

# LET THE SELLER BEWARE — RECENT DEVELOPMENTS IN AUSTRALIA

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## I. INTRODUCTION

The doctrine of *caveat emptor* ("let the buyer beware") is a maxim of respectable antiquity having a particular importance in contracts for the sale of goods. The twentieth century has however seen a marked erosion of the doctrine, not only in the area of sale of goods but in other areas as well, and this paper is an attempt to outline some of the modifications to the maxim that have been made by legislation in Australia in recent years. It is proposed to deal first of all with contracts for the sale of goods, as it is in this area that the erosion of the doctrine of *caveat emptor* has manifested itself most clearly, and then to pass on to consider the current situation in the wider sphere of consumer protection generally.

When Chalmers drafted his Sale of Goods Act in England in 1888 he attempted to codify as much as possible the common law as it stood in the nineteenth century. The common law, mirroring the concepts and philosophies of its time, embraced the notion of freedom of contract with its corollary of the minimum of legislative interference in the bargain negotiated between the parties. Accordingly, if the buyer did not insist on any warranty of quality from the seller at the time when a sale was made, he took the risk of any defect upon himself and had no remedy if he chose to rely on the bare representation of the seller—at least in the absence of fraud. The attitude of the law was that he had only himself to blame for he should either have obtained an express "guarantee" from the seller or satisfied himself as to the quality of the goods before agreeing to buy them. To this rule, however, there were exceptions.<sup>1</sup> For example, if an article was made or supplied to the order of the buyer, there was an implied warranty that it was reasonably fit for the purpose for which it was ordinarily used or for the special

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<sup>1</sup> See, e.g., *Bart v. Gibson*, 3 M. & W. 389, 150 E.R. 1196 (Ex. 1838). See generally, BENJAMIN'S SALE OF GOODS 351 (A. Guest ed. 1974); P. ATIYAH, THE SALE OF GOODS 70 (5th ed. 1975); CHALMERS' SALE OF GOODS 98 (16th ed., M. Mark ed. 1971).

purpose intended by the buyer where that special purpose had been communicated to the seller.<sup>2</sup>

Section 14 of the English Sale of Goods Act 1893<sup>3</sup> (faithfully copied in section 19 of the New South Wales Act<sup>4</sup> and in the corresponding legislation of other states) therefore correctly restated the common law when it said that there was no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as therein set out, the exceptions it proceeded to enumerate being those recognized by the common law. Further, section 55 of the English Act gave due recognition to the concept of freedom of contract by providing that any right, duty or liability arising by implication of law could be negated or varied by express agreement or by course of dealing between the parties. In other words, the seller could "contract out" of any warranty as to fitness implied in the Act.

Even before the passing of the Sale of Goods Act sellers had made use of their right to contract out of liability for the supply of defective goods, but with the statutory recognition of this right the practice became widespread, combined as it was with rapid changes in manufacturing and marketing techniques brought about by the development of mass production, the nation-wide distribution of these mass-produced goods through a complex system of wholesalers, distributors and local "agents" and the manipulation of consumer demand by intensive sales promotion campaigns and seductive advertising. The result was the proliferation of elaborate and carefully drawn exception clauses enshrined in standard form contracts aimed at giving the maximum protection to the seller. Attempts by the courts to restrict the efficacy of these clauses by the use of such devices as a strict construction of the terms employed and the development of doctrines such as that of fundamental breach were only partially successful.<sup>5</sup>

An illustration of the lengths to which traders were prepared to go is afforded by the case of *Hall v. Queensland Truck Centre Pty. Ltd.*,<sup>6</sup> where the purchase order form for a motor truck contained exempting provisions to the effect that the buyer acknowledged that he had had

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<sup>2</sup> See *Wallis v. Russell*, [1902] 2 I.R. 585, at 615 (C.A.). See also *BENJAMIN'S SALE OF GOODS*, *supra* note 1, at 352; *CHALMERS' SALE OF GOODS*, *supra* note 1, at 99.

<sup>3</sup> Sale of Goods Act 1893, 56 & 57 Vict., c. 71.

<sup>4</sup> Sale of Goods Act 1923 (N.S.W.), s. 57. Henceforth references in the text to the "Sale of Goods Act" will be to the New South Wales Act unless otherwise indicated.

<sup>5</sup> See, e.g., *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A.C. 394, [1911-13] All E.R. Rep. 989 (H.L.); *Andrews Bros. (Bournemouth) Ltd. v. Singer & Co.*, [1934] 1 K.B. 17, [1933] All E.R. Rep. 479 (C.A.); *L'Estrange v. Graucob Ltd.*, [1934] 2 K.B. 394, [1934] All E.R. Rep. 16 (Div'l Ct.); *Suisse Atlantique Société D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361, [1966] 2 All E.R. 61 (H.L.).

<sup>6</sup> [1970] Qd. Rep. 231. Cf. *Lowe v. Lombank*, [1960] 1 All E.R. 611, [1960] 1 W.L.R. 146 (C.A.), where promises by the hirer in a hire-purchase agreement that the goods were sound were held to be mere representations which could only raise an estoppel against the hirer if the other party had relied to his detriment thereon.

every opportunity to inspect the vehicle and had not relied on the skill or judgment of the seller and that, as the vehicle was second-hand, delivery under the contract would be made with all defects whether noticeable or otherwise. It also provided that the buyer agreed that he depended entirely on his own judgment and acknowledged that all implied conditions or warranties, statutory or otherwise, were expressly negated, and that the vehicle was not subject to any condition or warranty as to fitness or quality except as expressly provided by the contract. It further stipulated that the buyer's taking delivery of the vehicle should be conclusive evidence that the same was in satisfactory order and condition and fit for the purpose for which the buyer required it, and that despite any error or misdescription as to model, no claim or objection in respect of the vehicle should be admissible after such delivery.

The truck delivered to the buyer was, as the seller knew, a different model to that described in the order form and was completely unserviceable, and the Supreme Court of Queensland was able to circumvent the exemption clause on the ground of the seller's fraud. But, if there had been no fraud, it would appear from the decisions that the ability to evade the operation of the exemption clause would have hinged on the uncertain distinction between a difference in quality and a difference in kind. It is suggested that, as a matter of construction, an exemption clause would have no application where what was delivered by the seller was something different in kind to that which he had contracted to supply. An exemption clause cannot be used to evade responsibility for failure to carry out the main object of the contract.

The problem which faces a buyer when confronted with a sweeping exemption clause of this type is what kind of action he should take to protect himself. If he refuses to sign the agreement containing such provisions, he will be told that the seller is not prepared to do business with him. In other words, the attitude of the supplier is one of "take-it-or-leave-it". The buyer can of course attempt an examination of the goods in order to see if they are satisfactory, but immediately he is placed in a very difficult position. In the twentieth century age of technology many consumer goods are so complex and of such intricate design that an inspection would convey nothing about the quality of the article to the average purchaser. Even if the goods are not unduly complicated, the marketing practices of today, exemplified by the supermarket and the self-service store, have given rise to the packaging of goods in sealed containers which defy adequate or indeed any inspection.

It is no use the buyer saying that he will take the goods on the basis that if they are unsatisfactory he will return them. Unless he is protected by a "guarantee", his ability to return the goods and get a replacement or a refund of the price will depend on the whim of the

trader from whom he purchased the goods. Even if the buyer somehow circumvents the ubiquitous all-embracing exemption clause, he will find that under the Sale of Goods Act he cannot reject the goods for breach of an implied condition as to quality once title has passed to him in the case of specific goods (usually as soon as the contract is made), or once he has accepted the goods in other cases.<sup>7</sup> Retention of the goods for a short while to see if they are satisfactory may well be held to be an acceptance preventing rejection of the goods and limiting the buyer to a claim for damages.<sup>8</sup>

The law in relation to specific goods has been altered in England, South Australia and the Australian Capital Territory by legislation which makes it clear that the loss of the right to reject for breach of condition will arise only after acceptance of the goods, while it is further provided that there should be no acceptance of the goods until the buyer has had a reasonable opportunity to examine them.<sup>9</sup> But in other states, including New South Wales, the original position remains, although the New South Wales Law Reform Commission in its Working Paper on Sale of Goods published in 1975 has recommended a change in the law along the lines outlined above.<sup>10</sup>

But even if the buyer can call on a "guarantee" to protect him, this may be of little or no value to him. If it is the retailer who gives the express warranty, it will rarely be of any real worth to the buyer, being so worded as substantially to cut down the buyer's rights against the seller given to him under the Sale of Goods Act, while if the warranty is supplied by the manufacturer, as opposed to the retailer, there is the problem of privity of contract. Unless this difficulty can be overcome by finding a collateral contract to exist in the fact that the buyer, at the request of the manufacturer, has filled in and returned the requisite guarantee card, or by establishing that the buyer was aware of the guarantee before he bought and was influenced by it in his decision to make the purchase, there would appear to be no contractual relations between buyer and manufacturer. If privity of contract does exist, there is the further difficulty of ascertaining what the warranty means.

The guarantee may be couched in such technical language as to obscure the fact that no precise legal rights have been conferred on the

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<sup>7</sup> Sale of Goods Act 1923 (N.S.W.), ss. 16(3), 23 r. 1. Cf. Sale of Goods Act, R.S.O. 1970, c. 421, ss. 12, 18 r. 1.

<sup>8</sup> Sale of Goods Act 1893, 56 & 57 Vict., c. 71, s. 35; Sale of Goods Act, R.S.O. 1970, c. 421, s. 34.

<sup>9</sup> Misrepresentation Act 1967 (U.K.), c. 7, s. 4. Misrepresentation Act 1971-72 (S.A.), ss. 11, 12. Sale of Goods Ordinance Act 1975 (A.C.T.), s. 39. See also Consumer Transactions Act 1972 (S.A.), s. 15.

<sup>10</sup> NEW SOUTH WALES LAW REFORM COMMISSION, WORKING PAPER ON SALE OF GOODS (1975), paras. 3.14, 13.19, 13.39(e), 15.74. But see, s. 75A of the Trade Practices Act 1974 (Cwth.) which was inserted by the Trade Practices Amendment Act 1977 (Cwth.), discussed *infra*. The writer, as a full-time member of the Commission from 1973-1975, played a major part in the preparation of the Working Papers.

buyer. If any rights are given to the buyer they may be very much circumscribed and amount to little more than a promise to replace or repair within a certain period any parts which *in the manufacturer's opinion* are defective, and which have been delivered, carriage paid, to the premises of the manufacturer.<sup>11</sup> Alternatively, the guarantee may give only a vague undertaking to make good certain defects at the manufacturer's discretion, with the guarantor expressed to be the sole judge of whether or not a defect comes within the ambit of the guarantee.

It is true that, irrespective of the legal position, most manufacturers will stand behind the spirit of their warranties in order to maintain goodwill, but this may be a very uncertain foundation on which to rely. It is further true that any enforceable rights which a buyer may have against the manufacturer under the "guarantee" are additional to those which he may have against his seller under the Sale of Goods Act or otherwise, but the danger is that he is likely to regard the totality of his legal rights in relation to the sale as being encompassed by the terms of the guarantee and act accordingly. As will be seen, steps have been taken in recent years to try to minimize this danger by controlling the form and content of "guarantees".<sup>12</sup>

If recent legislation is left on one side, the paradoxical situation that exists today in relation to exemption clauses is that a buyer is in a better position, so far as obtaining a remedy for the supply of defective goods is concerned, if he obtains the goods on hire-purchase instead of by outright sale. This is because legislation controlling hire-purchase transactions is of fairly recent origin and reflects the necessity to protect the weaker party, the hirer, from the excesses of the all-powerful financier with his standard form clauses framed exclusively for his benefit. Accordingly, there are provisions to be found in the various Hire-Purchase Acts which prevent any contracting out of implied terms as to quality or fitness (except in the case of second-hand goods in special circumstances) and which enable the hirer to return the goods and terminate the hiring at any time, irrespective of his "acceptance" of the goods.<sup>13</sup>

It may be remarked in parentheses that the hire-purchase transaction may soon be a thing of the past in Australia. The concept has been done away with in South Australia, at least in respect of consumer

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<sup>11</sup> See, e.g., *Johnson v. Rolland Motors (Melfort) Ltd.*, 14 W.W.R. 159, [1955] 2 D.L.R. 418 (Sask. C.A.); *Adams v. Richardson & Starling Ltd.*, [1969] 2 All E.R. 1221, [1969] 1 W.L.R. 1645 (C.A.).

<sup>12</sup> See Part IV *infra*.

<sup>13</sup> See, e.g., Hire-Purchase Act 1960 (N.S.W.), ss. 5, 12, 36(i), now limited in its application to consumer transactions by virtue of the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.), s. 3. It is to be noted that the definition of "hire-purchase agreement" includes an instalment contract sale where property does not pass on or before delivery of the goods (s. 2(1)).

transactions, being replaced by the "consumer lease" and the "consumer mortgage". The Consumer Transactions Act 1972 provides that henceforth a hire-purchase agreement is deemed to be a sale of goods by instalments with the property in the goods passing to the consumer on delivery and with the rights of the supplier being secured by an equitable mortgage on terms prescribed by regulation.<sup>14</sup> Any provision in the agreement entitling the supplier to take possession and dispose of the goods is to be void,<sup>15</sup> while in the event of any inconsistency with the provisions of the Sale of Goods Act or any other law, the Consumer Transactions Act is to prevail.<sup>16</sup>

A consumer mortgage is defined as a charge over goods to secure the performance by the consumer of his obligations under a consumer credit contract, namely, an agreement including a sale of goods by instalments where the amount of credit advanced does not exceed \$10,000.<sup>17</sup> There are provisions somewhat similar to those to be found in the hire-purchase legislation regulating the right to repossession, the voluntary termination of the transaction, the exercise of the mortgagee's power of sale, etc.<sup>18</sup> There is power given to a Credit Tribunal established by the Act to relieve against the consequences of breach caused by circumstances not reasonably foreseeable by the consumer at the time he entered into the contract.<sup>19</sup> There is a significant departure from the *nemo dat quod non habet* rule in the provision that, where goods are subject to a consumer lease or mortgage and they are in the possession of the lessee or mortgagor so that he appears to be the owner thereof, a *bona fide* purchaser for value from the lessee or mortgagor without actual notice of any other interest acquires a good title in defeasance of the interest of the lessor or mortgagee in those goods.<sup>20</sup> However, a dealer in goods of that description cannot take advantage of this provision and the onus of proving that he comes within the terms of the section lies on the third party.<sup>21</sup>

The Consumer Transactions Act also embraces the concept of a consumer contract or an agreement made by a person, other than a body corporate or dealer in goods of the type supplied, to purchase or take any goods on hire or to contract for the performance of any services (as defined) where the consideration does not exceed \$10,000.<sup>22</sup> The concept appears to embrace a sale of goods for cash as well as one by instalments, from a private seller as well as from a dealer or merchant,

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<sup>14</sup> Consumer Transactions Act 1972 (S.A.), ss. 24(1), (3), (4).

<sup>15</sup> S. 24(2).

<sup>16</sup> S. 11.

<sup>17</sup> S. 24. [All references are to Australian dollars.]

<sup>18</sup> Ss. 20-23.

<sup>19</sup> Ss. 20-23.

<sup>20</sup> S. 36.

<sup>21</sup> S. 36.

<sup>22</sup> S. 24.

and to include the purchase or hiring of goods by a businessman for business purposes provided he is not a dealer in those goods and the amount paid does not exceed \$10,000.

In every consumer contract for the sale of goods there are to be implied conditions and warranties somewhat similar to those implied under the Sale of Goods Act with however various modifications.<sup>23</sup> These implied terms may not be excluded, limited or modified by agreement.<sup>24</sup> The Consumer Transactions Act provides for rescission of the contract by the consumer for breach of condition within a reasonable time (not exceeding seven days) after delivery of the goods to him,<sup>25</sup> and the existence of a consumer mortgage is no bar to such rescission. However, the Credit Tribunal may declare a rescission invalid on the ground that it is an inappropriate remedy in the light of the nature of the goods and the circumstances of the case.

This brief outline of some of the salient features of the South Australian legislation is relevant to the present inquiry since it is likely to form a basis for a uniform enactment on consumer credit which has been forecast for the forthcoming session of the Commonwealth Parliament. The South Australia statute was based on the recommendations of the Molomby Report made to the Victoria Parliament in 1972<sup>26</sup> and this report likewise forms the foundation for the draft bill in this area recently presented to the Standing Committee of State and Commonwealth Attorneys General. It remains to be seen whether this projected legislation will go as far as the South Australian statute has done in protecting the consumer purchaser.

