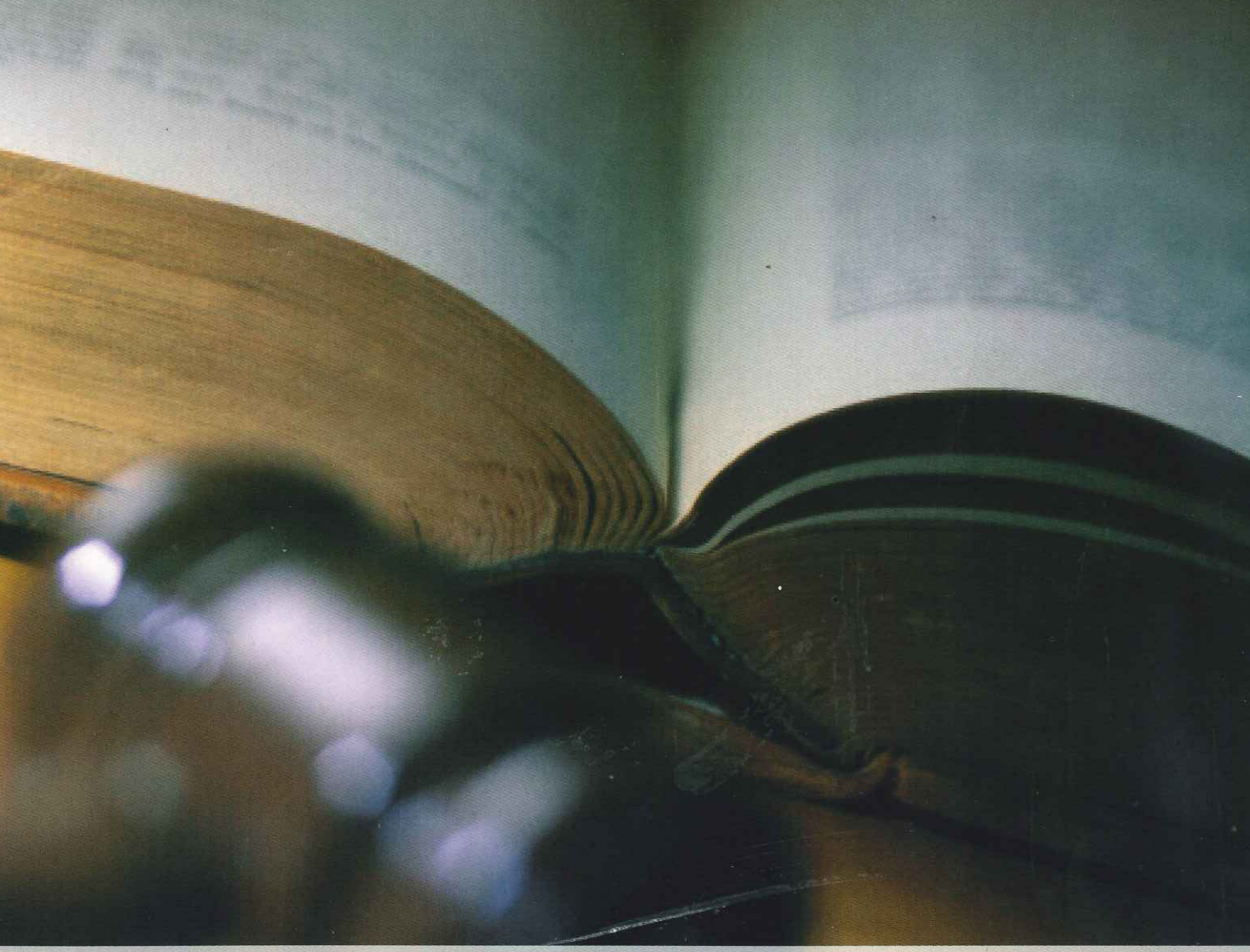

REVIEW OF THE CONSUMER PROTECTION ACT 1999

FOMCA

FEDERATION OF MALAYSIAN CONSUMERS ASSOCIATIONS

Review of
THE CONSUMER PROTECTION ACT 1999

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PREFACE

Malaysia is rapidly industrializing towards achieving a developed country status by the year 2020. As such there is increased emphasis on economic matters and on industralisation which is expected to facilitate the country's move to a developed country status. In the rush towards achieving a developed country status one should not forget that it is consumers confidence which will ultimately create demand and, which in turn will oil the wheels of industry. However, consumers have to be protected from the excesses of industry and business.

Malaysia enacted the Consumer Protection Act 1999 rather late compared to some of its neighbours in the Asian region. The Consumer Protection Act of Thailand was enacted in 1979; Philippines in 1990; India in 1986 and Indonesia in 1999. The promulgation of this Act was a major achievement for the consumer movement in Malaysia, which had been advocating such a legislation for nearly two decades.

The Consumer Protection Act 1999 of Malaysia which is now nearly seven years old, as of November 2006. Although slated for amendment in 2000, it was only in 2006 that the government decided to review the Act to remedy perceived weakness and loopholes. Towards this objective, the Ministry of Domestic Trade and Consumer Affairs provided the Federation of Malaysian Consumer Associations (FOMCA) with a grant to undertake the review. We are grateful for the confidence placed on FOMCA.

To undertake this rather onerous task, FOMCA assembled a team of experts comprising academicians and consultants experienced in consumer matters and consumer law. Their review of the Act is however academic in nature since there is no case law as yet on the Act. However, by referring to similar legislation in various countries, they have been able to identify areas in the Act which needed to be amended and improved upon in order to serve better the interests of Malaysian consumers.

We hope this review by FOMCA of the Consumer Protection Act 1999 will provide the impetus for the review and updating of other consumer related legislation under the purview of the Ministry of Domestic Trade and Consumer Affairs. In this way, consumer related legislation can be kept up to date and relevant to the needs of Malaysian consumers.

Datuk Marimuthu Nadason
President
Federation of Malaysian Consumers Associations

ACKNOWLEDGEMENTS

The Federation of Malaysian Consumer Associations (FOMCA) is grateful to the review team for their effort in carrying out the review of the Consumer Protection Act 1999 and its regulations in a coordinated and timely manner. This review would not have been possible without their commitment to the project and the time spent on researching and their written contributions. We would like to thank each member of the review team. The background of each team member is briefly stated below.

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LAWS REFERRED

Civil Code 2002 (Germany)

Civil Law Act 1956 (Malaysia).

Consumer Act 1990 (Philippines)

Consumer Contracts Regulations 1994 (United Kingdom)

Consumer Goods Safety Ordinance 1896 (Hong Kong)

Consumer Guarantees Act 1993 (New Zealand).

Consumer Protection Act 1979 (Thailand)

Consumer Protection Act 1986 (India)

Consumer Protection Act 1987 (United Kingdom)

Consumer Protection Act 1996 (Statutes of Saskatchewan)

Consumer Protection Act 1999 (Indonesia)

Consumer Protection Act 1999 (Malaysia)

Consumer Protection Act UK (Product liability) (Modification) Order 2000

Direct Sales Act 1993 (Malaysia)

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (1999) O.J. L171/12, 7 July 1999

European Council Directive 1985

European Council Directive on Product Liability 1985

Fair Trading Act 1986 (New Zealand)

Hire Purchase Act 1967 (Malaysia)

Law of The People's Republic of China On The Protection of Consumer Rights and Interests

Motor Vehicle Repair Act 1990 (Canada)

Motor Vehicle Service and Repair Industry Code of Practice of Australia

Product Liability Act 1994 (Japan)

Sale of Goods Act 1957 (Malaysia)

Sale of Goods Act 1979 (United Kingdom)

Supply of Goods and Services Act 1982 (United Kingdom)

Trade Practices Act 1974 (Australia)

Vehicle Builders and Repairers Association (VBRA) Consumer Code of Practice of United Kingdom

INTRODUCTION

The Consumer Protection Act 1999 (CPA) came into force on 15th November 1999 after a protracted twenty year struggle by the consumer movement, beginning in the seventies to get the government to introduce a comprehensive law to protect consumers. The law was also to provide for a redress mechanism, which would be consumer friendly and capable of handling consumer claims in a speedy manner. When the then Minister of Domestic Trade and Consumer Affairs presented the Consumer Bill in Parliament in July 1999, members of Parliament from both sides pointed out various shortcomings in the Bill and the need to carry out amendments in order to provide better protection for consumers.

The Minister promised that amendments would be done from time to time. A short time later, his Deputy Minister put a definite timetable for amendments, saying that the Act would be reviewed one year after implementation. However, seven years were to pass before the Ministry of Domestic Trade and Consumer Affairs decided to look into amendments to the Act. In 2006 The Federation of Malaysian Consumer Associations (FOMCA) was provided with a grant to carry out a review of the CPA.

The main complaints against the CPA were that it became 'supplementary' in nature to other legislation and contradicted some of their provisions. Important areas of consumer protection were left out of the Act such as medical and health services; housing; services provided by professionals governed by other legislation and electronic commerce. Other important areas for the CPA originally suggested by the consumer movement were also deleted at a later stage.These concerned unfair contract terms and consumer credit.

On July 26th 2005, the Ministry of Domestic Trade and Consumer Affairs celebrated Malaysian Consumer Day and launched the 'Smart Consumer Campaign', with two main objectives namely;

(a) to reduce consumers anxiety with regard to the anticipated increase in prices of goods by unscrupulous traders following a fuel price increase

(b) to ensure that consumers have a choice when making purchases of their daily goods and services, and to provide consumers with the choice to shun traders who sell at unreasonable prices.
The Smart Consumer Campaign is rightly focused at hypermarkets nationwide since they can offer their goods at lower prices because they purchase their stocks in volumes at lower cost. This represents a vital strategy by the Ministry to enable consumers to be aware of their rights and options and at the same time, empower them to be a smart and strong community of consumers.

One of the strategies in the National Consumer Policy which will drive the Smart Consumer Campaign to empower consumers is through enacting new consumer protection legislation and more importantly by reviewing existing laws with a view to upgrading consumer protection provisions and to impose civil and criminal penalties on recalcitrant traders.

With this in mind The Federation of Malaysian Consumers Associations (FOMCA) volunteered itself to conduct a holistic study of the CPA and to carry out a review of the said Act on behalf of the Ministry, in view of the time and human resource constraints imposed on the Ministry by its numerous consumer oriented programs. In anticipation of this task, FOMCA has taken initial steps to assemble a team of specialist experienced in consumerism and consumer law to undertake this difficult task.

The members of this team are highly qualified and capable of carrying out their task to the expectation of the Ministry whilst FOMCA will provide the coordination and management input.

The team had their first meeting on 16th November 2006 and continued having their meetings every fortnightly until they submitted their final report. Each team member was assigned a respective areas of review based on the individuals interest and expertise. The team then studied the current law and compared it with other similar legislations from various countries. In doing so, they were required to identify grey areas in the current CPA and give their suggestions and views based on their research, to further strengthen the CPA. The committee made references to more than 20 Consumer laws from more than 13 countries before making their final recommendations. The end result of this meticulous review was this final report. FOMCA sincerely hopes that the Minister will give a favorable consideration of our proposal and we urge the Ministry to make a speedy adoption of the points raised, as part of efforts to achieve the objectives of this project and of the Smart Consumer Campaign.

EXECUTIVE SUMMARY

REVIEW OF THE CONSUMER PROTECTION ACT 1999 AND IT'S REGULATIONS

1. Introduction

The enacting of the Consumer Protection Act 1999 (CPA) by the Ministry of Domestic Trade and Consumer Affairs was the highest achievement for the consumer movement in the country. The CPA however is deficient in certain areas and as such a review is due given the fact that a review was scheduled one year after its implementation.

In 2006, the Federation of Malaysian Consumers Associations (FOMCA) was given the task of carrying the review of the CPA. In anticipation of this, FOMCA assembled a team of specialists comprising consultants and academicians from local universities, experienced in consumerism and consumer law to undertake this task. The objectives of this review were (a) to conduct a holistic evaluation of the Consumer Protection Act 1999 and it's regulations so as to identify its weakness and (b) to make recommendations to overcome such weaknesses.

2. Review of the law

2.1 Part I: Preliminary

The CPA enhances the current consumer protection laws by creating new rights against suppliers and manufacturers in many aspects. Although the CPA's main objective is the protection of consumers, it is not free from ambiguities and uncertainties. Two important amendments proposed for Part I of the CPA relate to the status of the Act and the interpretation of certain words. The CPA in its application is supplementary in nature and without prejudice to any other law regulating contractual relations. This hinders the effectiveness of the Act in providing protection to consumers. It is thus proposed that the CPA be given the prevailing effect in matters of conflict with other legislation.

Application of the Consumer Protection Act 1999 (CPA) as set out in Part I of the Act seriously limits protection for consumers by excluding many important areas of consumer transactions. These are in relation to land or interests in land; services provided by professionals regulated by any written law; healthcare services and trade transactions effected by electronic means. Electronic transactions carried out by traders under the Direct Selling Act also need to be amended. As such, all these exclusions need to be reviewed to determine whether consumers are adequately protected by the CPA.

2.2 Interpretation

(a) It is important that the definition of 'goods' given in S.3 be widened and not limited to goods primarily purchased, used or consumed for personal, domestic or household purposes only. The types of goods listed should also be rearranged to avoid confusion and misinterpretation.

(b) The definition of services in S.3 excludes services provided in the form of supply of goods. It causes a problem in distinguishing between the two in situations that involve both. Hence, the definition of service should be amended to include the performance of work with or without

the supply of goods. As it covers both parts, consumers are more protected and suppliers are not able to escape from liabilitiy.

(c) The word 'healthcare professionals' used in S.3 has to be clearly defined to identify which professionals are meant. This is because they are many groups in the field of healthcare. Which groups in the wide area of healthcare are meant by this word?

(d) Definition of 'consumer' should be widened in keeping with the definition of goods as proposed in (a).

2.3 Part II : Misleading and Deceptive Conduct, False Representation and Unfair Practice

The CPA 1999 has to be in line with the changing needs of consumers who have become more aware of their rights. The CPA may confer rights but one needs to contemplate how difficult it might be to exercise them. In this respect, the definition of certain basic concepts is truly essential.

Certain constraints and limitations imposed by the language of the CPA needs to be addressed. The lack of a precise definition causes difficulty in regulating good consumer practice. It is expected that these changes would broaden the scope and reach of the CPA.

Emphasis is placed on the 'quality' of goods and services in respect of s.9 of the CPA. Further, there is a proposal to incorporate the concept of 'unfairness' in s. 10 of the CPA. This reflects the need for commitment to eliminate unfairness through legislative control. The proposal for 'misleading conduct' to be extended to the area of employment, for example, to protect those seeking employment by prohibiting practices on the ground of inequality of bargaining power. A specific framework to govern the evaluation of advertising is sought to be introduced through the setting up of a committee on advertisements.

All of the above proposed amendments are vital to ensure a better balance between the interests of consumers and vendors. The proposals submitted herein need to be considered as essential prerequisites for effective consumer protection

2.4 Part III : Safety of Goods and Services

The Consumer Protection Act 1999 is the first of legislations that provides special emphasis for the safety of goods and services previously not provided for by any legislation. It provides a legal basis for monitoring goods and services by the government. As far goods are concerned, the monitoring is done through two aspects:

1. Prescribing safety standards by the Ministry of Domestic Trade and Consumer Affairs.

2. Declaring unsafe goods as prohibited items.

The Act also imposes a general safety requirement duty on suppliers whereby only goods which are reasonably safe can be supplied to consumers. Nevertheless, the application of Part III which excludes healthcare goods and food is one of the weaknesses of the Act. The weaknesses of the Act can also be seen in that it does not impose a duty on a manufacturer to monitor goods, report serious defects of goods and recall of goods. Besides that, Part III does not give equal treatment to services. Part III gives more emphasis on goods. The Ministry can only monitor services if safety standards are prescribed. The Ministry is further not given the power to declare unsafe services as prohibited

services. There are also no regulations to enforce this part of the CPA.

2.5 Part V : Guarantees in respect of supply of goods; Part VI: Rights against suppliers in respect of guarantees in the supply of goods; PartVII: Rights against manufacturers in respect of guarantees in the supply of goods.

Parts V, VI and VII of the Consumer Protection Act 1999 provide for additional consumer protection in respect of supply of goods. The Act reproduces significantly Parts I, II and III of the New Zealand Guarantees Act 1993. The Act has a significant impact on both consumers and traders, regardless of suppliers or manufacturers. For consumers, Part V, VI and VII creates new rights against suppliers and manufacturers. Part V provides eight implied guarantees in the supply of goods to consumers. Failure in respect of these guarantees, except for the implied guarantee as to price, gives rise to a right of redress in Part VI against suppliers. The remedial scheme contained in Part VI is significantly different from the remedies contained in other laws governing contractual relations in Malaysia. The uniqueness of the Act lies in the rights given to consumers against manufacturers in respect of guarantees in the supply of goods. A consumer now has a right of redress against a manufacturer where goods fail to comply with certain implied guarantees irrespective of the existence of a contract between the two.

Nevertheless, the Act has its own flaws which call for a review. In respect of supply of goods, the definition of goods as provided under the Act is very narrow as compared to the definition of goods in other legislations here and abroad. The protection contained in Part V as regards to the right to sell and the implied guarantee as to an acceptable quality has to be revised for a new definition and a standard of quality appropriate to the consumer needs and interests. The right of redress for failure on the part of the supplier to comply with the implied guarantee as to price also calls for a review. Rights of the consumers in respect of repairs and spare parts should be enhanced. Certain provisions in Part VI as well as in Part VII should be deleted as they are likely to deprive consumers of their rights under the Act. The remedial scheme in Part VI should be replaced as it provides for lesser protection to the consumers in respect of supply of goods.

2.6 Part VIII: Guarantees in respect of supply of services; Part IX: Rights against suppliers in respect of guarantees in the supply of services.

Part VIII of the CPA provides for implied guarantees that need to be observed by service providers. However, there are several loopholes in these guarantees, especially with the problems of interpretation. The proposed reforms, among others, is to shift the burden of proof to the service providers and to widen the interpretation of the words 'make known' to include 'impliedly make known'.

Part IX of the CPA provides remedies in situations where suppliers fail to observe the guarantees listed in Part VIII. However, the remedies provided are not adequate to compensate consumers. Among the suggested ammendments is that the convenience of a consumer should be taken into consideration and to widen the scope of the term 'substantial character' to allow the consumer a better opportunity to cancel the contract. It is also proposed that the Act should give additional powers to the court to enforce remedies to correct any defects.

2.7 Part X : Product Liability

Part X of the CPA introduces a system of strict liability in respect of death, personal injury and damage to property caused by defective products. It is aimed at improving the substantive position of victims of defective products, beyond that already provided under common law. However, being a statutory scheme, Part X is not free from ambiguity and interpretation difficulties. Thus, there are certain aspects of Part X that need to be reviewed to minimize the ambiguities and uncertainties. The proposed reform for Part X focuses on amendments to the provisions on the strict liability rule, namely, 'products', 'producers', 'defect' and the development risk defence. Another important proposal is for the inclusion of unprocessed agricultural products into the scheme. Other provisions of Part X are also proposed to be amended or deleted due to their unclear meanings or overlapping with the general provisions of the CPA.

2.8 Part XI : The National Consumer Advisory Council

A few observations concern the National Consumers Advisory Council comprising 16 members appointed by the Minister to advise on consumer matters. Firstly, the number of consumer representatives appointed to the council is small and as such may be out-voted by a combined membership of other groups appointed to the council. Secondly, the consumer group is not mentioned in the enabling provision as a specific group to be appointed to the council. Thirdly, the Chairman of the council is sometimes appointed from the trade sector although this is a council for consumer interests. Fourthly one third of council members should be women. Finally, the council is less effective due to the absence of a dedicated secretariat, as provided for in the law.

2.9 Part XII : The Tribunal for Consumer Claims

To serve consumers better, a sufficient number of tribunals should be established at the Federal, State and District levels. Retired legal personnel should be utilized to conduct tribunal hearings. To reduce cost, new tribunals should be located strategically for consumer convenience, within the branch offices of the ministry and staff of the Consumer Affairs Units can be stationed at locations where only a few cases are filed.

To increase consumer accessibility, sittings of the tribunal should be held in the evenings and during weekends. Rural people who may be deterred from lodging claims due to ignorance and illiteracy can be helped by allowing consumer organisations to lodge claims on their behalf and represent them at tribunal hearings.

The time limit of three years provided for in the CPA when filing a claim should be similar to the time limit set out in the Statute of Limitation which provides a time limit of six years in filing contract and tort claims. The Ministry should also introduce 'class action' as part of the Consumer Protection Act, as it represents a credible and innovative mechanism to protect consumer rights. To effectively implement Part II and III of the CPA, mechanisms, procedures and regulations need to be drawn up.

3. Consumer Protection Act 1999, Consumer Protection Regulations, the Motor Vehicle Repair and Maintenance (Workshops Information Disclosure) Regulations 2002

The Motor Vehicle Repair and Maintenance (Workshops Information Disclosure) Regulations 2002 imposes liabilities on the operators of garages to disclose important information to consumers. However, some important terms are not clearly defined. The lists in the written statement are not

conclusive to cover all important information in order to avoid any dispute later on and to provide as much information as possible to consumers before they make any decision. In order to provide more comprehensive regulations on motor vehicle repairs, additional regulations on the following are suggested: (1) obtaining a consumers' authorization before any repair is carried out, (2) providing remedies to consumers in the situation where the repairers fail to give an estimated cost or charge more than what has been estimated. (3) Notifying consumers in any case of diagnosis.

4. Proposed New Regulation for Motor Vehicle Repairs Industry

The CPA and its regulations on motor workshops to disclose information to clients are insufficient to provide maximum protection to consumers in the motor vehicle service and repair industry. A more comprehensive regulation is needed for this purpose. Among the suggestions that need to be included in the proposed regulation are; business licensing requirements, certifications for trade people, disciplinary proceedings, administration of the regulation, dispute resolution and the penalties. Hopefully, the regulation will improve the competency of motor vehicle repairers and solve consumer problems related to motor-vehicle repairs.

5. New Part Proposed for the Consumer Protection Act

Unfair Contract Terms

The Doctrine of Freedom to Contract is unfair to consumers as it implies that the contracting parties are able to negotiate on an equal ground, have equal bargaining power and are equally able to look after their own interests with a full understanding of the consequences of their actions and the terms of the contract. In reality, the consumer is always in a weaker position expecially in the case of standard written contracts where standard terms used by the trader are favourable to him and it imposes terms on the consumer who is left with the choice of accepting or rejecting.

The CPA does not contain any provisions on *unfair contract terms* for consumer protection. Nor does any other statutes such as the Contracts Act 1950 provide for unfair contract terms. The law on this area is based on common law principles, which emphasizes on the doctrine of freedom to contract as stated above. To protect inexperienced consumers against abuse, other countries such as the United Kingdom, United States, Australia, Canada, Philippines, Thailand and other countries have enacted laws specifically to protect consumers against unfair contract terms. Malaysia should also enact suitable provisions to protect consumers.Thus, the Consumer Protection Act 1999 should be amended to protect consumers from unfair contract terms.

6. Review of Implementation of the Consumer Protection Act

6.1 Prosecution in Court

Although it has been more than seven years since the Act came into force, very few cases have been prosecuted in court. In fact, no such case has been reported in the media. Prosecutions in court are essential for the law to develop. However, the mode preferred seems to be 'compounding offences'. It is important to identify factors which prevent the Enforcement Division of the Ministry from bringing more prosecutions in court. One solution would be to establish a 'prosecutions unit' in the ministry since it is responsible for enforcing numerous laws under the Ministry.

6.2 Tribunal for Consumer Claims

The Tribunal remains the most active entity of the CPA. Although it hears approximately 5,000 claims a year, the Tribunal however faces problems which have been highlighted in the media. These should be overcome through monitoring implemention, evaluating problems and suggesting solutions. The Ministry's research unit should perform these functions and report to the management.

6.3 Research and Monitoring of the Act

Research and monitoring for each Act must lie with the division concerned, at the Ministry. Once this is determined, it will mean that the functions of monitoring, evaluation and amendment must be carried out regularly. It would be difficult to gauge the effectiveness of the CPA and the need for amendments and the functioning of the tribunal unless research is carried out periodically to determine various facets of it's implementation. It is proposed that regular research be carried out on the CPA and its regulations since it is the main avenue for consumer redress. A dedicated 'research unit' should also be established in the Ministry to research all laws under its purview.

6.4 Inter-Agency Committee on Advertisements

Section II sets out deceptive conduct, false representation and unfair conduct on the part of traders that can result in punitive action involving fines and jail terms. Advertisements remain one of the main forms of exploitations against consumers. There are many agencies involved in the supervision of advertisement contents in their specific areas of responsibility. However, only the MDTCA have an overall reponsibility in this respect. To adequately address the problem of consumers being cheated through deceptive advertisements, an implementation framework should be in place. As such, an inter-agency committee on advertisements should be an initial step for coordinated action in protecting consumers.

6.5 Safety of Goods and Services

Safety of goods and services is enforceable under Part III of the Act and carries punitive fines and jail sentences. However, a large chunk of consumer goods are excluded from the purview of the MDTCA since both food and agricultural produce come under the Ministry of Health and the Ministry of Agricultural Based Industry respectively. Setting standards for consumer goods is a difficult process to be undertaken in view of the number of goods in the market. There is also a need to develop regulations dealing with the procedures to be adopted by the private sector where recall of unsafe goods is necessary. Coordination with other enforcement agencies need to be planned where these agencies are required to inspect and restrict goods declared unsafe.

6.6 State and District Consumer Affairs Councils

The opportunity to review provisions of the CPA should be used to regularize the structure, financing and functioning of the state and district consumer affairs councils. These councils should be streamlined in terms of planning of activities, evaluation of programmes and reporting to the Ministry. Logically, these councils should play a supportive role in the deliberations of the National Consumers Advisory Council (NCAC). These councils should be made more effective in terms of promoting consumer awareness, education and activities at the state level. Strategic changes should be made at the leadership level.

THE CONSUMER PROTECTION ACT 1999

PART I

PRELIMINARY

1.0 PART I : PRELIMINARY

1.1 Application

1.1.1 Provisions in Section 2

2(1) Subject to subsection (2), this Act shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade.

(2) This Act shall not apply -

(a) to securities as defined in the Securities Industry Act 1983 [*Act 280*];

(b) to futures contracts as defined in the Futures Industry Act 1993 [*Act 499*];

(c) to contracts made before the date on which this Act comes into operation;

(d) in relation to land or interests in land except as may be expressly provided in this Act;

(e) to services provided by professionals who are regulated by any written law;

(f) to healthcare services provided or to be provided by healthcare professionals or healthcare facilities; and

(g) to any trade transactions effected by electronic means unless otherwise prescribed by the Minister.

(3) Notwithstanding subsections (1) and (2), this Act shall apply to any matter prescribed under section 103.

(4) The application of this Act shall be *supplemental* in nature and without prejudice to any other law regulating contractual relations.

1.1.2 Comments on provisions in the law

Section 2 (2) of the Consumer Protection Act 1999 (CPA) excludes application of this Act to land or interests in land; services provided by professionals who are regulated by any written law; healthcare services or healthcare facilities and consumer purchases through electronic means. A significant number of goods and services are therefore exempted and consumers have no protection when they purchase such goods and services. In view of the rapid growth in online sales of goods and services, exemption of electronic transactions from the CPA leaves many consumers vulnerable to unethical practices in such transactions.

1.1.3 Comparison with other legislation

i. <u>Chapter 1 General Provisions Law No. 8 Year 1999 Law Concerning Consumer Protection (Indonesia)</u>

Article 4: Goods shall be any object either tangible or intangible, either movable or immovable, consumable or not consumable, tradable, which can be used, utilised or exploited by consumers.

Article 5: Service shall be any service in the form of work or performance provided for the society for consumers' use.

ii. Section 3: Consumer Protection Act 1979 (Thailand)

"goods" means articles produced or possessed for sale;

"service" means an undertaking to accomplish a work; grant of any right or permission to use or conferring benefit in any property or business, for which monetary consideration or other value is demanded, excluding hire of services under the labour laws.

iii. Chapter 1 (4) Consumer Protection Act 1986 (India)

Save as otherwise expressly provided by the Central Government by notification, this Act shall apply to all goods and services.

PROPOSAL

2(2) To delete the following:

(d) in relation to land or interests in land except as may be expressly provided in this Act;

(e) to services provided by professionals who are regulated by any written law;

(f) to healthcare services provided or to be provided by healthcare professionals or healthcare facilities; and

(g) to any trade transactions effected by electronic means unless otherwise prescribed by the Minister.

1.1.4 Justification

i. The CPA exempts important classes of consumer goods and services from the jurisdiction of the law. These are namely land or interests in land; healthcare services by professionals and healthcare facilities; services of professionals regulated by any written law and any trade transactions effected through electronic means.

ii. Consumers need to be protected in purchases of all goods and services. Therefore the CPA should apply to all goods and services purchased by consumers. This is evident in the consumer protection legislation of Indonesia, Thailand and India illustrated above. It is also the practice in many other countries having consumer protection legislation. Exempting significant categories of goods and services will only reduce protection afforded to consumers.

iii. Consumers have many complaints against healthcare services provided by healthcare professionals or healthcare facilities. These are high charges for consultancy; high charges

for medical facilities used and high prices of medicines and medical equipment. In addition women face various problems with beauty treatment and slimming salons such as botched treatments. These issues have been frequently highlighted in the media. The Ministry of Health has no redressal mechanism to address consumer complaints and compensate them. As such the CPA should allow consumers to bring to the Tribunal the matters not connected to the conduct of medical professionals.

iv. In the case of professional services which are exempted because they regulated by other written law, consumers have no avenue for redress or compensation. The professionals involved are only subject to censure by their respective disciplinary panels and the law does not provide compensation to the affected consumer. As such the consumer is forced to seek recourse through the normal court system.

v. Consumers who carry out transactions through electronic means, such as the internet, telephone, facsimile or telegram are not protected under the CPA. They are therefore vulnerable to unfair and unethical trade practices. It was hoped that the Communications and Multimedia Act 1998, being formulated then would provide for consumer redressal. However this did not turn out to be the case as it regulated only content providers. The Electronic Commerce Act which is now before Parliament also fails to provide any avenue for consumer redressal. It is therefore important that the exclusion of electronic transactions in the CPA be amended to protect consumers.The Direct Sales Act 1993 also needs to be amended since it currently covers only door to door sales and mail order sales. Direct selling companies are increasingly involved in online sales of goods and services.

