affairs, released a briefing paper to the Select Committee.<sup>52</sup> The Ministry noted that none of the consumer groups dealing with the carriage of goods issues made detailed submissions on this point and it inferred from the silence that the consumer groups did not believe there was a large consumer detriment.<sup>53</sup>

The Ministry, after initially recommending that the carrier be subject to the CGA, decided instead to recommend that the supplier should bear the liability for problems in the delivery of goods by carriers. To make the supplier liable for loss or damage or delay of the delivery of goods the Ministry proposed adding a supplier guarantee that goods would be received when agreed (or otherwise within a reasonable time) and that the acceptable quality guarantee would apply at the point of time when the goods were actually received by the consumer. In addition, the Ministry's proposal was to prevent contracting out of s 20 of the Carriage of Goods Act.<sup>54</sup> Section 20 allowed consignees (such as consumers) to enforce the consignor's rights against carriers if goods were lost or damaged, but that right could be contracted out of under s 7.

## The Select Committee

The Select Committee<sup>55</sup> observed that "[s]ubmitters were concerned, and we agreed, that there would be unintended consequences (including additional costs to consumers) from this change."<sup>56</sup> The Select Committee agreed with the views expressed in the Ministry of Consumer Affairs' briefing paper—although the Select Committee's report made no express mention of the briefing. However, the Select Committee did not recommend that the ability for carriers to contract out of s 20 of the Carriage of Goods Act be changed.

The Select Committee recommended instead that a new guarantee be created. The Select Committee's description of its new guarantee was that:

"a new section 5A of the CGA [be inserted] as a more precisely focused way of increasing protection to consumers. This section would provide a new delivery guarantee, to the effect that when a supplier delivered or arranged delivery of goods to a consumer, the goods would have to be received by the consumer when agreed (or in a reasonable time), and the acceptable quality guarantee in section 6 of the CGA would apply at and from the time when the goods were actually received by the consumer."<sup>57</sup>

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<sup>52</sup> Ministry of Consumer Affairs, above n 29.

<sup>53</sup> *Ibid.*, at [26]. This serves as a lesson of the need to justify in submissions why a proposed change in a bill is necessary.

<sup>54</sup> *Ibid.*, at [34(b)].

<sup>55</sup> Consumer Law Reform Bill (287-2) (Select Committee Report). The Commerce Committee is the actual name of the Select Committee; however, the term "Select Committee" has been used in this article for ease of reference.

<sup>56</sup> *Ibid.*, at 11.

<sup>57</sup> *Ibid.*

The Select Committee therefore ignored the Bill's wording and moved the protection of consumers from the Carriage of Goods Act and the carrier to the CGA and the supplier. Instead of the carrier facing liability for problems with delivery, the Select Committee's recommendation was that the supplier was now liable for the carrier's actions. Parliament subsequently accepted the Select Committee's proposed new guarantee in its entirety and introduced s 5(A) a "[g]uarantee as to delivery" into the CGA:

"(1) Where a supplier is responsible for delivering, or for arranging for the delivery of, goods to a consumer there is a guarantee that the goods will be received by the consumer—

(a) at a time, or within a period, agreed between the supplier and the consumer; or

(b) if no time or period has been agreed, within a reasonable time.

(2) Where the delivery of the goods fails to comply with the guarantee under this section, Part 2 gives the consumer a right of redress against the supplier and, in that case, the consumer may,—

(a) if the failure is of a substantial character, reject the goods under section 18(3);

and

(b) in any case, obtain damages under section 18(4) (other than damages relating to the remedies set out in section 18(2)), whether or not the consumer also rejects the goods.

(3) For the purposes of this section, the reference in section 20(1)(b) to an agent of the supplier must be treated as including any carrier or other person who undertakes to deliver the goods on behalf of the supplier."<sup>58</sup>

There was, however, no mention of acceptable quality in the delivery guarantee. The delivery dealt only with the timing of delivery, not with issues surrounding damage suffered during delivery. Curiously the Select Committee chose not to deal with damage en route in the "guarantee as to delivery" or in s 6 which deals with acceptable quality, rather it added the following to the interpretation section: "a guarantee under s 6 applies to the goods delivered to the consumer on and from the time at which the consumer receives the goods."<sup>59</sup> The result is that the supplier cannot blame the carrier and is liable for damage caused to goods if the goods no longer met the acceptable quality guarantee or for the late or non-delivery of goods.

