



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 89

**Implied Terms in the
Sale Of Goods Act 1895**

DISCUSSION PAPER

AUGUST 1995

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Preface

The Commission has been asked to review the law relating to the *Sale of Goods Act 1895*.

The Commission has not formed a final view on the issues raised in this Discussion Paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 31 October 1995.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them in its final report. Since the process of law reform is essentially public, copies of submissions made to the Commission will usually be made available on request to any person or organisation. However, if you would like all or any part of your submission or comment to be treated as confidential, please indicate this in your submission or comments. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1992*.

The research material on which this Discussion Paper is based can be studied at the Commission's office by anyone wishing to do so.

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The pronouns and adjectives "he", "him" and "his", as used in this discussion paper, are not intended to convey the masculine gender alone, but include also the female equivalents "she", "her" and "hers".

Abbreviations

Atiyah	P S Atiyah <i>The Sale of Goods</i> (8th ed 1990)
Benjamin	<i>Benjamin's Sale of Goods</i> (4th ed 1992)
Bridge	M G Bridge <i>Sale of Goods</i> (1988)
FTA	<i>Fair Trading Act 1987</i> (WA)
Goode	R M Goode <i>Commercial Law</i> (1st ed 1982, reprinted with additions 1985)
HKLRC Report (1990)	Law Reform Commission of Hong Kong <i>Report on Sale of Goods and Supply of Services</i> (Topic 21, 1990)
NSWLRC WP (1975)	New South Wales Law Reform Commission <i>The Sale of Goods</i> (Warranties, Remedies, Frustration and Other Matters) (Working Paper 1975)
NSWLRC Second Report (1987)	New South Wales Law Reform Commission <i>Sale of Goods: Second Report</i> (LRC 51, 1987)
SGA	<i>Sale of Goods Act 1895</i> (WA)
TPA	<i>Trade Practices Act 1974</i> (Cth)
OLRC Report (1979)	Ontario Law Reform Commission <i>Report on Sale of Goods</i> (1979)
OLRC Warranties Report (1972)	Ontario Law Reform Commission <i>Report on Consumer Warranties and Guarantees in the Sale of Goods</i> (1972)
Sutton	K C T Sutton <i>Sales and Consumer Law in Australia and New Zealand</i> (1983)
UCC	The American Law Institute National Conference of Commissioners on Uniform State Laws <i>Uniform Commercial Code</i> (1972 Official Text)
UK First Report (1969)	[English] Law Commission and Scottish Law Commission <i>Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893</i> (Law Com No 24, Scot Law Com No 12, 1969)
UK Second Report (1975)	[English] Law Commission and Scottish Law Commission <i>Exemption Clauses: Second Report</i> (Law Com No 69, Scot Law Com No 39, 1975)

UK Report (1987)

[English] Law Commission and Scottish Law Commission *Sale and Supply of Goods* (Law Com No 160, Scot Law Com No 104, 1987)

UK WP (1968)

[English] Law Commission and Scottish Law Commission *Provisional Proposals Relating to Amendments to Sections 12-15 of The Sale of Goods Act 1893 and Contracting Out of the Conditions and Warranties Implied by those Sections* (Law Com No 18, Scot Law Com No 7, 1968)

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked to review the *Sale of Goods Act 1895* (SGA).

1.2 This paper covers the terms implied into all contracts of sale of goods by sections 12 to 15 of the SGA. Further discussion papers will deal with other aspects of the SGA which are in need of reform.

1.3 The SGA contains statutory implied terms of title, description, quality, fitness and correspondence with sample. These implied terms are identical to those in the United Kingdom *Sale of Goods Act* enacted in 1893.

* *Title*

In every contract of sale, there is an implied condition that the seller has a right to sell the goods. Two warranties are also implied: that the goods are free from any charge or encumbrance in favour of a third party which is unknown to the buyer and that the buyer will enjoy quiet possession of the goods.

* *Description*

Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with their contractual description.

* *Quality*

Where there is a contract for the sale of goods by description there is an implied condition that the goods will be of merchantable quality, meaning, essentially, commercially saleable under the description by which they are sold.