1.2 Application

1.2.1 Provisions in Section 2(4)

2(4) The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

1.2.2 Comments on provisions in the law

Section 2(4) hinders the effectiveness of the Consumer Protection Act 1999 (CPA) in relation to consumer protection since its nature is only supplemental. The literal interpretation of this provision leads to a conclusion that in a situation where there is a conflict between CPA and any other legislation regulating contractual relations for example the Contracts Act 1950 (CA) or the Sale of Goods Act 1957 (SOGA), these other acts shall be given priority even though one of the parties involved in the transaction is a consumer.

1.2.3 Comparison with other legislation

i. Section 1(4) Direct Sales Act 1993 (Malaysia)
The provisions of this Act shall be without prejudice to the Hire-Purchase Act 1967, the Sale of Goods Act 1957, the Contracts Act 1950 and the Companies Act 1965, and where there is any conflict between the provisions of this Act and the provisions of any such Acts the provisions of this Act shall prevail.

ii. Section 3 Sale of Goods Act 1957 (Malaysia)
The Contracts Act 1950, in so far as they are not inconsistent with the express provisions of this Act shall continue to apply to contracts for the sale of goods.

PROPOSAL

2(4) to be amended as follows:
The provisions of this Act shall be without prejudice to other law regulating contractual relations, and where there is any conflict between the provisions of this Act and other such laws the provisions of this Act shall prevail.

1.2.4 Justification

i. One of the objectives of CPA is to provide for the protection of consumers. It is therefore suggested that CPA should be given the prevailing effect in transactions involving consumers as defined under CPA.

ii. CPA provides for comprehensive consumer protection in various aspects. As such, an Act of this nature should not be supplemental and without prejudice in nature. CPA should be the main act so as to minimize abuses on consumers in areas covered by CPA.Provision giving the prevailing effect to legislations has become a characteristic of many legislations in Malaysia, for example the SOGA and the Direct Sales Act 1993. This provision has yet to bring about legal problems in its application.

iii. There exist similarities in the provisions contained in CPA and SOGA. Provisions similar to sections 31-35 appear in sections 14-17 SOGA. What is the effect of the application of sections 31-35 of CPA on sections 14-17 of SOGA? Are consumers allowed to bring an action against traders under both acts, or are the consumers' rights limited to claims under CPA? If CPA is in its nature supplemental to other legislation, why does it contain similar provisions to SOGA or even in certain circumstances imposes a duty less strict than SOGA? If CPA is given a prevailing effect, any conflict between CPA and SOGA will be able to be resolved. If CPA is not given that effect, SOGA will prevail. SOGA however contains anti-consumer provisions such as the provision as contained in section 62 which allows traders to negative all implied terms contained in SOGA. Consumers thus are not protected in cases where traders are relying on exclusion clauses to escape liability.

iv. CPA also contains provisions in conflict with the CA. CPA allows claims to be brought against manufacturers under Part VII, even though there exists no contract between the consumers and manufacturers. In this context, CPA to a certain extent has ignored the issue of privity whilst CA through the interpretation of the Privy Council in Kepong Prospecting Ltd. v. Schmidt [1968] AC 810 has affirmed the existence of privity in Malaysia. How is this conflict to be resolved taking into account the supplemental and without prejudice nature of CPA?

1.3 Interpretation

1.3.1 Provisions in Section 3(1)

(1) "goods" means goods which are **primarily** purchased, used or consumed for personal, domestic or household purposes, and includes –
- (a) goods attached to, or incorporated in, any real or personal property;;
- (b) **animals, including fish**;
- (c) vessels and vehicles;
- (d) utilities; and
- (e) **trees, plants** and crops whether on, under or attached to land or not, but does not include choses in action, **including negotiable instruments, shares, debentures and money.**

1.3.2 Comments on provisions in the law

The definition of 'goods' as contained in section 3(1) CPA is ambiguous and confusing. Phrases highlighted are ambiguous and confusing. The word 'primarily' is very subjective and leads to difficulty in identifying goods which fall under this criteria. Is a fish not an animal? Are trees not plants? Are negotiable instruments, shares, debentures and money part of goods or are they excluded from the definition? Negotiable instruments, shares and debentures are all examples of choses in action. If they are not part of 'goods' as defined under section 3, they need not be expressly mentioned since they are choses in action and choses in action are already expressly excluded.

1.3.3 Comparison with other legislation

i. Section 2 Sale of Goods Act 1957 (Malaysia)

'Goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

ii. Section 2 Hire Purchase Act 1967 (Malaysia)

'Consumer goods' means goods purchased for personal, domestic and household purposes.

iii. Chapter 1 General Provisions Law No. 8 Year 1999 Law Concerning Consumer Protection (Indonesia)

Goods shall be any object either tangible or intangible, either movable or immovable, consumable or not consumable, tradable, which can be used, utilized or exploited by consumers.

iv. Section 3 Consumer Protection Act 1979 (Thailand)

'Goods' means articles produced or possessed for sale.

PROPOSAL

3(1) the meaning of "goods" be amended as follows:
"goods" means any goods purchased, consumed or used for personal, domestic or household purposes; and includes–

(a) all movable property, other than actionable claims and money; and includes –
   i. animals;
   ii. vessels and vehicles;
   iii. utilities; and
   vi. plants, crops and products of crops, and things whether on, under or attached to land or not; and

(b) things attached to, or incorporated in, any real or personal property.

1.3.4 Justification

i. Goods covered by CPA are limited in its kind due to the word 'primarily'. It is difficult to assess whether a particular kind of goods is purchased or used primarily for personal, domestic or household purposes.

ii. Consumers are involved in many transactions involving many kinds of goods. CPA should be applicable to all kinds of goods if the goods are bought for personal, domestic or household purposes irrespective of whether they are primarily bought for those purposes.

iii. The provision pertaining to the definition of 'goods' is arranged in a confusing way; phrases such as 'animals, including fish' and 'trees, plants' are confusing since fish is an animal and trees are plants.

iv. The amendment suggested is in line with the amendments made to the definition of 'consumer' (deleting the phrase 'a kind ordinarily').

SUMMARY

PART I: PRELIMINARY

Section	Topic	Comments	Suggestion
S.2	Application	The Consumer Protection Act 1999 exempts important categories of goods and services such as land, healthcare services and facilities, services by professionals and electronic transactions. This significantly reduces protection to consumers.	Delete S2(2) (d) (e) (f) (g) to reinstate protection for consumers in the purchase of all goods and services. Deletion of S2 (2)(g) alone will reinstate protection to consumers' in electronic transactions at least in the case of companies incorporated in Malaysia
S.2	Supplemental	Professional groups regulated by any other written law, are exempted from the CPA	These 'groups' should to be clarified to avoid ambiguity
S.2 (4)	Definition	The CPA is supplemental to any other law governing contractual relations.	Where there is a conflict with other such laws, the CPA should prevail.
S.3		Goods classified as 'primarily' for domestic purposes and categorization of goods is confusing	Goods to be defined as those purchased by the consumer. Categorization of goods to be reordered

THE CONSUMER PROTECTION ACT 1999

PART II

MISLEADING AND DECEPTIVE CONDUCT, FALSE REPRESENTATION AND UNFAIR PRACTICE

1.0 PART II: MISLEADING AND DECEPTIVE CONDUCT, FALSE REPRESENTATION AND UNFAIR PRACTICE

1.1. Interpretation

1.1.1 Provisions in Section 3 (1)

3(1) "advertisement" includes every form of advertisement, whether or not accompanied by or in association with spoken or written words or other writing or sounds and whether or not contained or issued in a publication and includes advertisement;
a. by display of notices;
b. by means of catalogues, price list, circulars, label, cards, or other documents
c. by the exhibition of films or of pictures or photographs; or
d. by means of radio, television, telecommunication or any other similar means.

1.1.2 Comment on provisions in the law

The definition of "advertisement" provided in the Act is not comprehensive. It is stated in the Act that the word advertisement would include every form of advertisement whether or not accompanied by or in association with spoken words, written words sounds. However, it fails to include in the section, the purpose for which the advertisement should be placed. The reason the purpose needs to be stated is so that the issue of liability in so far as the purpose for which the advertisement is placed is easily determined. In this context, the ambit of the purpose should be narrowed to that of promoting goods and services only,. otherwise, trader who place advertisement for other purposes whatsoever, may escape liability by relying on the current definition of advertisement. The suggestion is to adopt the definition provided by the Fair Trading Act 1986 of New Zealand which states clearly the purposes of advertising in its definition of advertisement.

1.1.3 Comparison with other legislation

i. <u>No 2 Interpretation Fair Trading Act 1986 (New Zealand)</u>

"Advertisement" means any form of communication made to the public or a section of public for the purpose of promoting the supply of goods or services or the sale or granting of an interest in land;

ii. <u>Section 3 Consumer Protection Act 1979 (Thailand)</u>

"Advertisement" includes any act which, by whatever means causes the statement to be seen or known by an ordinary person for trading purposes.

PROPOSAL

S.3 (1) to be amended as follows:

"advertisement" means any form of communication made to the public or a section of public for the purpose of promoting the supply of goods or services or the sale or granting of an interest in land and includes every form of advertisement, whether or not accompanied by or in association with spoken or written words or other writing or sounds and whether or not contained or issued in a publication and includes advertisement;

a. by display of notices
b. by means of catalogues, price list, circulars, label, cards or other documents or materials.
c. by the exhibition of films or pictures or photographs or by means of radio, television, telecommunication or any other similar means;
d. by means of radio, television, telecommunication or any other similar means.

1.1.4 Justification

i. The purpose of incorporation of a comprehensive definition of the word 'advertisement' is to cover consumers who suffer damages as result of relying on false and misleading advertisement that are communicated to the public or a section of the public for the purpose of promoting the supply of goods and services.

ii. Without expending the definition of 'advertisement' the current mechanism is not sufficient to protect those affected by inaccurate advertisement. There is a need for statutory measures to eliminate the risk of cheating/fraud through advertisements. This amendment would ensure that traders will retain their accountability to the public because consumers have a right to 'correct' information through advertisements.

1.2 Misleading conduct

1.2.1 Provisions in Section 9

S.9 No person shall engage in conduct that ;

a. in relation to goods, is misleading or deceptive or is likely to mislead or deceive the public as to the nature, manufacturing process, characteristic, suitability for a purpose, or quantity, of the goods or
b. In relation to services, is misleading or deceptive or is likely to mislead or deceive, the public as to the nature, characteristics, suitability for a purpose, or quantity of the services.

1.2.2 Comments on provisions in the law

Section 9 provides protection against misleading and deceptive conducts in respect of nature, manufacturing process, characteristic suitability for a purpose or quantity. However,

the said section has not included protection against false and misleading conduct in respect of quality of goods and services.

1.2.3 Comparison with other legislation

i. Article 17 Consumer Protection Act 1999 (Indonesia).

(1) Business Entities conducting business activities in the field of advertising shall be prohibited from producing advertisement which

(a) mislead consumers concerning the quality, quantity, material, function and price of the goods and/or tariff of services as well as the timely receipt of goods and/or services.

(b) give misleading information about the guarantee and warranty of goods and/or services;

(c) indicate incorrect, misleading or inaccurate information concerning goods and/or services;

(d) fail to include information as to risk of using goods and /or services;

(e) exploit event and/or person without approval of the respective authorities or the permission of the person concerned.

(f) violates ethics and/or provisions of laws and regulations in the field of advertising.

(2) Business entities conducting activities in the field of advertising shall be prohibited from continuing the circulation of advertisements in violation of the provision of paragraph (1).

ii Section 53 of the Trade Description Act 1974 (Australia)

A corporation shall not, in trade and commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of the goods or services:

(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
  (aa) falsely represent that services are of a particular standard, quality, value or grade;
(b) falsely represent that goods are new;
  (bb) falsely represent that a particular person has agreed to acquire goods or services;
(c) represent that goods and services have sponsorship, approval, performance characteristic, accessories, uses or benefits they do not have;
(d) represents that the corporation has a sponsorship, approval or affiliation it does not have;
(e) make a false or misleading representation with respect to the price of goods or services;
  (ea) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;
  (eb) make a false or misleading representation concerning the place of origin of goods;

(f) make a false or misleading representation concerning the need for any goods or services; or

(g) make a false or misleading representation concerning the existence, exclusion of effect of any condition, warranty, guarantee, right or remedy.

PROPOSAL

S 9 to be amended as follows:

No person shall engage in conduct that;

i. in relation to goods, is misleading or deceptive or is likely to mislead or deceive the public as to the nature, manufacturing process, characteristic, suitability for a purpose, **quality** or quantity, of the goods or

ii. In relation to services, is misleading or deceptive or is likely to mislead or deceive, the public as to the nature, characteristics, suitability for a purpose, **quality** or quantity of the services.

1.2.4 Justification

The recommendation is to incorporate or include the word "quality" in Section 9 of the Act. The word "quality" has been omitted from Section 9 of CPA. Legal intervention is timely here because the customer has the right to select goods and services with an assurance of satisfactory quality.

1.3 False or misleading representation

1.3.1 Provisions in Section 10

S.10 False or misleading representation.

No person shall make a false or misleading representation that

(a) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model;

(b) the goods have had a particular history or particular previous use;

(c) the services are of a particular kind, standard, quality or quantity;

(d) the service are supplied by any particular person or by any person of a particular trade, qualification or skill;

(e) a particular person has agreed to acquire the goods or services;

(f) the goods are new or reconditioned;

(g) the goods were manufactured, produced, processed or reconditioned at a particular time;

(h) the goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits;

(i) the person has sponsorship, approval, endorsement of affiliation;

(j) concerns the need for any goods or services;

(k) concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or

(l) concerns the place of origin of the goods.

(m) in this section, "quantity" includes length, width, height, area, volume, capacity, weight and number.

1.3.2 Comments on provisions in the law

Section 10 of the Act makes references to false and misleading representation as statements but does not include to representations which are unfair to consumer. A consumer to whom a statement which is neither false nor misleading nevertheless unfair is not ensured the necessary safeguards under the consumer law. The Act should impose a general duty on traders to trade fairly. The Section should overall prohibit traders from engaging in unfair conducts in relation to supplying of goods and services to consumers. This can only be achieved by including the word "unfair representation" in the said section.

1.3.3 Comparison with other legislation

i. Section 22 of the Consumer Protection Act 1979 (Thailand)

An advertisement may not contain a statement which is unfair to consumer or which may cause adverse effect to the society as a whole; that is notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods of services.

The following statement shall be regarded as those which are unfair to consumers or may cause adverse effect to the society as a whole;

(1) Statement which is false or exaggerated

(2) Statement which will cause misunderstanding in the essential elements concerning goods and services, notwithstanding it is based on or refers to any technical report or statistic or anything which is false or exaggerated.

(3) Statement which is directly or indirectly encouraging the commission of an unlawful or immoral act or which adversely affects the national culture;

(4) Statement which will cause disunity or adversely affects the unity among the public;

(5) Other statement as prescribed in the Ministerial Regulation.

A statement used in the advertisement which an ordinary person knows that it is not possible to be true is not prohibited for use in the advertisement under (1).

PROPOSAL

The suggestion is to incorporate the word "and unfair representation" in the section

False Misleading and/or unfair representation
No person shall make a false, misleading **and unfair representation** that;

(a) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model;
(b) the goods have had a particular history or particular previous use;
(c) the services are of a particular kind, standard, quality or quantity;
(d) the service are supplied by any particular person or by any person of a particular trade, qualification or skill;
(e) A particular person has agreed to acquire the goods or services;
(f) The goods are new or reconditioned;

(g)	The goods were manufactured, produced, processed or reconditioned at a particular time;
(h)	The goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits;
(i)	The person has sponsorship, approval, endorsement of affiliation;
(j)	Concerns the need for any goods or services;
(k)	Concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or
(l)	Concerns the place of origin of the goods.
(m)	In this section, "quantity" includes length, width, height, area, volume, capacity, weight and number.

1.3.4 Justification

The recommendation is to include the word 'unfair' to consumer. The concept of 'unfairness' is entrenched in the basic consumer right. It protects the consumer against any discrimination or any vendor/supplier taking advantage of poor judgment by the consumer and young children and actions that are hazardous to the safety and health.

1.4 False and misleading conduct with respect to employment

1.4.1 Provisions in the Act

None

1.4.2 Comments on Provision in the Law

There is no provision in the Act that provides safeguard against misleading conduct against those who are seeking employment. It is not uncommon for many seeking employment to be mislead by false and misleading representations. Hence a section catering specifically for misleading representations in respect of employment is required.

1.4.3 Comparison with other legislation

i. <u>Section 53B Trade Description Act 1974 (Australia).</u>

A Corporation shall not in relation to employment, that is to be, or may be offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms of condition of, or any other matter relating to, the employment.

PROPOSAL

New Section to be added as 9(c)

S.9(c) No person shall in relation to employment, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms of condition, or any other matter relating to, the employment.

1.4.4 Justification

A unique feature of the Trade Description Act 1974 of Australia is that it has provided protection against misleading conduct to those who are seeking employment. Incorporation of a new section providing for misleading conduct in relation to employment would ensure appropriate safeguards to those seeking employment in Malaysia. This is necessary to combat unfair contract practices in situations of consumer dependency where reliance is placed on the conduct of the prospective employer.

1.5 Future services contract

1.5.1 Provisions in Section 17

S.17(2) A consumer who cancels a future services contract may be charged by the supplier the following amount:

(a) five percents of the full contract price;

(b) the cost of any goods the consumer used or is keeping; or

(c) the portion of the full contract price representing services received by the consumer

1.5.2 Comments on provisions in the law

This section is contrary with the remedies provided under part IX of the Act, which provides options to consumers to cancel the contract in the case if the services do not comply with guarantees.

1.5.3 Comparison with other legislation

There is no similar provision in the Consumer Guarantees Act 1993 of New Zealand or the Trade Practices Act 1974 of Australia which have served as guides in the formulation of the CPA.

PROPOSAL

Section 17 (2) be deleted. It may also be amended by adding a new sub-section 17(2A) as follows:

(2) A consumer who cancels a future services contract may be charged by the supplier the following amount:

(a) five percent of the full contract price;
(b) the cost of any goods the consumer used or is keeping; or
(c) the portion of the full contract price representing services received by the consumer

17(2A) the section is not applicable in a situation where the consumer takes the option of canceling the contracts under section 60 of the Act.

1.5.4 Justification

The rationale behind this provision is to protect a consumer in a situation where the consumer cancels the contract without justification. To be fair to both parties, the Act allows the supplier to charge only the stipulated amount mentioned in the Act. Therefore the supplier cannot impose charges higher than this. The problem is in the section it provides for both, cancellation with or without justification. In contrary with the remedies provided under part IX of the Act, which provides options to consumers to cancel the contract in the case if the services do not comply with the guarantees. Example is in the situation whereby the supplier fails to comply with a warranty and the failure is a substantial one. The consumer can cancel the contract but for future services contract, the consumer still lose 5 per cent of the full price which is unfair because no fault on his behalf. Therefore, the suggestion is either to delete the whole section or to add one sub-section to state that in a situation where the consumer cancels the contract because of the failure on the supplier's part, section 17(2) is not applicable.

SUMMARY

PART II : MISLEADING AND DECEPTIVE CONDUCT, FALSE REPRESENTATION AND UNFAIR PRACTICE

Section	Topic	Comments	Suggestion
S 3	Interpretation	The definition of "advertisement" provided in the Act is not comprehensive. It is stated in the Act that the word advertisement would include every form of advertisement whether or not accompanied by or in association with spoken words, written words sounds. However, it fails to include in the section, the purpose for which the advertisement should be placed. The reason the purpose needs to be stated is so that the issue of liability in so far as the purpose for which the advertisement is placed is easily determined. In this context, the ambit of the purpose should be narrowed to that of promoting goods and services only,. otherwise, trader who place advertisement for other purposes whatsoever, may escape liability by relying on the current definition of advertisement. The suggestion is to adopt the definition provided by the Fair Trading Act 1986 of New Zealand which states clearly the purposes of advertising in its definition of advertisement.	**"advertisement" means any form of communication made to the public or a section of public for the purpose of promoting the supply of goods or services or the sale or granting of an interest in land and** includes every form of advertisement, whether or not accompanied by or in association with spoken or written words or other writing or sounds and whether or not contained or issued in a publication and includes advertisement; a. by display of notices b. by means of catalogues, price list, circulars, label, cards or other documents or materials. c. by the exhibition of films or pictures or photographs or by means of radio, television, telecommunication or any other similar means;
S9	Misleading Conduct	Section 9 provides protection against misleading and deceptive conducts in respect of nature, manufacturing process, characteristic suitability for a purpose or quantity. However, the said section has not included protection against false and misleading conduct in respect of quality of goods and services.	To incorporate the word "quality" in the section No person shall engage in conduct that; a. in relation to goods, is misleading or deceptive or is likely to mislead or deceive the public as to the nature, manufacturing process, characteristic, suitability for a purpose, **quality** or quantity, of the goods or b. In relation to services, is misleading or deceptive or is likely to mislead or deceive, the public as to the nature, characteristics, suitability for a purpose, **quality** or quantity of the services.

S10	False or misleading representation	Section 10 of the Act makes references to false and misleading representation as statements but does not include to representations which are unfair to consumer. A consumer to whom a statement which is neither false nor misleading nevertheless unfair is not ensured the necessary safeguards under the consumer law. The Act should impose a general duty on traders to trade fairly. The Section should overall prohibit traders from engaging in unfair conducts in relation to supplying of goods and services to consumers. This can only be achieved by including the word unfair in the said section.	To include the word "unfair representation" as shown below. False Misleading and/or unfair representation No person shall make a false, misleading and **unfair representation** that; (a) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model; (b) The goods have had a particular history or particular previous use; (c) The services are of a particular kind, standard, quality or quantity; (d) The service are supplied by any particular person or by any person of a particular trade, qualification or skill; (e) A particular person has agreed to acquire the goods or services; (f) The goods are new or reconditioned; (g) The goods were manufactured, produced, processed or reconditioned at a particular time; (h) The goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits; (i) The person has sponsorship, approval, endorsement of affiliation; (j) Concerns the need for any goods or services; (k) Concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or (l) Concerns the place of origin of the goods. (2) In this section, "quantity" includes length, width, height, area, volume, capacity, weight and number.
None	False representation and other Misleading conduct in relation to employment.	There is no provision in the Act that provides safeguard against misleading conduct against those who are seeking employment. It is not uncommon for many seeking employment to be mislead by false and misleading advertisements. Hence a section catering specifically for misleading advertisement in respect of employment is required.	To incorporate a new provision as below. A Corporation shall not in relation to employment, that is to be, or may be offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms of condition of, or any other matter relating to, the employment.
S 17	Future Service Contract	This section is contrary with the remedies provided under part IX of the Act, which provides options to consumers to cancel the contract in the case if the services do not comply with guarantees.	Section 17 (2) be deleted or be amended and a new sub-section 17(2A) is added as follows: (2) A consumer who cancels a future services contract may be charged by the supplier the following amount: (a) five percents of the full contract price; (b) the cost of any goods the consumer used or is keeping; or

			(c) the portion of the full contract price representing services received by the consumer 17(2A) the section is not applicable in the situation where the consumers take the option of canceling the contracts under section 60 of the Act.
None	Committee on Advertising.	There is no committee on advertisement that evaluates and monitors on whether an advertisement has violated or failed to conform with this Act. A committee should be set up to consider and evaluate advertisements in order to ensure compliance with established standards. A Committees on Advertising would not only govern and regulate the deceptive practice of advertising but also serve for the betterment of the advertising industry.	The Minister may appoint a Committee on Advertisement, subject to terms and conditions as he deems fit, to evaluate and monitors all advertisements made to the public or a section of the public for the purpose of promoting the supply of goods and services, in accordance with the conditions prescribed by the Committee on Advertising.

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PART III

SAFETY OF GOODS AND SERVICES

1.0 PART III : SAFETY OF GOODS AND SERVICES

1.1 SAFETY STANDARD

1.1.1 Provisions in Section 19

19(1) The Minister may by regulations prescribe safety standards in respect of-
(a) any goods or class of goods; and
(c) any services or class of services,
and may prescribe different safety standards for different goods or services, or class of goods or services.

(2) The safety standard in relation to goods may relate to any or all of the following matters:

(a) the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods;
(b) the testing of the goods during or after manufacturing or processing;
(c) the form and content of markings, warnings or instructions to accompany the goods.

(3) For the purposes of subsection (1), the Minister may, on the recommendation of the Controller and with consultation with the competent agency-

(a) adopt in whole or in part the safety standard used by the competent agency; or

(b) obtain advice from experts in the relevant field.

(4) Where no safety standard has been prescribed under subsection (1), the person supplying or offering to supply the goods or services shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods or services concerned.

(5) In this section, "competent agency" means any person, body or authority that has determined or has the expertise to determine safety standards for any goods or services.

(6) This Part shall not apply to healthcare goods and food.

(7) For the purpose of this Part, "healthcare goods" means any goods used or intended to be used, provided or intended to be provided or prescribed or intended to be prescribed in the provision of healthcare services.

1.1.2 Comments on provisions in the law

Section 19(1) only empowers the Minister of Domestic Trade and Consumer Affairs to prescribe safety standards in respects of goods and services. Since there are various consumer goods, the power to prescribe safety standards should also be given to the Ministry of Health and Ministry of Agricultural Based Industry to prescribe standards for goods under their jurisdiction.

Section 19(6) exempts the application of Part III to healthcare goods and food. This will cause the healthcare goods and food exempted from the enforcement of safety standard.

Section 19(2) does not contain any provision in relation to precautions in storage and transporting.

Besides that, the use of 'reasonable standard of safety to be expected by a reasonable consumer' test in the case where no safety standard has been prescribed in subsection (4) will cause confusion because an ordinary consumer is not able to expect what is a reasonable standard especially when it involves complex goods or new goods in the market.

1.1.3 Comparison with other legislation

Chapter I : The Consumer Act 1990 (Philippines)

Article 6 : The provisions of this Article and its implementing rules and regulations shall be enforced by:

(a) the Department of Health with respect to food, drugs, cosmetics, devices and substances;
(b) the Department of Agriculture with respect to products related to agriculture;
(c) the Department of Trade and Industry with respect to other consumer products not specified above.

Article 7 : The concerned department shall establish consumer product quality and safety standards which shall consist of one or more of the following:

(a) requirements as to performance, composition, contents, design, construction, finish, packaging of a consumer product;
(b) requirements as to kind, class, grade, dimensions, weights, material;
(c) requirements as to the methods of sampling, tests and codes used to check the quality of the product;
(d) the requirements as to precautions in storage, transporting and packaging;
(e) requirements that a consumer product be marked with or accompanied by clear and adequate safety warnings or instructions, or requirement respecting the form of warnings or instructions.

PROPOSAL

Power given to the Ministry of Health and Ministry of Agricultural based Industry to prescribe safety standards

Section 19(1) shall be amended to insert the phrase 'of the relevant Ministry' as follow:

19(1) The Minister **of the relevant Ministries**, may by regulations prescribe the safety standards in respect of-

(a) any goods or class of goods; and
(b) any services or class of services,

and may prescribe different safety standards for different goods or services, or class of goods or services.

A new subsection (1A) shall be inserted as follow:
19(1A) The relevant Ministries are

(a) the Ministry of Health with respect to food, drugs and cosmetics;
(b) the Ministry of Agricultural Based Industry with respect to agricultural produce
(c) the Ministry of Domestic Trade and Consumer Affairs with respect to other consumer goods.

Requirement as to additional matter

Section 19(2) shall be inserted with a new paragraph (d) as follow:
(d) requirements as to precautions in storage and transporting.

Method of prescribing safety standards

Section 19(3) shall be amended to insert the phrase 'of the relevant Ministries'. The phrase 'on the recommendation of the Controller and' shall be deleted. The proposed amendment is as follow:
For the purpose of subsection (1), the Minister **of the relevant Ministries** may after consultation with the competent agency.....

Test of reasonable safety standard shall be deleted

The use of the test of 'reasonable safety standard expected by a reasonable consumer' in section 19(4) shall be deleted and substituted by 'general safety requirement for goods and services'. The proposed amendment is as follow:
Where no safety standard has been prescribed under subsection (1), the person supplying or offering to supply the goods or services **shall comply with general safety requirement for goods or services**.

Section 19(6) shall be deleted.

Section 19(7) shall be deleted.

1.1.4 Justification

i. The application of Part III shall cover all consumer goods to ensure that safety standard could be enforced on all consumer goods.

ii. Safety standard in relation to any goods shall include requirements as to precautions in storage and transporting to enable consumers or any person to follow the prescribed precautions while the goods are in the above process. These precautionary measures are important where the risk of danger is not apparent to consumers.

iii. The use of 'reasonable standard of safety to be expected by a reasonable consumer' could cause confusion since the concept is not clear. It is better if a person manufacturing or supplying goods or services observes the general safety requirement for goods or services where no safety standard has been prescribed.

1.2 Compliance with safety standards

1.2.1 Provisions in Section 20

S.20 No person shall supply, or offer to or advertise for supply, any goods or services which do not comply with the safety standards determined under section 19.

1.2.2 Comments on provisions in the law

This prohibition does not cover prohibition against supplying goods which do not comply with the general safety requirement for goods.

1.2.3 Comparison with other legislation

Consumer Goods Safety Ordinance 1896 (Hong Kong)

Section 6 : A person shall not-
(a) supply;
(b) manufacture; or
(c) import into Hong Kong, consumer goods unless the consumer goods comply with-
  (i) the general safety requirement for consumer goods; or
  (ii) where an approved standard applies to consumer goods, the approved standard for the particular consumer goods.