The Consumer Transactions Act is also of importance in the present context as exemplifying the growing concern for the protection of the consumer which has arisen in Australia in the last decade. Any discussion of the doctrine of *caveat emptor* must take this phenomenon into account. It has been recognized that the Sale of Goods Act is completely out of touch with the business methods of the second half of the twentieth century, that it affords little protection for the buying public who perforce must purchase their requirements on the terms dictated by the retailer or manufacturer, in most cases without any accurate knowledge of the quality of the article they are buying, and that the average purchaser who finds it impossible to make an informed selection is driven to rely on the advice of traders and the accuracy of advertisements extolling the product he seeks.

One of the first manifestations of the new concern was the enactment of consumer protection statutes in the various jurisdictions in Australia, beginning with the Consumer Protection Act 1964 in Victoria.

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<sup>23</sup> S. 8.

<sup>24</sup> S. 10(1).

<sup>25</sup> S. 15.

<sup>26</sup> REPORT ON FAIR CONSUMER CREDIT LAWS 1972 (VICT.) ("THE MOLOMBY REPORT").

It is not proposed to make a detailed analysis in this paper of such legislation for the latter is not concerned with the creation of rights in the consumer but rather with assisting him in the unequal struggle with the superior marketing forces ranged against him.<sup>27</sup> Basically, the legislation provides for the establishment of such bodies as a consumer protection council and a consumer protection bureau to act as watch-dogs of the interests of the consumer. The main function of the council is to act in an advisory capacity in the policy-making field, while the role of the bureau is to investigate and act on complaints by consumers, to offer them guidance and advice, to protect their interests generally, and to assist the council in carrying out its functions.<sup>28</sup> Both the supply of goods and the supply of services are usually included within the ambit of the legislation, while a consumer is defined in terms of a person, other than a corporation, (a) who buys or hires goods otherwise than for resale or letting on hire or in the course of trade or business carried on by him, or (b) for whom services are rendered for reward otherwise than in the course of a business conducted by him. The emphasis is thus on a person who is in contractual relations with the supplier of the goods or services, and those members of the public who may be regarded as consumers in the broad sense of the word are excluded.

The New South Wales, Victoria and Queensland statutes go beyond the establishment of consumer protection agencies and enact provisions dealing with false trade descriptions, false or misleading advertisements, the prescription of minimum standards of safety in the design and construction of certain goods, and so on.<sup>29</sup> Thus, Part III of the Consumer Protection Act 1969 (N.S.W.) largely re-enacts earlier legislation<sup>30</sup> in making it an offence, firstly, to sell certain classes of goods without having a trade description attached, and secondly, to attach a false or misleading trade description to any goods at all.<sup>31</sup> Power is given to the court either to order a refund of the price to the purchaser of goods bought with a false trade description or, alternately, to order that he be supplied with goods of the correct type.

Secondly, Part III of the New South Wales Act seeks to curb the publication of false or misleading advertisements aimed at promoting the sale, disposal or letting on hire of any goods or intended to induce a person to make use of any services for reward by making such publication an offence. In so providing, the Act expands on earlier

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<sup>27</sup> See further, Sutton, *The Consumer Protection Act 1969 (N.S.W.) and Comparable Legislation in Other States and Overseas*, 4 ADELAIDE L. REV. 43 (1972).

<sup>28</sup> But there are departures from the basic pattern. Thus, in both South Australia and Western Australia, civil proceedings may be undertaken on the consumer's behalf.

<sup>29</sup> See Sutton, *supra* note 27.

<sup>30</sup> Factories, Shops and Industries Act 1962 (N.S.W.), Pt. VIII.

<sup>31</sup> Consumer Protection Act 1969 (N.S.W.), s. 23.



legislation dealing with false and misleading advertising.<sup>32</sup> This provision must be contrasted with the stipulations in the Auctioneers and Agents Amendment Act 1971-72 (N.S.W.) prohibiting publication by a land agent of any false or misleading statement,<sup>33</sup> and making it an offence for a stock and station agent to make a false or misleading statement even if innocently.<sup>34</sup>

Other legislation aimed at assisting the consumer in enforcing his rights against the trader includes the enactments setting up small claims tribunals in various jurisdictions in Australia.<sup>35</sup> The basic objective of such legislation is to provide a cheap and informal procedure for settling disputes between consumers and traders involving goods and services up to a prescribed maximum figure.<sup>36</sup> A tribunal is set up whose function is to attempt to achieve a settlement of the dispute by agreement between the parties or, if such is impossible, to resolve the issue fairly and equitably. Proceedings are held in private, no record of evidence given is made, legal representation is allowed only in exceptional circumstances, and rules of evidence may be disregarded. There is no right of appeal from the tribunal's decision, nor can the issue be determined by any other court or tribunal, for the reference of the dispute to the tribunal operates as a bar to proceedings elsewhere. A decision of the tribunal ordering the payment of money is enforced by filing it free of charge in a magistrate's court whereupon it takes effect as a judgment of that court. The tribunal may also make a "work order" requiring the rectification of defects in goods or services and, on failure to comply, may order the payment of money instead. Any agreement purporting to annul, vary or exclude the provisions of the Act is of no effect.

There has been other legislation in the consumer protection field in the last few years. Enactments such as the Trade Practices Act 1974 (Cwth.), the Motor Dealers Act 1974 (N.S.W.), the Manufacturers Warranties Act 1974 (S.A.), the Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.) and the Commercial Transactions (Miscel-

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<sup>32</sup> Factories, Shops and Industries Act 1962 (N.S.W.). S. 133 was first enacted in 1935.

<sup>33</sup> Auctioneers and Agents Amendment Act 1971-72 (N.S.W.), s. 84(a).

<sup>34</sup> S. 50(1). *Cf.* s. 48 which covers misrepresentation by an auctioneer as to the value or quality of goods.

<sup>35</sup> *See, e.g.*, Consumer Claims Tribunals Act 1974 (N.S.W.); Small Claims Tribunals Act 1973 (Qd.); Small Claims Tribunals Act 1973 (Vict.).

<sup>36</sup> Under the New South Wales statute the amount prescribed in 1974 was \$500 (s. 26(1)(a)), but it is now apparently \$1,000. The amending Act of 1976 has widened the definition of "consumer" to include bodies corporate constituted under the Strata Titles Act 1973, while the definition of "services" has also been widened to encompass insurance contracts, professional services and the supply of gas or electricity. The claim must be made by the consumer and must be for the payment of money or the performance of work, or relief from an obligation to pay money, and must arise out of a contract made with a trader. Nevertheless, the lessee of a dwelling may invoke the Act in respect of a claim by him for repayment of a rental bond. *See* ss. 4(1), (1c), 4A.

laneous Provisions) Act 1974 (N.S.W.) have all played their part in eroding the common law doctrine of *caveat emptor*. As will be seen, the exigencies of the occasion have resulted in the abrogation in specific instances of the doctrine of privity of contract, while another basic concept which has become a victim of the burgeoning interest in consumer protection is the notion that, once a contract has been signed, the parties are bound irrespective of any subsequent change of heart—unless of course they mutually agree to cancel or vary their agreement. The notion of sanctity of contract has been eclipsed by the provision typically to be found in door-to-door sales legislation that the purchaser has an absolute right to cancel his contract within the statutory period there set out without assigning any reason for his action. If he does elect to cancel, the agreement is deemed to have been rescinded by mutual consent as though it never had effect and full restitution is to be made.<sup>37</sup>

Attempts have been made to establish the general principle of unconscionability of contract. In 1976, a draft ordinance was promulgated in the Australian Capital Territory which sought to reform the law relating to harsh and unconscionable agreements.<sup>38</sup> That draft has not yet been gazetted as an Ordinance, but it empowered a court, in any case where it found a contract or a provision thereof to be harsh or unconscionable, to refuse to enforce the contract or the objectionable provision, or to declare the contract void in whole or in part, or to vary any term of the contract so as to avoid a harsh or unconscionable result. Some of the matters that the court was enjoined to consider in deciding whether a provision was harsh or unconscionable were the degree of inequality in bargaining power between the parties to the contract, the economic circumstances of the parties, the physical and educational situation of the party seeking relief, and the commercial setting, purpose and effect of the contract.

This draft ordinance goes much further than the provisions of section 88F of the Industrial Arbitration Act 1940 (N.S.W.) under which the New South Wales Industrial Commission may declare a contract void in whole or in part on the ground that it is unfair, harsh or unconscionable, or is against the public interest. To come within that section the contract must have an "industrial colour or flavour" and must be one by means of or by the agency of which a person performs work in any industry.<sup>39</sup> It also goes further than section 32 of the Hire-Purchase Act 1960 (N.S.W.), empowering a court to reopen a

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<sup>37</sup> See, e.g., Door-to-Door Sales Act 1967 (N.S.W.), s. 4(2); Hire-Purchase Act 1960 (N.S.W.), s. 12.

<sup>38</sup> Law Reform (Harsh and Unconscionable Contracts) Ordinance 1976 (A.C.T.).

<sup>39</sup> *Becker v. Harry M. Miller Attractions Pty. Ltd.* (No. 2), [1972] A.R. 298 (N.S.W.); *Ex parte Richardson*, [1972] 2 N.S.W.L.R. 423 (C.A.).

transaction which is harsh and unconscionable and to take an account between the parties thereto.

In a report on harsh and unconscionable contracts commissioned by the Attorney General of New South Wales in September 1970<sup>40</sup> recommendations were made for the passing of legislation applicable to contracts generally to enable a court to refuse to enforce a contract on the ground that it was harsh, oppressive, or unconscionable or unjust in the circumstances at the time it was made. In determining whether a contract came within the categories listed, the court was to have regard to the public interest and to all the circumstances of the case including the reasonably foreseeable consequences of the contract, and criteria somewhat similar to those prescribed in the Australian Capital Territory draft ordinance were to be applied to assist the court in deciding whether a contract was harsh, oppressive, unconscionable or unjust.

The Trade Practices Act Review Committee ("The Swanson Committee"),<sup>41</sup> which was established by the Commonwealth Government in April 1976 to consider the operation and effect of the Trade Practices Act 1974, recommended in its report in August 1976 the prohibition, as a civil matter only, of unconscionable conduct or practices in trade or commerce, so as to give the Act a greater ability to deal with the problem of the general disparity of bargaining power between sellers and buyers. The Committee deliberately referred to "unconscionable conduct or practices" in contrast to the common legislative formulation of "harsh or unconscionable contracts", partly to give the reference a wider connotation and partly to avoid the uncertainty surrounding the concept of "harsh". The same uncertainty could no doubt be said to surround the concept of "unconscionable conduct", but the Committee sought to avoid this difficulty by proposing that fairly detailed legislative guidance should be given on that point, and it referred to such factors as the commercial nature and setting of the practice, the complexity of any transaction and the relative ability of the parties to understand the transaction and protect their interests. It referred also to the draft Australian Capital Territory ordinance on the matter and the guide list set out therein.<sup>42</sup>

Two comments can be made on these proposals. In the first place the recommendations are open to the criticism that they are far too vague and general and amount to an overthrow of the whole conceptual basis of the law of contract. The counterargument to this is to point out that the concept of freedom of contract assumes that the parties are more or less in an equal bargaining position and are in a position to

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<sup>40</sup> REPORT ON HARSH AND UNCONSCIONABLE PRACTICES (N.S.W. 1976) (Professor J. Peder).

<sup>41</sup> REPORT OF THE TRADE PRACTICES REVIEW COMMITTEE 1976 [hereinafter cited as SWANSON COMMITTEE REPORT].

<sup>42</sup> *Id.* at 66-67.

negotiate at arm's length. If they are not, a balance has to be struck between the notion of sanctity of contract (with the security of transactions which that principle affords) and the philosophy of protecting the weaker party at the cost of rendering contracts less secure.

The second comment is that this type of approach, whereby a court is given a wide discretion with respect to the enforceability of a contract, inevitably places tremendous pressure on the judges who have to decide what to do in a particular case. But, however unfortunate a consequence this is, it is suggested that it is preferable to the present situation where the juggernauts of big business impose one-sided standard form contracts on unwilling customers and in effect dictate the terms on which business is done.

The prevailing climate of opinion appears to be one of interference with the notion of sanctity of contract, with the trend today inexorably in the direction of allowing a party to escape from a contract which is oppressive to him in the circumstances. As far back as 1962, the American Uniform Commercial Code provided in relation to contracts for the sale of goods that, if the court as a matter of law found a contract or any clause in it to have been unconscionable at the time it was made, the court might refuse to enforce it or might so limit the application of the clause as to avoid an unconscionable result.<sup>43</sup>

The principle applied in such cases as *Schroeder Music Publishing Co. Ltd. v. Macaulay*,<sup>44</sup> *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.*<sup>45</sup> and *Lloyds Bank Ltd. v. Bundy*<sup>46</sup> appears to go part of the way in the same direction. The first two cases involved covenants in restraint of trade where a songwriter engaged to give his exclusive services to another for a period under conditions which were so oppressive that the agreement was held to be void as an unreasonable restraint of trade. In *Schroeder's* case, Lord Diplock described the public policy behind the court's refusal to enforce such agreements as "the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable".<sup>47</sup> In *Bundy's* case, where a bank

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<sup>43</sup> UNIFORM COMMERCIAL CODE 1962, s. 2-302. Decisions in which this provision is discussed indicate that an important factor is the relative bargaining position of the parties. See, e.g., *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (S.C. 1971). Cf. Sutton, *The Uniform Commercial Code and the Law of Contract*, 5 SYD. L. REV. 398, at 416-19 (1967).

<sup>44</sup> [1974] 3 All E.R. 616, [1974] 1 W.L.R. 1308 (H.L.).

<sup>45</sup> [1975] 1 All E.R. 237, [1975] 1 W.L.R. 61 (C.A.).

<sup>46</sup> [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.).

<sup>47</sup> *Supra* note 44, at 623, [1974] 1 W.L.R. at 1315. His Lordship said that the self-same policy existed in the law governing penalty clauses and relief against forfeiture as well as contracts in restraint of trade. In relation to covenants in restraint of trade, it is to be noted that the Trade Practices Act 1974 (Cwth.), ss. 45(1) and (2), prohibit corporations from entering into contracts, arrangements or understandings which are in restraint of trade. This general prohibition is, however, qualified by ss. 45(3) and (4) which require in effect, that any restraint within the section should have a significant impact on

had taken advantage of its fiduciary relationship with an old customer to exercise undue influence in obtaining a guarantee of a doubtful overdraft, the transaction was set aside. Lord Denning M.R. found a common principle to run through various categories of cases, namely, that of inequality of bargaining power. He said that relief was given to one who, without independent advice, entered into a contract upon terms which were very unfair, or transferred property for a consideration which was grossly inadequate, when his bargaining power was grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.<sup>48</sup>

As the law stands at present, it is clear that, where there is no inequality of bargaining power, the courts will not grant relief to a party merely because a contract operates harshly or oppressively against him.<sup>49</sup> It is clear also that the general principle that relief should be granted where inequality of bargaining is shown to exist is by no means as firmly established as Lord Denning would have us believe. Nevertheless, the decisions outlined above are "signposts on the road", and if such a principle is firmly established it will provide a useful means of attacking transactions made by the consumer through standard form contracts dictated by a party in a vastly superior bargaining position.<sup>50</sup>

Legislation has been enacted in Australia which has gone a considerable way in protecting the consumer in relation to the use of sweeping exemption clauses contained in standard form contracts,<sup>51</sup> but the matter has not as yet been taken further so as to allow the consumer to escape from a contract which is harsh or oppressive in other respects.

## II. RECENT LEGISLATION ON CONSUMER PROTECTION

The remainder of this paper will be devoted to a detailed consideration of recent Australian legislation in the consumer protection field and of suggested recommendations for the reform of the law in this area.

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competition. Under s. 51, there are further exceptions from the ambit of the section, including service agreements. It is suggested, therefore, that the common law doctrine of restraint of trade has a vital role still to play in this area. *Cf. Quadramain Pty. Ltd. v. Sevastopol Pty. Ltd.*, 50 A.L.J.R. 475, 8 A.L.R. 555 (H.C. 1976); *Hollywood Premier Sales Pty. Ltd. v. Faberge Australia Pty. Ltd.*, 11 A.L.R. 18 (N.S.W.S.C. 1976). Under s. 4M of the recently promulgated Trade Practices Amendment Act 1977 (Cwth.), the concurrent operation of the common law and the Act in this area is recognized, while in s. 4L the doctrine of severability is also recognized.

<sup>48</sup> *Supra* note 46, at 339, [1974] 3 All E.R. at 765. The other members of the Court of Appeal based their decision on a breach of fiduciary duty by the bank.

<sup>49</sup> *See, e.g., Bridge v. Campbell Discount Co.*, [1962] A.C. 600, at 614, [1962] 1 All E.R. 385, at 388 (H.L.); *South Australian Rys. Comm'n v. Egan*, 47 A.L.J.R. 140, at 141 (H.C. 1973); *Lloyds Bank Ltd. v. Bundy*, *supra* note 46, at 336, [1974] 3 All E.R. at 763.