* *Fitness*

Where in a contract for the sale of goods, the buyer makes known to the seller the purpose for which the goods are required and clearly relies on the seller's expertise for the supply of appropriate goods, there is an implied condition that the goods are reasonably fit for such purpose.

* *Correspondence with sample*

Where there is a contract for the sale of goods by sample, there is an implied condition that the bulk will correspond with the quality of the sample and that the goods will be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

1.4 There are now equivalents of the implied terms in sections 12 to 15 of the SGA in the Commonwealth *Trade Practices Act 1974* (TPA) and the Western Australian *Fair Trading Act 1987* (FTA).¹ These provisions are limited to consumer sales. The SGA provisions therefore, in practice, are confined in their operation to non-consumer sales.

1.5 One of the reasons for separating sections 12 to 15 from the other sections of the Act, and dealing with them in a separate paper, is that it is necessary to consider the role and future operation of these sections in the light of the competing provisions of the TPA and the FTA. This problem is confined to the implied terms sections and is not an issue when dealing with other sections of the Act.

2. THE COMMON LAW

In the years before 1893 the common law developed a number of terms that were to be implied into sale of goods contracts. At first, a seller was only responsible for statements made prefaced with the words "I promise" or "I warrant". The "bare affirmation" of the vendor could never be a cause of action.² By the late 17th century, it was already being held that an affirmation (a statement about the quality of the goods) could amount to a warranty.³

¹ See Ch 2.

² *Chandelor v Lopus* (1603) Cro Jac 4, 79 ER 3.

³ *Crosse v Gardner* (1688) Carth 90, 90 ER 656.

A further development came a hundred years later when it was held in *Pasley v Freeman*⁴ that there was a warranty by the seller whenever it was shown to have been that the defendant made a false affirmation with intent to defraud. Evolution continued throughout the 19th century, with the courts eventually imposing obligations on sellers by the mere fact of their selling. There were cases which held that goods had to be "saleable" under their descriptions⁵ and that goods had to be fit for the particular purpose for which they were sold.⁶ The basic principle of caveat emptor was gradually being eroded although there was some lack of consistency in judicial approaches.

3. THE SALE OF GOODS ACT

(a) The Act generally

1.7 In 1893 Sir Mackenzie Chalmers completed the drafting of the United Kingdom *Sale of Goods Act 1893*. This was part of a general move in favour of the codification of commercial law. (Other statutes passed in the United Kingdom around that time were the *Bills of Exchange Act 1882*, the *Partnership Act 1890*, and the *Marine Insurance Act 1906*.) The form of the United Kingdom *Sale of Goods Act* was adopted soon after, almost verbatim, throughout the British Commonwealth (including all States and Territories of Australia) and in the United States of America.⁷ In Western Australia it was adopted in 1895.⁸

1.8 Although the intention was to codify the law in the United Kingdom *Sale of Goods Act 1893*, the Act is not in fact a code.⁹ Chalmers distilled those principles of law which had evolved through case law and expressly included them in the Act. Those principles that are included do not provide an exhaustive list of answers to all commercial problems. In addition, the common law, particularly the general law of contract, was expressly preserved by the United Kingdom Act.¹⁰

1.9 The Act deals with such matters as the passing of property, the location of risk and the ability to transfer title (in contracts of sale), and the rights and obligations of buyers and

⁴ (1789) 3 TR 51, 100 ER 450.

⁵ *Gardiner v Gray* (1815) 4 Camp 144, 171 ER 46.

⁶ *Jones v Bright* (1829) 5 Bing 533, 130 ER 1167.

⁷ In its *Uniform Sales Act* of 1906. This was replaced in 1951 by the *Uniform Commercial Code* (UCC).

⁸ The *Sale of Goods Act 1895*.

⁹ As is, for example, the UCC.

¹⁰ S61(2). See SGA s 59(2). The Commission's second discussion paper on the *Sale of Goods Act 1895* will deal with the extent to which equitable principles have been imported into the Act.

sellers and terms implied by law into contracts of sale. It reflects 19th century types of trade and concepts of the law. The transactions on which it is based focus in the main on those between merchants – sales between those in business, sales by manufacturers and suppliers to wholesalers, and sales by wholesalers to retailers. Nothing in the Act prevented it from applying to sales to ultimate users or consumers and indeed it was often invoked in this context.¹¹ The Act was nevertheless predicated on an equality of bargaining power between the parties.