PROPOSAL

The title of section 20 shall be amended by inserting the phrase 'and general safety requirement for goods or services' as follows:
Compliance with safety standards **and general safety requirement for goods or services**

Section 20 shall be amended by inserting the phrase 'or general safety requirement for goods or services' as follows:
No person shall supply, or offer to or advertise for supply, any goods or services which do not comply with the safety standards determined under section 19 **or the general safety requirement for goods or services.**

1.2.4 Justification

The prohibition of supplying goods or services which do not comply with the general safety requirement for goods or services is inserted in section 20 so that the definition of 'general safety requirement for goods or services' could be given in section 21.

1.3 General safety requirements for goods

1.3.1 Provisions in Section 21

S.21 In addition and without prejudice to section 20, no person shall supply, or offer to or advertise for supply, any goods which are not reasonably safe having regard to all the circumstances, including-

(a) the manner in which, and the purposes for which, the goods are being or will be marketed;
(b) the get-up of the goods;
(c) the use of any mark in relation to the goods; and
(d) the instructions or warnings in respect of the keeping, use or consumption of the goods.

1.3.2 Comments on provisions in the law

No definition for the general safety requirement for goods

1.3.3 Comparison with other legislation

Consumer Goods Safety Ordinance 1896 (Hong Kong)

Section 2 : General safety requirement is a duty to ensure that the goods are reasonably safe having regard to all the circumstances, including those set out in section 4.
Section 4(1) : The general safety requirement for goods is that the consumer goods are reasonably safe having regard to all of the circumstances, including-

(a) the manner in which, and the purpose for which, the consumer goods are presented, promoted or marketed;
(b) the use of any mark in relation to the consumer goods and instructions or warning given for the keeping, use or consumption of the consumer goods;
(c) reasonable safety standards published by standards institute or similar body for consumer goods of the description which applies to the consumer goods or for matters relating to consumer goods of that description; and
(d) the existence of any reasonable means (taking into account the cost, likelihood and extent of any improvement) to make the consumer goods safer.

Section 4(2) : Where an approved standard applies to consumer goods, the consumer goods shall be taken as complying with the general safety requirement if they comply with the approved standard.

PROPOSAL

The title of section 21 shall be amended by inserting the phrase 'and services' as follows:
General safety requirement for goods **and services**

Section 21 shall be amended by giving the definition of general safety requirement for goods and services as follows:

(1) General safety requirement for goods is that the goods are reasonably safe having regard to all the circumstances, including those matters set out in paragraph (a) to (d) with an addition of a new paragraph (e).

(e) safety standard prescribed by the relevant Ministries.

(2) General safety requirement for services is that the services are reasonably safe having regard to all the circumstances, including the nature of the services.

(3) Where safety standard has been prescribed for goods or services under section 19(1), the goods or services shall be taken as complying with the general safety requirement if they comply with the prescribed safety standard.

1.3.4 Justification

i. The amendment to the title of section 21 is necessary to reflect the amended provisions in section 21.

ii. General safety requirement for services has to be included to ensure a supplier of services supplies services which are reasonably safe, where no safety standard has been prescribed for the services.

iii. The definition of general safety requirement for goods and services is important to ensure the adoption of a standard definition in every case.

1.4 Defence

1.4.1 Provisions in Section 22

S.22(1) Goods and services shall not be regarded as failing to comply with the requirements of section 20 or 21, or both, as the case may be, where it is shown that-
.....

1.4.2 Comments on provisions in the law

None

1.4.3 Comparison with other legislation

None

PROPOSAL

The phrase 'or 21, or both, as the case may be' in section 21 shall be deleted. Section 22(1) has to be amended as follow:
Goods or services shall not be regarded as failing to comply with the requirement of section 20, where it is shown that-
.....

1.4.4 Justification

Since section 20 is proposed to be amended to include prohibitions against supplying of goods or services which do not comply with general safety requirement for goods or services as the case may be, the phrase 'or 21 or both, as the case may be' has to be deleted from section 22.

1.5 Prohibition against unsafe goods

1.5.1 Provisions in Section 23

S.23

(1) The Minister may, on the recommendation of the Controller, by order published in the Gazette, declare any goods or any class of goods to be prohibited goods where the goods or goods of that class have caused or are likely to cause injury to any person or property or is otherwise unsafe.

(2) An order made under subsection (1) may require the supplier, in such manner and within such period as may be specified in the order, and at the supplier's own expense, to do any or all of the following:
- (a) recall the prohibited goods;
- (b) stop the supply of, or the offer to supply, the prohibited goods;
- (c) stop the advertisement of the prohibited goods;
- (d) disclose to the public any information relating to-
  - (i) the characteristics of the prohibited goods which render them unsafe;
  - (ii) the circumstances in which use or the prohibited goods are unsafe;
  - (iii) any other matter relating to the prohibited goods or the use of the prohibited goods as may be specified;
- (e) repair or replace the prohibited goods;
- (f) refund to any person to whom the prohibited goods were supplied the price paid or the value of the consideration given for the prohibited goods or any lesser amount as may be reasonable having regard to the use that that person has had of the prohibited goods.

(3) Where an order is made under subsection (1), the Controller shall, by notice to the supplier, require the supplier to take any or all of the actions referred to in the order.

(4) A notice under subsection (3) need not be provided directly to the supplier and may be provided by general methods, including placing notices in the public news media, as the Controller thinks fit, provided that the notice is clear and reasonable.

(5) The supplier shall comply with all the requirements of any order under subsection (1) is in effect-
- (a) no person shall supply, or offer to or advertise for supply, any prohibited goods; and
- (b) no supplier shall-
  - (i) where the notice identifies a defect in, or a dangerous characteristics of, the prohibited goods, supply goods of a kind to which the order relates which contain the defect or have the characteristics; or
  - (ii) in any other case, supply goods of a kind to which the order relates.

1.5.2 Comments on provisions in the law

Section 23(1) only provides prohibition in relation to unsafe goods. No prohibition in relation to unsafe services. Besides that, power to declare goods as prohibited goods does not include goods which do not comply with the prescribed safety standard and general safety requirement for goods. Orders in section 23(2) are only be made to suppliers.

1.5.3 Comparison with other legislation

i. Consumer Goods Safety Ordinance 1896 (Hong Kong)

Section 9 : Where the Commissioner reasonably believes-

(a) that the consumer goods-

(i) do not comply with an approved standard or safety specification established by regulation; or

(ii) for which a safety standard has not been approved, are, or may be unsafe; and

(b) that there is a significant risk that the consumer goods will cause a serious injury, Commissioner may serve on a person a notice requiring the immediate withdrawal of those goods from being supplied and the retrieval, in the manner and to the extent reasonably possible, of those items already supplied.

ii. Trade Practices Act 1974 (Australia) (the reference is made to the substantive law only, the word 'supplier' is not relevant)

Section 65(1)(b)(ii) : Subject to section 65J, where

(a) a corporation (in this section referred to as the supplier), in trade or commerce, supplies on or after 1 July 1986 goods that are intended to be used, or are of a kind likely to be used, by a consumer;

(b) one of the following subparagraphs applies:

(i) it appears to the Minister that the goods are goods of a kind which will or may cause injury to any person;

(ii) the goods are goods of a kind in respect of which there is a prescribed consumer product safety standard and the goods do not comply with that standard the Minister may, by notice in writing published in the Gazette, require the supplier to do one or more of the actions stated in paragraphs (d) to (f).

PROPOSAL

The title of section 23 has to be amended by inserting the phrase 'and services' as follow:
Prohibition against unsafe goods **and services**

Section 23(1) has to be amended by inserting the phrase 'of the relevant Ministries', 'or any services or class of services' to be prohibited services' and 'or services or services of that class'.

The phrase 'on the recommendation of the Controller' shall be deleted. The sentence structure of section 23(1) shall be amended as follow:

The Minister **of the relevant Ministries** may, by order published in the Gazette, declare any goods or any class of goods to be prohibited goods **or any services or class of services to be prohibited services,** where goods or goods of that class **or services or services of that class-**

(a) do not comply with the safety standard determined under section 19(1) or the general safety requirement for goods or services;

(b) have caused injury to any person or property;

(c) is likely to cause injury to any person or property; or

(d) is otherwise unsafe.

Section 23(2) shall be amended by inserting the words 'manufacturer or' as follow:
An order made under subsection (1) may require the **manufacturer or** supplier, in such manner.....

Paragraph (b) to (f) shall be amended as follow:

(b) stop the supply of, or the offer to supply, the prohibited goods **or the prohibited services, as the case may be**;

(c) stop the advertisement of the prohibited goods **or the prohibited services, as the case may be**;

(d) disclose to the public any information relating to-
   (i) the characteristics of the prohibited goods **or prohibited services, as the case may be**, which render them unsafe;
   (ii) .....
   (iii) any other matter relating to the prohibited goods **or prohibited services, as the case may be**, or the use of the prohibited goods as may be specified;

(e) repair or replace the prohibited goods **or repair the prohibited services**;

(f) refund to any person to whom the prohibited goods **or the prohibited services, as the case may be**, were supplied the price paid or the value of the consideration given for the prohibited goods **or the prohibited services, as the case may be**, or any lesser amount as may be reasonable having regard to the use that that person has had of the prohibited goods **or prohibited services**.

A new paragraph (g) shall be inserted under section 23(2) as follow:
(g) destroy the goods if the goods could not be repaired or modified.

Section 23(3) shall be deleted by inserting the phrase 'Minister of the relevant Ministries' and 'manufacturer or'. The word 'Controller' shall be deleted. The proposed amendment is as follow:
Where an order is made under subsection (1), the **Minister of the relevant Ministries** shall, by notice to the **manufacturer or** supplier, require the **manufacturer or** supplier to take any or all of the actions referred to in the order.

Section 23(4) has to be amended by inserting the words 'manufacturer or' as follow:
A notice under subsection (3) need not be provided directly to the **manufacturer or** supplier.....

Section 23(5) has to be amended by inserting the words 'manufacturer or' as follows:
The **manufacturer or** supplier shall comply with all the requirements of any order and notice made under this section.

Section 23(6)(a) shall be amended by inserting the phrase 'or prohibited services, as the case may be' as follow:

(a) No person shall supply, or offer to or advertise for the supply, any prohibited goods **or prohibited services, as the case may be**; and

Section 23(6)(b) shall be amended by inserting the words 'manufacturer or'. Paragraph (i) is amended by inserting the phrase 'or prohibited services, as the case may be, manufacture or' and 'or services'. Paragraph (ii) is amended by inserting the words 'or services'. The proposed amendments are as follow:

(b) no **manufacturer or** supplier shall-

(i) where the notice identifies a defect in, or a dangerous characteristic of, the prohibited goods **or prohibited services, as the case may be**, **manufacture or** supply goods **or services** of a kind to which the order relates which contain the defect or have the characteristic; or

(ii) in any other case, supply goods **or services** of a kind to which the order relates

1.5.4 Justification

i. The provisions in section 23 should be extended to cover unsafe services. Although criminal liability can be imposed on a person who supplies unsafe services, there is no provision to declare unsafe services as prohibited services. This will allow the supplier to continue supplying unsafe services to consumers.

ii. The declaration of prohibited goods and services shall also be made to goods and services which do not comply with the prescribed safety standard or the general safety requirement for goods or services. Although criminal liability can be imposed on a supplier who supplies goods which do not comply with the prescribed safety standard or the general safety requirement for goods, no action can be taken on those goods. This will give an opportunity to the supplier to continue supplying or offering to supply goods which do not conform to the prescribed safety standard or the general safety requirement for goods.

iii. The order under section 23(2) shall also include an order to destroy goods if the goods could not be repaired or modified in order to avoid the manufacturer or supplier from selling the goods to the consumers.

iv. An order made under sections 23(2) and 23(6) shall also be made to the manufacturer (if appropriate) because they are responsible for manufacturing and distributing goods on the market. It is unfair if the order is made to the supplier only.

1.6 PROPOSAL TO INCLUDE ADDITIONAL PROVISIONS IN PART III

1.6.1 The following additional provisions are proposed to be included:

i. power of the relevant Ministries to require testing of goods;
ii. duty of a manufacturer or supplier to inform the relevant Ministries where goods or services have serious defects; and
iii. power of authorized officers of the relevant Ministries

1.6.2 Comments on provisions in the law

None

1.6.3 Comparison with other legislation

i. Consumer Protection Act 1979 (Thailand)

Section 36 : Where there is a reasonable cause to suspect that any goods may be harmful to the consumers, the Board may order the businessman to have such goods tested or verified. If the businessman does not proceed to test or verify the goods or delays in so doing without justification, the Board may arrange for the verification at the expenses of the businessman.

If the result of the test or verification appears to be that the goods may be harmful to the consumers and the harm which may be caused by the goods cannot be prevented by means of the requirement of the label under section 30 or under any other law, the Board shall have the power to prohibit the sale of such goods and, if it thinks fit, may order the businessman to modify the goods in accordance with the conditions prescribed by the Board. In the case where the goods cannot be modified or it is doubtful as to whether the businessman would keep the goods for sale, the Board shall have the power to order the businessman to destroy the goods or arrange for the destruction thereof at the expenses of the businessman.

ii. Law On The Protection of Consumer Rights and Interests (People's Republic of China)

Article 18 : Business dealers, upon discovery of serious defects in the commodities or services they supply and liability to harm personal or property safety even though the commodities are used or services received in the correct way, must report to administrative departments concerned and inform consumers immediately and adopt measures to prevent occurrence of harms.

iii. Trade Practices Act 1974 (Australia)

Section 65R(1) : Where a corporation voluntarily takes action to recall goods because the goods will cause injury to any person, the corporation shall, within 2 days after taking that action, give notice in writing to the Minister:

(a) stating that the goods are subject to recall; and
(b) setting out the nature of the defect in, or dangerous characteristics of, the goods.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 30 penalty units.
(3) Subsection (2) is an offence of strict liability.

PROPOSAL

Power of the Minister of the relevant Ministries to require testing of goods

(1) Where there is a reasonable cause to believe that any goods are likely to cause injury to any person or property or is unsafe, the Minister of the relevant Ministries may issue a written notice to the manufacturer or supplier to have the goods tested to determine their safety.

(2) If the result of the test shows that the goods are harmful to any person or property, the Minister of the relevant Ministries shall use the power given in section 23(1) to declare the goods as prohibited goods and make an appropriate order.

Duty of a manufacturer or supplier to report to the relevant Ministries if goods or services have serious defects

(1) Where a manufacturer or supplier discovers that there are serious defects in the goods or services they manufacture or supply, as the case may be, which will or are likely to cause danger to personal and property safety of any person, they shall report to the relevant Ministries and inform the consumers immediately and adopt measures to prevent the occurrence of the injury.

(2) Where a manufacturer or supplier voluntarily takes action to recall the goods or services from the market because the goods or services will or are likely to cause injury to any person or property, the manufacturer or supplier shall, within 2 days after taking that action, give notice in writing to the relevant Ministries :
(a) stating that the goods or services are subject to recall; and
(b) setting out the nature of the defect or danger in the goods or services.

(3) Any person who contravenes subsection (1) or (2) is guilty of an offence.

Power of authorized officers

Authorized officers of the relevant Ministries shall have the following powers:
(1) to implement and supervise the implementation of this Part and regulations; and

(2) to inspect and analyze goods or services to determine the conformity to the prescribed safety standard or the general safety requirement for goods or services.

1.6.4 Justification

i. Minister of the relevant Ministries shall be given the power to require a manufacturer or supplier to test the goods. This is an additional power to monitor goods on the market.

ii. The aim of imposing a duty on the manufacturer or supplier to report serious defects in the goods or services they supply is due to the fact that the duty of the manufacturer or supplier does not end when the goods leave the factory or when the services are supplied to the consumers. The duty to ensure the goods or services are safe is a continuing duty.

iii. The power given to authorized officers is to ensure the smooth implementation of Part III.

SUMMARY

PART III – SAFETY OF GOODS AND SERVICES

Part/ Section	Topic	Comments	Suggestion
Section 19	Safety standard	Section 19(6) exempts the application of Part III to healthcare goods and food. This will cause healthcare goods and food to be exempted from the enforcement of safety standards. Section 19(2) does not contain any provisions as regards to precautions in storage, transporting and packaging. Besides that, the use of 'reasonable standard of safety to be expected by a reasonable consumer' test in the case where no safety standard has been prescribed in subsection (4) will cause confusion because ordinary consumer is not be able to expect what is a reasonable standard especially when it involves complex goods or new goods in the market.	The application of Part III shall cover all consumer goods to ensure that safety standard could be enforced on every consumer goods. Since consumer goods consist of various types of goods including healthcare goods and food (processed and unprocessed) which are under the jurisdiction of the Ministry of Health and the Ministry of Agricultural Based Industry, Part III shall be implemented by these Ministries. Every Ministry shall be vested with the power to prescribe safety standard for goods that are under their jurisdiction such as in The Consumer Act of The Philippines. Safety standard in relation to any goods shall also include the requirements as to precautions in storage, transporting and packaging to enable consumer or any person to follow the prescribed precautions while the goods in the above process. The use of reasonable standard of safety to be expected by a reasonable consumer could cause confusion and the concept is not clear either. It is suggested that a person manufacturing or supplying goods or services observe the general safety requirement for goods or services where no safety standard has been prescribed.
Section 20	Compliance with safety standards	This prohibition does not cover prohibition against supplying goods which do not comply with the general safety requirement for goods.	Prohibition should also cover goods and services which do not comply with the general safety requirement for goods and services.
Section 21	General safety requirement for goods	No definition for the general safety requirement for goods. Section 21 does not cover the general safety requirement for services.	General safety requirement for services has to be included to ensure a supplier of services supplies services which are reasonably safe, where no safety standard has been prescribed for the services. The definition of general safety requirement for goods and services must be provided to ensure the adoption of a standard definition in every case. The amendment to the title of section 21 is necessary to reflect the amended provisions in section 21.

Part/ Section	Topic	Comments	Suggestion
Section 22	Defence		Since it is proposed that section 20 shall cover the prohibition of supplying goods or services which do not comply with the general safety requirement, the phrase 'or 21, or both, as the case may' be shall be deleted.
Section 23	Prohibition against unsafe goods	Section 23(1) only provides prohibition in relation to unsafe goods. No prohibition in relation to unsafe services. Besides that, power to declare goods as prohibited goods does not include goods which do not comply with the prescribed safety standard and general safety requirement for goods. Orders in section 23(2) are only made to suppliers.	The provisions in section 23 should be extended to cover unsafe services. Although a criminal liability can be imposed on a person who supplies unsafe services, there is no provision to declare unsafe services as prohibited services. This will allow the supplier to continue supplying the unsafe services to consumers. The declaration of prohibited goods or services shall also be made to goods or services which do not comply with the prescribed safety standard or the general safety requirement for goods or services. Although a criminal liability can be imposed on a supplier who supplies goods which do not comply with the prescribed safety standard or the general safety requirement for goods, no action can be taken on those goods. This will give an opportunity to the supplier to continue supplying or offering to supply goods which do not conform to the prescribed safety standard or the general safety requirement for goods. The order under section 23(2) shall also include an order to destroy goods if the goods could not be repaired or modified in order to avoid the manufacturer or supplier from selling the goods to the consumers. An order made under sections 23(2) and 23(6) shall also be made to the manufacturer (if appropriate) because they are the one who are responsible in manufacturing and distributing goods on the market. It is unfair if the order is made to the supplier only.
New provisions	1. Power of the relevant Ministries to require testing of goods 2. Duty of a manufactur e or supplier to inform the relevant Ministries		Minister of the relevant Ministries shall be given the power to require a manufacturer or supplier to test the goods. This is an additional power to monitor goods on the market. The aim of imposing a duty on the manufacturer or supplier to report serious defects in the goods or services they supply is due to the fact that the duty of the manufacturer or supplier does not end when the goods

Part/ Section	Topic	Comments	Suggestion
	where goods or services have serious defects		leave the factory or when the services are supplied to the consumers. The duty to ensure the goods or services are safe is a continuing duty.
	3. Power of authorized officers of the relevant Ministries.		The power given to authorized officers is to ensure the smooth implementation of Part III.

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PART IV

GUARANTEES IN RESPECT OF SUPPLY OF GOODS

1.0 PART IV : GUARANTEES IN RESPECT OF SUPPLY OF GOODS

1.1 Implied guarantee as to title

1.1.1 Provisions in Section 31

(1) Subject to subsection (5), the following guarantees shall be implied where goods are supplied to a consumer:
(a) that the supplier has a right to sell the goods;

(b) that the goods are free from any undisclosed security; and

(c) that the consumer has a right to quiet possession of the goods, except in so far as the right is varied by

(i) a term of the agreement for supply where that agreement is a hire-purchase agreement within the meaning of the Hire-Purchase Act 1967 [Act 212];
(ii) a disclosed security; or
(iii) a term of the agreement for supply.

(2) Where subparagraphs (1)(c)(ii) and (iii) apply, the supplier shall first orally advise the consumer as to the way in which his right to quiet possession of the goods may be varied.

(3) The advice given by the supplier under subsection (2) shall be as may be sufficient to enable a reasonable consumer to understand the general nature and effect of the variation.

(4) Where a consumer has received oral advice under subsection (2) –
(a) the supplier shall give to the consumer a written copy of the security or agreement for supply or a written copy of the part thereof which provides for the variation as explained to the consumer under subsection (2); and
(b) the consumer shall acknowledge receipt thereof in writing.

(5) Where the goods are only hired or leased –
(a) paragraphs (1)(a) and (b) shall not apply; and
(b) paragraph (1)(c) shall confer a right to quiet possession of the goods only for the period of the hire or lease.

(6) For the purposes of this section –

"right to sell" means a right to dispose of the ownership of the goods to the consumer at the time when that ownership is to pass.

"undisclosed security" means any security that is –
(a) not disclosed to the consumer in writing before he agrees to the supply;
(b) not created by or with his express consent.

1.1.2 Comments on provisions in the law

Section 31(1)(a) of the Consumer Protection Act 1999 (CPA) should be read in conjunction with section 3(3). This means that the implied guarantee as to title applies on possession and not at the point of time where the title passes. In this sense, section 31(1)(a) is appropriate only in cases where title passes on possession but in the context of conditional sales and hire-purchase, title only passes when the condition stipulated has been fulfilled or when all installments have been paid. At this point of time, the implied guarantee as to title commences. Section 3(3) thus does not reflect the principle in both the transactions mentioned.

Section 31(3) on the right to quiet possession provides for the reasonable consumer test. A generalisation is not appropriate since it does not reflect the different socio-economic background of the Malaysian consumers. It is thus suggested that the yardstick should be the actual/the particular consumer. The sufficiency of advice given by the supplier will depend on that actual consumer dealing with the supplier.

Section 31(6) provides for a very narrow definition of the phrase 'right to sell'.

1.1.3 Comparison with other legislation

i. Section 14(a) Sale of Goods Act 1957 (Malaysia)

An implied condition on the part of the seller, that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

ii. Section 7(1)(b) Hire-Purchase Act 1967 (Malaysia)

An implied condition on the part of the owner that he will have a right to sell the goods at the time when the property is to pass.

iii. Section 69 Trade Practices Act 1974 (Australia)

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 property is to pass.

iv. Case interpretation of Section 12 Sale of Goods Act 1979(UK) (also applicable to section 14 Sale of Goods Act 1957 (Malaysia):

The case of Niblett v. Confectioners' Materials Co Ltd [1921] 3 KB 387 - "if the seller can be stopped by any process of law from selling the goods, he then does not have the right to sell, even though he is the legal owner of the goods sold".

PROPOSAL

Section 31 shall be amended as follows:

(1) Subject to subsection (5), the following guarantees shall be implied where goods are supplied to a consumer:

(a) 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 property is to pass.

(b) shall remain

(c) shall remain

(2) shall remain

(3) The advice given by the supplier under subsection (2) shall be as may be sufficient to enable that consumer to understand the general nature and effect of the variation

(4) shall remain

(5) shall remain

(6) For the purposes of this section -

The definition of 'right to sell' shall be amended as follows:

A supplier shall be regarded as having the "right to sell" the goods if that supplier has the right to dispose of the ownership of the goods to the consumer at the time when that ownership is to pass and that the supplier cannot be stopped from disposing of the goods by any law.

"undisclosed security" – shall remain

1.1.4 Justification

i. The time property passes in the goods will depend on the kind of transaction involved. The time property passes in a sale, an agreement to sell and a hire-purchase transaction differ. Therefore, the commencement of the implied guarantee as to title shall not be the same as regards to these three transactions. Provision as contained in section 31(1) is not accurate in relation to the existing principles of the passing of property under the relevant laws as applied to conditional sales and hire-purchase.

ii. This provision has to be in tandem with the existing principles on the passing of property in the context of conditional sale and hire-purchase. This provision may otherwise be regarded as ridiculous and may create confusion in its interpretation.

iii. The yardstick used, a reasonable consumer, is not appropriate in the context of the Malaysian consumers since the difference in our socio-economic background.

iv. Since the guarantee on quiet possession is vital and may disturb the enjoyment of the goods supplied to consumers, the particular consumer is entitled to know and fully understand the implication of the contract entered, and not by the standard of a reasonable consumer.

v. Infringements of trade marks are rampant in the Malaysian scenario. The amendment suggested in respect of the right to sell will enable this provision to be brought against supplier who is the legal owner of the goods but has infringed the trade mark of another company.

1.2 Implied guarantee as to acceptable quality

1.2.1 Provisions in Section 32

(1) Where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality.

(2) For the purposes of subsection (1), goods shall be deemed to be of acceptable quality-

(a) if they are-
- (i) fit for all the purposes for which goods of the type in question are commonly supplied;
- (ii) acceptable in appearance and finish;
- (iii) free from minor defects;
- (iv) safe; and
- (v) durable; and

(b) a consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to-
- (i) the nature of the goods;
- (ii) the price;
- (iii) any statements made about the goods on any packaging or label on the goods;
- (iv) any representation made about the goods by the supplier or the manufacturer; and
- (v) all other relevant circumstances of the supply of the goods.

(3) Where any defects in the goods have been specifically drawn to the consumer's attention before he agrees to the supply, then, the goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality by reason only of those defects.

(4) Where goods are displayed for sale or hire, the defects that are to be treated as having been specifically drawn to the consumer's attention for the purposes of subsection (3) shall be defects disclosed on a written notice displayed with the goods.

(5) Goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality if-

(a) the goods have been used in a manner or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and

(b) the goods would have complied with the implied guarantee as to acceptable quality if they had not been used in that manner or to that extent.

(6) A reference in subsections (3) and (4) to a defect is a reference to any failure of the goods to comply with the implied guarantee as to acceptable quality.

1.2.2 Comments on the provisions in the law

'Acceptable quality' is not an appropriate standard in the context of consumer sales. What is needed by consumers is not only that the goods purchased are acceptable but that they are satisfactory. It is therefore suggested that the standard of acceptable quality to be changed to 'satisfactory quality'. This section adopts the consumer expectation test in determining the standard of acceptability. The adequacy of the test is highly questionable in the light of the local scenario.

The supplier's liability in relation to satisfactory quality should be made a strict one (without fault). Section 32(5) provides for a defence on the part of the supplier and thus reduces the strength of CPA as contained in section 32. Section 32(5) has to be deleted. This subsection appears to provide the defence of contributory negligence in the realm of contractual liability and thus is questionable.

1.2.3 Comparison with other legislation

i. Section 14(2A) and (2B) Sale of Goods Act 1979 (UK)

(2A) For the purpose of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purpose of this Act, the quality of the state and condition and the following (among other things) are in appropriate cases aspects of the quality of goods –

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
(b) appearance and finish,
(c) freedom from minor defects,
(d) safety, and
(e) durability.

ii. Article 99 Consumer Act of the Philippines 1990

Liability for Defective Services: The service supplier is liable for redress, independently of fault, for damages caused to consumers by defects relating to the rendering of the services, as well as for insufficient or inadequate information on the fruition and hazards thereof.

PROPOSAL

Section 32 shall be amended as follows:

(1) Where goods are supplied to a consumer there shall be implied a guarantee, independently of fault, that the goods are of satisfactory quality.

(2) (a) For the purpose of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price, any statements made about the goods on any packaging or label on the goods, any representation made about the goods by the supplier or the manufacturer; and all other relevant circumstances of the supply of the goods.

(b) For the purpose of this Act, quality of the goods includes its state and condition and shall include –
- (i) fit for all the purposes for which goods of the type in question are commonly supplied;
- (ii) acceptable in appearance and finish;
- (iii) free from minor defects;
- (iv) safe; and
- (v) durable.

(c) Goods shall remain of satisfactory quality for a reasonable period of time depending on the circumstances of the case and nature of the goods involved.

(3) Acceptable quality to be replaced with satisfactory quality

(4) Shall remain

(5) Shall be deleted.

(6) Acceptable quality shall be replaced with satisfactory quality

1.2.4 Justification

i. Market now is being dumped with poor quality goods. Consumers acquire goods with the hope that those goods are of satisfactory quality, not only that the goods are acceptable. The standard of acceptable quality is relatively lower as compared to satisfactory quality. There is a possibility that goods may be acceptable to a particular consumer even though they are not satisfactory, but to another consumer the goods may not be acceptable at all as they are unsatisfactory.

ii. The consumer expectation test is not appropriate in the local scenario since there exists a difference in our socio-economics background.

iii. CPA with its objective in providing consumer protection should not be seen affording protection to traders so as to deprive consumers of their right to redress in cases where there have been breaches of the implied guarantees. Similar provision is not contained in the Australian, UK legislations as well as in the Asian countries such as India.

1.3 Implied guarantee as to price

1.3.1 Provisions in Section 36

(2) Where there is a failure to comply with the implied guarantee under subsection (1), the consumer's only right of redress shall be to refuse to pay more than the reasonable price.

(3) Nothing in Part IV shall be taken to confer on the consumer any other right of redress.

1.3.2 Comments on provisions of the law

This section limits the right to claim redress. It only allows consumers to refuse to pay more than the reasonable price. Consumers are not entitled to claim further under Part IV. Practically, this section is inappropriate.

1.3.3 Comparison with other legislation

This section is similar to section 11 of the Consumer Guarantees Act 1993 (New Zealand). There is no similar provision elsewhere, besides New Zealand.