<sup>50</sup> *See Clarke, Unequal Bargaining Power in the Law of Contract*, 49 AUST L.J. 229 (1975).

<sup>51</sup> *See* text accompanying notes 138 to 144 *infra*.

Specific matters on which legislation has recently been enacted by the Australian states in an endeavour to afford protection to consumers include the control of the marketing of prepacked goods and the use of "over-sized" containers, the prohibition of misleading statements on packaging, the use of "bogus" price reductions, and the like. Statutes have been passed dealing with door-to-door sales, pyramid and referral sales, mock auctions, "bait" advertising, and the practice of so-called "inertia selling". This legislation can differ significantly from jurisdiction to jurisdiction and no attempt will be made here to summarize the various provisions, but emphasis will be placed instead on recent Commonwealth enactments in this field and on state legislation which involves a marked departure from traditional concepts of the common law.

#### A. *The Trade Practices Act 1974*

The first enactment to be considered is the Trade Practices Act 1974 (Cwth.), ("Trade Practices Act"), Part V of which contains detailed provisions for the protection of the consumer. This Act has now been amended by the Trade Practices Amendment Act 1977 (Cwth.), ("Trade Practices Amendment Act"), which came into force on July 1, 1977. The approach that will be adopted in this paper is first to refer to the provisions of the Trade Practices Act, then to consider the recommendations of the Swanson Committee, contained in its report on the operation of the Act, and finally to see how far these recommendations have been incorporated in the Trade Practices Act or the Trade Practices Amendment Act.

##### 1. *Constitutional Limitations*

It is to be noted that the consumer protection provisions of the Trade Practices Act are limited to dealings between a corporation and a consumer so as to minimize the risk of the statute being held to be outside the legislative powers of the Commonwealth. Nevertheless, under sections 6(2) and (3) of the Act, its provisions extend to individuals who are engaged in interstate, overseas or territorial trade or dealings with the Commonwealth or who (in relation to Division 1 of Part V) use postal or broadcasting facilities. This appears to be an attempt to invoke the trade and commerce power and the postal and broadcasting power of the Commonwealth.<sup>52</sup>

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<sup>52</sup> See Evans, *The Constitutional Validity and Scope of the Trade Practices Act 1974*, 49 AUST L.J. 654 (1975); see also *Wells v. John R. Lewis (Int'l) Pty. Ltd.*, A.T.P.R. 4001-07 (1975), where it was held that the operation of Division 1 of Part V extended to conduct which was potentially injurious to overseas consumers. The Australian Industrial Court has on a number of occasions imposed penalties for breaches of the consumer protection provisions of the Act, thereby impliedly recognizing its validity. The application of ss. 6(2) and (3) of the Act and the extent to which they widened the operation of

Another way in which the operation of the Trade Practices Act may be extended is illustrated by the decision of the High Court of Australia in *Ex parte C.L.M. Holdings Pty. Ltd.*,<sup>53</sup> where section 5 of the Crimes Act 1914 (Cwth.) was applied to render a director of a corporation liable for a breach of Part V of the Act by the corporation. Section 5 of the Crimes Act provides that any person who by act or omission is in any way directly or indirectly knowingly concerned in or party to the commission of any offence against any law of the Commonwealth shall be deemed to have committed that offence. The High Court rejected as without substance the argument that if it was beyond the legislative power of the Commonwealth to render a natural person liable for a breach of Part V of the Trade Practices Act he could not be rendered liable under section 5 of the Crimes Act 1914. It was pointed out that there was no limitation in the language of the section which confined its operation to principal offences capable of being committed by the person who was knowingly concerned in their commission. It was clear that it was not necessary for the purpose of section 5 that the person deemed to have committed the offence should have been capable of having done so. Accordingly, if the Commonwealth had the legislative power to create a particular offence, then that head of power would authorize a provision to the same effect as section 5 of the Crimes Act in its application to a person knowingly concerned in the commission of the offence.

It is of course an essential prerequisite to the application of section 5 in the present context that a breach of Part V of the Trade Practices Act should be committed by a corporation. A corporation can only act through its agents; accordingly, natural persons actually performing the prohibited acts on behalf of the corporation, or authorizing or instructing that they be carried out, will come within the ambit of the Trade Practices Act. It will depend on the interpretation of the words, "directly or indirectly knowingly concerned in . . . the commission of any offence", how far the net will be cast: for example, whether a director of a company who votes against a proposal involving a contravention of Part V of the Trade Practices Act will be caught by section 5 of the Crimes Act 1914.<sup>54</sup> Presumably, by voting against the proposal he is not "concerned" in the commission of the offence.

## 2. Definition of "Consumer"

A consumer was defined widely under the Trade Practices Act, section 4(3) specifying that, unless a contrary intention appeared, a

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the Act was considered by the High Court of Australia in *Ex parte C.L.M. Holdings Pty. Ltd.*, A.T.P.R. 40-017, 13 A.L.R. 273 (H.C. 1977). In that case, the High Court proceeded on the footing that the provisions of Part V were valid, no argument to the contrary having been raised.

<sup>53</sup> *Supra* note 52.

<sup>54</sup> *Cf. Regina v. Hussain*, [1969] 2 Q.B. 567, [1969] 2 All E.R. 1117 (C.A.).

person who acquired goods was to be taken as a consumer if the goods were of a kind ordinarily acquired for private use or consumption, and the person did not acquire them or hold himself out as acquiring them for the purpose of resupply. A somewhat similar definition was given in respect of a consumer of services. In the latter case the acquisition must not be for the purpose of or in the course of a profession, business, trade or occupation, or for a public purpose. The onus of proving that a person alleged to be a consumer was not such rested on the person disputing the allegation.<sup>55</sup>

This definition was one which was apt to cause difficulties in its application. For instance, it was a moot point whether a four-wheel drive vehicle, a typewriter, a power-saw, or any item which has gained a degree of popularity with the general public although it may be commonly used for commercial purposes, was a good of a kind ordinarily acquired for private use or consumption.

The definition was, however, clearly apt to exclude articles such as filing cabinets, desks or office equipment that are bought by a commercial firm for its own use in its business, for it would be giving too wide a meaning to "private use" to hold that the purchase of such items was within the definition simply because the firm acquired them for personal use in its business.<sup>56</sup> If, however, the article was of a kind ordinarily acquired for private use, as for instance a motorcar, airconditioner or fan, the buyer would be a consumer even though the equipment was intended for use in the business. Thus, a person who bought a motorcar to use as a taxi would be a consumer under the Trade Practices Act. With this must be contrasted the position under the "consumer sales" provisions of the Sale of Goods Act inserted by section 7 of the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.). A consumer sale is there defined in terms of goods which are of a kind *commonly* bought for private use or consumption and which are sold to a person who does not buy or hold himself out as buying the goods in the *course of a business*. It would seem that under this definition a commercial firm which purchases a motorcar or airconditioner for use in the business buys the goods in the course of a business, *i.e.*, it is not a consumer sale.

Both tests require that the goods must be those commonly or ordinarily obtained for private use, but the Trade Practices Act superimposed on this the test of the intention of the purchaser not to resell or resupply the goods, whereas the Sale of Goods Act applies the test of purchase in the course of a business. However, in the case of the supply of services the test adopted by the Trade Practices Act was the same as that applied in the Sale of Goods Act.

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<sup>55</sup> Trade Practices Act 1974, s. 4(4). *See also* Sale of Goods Act (N.S.W.), s. 63, inserted by the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.), s. 7.

<sup>56</sup> Trade Practices Act 1974, s. 4(3).



The Swanson Committee in its report on the operation of the Trade Practices Act criticized the definition of "consumer" contained in that Act for its inherent uncertainties, especially in relation to the test of private use and its failure to recognize the inequalities that occur in commercial dealings. It felt that the definition should be broad enough to provide protection to a range of business transactions, particularly purchases by small businesses, where there existed the same inequalities in the expertise required to recognize and the bargaining power to negotiate a fair bargain as were to be found in the case of the "traditional" consumer and transactions involving "consumer" goods in the narrow sense. Hence it rejected proposals that the definition should be limited either to transactions where the goods or services were for personal, domestic or household use, or to transactions for non-commercial purposes. Likewise, the distinction between corporate and non-corporate purchasers was rejected on the grounds that it was illogical and promoted form over substance. It advocated that a consumer should be defined by reference to the price paid for the goods or services, an approach already adopted in other legislation,<sup>57</sup> and it suggested a figure of \$15,000 which could be amended from time to time by regulation. To this the Committee was prepared to add all acquisitions of goods or services of a kind ordinarily obtained for personal, domestic or household use or consumption irrespective of amount, but it supported the continued exclusion of goods obtained for the purpose of resupply and also the exclusion of goods acquired for the purpose of being used up in a commercial process of production, or as an input into the repair or processing of goods or of fixtures on land.<sup>58</sup>

The Committee, in other words, took the definition of "consumer" in the Trade Practices Act<sup>59</sup> with its problems of characterization and added thereto all transactions up to a figure of \$15,000, while deleting goods used in the repair or processing of goods, and so forth.

The Committee's proposal appears to have been adopted in section 4B of the Trade Practices Amendment Act. Under that provision a "consumer" means a person (which term includes a body corporate) who has acquired goods by way of purchase, exchange, lease, hire or hire-purchase, where:

- (a) the price paid or payable by him did not exceed \$15,000; or, if it did, the goods are of a kind ordinarily acquired for personal or domestic use; and in addition

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<sup>57</sup> See Hire-Purchase Act 1960 (N.S.W.), s. 1(6), as amended by Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.), s. 3, excluding from the operation of the Act, apart from s. 32 (the unconscionable provisions section), hire-purchase agreements in respect of goods priced over \$10,000 (other than industrial or farm equipment or motor vehicles) or under which the hirer was a company. See also, Consumer Transactions Act 1972 (S.A.), s. 5.

<sup>58</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 63-65, paras. 9.38-45.

<sup>59</sup> This assumes that the words "for private use or consumption" in s. 4(3)(1c) of the Trade Practices Act are equivalent with the phrase "for personal, domestic or household use or consumption".

- (b) the goods were not acquired for the purpose of re-supply, or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods, etc.

The section covers also the acquisition of services as a consumer, with the same qualifications as are contained in (a) above, *i.e.*, the price paid for the services must either not exceed \$15,000 or they must be of a kind ordinarily acquired for personal or domestic use. Thus, the restriction previously to be found in section 4(3)(b) of the Trade Practices Act, that services acquired for the purposes of or in the course of a business are outside the protection of the Act, has been removed—at least where the price does not exceed \$15,000.

The exclusion in section 4B of goods acquired “for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land” is not easy to interpret and might be construed as including the home handyman who does his own mechanical repairs to his motorcar or who buys timber, paint or cement to improve his dwelling, unless the words “in trade or commerce” qualify the last part of the exclusion. It is suggested that the words “using them up” are not apt to encompass the use of equipment in a manufacturing process where the only “using up” is in the form of notional wastage by depreciation, for the phrase surely has connotations of the consumption or exhaustion of the goods. Sections 4B(2)(b) and (c) of the Act meet the case where goods or services are acquired together with other property or services and a specified price is not allocated to the goods or first-mentioned services in the contract by providing that the price paid is to be taken as the market value of the goods or services at the time the contract was entered into. The presumption that a person is a consumer unless the contrary is established is continued by section 4B(3).

### 3. *Definition of Goods and Services*

Both goods and services were defined widely in section 4(1) of the Trade Practices Act, the former embracing ships, aircraft, animals including fish, minerals, trees and crops, whether on, under, or attached to land or not, and gas and electricity; the latter including the rights or benefits under contracts for the performance of work (but not work done under a contract of service), the provision of facilities for amusement, recreation and instruction, the conferring of privileges in return for a levy, contracts of insurance, contracts between banker and customer in relation to the business of banking, and contracts for the lending of money. It is to be noted that under the Trade Practices Amendment Act the definition of “services” has been expanded to embrace as a general category rights provided in trade or commerce, including rights in relation to real or personal property, while the categories of rights and

benefits listed above have been retained as illustrations, without however limiting the generality of the expanded definition.

#### 4. *Misleading Conduct*

Division 1 of Part V of the Trade Practices Act prohibits certain misleading and unfair practices, while Division 2 implies into a contract for the supply of goods or services by a corporation<sup>60</sup> to a consumer certain terms which are an extension of the conditions and warranties implied under the Sale of Goods Act. A wider range of contracts than is caught by the Sale of Goods Act comes within the ambit of the Trade Practices Act, for the supply of goods is defined to include supply or resupply by way of sale, exchange, lease, hire or hire-purchase.<sup>61</sup>

Division 1 is directed against deceptive conduct and other unfair practices by corporations which are not necessarily confined to dealings with consumers, for many of the prohibitions contained in that division are of general application. There is firstly a proscription in section 52 against a corporation's engaging in conduct<sup>62</sup> that is misleading or deceptive when concerned with trade or commerce—a term which has a wider connotation than the mere supply of goods or services, and this is followed by a number of provisions forbidding particular practices which are intended to supplement the blanket prohibition in section 52. The particular practices which are prohibited in the sections following section 52 include:

- (a) making certain kinds of false or misleading representations in connection with the supply or possible supply of goods or services;<sup>63</sup>
- (b) offering gifts or prizes, which it is not intended to provide, in connection with the supply or possible supply, or the promotion of supply or use of goods or services;<sup>64</sup>

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<sup>60</sup> But by virtue of ss. 5 and 6, the Act may in certain areas extend to activities by individuals as opposed to corporations: *see* note 52 *supra*.

<sup>61</sup> S. 4(1). *Cf.* Hire-Purchase Act 1960 (N.S.W.), s. 5. *See also* the definition of "acquire" in the Trade Practices Amendment Act 1977, ss. 4 and 4c.

<sup>62</sup> "Engaging in conduct" is defined in s. 4(1) to include the refusal to do or the refraining from doing any act. An expanded definition is contained in s. 4(1)(e) of the Trade Practices Amendment Act 1977.

<sup>63</sup> S. 53.

<sup>64</sup> S. 54. For examples of advertisements which in the view of the Trade Practices Commission would infringe the section, *see* Circular No. 10, Advertising Guidelines (1975), at 23-24, para. 12.1. A "free" gift must in fact be free without its costs being recouped by inflating the price of another item or in other ways. The Swanson Committee suggested that the section be amended to make it clear that it applied not only where the gift was not intended to be supplied as offered, but also where it was not intended to be supplied at all: *see* SWANSON COMMITTEE REPORT, *supra* note 41, at 70, para. 9.83. *See now* s. 54, as amended by the Trade Practices Amendment Act 1977.

- (c) engaging in conduct which is liable to mislead the public as to the nature, manufacturing process, the characteristics, suitability for the purpose, or the quantity of goods;<sup>65</sup>
- (d) "bait" advertising, *i.e.*, advertising for supply at a special price, goods or services which the corporation does not intend to offer for supply for a period and in quantities that are reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement;<sup>66</sup>
- (e) referral selling whereby a *consumer* is induced to acquire goods or services on the basis that he will receive a rebate or commission if, *after* the contract is made, he supplies the names of prospective customers or otherwise assists the corporation to supply other consumers, if receipt of the rebate or commission is contingent on an event occurring after the contract is made;<sup>67</sup>
- (f) accepting payment or other consideration for goods or services without intending to supply the goods or services ordered;<sup>68</sup>
- (g) making false or misleading statements as to the profitability, risk or other material aspect of a business activity represented to be able to be carried on at home;<sup>69</sup>
- (h) the use by a servant or agent of a corporation of physical force, undue harassment or coercion at a place of residence, in connec-

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<sup>65</sup> S. 55. The section applies to "any person" and its validity is based on the external affairs power of the Commonwealth. S. 2(2) provided that s. 55 would come into operation on the date to be proclaimed, being a date not earlier than the date when the Paris Convention for the Protection of Industrial Property (as revised at Stockholm in 1967) came into force in Australia. The section came into operation on September 27, 1975. As to "services", see the new s. 55A inserted by the Trade Practices Amendment Act 1977.

<sup>66</sup> S. 56, discussed in Trade Practices Commission Circular No. 10 (1975), at 25-27, paras. 13.1-13.8. The section applies only where a corporation has advertised goods or services for supply. There is no definition of what constitutes "advertising" in the Act. "Special price" is defined in s. 4(1) and may include such expressions as "greatly reduced", "limited offer", "below cost", "anniversary special" and similar descriptions. It might not always be easy to establish the corporation's intentions as to offering for supply, and the Swanson Committee recommended that, subject to certain safeguards, the section should be extended to cover the situation where the advertiser does not in fact supply the advertised goods in reasonable quantities, irrespective of his intention. See SWANSON COMMITTEE REPORT, *supra* note 41, at 70, paras. 9.84-85. Cf. ss. 56(2) and (3) added to the Trade Practices Act 1974 by the Trade Practices Amendment Act 1977, whereby goods and services advertised at a special price must be offered for a period and in quantities that are reasonable having regard to the nature of the market and advertisement. Certain defences are available under s. 56(3).