(b) The statutory implied terms

1.10 The implied terms as to title, description, quality, fitness and sale by sample (sections 12 to 15) reflected a development that had already occurred at common law - an erosion of the rule of caveat emptor. The seller was under a legal obligation to supply goods of the right status, quality and fitness and these obligations were implied into every contract for the sale of goods.

4. REFORM OF THE LAW IN THE UNITED KINGDOM

1.11 The obligations implied by the Act were easily avoided as parties had the right to contract out of these implied terms through the use of exclusion clauses.¹² This was of particular concern in the context of consumer transactions, where there was often a great disparity in the bargaining power of the parties. There were also problems with the language used in the implied terms provisions, which in places was ambiguous, uncertain and unnecessarily technical.¹³

1.12 As a result, the United Kingdom enacted the *Supply of Goods (Implied Terms) Act 1973* which, in addition to amending sections 12 to 15, restricted the right of the seller to avoid statutory obligations in consumer sales through the use of exclusion clauses. The implied terms, as reformed by the Act, were also to apply in certain transactions other than sale, principally hire purchase agreements. The *Unfair Contract Terms Act 1977*¹⁴ further developed the concept of controlling contract terms which purported to exclude or restrict the

¹¹ See eg *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387; *David Jones Ltd v Willis* (1934) 52 CLR 110.

¹² S 55. See SGA s 54.

¹³ Goode 256

¹⁴ Derived substantially from recommendations made by the English and Scottish Law Commissions: UK Second Report (1975).

seller's liability under sections 12 to 15 when the buyer was "dealing as a consumer".¹⁵ Where the buyer did not deal as a consumer the implied undertakings as to title could not be excluded; the exclusion or restriction of the other implied terms was subject to a "reasonableness" test.¹⁶

1.13 In 1979 the United Kingdom *Sale of Goods Act* was passed incorporating the 1973 amendments. It remained subject to the *Unfair Contract Terms Act 1977*. The 1979 Act applies to both consumer and non-consumer transactions. This Act was amended by the United Kingdom *Sale and Supply of Goods Act 1994*, which came into force in January 1995. This Act has changed the emphasis on the criteria defining quality of goods in section 14 as well as modifying remedies available to non-consumers.

5. REFORM OF THE LAW IN AUSTRALIA

1.14 In Australia, the Commonwealth *Trade Practices Act* was passed in 1974. Part V is broadly concerned with consumer protection and Division 2 of that Part with conditions and warranties in consumer transactions.¹⁷ Sections 69, 70, 71 and 72 set out the implied terms as to title, correspondence with description, quality, fitness and correspondence with sample in terms almost identical to the corresponding sections in the United Kingdom *Supply of Goods (Implied Terms) Act 1973*, and, as provided for in that Act, the implied terms in the TPA cannot be excluded.¹⁸

1.15 The States' legislative responses to Division 2 of Part V of the TPA differed. Two States added new parts to their Sale of Goods Acts, applying specifically to consumers: in New South Wales Part 8 was added to the *Sale of Goods Act 1923* in 1974 and in Victoria a new Part IV was added to the *Goods Act 1958* in 1982. Broadly, Part V Division 2 of the TPA was followed, including making the implied terms non-excludable in consumer transactions and adopting the TPA definition of merchantable quality. The Fair Trading Acts of these States, enacted in 1987 and 1985 respectively, focused on misleading and deceptive conduct and other unfair practices along the lines of Part V Division 1 of the TPA.

¹⁵ See s 6(1)-(2).

¹⁶ S 6(3).

¹⁷ See TPA s 4B for the definition of "consumer". Broadly it includes someone who buys goods or services for their own use and either the goods or services cost less than \$40,000 or if they cost more are of a kind ordinarily acquired for personal consumption: see para 2.3 below.

¹⁸ TPA s 68.

1.16 In Queensland, Tasmania and the Australian Capital Territory there has been no significant amendment to the implied terms provisions of the Sale of Goods Acts since those Acts were enacted in 1896, 1896 and 1954 respectively. The Fair Trading Acts of these jurisdictions, enacted in 1989, 1990 and 1992 respectively, focus on unfair practices.