PROPOSAL

Section 36 shall be amended as follows:

(2) and (3) to be deleted and replaced with the following:

(2) Where there is a failure to comply with the implied guarantee under subsection (1), the consumer's right of redress shall be to refuse to pay more than the reasonable price.

(3) In addition to sub section (2), nothing in this part shall have the effect of excluding the consumer from other right of redress in Part IV.

1.3.4 Justification

The issue of unreasonable or exorbitant prices of goods has become a matter of grave concern. Limiting the right of redress to a reasonable price is not practical. In the real life, it is difficult for a consumer to pay the reasonable price and to walk away. It is therefore necessary to provide for additional remedies to curtail the unethical conduct of traders in respect of price. Other countries, except New Zealand, do not have a similar provision in their legislations.

1.4 Implied guarantee as to repairs and spare parts

1.4.1 Provisions in Section 37

(1) Where imported or locally manufactured goods are supplied to a consumer, there shall be implied guarantee that the manufacturer and the supplier will take reasonable action to ensure that facilities for the repair of the goods and the supply of spare parts for the goods are reasonably available for a reasonable period after the goods are so supplied.

(2) Subsection (1) shall not apply where reasonable action has been taken to notify the consumer, at or before the time the imported or locally manufactured goods are supplied, that the manufacturer or supplier or both does not undertake that repair facilities and spare parts will be available for those goods.

(3) Where reasonable action has been taken to notify the consumer, at or before the time the goods are supplied, that the manufacturer or supplier or both does not undertake that repair facilities and spare parts will be available for those goods after the expiration of a specified period, subsection (1) shall not apply in relation to the imported or locally manufactured goods after the expiration of that period.

1.4.2 Comments on provision in the law

The phrase 'reasonably available for a reasonable period after the goods are so supplied' in section 37(1) is difficult to asses. What is meant by 'reasonable period'? It is suggested that this phrase be replaced with 'at the relevant time'.

What is meant by 'reasonable action' on the part of the manufacturer or supplier under this section? This section does not explain or elaborate on what actions are regarded as reasonable on the part of the supplier or manufacturer in ensuring the availability of repairs and spare parts.

CPA should provide for a continuous obligation on manufacturers and suppliers to ensure repair facilities and spare parts are reasonably available when the need arises. No exceptions or grounds should be provided for manufacturers in particular to escape this responsibility. Suppliers however should be required to inform the consumers if they do not undertake that repair facilities and spare parts are available for those goods.

A section should be included providing for what should be taken into account in determining whether manufacturers and suppliers have acted reasonably. In determining whether manufacturers and suppliers have acted reasonably in ensuring that facilities for the repair of goods and the supply of spare parts for the goods are reasonably available at the relevant time, all relevant circumstances should be taken into account, in particular, the existence, at the relevant time, the circumstances preventing those facilities being so available are beyond the control of the manufacturers and suppliers.

1.4.3 Comparison with other legislation

(i) Section 74F of the Trade Practices Act 1974 (Australia)

74F(1)(c) at a time (in this section referred to as the relevant time) after the acquisition of the goods by the consumer:

74F(4) In determining whether a corporation acted unreasonably in failing to ensure that facilities for the repair of goods were, or that a part was, reasonably available to a person at the relevant time, a court shall have regard to all the circumstances of the case, and in particular to the existence, at the relevant time, of circumstances that prevented those facilities or that part being so available, being circumstances beyond the control of the corporation.

PROPOSAL

Section 37 shall be amended as follows:

(1) Where imported or locally manufactured goods are supplied to a consumer, there shall be implied guarantee that the manufacturer and the supplier will take reasonable action to ensure that facilities for the repair of the goods and the supply of spare parts for the goods are reasonably available for a reasonable period after the goods are so supplied.

A section shall be added as follows:

(2) If the supplier only undertake that repair facilities and spare parts will be available for a reasonable period after supply, supplier shall notify the consumer of this at or before the time the imported or locally manufactured goods are supplied.

(3) shall be amended as follows:

(3) Where reasonable action has been taken to notify the consumer, at or before the time the goods are supplied, that the supplier does not undertake that repair facilities and spare parts will be available for those goods after the expiration of a specified period, subsection (1) and (2) shall not apply in relation to the imported or locally manufactured goods after the expiration of that period.

(2) shall be amended as follows:

(4) Subsection (1) and (2) shall not apply where reasonable action has been taken to notify the consumer, at or before the time the imported or locally manufactured goods are supplied, that the supplier does not undertake that repair facilities and spare parts will be available for those goods.

A section shall be added as follows:

(5) In determining whether the supplier and manufacturer have acted unreasonably in failing to ensure that facilities for the repair of goods were, or that a part was, reasonably available to a person at the relevant time, a court shall have regard to all the circumstances of the case, and in particular to the existence, at the relevant time, of circumstances that prevented those facilities or that part being so available, being circumstances beyond the control of the supplier and the manufacturer.

1.4.4 Justification

i. Repair facilities and spare parts are two most appropriate areas for consumer claims and are not contained in any other legislation prior to CPA. This provision however may still be enhanced to ensure these facilities are available when the need arises and not merely limited to a reasonable period of time.

ii. A continuous obligation should be shouldered by suppliers and manufacturers in ensuring these facilities are made available when the need arises. However, any provision providing manufacturers with reasons to avoid this responsibility should not be allowed since manufacturers are the most appropriate group to be entrusted with this responsibility.

iii. Suppliers, however, may be excluded from this liability if they expressly notify the consumers that they do not undertake that repair facilities and spare parts are available for those goods.

1.5 Manufacturer's express guarantee

1.5.1 Provisions in Section 38

(1) An express guarantee given by a manufacturer of goods which are supplied to a consumer shall bind the manufacturer to the extent specified in subsections (2), (3) and (4).

1.5.2 Comments on provisions in the law

This section if literally interpreted may mean that the manufacturer's express guarantees which impose a duty less strict than the implied guarantees as contained in CPA are binding on the manufacturer and may to a certain extent deprive consumers of their rights under the implied guarantees. A subsection should be added to section 38 which provides that claims under the express guarantee should not deprive consumers of their rights under the implied guarantees and where there is any conflict between the express and the implied guarantees, whichever guarantee that imposes a stricter duty shall prevail.

1.5.3 Comparison with other legislation

<u>Section 74G Trade Practices Act 1974 (Australia)</u>

(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 acquires the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer;

and

(c) the corporation fails to comply with an express warranty given or made by the corporation in relation to the goods; and

(d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason of the failure;

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.

PROPOSAL

Section 38 shall be amended as follows:

A section shall be added as follows:
Nothing in this section shall remove or restrict the effect of the implied guarantees as contained in Part IV and where there is any conflict between the express guarantee in this section and the implied guarantees under Part IV, whichever guarantees that imposes a stricter duty shall prevail.

1.5.4 Justification

i. Before the enactment of CPA, consumers may only rely on collateral contract as the cause of action for breaches of the manufacturer's express guarantees. The statutory right provided by CPA has brought the problem associated with these types of breaches prior to 1999 to an end.

ii. Nevertheless the provision in section 38 may lead to abuses if in the case where there exists a manufacturer's express guarantee, the only right of redress is as regards to breaches of those express guarantees without having a recourse against the manufacturers under the implied guarantees in CPA. This may also lead to abuses of the consumers if the rights under those express guarantees are weaker than those under the implied guarantees contained in CPA. The protection afforded under CPA will be weakened if this is so.

SUMMARY

GUARANTEES IN RESPECT OF SUPPLY OF GOODS

Part/Section	Topic	Comments	Suggestion
Part V	Guarantees in respect of supply of goods		
Section 31	Implied guarantee as to title	Section 31(1)(a) should be read in conjunction with section 3(3). Section 31(1)(a) is appropriate in cases where title passes on possession but in the context of conditional sales and hire-purchase, title only passes when the condition stipulated has been fulfilled or when all the installments are paid. At this point of time, the implied guarantee as to title commences. Section 3(3) thus does not reflect the principle in both the transactions mentioned.	This section shall be amended by inserting 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 property is to pass.
		Section 31(3) on the right to quiet possession provides for the reasonable consumer test. A generalisation is not appropriate since it does not reflect the different socio-economic background of the Malaysian consumers.	It is thus suggested that the yardstick should be the actual/the particular consumer. What is sufficient will depend on the state of the particular consumer dealing with the supplier. Section 31(3) shall be amended to include 'as may be sufficient to enable that consumer to understand the general nature and effect of the variation'.
		Section 31(6) provides for a very narrow definition of the phrase 'right to sell'	This section shall be amended to include a wider definition of the phrase "right to sell" the goods by adding 'or that the supplier cannot be stopped from disposing of the goods by any law.'
Section 32	Implied guarantee as to acceptable quality	'Acceptable quality' is not an appropriate standard in the context of consumer sales. What is needed by consumers is not only that goods purchased are acceptable but that they are satisfactory. This section adopts the consumer expectation test in determining the standard of acceptability. The adequacy of the test is highly questionable in the light of the local scenario.	This section to be amended by replacing the standard with the standard of satisfactory quality and redefining the elements – goods shall be regarded as satisfactory if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price, any statements made about the goods on any packaging or label on the goods, any representation made about the goods by the supplier or the manufacturer; and all other relevant circumstances of the supply of the goods. Quality of the goods includes its state and condition and

			shall include, fitness for all the purposes for which goods of the type in question are commonly supplied; acceptable in appearance and finish; free from minor defects; safe; and durable. Goods shall remain of satisfactory quality for a reasonable period of time depending on the circumstances of the case and nature of the goods involved.
		Section 32(5) provides for a defence on the part of the supplier and thus reduces the strength of CPA as contained in section 32. This subsection appears to provide the defence of contributory negligence in the realm of contractual liability and thus is questionable.	Section 32(5) to be deleted.
Section 36	Implied guarantee as to price	This section limits the consumer's right of redress. It only allows consumers to refuse to pay more than the reasonable price. Consumers are not entitled to further claim under Part V. Practically, this section is inappropriate.	Section 36(2) and (3) shall be deleted. The consumer's right of redress shall not be limited to paying no more than the reasonable price. The right of redress under Part V shall also be applicable.
Section 37	Implied guarantee as to repairs and spare parts	The phrase 'reasonably available for a reasonable period after the goods are so supplied' in section 37(1) is difficult to asses. What is meant by 'reasonable period'?	This section shall be amended by replacing the phrase 'for a reasonable period after the goods are supplied' with 'at the relevant time'.
		The obligation on the manufacturer to ensure that repair facilities and spare parts are reasonably available should be a continuous obligation. No ground should be provided to enable manufacturers to avoid such obligation. Suppliers however may exclude themselves if steps have been taken to notify consumers that they do not undertake to supply such facilities.	A section shall be inserted providing for supplier to inform the consumer expressly if they are only able to provide these facilities within a reasonable period of time or they do not undertake to provide these facilities at all. Subsection (3) remains as subsection (3) but applicable only to suppliers. Subsection (2) will appear as subsection (4) and applicable only to suppliers.
		What is meant by 'reasonable action' on the part of the manufacturer or supplier under this section? This section does not explain or elaborate on what actions are regarded as reasonable in ensuring the availability of repairs and spare parts.	A subsection shall be included providing for what will be taken into account in determining whether manufacturers and suppliers have acted reasonably. In determining this, all relevant circumstances should be taken into account, in particular, the existence, at the relevant time, the circumstances preventing those facilities being so available are beyond the control of the manufacturers and suppliers.

Section 38	Manufacturer's express guarantee	This section if literally interpreted may mean that the manufacturer's express guarantees which imposes a duty less strict than the implied guarantees as contained in CPA are binding on the manufacturer and may to a certain extent deprive consumers of their rights under the implied guarantees.	A section shall be added in section 38 which provides for claims under the express guarantee should not deprive consumers of their rights under the implied guarantees and where there is any conflict between the express and the implied guarantees, whichever guarantee that imposes a stricter duty shall prevail.

THE CONSUMER PROTECTION ACT 1999

PART V

RIGHTS AGAINST SUPPLIERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF GOODS

1.0 PART V: RIGHTS AGAINST SUPPLIERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF GOODS

1.1 Exception in respect of implied guarantee as to acceptable quality

1.1.1 Provisions in Section 40

Notwithstanding section 39, there shall be no right of redress against the supplier of goods under this Act in respect of the failure of the goods to comply with the implied guarantee as to acceptable quality where –

(a) the manufacturer makes a representation in respect of the goods otherwise than by a statement on any packaging or label; and

(b) the goods have complied with the implied guarantee as to acceptable quality if that representation had not been made.

1.1.2 Comments on provisions in the law

Section 40 should be deleted since it provides for grounds for suppliers to avoid liability and is confusing (limits the right of redress against supplier). The implied guarantee as to acceptable quality should be made a strict liability on the suppliers. If section 2(4) be deleted and giving CPA the prevailing effect, section 40 should be deleted to provide for a similar or even better protection under CPA as compared to the Sale of Goods Act 1957 (SOGA). SOGA imposes a strict liability on sellers in respect of its implied terms.

1.1.3 Comparison with other legislation

This section is similar to section 17 of the Consumer Guarantees Act 1993 (New Zealand). There is no similar provision elsewhere, besides New Zealand.

PROPOSAL
Section 40 shall be deleted.

1.1.4 Justification

CPA with its objective in providing consumers with protection should not be seen as creating rooms or grounds for traders to escape liability thus leaving consumers with no right of redress. Similar provision is not contained in the legislations of any other countries besides New Zealand.

1.2 Options against suppliers where goods do not comply with guarantees

1.2.1 Provisions in Section 41

(1) Where a consumer has a right of redress against the supplier under this Part in respect of the failure of any goods to comply with a guarantee under Part IV, the consumer may exercise the following remedies:

(a) where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time in accordance with section 42; and

(b) where the failure is one that cannot be remedied or is of a substantial character within the meaning of section 44, the consumer may-
(i) subject to section 43, reject the goods in accordance with section 45; or
(ii) obtain from the supplier damages in compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(2) In addition to the remedies under subsection (1), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the goods, which is proved to be a result or consequence of the failure.

(3) Where the supplier refuses or neglects to remedy the failure as required under paragraph (1)(a), or refuses or neglects to do so within a reasonable time, the consumer may-

(a) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or

(b) subject to section 43, reject the goods in accordance with section 45.

1.2.2 Comments on provisions in the law;

Comment 1

The right of redress as contained in CPA is relatively weaker than those contained in SOGA. Under SOGA, a buyer has an automatic right to reject the goods for a breach of an implied condition (subject only to *de minimis non curat lex*) (the law does not concern itself with trifles). CPA adopts a different approach. CPA looks at the seriousness of the breach rather than to the term that has been broken.

In brief, CPA adopts the innominate approach. Remedies that are available to a consumer will depend on whether the failure can be remedied or it is of a substantial nature and thus cannot be remedied. Based on section 41(1)(a), for failure which can be remedied, a consumer's right of redress is limited to having the supplier remedying the failure within a reasonable time. A consumer's right should not be limited as such. For any failure to comply with the implied guarantees under Part IV, regardless of the nature of the failure, a consumer should be entitled to reject the goods and opt out of the contract besides obtaining damages under section 41(2). To a consumer, these breaches are serious.

Section 41(1)(a) read together with section 42(1)(b) provides a remedial scheme that is weaker than that of SOGA. A breach of the implied guarantee as to title should entitle a consumer to repudiate the contract and claim damages without reduction in the value of the goods since there exists a total failure of consideration in such a case.

The right of redress under section 41(3) should be coupled with an additional right for damages from the supplier for any losses or damage suffered by the consumer.

Comment 2

However should a decision be made to retain the current provision, several amendments are proposed to enhance the protection under this section. Section 41(1)(a) provides for the failure that can be remedied to be remedied within a reasonable time. What is a reasonable time is a question of fact. If the time taken is a reasonable time but yet causes significant inconveniences to the consumer, it is not fair to allow the supplier to remedy the failure. There are situations where suppliers are willing to remedy the failure but charge extra costs or charging the costs of remedying the failure to the consumers. This section does not provide for these situations.

Section 41(2) which allows the consumer to obtain from the supplier damage for any loss or damage suffered by the consumer other than loss or damage through a reduction in the value of the goods which is proved to be a result or consequence of the failure, does not provide sufficient compensation to consumers falling under paragraph (1)(a) or (1)(b)(i) category.

1.2.3 Comparison with other legislation

i. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (1999) O.J. L171/12, 7 July 1999

"Recital 12 states that "in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy; ...it is for the consumer to decide whether to accept or reject this remedy." In the absence of agreement, Article 3 provides for four remedies to be available; (i) repair of the goods; (ii) replacement, (iii) rescission of the contract and (iv) price reduction. Whereas earlier proposals provided for the consumer to choose between these remedies, the final text effectively arranges them in a hierarchy, so that repair and replacement are the primary remedies, with rescission available only in limited circumstances. Article 3(2) lists the remedies and Article 3(3) then continues "In the first place the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate." By way of clarification the paragraph explains that "a remedy shall be deemed disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable taking into account the value the goods would have if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be completed without significant inconvenience to the consumer." Any repair or replacement shall be completed "within a reasonable time and without any significant inconvenience to the consumer."

ii. Case interpretation of Section 12 of the Sale of Goods Act 1979(UK) (also applicable to the Sale of Goods Act 1957 (Malaysia))

In the case of Rowland v. Divall [1923] 2 KB 500, the court held that a breach of section 12 is a serious beach of condition which led to a total failure of consideration. The reduction in the value of

the goods or the usage of the car for four months by the plaintiff was not allowed to be taken into account in assessing the damage.

iii. Section 11N Supply of Goods and Services Act 1982 (UK)

(1) If section 11M above applies, the transferee may require the transferor -
(a) to repair the goods, or
(b) to replace the goods.

(2) If the transferee requires the transferor to repair or replace the goods, the transferor must –
(a) repair or as the case may be, replace the goods within a reasonable time but without causing significant inconvenience to the transferee;
(b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

(3) The transferee must not require the transferor to repair or, as the case may be, to replace the goods if that remedy is –
(a) impossible,
(b) disproportionate in comparison to the other of those remedies, or disproportionate in comparison to an appropriate reduction in the purchase price
(c) under paragraph (a), or rescission under paragraph (b), of section 11P(1) below.

(4) One remedy is disproportionate in comparison to the other if one imposes costs on the transferor which, in comparison to those imposed on him by the other, is unreasonable, taking into account –
(a) the value which the goods would have if they conformed to the contract for the transfer of goods,
(b) the significance of the lack of conformity to the contract for the transfer of goods,
(c) whether the other remedy could be affected without significant inconvenience to the transferee,

(5) Any question as to what is a reasonable time or significant inconvenience is to be determined by reference to –
(a) the nature of the goods, and
(b) the purpose for which the goods were acquired.

PROPOSAL 1

Section 41 shall be amended as follows:

(1)(a) Where a consumer has a right of redress against a supplier under this Part in respect of failure to comply with the implied guarantees under Part IV, the supplier may offer to the consumer by way of settlement, any remedy and it is for the consumer to accept or to refuse the offer from the supplier.

(b) Where the supplier does not offer any remedy by way of settlement, or if the consumer refuses to accept the offer made by the supplier, the consumer may claim the following remedies:
(i) repair of the goods; or
(ii) replacement of the goods with identical type; or

(iii) rescission of the contract, rejection of the goods and a refund in cash of money paid or the value of any other consideration provided, or both, as the case may require; or

(iv) damages from the supplier by way of compensation for the reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(c) If the consumer accepts sub section (b)(i) or (ii) by way of remedy, repairs or replacement of the goods must be completed within a reasonable time without any significant difficulty on the part of the consumer.

(2) shall remain.

(3) If a consumer opts for the remedy in sub section (1)(b)(i) or (ii), but the supplier refuses or neglects to remedy the failure as required under sub section (1)(c), or refuses or neglects to do so, the consumer may have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied or subject to section 43, reject the goods in accordance with section 45.

(4) In addition to the remedy under subsection (3), the consumer may obtain damages from the supplier for other loss or damage suffered which is proved to be a result or consequence of the failure.

(5) Where a consumer obtains goods to replace the defective goods under sub section (1)(b)(ii), the replacement goods shall, for the purposes of this Act, be deemed to be supplied by the supplier and the guarantees and obligations under this Act relating to the supply of goods to a consumer shall apply to the replacement goods.

Section 42 shall be deleted.

Section 43, 45, 46, 47, 48, 49 shall remain.

Section 44 shall be deleted.

PROPOSAL 2

Section 41 to be amended as follows:

(1) Where a consumer has a right of redress against the supplier under this Part in respect of the failure of any goods to comply with a guarantee under Part IV, the consumer may exercise the following remedies:

(a) where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time in accordance with section 42, without causing significant inconvenience to the consumer and the supplier must bear any necessary costs incurred in doing so (including in particular the cost of labour and materials); and

(b) where the failure is one that cannot be remedied or is of a substantial character within the meaning of section 44, the consumer may-

(i) subject to section 43, reject the goods in accordance with section 45; or

(ii) obtain from the supplier damages in compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

An additional section shall be inserted as follows:

(2) In addition to the remedies under paragraphs (1)(a) and (1)(b)(i), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, which is proved to be a result or consequence of the failure.

Subsection (2) shall be amended as follows:

(3) In addition to the remedies under paragraphs (1)(b)(i), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the goods, which is proved to be a result or consequence of the failure.

Subsection (3) shall be amended as follows:

(4) Where the supplier refuses or neglects to remedy the failure as required under paragraph (1)(a), or refuses or neglects to do so within a reasonable time, the consumer may-
   (a) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
   (b) subject to section 43, reject the goods in accordance with section 45.

1.2.4 Justification

PROPOSAL 1

i. Nowadays consumers are confronted with all sorts of abuses and suppression particularly in relation to goods. Breaches of the implied guarantees in Part IV are serious breaches to a consumer and must be accompanied with a serious sanction. Consumer should be given the right to choose the sanction most suitable to them.

ii. The current section 41 provides for a remedial scheme which is weaker and less effective as compared to SOGA. CPA does not provide for an automatic right to reject the goods even though the supplier is in breach of a serious guarantee which amounts to a condition such as the right to sell. A more attractive remedial scheme appears in UK and in the EC Directive.

PROPOSAL 2

i. Any obligation of the supplier should be carried out without causing any significant inconvenience to the consumer. If the failure could be remedied within the reasonable time but causing inconvenience to the consumer, the protection given is not effective.

ii. To avoid the consumer having to pay for the work carried out by the supplier in remedying the failure, a clear provision should be inserted to this effect providing that all costs as a result of remedying the failure should be borne by the supplier. Without this provision, there is a likelihood that this type of expenses shall be charged to the consumer.

iii. Section 41(2) limits a consumer's claim to damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the goods, which is proved to be a result or consequence of the failure. Even though this subsection may be appropriate for consumers claiming under section 41(1)(b)(ii), this section should be reviewed taking into account its suitability in the context of section 41(1)(a) and (1)(b)(i).

1.3 Satisfaction of requirement to remedy a failure

1.3.1 Provisions in Section 42

A supplier may satisfy a requirement under section 41 to remedy a failure of any goods to comply with a guarantee by –

(a) where the failure does not relate to title, repairing the goods;

(b) where the failure relates to title, curing any defect in title;

(c) replacing the goods with goods of identical type; or

(d) providing a refund of any money paid or other consideration provided by the consumer in respect of the goods where the supplier cannot reasonably be expected to repair or replace the goods or cure any defect in title.

1.3.2 Comments on provision in the law

The protection in relation to title under CPA is weak as compared to the protection under SOGA. A breach of the implied guarantee as to title is a serious breach which goes to the root of the contract in particular in a contract of sale of goods. This type of breach should be categorised as a failure that cannot be remedied or substantial.

1.3.3 Comparison with other legislation

Case interpretation of Section 12 of the Sale of Goods Act 1979(UK) (applicable also to the Sale of Goods Act 1957 (Malaysia))

In the case of Rowland v. Divall [1923] 2 KB 500, the court held that a breach of section 12 is a serious beach of condition which led to a total failure of consideration. The reduction in the value of the goods or the usage of the car for four months by the plaintiff was not allowed to be taken into account in assessing the damage.

PROPOSAL (If section 42 is to remain)

Section 42 shall be amended as follows:

(1) A supplier may satisfy a requirement under section 41 to remedy a failure of any goods to comply with a guarantee by –

- (a) repairing the goods;
- (b) shall be deleted.
- (c) shall remain but will appear as paragraph (b)
- (d) shall appear as paragraph (c) with the following amendments: providing a refund of any money paid or other consideration provided by the consumer in respect of the goods where the supplier cannot reasonably be expected to repair or replace the goods.

1.3.4 Justification

i. A breach of the implied guarantee in particular right to sell cannot be regarded as a failure that can be remedied since such a breach goes to the root of the contract.

ii. Breach of the implied guarantee as to title leads to a total failure of consideration resulting in no contract at all. In the consumer context, breach of this implied guarantee should be regarded as serious breach and thus substantial.

1.4 Failure of a substantial character

1.4.1 Provisions in Section 44

For the purposes of paragraph 41(1)(b), a failure to comply with a guarantee shall be of a substantial character where –

(a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;

(b) the goods depart in one or more significant respects from the description by which they were supplied or, where they were supplied by reference to a sample or demonstration model, from the sample or demonstration model;

(c) the goods are –
   (i) substantially unfit for a purpose for which goods of the type are commonly supplied; or
   (ii) where subsection 33(1) applies, unfit for a particular purpose made known to the supplier or represented by the supplier to be a purpose for which the goods would be fit,

   and the goods cannot easily and within a reasonable time be remedied to make them fit for such purpose; or

(d) the goods are not of acceptable quality within the meaning of section 32 because they are unsafe.

1.4.2 Comments on provision in the law

With the amendments proposed to section 32 and 43, section 44 should be amended accordingly. All phrases of 'acceptable quality' shall be replaced with 'satisfactory quality' and a breach of the implied guarantee as to the right to sell should be listed under this section, making a failure to comply with this guarantee a failure that cannot be remedied and thus substantial in character.

1.4.3 Comparison with other legislation

Case interpretation of Section 12 of the Sale of Goods Act 1979(UK) (applicable also to the Sale of Goods Act 1957 (Malaysia))

In the case of Rowland v. Divall [1923] 2 KB 500, the court held that a breach of section 12 is a serious beach of condition which led to a total failure of consideration. The reduction in the value of the goods or the usage of the car for four months by the plaintiff was not allowed to be taken into account in assessing the damage.

PROPOSAL

Section 44 shall be amended as follows:

For the purposes of paragraph 41(1)(b), a failure to comply with a guarantee shall be of a substantial character where –

(a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;

A paragraph shall be inserted as follows:

(b) the supplier does have a right to sell the goods;

(c) paragraph (b) shall appear as paragraph (c)

(d) paragraph (c) shall appear as paragraph (d)

(e) paragraph (d) shall appear as paragraph (e) with the following amendments: the goods are not of satisfactory quality within the meaning of section 32 because they are unsafe.

1.4.4 Justification

i. A breach of the implied guarantee in particular right to sell cannot be regarded as a failure that can be remedied since such a breach goes to the root of the contract.

ii. Breach of implied guarantee as to the right to sell leads to a total failure of consideration resulting in no contract at all. In the consumer context, breach of this implied guarantee should be regarded as s serious breach and thus substantial.

SUMMARY

PART VI: RIGHTS AGAINST SUPPLIERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF GOODS

Part/section	Topic	Comments	Suggestion
Section 40	Exception in respect of implied guarantee as to acceptable quality	Section 40 should be deleted since it provides for grounds for suppliers to avoid liability and is confusing (limits the right of redress against supplier). The implied guarantee as to acceptable quality should be made a strict liability on the suppliers. If section 2(4) be deleted and giving CPA the prevailing effect, section 40 should be deleted to provide for a similar or even better protection than that of SOGA.	Section 40 shall be deleted.
Section 41	Options against suppliers where goods do not comply with guarantees	The right of redress as contained in CPA is relatively weaker than those contained in SOGA. Remedies that are available to a consumer will depend on whether the failure can be remedied or it is of a substantial nature and thus cannot be remedied. Based on section 41(1)(a), for failure which can be remedied, a consumer's right of redress is limited to having the supplier remedying the failure within a reasonable time. A consumer's rights should not be limited as such. Section 41(1)(a) read together with section 42(1)(b) provides a remedial scheme that is weaker than that of SOGA. A breach of the implied guarantee as to title should entitle a consumer to repudiate the contract and claim damages without reduction in the value of the goods since there exists a total failure of consideration in such a case.	<u>Proposal 1</u> The section shall be deleted and replaced with a new section which allows the supplier to offer to the consumer by way of settlement, any remedy and it is for the consumer to accept or to refuse the offer from the supplier. Where the supplier does not offer any remedy by way of settlement, or if the consumer refuses to accept the offer made by the supplier, the consumer may claim either repair of the goods; or replacement of the goods with identical type; or rescission of the contract, rejection of the goods and refund in cash of money paid or the value of any other consideration provided, or both, as the case may require; or damages from the supplier by way of compensation for the reduction in the value of the goods below the price paid or payable by the consumer for the goods. Section 41(2) shall remain. Section 41(3) shall be amended by replacing paragraph (1)(a) with sub section (1)(b)(i) or (ii). The right of redress under section 41(3) shall be coupled with an additional right for damages from the supplier for any losses or damage suffered by the consumer. Section 42(2) now shall be renumbered as section 41(4). Section 42 shall be deleted.

		However if the present provision were to remain, several amendments should be made to the section.	Section 43, 45, 46, 47, 48, 49 – shall remain. Section 44 shall be deleted. <u>Proposal 2</u> Section 41(1)(a) shall be amended inserting the phrase without causing any significant inconvenience to the consumer and the supplier must bear any costs incurred in doing so. One section shall be inserted as addition to paragraph (1)(a) and (1)(b)(i) and deleting the phrase 'other than loss or damage through a reduction in the value of the goods'. Subsection 41(2) shall appear as subsection 41(3) providing for additional remedy to paragraph (1)(b)(ii).
Section 42	Satisfaction of requirement to remedy a failure	Failure to comply with the implied guarantee as to title should not be regarded as a failure that can be remedied since title forms part of the consideration in a contract in particular the sale of goods. A breach of this implied guarantee should be listed under failure which is substantial in character.	This section shall be amended deleting paragraph (1)(b) and amending paragraph (d) accordingly.
Section 44	Failure of substantial nature	With the amendments made to sections 32 and 43, this section shall be amended accordingly.	This section shall be amended making failure as to the right to sell a failure that cannot be remedied and thus substantial in character and inserted as paragraph (b). Other paragraphs shall be amended accordingly – paragraph (b) shall appear as (c) and (c) as (d). Paragraph (d) shall appear as paragraph (e) and shall be amended replacing acceptable quality with satisfactory quality.