<sup>67</sup> S. 57. Note the limitation to a consumer transaction.

<sup>68</sup> S. 58. This section is aimed particularly at payments made in response to mail-order advertisements, but it might not be easy to establish an intention at the time of acceptance not to supply the goods or services. The Swanson Committee refused to recommend an extension of the section to cover mere failure to supply, irrespective of intention, as it had done in respect of s. 56 ("bait" advertising), stating that to do so would be going too far. The element of intention was the essential point of the section. See SWANSON COMMITTEE REPORT, *supra* note 41, at 71, paras. 9.88-90. Is not intention, however, also the essence of s. 56?

<sup>69</sup> S. 59. Under the Trade Practices Amendment Act 1977, the statement must be false or misleading in a material particular.

tion with the supply of goods or services to a *consumer* or the payment therefor by a consumer;<sup>70</sup>

- (i) pyramid selling, *i.e.*, a trading scheme based on an ever-expanding recruitment of further participants into the scheme, with the final result that there are far more participants than can be justified by the market for the commodity sold and the whole scheme collapses with consequent financial loss;<sup>71</sup>
- (j) supplying goods intended or likely to be used by a *consumer* in respect of which a consumer product safety standard or a product information standard has been prescribed, if those goods do not comply with that standard;<sup>72</sup>
- (k) "inertia" selling, *i.e.*, the supply of unsolicited goods and the assertion of a right to payment therefor or for the making of an entry in a directory, often by means of a pseudo-invoice.<sup>73</sup> But this provision does not apply in respect of unsolicited goods where the recipient ordinarily uses like goods in the course of his business or profession.<sup>74</sup> The prohibition does not apply where the corporation has reasonable cause to believe that there is a right to payment for unsolicited goods, or where it has reasonable cause to believe that the making in the directory of an entry is authorized in the manner set out in section 64(6). The

<sup>70</sup> S. 60. This section, which is limited to a consumer transaction, is aimed at high-pressure sales tactics and the use of dubious methods in obtaining the payment of debts due for goods or services supplied. *Cf.* the protection afforded the householder against the tactics of the door-to-door salesman under the various Door-to-Door Sales Acts.

<sup>71</sup> S. 61.

<sup>72</sup> Ss. 62, 63. These sections provide for regulations to be made prescribing standards and listing the requirements encompassed by those standards. Performance, contents, design or packing, and the form and content of markings and instructions reasonably necessary to prevent or reduce the risk of injury are some of the requirements listed. Accurate information as to quantity, quality, the nature and value of the goods are also mentioned. *See* Trade Practices (Buoyancy Aids Safety Standards) Regs. 1974-75. The Swanson Committee regarded ss. 62 and 63 as important legislative tools for consumer protection and recommended increased use of these sections, especially by adopting the standards already formulated by the Standards Ass'n. of Australia. It felt that all goods intended for and marked for export (and not merely those exempted under the discretionary power under the Trade Practices Act) should be exempt from these standards. The Committee also recommended that the Trade Practices Act should be amended to allow the sale of hazardous products to be prohibited. *See* SWANSON COMMITTEE REPORT, *supra* note 41, at 73-74, paras. 9.94-109. *See also* the amendments made to ss. 62 and 63 by the Trade Practices Amendment Act 1977.

<sup>73</sup> S. 64. "Unsolicited goods" are defined in s. 4(1) and "to assert a right to payment" is defined in s. 64(5). Sending an invoice will suffice, and this does not necessarily involve receipt by the customer. *See* Wells v. John R. Lewis (Int'l) Pty. Ltd., *supra* note 52, which cites Tank-Express A/S v. Compagnie Financière Belge des Pétroles S.A., [1949] A.C. 76, at 101, [1948] 2 All E.R. 939, at 962 (H.L.). The section applies to overseas consumers, and it is within the constitutional power of the Commonwealth to legislate that a natural person, by being knowingly concerned in the offence committed by the corporation, shall be deemed to have committed that offence.

<sup>74</sup> S. 64(2). *See also* s. 65(6) where the protection afforded by that section is declared to be inapplicable if the recipient ordinarily uses like goods in the course of his business or profession.

onus of proof that such reasonable cause exists lies on the corporation and is not met by establishing the fact that a subscription has been paid in respect of an entry for a previous year.<sup>75</sup> The liability of the recipient in respect of unsolicited goods is dealt with in section 65.

- (l) a prohibition against sending unsolicited credit cards.<sup>76</sup>

### 5. *General Prohibition Against Deceptive Conduct—Section 52*

Some comment on these various categories of unfair practices must be made. The potential impact of section 52 with its wide and general reference to conduct that is misleading or deceptive is very great indeed. It is a "catch-all" provision, apparently couched in such wide language so as to be able to encompass a whole variety of conduct and to meet new types of sharp practice as they appear. The remedies for contravention of the section include damages,<sup>77</sup> injunction,<sup>78</sup> and such orders as the court thinks fit to redress injury caused to persons,<sup>79</sup> but the criminal sanctions generally imposed for the contravention of any provision of Part V of the Trade Practices Act are excluded, apparently because it was thought unfair to impose them when the words of the section were couched in such wide and general terms.<sup>80</sup>

Section 52 is not limited to dealing in goods or services nor to transactions with consumers, although it is qualified by the requirement that the corporation must be acting "in trade or commerce". It could therefore apply to advertisements in connection with the sale of land, etc., although the word "conduct" obviously embraces a far greater range of activity than mere advertising. It would seem to cover not only all forms of advertisements, including press, television, radio and magazine advertising, catalogues, brochures, pamphlets, billboards and other signs, but also oral, written or pictorial representations made at any stage of a transaction. Practices such as "bogus" price reductions, misdescription of goods, failure to disclose additional charges, and ambiguous statements as to availability of financing would all seem to be caught by the section. Indeed, it is evident that the section overlaps the more specific types of unfair practices dealt with in the provisions

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<sup>75</sup> Wells v. John R. Lewis (Int'l) Pty. Ltd., *supra* note 52.

<sup>76</sup> S. 63A, added by the Trade Practices Act 1975. The definition of credit card in s. 63A(3) is, under the Trade Practices Amendment Act 1977, limited to obtaining cash or goods or services on credit. For a detailed examination of the provisions in Division 1 of Part V of the Trade Practices Act, see C. TAPERELL, R. VERMERSCH, D. HARLAND, *TRADE PRACTICES AND CONSUMER PROTECTION* (1974).

<sup>77</sup> S. 82.

<sup>78</sup> S. 80. See *Trade Practices Comm'n v. Glen Ion*, A.T.P.R. 40-008 (1975).

<sup>79</sup> S. 87.

<sup>80</sup> S. 79. See TAPERELL, VERMERSCH, HARLAND, *TRADE PRACTICES AND CONSUMER PROTECTION*, *supra* note 76, at 181, s. 1002.

that follow it, but subsection 2 makes it clear that the generality of the section is not to be limited by these succeeding provisions.<sup>81</sup>

Speaking of section 52, the Swanson Committee referred to a disagreement in the community about the effect of the section, many seeing it as the most significant provision in the whole of Part V of the Act, giving a flexibility to deal with changing marketing techniques, while others saw it as a broad, uncertain prohibition which unnecessarily interfered with business conduct at a great deal of cost to the business community. Uncertainty was said to arise from mere "puffery" and artistic devices which did not affect the content of the provision being caught by the section, and from the possibility of infringement where there was no more than a mere tendency to deceive, as measured by the lowest common denominator in the community.<sup>82</sup>

This uncertainty springs from the fact that there is no definition in the Trade Practices Act of what is meant by misleading or deceptive conduct. In a circular issued in 1975,<sup>83</sup> the Trade Practices Commission advised that, in considering whether or not an advertisement contravened section 52, it would have regard to the ordinary meaning of the words "misleading" or "deceptive" and would examine the advertisement as a whole, from the point of view of an average member of the class of persons at whom the advertisement was aimed, to determine whether it was likely to lead the persons to whom it was directed into error, or had a tendency to deceive such persons.

Some guidance as to the meaning of the words may be obtained from American decisions, for section 5 of the Federal Trade Commission Act 1914 declares as unlawful unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.<sup>84</sup> The American decisions establish that contravention of section 5 of the federal statute does not have to be wilful; that is, there does not have to be any intent to deceive or any knowledge that the representation is false and that it is enough for the practices to be deceptive if they have the capacity or tendency to deceive. Actual deception is not required—it is sufficient if there is a

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<sup>81</sup> The Trade Practices Commission in its Circular No. 18 (1976) on real estate advertising guidelines took a very wide view of what was encompassed by misleading or deceptive advertisements in relation to real estate. It suggested that the provisions of the Trade Practices Act following s. 52 were highly relevant in deciding whether a real estate advertiser had infringed s. 52. *See also* the Trade Practices Commission, Circular No. 19, Travel Advertising Guidelines (1976).

<sup>82</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 65-66, paras. 9.50-53.

<sup>83</sup> Circular No. 10, Advertising Guidelines (1975), at 5, para. 5.1, issued pursuant to s. 28 of the Trade Practices Act 1974.

<sup>84</sup> *See* Dietrich, *Federal Trade Commission and Consumer Protection*, 1 AUST BUS. L. REV. 204, at 216 (1973).

"fair probability" of deceiving an "ordinary" purchaser,<sup>85</sup> including in that expression "the ignorant, the unthinking and the credulous".<sup>86</sup>

In *Findlay v. Couldwell*,<sup>87</sup> the Supreme Court of British Columbia, in construing provisions of the provincial Trade Practices Act which prohibited a deceptive act or practice, including a representation or conduct having the capability, tendency or effect of deceiving or misleading a person, held that it was not necessary to establish a deliberate intention to deceive. Ruttan J. said that deception need only have the capability of deceiving or misleading, and it might be inadvertent yet still be sufficient to avoid the transaction under the Act, which concerned the welfare of the consumer, not the punishment of the seller. He adopted the view that an act having the tendency of deceiving or misleading a person was one which tended to lead that person into making an error of judgment.<sup>88</sup>

It seems clear that if a word or term is used which is ambiguous and one of its possible meanings is false, the expression is deceptive. The same will be true of qualifications or disclosures contained in advertisements or labels which are set out in small print or otherwise rendered inconspicuous. Again, half-truths will be tainted with the same fatal defect—what is not said may render the whole statement deceptive, as the Trade Practices Commission recognized in its circular on advertising already referred to.<sup>89</sup> Indeed it has been said that matters known to a

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<sup>85</sup> See, e.g., *Herzfeld v. Federal Trade Comm'n*, 140 F.2d 207 (2d Cir. 1944); *Charles of the Ritz Distribs. Corp. v. Federal Trade Comm'n*, 143 F.2d 676 (C.A. 1944).

<sup>86</sup> *Charles of the Ritz Distribs. Corp. v. Federal Trade Comm'n*, *supra* note 85, at 679; see also *C.R.W. Pty. Ltd. v. Sneddon*, [1972] A.R. 17, at 28 (N.S.W.S.C.): "The advertiser must be assumed to know that the readers will be both the shrewd and the ingenuous, the educated and uneducated and the experienced and inexperienced in commercial transactions. . . . An advertisement may be misleading even though it fails to deceive more wary readers". (This case was decided under s. 32 of the Consumer Protection Act 1969-70 (N.S.W.), dealing with false or misleading advertisements).

<sup>87</sup> [1976] 5 W.W.R. 340, 69 D.L.R. (3d) 320 (B.C.S.C.).

<sup>88</sup> *Id.* at 345-46, 69 D.L.R. (3d) at 325-26 which followed *Director of Trade Practices v. Household Fin. Corp. of Canada*, [1976] 3 W.W.R. 731, at 736-37 (B.C.S.C.). *Findlay's* case concerned an oral representation by a used car dealer that a vehicle was "a good little highway car" with a motor in "A-1 condition" which induced the purchaser to buy it. The contract of sale contained a widely drawn exemption clause. It was held that at common law the exemption clause was not, as a matter of construction, applicable to exclude liability for the fundamental breach of contract, the question of construction being determined from the contract as a whole, including oral representations inducing signature, as well as the terms of the written document. Ruttan J. took the view that pre-contractual representations were relevant in establishing the presumed intention of the parties as to the scope of the exemption clause and also took precedence over printed terms in accordance with *Mendelssohn v. Normand Ltd.*, [1970] 1 Q.B. 177, at 182, [1969] 2 All E.R. 1215, at 1218 (C.A.).

The second ground for the decision was that relevant provisions of the Trade Practices Act prohibiting deceptive acts or practices, including representations, entitled the purchaser to succeed in a claim for damages. This approach gives the court a new weapon with which to fight the all-embracing exemption clause, for a representation will have the same effect as a deceptive or misleading act even though the exemption clause may succeed in protecting the seller at common law.

<sup>89</sup> Circular No. 10 (1975), at 6, 8, paras. 5.6, 5.8. In para. 5.9, the Commission set out a number of examples of advertisements which it considered contravened s. 52.



vendor of land which a reasonable examination of the property would not reveal, and which would be relevant in a decision to purchase, should be disclosed.<sup>90</sup> This seems to go very far. The common law never regarded mere non-disclosure in itself as amounting to misrepresentation except in very exceptional circumstances.

The Swanson Committee declined to recommend the introduction into the Trade Practices Act of a general prohibition of "unfair conduct" on the ground that it could result in a considerable degree of uncertainty in commercial transactions,<sup>91</sup> but, as has been seen, it did see advantages in prohibiting, as a civil matter only, unconscionable conduct or practices in trade or commerce.<sup>92</sup> The Committee regarded section 52 of the Trade Practices Act as an attempt to prescribe a minimum level of probity and fairness to which it was in the public interest that commercial behaviour should conform. It rejected the suggestion that the concept of wilfulness should be imported into the section on the ground that its aim was to protect consumers, not to provide penal sanctions against those who sought to take advantage of consumers. Further, it considered that the section should apply to conduct which was likely to mislead or deceive, without proof being required that the conduct had in fact misled or deceived, but should not apply to conduct which had merely a tendency to mislead or deceive. The Committee accordingly recommended that section 52 should be amended to make it clear that it applied only to conduct that was, or was likely to be, misleading or deceptive.<sup>93</sup> This recommendation has been implemented by the Trade Practices Amendment Act which alters section 52(1) of the Trade Practices Act so as to prohibit conduct that is *or is likely to be* misleading or deceptive. The amendment appears to widen considerably the ambit of the section as it stands, although the Committee's aim was to remove any suggestion that a mere tendency to mislead or deceive was enough. Presumably, the likelihood of deception is decided by the objective test of the "ordinary" purchaser, including "the ignorant, the unthinking and the credulous".<sup>94</sup>

#### 6. *Particular Types of Unfair Practices—Sections 53 to 65*

So far as the more specific types of unfair practices are concerned, section 53 prohibits, in connection with (a) the supply, (b) the possible supply, or (c) the promotion by any means of the supply or use, of goods or services, the making of four categories of false representation and of three types of false or misleading statements.<sup>95</sup> Again, the

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<sup>90</sup> Trade Practices Commission, Circular No. 18, Real Estate Advertising Guidelines (1976), at 2, para. 2.3.

<sup>91</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 67, para. 9.58.

<sup>92</sup> *Id.*, para. 9.59.

<sup>93</sup> *Id.* at 66, paras. 9.52-55.

<sup>94</sup> S. 29.

<sup>95</sup> Trade Practices Act 1974, s. 53.

conduct prohibited is not limited to transactions with consumers. The four categories of false representation deal with representations (i) that goods or services are of a particular standard, quality, grade or model;<sup>96</sup> (ii) that goods are new;<sup>97</sup> (iii) that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;<sup>98</sup> (iv) that the corporation has a sponsorship, approval or affiliation it does not have.<sup>99</sup> The three types of false or misleading statements refer to (i) the existence or amount of price reductions; (ii) the necessity for any goods, services, replacements or repairs; (iii) the existence or effect of any warranty or guarantee.