1.17 In South Australia, the implied terms provisions of the *Sale of Goods Act 1895* have never been altered but Part II of the *Consumer Transactions Act 1972* includes provisions similar to those in Part V Division 2 of the TPA. The *Fair Trading Act 1987* focuses on unfair practices.

1.18 In the Northern Territory similar provisions to those in Part V Division 2 of the TPA were included in the *Consumer Affairs and Fair Trading Act 1990*. The implied terms of the *Sale of Goods Act 1972* have never been altered.

1.19 In Western Australia the SGA has remained virtually untouched while the FTA has incorporated the provisions of Part V Division 2 of the TPA (as well as those of Part V Division 1) but without the limitations that appear in the TPA due to constitutional constraints.¹⁹ Like the TPA, the FTA deals only with consumer sales.

1.20 The major issue for this paper is whether there should be reforms in relation to non-consumer sales. No Australian jurisdiction has as yet extended reform beyond consumer sales.²⁰

6. REFORM OF THE LAW ELSEWHERE

1.21 The Ontario Law Reform Commission²¹ has proposed significant amendments to the implied terms of the Ontario *Sale of Goods Act*²² which are almost identical to those in the Western Australian SGA. In the Ontario Act and its amendments no distinction is made between consumer and non-consumer sales (although Ontario has a *Consumer Protection Act*

¹⁹ As the TPA is a Commonwealth Act, it must be supported by particular heads of constitutional power. See also paras 2.6-2.10 below.

²⁰ But some reforms of this kind are suggested in the NSWLRC WP (1975) and the NSWLRC Second Report (1987), the recommendations of which are referred to throughout this paper.

²¹ OLC Report (1979).

²² The latest reprint is the *Sale of Goods Act 1990* (Ontario).

1980 which controls exclusion of implied terms in consumer transactions). The Ontario Law Reform Commission put its recommendations and draft Bill before the Uniform Law Conference of Canada with a view to the adoption of the latter as model uniform legislation.²³ The Uniform Law Conference ultimately recommended the adoption of a revised version of the Ontario Law Reform Commission's draft Bill. This recommendation was accepted and the revised Bill became the *Uniform Sale of Goods Act 1981*. The Alberta Institute of Law Research and Reform has recommended the adoption of the Act by the province of Alberta,²⁴ but as yet no province has adopted it.

7. CONTENTS OF THE DISCUSSION PAPER

1.22 In this Discussion Paper the comparative application of the SGA and the TPA (and FTA) will be examined (chapter 2); some general issues pertaining to all the implied terms will be raised (chapter 3); and specific issues relevant to each individual implied term will be considered (chapters 4, 5, 6, 7 and 8).

²³ The Uniform Law Conference prepares model legislation with a view to it being adopted in each Canadian jurisdiction, in order to promote uniformity. There is no equivalent body in Australia, although in a number of instances uniform legislation has been adopted by all Australian States and Territories as a result of decisions made by the Standing Committee of Attorneys General.

²⁴ Alberta Institute of Law Research and Reform *The Uniform Sale of Goods Act* (Report No 38, 1982).

Chapter 2

THE SALE OF GOODS ACT, THE TRADE PRACTICES ACT AND THE FAIR TRADING ACT

1. COMPARISON OF THE SALE OF GOODS ACT AND THE TRADE PRACTICES ACT

2.1 There is an impression, even amongst lawyers, that the implied terms of the SGA have been superseded by those in the Commonwealth TPA and the Western Australian FTA. This is not so. It is true that the focus of the implied terms in the SGA has narrowed, but nevertheless they still have a substantial application. This is because the TPA and FTA provisions apply only to consumer transactions, leaving the SGA to regulate non-consumer sales.

2.2 The following table compares the implied terms of the SGA and the TPA. (The corresponding provisions of the FTA are almost identical to those of the TPA.)