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PART VI

RIGHTS AGAINST MANUFACTURERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF GOODS

1.0 PART VI : RIGHTS AGAINST MANUFACTURERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF GOODS

1.1 Consumer's right of redress against manufacturers

1.1.1 Provisions in Section 50

This Part gives a consumer a right of redress against a manufacturer of goods where –

(a) the goods fail to comply with the implied guarantee as to acceptable quality under section 32;

(b) the goods fail to comply with the implied guarantee as to correspond with description under section 34 due to the failure of the goods to correspond with a material description applied to the goods by or on behalf of the manufacturer or with the express or implied consent of the manufacturer;

(c) the goods fail to comply with the implied guarantee as to repairs and spare parts under section 37;

(d) the goods fail, during the currency of the guarantee, to comply with any express guarantee given by the manufacturer that is binding on the manufacturer in accordance with section 38.

1.1.2 Comments on provision in the law

A manufacturer should be responsible for the failure of their goods to comply with its description and not only the material description. What is a material description is difficult to identify. Manufacturers should also be made responsible for goods which are not reasonably fit for its ordinary purpose.

1.1.3 Comparison with other legislation

Section 25 Consumer Guarantees Act 1993 (New Zealand)

This Part of this Act gives a consumer a right of redress against a manufacturer of goods where –

(a) the goods fail to comply with the guarantee as to acceptable quality set out in section 6 of this Act;

(b) the goods fail to comply with the guarantee as to correspondence with description set out in section 9 of this Act due to failure of the goods to correspond with any description applied to the goods by or on behalf of the manufacturer or with the express or implied consent of the manufacturer;

(c) the goods fail to comply with the guarantee as to repairs and parts set out in section 12 of this Act;

(d) the goods fail, during the currency of the guarantee, to comply with any express guarantee given by the manufacturer that is binding on the manufacturer in accordance with section 14 of this Act.

PROPOSAL

Section 50 shall be amended as follows:

This Part gives a consumer a right of redress against a manufacturer of goods where -

(a) the goods fail to comply with the implied guarantee as to satisfactory quality under section 32;

(b) goods are reasonably unfit for the ordinary purpose for which goods of the type are commonly supplied;

(c) the goods fail to comply with the implied guarantee as to correspond with description under section 34 due to the failure of the goods to correspond with any description applied to the goods by or on behalf of the manufacturer or with the express or implied consent of the manufacturer; (the current paragraph (b) will appear as paragraph (c) with amendments)

(d) the current paragraph (c)

(e) the current paragraph (d)

1.1.4 Justification

i. Manufacturers are directly involved in the production of goods. Therefore manufacturers should not only be made responsible in respect of the quality of goods, material description of the goods, repairs and spare parts, and their express guarantees, they should also be held responsible for goods which are not reasonably fit for its ordinary use. If suppliers are held responsible for compliance with the description and fitness, why then not the manufacturers?

ii. Manufacturer is the most appropriate party to ensure compliance of the goods with its description and reasonably fit for its ordinary use at the production stage. With this additional obligation on the manufacturers, they will be made more responsible in the production of their goods. This may to a certain extent reduce the problem of dumping of defective goods in the market.

1.2 Exceptions to right of redress against manufacturers

1.2.1 Provisions in Section 51

Notwithstanding section 50, there shall be no right of redress against the manufacturer under this Act in respect of goods which fail to comply with the implied guarantee under section 32 or 34 where the failure is due to –

(a) an act, default or omission of, or any representation made by, a person other than the manufacturer; or

(b) a cause independent of human control, occurring after the goods have left the control of the manufacturer.

1.2.2 Comments on provision in the law

This section enables a manufacturer to escape liability under section 50, if the failure is due to an act, default or omission of, or any representation made by, a person other than the manufacturer. This section is not clear as regards to the manufacturer's liability for acts or omission of their servant, agent or any person action on their behalf.

1.2.3 Comparison with other legislation

Section 26 Consumer Guarantees Act 1993 (New Zealand)

Notwithstanding section 25 of this Act, there shall be no right of redress against the manufacturer under this Act in respect of goods which –

(a) fail to comply with the guarantee of acceptable quality only because of -
   (i) an act or default or omission of, or any representation made by, any person other than the manufacturer or a servant or agent of the manufacturer
   (ii) a cause independent of human control, occurring after the goods have left the control of the manufacturer; or
   (iii) the price charged by the supplier being higher than the manufacturer's recommended retail price or the average retail price;

(b) Fail to correspond with the guarantee as to correspondence with description because of –
   (i) an act or default or omission of a person other than the manufacturer or a servant or agent of the manufacturer; or
   (ii) a cause independent of human control, occurring after the goods have left the control of the manufacturer.

PROPOSAL

Section 51 shall be amended as follows:

Notwithstanding section 50, there shall be no right of redress against the manufacturer under this Act in respect of goods which fail to comply with the implied guarantee under section 32 or 34 where the failure is due to –

(a) an act, default or omission of, or any representation made by, a person other than the manufacturer or servant or agent or any person acting on their behalf; or

(b) a cause independent of human control, occurring after the goods have left the control of the manufacturer.

1.2.4 Justification

Manufacturers should be directly responsible for any act or default or omission of any person acting on their behalf, may it be their servant or agent or anyone else.

SUMMARY

PART VI: RIGHTS AGAINST MANUFACTURERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF GOODS

Part/section	Topic	Comments	Suggestion
Section 50	Consumer's right of redress against manufacturers	Manufacturer shall be made responsible for the failure of the goods to comply with its description and not only limited to the material description. Manufacturers should also be made responsible for goods that are reasonably unfit for its ordinary purpose.	Section 50 shall be amended by replacing the phrase 'acceptable quality' with 'satisfactory quality' and adding right of redress to consumer in cases where goods do not fit its ordinary purpose and fail to comply with any description under section 34, not merely material description. (The current paragraph (b) will appear as paragraph (c) with amendments; paragraph (c) will appear as paragraph (d) and (d) as (e)).
Section 51	Exceptions to right of redress against manufacturers	This section is unclear in relation to the manufacturer's liability for acts and omission of their servants, agents and any person acting on their behalf.	This section shall be amended making manufacturers liable for acts and omission of their servants, agents and any person acting on their behalf.

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PART VII

GUARANTEES IN RESPECT OF SUPPLY OF SERVICES

1.0 PART VII: GUARANTEES IN RESPECT OF SUPPLY OF SERVICES

1.1 Implied Guarantee as to reasonable care and skill

1.1.1 Provisions in Section 53

S.53 Where services are supplied to a consumer, there shall be implied a guarantee that the services will be carried out with reasonable care and skill

1.1.2 Comments on provisions in the law

This section provides an implied guarantee that the supplier when supplying services to consumers will carry out the services with reasonable cares and skill. For better consumer protection, a proviso should be added to the effect that materials supplied in connection with the services should also be reasonably fit for the purpose for which they are supplied.

This implied guarantee available is good in the sense that it provides the standard that the suppliers need to observe. However, problems will arise in proving the case in court. The provision puts the burden on the consumer to prove 'reasonable care and skill' which is a question of fact.

1.1.3 Comparison with other legislation

i. Section 74(1) Trade Practices Act 1974 (Australia)

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.

ii. Article 69 Consumer Act 1991 (Philippines)

In every contract for the supply of services to a consumer made by a seller in the course of a business, there is an implied warranty that the services will be rendered with due care and skill and that any material supplied in connection with such services will be reasonably fit for the purpose for which it is supplied.

iii. Article 99 Consumer Act 1991 (Philippines)

Liability Defective Services. The service supplier is liable for redress, independently of fault, for damages caused to consumers by defects relating to the rendering of the services, as well as for insufficient or inadequate information on the fruition and hazards thereof.

PROPOSAL

Section 53 to be amended as follows;

> Where services are supplied to a consumer, there shall be implied a guarantee, independently of fault, that the services will be carried out with care and skill and that any material supplied in connection with such services will be fit for the purpose for which it is supplied.

1.1.4 Justification

i. Since there is a suggestion to amend the definition of services to include the performance of work with or without the supply of goods, (see 1.1 above) section 53 should also be amended to include materials in connection with those services. Therefore, the scope of the protection is wider to include both services and goods supplied with it.

ii. The standard of care and skill demanded from providers of services is "the standard of the ordinary skilled man exercising and professing to have that special skill and it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art" meaning that the liability is determined by the reasonableness of the supplier's conduct and not by the condition or outcome of his service. Therefore, if the mechanics have done up to the standard or practice of other mechanics, it already satisfies this guarantee although the outcome of the services is unsatisfactory to the consumers.

iii. The consumer is the one who should prove to the court that the supplier was at fault in the way they provided the service and not simply show that the service was defective. Without proper knowledge of the practice in the industry, it will be very difficult to prove what amounted to a breach of the duty to exercise reasonable care and skill.

iv. Obviously, the guarantee may only be useful for a consumer if the burden to prove reasonable care and skill is shifted to the defendant i.e. the service provider rather than the consumer or the burden of plaintiff is to prove that the service is defective rather than the defendant has breached their duties to exercise reasonable care and skill.

v. The practical solution is to abandon the reasonableness test and replacing it with strict liability. In United Kingdom there are lots of discussions on this approach but no further steps taken so far to bring it into reality. However, the Philippines Consumer Act provides a strict liability as regards to liability defective services. This approach should preferably be adopted in the CPA.

1.2 Implied Guarantee as to fitness for particular purpose

1.2.1 Provisions in Section 54

54(1) Where services are supplied to a consumer, there shall be implied a guarantee that the services, and any product resulting from the services, will be-

(a) reasonably fit for any particular purpose; and

(b) of such nature and quality that it can be reasonably be expected to achieve any particular result,

that the consumer makes known to the supplier, before or at the time of making of the contract for the supply of the services, as the particular purpose for which the services are required or the result that the consumer desires to achieve.

1.2.2 Comments on provisions in the law

The provision provides an implied guarantee that services supplied to a consumer will be reasonably fit for any particular purpose and can reasonably be expected to achieve any particular result. However, to apply this guarantee, the consumer must make known to the supplier a particular purpose for which the services are required or the result that the consumer desires to achieve. This provision put a requirement on a consumer to make known his intention before he can invoke this guarantee. In most situations, a consumer fails to inform the supplier his intention and therefore cannot invoke this remedy.

1.2.3 Comparison with other legislation

Section 74(2) Trade Practices Act 1974 (Australia)

Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connection with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.

1.2.4 Justification

i. To apply this guarantee, the consumer must make known to the supplier, before or at the time of making of the contract, as to the particular purpose for which the services are required or the result that the consumer desires to achieve. The issue is whether it also includes impliedly make known. This is because in most situations, the consumer fails to inform the service provider the intended outcome.

ii. Even though, it has been argued in favour of consumers that the term "make known' should be interpreted widely to include "impliedly make known" it is better if the legislature can define it or at least clearly state that it also covers impliedly make known to the service provider. It is better to follow the Australian Trade Practices Act by putting it clearly, make known means either expressly or by implication.

iii. In most cases, consumers must enforce their rights by bringing a claim to the tribunal. The terms such as 'make known' should be clearly defined to clear the doubt in interpretation later on.

1.3 Implied guarantee as to price

1.3.1 Provisions in Section 56

S.56 Where there is a failure to comply with the implied guarantee under subsection (1), the consumer's only right of redress shall be to refuse to pay more than the reasonable price.

(3) Nothing in Part VIII shall be taken to confer on the consumer any other right of redress.

1.3.2 Comments on provisions in the law

This section limits the right to claim redress. It only allows consumers to refuse to pay more than the reasonable price. Consumers are not entitled to further claim under Part V. Practically, this section is inappropriate.

1.3.3 Comparison with other legislation

Even though this provision is similar to section 11 of the New Zealand Consumer Guarantees Act 1993, there is no similar provision in the Supply of Goods and Services Act 1982 (United Kingdom).

PROPOSAL

S56 (2) and (3) to be deleted and replaced with the following:

(2) Where there is a failure to comply with the implied guarantee under subsection (1), the consumer's right of redress shall be to refuse to pay more than the reasonable price.

(3) In addition to sub section (2), nothing in this part shall have the effect of excluding the consumer from other right of redress in Part VIII.

1.3.4 Justification

The issue of unreasonable or exorbitant prices of services has become a matter of grave concern. Limiting the right of redress to a reasonable price is not practical. In the real life, it is difficult for a consumer to pay the reasonable price and to walk away. It is therefore necessary to provide for additional remedies to curtail the unethical conduct of traders in respect of price. Other countries such as the United Kingdom do not have similar provision in their legislation.

SUMMARY

PART VII: GUARANTEES IN RESPECT OF SUPPLY OF SERVICES

Part/ Section	Topic	Comments	Suggestion
Part VIII: Guarantees in respect of supply of services Section 53	Implied Guarantee as to reasonable care and skill	This implied guarantee available is good in the sense that it provides the standard that the suppliers need to observe. However, the problem will arise in proving the case in court. The provision puts the burden on the consumer to prove 'reasonable care and skill' which means the liability is determined by the reasonableness of the supplier's conduct and not by the condition or outcome of his service.	Obviously, the guarantee may only be useful for a consumer if the burden of proof is shifted to the service provider or the burden of plaintiff is just to prove that the service is defective rather than the defendant has breached their duties to exercise reasonable care and skill. Another practical solution is to abandon the reasonableness test and replacing it with strict liability.
Section 54	Implied Guarantee as to Fitness For particular Purpose	This provision puts a requirement on a consumer to make known his intention before he can invoke this guarantee. In most situations, a consumer fails to inform the supplier his intention and therefore cannot invoke this guarantee.	It has been argued in favour of consumers that the term "make known' should be interpreted widely to include "impliedly make known".
Section 56	Implied Guarantee as to price	This section limits the consumer's right of redress. It only allows consumers to refuse to pay more than the reasonable price. Consumers are not entitled to further claim under Part VIII. Practically, this section is inappropriate.	Section 56(2) and (3) to be amended. The consumer's right of redress shall not be limited to paying no more than the reasonable price. The right of redress under Part IX shall also be applicable.

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PART VIII

RIGHTS AGAINST SUPPLIERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF SERVICES

1.0 PART VIII: RIGHTS AGAINST SUPPLIERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF SERVICES

1.1 The consumer's right of redress and the exceptions

1.1.1 Provisions in Section 57 and 58

The consumer's right of redress against suppliers

S.57 This Part gives consumer right of redress against a supplier of services where the service or product resulting from the services fails to comply with any of the implied guarantee under section 53 to 55

Exceptions to right of redress against suppliers in relation to services

S.58 "Notwithstanding section 57, there shall be no right of redress against the supplier under this Act in respect of the failure of the services or any product resulting from the services to comply with the implied guarantee under section 54 or 55 where the failure is due to-

(a) an act, default or omission of, or any representation made by, a person other than the supplier; or
(b) a cause independent of human control"

1.1.2 Comments on provisions in the law

Section 57 gives consumer right of redress against a supplier in the case where the supplier fails to comply with the implied guarantee under section 53 to 55..Basically there are 3 important remedies provided, namely; remedy the defect, cancel the contract and claim damages.

However, in spite of this, there are certain exceptions to this right of redress. In Section 58(a) provides that if the act, default or omission is made by a person other than the supplier there shall be no right of redress against the supplier. This provision is similar to the provision in section 33 of the New Zealand Consumer Guarantee Act 1993 except that section 33 includes in the provision a servant or agent of the supplier. This will raise the issue of whether the representations made by the servant or agent of the supplier fall under the exception. The supplier is defined in section 3 of the Act but it does not include the agent who works for another person where that other person is supplying in trade. Servants are not also clearly included in the definition of supplier. The same applies in cases where it involves subcontractors.

1.1.3 Comparison with other legislation

<u>Section 33 Consumer Guarantee Act 1993 (New Zealand)</u>

Notwithstanding section 32 of this Act, there shall be no right of redress against a supplier under this Act in respect of a service or any product resulting from a service which fails to comply with a guarantee under section 29 or 30 of this Act only because of-

(a) An act, default or omission of, or any representation made by, any person other than the supplier or a servant or agent of the supplier; or

(b) a cause independent of human control.

PROPOSAL

Section 58 to be amended as follows:
Notwithstanding section 57, there shall be no right of redress against the supplier under this Act in respect of the failure of the services or any product resulting from the services to comply with the implied guarantee under section 54 or 55 where the failure is due to-

(a) an act, default or omission of, or any representation made by, a person other than the supplier <u>or a servant, agent or a person with whom the supplier has subcontracted</u> the work; or

(b) a cause independent of human control

1.1.4 Justification

i. The issue is whether the representations made by the servant or agent of the supplier fall under the exception. The assumption is that the word supplier can be interpreted widely to include them but it is better to clear the doubt by asserting them in the provision as stated in the New Zealand Act.

ii. Another issue is in the context of service contracts involving subcontractors. If the suppliers subcontract the work to other person, they can escape liability under the Act because the exception would apply. It seems unfair to consumers because suppliers should be responsible for the work carried out by subcontractors engaged to carry out the work.

iii. The existing provision seems unfair to consumers because there is much room for suppliers to escape their liabilities. They should be responsible even though their servant, agent or the subcontractor engaged to carry out the work made the representation.

1.2 Options against suppliers where services do not comply with guarantees

1.2.1 Provisions in Section 60

Section 60 provides;

(1) Where a consumer has a right of redress against the supplier under this Part in respect of the failure of any services or any product resulting from the services to comply with a guarantee under Part VI, the consumer may exercise the following remedies;
   (a) where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time;
   (b) where the failure is one that cannot be remedied or is of a substantial character within the meaning of section 62, the consumer may-
      i. subject to section 61, cancel the contract for the supply of the services in accordance with section 63; or
      ii. obtain from the supplier damages in compensation for any reduction in the value of the product resulting from the services below the charge paid or payable by the consumer for the services

(2) In addition to the remedies under subsection (1), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the product resulting from the services, which is proved to be a result or consequence of the failure.

(3) Where the supplier refuses or neglects to remedy the failure as required under paragraph (1)(a), or refuses or neglects to do so within a reasonable time, the consumer may-
   (a) have the failure remedied elsewhere and obtained from the supplier all reasonable costs incurred in having the failure remedied; or
   (b) subject to section 61, cancel the contract for the supply of the services in accordance with section 63.

1.2.2 Comments on provisions in the law

i. This provision brings the law in line with reality by giving a consumer, in many cases, the remedy that he really wants – namely to remedy the defect within a reasonable time. What constitutes a reasonable time is a question of fact. It may be unfair to a consumer in the case where it causes inconvenience to him even though it is done within a reasonable time. There are also cases whereby the suppliers may be willing to remedy the defect but impose extra charges on consumers for this. They may claim that they have to replace the materials to remedy the defect and ask the consumer to pay for the cost. The provision is silent on this aspect.

ii. Section 60 (1)(b) provides that, in a situation where the failure cannot be remedied or is of a substantial character, no opportunity for repair needs to be given to the supplier. The consumer may cancel the contract or, alternatively may obtain damages for any reduction in value of the product of the services below the price paid for the service. The problem is that there is no definition of the word 'product' whether it includes intangible product such as happiness.

1.2.3 Comparison with other legislation

Section 11N Supply of Goods and Services Act 1982 (United Kingdom)

(1) If section 11M above applies, the transferee may require the transferor—
   a. to repair the goods, or
   b. to replace the goods.

(2) If the transferee requires the transferor to repair or replace the goods, the transferor must—
   (a) repair or, as the case may be, replace the goods within a reasonable time but without causing significant inconvenience to the transferee;
   (b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

(3) The transferee must not require the transferor to repair or, as the case may be, replace the goods if that remedy is—
   (a) impossible,
   (b) disproportionate in comparison to the other of those remedies, or disproportionate in comparison to an appropriate reduction in the purchase price
   (c) under paragraph (a), or rescission under paragraph (b), of section 11P(1) below.

(4) One remedy is disproportionate in comparison to the other if the one imposes costs on the transferor which, in comparison to those imposed on him by the other, is unreasonable, taking into account—

   (a) the value which the goods would have if they conformed to the contract for the transfer of goods,
   (b) the significance of the lack of conformity to the contract for the transfer of goods
   (c) whether the other remedy could be affected without significant inconvenience to the transferee.

(5) Any question as to what is a reasonable time or significant inconvenience is to be determined by reference to—
   (a) the nature of the goods, and
   (b) the purpose for which the goods were acquired.

PROPOSAL

Section 60 to be amended as follows;

(1) Where a consumer has a right of redress against the supplier under this Part in respect of the failure of any services or any product resulting from the services to comply with a guarantee under Part VI, the consumer may exercise the following remedies;

(a) where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time <u>but without causing significant inconvenience to the consumer and the supplier must bear any necessary costs incurred in doing so (including in particular the cost of labour and materials).</u>

(b) where the failure is one that cannot be remedied or is of a substantial character within the meaning of section 62, the consumer may-

i. subject to section 61, cancel the contract for the supply of the services in accordance with section 63; or

ii. obtain from the supplier damages in compensation for any reduction in the <u>services</u> below the charge paid or payable by the consumer for the services

(2) In addition to the remedies under subsection (1), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, which is proved to be a result or consequence of the failure.

(3) Where the supplier refuses or neglects to remedy the failure as required under paragraph (1)(a), or refuses or neglects to do so within a reasonable time <u>and causes significant inconvenience</u> to the consumer, the consumer may-

a. have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or

b. subject to section 61, cancel the contract for the supply of the services in accordance with section 63.

1.2.4 Justification

i. By virtue of the Sale and Supply of Goods to Consumers Regulations 2002 (United Kingdom), the remedies under the Supply of Goods and Services Act 1982 have been amended to provide better remedies for the consumers. The remedies as stated in section 11N of the Act are compared with the remedies provided in the CPA. Even though section 11N only applies to goods, the same provision should be applicable to defective services since in our CPA the remedies provided under the supply of goods (Part V and IV of the Act) are similar to the supply of services. It means that the right to remedy the defect can only be applied within a reasonable time and it also must not cause inconvenience to consumers.

ii. This will help the consumers to opt for other options if repairing the defect causes significant inconvenience to them even though it is made within a reasonable time. Reasonable time is a question of fact and there are many reasons that make the repair take a longer time but is still within a reasonable time. By the end of the day, the supplier will win and the consumer will suffer.

iii. Even though what constitutes significant inconvenience is also a question of fact and the consumer has to prove this, at least there is room for them to set aside this remedy and opt for other remedies.

iv. For the same reason, section 60(3) on a situation where the supplier refuses or neglects to remedy the failure as required, should also be amended to add the clause without causing significant inconvenience to the consumer.

v. In addition, the supplier must bear any cost incurred in remedying the defect and cannot charge the consumer for this. Without making it clear in the provision regarding the cost of repairing the defect, the supplier may repair it but may put the extra charge for materials and labour on the consumers.

vi. Section 60(1)(b) provides that in a situation where the failure cannot be remedied or is of a substantial character, there are two options provided –either to cancel or to claim damages in compensation for any reduction in the value of the product resulting from the services. The limitation is that the damages must be below the charge paid or payable by the consumer for the services. The problem is on the interpretation of the word 'product'. It is not clearly defined in the CPA. It will cause interpretation problems in future where an intangible product such as happiness is included in the definition. The suggestion is to use the word 'services' as it has already been defined in the Act.

1.3 Failure of a substantial character

1.3.1 Provisions in Section 62

S.62 For the purpose of paragraph 60(1)(b), a failure to comply with a guarantee shall be of a substantial character where-

(a) the product resulting from the services-

(i) is substantially unfit for a purpose for which services of the type in question are commonly supplied; or

(ii) where subsection 54(1) applies-

(A) is unfit for a particular purpose made known to the supplier; or

(B) of such a nature and quality that the product cannot be expected to achieve a particular result made known to the supplier,

and the product cannot easily and within a reasonable time be remedied to make it fit for the particular result; or

(b) the product resulting from the services is unsafe.

1.3.2. Comments on the provisions in the law.

The provision explains a situation, where there is failure of a substantial character, which allows a consumer to cancel the contract. Unfortunately the situations are not conclusive as there are other situations that can fall under the ambit of this section.

The provision also gives an opportunity to the supplier to remedy the defect within a reasonable time. This opportunity makes this remedy similar to what has been provided under section 60(1)(a) even though the failure is of a substantial character.

1.3.3 Comparison with other legislation.

i. Section 36 Consumer Guarantee Act 1993 (New Zealand)

For the purposes of section 32(b) of this Act, a failure to comply with a guarantee is of a substantial character in any case where-

(a) the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or

(b) the product of the service is substantially unfit for a purpose for which services of the type in question are commonly supplied and the product cannot easily and within a reasonable time be remedied to make it fit for the purpose; or

(c) where section 29 of this Act applies, the product of the service is unfit for a particular purpose, made known to the supplier and the product cannot easily and within a reasonable time be remedied to make it fit for the particular purpose or to achieve a particular result; or

(d) the product of the service is unsafe.

ii. Section 39 the Consumer Protection Act 1996(Statutes of Saskatchewan)

Breach of a substantial character means:

(i) that a consumer product, or the level of performance of the retail seller or manufacturer of a consumer product, departs substantially from what consumers can reasonably expect, having regard to all the relevant circumstances of the sale of the product, including:
   (a) the description of the product
   (b) its purchase price;
   (c) the statutory warranties of the retail seller or the manufacturer of the product; or

(ii) that a consumer product is totally or substantially unfit for all the usual purposes of such product or for any particular purpose for which, to the knowledge of the retail seller, the product is being brought.

PROPOSAL

Section 62 to be amended as follows;

For the purpose of paragraph 60(1)(b), a failure to comply with a guarantee shall be of a substantial character where-

(a) the service would not have been acquired by a consumer fully acquainted with the nature and extent of the failure;

(b) the service-
   (iii) is substantially unfit for a purpose for which services of the type in question are commonly supplied; or
   (iv) where subsection 54(1) applies-
      a) is unfit for a particular purpose made known to the supplier; or
      b) of such a nature and quality that the product cannot be expected to achieve a particular result made known to the supplier;

(c) the service is unsafe.

1.3.4 Justification

i. Section 62 states the situations where the failure can be considered as substantial and entitles the consumer to cancel the contract. There are only 2 situations, which make the failure substantial which are where the product resulting from the services is substantially unfit or unsafe. The provision is different compared to the provision under the New Zealand Consumer Guarantees Act 1993 which adds one more situation to the definition of substantial character, which is, in a situation where the service would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure.

ii. Just as a matter of comparison, the Consumer Protection Act (Statutes of Saskatchewan 1996), section 39 defines substantial character as *"a consumer product, or the level of performance of the retail seller or manufacturer of a consumer product, departs substantially from what consumers can reasonable expect, having regard to all the relevant circumstances of the sale of the products."* Therefore, the substantial character is defined widely which also includes the expectation of the consumers and whatever warranties agreed by the parties.

iii. As has been discussed in section 60(1)(b)(ii) above, the word 'product' will raise the issue of interpretation. The suggestion is to use the word 'service' instead of 'product'.

iv. The provision also gives an opportunity to the supplier to remedy the defect within a reasonable time. This opportunity makes this remedy similar to what has been provided under section 60(1)(a) even though the failure is of a substantial character. This remedy is weaker compared to the remedy under the law of contract which enable the aggrieved party to repudiate the contract in the case if the breach is substantial (breach of condition).

v. Therefore, the proposals are to delete the clause '***and the product cannot easily and within a reasonable time be remedied to make it fit for the particular purpose***' from section 62 and to include one more subsection (section (a) as what been provided under the New Zealand of Consumer Guarantees Act 1993 as well as section 39 of the Consumer Protection Act 1996 (Statutes of Saskatchewan) to provide one more situation of a failure of a substantial character.

1.4 Power of court to grant ancillary relief.

1.4.1 Provision in Section 65(1)

> S.65(1) Where the consumer cancels a contract for the supply of services under this Act, a court, in any proceedings or on an application made for the purpose, may make an order or orders granting relief under this section as it thinks just and practicable to do so.

1.4.2 Comments on provisions in the law

The section provides wide discretionary powers to the court to grant relief in the event of cancellation. However, this section is only applicable in a situation of cancellation but it does not extend to a situation where the consumer chooses the option in section 60 i.e to remedy the defect. By referring to the power of the court stated in the United Kingdom Supply of Goods and Services Act 1982, section 11R provides additional power which is not available in section 65 of the CPA. This provision in section 11R is good for consumers because it is by the order of the court to enforce the remedy of remedying the defect.

1.4.3 Comparison with other legislation.

Section 11R Supply of Goods and Services Act 1982 (United Kingdom)

(1) In any proceedings in which a remedy is sought by virtue of this Part the court, in addition to any other power it has, may act under this section.

(2) On the application of the transferee the court may make an order requiring specific performance or, in Scotland, specific implement by the transferor of any obligation imposed on him by virtue of section 11N (Repair or replacement) above.

PROPOSAL

To add additional section (Section 65A), which read as follows;

Power of court

On the application of the consumer, the court may make an order requiring specific performance by the service provider of any obligation imposed on him by virtue of section 60(1)(a) and section 60(3) above.

ii. Section 65 only states the power of court to grant ancillary relief where the consumer cancels a contract for the supply of services and not to a situation if a consumer opts for the remedy of remedying the defect in section 60. The power of court to grant ancillary relief should be extended to a situation where the consumer opts for the remedy of remedying the defect as that has been provided in section 11R of the UK Supply of Goods and Services Act 1982.