As framed, section 53 is a fairly comprehensive provision. It is, however, difficult to see why a distinction is drawn between a false *representation* on the one hand and a false or misleading *statement* on the other, although the intention may be to encompass misleading statements which are made outside a contractual situation or outside negotiations leading to a contract, *i.e.*, to the general public as opposed to a particular person. In such a situation, an offence will be committed giving rise to penal provisions even though no one has in fact suffered loss. But this is true of the four categories of false representation, for the section proscribes representations in respect of the possible supply of goods or services or the promotion by any means of such supply or use, whether or not a contract eventuates. Indeed, in a case involving a false or misleading statement as to the effect of a warranty, it was said that, as the section created an offence in connection with the *possible* supply of goods, the question as to who were parties to the contract embodying the warranty was irrelevant. Hence, it was of no consequence that goods were ordered by one person and supplied to another, although it appeared from the circumstances of the case that at the time the former was acting as the latter's agent.<sup>100</sup>

The Swanson Committee did not accede to the suggestion that the number of concepts in section 53 should be reduced to the one formula

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<sup>96</sup> S. 53(a).

<sup>97</sup> S. 53(b). Difficulties can arise as to the interpretation of "new". The Trade Practices Commission has suggested three different meanings: (a) in the sense of novelty or invention; (b) recently produced or acquired; and (c) not used, second hand or re-built, all of which are encompassed by the prohibition: Circular No. 10, Advertising Guidelines (1975), at 14-16, paras. 7.1-7.9. As to what is meant to be a "new" motor vehicle, see *Regina v. Ford Motor Co.*, [1974] 3 All E.R. 489, [1974] 1 W.L.R. 1220 (C.A.).

<sup>98</sup> See *Given v. Optional Extras Pty. Ltd.*, 10 A.L.R. 627 (Ind. Ct. 1976).

<sup>99</sup> See *Sydney Bldg. Information Centre Ltd. v. Hornsby Bldg. Information Centre Pty. Ltd.*, 8 A.L.R. 230 (Ind. Ct. 1975).

<sup>100</sup> *Ballard v. Sperry Rand Australia Ltd.*, A.T.P.R. 40-0006, 6 A.L.R. 696 (Ind. Ct. 1975). The Trade Practices Commission has said that the Trade Practices Act, insofar as it was concerned with statements or representations in connection with the supply or possible supply of goods or services, operated independently of contractual relationships and that therefore contractual exemption clauses purporting to avoid liability for loss or damage due to a breach of the consumer protection provisions of the Act would not necessarily defeat a consumer seeking to recover damages. Circular No. 19, Travel Advertising Guidelines (1976), at 12, para. 12.3.

of "false or misleading representations". It took the view that "the present carefully chosen differentiated wording" was adopted as a technique to ensure that the section was not unnecessarily broad, and that to adopt the suggestion might lead to the extension of the application of the section to encompass conduct of a trivial nature. In its opinion, section 53 with its penal sanctions should be applicable only to conduct which had demonstrably led to abuses and involved a real potential for harm, leaving the general prohibition of undesirable practices to section 52 with its civil remedies.<sup>101</sup> The Committee's attitude is understandable if the section is to be widened by including misleading as well as false representations in the first four categories listed, but it would certainly not extend the application of the section if the reference to "false or misleading statements" in the last three categories of case was replaced by the words "false or misleading representations".

The Swanson Committee did however recommend widening the ambit of section 53 in certain respects. It proposed the extension of paragraph (a) to cover false representations as to history or previous use so as to include, for instance, the winding back of motor vehicle odometers;<sup>102</sup> the inclusion of "composition" in paragraph (a) so as to meet deceptive labelling; and an appropriate amendment to make it clear that the nature, characteristics and quantity of "services" as opposed to "goods" were included. So far as goods were concerned, the Committee pointed out that attempts to mislead the public as to the nature, manufacturing process, characteristics, suitability for the purpose and quantity of goods, were presently governed by section 55 which applied to transactions, including intrastate ones, by natural persons as well as by corporations, and that to the extent that section 55 did not meet conduct relating thereto, such matters were better left to the general approach of section 52.<sup>103</sup>

These recommendations are now incorporated in new sections 53(a) and 53(aa) inserted by section 25(a) of the Trade Practices Amendment Act, the new paragraph covering false representations that goods and services are of a particular standard, quality or grade, and adding, in respect of goods, references to composition, style and history. In addition, a new section 55A is added to the Trade Practices Act by the amending Act, prohibiting a corporation in trade or commerce from engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for the purpose or quantity of any services.

Other proposals by the Committee concerned the extension of paragraph (e) to include false or misleading statements as to a "special price" as defined in section 4(1) of the Trade Practices Act, and the

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<sup>101</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 67-68, paras. 9.64-67.

<sup>102</sup> Cf. *Regina v. Hammerstons Cars Ltd.*, [1976] 3 All E.R. 758, [1976] 1 W.L.R. 1243 (C.A.).

<sup>103</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 68-69, paras. 9.69-75.

clarification of paragraph (g) so as to remove any doubt that the paragraph covered misleading statements as to the exclusion of conditions and warranties implied under Division 2 of Part V of the Act, or under state legislation such as the Sale of Goods Act.<sup>104</sup>

These recommendations have been implemented by the Trade Practices Amendment Act, with paragraph (e) referring now to the making of a false or misleading statement with respect to the price of goods or services, and paragraph (g) covering the making of a false or misleading statement concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Paragraph (g) will thus prevent the use of such "guarantees" as, "This warranty is expressly in lieu of all other warranties expressed or implied at common law or by statute or otherwise howsoever". Further, if the effect of a guarantee is to lead consumers to forego rights arising on a breach of condition or warranty implied by the Trade Practices Act, the Sale of Goods Act or other legislation, it may be caught either by section 53(g) or by section 52 (as constituting misleading or deceptive conduct). It would seem that failure to include a reference to the existence of rights conferred by the Trade Practices Act or other legislation in an express warranty which purports to restrict or modify a manufacturer's liability in respect of his product may involve a contravention of the Act.<sup>105</sup>

The Trade Practices Amendment Act has also altered paragraph (f) of section 53 by deleting the words "replacements or repairs" so that the paragraph no longer covers specifically a false or misleading statement concerning the need for any replacements or repairs, as opposed to goods or services. Presumably this has been done on the ground that replacements or repairs come within the ambit of the term "goods or services".

Finally, the Committee proposed a major extension of Division 1 of Part V by recommending that it should extend to transactions for the sale, lease or licence of an interest in land. The Committee proposed that the full range of proscriptions contained in Division 1 of Part V should apply, as appropriate, to all sales, leases, tenancies or licences of an interest in land, particularly in the light of the widespread practice of promoting sales of land interstate. It felt that the mere extension of the present prohibitions in Division 1 to contracts relating to an interest in land would not cover adequately the main abuses which had arisen in this area, and that accordingly there should be a special provision to

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<sup>104</sup> *Id.* at 69, paras. 9.76-77.

<sup>105</sup> This assumes that a non-disclosure of rights amounts to a misleading statement. See Trade Practices Commission, Circular No. 6, Exclusion Clauses in Consumer Contracts (1975). Cf. Consumer Affairs Amendment Act 1974 (Qd.) which prescribes the minimum information which must be contained in any warranty issued by a person whose principal place of business is in Queensland and which stipulates that any warranty given must confer a benefit additional to that given by law.

prohibit false or misleading representations concerning the characteristics, location and future use of the land, or the services associated with the land.<sup>106</sup> Such an approach would clearly obviate the necessity to rely on the general provisions of section 52 with its lack of criminal sanctions which the Trade Practices Commission was forced to do when it promulgated its guidelines on real estate advertising.<sup>107</sup>

The Committee's recommendations are now to be found in a new section 53A inserted by section 31 of the Trade Practices Amendment Act which prohibits, in trade or commerce in connection with the sale or grant, or the possible sale or grant, or the promotion by any means of the sale or grant of an interest in land:

- (a) a representation that the corporation has a sponsorship, approval or affiliation it does not have;
- (b) a false or misleading statement concerning the nature of the interest in the land, the price payable, the location, characteristics, or use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities associated with the land;
- (c) the offering of gifts as prizes with the intention of not providing them or of not providing them as offered.

In addition, there is a prohibition against the use at a place of residence of physical force, undue harassment, or coercion in connection with the sale or possible sale, grant of or payment for an interest in land. "Interest in land" is defined widely to include a legal or equitable estate therein, a right of occupancy of the land or building thereon arising by virtue of the holding of shares in a company owning the land, or a right, power, or privilege over or in connection with the land. It would appear that leases and licences of an interest in land will now come both within the definition in section 53A(3) and also within the expanded definition of "services" in section 4(1) of the Trade Practices Act. It is suggested that the new section, taken in conjunction with section 52, is a wide-ranging provision which must inevitably have serious repercussions in the real estate field.

In the two years of its existence, section 53 has been invoked to meet such cases as the motorcar sold as an "ex-company executive car", when it was in fact an ex-rental vehicle; the calculating machine said to have a twelve-month warranty when in truth the period was only 90 days;<sup>108</sup> and the product (microwave ovens) wrongly claimed to have been tested and approved by the Standards Association of Aus-

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<sup>106</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 65, 69-70, paras. 9.47-49, 9.78-80. Misdescriptions as to physical dimensions and failure to disclose matters discoverable by formal search in the normal conveyancing process were, however, to be excluded from this provision.

<sup>107</sup> Circular No. 18 (1976).

<sup>108</sup> *Ballard v. Sperry Rand Australia Ltd.*, *supra* note 100.

tralia.<sup>109</sup> Other instances which might be regarded as infringing the section are advertised claims as to the nature and quality of fruit juices, their freshness and purity;<sup>110</sup> advertisements which represent that goods have unique or exclusive qualities they do not possess; advertisements which offer "immediate 24-hour repair service" when in fact the service is subject to lengthy delays; claims as to motor vehicle consumption of fuel; representations as to the foreign origin of goods; and advertisements of goods for sale at a "special price" below the recommended retail price often for a limited time, when the retail price is unrealistic in the sense that it is generally ignored in the trade, or the limited offer is spurious in that the usual price both before and after the limited period was at the same figure.<sup>111</sup>

As already indicated, if a particular case does not come within section 53, it may well be caught by either section 55 or section 52.

A major extension to the prohibition in section 59 against making false or misleading statements about home-operated businesses was proposed by the Swanson Committee. It suggested that the section should be extended to proscribe materially or prejudicially false or misleading statements concerning the profitability, risk or other material aspects of business opportunities which required the investment of money by an individual together with his performing work associated with that investment.<sup>112</sup> This suggestion has now been implemented by the Trade Practices Amendment Act which amends section 59 of the Trade Practices Act so that it refers to a statement that is false or misleading in a material particular, and adds a subsection forbidding a corporation to make such a statement touching the profitability or risk or other material aspect of a business activity, where it has in trade or commerce invited persons to engage in the business activity, requiring the investment of moneys and the performance of work associated with such investment.<sup>113</sup> As the subsection is drawn, it would appear to cover the conduct of a real estate company which advertises a corner grocery store for sale as a going concern and innocently misstates the possible takings that could be gained by an energetic proprietor-

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<sup>109</sup> *Hartnell v. Sharp Corp. of Australia Pty. Ltd.*, A.T.P.R. 40-003, 5 A.L.R. 493 (Ind. Ct. 1975).

<sup>110</sup> See Circular No. 16 (1976), issued by the Trade Practices Commission. Cf. the cereal advertised as "all bran".

<sup>111</sup> See the examples set out in the Trade Practices Commission's guidelines on advertising, Circular No. 10, at 13-14, para. 6.2. At 19-20, the Commission refers to such advertisements as "Was \$15. Now only \$10." where the normal selling price is in fact \$10, and "\$9.99 — Reduced" where the normal selling price is \$10, as contravening s. 53(e). Advertisements implying price reductions with such expressions as "closing down", "clearance" sale or "bankrupt stock", where in fact there are no reductions, will obviously contravene the section. Prices said to be "below cost" or "factory prices" may be misleading.

<sup>112</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 71, para. 9.91. The Committee appeared to have in mind part-time activities of a franchise nature under which a person was required to purchase tools or other equipment.

<sup>113</sup> Trade Practices Amendment Act 1977, s. 35.

purchaser of the business. The proprietor of a corner grocery is surely engaged in a business activity requiring the investment of money by him and the performance by him of work associated with that investment.<sup>114</sup>

As a result of recommendations made by the Swanson Committee,<sup>115</sup> section 39 of the Trade Practices Amendment Act has amended section 64 of the Trade Practices Act to include within its purview the assertion of a right to payment for unsolicited services, as that term is defined in section 4(a) of the Act. An exception is made in the case of a person who ordinarily uses like services in the course of his business or occupation.<sup>116</sup>

### III. IMPACT OF PART V

The provisions of Division 1 of Part V of the Trade Practices Act are far-reaching and their potential impact is very great. In particular, the wide terms of section 52, the detailed prohibitions contained in section 53, the powers to lay down product safety and information standards provided in sections 62 and 63, and the wide extensions contained in the new sections 53A and 59, together with the broadened definition of "consumer" set out in the Trade Practices Amendment Act must have a very strong influence on advertising methods and the conduct of business transactions generally. Indeed, so great is the potential impact of section 52 that, as has been seen, a contravention of the section is not treated by the Trade Practices Act as giving rise to criminal sanctions, while in the case of sections 62 and 63 a special defence is provided by section 85(4) to protect the middleman who acquires goods for resale which do not conform to the standards prescribed. He must however establish that he did not know of and could not reasonably have discovered the lack of conformity, or alternatively that he relied in good faith on a representation from his supplier that no standard had been prescribed.<sup>117</sup>

#### A. *Overlap Between Commonwealth and State Legislation*

The question of penalties for breach of the provisions of Part V and the defences available will be considered further below. At the moment attention must be drawn to the obvious fact that a considerable degree

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<sup>114</sup> The Trade Practices Commission, Circular No. 10 (1975), at 28-30, paras. 15.1-15.4, suggested that full disclosure of all material aspects of a home-operated business should be made to prevent an advertisement from being misleading. But *quaere* whether mere non-disclosure will, in itself and without more, be misleading.

<sup>115</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 74, paras. 9.110-113. The Committee considered that a contravention of s. 64 in relation to unsolicited services should not give rise to penal sanctions, but this qualification appears to have been omitted from the amending Act.

<sup>116</sup> Trade Practices Amendment Act 1977, s. 39.

<sup>117</sup> To date, however, very little has been done to establish the requisite standards. See SWANSON COMMITTEE REPORT, *supra* note 41, at 72, para. 9.96, and note 72 *supra*. The only regulations made to date have been in respect of buoyancy aids safety standards.

of overlap exists between the wide-ranging provisions of Division 1 (and indeed those of Division 2, as will be apparent), and corresponding legislation in the various Australian states, where laws have been passed to prohibit or control such practices as misleading advertising, "inertia" selling, mock auctions and pyramid sales. Section 75 of the Trade Practices Act attempts to meet this problem by stipulating that the provisions of Part V are not intended to be overriding but rather to be concurrent with any state legislation. This is subject to the qualification that where an act is both an offence under the Trade Practices Act and under state legislation a conviction under one statute is a bar to conviction under the other. Nevertheless, a conviction under state legislation does not prevent the application of other enforcement measures provided for in the Trade Practices Act.<sup>118</sup>

Thus, the Commonwealth and the state enactments will be regarded as cumulative if at all possible, although it seems clear that in the event of a direct conflict or inconsistency between the two, the Trade Practices Act must prevail in accordance with section 109 of the Constitution.<sup>119</sup> It is clear of course that state legislation must operate in areas into which the Trade Practices Act cannot reach, such as the intrastate activities of individuals which are not caught by the extended operation of sections 6(2) and 6(3) of the Trade Practices Act. There is an obvious need for uniformity as far as possible at both Commonwealth and state level in consumer protection legislation. The Swanson Committee, in recognizing this need, recommended as high a degree of uniformity as possible in relation to the prohibition of unfair practices against consumers (the Part V, Division 1 provisions of the Trade Practices Act), but considered that it was essential both in the interests of commercial certainty and effective consumer protection that the Commonwealth should legislate to cover the field with regard to implied conditions and warranties as to quality in consumer transactions (the Part V, Division 2 provisions of the Trade Practices Act). This was subject to one qualification, that where in relation to particular goods and services, for example, the sale of motor vehicles, state laws also gave appropriate rights to consumers, the latter should have the benefit of the most appropriate law in these specific areas.<sup>120</sup>

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<sup>118</sup> Trade Practices Act 1974, s. 75(3).

<sup>119</sup> As to when an inconsistency arises, see *Ex parte McLean*, 43 C.L.R. 472, at 483 (H.C. 1930); *Hume v. Palmer*, 38 C.L.R. 441 (H.C. 1926); *Ex parte Blacklock*, 48 A.L.J.R. 368 (H.C. 1974), discussed in Mason & Butler, *The Trade Practices Act 1974, and the Possible Inconsistency Therewith of Certain State Laws Dealing with Consumer Protection*, 49 AUST. L.J. 539 (1975). A possible conflict could arise between the Trade Practices Act and the Sale of Goods Act in those states (all but New South Wales and South Australia) which have no special legislation in relation to conditions and warranties to be implied in consumer transactions. Under the Sale of Goods Act, such conditions and warranties can be contracted out of, but this is prohibited under the Trade Practices Act.