SALE OF GOODS ACT 1895 (WA)

TRADE PRACTICES ACT 1974 (Cth)

Interpretation (FTA s 33)

- 66.** (1) In this Division:
- (a) a reference to the quality of goods includes a reference to the state or condition of the goods;
 - (b) a reference to a contract does not include a reference to a contract made before the commencing date;
 - (c) a reference to antecedent negotiations in relation to a contract for the supply by a corporation of goods to a consumer is a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person whereby the consumer was

induced to make the contract or which otherwise promoted the transaction to which the contract relates; and

(d) a reference to the person by whom any antecedent negotiations were conducted is a reference to the person by whom the negotiations or arrangements concerned were conducted or made.

(2) Goods of any kind are of merchantable quality within the meaning of this Division 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 the other relevant circumstances.

Exclusion of implied terms and conditions

54. Where any right, duty, or liability would arise under a contract of sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Application of provisions not to be excluded or modified (FTA s 34)

68. (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Division;
- (b) the exercise of a right conferred by such a provision;
- (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
- (d) the application of section 75A;

is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or

the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

Limitation of liability for breach of certain conditions or warranties (FTA s 35)

68A. (1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by section 69) to:

- (a) in the case of goods, any one or more of the following:
 - (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
 - (iv) the payment of the cost of having the goods repaired; or
- (b) in the case of services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost of having the services supplied again.

(2) Subsection (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.

(3) In determining for the purposes of subsection (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters:

- (a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this subsection referred to as *the buyer*) relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;
- (b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;
- (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and
- (d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

Implied undertaking as to title, etc

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is, -

- (I) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at

Implied undertakings as to title, encumbrances and quiet possession (FTA s 36)

69. (1) In every contract for the supply of goods by a corporation to a consumer, other than a contract to which subsection (3) applies, there is:

- (a) an implied condition that, in the case of a supply by way of sale, the

the time when the property is to pass:

- (II) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- (III) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;

- (b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and
- (c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer - an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.

(2) A corporation is not, in relation to a contract for the supply of goods, in breach of the implied warranty referred to in paragraph (1)(c) by reason only of the existence of a floating charge over assets of the corporation unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.

(3) In a contract for the supply of goods by a corporation to a consumer in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the supplier should transfer only such title as he or a third person may have, there is:

- (a) an implied warranty that all charges or encumbrances known to the supplier and not known to the consumer have been disclosed to the consumer before the contract is made; and
- (b) an implied warranty that:

- (i) the supplier;
- (ii) in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have - that person; and
- (iii) anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made;

will not disturb the consumer's quiet possession of the goods.

Sale by description

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Supply by description (FTA s 37)

70. (1) Where there is a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

Implied conditions as to quality or fitness

14. Subject to the provisions of this Act, and of any Statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:-

- (I) Where the buyer, expressly or by

Implied undertakings as to quality or fitness (FTA s 38)

71. (1) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:

implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

- (II) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed:
- (III) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:
- (IV) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by sample

15. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample -

- (a) There is an implied condition that the

- (a) as regards defects specifically drawn to the consumer's attention before the contract is made; or
- (b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(2) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except 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 of that person.

(3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a corporation as they apply to a contract for the supply of goods made by a corporation in the course of a business, except where that corporation is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

Supply by sample (FTA s 39)

72. Where in a contract for the supply (otherwise than by way of sale by auction) by a corporation in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample:

- | | |
|--|--|
| <p>bulk shall correspond with the sample in quality:</p> <p>(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:</p> <p>(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.</p> | <p>(a) there is an implied condition that the bulk will correspond with the sample in quality:</p> <p>(b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and</p> <p>(c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.</p> |
|--|--|

When condition to be treated as warranty

11. (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(3) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract express or implied to that effect.

(4) Nothing in this section shall affect the case of any condition of warranty, fulfilment of which is excused by law by

Rescission of contracts (FTA s 41)

- 75A.** (1) Where:
- (a) a corporation supplies goods to a consumer in the course of a business; and
 - (b) there is a breach of a condition that is, by virtue of a provision of Division 2, implied in the contract for the supply of the goods;

the consumer is, subject to this section, entitled to rescind the contract by:

- (c) causing to be served on the corporation a notice in writing signed by him giving particulars of the breach; or
- (d) causing the goods to be returned to the corporation and giving to the corporation, either orally or in writing, particulars of the breach.