SUMMARY

PART VIII: RIGHTS AGAINST SUPPLIERS IN RESPECT OF GUARANTEES IN THE SUPPLY OF SERVICES

Part/section	Topic	Comments	Suggestion
Part IX: Rights against suppliers Section 58	Exceptions to the right of redress against suppliers	This provision gives a defence to the supplier if the failure is due to the fault of other people. The doubt is the position of agent, servant or subcontractor of the supplier, whether it falls under the exception.	For a better protection, the agent, servant and subcontractor should be excluded in this exception and therefore the supplier would still be responsible for the failure due to these persons.
Section 60(1)(a)	Options where services do not comply with guarantees (Remedy the failure)	It is unfair to consumers in the case where it causes a significant inconvenience to them even though the repair is done within a reasonable time.	The convenience of a consumer should be taken into consideration in applying the option of repairing the failure. In addition, the provision should be clear that the supplier should bear any cost incurred in remedying the defect.
Section 60(1)(b)	Options where services do not comply with guarantees (Failure to remedy the failure)	The consumer can claim damages for any reduction in the value of product but subject to the charge paid or payable by the consumer for the services. There are problems in interpreting the word 'product'.	The proposal is to use the word services instead of product.
Section 62	Failure of substantial character	The situations, which make the failure a substantial character, are not conclusive. There are other situations which should fall under the ambit of this section. The provision also gives an opportunity to the supplier to remedy the defect within a reasonable time, which makes this remedy similar to what has been provided under section 60(1)(a) and weaker compared to the remedies under law of contract.	The proposal is to widen the scope of this section so that a consumer has more opportunity to cancel the contract. Once the failure is a substantial one, automatically the consumers can invoke this section without giving time for the supplier to remedy the failure. This is due to the fact that the failure is substantial and not minor.
Section 65	Power of court	Referring to the power of the court stated in the United Kingdom Supply of Goods and Services Act 1982, section 11R provides additional power, which is not available in section 65 of the CPA. This provision is good for consumers because it is by the order of the court to enforce the remedy of remedying the defect.	In many cases the service providers may neglect to remedy the defect and therefore makes the remedy meaningless for the consumers. If the order comes from the Court, the service providers will take it seriously to remedy the defect. Section 65 only gives power to the court in a situation if the consumer cancels the contract and not in a situation to remedy the defect.

THE CONSUMER PROTECTION ACT 1999

PART IX

PRODUCT LIABILITY

1.0 PART IX : PRODUCT LIABILITY

1.1 Meaning of 'Product'

1.1.1 Provisions in Section 66(1) and 3(1)

Section 66(1) "Product" means '**any goods** and, subject to subsection (2), includes a product which is comprised in another product, whether by virtue of being a component part, raw material or otherwise.'

Section 3(1) defines goods as 'goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes –

(a) goods attached to, or incorporated in, any real or personal property;
(b) animals, including fish;
(c) vessels and vehicles;
(d) utilities; and
(e) trees, plants and crops whether on, under or attached to land or not

1.1.2 Comments on provisions in the law

The definition of "goods" in section 3(1) is not suitable for Part IX for two reasons:
(a) it confines to 'consumer goods'
(b) since fresh agricultural products are excluded from Part IX, animals, trees, plants are irrelevant for Part X.

1.1.3 Comparison with other legislation

Article 2 of the European Council Directive on Product Liability 1985 defines product as -

'All movables, even though incorporated into another movable or into an immovable'

PROPOSAL

To amend the definition of 'product' so that no reference should be made to 'goods.' New definition proposed:

'Product' means movable property manufactured or processed or in its natural form and includes –

(a) those attached to, or incorporated in, any real or personal property;
(b) animals;
(c) utilities; and
(d) trees, plants and crops whether on, under or attached to land or not

1.1.4 Justification

i. The definition of 'goods' in section 3(1) which is taken from the New Zealand Consumers Guarantees Act 1993 is more relevant to the law on supply of goods. It is not meant for Part IX.

ii. Confining the meaning of product to 'consumer goods' will result in injustice to those who suffered injuries caused by defective major capital items such as buses, ships and aircraft which are normally bought for commercial purposes.

1.2 Unclear meaning of Section 66(2)

1.2.1 Provision in Section 66(2)

> For the purposes of this Part, a person who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised.

1.2.2 Comments on provisions in the law

The meaning of the section is not clear. It can be interpreted to mean –

(a) a manufacturer of a finished product can escape liability for defects attributable to a component part, or

(b) a supplier will not be regarded as a 'supplier' of a product which comprised a defective component part.

1.2.3 Comparison with other legislation

The same provision can be found in the Consumer Protection Act 1987 UK but the intended meaning of the section has been explained by the UK government during the parliamentary debate of the Act.

> **PROPOSAL**
>
> Delete section 66(2) from Part IX

1.2.4 Justification

i. To avoid confusion, since 'a person who supplies' may also include a manufacturer.

ii. The section may be used by a manufacturer of a finished product to escape liability for defects attributable to a component part.

1.3 Meaning of 'Producer'

1.3.1 Provisions in Section 68(1) and Section 3(1)

Where any damage is caused wholly or partly by a defect in a product, the following persons shall be liable for the damage:

(a) the producer of the product;
(b) the person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product; and
(c) the person who has, in the course of his business, imported the product into Malaysia in order to supply it to another person.

Section 66(1) states "producer", in relation to a product, means -
(a) the person who manufactured it;

Section 3(1) defines 'manufacturer' as a 'a person who carries on a business of assembling, producing or processing goods, and includes –

(a) any person who holds himself out to the public as a manufacturer of the goods;

(b) any person who affixes his brand or mark, or cause or permits his brand or mark to be affixed, to the goods; and

(c) where goods are manufactured outside Malaysia and the foreign manufacturer of the goods does not have an ordinary place of business in Malaysia, a person who imports or distributes those goods.'

1.3.2 Comments on provisions in the law

The definition of 'manufacturer clearly overlaps with section 68(1) since it covers almost all persons that should be liable for defective products, namely, producer, own-brander and importer.

1.3.3 Comparison with other legislation

No comparison to be made

PROPOSAL

Clause (b) and (c) of section 68(1) should be deleted and the section should read-

'Where any damage is caused wholly or partly by a defect in a product, the producer of the product shall be liable for the damage'.

1.3.4 Justification

To avoid overlapping

1.4 Own-brander

1.4.1 Provision in Section 68(1)(b)

> Any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product.

1.4.2 Comments on provisions in the law

The section raises the issue as to whether liability can be imposed on an own-brander when there is a clear indication on the product that he is not the manufacturer. It is a common practice that most own-branded products have some indication, often in very small print, that someone else is the manufacturer. For example, although a product is marked with the logo of AA Supermarket, the phrases 'specially made for AA Supermarket' or, packed for AA Supermarket by B.Ltd' also appear on the product.

1.4.3 Comparison with other section

Section 3(1) of the Consumer Protection Act 1999 (Malaysia) provides better definition of own-brander – 'any person who affixes his brand or mark, or cause or permits his brand or mark to be affixed, to the goods.'

> **PROPOSAL**
>
> The phrase '*has held himself out to be the producer of the product*' should be deleted from the section.

1.4.4 Justification

The phrase can be used by own-branders to escape liability by arguing that they never intended to hold themselves out to be as 'producers'.

1.5 Exclusion of fresh agricultural produce

1.5.1 Provision in Section 68(5)

> This section shall not apply to a person in respect of any defect in agricultural produce if the only supply of the agricultural produce by the person to another person was at a time when the agricultural produce had not undergone any industrial process.'

1.5.2 Comments on provisions in the law

The section exempts farmers and fishermen as well as other persons in the chain of distribution of unprocessed agriculture produce from the strict liability rule.

1.5.3 Comparison with other legislation

The provision on the exclusion of fresh agriculture produce has been removed from the UK Consumer Protection Act 1987 - (Consumer Protection Act (Product liability) (Modification) Order 2000).

> **PROPOSAL**
>
> Section 68(5) and the definition of 'agricultural produce' in section 66(1) should be deleted from Part IX.

1.5.4 Justification

i. An exemption for any particular class of product inevitably creates some anomalies. Such an exemption would be inconsistent with the basic tenet of strict product liability whereby liability should be imposed without fault.

ii. Malaysia is moving towards industrialization and commercialization of agriculture and thus, the argument that many of the farmers and fishermen are only in business in a small way with little net revenue is no longer valid.

iii. There are many diseases that can be connected to fresh agriculture produce due to modern methods of farming which take full advantage of technical advances, for example the use of fertilisers, pesticides, steroids, artificial insemination etc.

iv. If natural conditions do make primary agricultural produce dangerous, such as natural infestations, pollution and other environmental factors, then the loss spreading risk allocation rationales for strict product liability apply with particular force to protect the victims who are thereby injured.

v. The exemption is not only confined to farmers and fishermen but all suppliers of fresh agriculture products including importers and supermarkets.

1.6 Meaning of 'defect'

1.6.1 Provision in Section 67(1)

> Subject to subsection (2) and (3), there is a defect in a product for the purposes of this Part if the safety of the product is not such as a person is generally entitled to expect'.

1.6.2 Comments on provisions in the law

The section adopts the consumer expectation test in determining defectiveness. Safety is to be judged according to what 'a person is generally entitled to expect'. The test appears to be subjective since it is based on the individual consumer expectation. However it is a 'general expectation' that will be taken into account. It is not based on actual expectation, but on entitlement to expectation. The wording of section 67(1) offers less demanding concept of entitlement to expectation compared to the European Council Directive 1985 and the Consumer Protection Act 1987 UK.

1.6.3 Comparison with other legislation

Article 2(2), the Product Liability Act 1994 (Japan)

The term "defect" means lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc. delivered the product and other circumstances concerning the product.

Article 6(1) of the European Council Directive

A product is defective when it does not provide the safety which a person is entitled to expect.

Section 3(1) Consumer Protection Act 1987(UK)

Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect.

> **PROPOSAL 1**
>
> Do away with the consumer expectation test and focus more on the condition of the product.

> **PROPOSAL 2**
>
> Section 67(1) needs to be amended by removing the word 'generally'. The wording of Article 6 of the European Council Directive should be considered – 'a product is defective when it does not provide the safety which a person is entitled to expect.'

1.6.4 Justification

i. The adequacy of the consumer expectation test in determining 'defectiveness' is highly debatable. Some consider the test is simply a semantic veneer covering what is in reality a cost-benefit test.

ii. The test will not protect a consumer in a case of patent danger.

iii. The problem may also arise when applying the test to a situation where a consumer has no expectation at all regarding the safety of the product, for e.g. new product.

iv. Justification for proposal 2 - it will provide a more demanding concept of entitlement to expectation.

1.7 Recoverable loss and damage

1.7.1 Provision in section 66(1)

'Damage' means 'death or personal injury, or any loss of or damage to any property, including land, as the case may require'.

1.7.2 Comments on provisions in the law

Personal injury is nowhere defined in the Consumer Protection Act as well as the Civil Law Act 1956 (Malaysia).

1.7.3 Comparison with other legislation

Section 45(1) of the Consumer Protection Act 1987 UK defines personal injury to include 'any disease and any other impairment of a person's physical or mental conditions'.

PROPOSAL
Personal injury should be defined. The proposed definition –
Personal injury includes 'any disease and any other impairment of a person's physical or mental conditions and pre-natal injury'

1.7.4 Justification

i. Personal injury needs to be defined since defective product may cause injury which is different from ordinary accident cases – e.g. disease, pre-natal injury.

ii. Unlike the UK, there is no written law in Malaysia which allows recovery for pre-natal injury.

iii. To provide clarity.

1.8 Property damage

1.8.1 Provision in section 69(1)

'Where any damage is caused wholly or partly by a defect in a product, the liability of the person liable for the damage under section 68 shall not include the loss of or damage to –

(a) the defective product;
(b) the whole or any part of any product which comprises the defective product; or

1.8.2 Comments on provisions in the law

Where the defective product itself is damaged due to a defect in its component parts, it is irrecoverable under sub section (b). Thus, if a car was supplied with a defective battery which caught fire and destroyed the car, the damage to the battery and the car would not be recoverable. However, damage to the car could be recovered if the battery was a replacement because it had not been 'comprised in the car'. The subsection will inevitably create a difficulty and anomaly.

1.8.3 Comparison with other legislation

Article 9(b) of the European Council Directive 1985

For the purpose of Article 1, 'damage' means:

(a) damage caused by death or by personal injuries
(b) damage to, or destruction of, any item of property other than the defective product itself...

PROPOSAL

Sub section (b) should be deleted from section 69(1).

1.8.4 Justification

i. A component part has been recognised as a product in its own right in the definition of 'product', thus there seems no valid reason for treating it differently for the purpose of damages.

ii. It would be an anomalous position if recovery for the damaged property had to depend on whether the component part was a replacement or was bought separately from the 'basic product'.

iii. Damage within a defective product should be categorised as physical damage to other property rather than as pure financial loss.

1.9 The defence of compliance with legal requirement

1.9.1 Provision in section 72(1)(a)

The section provides that the producer may escape liability if he can prove that 'the defect is attributable to compliance with any requirement imposed under any written law.'

1.9.2 Comments on provisions in the law

The section provides a defence for the defendant to prove that he had no choice in the matter because he was under a legal obligation to comply. In practice the defence may have a very limited application, and is probably confined to those cases where the legal requirement is itself inadequate because it is misconceived or outdated.

1.9.3 Comparison with other legislation

Section 75AL Trade Practices Act 1974 (Australia) provides –

1. If a defendant in a liability action raises the defence that the action goods had the alleged defect only because there was compliance with a Commonwealth mandatory standard for them, that defendant must, as soon as practicable after raising that defence, serve on the Commonwealth a prescribed notice of the action and of that defence together with a copy of the defendant's defence in the action.

2. Service of the notice and defence makes the Commonwealth a defendant in the action.

3. If, in the action, the Court finds that the plaintiff would have succeeded against the defendant who served the notice but for the action goods having alleged defect only because there was compliance with a Commonwealth mandatory standard for them, then:

   (a) the Commonwealth, and not the defendant who served the notice, is liable to pay the plaintiff for the amount of the loss caused by the defect.

PROPOSAL

If the defence is successfully raised by the defendant, the state should take the responsibility to compensate the injured party.

1.9.4 Justification

i. It is very unfair for the victim of a defective product to be left uncompensated in such cases.

ii. The state should be responsible for their failure to update the law which resulted in defect in the producers' products.

1.10 Defence – Producers did not supply the product

1.10.1 Provision in section 72(1)(b)

The section provides a defence for the defendant that 'he did not at any time supply the defective product to another person'.

'Supply' is defined in section 3(1) to mean 'to supply or resupply by way of sale, exchange, lease, hire or hire-purchase'.

1.10.2 Comments on provisions in the law

Since 'supply' in the context of the Consumer Protection Act must be done 'in trade' or in the course of business, the defence of section 72(1)(b) would apply to all non-commercial supplies such as charitable activities.

1.10.3 Comparison with other legislation

i. Section 2, Consumer Guarantees Act 1993 (New Zealand)

Supply (a) in relation to goods, means supply (resupply) by way of gift, sale, exchange, lease, hire, or hire purchase.

ii. Section 46(1) of the Consumer Protection Act 1987 (UK) defines 'supply' to include

"doing any of the following, whether as principal or agent, that is to say-

(f) giving the goods as a prize or otherwise making a gift of the goods...."

PROPOSAL

The definition of 'supply' should include non-commercial activities. The proposed new definition -

'Supply' (a) in relation to goods, means supply (resupply) by way of gift, sale, exchange, lease, hire, or hire purchase.

1.10.4 Justification

i. To prevent producers from using charitable activities as means to dispose 'unsold' or 'unwanted' products.

ii. Given the nature of modern charities, it may not sometimes be easy to differentiate between business activities for charity and purely charitable activities.

1.11 The development risk defence

1.11.1 The provision in section 72(1)(d)

The section allows the person proceeded against a defence if he can show that:

'the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question may reasonably be expected to discover the defect if it had existed in his product while it was under his control.'

1.11.2 Comments on provisions in the law

The phrase 'may reasonably be expected' clearly adopts the standard of reasonable discoverability and it thus offers the less demanding concept of expectancy. It limits the inquiry relating to scientific and technical knowledge to producers 'of products of the same description as the product in question'.

1.11.3 Comparison with other legislation

i. Article 7(e) of the European Council Directive 1985 provides a defence -

'the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to allow the existence of the defects to be discovered'

ii. The same provision can be found in Article 4(1) of the Product Liability Act 1994 (Japan) and section 75AK(1)(c) of the Trade Practices Act 1974 (Australia).

PROPOSAL

The section should be amended to be more 'strict' on the producers. It is proposed that the wording of defence in Article 7(e) of the European Council Directive to be adopted.

1.11.4 Justification

i. Article 7(e) provides a narrow test based upon the simple concept of discoverability. It is not concerned at all with the conduct or knowledge of the individual producer.

ii. The Article has been interpreted by the court in UK (*A and Others v National Blood Authority and others* (2002)) to mean that once the existence of a risk was known, the defence ceased to be available, even if the risk could not be avoided. In other words the defence only protects against unknown risks but not against known risks, that is, risks that either are known or should have been known on the basis of the most advanced available accessible knowledge. A narrower interpretation of the scope of the defence is very important for consumer protection. However it is perhaps difficult for the court in Malaysia to have such interpretation based on the present wording of the defence in section 72(1)(d).

1.12 Relevant time

1.12.1 Provision in section 72(2)

'For the purposes of subsection (1), "relevant time" –

(b) in relation to any other product, means –
(i) where section 68 applies, the time when the producer supplied the product to another person; and
(ii) where section 68 does not apply, the time when the product was last supplied by a person to whom section 68 applies to another person

1.12.2 Comments on provisions in the law

The section is presumably intended to provide a different time of/ for supply between primary defendant (section 68(1)) and secondary defendant (section 68(2)). To serve this purpose the section should state –

(i) where section 68(1) applies,.....
(ii) where section 68(1) does not apply,.....

because section 68 generally covers both primary and secondary defendants.

1.12.3 Comparison with other legislation

Section 75AK(2) of the Trade Practices Act 1974 (Australia) states – "supply time" means:

(b) in relation to other goods – the time when they were supplied by their actual manufacturer.

PROPOSAL 1

It is proposed that only one time of supply should be adopted. Proposed amendment to section 72(2)(b) -
'For the purposes of subsection (1), "relevant time" –
(b) in relation to any other product, means the time when they were supplied by their actual producer.
the time when they were supplied by their actual manufacturer.

1.12.4 Justification 1

i. A different time for supply may lead to confusion and difficulty.

ii. The definition of "relevant time" is directly relevant to the defence that 'the defect did not exist in the product at the relevant time' (section 72(1)(c). The present section 72(2) provides a different time of supply, so that for the producer, own-brander or importer the time is when the producer supplied the product to another, whereas for the supplier, the time is when the product was last supplied by the producer, own-brander or importer. This may result in an

anomaly since the supplier who may be responsible for the defect, for example, by removing the producer's instruction and adding his own, can argue that the product was not defective when it was last supplied by its producer, own-brander or importer.

PROPOSAL 2

Section 72(1)(c) should be amended in which no reference to relevant time should be made. The proposed amendment – it is a defence for the person proceeded against to prove that-

'the defect did not exist in the product at the time the product was supplied by him or that the defect came into being afterwards'

Justification 2

A person who is responsible for causing the defect such as mishandling, poor fitting, servicing, transporting, adjusting or faulty installation or repair will not be able to rely on the defence.

SUMMARY

PART IX – PRODUCT LIABILITY

SECTION	TOPIC	COMMENTS	SUGGESTION
66(1)	Meaning of 'product'	'Product' is defined to include any goods, component parts and raw materials. However the definition of "goods" in section 3(1) is not suitable for Part IX.	To amend the definition of 'product' *New definition proposed -* 'product' means movable property manufactured or processed or in its natural form and includes – (a) those attached to, or incorporated in, any real or personal property; (b) animals; (c) utilities; and (d) trees, plants and crops whether on, under or attached to land or not
66(2)	Unclear meaning	The section seems to suggest that a manufacturer of a finished product exculpates liability for defects attributable to a component part. However this interpretation clearly contradicts section 68(1) which imposes primary liability for defective product on the manufacturer.	The section should be deleted from Part IX.
68(1)	Liability for defective product	Section 68(1) lists three principal persons who may be strictly liable; (a) the producer of the product (b) own-brander (c) importer The producer is defined to include *manufacturer*, collector and processor. The definition of *manufacturer* in section 3(1) overlaps with section 68(1) since it covers almost all persons stated in this section, namely, producer, assembler, processor, own-brander and importer.	Clause (b) and (c) of section 68(1) should be deleted.
68(1)(b)	Own-brander	The phrase '*has held himself out to be the producer of the product*' can be used by own-branders to escape liability by arguing that they never intended to hold themselves out as 'producers.'	The phrase '*has held himself out to be the producer of the product*' should be deleted from section 68(1)(b).
68(5)	Fresh agriculture produce	There is no good reason to exclude unprocessed agriculture products from the strict liability rule.	Section 68(5) and the definition of 'agricultural produce' in section 66(1) should be deleted from Part IX.

67(1)	Meaning of 'defect' - there is a defect in a product *...if the safety of the product is not such as a person is generally entitled to expect'*	Comment 1 The section adopts the consumer expectation test in determining the 'defectiveness'. The adequacy of the test is highly debatable.	Suggestion 1 Do away with the consumer expectation test and focus more on the condition of the product.
		Comment 2 The wording of section 67(1) offers less demanding concept of entitlement to expectation. It needs to be amended by removing the word 'generally'.	Suggestion 2 The word 'generally' should also be deleted from section 67(1).
69(1)(a)	Recoverable loss and damage	Personal injury needs to be defined since defective product may cause injury which is different from ordinary accident cases – e.g. disease and pre-natal injury.	Proposed definition Personal injury includes 'any disease and any other impairment of a person's physical or mental conditions and pre-natal injury'.
69(1)(b)	Irrecoverable property damage	The subsection creates a difficulty and anomaly since a recovery depends on whether the component part is a replacement or comprised in the product.	This sub-section should be deleted.
72(1)(a)	Defence - compliance with legal requirements	The product becomes defective due to misconceived or outdated law.	If the defence is successfully raised by the defendant, the state should take the responsibility to compensate the injured party.
72(1)(b)	Defence - Producers did not supply the product	Since 'supply' in the context of the CPA must be done 'in trade' or in the course of business, the defence of section 72(1)(b) would apply to all non-commercial supplies such as charitable activities.	The definition of 'supply' should include non-commercial activities.
72(1)(d)	The development risk defence	The Section introduces the less demanding concept of expectancy as the phrase *'may reasonably be expected to discover the defect'* clearly adopts the standard of reasonable discoverability.	The section should be amended to be more 'strict' on the producers.

72(2)(b)	Relevant time	The section is presumably intended to provide a different time of supply between primary defendant and secondary defendant. To serve this purpose the section should state – (iii) where section 68(1) applies,... (iv) where section 68(1) does not apply,.....	A different time for supply may lead to confusion and difficulty. It is proposed that only one time of supply should be adopted.

THE CONSUMER PROTECTION ACT 1999

PART X

THE NATIONAL CONSUMER ADVISORY COUNCIL

1.0 PART X : THE NATIONAL CONSUMER ADVISORY COUNCIL

1.1 Establishment of the National Consumer Advisory Council

1.1.1 Provisions in Section 73

73(1) The Minister may establish the National Consumer Advisory Council to advise him on the following matters:

(a) in respect of consumer issues and the operation of this Act;

(b) the promotion of consumer protection and awareness in consumer affairs;

(c) any other matter which may be referred to it by the Minister for the proper and effective implementation of this Act and for the protection of consumers.

1.1.2 Comments on provisions in the law

With the establishment of the National Consumer Advisory Council (NCAC) under the CPA, the Ministry has two such councils to advise the Minister. The other being the council established under the Price Control Act 1946. The establishment of the (NCAC) under the CPA has however missed the opportunity to legalise the existence of the State and District Consumer Affairs Councils. These councils were set up to implement consumer education and awareness programmes. Amendments to the CPA at this juncture should take the opportunity to legalise this structure.

1.1.3 Comparison with other legislation

None

PROPOSAL

73(1) to be amended by adding 73 (2)

(1) The Minister may establish the National Consumer Advisory Council to advise him on the following matters:

(a) in respect of consumer issues and the operation of this Act;
(b) the promotion of consumer protection and awareness in consumer affairs;
(c) any other matter which may be referred to it by the Minister for the proper and effective implementation of this Act and for the protection of consumers.

(2) To implement S.73(1)(b) the Minister may establish Consumer Affairs Councils at the State and District levels.

1.1.4 Justification

i. The State Consumer Affairs Councils (SCAC) and the District Consumer Affairs Councils (DCAC) were set up in 1994 to implement the 'consumer' function of the Ministry at state and district levels. The adminstrative and financial basis of these councils have remained informal and without any legal standing. The leadership function was given to the State Executive Councillor (Exco) in charge of consumer affairs. The adminstrative and secretariat function to these councils was performed by the enforcement officers of the ministrys branch office. Annual funding was provided by the ministry.

ii. Over the years the performance of the SCACs' and the DCACs' has deteriorated and it has become difficult to get them to be accountable for money expended and consumer programmes implemented.The main reasons are:

(a) The Excos' who head these organizations are politicians who can spare little time to be fully involved to ensure the success of these organisations;

(b) The councils have too many members who tend to absent themselves frequently from council meetings. The District Officer is too busy to give attention to the councils.

(c) The secretariat from the Enforcement Division does not have sufficient support to plan and implement consumer oriented programmes;

(d) There is a lack of adequate plans at the SCAC and DCAC level which amplify policies and programmes determined at the ministry level on the basis of consumer programmes approved in the governments Five Year Plans.

(e) There is a lack of supervision by the Ministry of the activities of the SCAC and the DCAC which are not regularly monitored in terms of projects planned, implemented and expenditure incurred.

iii. It is a suitable time for the ministry to revamp the structure of the SCACs and DCACs with the recent establishment of 'Consumer Affairs Units' (CAU) at the ministry's branch offices at state and eventually at the district levels. These CAUs should take over the function of the secretariat to the council. The head of the ministry's branch office should head these councils.

iv. The Minister should utilise his powers under S.84 to make regulations pertaining to the state and district consumer affairs councils to ensure that they function effectively in implementing consumer programs at their respective levels.

1.2 Membership of Council

1.2.1 Provisions in Section 74

74(1) The Council shall consist of the following members:

(*a*) the Secretary General of the Ministry responsible for consumer affairs or his representative; and

(*b*) not more than sixteen other persons to represent the interests of consumers, manufacturers, suppliers, other non-governmental organizations and academicians.

(2) The members referred to in paragraph (1)(*b*)-

(*a*) shall be appointed by the Minister for a term not exceeding two years; and

(*b*) shall be eligible for reappointment upon expiry of his term of office.

(3) The Minister shall appoint from among the members of the Council a Chairman and a Deputy Chairman.

1.2.2 Comments on provisions in the law

Section 1 (b) provides that a maximum of sixteen persons can be appointed to the council to represent the interests of consumers, manufacturers, suppliers, other non-governmental organizations and academicians. The composition of the advisory council is not favourable to safeguarding consumers' interests as well as providing specific representation for women on the council.

1.2.3 Comparison with other legislation

i. <u>Chapter VIII: Law No. 8 Year 1999 Law Concerning Consumer Protection (Indonesia)</u>

Article 35(1) The National Consumer Protection Board shall consist of one chairperson concurrently serving as a member and not less than 15 (fifteen) and not more than 25 (twenty-five) representing all elements.

Article 36 The members of the National Consumer Protection Board shall consist of the following elements:

a. government;
b. business entities;
c. consumer protection agencies;
d. academicians; and
e. experts.

PROPOSAL

S74 (1)(b) be amended and a new sub-section (c) and (d) added as follows:

The Council shall consist of the following members:

(a) the Secretary General of the Ministry responsible for consumer affairs or his representative; and

(b) not less than (16) sixteen and not more than 20 (twenty) other persons to represent the interests of consumers, manufacturers, suppliers, other non-governmental organizations and academicians prescribed by the Minister.

(c) of the total members prescribed by the Minister, one-third to comprise of representatives of non –government consumer organizations recognised by the government.

(d) one-third of total members of the council to comprise women

1.2.4 Justification

i. 'Non-government consumer organizations' should be stated as a specific group in the CPA to be appointed to represent consumer interests in the National Consumer Advisory Council. The current provision is ambiguous as the Minister may appoint 'any person' to represent consumers' interest, not necessarily from consumer organizations. Consumers should be given a larger representation compared to manufacturers and suppliers as there is no way to ascertain that non-consumer groups given seats on the Council will champion the interests of consumers. Under the current setup consumer representatives can be out-voted by the other groups although the Council was set up to advise the minister on consumer matters. Suppliers and manufacturers should not be allowed to dominate the Council. There have been instances in the past when the chairman of the Council was from the business sector.

ii. Women should be given fair representation in the council. This is in line with the governments obligations under international conventions such as CEDAW. The Ministry of Domestic Trade and Consumer Affairs should be a leader in pursuing women's' rights since women represent the largest group of consumers in the country.

1.3 Secretary to Council and other officers

1.3.1 Provisions in Section 80

80. There shall be appointed a Secretary to the Council and such other officers as may be necessary to assist the Council

1.3.2 Comments on provisions in the law

The law as it stands is unclear as to the setting up of a secretariat to assist the Council in achieving it's objectives as set out in S.73 (1)(a)-(c). Under the current setup S.80 has been interpreted to mean requiring the Consumer Affairs Division of the ministry to provide its officers to serve as secretaries for meetings of the council and its taskforces.

1.3.3 Comparison with other legislation

i. Chapter VIII: National Consumer Protection Board, Law No. 8 Year 1999 Law Concerning Consumer Protection (Indonesia)

Article 39

(1) For smooth performance of duties, the National Consumer Protection Board shall be assisted by a secretariat.

(2) The secretariat as intended in paragraph (1) shall be chaired by a secretary appointed by the Chairperson of the National Consumer Protection Board.

(3) The functions, duties and working procedures of the secretariat as intended in paragraph (1) shall be set forth in a decision of the Chairperson of the National Consumer Protection Board.

PROPOSAL

To be amended as follows:

There shall be appointed a secretariat comprising a Secretary to the Council and such other officers as may be necessary to assist the Council.