<sup>120</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 59-61, paras. 9.11, 9.13, 9.20-25. The Committee realized that problems of constitutional law would arise and that it would be necessary to persuade the states to adopt legislation mirroring the Trade Practices Act in this area.



The possibility of a conflict between the Trade Practices Act and state legislation is a very real one in relation to the conditions and warranties implied in consumer transactions by virtue of Part V, Division 2 of the Trade Practices Act. These implied terms are superimposed on the special provisions as to "consumer sales" (as there defined) inserted in the Sale of Goods Act (N.S.W.) by section 7 of the Commercial Transactions (Miscellaneous Provisions) Act 1974; the special terms as to consumer transactions inserted by the Consumer Transactions Act 1972 (S.A.); and the familiar conditions and warranties implied in contracts for the sale of goods by the Sale of Goods Act. In addition, there is such specific state legislation as the Hire-Purchase Acts of the various jurisdictions, the different statutes aimed at correcting abuses in the sale of motor vehicles, and enactments such as the Manufacturers Warranties Act 1975 (S.A.). As noted above, the position is aggravated by the fact that under the Trade Practices Act and other consumer protection legislation there is no contracting out of the provisions of the Act<sup>121</sup> whereas such is possible and indeed the practice under the Sale of Goods Act.

#### B. Division 2—Implied Terms

Division 2 of Part V is concerned with the supply (including sale, exchange, hire or lease) of goods and services by a corporation to a consumer, and includes such trading activities of individuals as are within sections 6(2) and 6(3). The different approach of the Trade Practices Act and section 7 of the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.) to the concept of "consumer" or "consumer sale" has already been noted, but it is of interest to observe that the notion of "consumer sale" and its definition in the N.S.W. Act are taken almost word for word from section 4 of the Supply of Goods (Implied Terms) Act 1973 (U.K.) on which indeed the provisions of both Division 2 of the Trade Practices Act and the N.S.W. statute are based.<sup>122</sup>

##### 1. Right to Reject

The Trade Practices Act retains the wellknown dichotomy between conditions and warranties to be found in the Sale of Goods Act with the consequence that, subject to the rule preventing rejection of the goods once property has passed or they have been accepted, the buyer can

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<sup>121</sup> See, e.g., Trade Practices Act 1974, ss. 67, 68; Sale of Goods Act, s. 64(1); Consumer Transactions Act 1972 (S.A.), s. 10(1); Hire-Purchase Act 1960 (N.S.W.), ss. 5, 36(1)(i). Cf. Goods Act 1958 (Vict.), s. 61.

<sup>122</sup> Under the Supply of Goods (Implied Term) Act 1973 (U.K.), c. 13, there can be no contracting-out of the implied terms in the case of a consumer sale, but such is permissible in other cases unless shown not to be fair or reasonable — with the exception of the warranty as to title. See now Unfair Contract Terms Act 1977 (U.K.), c. 50.

rescind the contract for breach of condition, but must keep the goods and claim damages only for a breach of warranty. The Trades Practices Act makes no attempt to depart from the general law of remedies in this regard.

The Swanson Committee regarded as unsatisfactory the situation whereby goods could not be rejected for breach of condition once property had passed or the goods had been accepted, even though there was no opportunity for examination, and recommended that the Trade Practices Act should be amended to permit the termination of a contract for breach of condition, notwithstanding the passing of property or acceptance, until the consumer had had a reasonable opportunity to examine the goods.<sup>123</sup> This recommendation has now been implemented by the Trade Practices Amendment Act which brings the law in respect of sales of goods to which the Trade Practices Act applies into line with that of England, South Australia and the Australian Capital Territory. In fact it goes further, as it is not merely an amendment to the Sale of Goods Act, but it is also narrower as it applies only to a consumer transaction. The new section 75A provides that where a corporation supplies goods to a consumer in the course of a business and there is a breach of a condition implied under Division 2, the consumer may rescind the contract either by written notice specifying the breach or by returning the goods to the corporation giving particulars, orally or in writing, of the breach. The notice must be served or the goods returned within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods. Presumably where the goods involved are complex and sophisticated the consumer should call in an expert to advise him as soon as possible, otherwise he may lose the right to rescind the contract under this provision. Of course, if the equipment performs badly from the start there is no problem, and even if the right to rescind is lost, the damages for breach of condition treated as a warranty may approximate the price paid by the consumer. Rescission is ineffective if, in the case of written notice being given, after delivery but before the notice is served, the goods are disposed of by the consumer,<sup>124</sup> or are lost or destroyed, or in both this case and in the case of the return of the goods, if the consumer fails to take reasonable steps to prevent the goods from becoming unmerchantable or they are damaged by abnormal use. There is provision for the reversion of property in the goods and the recovery of any money paid by the consumer. The right of rescission is expressed to be in addition to any other remedy under any law.

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<sup>123</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 75, para. 9.118.

<sup>124</sup> If delivery is effected by shipping the goods f.o.b. Sydney for transmission to the buyer in Brisbane and the buyer resells the goods while they are in transit, he loses the right to rescind. But a consumer is most unlikely to want to dispose of the goods so quickly. See *Canterbury Seed Co. v. J. G. Ward Farmers' Ass'n*, 13 N.Z.L.R. 96, at 108-09 (C.A. 1895).

Under this provision it is clear that the incidence of risk is on the consumer between the time of delivery and the service of the notice to rescind, irrespective of whether or not property has passed to him. But if the goods can be returned, the risk of accidental damage while they are in the consumer's possession is on the supplier.

With this approach must be contrasted the recommendations made by the New South Wales Law Reform Commission in its Working Paper on Sale of Goods published in 1975. It proposed the abrogation of the distinction currently drawn between misrepresentation, collateral contract and warranty, the assimilation of the remedies for misrepresentation to those available for a breach of a term of the contract, and the abandonment of the dichotomy between condition and warranty. It took the view that any promise or affirmation of fact, the natural tendency of which was to induce the entry into the contract and which did have that effect, should be regarded as a warranty.<sup>125</sup> So far as remedies were concerned, the Commission recommended that the primary remedy for breach of warranty should lie in damages, with the buyer able to reject the goods and rescind the contract only where the breach was a material one, that is, only if in the light of the nature of the term broken and the consequences of the breach the performance of the contract was substantially different from that which had been stipulated for by the buyer.<sup>126</sup> This proposal would involve the abrogation of the present system of an *a priori* classification of terms in favour of a consideration of the nature of the term that was broken and the consequences that followed from it.

## 2. Implied Conditions and Warranties

The conditions and warranties implied in Division 2 of the Trade Practices Act have a substantial similarity with the wellknown conditions and warranties relating to title, quiet possession, correspondence with description and with sample, merchantable quality and fitness for the particular purpose implied in the Sale of Goods Act. Nevertheless, they depart in major respects from their progenitor, and in so doing follow substantially the provisions of the Supply of Goods (Implied Terms) Act 1973 (U.K.), a statute itself based on the recommendations of the English Law Commission.

Space will permit only the most significant departures from the Sale of Goods Act to be adverted to. Section 69 of the Trade Practices Act spells out in more detail the warranty as to title contained in the Sale of Goods Act and gives explicit recognition to the case where it is intended to transfer only a limited title to the buyer. It is to be noted that

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<sup>125</sup> N.S.W. LAW REFORM COMMISSION, WORKING PAPER, *supra* note 10, paras. 3.6, 3.21-22, 3.30, 3.44-49. This recommendation has reference of course to express statements made at or prior to entry into the contract, as opposed to an implied term.

<sup>126</sup> *Id.*, paras. 13.18, 13.40.

neither the Trade Practices Act nor the Sale of Goods Act makes any attempt to deal with the consequences of breach of the implied term as to title. The principle established in *Rowland v. Divall*<sup>127</sup> still holds sway; if the seller has no right to sell the goods, there is a total failure of consideration and the buyer can recover the purchase price without any set-off for depreciation despite the considerable use he may have made of the goods before having to return them.<sup>128</sup> This rule can clearly work an injustice and it is suggested that the time is ripe for the formulation of a comprehensive restitutionary principle where a breach of warranty of title is shown to exist.<sup>129</sup> In this regard, the New South Wales Law Reform Commission recommended that a seller who was in breach of warranty of title should be given a reasonable time within which to perfect his title before the buyer could rescind the contract. If the seller failed to do this, the buyer should obtain a refund of his purchase price but only on condition that he joined the true owner as a party to the action and offered to pay him reasonable compensation for his use and enjoyment of the goods.<sup>130</sup> It was further recommended that the warranty of title should "run with" the goods so as to enable a buyer to sue a remote seller for breach of such a warranty, subject to certain safeguards such as allowing the joinder of other interested parties and allowing the remote seller to rely on any ground of defence available to him against his immediate buyer.<sup>131</sup>

With this approach must be contrasted the scheme adopted in section 40(2) of the Motor Dealers Act 1974 (N.S.W.) whereby a compensation fund financed from motor dealers' licence fees is made available to meet any claims made by a person suffering loss by reason, *inter alia*, of the fact that a dealer has not passed an unencumbered title to a motor vehicle. The claimant must however have taken all reasonable steps to exercise the legal remedies open to him. It is suggested that this scheme is not one which could appropriately be applied over the whole range of sales of goods.

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<sup>127</sup> [1923] 2 K.B. 500, [1923] All E.R. Rep. 270 (C.A.).

<sup>128</sup> The new s. 75A enacted by the Trade Practices Amendment Act discussed above does not alter the position but only allows rescission for breach of condition within a reasonable time after an opportunity for inspection. See text between footnotes 122 & 126 *supra*.

<sup>129</sup> The English Law Commission in 1975 published WORKING PAPER 65, PECUNIARY RESTITUTION ON BREACH OF CONTRACT, Part IV of which deals with pecuniary restitution in respect of possession without title. The proposal made there is that the seller should be entitled to be paid the value of any benefit conferred on the buyer by delivering goods which he had no right to sell. This entitlement was to be conditional on the satisfaction of the true owner's claim against the buyer, and was in any event to be inapplicable where goods were sold which were known or believed to be stolen. A valuable benefit was to be regarded as conferred only where a suitable replacement for the goods delivered could reasonably be obtained by the buyer at less than the contract price.

<sup>130</sup> N.S.W. LAW REFORM COMMISSION, WORKING PAPER, *supra* note 10, paras. 12.23-24, 12.31.

<sup>131</sup> *Id.*, paras 12.33-34.

Section 70(2) of the Trade Practices Act, following section 2 of the Supply of Goods (Implied Terms) Act 1973 (U.K.), provides that a supply of goods is not prevented from being a supply by description by reason only that, being exposed for sale or hire, the goods are selected by the consumer. This provision was intended to remove any doubt that a buyer who selected an item from the display shelves of a self-service store was nevertheless still buying by description. Section 70(1) of the Trade Practices Act reiterates the implied condition of correspondence with the description contained in the Sale of Goods Act but excludes the supply of goods by way of sale by auction or by competitive tender—exceptions which are likewise to be found in the English Act—as being exclusions from the definition of “consumer sale” contained therein.<sup>132</sup> It is to be noted that these exclusions are also contained in sections 71, 72 and 74 of the Trade Practices Act and further, that these sections refer to the supply of goods by a corporation *in the course of business* rather than to such supply in *trade or commerce* as is usual in Division 1 of Part V.<sup>133</sup> The exclusion of sales by competitive tender has now been deleted by the Trade Practices Amendment Act.

The implied condition as to merchantable quality contained in section 71(1) of the Trade Practices Act follows the provisions of the English Act and the definition of merchantable quality contained in that Act is adopted in Section 66(2) of the Trade Practices Act. Under that definition, goods are of merchantable quality “if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.” The corresponding definition in relation to consumer sales contained in section 64 of the Sale of Goods Act (N.S.W.), added by section 7 of the Commercial Transactions (Miscellaneous Provisions) Act 1974, is of similar effect.<sup>134</sup>

The effect of this definition is to change the previous law. If the goods are capable of being commonly used for several purposes, it was sufficient under the common law if they were fit for any one of those purposes,<sup>135</sup> but it now appears that they must be fit for each and every

<sup>132</sup> Supply of Goods (Implied Terms) Act 1973 (U.K.), s. 4(7). *See now* the Unfair Contract Terms Act 1977 (U.K.), c. 50.

<sup>133</sup> *Cf.* Supply of Goods (Implied Terms) Act 1973 (U.K.), ss. 3, 4(7).

<sup>134</sup> *See also* s. 5(2A) of the Hire-Purchase Act 1960 (N.S.W.) added by s. 3(d)(ii) of the 1974 Act. Under s. 64(9) of the Sale of Goods Act, liability for breach of the implied condition in a consumer sale of second-hand goods, is subject to any contrary agreement limited to the cash price of the goods. *And see* s. 5(2F) of the Hire-Purchase Act 1960 (N.S.W.). There is no corresponding limitation under the Trade Practices Act 1974, which applies to all goods, new or second-hand. Nevertheless, the definition of merchantable quality allows the fact that goods are second-hand to be taken into account.

<sup>135</sup> *See* *Henry Kendall & Sons v. William Lillico & Sons Ltd.*, [1969] 2 A.C. 31, [1968] 2 All E.R. 444, [1968] 3 W.L.R. 110 (H.L.), which would have been decided the other way under the Trade Practices Act definition.

one of those common purposes before they will be held to be merchantable. The result is to emasculate the implied condition as to fitness for the particular purpose by restricting it in practice to a purpose outside the range of normal purposes to which the goods are commonly put. The definition appears also to adopt the somewhat different test of the reasonable expectations of the particular buyer at the time of the contract of sale in place of the expectations of a reasonable buyer on a notional resale of the goods.

The implied condition as to merchantability does not apply as regards defects specifically drawn to the consumer's attention before the contract was made or, where the consumer examines the goods before entering into the contract, as regards defects which the examination ought to have revealed.<sup>136</sup> Further, in considering whether there has been a breach of the condition, regard must be had to the description applied to the goods by the seller and the price paid.

Section 71(2) contains the implied condition as to fitness for the purpose of the Sale of Goods Act, modified however in the same manner as under the Supply of Goods (Implied Terms) Act 1973 (U.K.). Thus there is no implied condition where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely on the skill or judgment of the corporation or its agent. This provision raises a presumption of reliance when the buyer discloses the particular purpose for which the goods are being bought, and the onus is on the seller to rebut this presumption, thus reversing the position existing under the Sale of Goods Act where the buyer has to establish reliance. It is to be noted also, that the trade name proviso in the Sale of Goods Act provision has been deleted, an alteration which accords with existing practice and is long overdue.

Section 72 is concerned with correspondence of bulk with sample, while section 73 in effect exempts financiers (who are corporations) from liability for breach of the implied terms. Where a contract is entered into by a corporation for the lease, hire or hire-purchase of goods to a consumer, and the negotiations leading up to the contract are conducted by another corporation not related to the first, which second corporation supplies the goods to the first, then if the first corporation does not take physical possession of the goods before they are delivered to the consumer, it is not liable for breach of a condition implied by virtue of sections 70, 71 or 72. The consumer may however recover any loss or damage from the second corporation.

This provision must be contrasted with section 5 of the Hire-Purchase Act 1960 (N.S.W.) under which the financier would be liable for breach of the implied conditions as to quality, although he would be

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<sup>136</sup> Trades Practices Act 1974, s. 71(1). *See also* the Sale of Goods Act (N.S.W.), s. 66(4); Hire-Purchase Act 1960 (N.S.W.), s. 5(2)(c), added by ss. 3(d)(1) and 7(b) of the Commercial Transactions (Miscellaneous Provisions) Act 1974.

entitled to be indemnified by the dealer by whom the antecedent negotiations had been conducted, provided that the terms of section 6 had been met. The consumer is thus in a better position under the Hire-Purchase Act than he is under the Trade Practices Act, for he has a right of action against the financier under the Hire-Purchase Act which is likely to be of greater value to him than a right to claim against a dealer corporation that may have meagre financial resources with which to satisfy any judgment.

The Swanson Committee in discussing section 73 recommended that the section should be amended to make it clear that where the original supplier and the credit provider (or financier) were separate persons but were "linked", they should be jointly and severably liable for breach of an implied term of the contract. In its view the consumer should be able to proceed against the financier provided he had also proceeded against the supplier, and he should be able to recover any judgment against the financier to the extent that he had not recovered it from the supplier.<sup>137</sup> This recommendation does not appear to have been implemented specifically in the Trade Practices Amendment Act. Perhaps the position is already covered by the stipulation in section 73(b) that before the section is operative the antecedent negotiations must have been conducted by a corporation that is not related to the *owner*, that is, the original supplier and the credit provider must not be "linked" for section 73 to relieve the latter from liability. If this view is correct, a "linked" financier who "supplies" goods as defined in the Trade Practices Act is liable for breach of any implied term as to description, quality or fitness and there is no right of indemnity against the dealer.