(2) Where a consumer purports to rescind under this section a contract for the supply of goods by a corporation, the purported rescission does not have any effect if:

- (a) the notice is not served or the goods are not returned within

reason of impossibility or otherwise.

a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods;

- (b) in the case of a rescission effected by service of a notice, after the delivery of the goods to the consumer but before the notice is served:
 - (i) the goods were disposed of by the consumer, were lost, or were destroyed otherwise than by reason of a defect in the goods;
 - (ii) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
 - (iii) the goods were damaged by abnormal use; or
 - (c) in the case of a rescission effected by return of the goods, while the goods were in the possession of the consumer:
 - (i) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
 - (ii) the goods were damaged by abnormal use.
- (3) Where a contract for the supply of goods by a corporation to a consumer has been rescinded in accordance with this section:
- (a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to, the corporation - the property in

the goods re-vests in the corporation upon the service of the notice or the return of the goods; and

(b) the consumer may recover from the corporation, as a debt, the amount or value of any consideration paid or provided by him for the goods.

(4) The right of rescission conferred by this section is in addition to, and not in derogation of, any other right or remedy under this Act or any other Act, any State Act, any law of a Territory or any rule of law.

2. APPLICATION OF THE IMPLIED TERMS OF THE TRADE PRACTICES ACT 1974

(a) Buyers

2.3 The implied terms of the TPA are directed to regulating consumer transactions. They thus operate only in favour of a buyer who is a consumer. Section 4B provides that a person may acquire goods as a consumer in one of two ways -

- * if the price of the goods is not more than \$40,000;
- * if their price exceeds \$40,000 and the goods are of a kind ordinarily acquired for personal, domestic or household use, or the goods are a commercial road vehicle;

and, in each case, the goods were not bought for resupply or for some other commercial purpose.

(b) Sellers

2.4 The scope of this Act is further restricted on account of the limits on the Commonwealth's legislative powers under the Constitution. Hence, sections 69 to 72 of the TPA (which respectively set out implied undertakings as to title, description, quality and fitness, and correspondence with sample) apply only to sellers or suppliers who are trading, financial or foreign corporations.¹

3. APPLICATION OF THE IMPLIED TERMS OF THE *FAIR TRADING ACT 1987*

2.5 Sections 36 to 39 of the FTA, which set out implied terms equivalent to sections 69 to 72 of the TPA, also operate only in favour of consumers. However, as the State is not subject to the same constitutional restrictions as the Commonwealth, the FTA applies to all suppliers and not just to corporations.

4. WHAT TRANSACTIONS ARE COVERED BY THE IMPLIED TERMS IN THE SALE OF GOODS ACT?

2.6 On its face, the SGA applies to all transactions involving the sale of goods. However as a State Act it ceases to be operative in the event of any inconsistent Commonwealth Act or subsequent inconsistent State Act.

2.7 According to section 75(1) of the TPA, Part V (which includes the implied terms) was not intended to "exclude or limit the concurrent operation of any law of a State or territory". That is, the Commonwealth did not intend to "cover the field" in the area of consumer protection. Therefore, the SGA is only inoperative in cases of direct inconsistency with the TPA. In cases where the substance of both laws is the same the SGA remains operative.²

¹ TPA s 6 extends the operation of the Act to other entities including individuals in limited instances. These are instances where constitutional powers, other than the corporations power, may apply.

² Though the limitation period for actions under the TPA and the FTA is three years (TPA s 82(2); FTA s 79(2)), this does not apply to claims for damages for breach of terms implied by Part V Div 2 of the TPA and the equivalent provisions in the FTA: *E v Australian Red Cross Society* (1991) 99 ALR 601, 642-643 per Wilcox J. Such claims, like claims under the SGA, will be subject to the six year limitation period for actions for breach of contract in s 38(1)(c)(v) of the *Limitation Act 1935*.

Further, the SGA applies to those transactions not covered by the TPA. In practical terms the SGA continues to have its most significant operation outside the area of consumer sales.