1.3.4 Justification

i. The National Consumer Advisory Council has to date operated below its capacity due mainly to the lack of a dedicated secretarial unit to service its needs and to assist the Council in effectively implementing the objectives of setting up the Council.

ii. The current practice where the Consumer Affairs Division (CAD) of the Ministry doubles up as a secretariat to the Council is neither practical nor effective because of the lack of human resources at CAD. Making it a secretariat to the Council would be an additional workload which the division is ill equipped to carry, bearing in mind that there are several taskforces established by the Council which also need the services of the secretariat. The Council should be provided with a dedicated secretariat comprising of a secretary and a sufficient number of officers to enable the Council to perform its function well as an advisory mechanism to the Minister.

iii. It is implicit in the wording of Section 80 above that a dedicated unit comprising a secretary and supporting officers is to be set up to assist the Council to carry out its functions. It is incorrect to interpret this to mean loading this function onto the CAD which has numerous programmes of its own to implement.

iv. It is recommended that the ministry seriously consider appointing a dedicated secretariat to the Council. This 'unit' should logically be a separate unit set up to assist the Council and could be located in the CAD and answerable to the Director. Alternatively one of the current six units in the Consumer Affairs Division could be converted to be the dedicated 'unit' with sufficient officers appointed to serve as a secretariat to the Council.

v. The Ministry has to bear in mind that there are administrative, consultative, research and publication functions that the secretariat has to carry out on behalf of the Council and its taskforces. There have been complaints previously from council members that there is inadequate support from the secretariat to enable it to function effectively.

vi. The Minister should use his power under S.84 to make regulations pertaining to the Council and the Secretariat to make it an effective body to give advice to the Minister on the CPA and related matters.

SUMMARY

PART X : THE NATIONAL CONSUMER ADVISORY COUNCIL

Part/Section	Topic	Comments	Suggestion
S. 74	Membership	The composition of the advisory council is not favourable to the safeguarding of consumers' interests as well as providing adequate representation for women on the Council.	The membership of the council should be between 16-20 persons. The number of representatives from each sector should be specified. Consumer organisations should be specified in S.74. Consumers should be given more representation compared to business sector and one third of council members should be women.
Section 80	Secretary to the council and other officers	The Council can not perform its functions effectively if it has to depend on the Consumer Affairs Division to provide a secretariat. S.80 envisages a dedicated unit comprising the Secretary and a sufficient number of officers. Such a unit is required to serve the council and its many taskforces.	A dedicated unit comprising the Secretary and a sufficient number of officers should be provided to assist the council in effectively carrying out its functions. Administratively this unit may be located in the Consumer Affairs Division and be responsible to the Director. Alternatively an existing unit in the division can be converted into a dedicated secretariat to the council

THE CONSUMER PROTECTION ACT 1999

PART XI

THE TRIBUNAL FOR CONSUMER CLAIMS

1.0 PART XI: THE TRIBUNAL FOR CONSUMER CLAIMS

1.1 Establishment of the Tribunal for Consumer Claims.

1.1.1 Provisions in Section 85 and 86

S.85. There shall be established a tribunal to be known as the "Tribunal for Consumer Claims"

S.86. (1) The Tribunal shall consist of the following members who shall be appointed by the Minister:

(a) a Chairman and a Deputy Chairman from among members of the Judicial and Legal Service; and

(b) not less than five members-

(i) being person who are qualified persons within the meaning of the Legal Profession Act 1976 [Act 166], Advocates Ordinance Sabah [Cap. 2] or Advocates Ordinance Sarawak [Cap. 110], as the case may require;

(ii) persons not falling within subparagraph (i) but are holding or have held the posts specified in the Fourth Schedule to the Subordinate Courts Act 1948 [Act 92]; or

(iii) any combination of members from subparagraph (i) or (ii).

(2) The members referred to in paragraph (1)(b)-

(a) shall hold office for a term not exceeding three years; and

(b) shall be eligible for reappointment upon expiry of his term of office but shall not be appointed for more than three consecutive terms.

1.1.2 Comments on provisions in the law

The law as it stands on the establishment and structure of the Tribunal is not very clear. The provision in S.85 gives the impression that there is to be established only one Tribunal at national level. This Tribunal will then have sittings throughout the country to hear consumer claims. The chairman, deputy chairman and other members will then move around the country chairing one man Tribunals to hear cases in two or more sittings on such day and time as the chairman may decide (S.96).

At State level, they will be assisted by bureaucrats recognised as magistrates by virtue of the their positions and functions.

There is no clear provision for the establishment of Tribunals at the State and District levels, to make such tribunals relevant and accessible to the consumer. Bureaucrats at State level also need to be well versed in the law since they will be applying the provisions of the CPA.

In view of the unclear structure of the Tribunal and the need to move from place to place, Tribunals should be established at State and District levels.

1.1.3 Comparison with other legislation

i. Chapter III Consumer Protection Act 1986 (India)

S.9. Establishment of Consumer Disputes Redressal Agencies.

There shall be established for the purposes of this Act, the following agencies, namely:-

(a) a Consumer Disputes Redressal Forum to be known as the "District Forum" established by the State Government in each district of the State by notification:

S.10. Composition of the District Forum.

(1) Each District Forum shall consist of, –

(a) a person who is, or has been, or is qualified to be, a District Judge, who shall be its President;

(b) two other members shall be persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

PROPOSAL

Section 85 and 86 to be amended as follows:-

85. There shall be established a tribunal to be known as the "Tribunal for Consumer Claims" at the national level, state level and district level in such numbers as may be determined by the Federal Government.

86. (1) The Tribunal at Federal Level shall consist of the following members who shall be appointed by the Minister:

(a) a Chairman and a Deputy Chairman from among members of the Judicial and Legal Service; and

(b) not less than five members-

(i) being person who are qualified persons within the meaning of the Legal Profession Act 1976 [Act 166], Advocates Ordinance Sabah [Cap. 2] or Advocates Ordinance Sarawak [Cap. 110], as the case may require;

(ii) persons not falling within subparagraph (i) but are holding or have held the posts specified in the Fourth Schedule to the Subordinate Courts Act 1948 [Act 92]; or

(iii) any combination of members from subparagraph (i) or (ii).

(2) The Tribunal at State and District levels shall consist of a Chairman and Deputy Chairman as may be appointed by the Minister.

(a) The Chairman and Deputy Chairman may be chosen from persons who are, or have been, or are qualified to be, magistrates to be assisted by any combination of as in (1)(b)(iii)

1.1.4 Justification

i. There should be clear provisions for the establishment of Consumer Claims Tribunals at the Federal, State and District levels, to enable consumers to lodge their complaints and seek redress. It is problematic for consumers and the Tribunal where the Tribunal has to move around the country holding sittings based on the places and number of claims filed. This hierarchy of Tribunals suggested is not meant to be an appeal process.

ii. The current setup is not proactive but reactive since it will hold sittings 'if' cases are filed. It does not increase accessibility for consumers. Tribunal offices are set up in stages and are dependent on the Attorney Generals Office for personnel. It is possible that many more consumers will file their claims if there is a Tribunal near their locality.

iii. Statistics for 2005 indicate that some 5000 claims were heard by the Tribunal. Whether this is a true reflection of the 'effectiveness' of the Tribunal or the number of 'problems' faced by consumers throughout the nation is uncertain. Firstly 5,000 claims out of say an 'adult' population of 5 million (out of a total population of 25 million) is only 0.1% which is a very insignificant number. Does it mean that consumers do not have claims against traders or that they have little accessibility to the Tribunal as sittings are held infrequently in big and smaller urban areas or are consumers not aware of the Tribunal? The majority of the 5,000 claims were filed are in big urban areas.

iv Tribunals should be established at the Federal, State and District levels for the following reasons. One is to make consumers aware of the Tribunals existence and purpose. Second, to improve accessibility of consumers to the Tribunal, third, to reduce consumers' cost of access and fourth, to create a climate of ethical trade throughout the nation.

v. It is common knowledge that consumers in small urban areas and villages face far more consumer problems with traders compared to the more knowledgeable urban consumers who have more choice and avenues for redress. Tribunals should therefore be established as a permanent feature at the State and District Levels to really serve consumers.

1.2 Commencement of proceedings; Right to appear at hearings

1.2.1 Provisions of Section 97 and 108

S.97. A consumer may lodge with the Tribunal a claim in the prescribed form together with the prescribed fee claiming for any loss suffered on any matter concerning his interests as a consumer under this Act.

S.108. (1) At the hearing of a claim every party shall be entitled to attend and be heard.

(2) No party shall be represented by an advocate and solicitor at a hearing.

(3) Subject to subsection (2) but notwithstanding section 37 of the Legal Profession Act 1976-

(a) a corporation or an unincorporated body of persons may be represented by its full time paid employee;

(b) a minor or any other person under a disability may be represented by his next friend or guardian ad litem.

(4) Where a party is represented as provided under subsection (3), the Tribunal may impose such conditions as it considers necessary to ensure that the other party to the proceedings is not substantially disadvantaged.

1.2.2 Comments on provision in the law

The law as it stands only allows a 'consumer' to lodge a claim with the Tribunal. The law should also allow a consumer association to lodge a claim at the request of and on behalf of a consumer. As a corollary to this, the consumer should also be able to seek the assistance of a consumer association to represent him during the hearing of his claim

1.2.3 Comparison with other legislation

i. S.12. Consumer Protection Act 1986 (India)

Manner in which complaint shall be made

A complaint, in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by –

(a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;

(b) any recognised consumer association, whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;

(c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

(d) the Central or the State Government.

PROPOSAL

S.97 to be amended as follows:-

A consumer or any recognised consumer association may on his behalf lodge with the Tribunal a claim in the prescribed form together with the prescribed fee claiming for any loss suffered on any matter concerning his interests as a consumer under this Act.

S.108. Right to appear at hearings to be amended by adding (3)(c)

(1) At the hearing of a claim every party shall be entitled to attend and be heard.

(2) No party shall be represented by an advocate and solicitor at a hearing.

(3) Subject to subsection (2) but notwithstanding section 37 of the Legal Profession Act 1976-

(a) a corporation or an unincorporated body of persons may be represented by its full time paid employee;

(b) a minor or any other person under a disability may be represented by his next friend or guardian ad litem.

(c) a consumer may be represented by a consumer association whether the consumer is a member of such association or not;

(4) Where a party is represented as provided under subsection (3), the Tribunal may impose such conditions as it considers necessary to ensure that the other party to the proceedings is not substantially disadvantaged

1.2.4 Justification

i. Allowing a consumer association to file a claim at the request and on behalf of a consumer may go a long way in assisting consumers who are unable to bring their claim due to ignorance, helplessness, poverty or illiteracy.

ii. The aim of the government in setting up the Consumer Complaints Tribunal is to help the ordinary consumers obtain redress where they have been taken cheated by traders. Such instances happen more often in the rural areas and where consumers may be dependent on a limited number of traders for goods and services. Many of the consumers are rural folk, illiterate and have no knowledge of where and how to seek their rights. Consumer associations may be able to help such consumers if they are allowed to act on behalf of the consumers.

iii. Corporations are allowed to be represented by a full time employee, who may well be a lawyer and better prepared to represent his client compared to the consumer representing himself. The Chairman has the power to redress this imbalance (S.108-4). However there has been no implementation of this power in practice.The playing field should therefore be levelled and the consumer allowed to be represented by a consumer association whether or not the consumer is a member of such an association.

1.3 Limitation to jurisdiction

1.3.1 Provisions in Section 99 (2)

99(2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action which accrues within three years of the claim.

1.3.2 Comments on provisions in the law

The law as it stands is in conflict with the Limitation Act 1953 which provides a time limit of six years in filing contract and tort claims.

1.3.3 Comparison with other legislation

None

PROPOSAL

Section 99(2) to be amended as follows:-
(2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action which accrues within six years of the claim.

1.3.4 Justification

i. Time limits for instituting action in the Consumer Protection Act 1999 should be consistent with those in the Limitation Act 1953. Personal injury and death claims under the Consumer Protection Act cannot be heard by the Tribunal. As such, consumers are forced to bring such claims under tort in the normal courts within a six year time period. However in contract cases which can be heard by the Tribunal claims are time limited to three years. This anomaly should be corrected.

SUMMARY

PART XII : THE TRIBUNAL FOR CONSUMER CLAIMS

Section	Topic	Comment	Suggestion
S.85	Establishment of the Tribunal for Consumer Claims	The law as it stands provides for the establishment of a single tribunal at Federal level. This tribunal will then hold sittings throughout the country. This structure is cumbersome and makes the functioning of the tribunal ad-hoc and inaccessible to consumers who wish to file their claims.	A Tribunal for Consumer Claims should be established at the Federal, State and District levels to provide better accessibility to consumers to lodge their complaints and seek redress. This structure does not envisage an appeal process. There should be no dependency on the Attorney General for legal staff
S.86	Membership of the Tribunal	As the law stands, the Federal level Tribunal needs to conduct sittings throughout the country. If it does not have sufficient members to conduct hearings, it then commissions private lawyers or state level bureaucrats who by their vocation qualify as 'magistrates'. The setup is unsatisfactory.	Federal government should establish States and District level Tribunals as permanent entities as the need arises. They should utilise state and district level 'legal' manpower both serving, previously serving and qualified to serve. This will also improve accessibility of consumers to the Tribunal and reduce a 'fire fighting' approach by the Federal Tribunal. It will also lower cost for consumers to access the Tribunal.
S. 97	Commencement of Proceedings	The law provides that only a consumer may commence proceedings in the Tribunal. Consumer Organisations should also be able to commence proceedings on behalf or at the request of the consumer. Many consumers are unable to commence proceedings because of ignorance, illiteracy, poverty and helplessness.	The law should allow for Consumer Organisations to commence proceedings at the Tribunal at the request of the consumer or on his behalf irrespective of whether the consumer is a member of the consumer organisation.
S. 108	Right to appear at hearings	Although both parties at a hearing are not permitted to have lawyers represent them, corporations are given leeway in having a fulltime employee represent them. This person may well be a lawyer or well versed in the law. The consumer is definitely at a disadvantage here. Though the Chairman can offset the disadvantage, he has not acted so in practice.	To level the playing field and in keeping with the suggestion in S.97 above it is recommended that the consumer be allowed, at least to be represented by a Consumer Organisation of his choice. They may be of help to a consumer who is unable to represent himself due to ignorance, lack of education, helplessness or poverty.
S.99(2)	Limit to jurisdiction	A claim is limited to a cause of action which accrues within three years. This limit is not in line with time limits set in the Statute on Limitation.	The time limit for bringing a claim in the Tribunal for contract cases should also be six years as set in the Statute on Limitation.

Matters concerning the establishment of Tribunal.	Tribunal hearings-Time of hearings	Hearings of the Tribunal follow fixed office hours. This may not be convenient for consumers in small towns and rural areas where they may not be able to acess the Tribunal during working hours	Tribunal hearings should be held in some places during evening hours to enable those working and self employed to access its services without losing financially.
	New Tribunal offices	The practice of setting up new offices of the Tribunal to meet demand with all the physical infrastructure will be an expensive matter for the Ministry to handle. Shortage of funds for such projects may limit the number of such offices being set up. Legal manpower and supporting staff will be an additional cost.	To overcome such additional expenditure, the office of the Tribunal should be kept as simple as possible. There is no need to mimic the court setup. Space available in the Ministry's branch offices should be utilised to the maximum and support staff of the 'Consumer Unit' at the branch office can serve as suport staff for the Tribunal.
	Class Action	Currently Malaysian Law does not provide for class action. Class action is very important for consumers where many consumers suffer but each in a small way that does not favour bringing an action. Class action will also allow remedy for a large number of consumers if consumer organisations can bring such an action on behalf of consumers.	The Ministry can take the initiative to begin a dialogue with the Government to allow such an action to increase protection for consumers where a large number of consumers suffer a little each because of the actions of a corporation. Such a move by the Ministry will show that it values consumer protection highly.

THE CONSUMER PROTECTION ACT 1999

REGULATIONS

10. NEW REGULATIONS PROPOSED FOR PART III OF CPA

10.1 Regulations on Safety of Goods

Product Safety Regulations shall contain the following provisions:

1. Definition
   a. goods
   b. consumer
   c. relevant Ministries
   d. authorized officer
   e. safe product
   f. general safety requirement

2. Application

3. Duty of a manufacturer
   a. provide information to consumers in relation to goods
   b. periodical testing of goods on the market to determine their safety
   c. make a report to the relevant Ministries if goods have serious defects
   d. recall goods if goods are not safe

4. Duty of a supplier
   a. supply safe goods only
   b. monitor the safety of goods on the market
   c. make a report to the relevant Ministries if any goods have serious defects

5. Duty of the relevant Ministry if goods are not safe:
   a. if the defect could not be repaired – declare the goods as unsafe goods under section 23(1) and (2) of the Consumer Protection Act 1999;
   b. if the defect could be repaired by the manufacturer – order the manufacture to take necessary steps within 3 months to repair the defect, such as instructing the consumers to return the goods to repair centers established by the manufacturer

6. Procedure of reporting to the relevant Ministry

7. Procedure for recall of goods by a manufacturer or supplier

8. Liability of a person who supplies unsafe goods

9. Liability of a manufacturer or supplier for failure to do periodical testing

10. Liability of a manufacturer or supplier for failure to make a report to the relevant Ministries if any goods have serious defects

11. Liability of a manufacturer or supplier for failure to repair the defect or recall unsafe goods

12. Defence

13. Penalty

REVIEW OF MOTOR VEHICLE REPAIR AND MAINTENANCE CONSUMER PROTECTION (WORKSHOPS INFORMATION DISCLOSURE) REGULATIONS 2002

1.0 INTERPRETATION

1.1 Definition of Repair Service

1.1.1 Provision in Regulation 2

Repair service means the service of—

(a) diagnosing and fixing malfunctions in motor vehicles;

(b) replacing parts of motor vehicles; or

(c) servicing, maintaining, renovating or reconditioning motor vehicles,

1.1.2 Comments on the provisions in the law

The definition of repair service does not include all aspects of repair service.

1.1.3 Comparison with other legislation

Motor Vehicle Service and Repair Industry Code of Practice of Australia

repairs: means any of the following work performed on, or in relation to, a motor vehicle or any component, system or part of a motor vehicle:

(a) examination or assessment in relation to condition or performance;
(b) detection of faults;
(c) dismantling or assembling;
(d) servicing or maintenance;
(e) replacement;
(f) adjustment;
(g) painting;
(h) modification, installation or fitting;
(i) towing to a premises in anticipation of the performance of any of the foregoing; or
(j) provision of advice in relation to any of the foregoing;

PROPOSAL

Regulation 2 to be amended as follows;

repair service means the service of –

(a) examination or assessment in relation to condition or performance;
(b) diagnosing and fixing malfunctions in motor vehicles;
(c) replacing parts of motor vehicles; or
(d) servicing, maintaining, renovating or reconditioning motor vehicles; or
(e) towing to a workshop in anticipation of the performance of any of the foregoing; or
(f) provision of advice in relation of any of the foregoing.

1.1.4 Justification

i. The definition of repair service is not comprehensive. It does not include all aspects of repair service. This includes the examination and assessment of the vehicles before any repair can be carried out. For example, the consumer brings a car just for assessment and getting advice on the performance of the car. It may not involve any repair work and this transaction is not included in the definition and therefore the consumer will not benefit from protection under this Regulation.

ii. Similarly in respect of towing services. It is also not included in the definition. All the information regarding towing to a workshop should be disclosed to consumers so that the consumers can make decisions wisely.

iii. The definition of repair service provided by the Motor Vehicle Service and Repair Industry Code of Practice of Australia is more comprehensive and can be adopted into the local regulations.

iv Widening the definition will benefit consumers in dealing with workshops in many aspects of repair service such as in respect of towing services and assessment of vehicles before repairs and not just limited to aspects stated in regulation 2.

1.2 The definition of estimate

The proposal is to add a definition for 'estimate' in Regulation 2.

1.2.1 Provisions in the law

None

1.2.2 Comments on provision in the law.

There is no definition of 'estimate' in Regulation 2. The Regulation provides for the operator to give an estimate of charge to consumers for the repair service. There are problems in distinguishing between estimate, quotation and price.

1.2.3 Comparison with other legislation.

Vehicle Builders and Repairers Association (VBRA) Consumer Code of Practice of United Kingdom

Estimate is defined as " an anticipated cost for the work requested."

PROPOSAL

To add the definition of estimate in Regulation 2.

An anticipated cost for the work requested.

1.2.4 Justification

It is better to give a definition of the word 'estimate' so that it can be distinguished from the word 'price' and 'quotation'.

1.3 Disclosure of information in respect of repair service to each consumer

1.3.1 Provision in Regulation 6

(1) Before undertaking any repair service for a consumer, the operator of a workshop shall ensure that the consumer is provided with a written statement-

(a) describing the repair service which is expected to be required to be made to the motor vehicle;
(b) stating the estimate of labour fee to be charged for the repair service;
(c) stating the estimated taxes payable in respect of the repair service, if any; and
(d) stating the estimated time of completion of the repair service.

1.3.2 Comments on provisions in the law

Regulation 6 gives a responsibility to the operator of a workshop to ensure that the consumer should be provided with a written statement before undertaking any repair service. There are other matters that should be included in the written statement. They are;

i) The method of payment and terms of payment
ii) New parts used and a clear explanation for the need for replacement of old parts.

Comparison with other legislation.

Vehicle Builders and Repairers Association (VBRA) Consumer Code of Practice of United Kingdom

4. Payment.

The methods and terms of payment that are available should be advised prior to any work being undertaken. In the event of any pre-payments or deposits being required, the business will have a procedure in place for the handling and security of any pre-payment to ensure that in the event of non-supply of services or goods the pre-paid money is safeguarded and can be returned. The details of this procedure are available on request from the repairer company.

5. Parts used.

Where parts are required to be fitted the customer should be provided with a clear explanation for the need for replacement. If other than new and original manufacturers main structural parts, panels or mechanical items, are to be fitted, the customer should be advised as to the reason(s) for their use and the customer's authorization obtained.

PROPOSAL

Regulation 6 to be amended as follows;

(1) Before undertaking any repair service for a consumer, the operator of a workshop shall ensure that the consumer is provided with a written statement-

(a) describing the repair service which is expected to be required to be made to the motor vehicle;
(b) stating the estimate labour fee to be charged for the repair service;
(c) stating the estimated taxes payable in respect of the repair service, if any;
(d) stating the estimated time of completion of the repair service;
(e) stating the methods and terms of payment that are available; and
(f) describing the replacement of spare parts used.

1.3.3 Justification

i. There are two additional matters that the operator needs to inform a consumer before undertaking any repair service. The first one is the method and terms of payment that are available. The method of payment is important because failure to pay will mean the consumer is unable to claim the car after repair work is done. In the event a deposit is required, the consumer should be informed of the amount and the reasons the operator requires the deposit.

ii. Another matter that should be disclosed is the need for spare part replacement. Where new parts are required to be fitted, the consumer should be provided with a clear explanation for the need for replacement. There are certain cases whereby replacement is better than repair and the consumer should be informed of this before making any decision. In a situation if modified or reconditioned parts are used, a clear information about these parts should be given to consumers.

iii. Even though, the Malaysian Guidelines and Code of Ethics for Motor Vehicle Repair and Service Industry provide these requirements, it is better to restate them in the Regulation.

1.4 Estimated Fees

1.4.1 Provisions in the law

None.

1.4.2 Comments on provisions in the law

Regulation 6(1) states that the operator of a workshop has to provide a written statement to each consumer stating the estimated labour fee and taxes. However the Regulation does not mention a situation where the workshop imposes charges higher than those estimated.

1.4.3 Comparison with other legislation

i. Most of the United States Automotive Repair Laws (such as Florida Motor Vehicle Repair Act)

The motor vehicle repair shop could not collect charge for repairing the motor vehicle, in the event that they fail to provide customer with a written estimate or a written notice of the right to a written repair estimate as mandated by the statute.

ii. Section 4(2) Motor Vehicle Repair Act 1990 (Canada)

No person shall charge, for work or repairs for which an estimate was given, an amount that exceeds the estimate by more than 10 per cent.

PROPOSAL

To add a new subsection in Regulation 6A,

(b) No person shall charge, for work or repairs for which an estimate was given or asserting a lien against the car, an amount that exceeds the estimate unless the customers know and agree with the amount."

1.4.4 Justification

i. The common scenario occurs when the customer picks up the car only to find the bill higher than the estimate. The operator refuses to release the car until paid, leaving the customer with the choice of paying or litigating.

ii. In the United States there are many state laws known as Automotive Repair Laws whereby the statute requires the repairers to provide an estimate of fees and if they fail, the repairers are precluded from charging the owner for work performed or asserting a lien against the car in the case where a consumer does not want to pay.

iii. The same approach should be taken by the Malaysian Regulation so that charges imposed should not be higher than estimated cost. If this is not the case, the requirement of providing a written statement which states the estimated cost would be meaningless to consumers.

1.5 Diagnosis

1.5.1 Provisions in the law

None.

1.5.2 Comments on provisions in the law.

Sometimes a diagnosis is performed where it is not reasonably practicable for the repairer to provide an estimate without carrying out a diagnosis of the vehicle. If the diagnosis is likely to result in any damage to the vehicle, the consumer must be notified in writing. However, the regulation is silent on this.

1.5.3 Comparison with other legislation.

Section 8(2) Motor Vehicle Service and Repair Industry Code of Practice of Australia

Where it is not reasonably practicable for a principal to provide an estimate of repairs until a diagnosis of the motor vehicle has been carried out, the principal shall:

(a) provide to the consumer a copy of Schedule A to this Code endorsed by the principal, unless done so previously;

(b) provide the consumer with a written estimate of the cost of the diagnosis, including any costs associated with the return of the motor vehicle to the state in which it was placed in the principal's care;

(c) if the diagnosis is likely to result in any damage to the motor vehicle, notify the consumer of that fact in writing;

(d) obtain the consumer's written authorization for the principal to perform the diagnosis;

PROPOSAL

Add a new subsection to regulation 6:

where it is not reasonably practicable for the operator of a workshop to provide an estimate of repairs until a diagnosis of the motor vehicle has been carried out, the operator shall:

(a) provide the consumer with a written estimate of the cost of the diagnosis, including any costs associated with the return of the motor vehicle to the state in which it was placed in the operator's care;

(b) if the diagnosis is likely to result in any damage to the motor vehicle, notify the consumer of the fact in writing.

1.5.4 Justification

The provision is important due to the fact that sometimes it is difficult to know the problems and the estimated cost until diagnosis is carried out. However, diagnosis will incur cost and may be likely to cause damage to the motor vehicle. Hence, a clear provision regarding diagnosis should be clearly stated in the Regulation.

PROPOSED REGULATIONS ON MOTOR VEHICLE REPAIR AND MAINTENANCE INDUSTRY FOR BETTER CONSUMER PROTECTION

1. Comments on the existing laws

The Consumer Protection Act 1999, the Consumer Protection (Workshops Information Disclosure) Regulations 2002 and the Guidelines and Code of Ethics for Motor Vehicle Repair and Service Industry are insufficient to provide maximum protection to consumers in the motor vehicle and repair industry. A more comprehensive regulation is needed for this purpose.

2. Justification of having a new regulation.

2.1 Consumer problems in this area appear to be numerous. Among the examples are the failures of service providers to carry out work according to the customer's instructions or exceeding the customer's instructions such as carrying work more than the customer intended. It occurs when a service provider carries out work on a car, which is completely unrealistic given the relationship between the cost of the work and the condition and value of the car. Consumers also complain that instead of carrying out repairs, a new part is fitted or the service providers replace a whole section of a car when only a small element of that section is damaged. Apart from that, other problems are works which are not completed on time and the services provided do not reach the expected standard. The spare parts that have been used are also defective and that excessive charges are imposed on the consumers.

2.2 The problems identified are complex and to a certain extent inter-related. The motor vehicle is an important possession for many people as their mobility depends upon it. For many, it is essential for getting to work and its failure to perform properly can thus cause unfortunate consequences. It can also lead to personal injury or death. Furthermore, it is very likely that incompetent work may increase the level of environmental pollution. Therefore, the defective and unsatisfactory services turn out to be serious problems to consumers and it is worth doing legal reforms in order to give adequate protection to consumers.

2.3 Unlike a sale of goods contract which is well regulated, a contract for services has never before been incorporated into a piece of legislation in Malaysia. In addition, there are a lot of obstacles under the existing laws of contract and tort that hinder the rights of consumers from bringing actions under these two branches of law. Apart from that, the Ministry of Domestic Trade and Consumer Affairs has laid down a code of ethics for those who are involved in car service and repair sectors. It is more detailed and lays down many responsibilities that must be observed by service providers. However, the code of practice is not a law as it is implemented on a voluntary basis. Legal control is still the best means to protect consumer. Part VI of the Consumer Protection Act 1999 provides several implied guarantees that must be observed by service providers. However, these implied guarantees are general in nature and inadequate to solve many complicated issues in the motor vehicle repair and service industry. As a whole, the laws seem inadequate to give the maximum protection to consumers.

2.4 From the statistics issued by the Consumer Tribunal, there are 443 cases and complaints that have been brought to the Tribunal regarding the services of garage since the formation of the Consumer Tribunal in 1999. This shows that the problems are alarming and poor services from garages is becoming a major consumer issue since consumer mobility depends on it. In fact the problems in reality are more alarming then the figures mentioned in

the above statistics because there are many cases whereby the consumers choose to keep quite rather than bringing the case to the Tribunal.

3. Comparison with other legislation

In many developed countries, they are legislation or Code of Practice on Motor Vehicle Repair Industry such as;

(i) Australian Fair Trading Act 1992 Motor Vehicle Service and Repair Industry Code of Practice

(ii) Australian Motor Vehicle Repairs Act 1980

(iii) United States Automotive Repairs Laws (State Law)

(iv) United Kingdom Vehicle Builders and Repairers Association (VBRA) Consumer Code of Practice

4. OUTLINE OF THE PROPOSED REGULATIONS

4.1. The objectives of the Regulation

1. To enhance fairness of trading in the market from the viewpoint of both businesses and consumers;
2. To improve the competency of motor vehicle repairers;
3. To improve the quality of motor vehicle repairs and reduce the incidence of rework;
4. To enhance public safety by reducing the incidence of accidents in which inadequately performed repairs are a contributing factor;
5. To reduce the harmful environmental impact of motor vehicle emissions and motor vehicle repair work practices
6. To effect a speedy, relevant and efficient dispute resolution process between repairers and consumers.
7. To provide sanctions against misleading and dishonest business practices in motor vehicle repairs;
8. To allow losses due to dishonest or incompetent trader conduct to be recovered.