It is difficult to justify on a theoretical basis why carriers should be the one service industry exempt from the operation of the CGA. However, the shift to making the supplier liable is rational and pragmatic. From the consumer's viewpoint, the consumer believes she is entering into a contract with the supplier for the supply of goods. If the goods are damaged,

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<sup>58</sup> Consumer Guarantees Amendment Act 2013, s 7.

<sup>59</sup> CGA, s 2(3).

the consumer is often not able to prove who caused the damage. Even if it can be proved that the carrier caused the damage, the consumer should not have to pursue a separate party to what is after all in the consumer's mind, a single transaction. The supplier has the contractual relationship with the carrier and can therefore sue the carrier. In addition, the supplier will be able to obtain cheaper insurance than the consumer to cover the supplier for damage or loss caused by carriers. Moreover, and often practically more importantly, the supplier has the ability and the incentive to change carrier if that carrier damages, loses or delivers late too many of its deliveries.

## **The Australian Position in practice**

The Australian position in practice on the liability of loss, damage or delay in the delivery of goods is far from clear. NSW Fair Trading under the heading "Who is responsible for undelivered goods or damage in transit?" provides that:<sup>60</sup>

"Read the delivery terms and conditions before you buy from an online seller. That information usually explains how such issues are handled and who is responsible if goods are not delivered or get damaged in transit. If you are not sure whether insurance is included in the cost of the goods or the shipping charges, email the seller about this before buying the goods."

"While completing a sale, you might sometimes be given a choice of delivery options and even asked if you want to insure your goods at extra cost."

From the above statement it appears that NSW Fair Trading believes that the liability of the carrier and supplier is determined by the contract between the parties. The Postal Industry Ombudsman also appears to be of the opinion that the supplier is not ordinarily looked to if goods are damaged by carriers in transit:<sup>61</sup>

"If you are sending mail, or having something sent to you, refer to the terms and conditions and any packaging guidelines the operator may have. The terms and conditions may provide information about compensation for damage and any exclusions from liability. Packaging guidelines have been developed based on experience in handling mail items and take into account handling practices at all stages of transport, processing and delivery."

In contrast, Consumer Affairs Victoria is clear that damage to goods is the supplier's responsibility:<sup>62</sup>

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<sup>60</sup> NEW Fair Trading, 'Online Shopping' at <[http://www.fairtrading.nsw.gov.au/ftw/Consumers/Ways\\_to\\_shop/ Online\\_shopping.page](http://www.fairtrading.nsw.gov.au/ftw/Consumers/Ways_to_shop/Online_shopping.page)> (accessed 19 January 2016).

<sup>61</sup> Postal Industry Ombudsman, 'Damaged Mail' <<http://www.pio.gov.au/making-a-complaint/common-complaints/damaged-mail.php>> (accessed 19 January 2016).

<sup>62</sup> Consumer Affairs Victoria, 'Items missing or damaged in transit' <<https://www.consumer.vic.gov.au/shopping/refunds-and-returns/problems-with-a-product/items-missing-or-damaged-in-transit>> (accessed 19 January 2016).

“If an item you ordered arrives damaged, it may not meet the ‘consumer guarantee’ of acceptable quality. To meet this guarantee, it must be:

fit for the purpose for which it is commonly supplied

safe, durable and free from defects

acceptable in appearance and finish.”

Note: the store or seller is responsible for resolving any issues with Australia Post or a courier company used to deliver your item.”

Not surprisingly, the contracts used by individual suppliers vary. As extracts from the following suppliers’ contracts demonstrate, it is common for suppliers to attempt to exclude liability for loss or damage of goods in transit:

“7.2 Where the Purchaser has requested delivery by Australia Post, the purchaser accepts all liability for loss or damage in transit.

7.3 Where the Purchaser has requested delivery by TNT, the purchaser accepts all liability for loss or damage in transit.

Once items have been shipped, they become the property and responsibility of the purchaser. If a product arrives damaged, or is misplaced, it is the purchaser’s responsibility to liaise with Australia Post. No refunds or replacements will be given for products missing or damaged in transit. We will however provide you with all the necessary information to make your claim.