2.8 Further section 33(3) of the FTA provides that the FTA overrides the SGA in case of "any circumstance, matter or thing inconsistent . . .". Therefore, in cases of inconsistency the operation of the SGA will be excluded by the FTA in all consumer transactions whether or not the seller is a corporation. Consequently, transactions governed solely by the implied terms of the SGA are effectively non-consumer ones, in which sellers may be individuals, partnerships or corporations, and buyers protected by these implied terms fall into three categories -³

1. Where the price of the goods is not more than \$40,000 and the goods are bought for resale or some other commercial purpose.
2. Where the price of the goods exceeds \$40,000 and the goods are not of a kind ordinarily acquired for personal, domestic or household use (whether or not the goods were bought for resale or some other commercial purpose).
3. Where the price of the goods exceeds \$40,000 and the goods are of a kind ordinarily acquired for personal, domestic or household use and the goods were bought for resale or some other commercial purpose.

2.9 Clearly the principal focus of the implied terms in the SGA is now almost solely on commercial transactions. However, the fact that section 13 of the SGA is not confined to sales in the course of a business will mean that in the case of private sales it will be the SGA implied term of correspondence with description which will be relevant, not the corresponding term in the TPA or FTA, according to which the supply of goods must be in the course of a business.

2.10 The substance of the implied terms in all three Acts is very similar. The terms in the TPA and the FTA are more detailed but in most cases these details are a statutory expression of established judicial interpretation of the United Kingdom *Sale of Goods Act 1893*.⁴

³ By virtue of being excluded from the definition of "consumer" in TPA s 4B, FTA s 6(2).

⁴ The TPA and the FTA incorporate amendments which were made to the *Sale of Goods Act* (UK) by the *Supply of Goods (Implied Terms) Act 1973* (UK).

5. OPTIONS FOR AMENDING THE SALE OF GOODS ACT IMPLIED TERMS

2.11 What needs to be considered in Western Australia is whether there is a need to alter the implied terms of the SGA. The Sale of Goods Acts in the other States have either been left largely untouched in this area or, in the case of two States, have had special consumer supplements added, leaving the original Act intact.

2.12 There are several options -

1. To leave the SGA as it is, thus maintaining a rough parity with the other States as far as implied terms in non-consumer transactions are concerned.
2. To amend the SGA implied terms to bring about consistency with the corresponding terms in the TPA and FTA. Even though the latter are concerned with consumer transactions, many of the concepts contained therein are equally applicable to non-consumer transactions.

The amendments needed to achieve this would, in the main, not effect any substantive changes in the law in Western Australia but would rather simply give legislative effect to interpretations of the Act established by case law. Greater clarity would be achieved in some areas.

3. To amend the SGA in ways that would take it beyond the TPA and FTA, remedying deficiencies that have become apparent during the course of operation of the SGA and TPA, and which have been highlighted by academic commentators and law reform commissions. Given that implied terms of the SGA govern commercial transactions as distinct from consumer ones, uniformity with the TPA and FTA is not an imperative and may not even be desirable.

This is the most radical approach, for to adopt it would be to unhitch the SGA from the Acts in the other States and allow it an independent development and evolution.

2.13 Some possible changes to the SGA are perhaps too radical to be done in isolation from other legislation, in particular the abandonment of the statutory dichotomy between condition and warranty in favour of a single term, "warranty", to describe the seller's obligations with respect to the attributes of the goods,⁵ and a possible new regime of remedies for breach of warranty obligations that would turn on the gravity of the breach and not on an *a priori* classification of the term breached.⁶

1. *Should the SGA be amended? If so,*

(a) *should the purpose of the amendments be simply to bring about conformity between the SGA, TPA and FTA, for the sake of simplicity?*

(b) *which amendments can be made to the SGA in isolation from other legislation?*

⁵ See paras 3.2-3.9 below.

⁶ See paras 3.18-3.35 below.

Chapter 3

SOME GENERAL ISSUES

3.1 The following have general application to all the implied terms.

1. THE CONDITION-WARRANTY DISTINCTION

3.2 It would seem that, according to the SGA, both express and implied terms are required to be classified exhaustively as either conditions or warranties.¹ The importance of the classification lies in the remedy: a breach of a condition gives rise to a right to terminate the contract as well as a right to sue for damages, but a breach of a warranty only gives rise to a right to sue for damages. There has been discussion by law reform bodies about what they consider as the unsatisfactory condition/warranty dichotomy in the SGA.² Not only are the terms condition and warranty ambiguous (particularly condition) but this a *priori* classification of contractual terms has been criticised because of the arbitrary results it produces, and because it encourages contrived excuses by the contracting party who wants to extricate himself from a bargain he no longer finds profitable.³ It can also lead to a court disallowing the buyer from rejecting goods for minor defects and thus also claiming damages where the undesirable consequences of a breach of condition (rejection of goods) may induce a court to find no breach at all.