The remaining section in Division 2 of Part V, section 74, sets out two warranties which are to be implied in every contract by a corporation in the course of a business for the supply of services to a consumer. These warranties (along with every other term implied in a contract with a consumer by virtue of Division 2) cannot be contracted out of. They are:

- (a) 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;<sup>138</sup> and
- (b) that where the consumer expressly or by implication makes known any particular purpose for which the services are required or the result that he desires the services to achieve, the services and any materials supplied in connection therewith will be reasonably fit for that purpose or are of such a nature and

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<sup>137</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 77-78, paras. 9.128-32. The Committee endorsed in this regard the recommendation of the Molomby Committee, *supra* note 26, in its report on consumer credit presented to the Victoria Parliament in 1972.

<sup>138</sup> Trade Practices Act 1974, s. 74(1).

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 to rely on the supplier's skill or judgment.<sup>139</sup>

The first warranty is somewhat similar to that which had previously been implied at common law in contracts for the supply of services,<sup>140</sup> but the second warranty appears to be an extension of the previous law, although it is obviously very close to and is modelled on section 9(2) of the Consumer Transactions Act 1972 (S.A.).

Section 74 of the Trade Practices Act has a restricted application since, although the term "services" is defined widely for the general purposes of the Act, it is defined narrowly for the purposes of section 74.

Subsection (3) lists the services caught by the provision as services by way of the construction, maintenance, repair, alteration, etc., of goods or fixtures on land; alteration of the physical state of land; and distribution or transportation of goods. Thus a contract for the *erection*<sup>141</sup> of a house comes within the section, but not a contract for the supply of professional services such as medical, dental or legal services, or for services to be supplied by a tour operator or travel agent.

The Swanson Committee considered whether the definition of "services" should be widened for the purposes of section 74, but made no recommendation in the light of the current investigation on the matter by the committee on consumer credit laws.<sup>142</sup>

However, under the Trade Practices Amendment Act, an alteration has been made to the definition of services which has the effect of limiting the operation of section 74 in the case of the distribution and transportation of goods. The reference to the distribution of goods has been deleted, and services by way of transportation of goods are restricted to transportation otherwise than for the purposes of a business, trade, profession or occupation carried on by the person for whom the goods are transported.

### C. *Impact of Part V—Division 2*

It is clear that the expanded definition of a "consumer" to include business transactions up to \$15,000 in value brought about by the Trade

<sup>139</sup> S. 74(2).

<sup>140</sup> See, e.g., *Stewart v. Reavell's Garage*, [1952] 2 Q.B. 545, at 549-51, [1952] 1 All E.R. 1191, at 1194-95; *Regina Glass Pty. Ltd. v. River's Locking Systems Pty. Ltd.*, 120 C.L.R. 516 (H.C. 1968); *Young & Marten Ltd. v. McManus Childs Ltd.*, [1969] 1 A.C. 454; [1968] 2 All E.R. 1169 (H.L.). Cf. *Helicopter Sales (Australia) Pty. Ltd. v. Rotor Work Pty. Ltd.*, 48 A.L.J.R. 390 (H.C. 1974).

<sup>141</sup> The purchase of a house already built is not within s. 74 as the contract is not for the construction, repairs or alteration of fixtures on land. Nor is it within the remaining provisions of Division 2 as they relate to the supply of goods. Structural alterations to a house, however, are within s. 74. See *Builders' Licensing Act 1971* (N.S.W.), ss. 30A, 47-48.

<sup>142</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 78, para. 9.133.



Practices Amendment Act will place an increased burden on suppliers who are faced with the implied conditions and warranties in Division 2, out of which they cannot contract. It is not hard to envisage business transactions under the prescribed amount where the loss to the consumer for breach of an implied condition as to merchantability or fitness for the purpose would be heavy and would not be too remote within the *Hadley v. Baxendale* test,<sup>143</sup> with the result that the supplier would be faced with a claim for very heavy damages.

For instance, the user of a computer-based data processing system might acquire an additional component at a price under the prescribed figure of \$15,000. If the component turned out to be defective and as a result of its malfunctioning the user suffered the loss of irreplaceable records, the supplier could be liable for enormous consequential damages.

The possibility of a supplier being faced with a heavy liability in such circumstances has led the Commonwealth Government to announce proposed amendments to the Trade Practices Act which would allow the parties to certain commercial transactions to limit their liability for breach of the implied undertakings as to quality or fitness. Where the goods or services supplied are of a type not ordinarily acquired for personal, domestic or household use, liability may be limited by the contract between the parties to (a) the replacement or repair of the goods supplied; (b) the rendering again of the services; or (c) the current market value of either. However, the limitation of liability must be fair and reasonable between the parties (the onus of proof that it is not being on the party so contending) and the criteria set out in the Supply of Goods (Implied Terms) Act 1973 (U.K.) would be used as a guide as to what was fair or reasonable.<sup>144</sup>

#### D. *Liability of the Crown*

It is to be noted that the Trade Practices Amendment Act has inserted a specific provision (section 2A) in the Act binding the Crown insofar as it carries on a business (which need not be one carried on for profit), either directly or by an authority of the Commonwealth (as defined). However, activities of the Crown may be exempted by regulation under section 172(2)(c) and it is in any event not liable to be prosecuted for an offence under the Act.

### IV. MANUFACTURERS WARRANTIES

The Swanson Committee had some proposals to make on the question of warranties by manufacturers. At common law a manufac-

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<sup>143</sup> 9 Exch. 341, 156 E.R. 145, [1843-60] All E.R. Rep. 461 (1854).

<sup>144</sup> Press Release, Canberra, Australia Capital Territory, November 2, 1977. Presumably the criteria as to what is reasonable contained in the Unfair Contract Terms Act 1977 (U.K.) will now be used. As far as the writer is aware, the proposed amendments were not enacted before the Commonwealth Parliament was prorogued later in November 1977.

turer is liable for the supply of defective goods only if he is in direct contractual relations with the purchaser or, in other words, where there is privity of contract, or where the person injured through the defective nature of the goods can establish negligence by the manufacturer, including breach of a duty of care owed to him.<sup>145</sup> Apart from situations encompassed by the principle in *Donoghue v. Stevenson*,<sup>146</sup> the law in England and Australia has shown no great enthusiasm for the concept of a general duty of care on the part of manufacturers owed to the public at large to ensure that their products are free of defects. Nor have the courts in these countries shown any enthusiasm towards developing a theory of liability on the part of manufacturers based on an offer to the general public contained in statements extolling their products and resulting in a contract on the principle of *Carlill v. Carbolic Smoke Ball Co.*<sup>147</sup> As mentioned earlier, the problem of the extravagantly worded or misleading advertisement is to a large extent now met by sections 52 or 53 of the Trade Practices Act, but, in the absence of express statements or representations by the manufacturer or in circumstances outside the purview of section 53, the difficulty remains of sheeting home to the person really responsible liability for the putting into circulation of defective goods. Of course the potential liability of a manufacturer under section 62 of the Trade Practices Act for failure to supply goods which do not conform to a prescribed safety standard is high—given that such standards will be established in the future.

There has been legislation in specific areas in recent years which has made inroads into the doctrine of privity of contract. Thus, section 45(2)(a) of the Builders Licensing Act 1971 (N.S.W.) stipulates that certain building contracts shall be deemed to contain a warranty as to efficient workmanship "in favour of every purchaser as if that purchaser were a party to the contract and the warranty were given to him in return for valuable consideration". Again, by virtue of sections 27(1)(a) and 27(4) of the Motor Dealers Act 1974 (N.S.W.), if a dealer sells a new car and defects occur within a certain period or within a given mileage, the dealer must make good the defect at his own expense and his obligation to do so is deemed to be a term of the contract of sale. This obligation "subsists for the benefit of the owner from time to time of the vehicle and, for this purpose, the owner from time to time shall be deemed to have entered into a contract of sale with the dealer in respect of the vehicle."<sup>148</sup>

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<sup>145</sup> BENJAMIN'S SALE OF GOODS, *supra* note 1, at 461.

<sup>146</sup> [1932] A.C. 562, [1932] All E. R. Rep. 1 (H.L.).

<sup>147</sup> [1893] 1 Q.B. 256, [1891-94] All E. R. Rep. 127 (C.A.).

<sup>148</sup> Under s. 27(1)(b) and (c) of the Motor Dealers Act 1974 (N.S.W.), the dealer has to make good defects occurring within a specified period or within a given mileage in respect of a second-hand motor vehicle not exempted under s. 28(5) and (6), but under s. 27(5) the dealer's obligation does not extend to subsequent purchasers of the vehicle.

An even wider erosion of the doctrine of privity extending to consumer sales generally is provided by section 64(5) of the Sale of Goods Act (N.S.W.) added by section 7(b) of the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.).<sup>149</sup> Under that provision, if goods (other than second-hand goods) appear to be unmerchantable at the time of delivery, the court may add the manufacturer as a party to the proceedings and may order him to remedy the defect or pay the consumer the cost of so doing. Consequential loss or damages for personal injury are thus not recoverable, and the consumer must bring proceedings against his seller before the court can add the manufacturer as a party. The Manufacturers Warranties Act 1974 (S.A.)<sup>150</sup> stipulates that where manufactured goods are sold by retail in South Australia or wherever sold by retail are delivered to a purchaser in that state, there is a statutory warranty by the manufacturer that the goods are of merchantable quality (defined in section 4(2) in very similar terms to those in the Trade Practices Act), and, if of a kind likely to require repair or maintenance, that spare parts will be available for a reasonable time after the date of manufacture.<sup>151</sup> There is no liability where the goods are rendered unmerchantable through an act or default of the consumer or some other person (other than the manufacturer, his servants or agent), or through a cause independent of human control, in either case occurring after the goods have left the manufacturer's control. Similarly, there is no liability on the warranty as to the availability of spare parts if their unavailability arose from circumstances that could not reasonably have been foreseen.<sup>152</sup>

The stipulation contained in section 4 is expressed in general terms with no apparent limitation in favour of consumer sales, but this limitation appears to be achieved by section 5(1) which gives a consumer in lawful possession of the goods the right to recover damages against the manufacturer for breach of the statutory warranty as if he were in contractual relations with the manufacturer. The latter cannot exclude or limit his liability except in the case of the warranty as to the availability of spare parts where he has taken reasonable steps to ensure that the retail purchaser is advised at the time of purchase that no warranty as to availability is given.<sup>153</sup>

A consumer is defined as any person (*including* a body corporate) who purchases the goods when offered for sale by retail, and includes any person who derives title to the goods through or under such

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<sup>149</sup> A similar provision, s. 5(2B), is added to the Hire-Purchase Act 1960 (N.S.W.) by s. 3(d)(ii) of the Commercial Transactions (Miscellaneous Provisions) Act 1974.

<sup>150</sup> See also the Law Reform (Manufacturers Warranties) Ordinance 1975 (A.C.T.) which was repealed on May 27, 1976, apparently because it represented novel legislation.

<sup>151</sup> Manufacturers Warranties Act 1974 (S.A.), s. 4(1). "To sell" includes to let on hire (s. 3(1)).

<sup>152</sup> S. 4(2).

<sup>153</sup> Ss. 6(1), (2).

person.<sup>154</sup> Thus, subsequent purchasers are included, but not, it would seem, the family of the original purchaser. The statutory warranties are limited to "manufactured goods" and these are defined so as to exclude goods normally offered for sale by retail at a genuine retail price exceeding \$10,000, thus in effect adopting the concept of a consumer sale defined in terms of a monetary limit.<sup>155</sup>

In these circumstances the ambit of the term "manufacturer" becomes important. The term is not defined in the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.) beyond a statement that it includes a person residing or carrying on business in Australia who received goods from a person outside Australia, *i.e.*, an importer.<sup>156</sup> However, there is an elaborate definition in the South Australian statute which follows largely the definition set out in the report on consumer warranties and guarantees issued by the Ontario Law Reform Commission in 1972.<sup>157</sup> It includes a person who manufactures or assembles goods, who holds himself out as doing so, who imports goods into Australia (unless the foreign manufacturer has a place of business there), and who causes his name or his brand to be attached to goods in a form that infers he is the manufacturer thereof.<sup>158</sup>

Section 5 of the South Australian Act also gives a consumer in lawful possession of manufactured goods the right to sue the manufacturer for breach of an express warranty as defined in the Act. An express warranty means any assertion or statement in relation to the quality, utility, capacity, performance or durability of manufactured goods (including a statement in an advertisement or sales brochure) by a manufacturer or his agent, the natural tendency of which is to induce a reasonable purchaser to buy the goods.<sup>159</sup> Again, there can be no exclusion of this liability or any waiver by the consumer of his rights, and any attempt by a manufacturer to exclude or limit his liability is an offence. There is a presumption that an advertisement containing an assertion which would constitute an express warranty if made by a manufacturer, is made by him, the onus being on the manufacturer to prove that he did not cause or permit the publication of the advertisement.<sup>160</sup> Where a person's name or brand is attached to goods in such

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<sup>154</sup> S. 3(1).

<sup>155</sup> S. 3(1).

<sup>156</sup> Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.), s. 64(6).

<sup>157</sup> See N.S.W. LAW REFORM COMMISSION, WORKING PAPER, *supra* note 10, at 105, para. 7.17. For the difficulties inherent in the concept of "manufacturer", *see*, at 65, para. 6.10.

<sup>158</sup> The Manufacturers Warranties Act 1974 (S.A.), s. 3(1). The definition does not include repairer of goods. *Quaere* whether a processor of goods is a manufacturer under the definition.

<sup>159</sup> Apparently it is not necessary to establish that the warranty did in fact induce the purchase.

<sup>160</sup> S. 8(1).

a way as to bring him within the definition of "manufacturer", a similar presumption arises that he has authorized the use of his name in this way.<sup>161</sup>

Finally, the Act gives a vendor of manufactured goods, who is liable to a consumer "for breach of any condition or warranty implied by law as to the quality of those goods (other than a condition or warranty implied by reason of conduct or representations of the vendor)", the right to be indemnified by the manufacturer provided that the consumer could, by virtue of a statutory warranty arising under the Act, have recovered damages against the manufacturer for any defect in the quality of the goods. In other words, the vendor is subrogated to the rights given the consumer against the manufacturer by the Act.<sup>162</sup>

The provisions of the South Australia statute bear a certain resemblance to the conclusions arrived at independently by the New South Wales Law Reform Commission in its Working Paper on the Sale of Goods. It was there proposed that a manufacturer or other remote seller should be liable as a warrantor for express statements made by him, despite lack of privity of contract or want of consideration moving from the plaintiff. A buyer should be able to sue directly more remote sellers than his immediate vendor for statements made, the natural tendency of which was to induce and which did induce him to purchase the goods.<sup>163</sup> Further, a manufacturer or other remote seller (who was a trader) should be liable to a subsequent buyer on an implied warranty as to merchantable quality in respect of the goods he put into circulation or helped to distribute, the concept being one of an implied warranty as to quality "running with" the goods. The buyer at his election could sue his immediate seller or a more remote seller and the latter, if not the original seller, should have a right of indemnity against that original seller.<sup>164</sup>

As already indicated, the Swanson Committee has also put forward proposals in relation to warranties by manufacturers suggesting that the Trade Practices Act be amended to render a manufacturer or importer liable to a consumer buyer, whether or not he purchased the goods from the manufacturer, or to persons deriving title to the goods through the buyer, for breach of any express warranty given by the manufacturer, or of implied warranties essentially of the same kind as those presently implied by the Trade Practices Act in contracts between a seller and a consumer buyer. The manufacturer should not however be liable for any breach due to an act or omission after the goods have left his

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<sup>161</sup> S. 8(3).

<sup>162</sup> S. 7.

<sup>163</sup> N.S.W. LAW REFORM COMMISSION, WORKING PAPER, *supra* note 10, paras. 6.21, 6.43-44, 6.47-48, 7.1, 15.8.