Pinnacle Runway is not responsible for goods that are either damaged in transit or not received. Damaged or lost orders should be resolved with Australia Post or the courier company directly. Replacement of damaged or lost items is made at the discretion of Pinnacle Runway.”<sup>63</sup>

“Goods damaged in transit is a risk to the customer and Giant Cannington can not be held responsible for goods damaged by others after it has left our premises as it is the customer who is requesting the delivery service.”<sup>64</sup>

“www.freddystore.com.au uses Australia Post to deliver physical goods. www.freddystore.com.au is not responsible for goods that are either damaged in transit or not received. Damaged or lost orders should be resolved with Australia Post. Replacement of damaged or lost items is made at the discretion of www.freddystore.com.au.”<sup>65</sup>

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<sup>63</sup> Pinnacle Runway, ‘Delivery and Refund’, <<http://pinnaclerunway.com/delivery-refund>> (accessed 4 August 2015).

<sup>64</sup> Giant Carrington, ‘Terms and Conditions’, <<http://www.giantcannington.com.au/terms-and-conditions.asp>> (accessed 19 January 2016).

<sup>65</sup> Comfyballs, ‘Terms and Conditions’, <<http://comfyballs.com.au/pages/terms-conditions>> accessed 19 January 2016.

However, not all suppliers attempt to contract out of liability, Dan Murphy's contract provides that:

"If in the event your purchase is faulty, damaged, wrongly described or breaches a consumer guarantee we will cheerfully refund your money or exchange the product upon presentation of your proof of purchase. If your purchase incurred a delivery fee, then we will cover the cost of delivery for the return if Dan Murphy's is at fault. That is, if the wrong product is delivered, there is a fault with the product (including any damage caused in transit) or Dan Murphy's has breached a consumer guarantee..."<sup>66</sup>

## Conclusion

The CGA granted New Zealand consumers a number of guarantees, so compelling and elegant were those guarantees that they were incorporated into the ACL. The CGA, as originally enacted; however, did not provide a guarantee of delivery, indeed, carriers were excluded from liability under the CGA. Moreover, the SGA meant that the risk in the goods passed from the supplier to the consumer once the contract had been formed. The combination of the exclusion of carrier's liability under the CGA and the effect of the SGA resulted in New Zealand consumers having little recourse if they purchased goods from a supplier and the goods were lost, delayed or damaged during transit. With consumers increasingly purchasing goods online, the gap in the law, which the Ministry of Consumer Affairs was gravely concerned about, was remedied by the introduction of the guarantee of delivery of goods into the CGA which made the supplier bear the responsibility for delay or non-delivery of goods. In addition, the CGA was also amended so that the supplier was liable if the goods were damaged during delivery. While the placement of liability on the supplier for the actions of a carrier may at first glance appear unfair on the supplier, the change furthers the goal of consumer protection: the supplier is in a stronger position to protect itself than the consumer.

The rights of a consumer in Australia who has purchased goods online and the goods are damaged, delayed or lost during delivery by a carrier is the subject of differing opinions in Australia. For example, state consumer protection agencies have different views on the liability of suppliers under the ACL, with some believing that the supplier is liable for loss, damage or delay caused by carriers, others of the opinion that the supplier is not responsible for the actions of carriers. What is clear is that the ACL, unlike the CGA in New Zealand, contains no express delivery of goods guarantee. In addition, the states' sale of goods legislation mirrors the SGA in New Zealand and are clear that the property in goods and thus the risk of damage or loss passes from the supplier to the consumer once the contract between supplier and consumer is formed. Moreover, unlike the CGA, which provides that a person in trade who does not have a contract with a consumer and supplies

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<sup>66</sup> Dan Murphy's, 'Returns and Refunds', <<https://www.danmurphys.com.au/help/returns-and-refunds-content.jsp;jsessionid=42B85A8A7FFFA1C152BD63477EC93832.ncdlmorasp1301?bmUID=I5zKHvq>> (accessed 19 January 2016).

services to the consumer is deemed to be supplier, the definition of supplier in the ACL does not extend expressly to a service provider who does not have a contract with the consumer. Even if an expansive view of supplier is taken and carriers are found to be suppliers despite the lack of a contract between the two, consumers will find it difficult to prove whether it was the supplier that damaged the goods or the carrier. To be confident that Australian consumers have the same level of protection both in theory and practice in relation to the delivery of goods as their New Zealand cousins, the ACL requires amendment and a delivery of goods guarantee should be introduced.