4.2 The areas of Regulation

1. Business licensing regime / registration
2. Certification for trade people
3. Disciplinary proceedings
4. The administration of the regulation/ The enforcement
5. Dispute resolution
6. Remedies / Penalties

4.2.1 Business licensing regime / registration

(i) The Regulation should impose a licensing requirement on the proprietor of a repair business.

(ii) Entry criteria to obtain a license include:

a. the applicant being over 18 years old
b. the applicant having sufficient financial resources
c. the applicant not being a bankrupt;

d. the applicant being a fit and proper person (e.g. not being convicted of an offence involving fraud or dishonestly)
e. the applicant not having been guilty of motor vehicle theft or receiving a stolen motor vehicle or motor vehicle parts;
f. the applicant having any qualifications, if prescribed.

(iii) The making of false statement under this provision carries a criminal sanction.

4.2.2 The certification for trade people.

(i) repair work in a repair business can only be undertaken by the person who fulfills certain criteria.
(ii) The criteria includes;
a. the repairer being a fit person;
b. the repairer possess certain qualifications prescribed or determined by the regulating authority
(iii) must exist a mechanism for ongoing monitoring the certification.

4.2.3 Disciplinary proceeding

The repairer may be reprimanded, the license may be revoked or suspended.
Among the ground for disciplinary action;
a) the license was improperly obtained
b) the license holder was convicted of offences involving fraud or dishonesty or the business was conducted in a dishonest or fraudulent way
c) repair work was carried out below usual trade standard.

The hearing can be conducted by the Council/ Committee established under this regulation.

The Motor Vehicles Repairs Act 1980 of Australia provides this disciplinary proceeding.

4.2.4 The administration of the regulation/ The enforcement

Establish a Council or Committee to enforce the regulation

The functions of the Committee are:
(a) to regulate the motor vehicle repair industry in accordance with the Regulation

(b) to issue licenses
(c) to make reports and recommendations to the Minister with respect to the regulation of the motor vehicle repair industry, including the motor vehicle repair industry licensing scheme

(d) to inform the public about the motor vehicle repair industry
(e) to keep under review, and promote improvement in the standard of, motor vehicle repair work;

(f) to promote and undertake research into the motor vehicle repair industry

(g) In Australia, the Motor Vehicle Repair Industry Authority (MVRIA) is responsible for administering the Motor Vehicle Repairs Act 1980.

4.2.5 Dispute resolution

(a) The establishment of a Motor Vehicle Division in the Tribunal, which looks at disputes relating to motor vehicle sales and repairs.
(b) The dispute can be solved through mediation or hearing in the Tribunal. Enforceable orders to be made to ensure that remedies are carried out.
(c) The technical knowledge of the repair dispute committee can assist settlement of disputes with repairers.

4.2.6 Penalties

The regulations should clearly prescribe sanctions on those who fail to observe the requirements under the Act.

THE CONSUMER PROTECTION ACT 1999

NEW PART

PROPOSED NEW PART FOR THE ACT
UNFAIR CONTRACT TERMS

1.0 Introduction

The Consumer Protection Act 1999 does not contain any provisions on unfair contract terms. Consumers all over the world are affected by various forms of unfair contract terms. As such there is a need to protect consumers from contract terms which may be unfair to them and operate to their detriment. The unequal bargaining position between consumers and suppliers results in consumers being unable to renegotiate terms which they find unfavorable to them. Suppliers are often reluctant to make any changes to standard terms offered to the consumer. Consumers are then left in a 'take it or leave it position'. It is therefore imperative for the government to provide protection to consumers in this respect by including basic protection in the CPA 1999 until there is a separate legislation governing contract terms.

2.0 Standard Terms:

Proposal

Provisions on the usage of unfair terms in standard form contracts must be enacted.

2.1 Comments

The form of many contracts have become standardized, thus there is no actual freedom of choice or negotiation as prescribed by common law. Thus, the law on unfair contract terms must be regulated.

2.2 Comparison with other legislation

Unfair Terms in the Consumer Contracts Regulations 1999 (United Kingdom) provides;

5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

2.3 Justification

Standard terms are contract terms that are formulated by one party usually the seller or supplier for use in contracts generally. These terms are not negotiated but are imposed on the consumer at the conclusion of a contract. These terms are favorable to party who formulated it. Thus, most of the time consumers might not willingly agree to these terms as they are left with take it or leave it situations. There is little, if any real freedom of choice or negotiation of terms. Where inequality of bargaining power exists, the supplier can be expected to take advantage of its position to the detriment of consumers. Therefore, regulating unfair contract terms imposed in standard term contracts particularly is of utter importance to protect consumers legitimately. Otherwise, consumers will continue to find themselves being taken away by surprise either by way of extra charges, bearing the risks or be denied of statutory rights.

3.0 Ambit of Unfair Terms:

PROPOSAL

Statutory provisions on unfair terms must extend to both procedural unfairness and substantive unfairness. Procedural unfairness and substantive unfairness must be distinguished to provide better protection to consumers and for clarity. The ambit of 'unfairness' must incorporate the conduct of unconscionability for both procedural and substantive unfairness.

*1.**Procedural Unconscionability;***
The manner the terms are incorporated are in reference to procedural unconscionability.
In assessing procedural unconscionability regard must be made in particular to these factors as to whether;-

a) The terms must be drawn to the consumer's attention before the contract is concluded.

b) The supplier/seller must have provided the other party with an opportunity to review the standard terms.

c) The seller/supplier must have drawn the consumer's attention and bring to the knowledge of the consumer the contractual terms especially if its:

-*exemption clauses* which excludes or limits liability of the seller/supplier

-*Surprising and ambiguous clauses* which are so unusual that the consumer could not be expected to have reckoned with.

d) Physical or mental handicap, ignorance and illiteracy of the consumer is to betaken into account in assessing whether the terms has been adequately brought to the consumers attention

2. ***Substantive Unconscionability***
The standard terms itself is to the disadvantage or detriment of the consumer, which is in reference to substantive unconscionability. In assessing substantive unconscionability,

regard must be made to these factors ;

a) Does the terms cause significant imbalance where the terms are to the detriment and disadvantage of the consumer?

b) Are the terms contrary to good faith, harsh or unjust?

c) Do the terms deviate from protection provided by statutory rights?

d) Terms stated in a contract must be in plain, clear and comprehensible language?

3.1 Comments

Different countries have prescribed for unfair contract terms under various classifications of terms such as unfair, unreasonable, unjust, oppressive, unconscionable etc. Of all these words 'unconscionable' denotes diverse meaning to unfair contract terms thus curbing abuse of terms to the disadvantage of the consumers.

3.2 Comparison with the other legislation

i. Section 51AB of the Trade Practices Act 1974(Australia): prohibits conduct, which is in all the circumstances unconscionable.

ii. Section 70 of the Uniform Consumer Credit Code 1996 (Australia): provides that terms in credit agreements must not be unjust. Unjust is defined as,' unconscionable, harsh or oppressive.

iii. Section 2-302 of the Uniform Commercial Code 2002 (United States): provides that the court may refuse to enforce the remainder of the contract if as a matter of law the court finds the contract or any clause of the contract to have been unconscionable.

iv. Section 6(q) of the Consumer protection Act 1996; Section 6(3) (c) of the Fair Trading Act 1998; Section 4(3) (e) of the Trade Practice Act 1996 (Canada): imputes unconscionability by providing that terms are unfair if is "so adverse to the consumer so as to be inequitable", "takes advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one sided.

3.3 Justification

Nature and incidence of unfair contract terms has lead many countries to legislate provisions to protect consumers as well to achieve a fair balance between the consumer and the seller/supplier. Focus is on standard term contracts as formulation of terms is one sided. To preserve the doctrine of freedom of contract, individual negotiated contracts gives the freedom to the parties to impose the terms most suited to their contract.

Perusing through the statutory provisions of America, European Union Countries, Common Wealth Countries, the ambit of protection for unfair contract terms must cater for both procedural issues and substantive issues.

- **firstly**, *procedural unfairness* which is concerned with the circumstances leading up to and at the time of making of the contract
- **secondly,** *substantive unfairness*, which is, concerned with the unfairness of the terms of the contract themselves, which leads to injustice.

Protection for both procedural and substantive unfairness must be incorporated in the CPA 1999 and must be distinguished to provide clarity.

Furthermore, the usage of the term ***'unconscionable'*** to denote unfairness of the terms in a contract is self- explanatory and desirable as it provides for both substantive and procedural unfairness. The notion of unconscionable defines;

- Exploitation of vulnerability or weakness
- Abuse of position of trust or confidence
- Insistence upon rights in circumstances which make that harsh or oppressive
- Inequitable denial of legal obligations

An ordinary meaning of unconscionable is "***showing no regard for conscience; irreconcilable with what is right or reasonable,"*** which is clear linkage to equity. As such, no new statutory form of unconscionable conduct is created but the incorporation of provisions relating to unfair terms under the notion of unconscionablity will give the CPA greater ability to deal with the problem of general disparity of bargaining power between consumers and sellers/suppliers.

4.0 Consequence if a term is rendered unfair:

Proposal

(i) Declare the unfair terms to be null and void, continue with the contract if it is capable of continuing or

(ii) Declare the contract to be invalid if the consumer would suffer unreasonable hardship if he were to be bound by the contract and

(iii) If a seller or supplier uses a term which has been declared void against him or uses a non-approved standard term, he is liable to a substantial fine or imprisonment.

4.1 Comments

The ability to grant relief in respect of harsh or unfair terms had been confined to specific areas, which is ineffectual because of inadequate drafting and judicial reluctance.

4.2 Comparison with other legislation

i. Unfair Terms in Consumer Contracts Regulations 1999 (United Kingdom): Regulation 8

(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

ii. Article 5 and 6 of the Consumer Protection Act 1983 (Luxembourg): provides that any consumer or supplier's organization may request a court to declare the terms of a consumer contract null and void, if a seller or supplier uses a term which has been declared void against him, he is liable to a substantial fine.

4.2 Justification

Rendering a term to be merely unenforceable cannot do more than invalidate the use of the specific term in a particular contract. It thus has little effect beyond that individual case. However, by declaring the terms disputed to be null and void can compel suppliers or sellers to cease using those terms and comparable terms in all similar contracts. Furthermore, by imposing a substantial fine/imprisonment against the seller or supplier for standard terms not pre-approved by the Ministry will further deter the usage of the same / similar terms.

Thus, to deter the recurring usage of terms deemed unfair or to cease usage of unfair terms, it is proposed that such terms be declared null and void. And the usage of all standard term contracts, which is not pre-approved, shall attract penalty in the form of a fine or in extreme cases imprisonment.

5.0 List of terms deemed to be unfair:

PROPOSAL

List of terms which are regarded as unfair if the seller or supplier;

- excludes or limits liability for death/ personal injury of the consumer
- excludes or limits rights of the consumer in the event of the supplier or seller does not perform or partially performs his contractual obligations
- allows the seller or supplier to retain money received in the event of non-compliance of contractual obligations
- disallows compensation to the consumer in event of the seller or supplier canceling the contract
- requires consumer to pay unreasonable sum of compensation in the event of the consumers non-compliance of contractual obligations.
- only gives the seller or supplier dissolution/termination rights of the contract.
- termination rights without prior notice/proper notice.
- terms binding Consumers without consumer's knowledge/after conclusion of contract.
- allows automatic extension of time for performance contractual obligation without consumers' approval.

- allows seller or supplier to alter terms without valid reasons.
- allows seller or supplier to fix price/increase price at time of the delivering goods without giving the consumer the option to cancel the agreement if the price is too high.
- transferring rights/duties which will reduce consumers as of rights.(either statutory rights/as agreed in the contract)
- excluding the consumers rights to take legal action or any other legal remedy.

5.1 Comments

The gap between the knowledge of a supplier and a consumer has become wider with a correspondingly greater opportunity for abuse. Furthermore, the courts device to do justice is not a frontal attack on the problem of unjust contracts but a multitude of individual decisions. Thus, a non-exhaustive list will provide guidance to both trader and consumer to be aware of unfair terms.

5.2 Comparison with other legislation

Regulation 5(5) of the Unfair Terms in Consumer Contracts Regulations 1999 (United Kingdom) : provides

SCHEDULE 2

INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR

1. Terms which have the object or effect of-

   (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

   (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

   (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;

   (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party canceling the contract;

   (e) requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation;

(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of paragraphs 1(g), (j) and (l)

(a) Paragraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without

notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Paragraphs 1(g), (j) and (l) do not apply to: - transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control; - contracts for the purchase or sale of foreign currency, traveler's cheques or international money orders denominated in foreign currency;

(d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

ii. Section 308 and 309 of the Civil Code 2002 (German) : provides for standard terms, which are invalid and standard terms which are subject to evaluation.

In standard terms the following terms, in particular, are invalid:

1. **(period for acceptance or performance)**
a provision by which the user reserves the right to an unreasonably long or inadequately specified period for acceptance or rejection of an offer or for performance; this does not include reservation of the right to perform only after expiry of the period for revocation or return under 355(1) and (2) and 356;

2. **(additional period for performance)**
a provision by which the user, in derogation from legislative provisions, reserves the right to an unreasonably long or inadequately specified additional period within which to perform;

3. **(right of termination)**
the stipulation of a right for the user to free himself, without an objectively justified reason specified in the contract, of his duty to perform; this does not apply to a contract for the performance of a recurring obligation;

4. **(right of amendment)**
the stipulation of the user's right to alter or depart from the promised performance, unless, taking into account the user's interests, the stipulation to alter or depart from performance is reasonable for the other party;

5. **(fictitious declarations)**
a provision whereby a declaration of the user's contractual partner is deemed or not deemed to have been made by him if he does or fails to do a particular act, unless

a) he is allowed a reasonable period within which to make an express declaration and
b) the user undertakes to draw to his attention at the beginning of the period the particular significance of his conduct; this does not apply to contracts in which the whole of Part B of the contracting rules for award of public works contracts is incorporated;

6. **(fictional receipt)**
a provision which provides that a declaration by the user of particular importance is deemed to have been received by the other party;

7. **(winding-up of contracts)**
a provision by which, in the event that one of the parties to the contract terminates the contract or gives notice to terminate it, the user can demand

a) unreasonably high remuneration for the utilisation or use of a thing or a right or for performance made, or

b) unreasonably high reimbursement of expenditure;

8. **(unavailability of the object of performance)**
a stipulation permitted under 3. above of the user's right to free himself of his obligation to perform the contract if the object of the performance is not available, unless the user agrees

a) to inform the other party immediately of the unavailability, and

b) immediately to refund counter-performance by that party.

309 Clauses whose invalidity is not subject to any evaluation even where derogation from the statutory provisions is permissible, the following are invalid in standard terms:

1. **(price increases at short notice)**
a provision which provides for an increase in the remuneration for goods or services that are to be supplied within four months of the conclusion of the contract; this does not apply to goods or services supplied in the course of a recurring obligation;

2. **(right to refuse to perform)**
a provision by which
a) the right under 320 of the contractual partner of the user to refuse to perform is excluded or restricted, or
b) a right of retention of the contractual partner of the user, in so far as it arises from the same contractual relationship, is excluded or restricted, in particular by making it subject to recognition by the user of the existence of defects;

3. **(prohibition of set-off)**
a provision by which the contractual partner of the user is deprived of the right to set off a claim which is undisputed or has been declared final and absolute;

4. **(notice, period for performance)**
a provision by which the user is relieved of the statutory requirement to give notice to the other party to perform or to fix a period for performance or supplementary performance by him;

5. (lump-sum claims for damages)
stipulation of a lump-sum claim by the user for damages or for compensation for reduction in value, if

a) the lump sum in the cases in question exceeds the damage expected in the normal course of events or the reduction in value which normally occurs, or

b) the other party is not given the express right to prove that damage or reduction in value has not occurred or is materially lower than the lump sum agreed;

6. (penalty)
a provision by which the user is entitled to receive payment of a penalty in the event of non-acceptance or late acceptance of performance, delay in payment or in the event that the other party withdraws from the contract;

7. (exclusion of liability for death and for injury to body and health and for gross fault)

a) (death and injury to body and health)

exclusion or limitation of liability for losses arising out of death, injury to body or health caused by negligent breach of duty by the user or a deliberate or negligent breach of duty by his statutory agent or a person employed by him to perform the contract;

b) (gross fault)

exclusion or limitation of liability for other losses caused by a grossly negligent breach of duty by the user or a deliberate or grossly negligent breach of duty by a statutory agent of the user or by a person employed by him to perform the contract;

a) and b) above do not apply to restrictions of liability in the terms of transport, authorised in accordance with the Passenger Transport Act, of trams, trolley buses and motor vehicles in scheduled services, in so far as they do not derogate, to the detriment of passengers, from the Regulation concerning the terms of transport by tram and trolley bus and by motor vehicles in scheduled services of 27 February 1970; b) above does not apply to restrictions of liability for State-approved lottery or raffle contracts.

8. (other exclusions of liability in the event of breach of duty)

a) (exclusion of the right to withdraw from the contract)

a provision which, upon a breach of duty for which the user is responsible and which does not consist in a defect of the thing sold or the work, excludes or restricts the other party's right to withdraw from the contract; this does not apply to the terms of contract and tariff rules referred to in No. 7 on the conditions set out therein;

b) (defects)
a provision by which, in contracts for the supply of new, manufactured things or of work,

aa) (exclusion and reference of claims to third parties)
claims against the user on account of a defect as a whole or with regard to individual elements of it are excluded entirely, restricted to the assignment of claims against third parties, or which make the pursuit of legal proceedings against third parties a condition precedent;

bb) (restriction to supplementary performance)
claims against the user are restricted, entirely or with regard to individual elements, to a right to supplementary performance, unless the other party is given an express right to claim a price reduction if supplementary performance is unsuccessful or, except where the defects liability is in respect of building work, to choose to terminate the contract;

cc) (expenditure incurred in the course of supplementary performance)
the user's obligation to bear the expenditure necessary for supplementary performance, in particular the costs of carriage, transport, labour and materials, is excluded or restricted;

dd) (withholding of supplementary performance)
the user makes supplementary performance conditional on the prior payment of the entire price or, having regard to the defect, an unreasonably high proportion thereof;

ee) (time-limit for notice of defects)
the user fixes a period within which the other party must give notice of non-obvious defects which is shorter than the period permitted under ff) below;

ff) (facilitation of limitation)
facilitates the limitation of claims on account of defects in the cases set out in 438(1), No. 2 and 634a(1), No. 2, or, in other cases, results in a limitation period of less than one year from the date on which the statutory period of limitation begins; this does not apply to contracts in which the whole of Part B of the contracting rules for award of public works contracts is incorporated;

9. (period of recurring obligations)

in a contractual relationship concerning the periodic delivery of goods or the periodic supply of services or work by the user,

a) a contract duration which binds the other party for more than two years,

b) a tacit extension of the contractual relationship which binds the other party for a period of more than one year in each particular case, or

c) to the detriment of the other party, a period of notice to terminate the contract which is more than three months prior to the expiration of the initial or tacitly extended period of the contract;

this does not apply to contracts for the supply of things sold as a unit, to insurance contracts or contracts between the owners of **copyrights** and of claims and **copyright** collecting societies within the meaning of the Protection of **Copyrights** and Related Rights Act;

10. (change of contract partner)

a provision whereby in sales contracts, contracts for the supply of services or contracts for work a third party assumes or may assume the rights and obligations of the user under the contract, unless the provision

a) specifies the third party by name, or
b) gives the other party the right to withdraw from the contract;

5.3 Justification

An indicative and non- exhaustive list is proposed as provided in the Unfair Terms in Consumer Contracts Regulations 1999 directive. The list of terms falls into five broad categories which are;

- excluding or limiting liability
- granting the trader unilateral decision making power to alter the terms or terminate the contract
- imposing obligations on the consumer without corresponding obligations being assumed by the trader
- granting rights exclusively to the trader
- making consumer access to justice more difficult.

Thus, as the list is non-exhaustive and only indicative in nature, it is proposed that any terms which do not fall strictly within the list but which is similar to one of the effects mentioned above under the five categories should qualify for inclusion.

6.0 Preventative Measures

PROPOSAL

- by creating, an administrative agency charged with analyzing and prohibiting usage of unfair terms, with the task of safeguarding and promoting rights on behalf of consumers.

- allow institutional action, whereby consumer groups or trade associations have the right to bring suit against those who use or recommend use of unlawful standard terms.

- allow a working committee to provide guidance on industry best practice for contract provisions and guidance on unfair and unintelligible contract terms.

- a committee set up at the Ministry of Domestic Trade and Consumer Affairs to vet and approve all standard term contracts before it is used by the sellers/suppliers.
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6.1 Comments

Other means must be provided for to curb usage of unfair contract terms instead of being confined to judicial action.

6.2 Comparison with other countries

i. United Kingdom: Under the Unfair Contract Terms in Consumer Contracts Regulations 1999, the Office of Fair Trading (OFT) has the power to seek injunctions to prevent the continued use of unfair terms. There are eight teams engaged on unfair contract terms cases, each with two or three caseworkers, (21 staff). The UK OFT is mandated to deal with any complaint in relation to a contract term drawn up for general use.

ii. Australia: The Australian Communication Industry Forum (ACIF) published an Industry Guideline on Consumer Contracts with the aim of providing guidance on issues of contractual fairness and best practice for contract provisions. The guideline gives recommendations as to how terms should be written.

6.3 Justification

It is unrealistic to expect individual consumers to challenge the alleged use of unfair terms by sellers and suppliers because expensive litigation and ignorance of the law deters the consumers' from enforcing their rights in court. It will be viable to consumers if persons or organizations are given the mandate to take preventative steps against the use of unfair terms.

Conclusion:

The advantages of providing a statutory prohibition for unfair contract terms which is already dealt with by common law and equity lie in the availability of remedies under the Consumer Protection Act 1999, the potential involvement of consumer organizations or trade commission including the possibility of representative actions, and the educative and deterrent effect of a legislative prohibition in the Consumer Protection Act 1999 itself. Thus, in enacting provisions on unfair contract terms into the Consumer Protection Act 1999 will prove valuable in protecting consumers and provide consumers with a level of protection not hitherto available in this country.

THE CONSUMER PROTECTION ACT 1999

IMPLEMENTATION OF THE CONSUMER PROTECTION ACT 1999

REVIEW OF THE IMPLEMENTATION OF THE CONSUMER PROTECTION ACT 1999

1. Introduction

The Consumer Protection Act 1999 (CPA) came into force throughout the country on 15th November 1999. It was supposed to be reviewed one year after implementation but it was only in 2006 that the Ministry of Domestic Trade and Consumer Affairs (MDTCA) provided funds to the Federation of Malaysian Consumers Associations (FOMCA) to carry out a review. A review was thus carried out of the law and its implementation. The following are aspects of the CPA, that require the attention of the MDTCA.

1.1 The Tribunal for Consumer Claims

The law provides for only one tribunal at national level which conducts hearings throughout the country. To serve consumers better, tribunal offices should be established in both large and small urban areas. Tribunals should be established at Federal, State and District levels. To reduce dependence on the Attorney General and judges in service, retired judges should be allowed to conduct tribunal hearings.

Tribunal offices should be modest and simple. To reduce expenditure in building new tribunal offices, available space at MDTCA's branch offices should be utilized. To reduce the cost of personnel, the staff of the newly established Consumer Affairs departments at the branch offices of the Ministry should be allowed to handle tribunal activities. This will be possible where only a few claims are filed. The Tribunal Chairmen can conduct 'circuit' hearings, to avoid a high expenditure of having permanent tribunal offices in small towns and rural areas.

To increase consumer accessibility, the tribunal should also hold hearings in the evenings and on weekends. This is to enable rural workers; comprising the self-employed and employees alike, an opportunity to lodge their complaints with the tribunal after working hours.

Consumers especially rural people who are deterred from lodging claims due to ignorance poverty and illiteracy can be helped by allowing the respective consumer organisation to lodge claims on their behalf and represent them at tribunal hearings.

Up to ten percent of tribunal awards are not complied with by traders. This would amount to 500 cases from the approximately 5000 claims handled by the tribunal in 2005. There is seldom action taken immediately on the offending party after the 14 day grace period for settling an award. Firm action such as a mandatory jail sentence should be enforced on recalcitrant traders. This will serve to raise consumer confidence while preserving the dignity of the tribunal and its decision in granting an award.

1.2 Prosecutions in Court

Although it has been more than five years since the Act came into force, few cases have been prosecuted in court. The Biennial Report of the Enforcement Division of the Ministry for 2004-2005 lists 833 cases prosecuted under the CPA in 2005. Compounds totalling RM209,440 were collected while fines imposed by the courts totalled only RM1,700. It is clear that compounding of offences remain the preferred method of prosecution whilst only a few cases make it to court. The Ministry should investigate this mater. Without prosecutions, it is difficult for the CPA to develop in

terms of case law and interpretation. It may also be advisable to set up a 'Prosecution Unit' at the Ministry to handle prosecutions, in view of the various laws enforced and the lack of legal resources in the Enforcement Division to undertake prosecutions.

1.3 Research and Monitoring of the Act

All laws under the purview of the Ministry must be monitored for evaluation to determine the need for reviews and amendments to ensure these laws are relevant to current circumstances. As such, each Act should belong to a 'custodian division' which will carry out periodic evaluation and table the findings to a Legal Review Committee at the management level. Since each Ministry is responsible for the monitoring of respective areas of law, it is sensible to set up this mechanism.

Research on a wider basis should also be carried out on various aspects of legislation, to determine whether it is effective in the areas it is supposed to address. For example, Part II of the Act is meant to address 'Misleading and deceptive conduct, false representation and unfair practice'. This part requires both proactive enforcement and investigation of complaints. There is however, no mechanism set up to receive complaints of this nature, although the media is full of advertisements which run foul of this part of the legislation. It would also be useful to conduct research on whether any prosecutions have been brought under this part or generally, whether this part has deterred the kind of conduct which it seeks to prevent.

Research should also be conducted on the functioning of the tribunal to evaluate various facets of it's implementation. For instance, approximately 5,000 claims were handled by the tribunal in 2005. Does this mean that it is effective as a remedy for consumers or that not many consumers have access to the Tribunal, since 5000 claims from an adult population of about ten million is negligible. For a regular and credible research, a dedicated 'research unit' should also be established in the Ministry.

1.4 Inter-Agency Committee on Advertisements

There is no mechanism in place at the MDTCA, to take proactive action to monitor, evaluate and determine whether advertisements in the media comply with Part II of the CPA. Without any system to enforce Part II of the Act, consumers continue to be exposed to deceptive advertisements which do not fall within the jurisdiction of any other agencies.

As the supervision of advertisements fall under various agencies, each with its specific area, the MDTCA in its supervisory role over misleading and deceptive conduct, false representation and unfair practice under the CPA should take proactive action to form an inter-agency committee to monitor advertisements in the media in order to protect consumers. The MDTCA should not wait until complaints are received before taking the necessary action to protect consumers against misleading advertisements.

The Committee should comprise of not more than six core members. Additional members can be selected as required. These six members should be from the following agencies:-

1. Ministry of Domestic Trade and Consumer Affairs- Chairperson
2. Ministry of Health
3. Ministry of Housing and Local Government
4. Ministry of Information
5. Department for the Development of Islam
6. Federation of Malaysian Consumers Associations

The Secretariat of the Advertisements Committee should come from either the Enforcement Division or the Consumer Affairs Division of the Ministry of Domestic Trade and Consumer Affairs.

1.5 Safety of Goods and Services

Since consumer goods are of various types and include healthcare goods and food, which are under the jurisdiction of the Ministry of Health, Part III should be implemented by the Ministry of Domestic Trade and Consumer Affairs and the Ministry of Health together with the Ministry of Agricultural Based Industry, which is responsible for agricultural produce. Every Ministry shall be vested with the power to prescribe safety standards for goods that are under their jurisdiction as implemented in The Consumer Act of The Philippines.

For the purpose of goods testing, the Government may give accreditation to various existing labs in Malaysia and require manufacturers or suppliers to do goods testing on those which are likely to cause injury to any person or property or is unsafe for use. The cost shall be borne by the manufacturer or supplier.

1.6 State and District Consumer Affairs Councils

The opportunity to review the provisions of the CPA with regard to the National Consumer Advisory Council, should be conducted to regularize the structure, financing and functioning of the state and district consumer affairs councils. The following councils should be part of a network which advises the Minister on consumer matters:

- National Level- National Consumer Advisory Council (NCAC)
- State Level- State Consumer Affairs Council (SCAC)
- District Level- District Consumer Affairs Council (DCAC)

The NCAC, SCAC and the DCAC can only be effective if they are able to identify and solve consumer issues and problems at the national, state and district levels respectively. This can be done by directing consumer problems and issues at the implementation level, to be discussed and determined by the NCAC for consideration by the Minister. At the same time, the Minister's decision can be reverted to the NCAC and then straight to the SCAC and the DCAC for implementation.

The SCAC and the DCAC have to perform their roles in translating policies and programs of the Ministry into projects for the benefit of consumers. In order to provide feedback to the Ministry on the performance of the projects, they have to carry out the activities of planning, implementation, supervision and evaluation of projects. In this way, reports prepared could be tabled at NCAC meetings, discussed and presented to the Minister.

In order for these councils to succeed in their roles, it is important that their structure, finance and management be strengthened. The ability to plan, implement, supervise and evaluate projects must be given priority. In addition, the leadership of these councils must be enhanced. It is clear that the previous structure of politicians as council leaders had been less effective. Therefore the establishment of Consumer Units at state level should be appoint a Secretariat to the council with the Director of the branch office as the chairman of the council.

Lastly, serious attention should be given by the management to financial allocations provided annually by the Ministry to these councils. Expenditure records and annual accounts should be

prepared with care to ascertain that allocation of money has been expended for the benefit of consumers.

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