<sup>164</sup> *Id.*, paras. 6.39, 6.49-50, 7.2, 7.5, 7.8, 7.10, 7.12, 15.12. These proposals were not limited to consumer transactions.

control. The liability of the manufacturer should be concurrent with that of the actual seller, but the latter should be subrogated to the rights of the consumer against the manufacturer for breach of any implied warranty.<sup>165</sup>

These proposals go further than either the South Australia legislation or the recommendations of the New South Wales Law Reform Commission and are similar to the recently enacted provisions of the Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.) in including within the scope of consumer transactions implied warranties by the manufacturer or importer as to fitness for a particular purpose, compliance with description and with sample, as well as that of merchantable quality. The proposals have not been implemented by the Trade Practices Amendment Act, but a draft bill has recently been promulgated as a possible amendment to the Trade Practices Act which seeks to amend the law relating to manufacturers' warranties. At this stage it is no more than a draft bill which has been circulated to interested bodies, including industry and consumer organizations, for their consideration and comment, but the Commonwealth Government has indicated its intention to implement the bill after considering the representations received. The bill follows the recommendations of the Swanson Committee and seeks to make manufacturers and importers statutorily responsible for certain implied conditions and warranties in relation to their products. These include the wellknown implied conditions as to correspondence with the description, fitness for the purpose, merchantable quality and correspondence with sample to be found in the Sale of Goods Act. The basic pattern of the draft bill is to render a corporation liable, subject to certain safeguards, where it has supplied defective goods manufactured by it to a trader and those goods are in turn supplied (otherwise than through sale by auction) to a consumer. In addition, a corporation is liable if it acts unreasonably in failing to ensure that spare parts for or facilities for repairs of goods manufactured by it and supplied as above are reasonably available at the relevant time. This liability does not arise if the corporation takes reasonable action to ensure that the consumer is given notice when he acquires the goods that there is no undertaking as to availability of spare parts or repair facilities. Finally, the corporation is liable for failure to comply with an express warranty (as defined in the draft bill) given by it in respect of goods manufactured and supplied by it as above.

The manufacturer or importer is made concurrently liable with the actual seller of the goods and is liable to indemnify the latter where the actual seller incurs liability to a consumer for a breach of a condition or warranty implied by Division 2 of Part V of the Trade Practices Act in circumstances in which the consumer could have recovered damages

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<sup>165</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 67-77, paras. 9.120-27.

from the manufacturer or importer under the draft bill. There can be no "contracting out" of the provisions of the draft bill.

## V. ENFORCEMENT PROVISIONS

Three great advantages possessed by the Trade Practices Act over the Sale of Goods Act, at least so far as the consumer purchaser is concerned, are that the Trade Practices Act constitutes legislation on a nation-wide scale which is not inhibited by state boundaries, although this advantage is considerably diminished by the fact that the Sale of Goods Act is almost identical in each jurisdiction;<sup>166</sup> that it is not possible to "contract out" of the protective provisions of the Trade Practices Act as it is in the Sale of Goods Act; and that the breach of all except one of the provisions of Part V gives rise to an offence involving penalties, establishing a much more effective sanction than the possibility of being sued for damages for breach of warranty in a civil action under the Sale of Goods Act. Section 79 of the Trade Practices Act prescribed the penalties of a fine (or imprisonment where the offender is not a body corporate) for the contravention of a provision of Part V other than section 52,<sup>167</sup> but the penalty of imprisonment was frowned upon by the Swanson Committee and has been eliminated by the Trade Practices Amendment Act. The amending Act implements another recommendation of the Committee by adding subsections to section 79 limiting the monetary penalty where the offences were of substantially the same or similar nature and occurred at or about the same time.<sup>168</sup>

The amending Act has added a new interpretation section to Part VI defining a reference to "a person involved in a contravention of a provision of Part IV or V."<sup>169</sup> This clause is to be found in a number of provisions in Part VI, such as sections 80A, 82 and 87. Under section 82 (as amended by the 1977 Act) a person who suffers loss or damage by the conduct of another person done in contravention of a provision of Part IV or V may recover the amount of the loss against that person or any person involved in the contravention by an action begun within three years of the accrual of the cause of action.

Section 87 of the Trade Practices Act provided that, if proceedings had been instituted for the offence of contravening a provision of Part V, the court, in addition to imposing a penalty or making an order for

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<sup>166</sup> But such uniformity does not exist in respect of state consumer protection legislation.

<sup>167</sup> S. 79 is concerned solely with the prohibitions contained in Part V of the Trade Practices Act and the consequences of a breach thereof and does not of itself proscribe any particular action or conduct. It does not provide independently that bodies corporate (as opposed to corporations) and persons who contravene the directions as to conduct in Part V are guilty of offences. See *Ex parte* C.L.M. Holdings Pty. Ltd., *supra* note 52.

<sup>168</sup> Trade Practices Amendment Act 1977, s. 47(1)(b).

<sup>169</sup> S. 45.

the recovery of any loss, might make such ancillary orders as it thought fit to redress injury to persons caused by any conduct to which the proceedings relate. Under this section it seemed that not only the consumer-purchaser but also members of his family, or guests, might be able to obtain redress as persons injured by the defendant's conduct.

The Swanson Committee felt that section 87 should be widened and the Trade Practices Amendment Act has accordingly replaced section 87 with a new provision to enable orders for appropriate relief to be made in favour of (a) a party to proceedings for an offence under Part V who has suffered or is likely to suffer loss through a breach of a provision of Part V, whether or not the court makes orders under sections 80A or 82 or other sections of the Trade Practices Act; and (b) a person who has suffered or is likely to suffer loss through a breach of a provision of Part V, irrespective of whether or not proceedings for an offence have been instituted. In other words, orders under (b) may be made in favour of any person who suffers loss as a result of a contravention of section 52 (which does not give rise to criminal sanctions). The orders are to be made if the court thinks that they will compensate in whole or in part for the loss or will prevent or reduce it, and they may be made against the guilty party or a person who was involved in the contravention. The type of orders that may be made are illustrated in section 87(2) and include an order requiring the repair of goods or the provision of services, the refund of money or return of property, and the variation or avoidance of a contract in whole or in part.

Under section 80 there is provision for the granting of an injunction or interim injunction to restrain a contravention or attempted contravention of Part V. The Swanson Committee was concerned that the section as framed was not strong enough to prevent a threatened contravention of the Trade Practices Act and suggested that alterations should be made to section 80 to place beyond doubt the power of the court to prevent such conduct, on the basis that greater reliance should be placed on preventive rather than punitive measures.<sup>170</sup> This result is achieved by amendments to section 80 contained in the Trade Practices Amendment Act. Under these amendments it is not necessary to show that the person restrained intends to engage again, or to continue to engage, in conduct of the kind complained of, or that he has previously engaged in that conduct.

The Trade Practices Amendment Act also amends the defences available to the defendant in a prosecution for a contravention of a provision of Part V by incorporating therein the concept of reasonableness.<sup>171</sup> As amended, section 85 provides that it is a defence if the defendant proves that the breach was due to a reasonable mistake; or to

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<sup>170</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 81, para. 9.150.

<sup>171</sup> *Cf. id.*, at 79-80, para. 9.144.



reasonable reliance on information supplied by another person; or to the act or default of another person; or to an accident or some other cause beyond his control; and in addition that the defendant took reasonable precautions and exercised due diligence to avoid the breach.<sup>172</sup> The defendant must supply information that will assist in identifying such other person. A publisher is protected in relation to an advertisement contravening Part V if he establishes that he received it in the ordinary course of business and did not know of and had no reason to suspect a breach of the Act.<sup>173</sup>

Finally, the Trade Practices Amendment Act adds section 80A to the Trade Practices Act empowering a court to order a person who has contravened a provision of Part V or who is involved in such contravention to disclose particular information to the public or to certain persons, or to publish an advertisement containing specified terms. A limitation in expenditure of \$50,000 is placed on the amount of affirmative disclosure or corrective advertising which may be ordered in relation to any one contravention or substantially related contraventions. The purpose of this section is to enable any misunderstanding or deception which may have resulted from any misleading conduct or advertisement to be rectified, by requiring the affirmative disclosure or publication of the true facts.<sup>174</sup>

It is to be noted that under section 83 findings of fact in proceedings for the recovery of penalties, an injunction, or an order to disclose information in which a person is found to have contravened or to have been involved in a contravention of Part V are *prima facie* evidence of those facts in a proceeding against that person under section 82 or section 87(1A).

## VI. CONCLUSION

In this paper some attempt has been made to outline the radical departures that have already been made from the common law doctrine of *caveat emptor* and those that are foreshadowed. What other changes are likely to be made in the future is largely a matter for conjecture, but what can be foreseen is the necessity for uniformity of consumer protection legislation throughout Australia, as indeed the Swanson Committee advocated.<sup>175</sup> The model should be the Trade Practices Act,

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<sup>172</sup> Cf. Trade Description Act 1968 (U.K.), c. 29, s. 24; *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.). In *Ballard v. Sperry Rand Australia Ltd.*, *supra* note 100, it was pointed out that the Trade Description Act had no provision corresponding to s. 84(2) of the Trade Practices Act. See also *Hartnell v. Sharp Corp. of Australian Pty. Ltd.*, *supra* note 109.

<sup>173</sup> Trade Practices Amendment Act 1977, s. 85(3). Cf. *Naish v. Gore*, [1971] 3 All E.R. 737, at 741 (Q.B.).

<sup>174</sup> See SWANSON COMMITTEE REPORT, *supra* note 41, at 81-82, paras. 9.152-56.

<sup>175</sup> SWANSON COMMITTEE REPORT, *supra* note 41, at 59-61, paras. 9.8-85.

which is already operative on a national scale. With the broad definition of "consumer" contained in the amendments to the Act; with the wide-ranging scheme of criminal sanctions coupled with the ability to grant civil remedies, including injunctions and ancillary orders included therein; and with powers of enormous potential contained in section 52 prohibiting misleading or deceptive conduct and in sections 62 and 63 authorizing the prescription of product safety and product information standards, the Trade Practices Act is in a much stronger position than the Sale of Goods Act and the consumer protection legislation of the states to advance the cause of consumerism.

The necessity for uniformity is emphasized by the apparent ease with which the provisions of the Trade Practices Act can at present be evaded. A corporation could arrange to sell its goods to a dealer who is unincorporated but who has close ties with the corporation and who would then resell those goods to the consumer. It would appear that the transaction would not come within the purview of the Trade Practices Act unless it was caught by those provisions, such as sections 5, 6 and 55, which extend the application of the Act to individuals in certain circumstances. This loophole would not of course be open if uniform consumer protection legislation were established throughout Australia.

Apart from a move towards uniformity, prognostications as to future developments that might occur include a further erosion of the doctrine of privity of contract, with widespread acceptance of the concept of warranties of quality "running with" the goods so as to render the manufacturer liable to the ultimate user for breach of warranty; the establishment of a comprehensive scheme of product safety and product information standards to which manufacturers must conform; and the emasculation of the ubiquitous exemption clause. The potency of such a clause has already been destroyed in the consumer field in the area of the supply of goods, as is apparent from the foregoing pages of this paper, and in this area courts will have to resort to a flexible interpretation of the statutory definition of merchantable quality in order to achieve a just result in a given case. The price paid for the goods, the description applied to them and all other relevant circumstances will in this regard be important safeguards to retail traders of the future. But it can be expected that curbs will also be placed in the future on the efficacy of exemption clauses in areas other than that of consumer transactions. The Supply of Goods (Implied Terms) Act 1973 (U.K.), while banning exemption clauses in relation to implied conditions as to quality in consumer sales, provided that such clauses should not be enforceable in any other case to the extent that it was shown not to be fair and reasonable to allow reliance on them,<sup>176</sup> and the New South

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<sup>176</sup> S. 4(4).

Wales Law Reform Commission has put forward alternative proposals for the control of such clauses in contracts for the sale of goods generally.<sup>177</sup>

Indeed, the United Kingdom has already taken further steps to curb the use of exemption clauses, not only in sale of goods contracts, but in other areas as well. Under the Unfair Contract Terms Act 1977 (U.K.), which came into force in February 1978, there has been a radical alteration of the common law in relation to exemption clauses. The main purpose of the legislation is to control the exclusion or restriction of liability for negligence or in contract. To this end, section 2 provides that a person cannot by any term in a contract exclude or restrict his liability for death or personal injury resulting from negligence, but that in the case of other loss or damage he may do so if the clause satisfies the requirement of reasonableness.

So far as liability arising in contract is concerned, the Act distinguishes between a person who "deals as consumer" (an expression which is defined in the Act) and others. A party to a contract deals as consumer under section 12 if he does not make the contract in the course of a business (a word which includes a profession and the activities of a government department or local authority) and the other party does so contract. Further, if the contract is one which is governed by the law of sale of goods or hire-purchase, the goods involved must be of a type ordinarily supplied for private use or consumption. An exception is that on a sale by auction or by competitive tender, the buyer can never be regarded as dealing as consumer. Subject to that, the onus is on the party so asserting to prove that a party does not deal as consumer.

Section 3 of the Act provides that, subject to the exceptions listed in Schedule 1, where one of two contracting parties deals as consumer, or deals on the other's written standard terms of business, the other party cannot by a term of the contract (i) exclude or restrict his liability for breach of contract; or (ii) claim that he need not perform any part of his contractual obligation at all; or (iii) claim that he can perform the contract in a substantially different way to that which was reasonably expected of him—unless in any of these instances the term of the contract satisfies the requirement of reasonableness. The test of reasonableness is given in section 11, where it is stipulated that the contractual term must have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made. Where the term is one which stipulates a monetary limit to liability, relevant factors to be taken into account

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<sup>177</sup> N.S.W. LAW REFORM COMMISSION, WORKING PAPER, *supra* note 10, paras. 7.23-24, 7.22, 7.36, 7.41-42, 15.23-24.

are the available resources of the party relying on the term and the extent to which it was open to him to cover himself by insurance. The onus of proof that a contractual term satisfies the requirement of reasonableness lies on the party seeking to rely on it.

There are further provisions dealing with the sale or supply of goods. The seller's undertaking as to title implied under the Sale of Goods Act cannot be excluded, whether the party is dealing as consumer or not, while the implied undertakings as to quality and conformity with the description cannot be excluded if the party is dealing as consumer and can only be excluded in other cases where the contractual term purporting to do so satisfies the requirement of reasonableness. A similar provision obtains where the goods are acquired under a contract outside the law of sale of goods or hire-purchase. The test of reasonableness in such cases is based on the matters specified in Schedule 2 to the Act and includes such things as the relative bargaining positions of the parties, the existence of alternative sources of supply, whether the customer received an inducement to agree to the contractual term, whether he knew or ought to have known of the existence of the term, and whether the goods were manufactured to his special order.

There are other provisions in the Act which are worthy of note, such as the prohibition in section 5 of any attempt to exclude liability on the part of a manufacturer or distributor by means of a contractual term in a "guarantee" (as defined) for loss due to goods proving defective "while in consumer use", and the proscription against making the enforcement of any liability subject to restrictive or onerous conditions. Finally, there is an attempt to remove the uncertainty in the law created by *Harbutt's Plasticine Ltd v. Wayne Tank & Pump Co.*<sup>178</sup> with the provision in section 9(1) that a contractual term excluding or restricting liability which satisfies the test of reasonableness may be given effect to even though the contract has been terminated by breach or by a party electing to treat it as repudiated.

Enough has been said to indicate the far-reaching effect of the provisions of the Unfair Contract Terms Act 1977. It is clear that it is open to criticism in that the vagueness of such concepts as the "written standard terms of business", "in the course of a business" and "goods of a type ordinarily supplied for private use or consumption" will give rise to difficulties and doubts. The most serious criticism of all, of course, is that the test of reasonableness as set out in the Act will lay the way open to the vagaries and idiosyncrasies of the particular judge trying the case. Nevertheless, the legislation is a valiant attempt to deal with a serious problem created by the almost universal use of exemption clauses.

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<sup>178</sup> [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A.).

How far the lead thus given by the United Kingdom will be followed elsewhere remains to be seen. What is clear is that the concept of *caveat emptor* has in the last twenty years been so eroded that the governing legal principle could now with justice be said to be *caveat venditor*. The thought persists that perhaps the pendulum has swung too far in the direction of the consumer and that the cost to the community of these protective measures not only in terms of money but in terms of inhibiting initiative outweighs the advantages to the public.

The inevitable result of increasing the burden on the suppliers of goods and services is that additional insurance cover has to be taken out to meet the increased liability, and the cost involved has to be passed on to the public. It has been said that the effect in New South Wales of implementing the provisions of section 27 of the Motor Dealers Act 1974 rendering the dealer liable for defects in a motor vehicle sold by him has been to increase the price of second-hand motorcars by an average of \$300, a result which was no doubt unintended. No one would quarrel with the proposition that the consumer (a category into which every member of the community comes at one stage or another) deserves protection from the wiles and deceptions of big business, but the difficulty is to know where to stop. It is suggested that today a respectable body of opinion would support the view that the legislature has gone far enough in its endeavours to ensure that there is a truly fair market for goods and services in Australia.<sup>179</sup>

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<sup>179</sup> Cf. SWANSON COMMITTEE REPORT, *supra* note 41, at 58-59, para. 9.7.