3.3 An intermediate or innominate term is a contractual term whose status lies somewhere between that of condition and warranty. Every breach of it will give rise to a right to claim damages, but a breach which is serious in terms of its consequences for the promisee may allow a right to terminate. Development of the common law in England has allowed termination of a contract for breach of an intermediate term as well as for breach of a condition. The doctrine was first developed by the courts in non-sale of goods cases⁴ but was later extended to cases involving sale of goods.⁵ In Australia, the doctrine of the intermediate

¹ See s 11 of the SGA, quoted above, p 15.

² See eg OLRC Report (1979) 145; NSWLRC WP (1975) 17.

³ OLRC Report (1979) 146.

⁴ *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

⁵ *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44.

term has not been expressly approved by the High Court, although it has been endorsed by various State Supreme Courts.⁶

3.4 According to section 59(2) of the SGA, common law rules which are not inconsistent with express provisions of the SGA will apply to contracts for the sale of goods. An argument could be raised that the doctrine of the intermediate term is inconsistent with the SGA, which speaks only in terms of conditions and warranties, and therefore should not apply. There are nevertheless compelling reasons for the doctrine to be incorporated into the SGA. Not only did the English Court of Appeal in *The Hansa Nord* find no inconsistency between the doctrine and the United Kingdom *Sale of Goods Act 1893*, but the flexibility of the doctrine makes it particularly appropriate to sale of goods contracts, where breach of terms relating to the quality and fitness of the goods may have consequences varying from the trivial to the serious. This would apply equally to express and implied terms.

3.5 The New South Wales Law Reform Commission⁷ has recommended that the New South Wales equivalent of the SGA be amended expressly to incorporate the doctrine of the intermediate term, allowing a serious breach of a term that is neither a condition or warranty to give rise to a right to treat the contract as repudiated. This approach would not disturb any terms which are pre-classified as conditions or warranties, including the implied terms.

3.6 A more radical approach has been adopted in the United States under the *Uniform Commercial Code* where the single term "warranty" is used in the implied terms provisions synonymously with intermediate term.⁸ It is therefore the seriousness of the breach which determines the remedies the innocent party may have, in particular whether the goods can be rejected. A similar approach has been proposed on Ontario.⁹

3.7 Although the English and Scottish Law Commissions in their joint consultative paper on the *Sale and Supply of Goods*¹⁰ recommended that implied terms no longer be classified as conditions, after consultation they decided that the classification should be retained. To abandon it would in their opinion weaken the position of consumer buyers.

⁶ *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSW 1504; *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254.

⁷ NSWLRC Second Report (1987) 22-23.

⁸ UCC s 2-313.

⁹ OLCRC Warranties Report (1972) 44; OLCRC Report (1979) 147.

¹⁰ UK Report (1987) 36.

3.8 The Hong Kong Law Reform Commission would have liked to recommend the abolition of the condition/warranty dichotomy for commercial transactions. Apart from bringing the law of sale into line with general contract law, the Commission argued that commercial buyers and sellers do not abide by the distinction anyway. For example, even if a seller may be in breach of a condition, a commercial buyer will usually perform his contractual obligation (payment) because of a desire to continue business relations. Their arguments for not recommending the abolition of the distinction were that since the Commission believed that the dichotomy should be retained for consumer sales, there should be a common rule for both consumer and non-consumer sales. This was especially so since the distinction between commercial and consumer sales was not always clear cut.¹¹ This latter argument has much less force in Western Australia where the terms implied in consumer and non-consumer transactions are regulated by different Acts.

3.9 There are thus two possible reforms that could be made to the SGA -

1. The Act could be amended to recognise that some terms in sale of goods contracts can be intermediate terms rather than conditions or warranties. The classification of the existing implied terms as conditions or warranties could remain unchanged.
2. The dichotomy between conditions and warranties could be eliminated entirely from the Act. All terms would then be intermediate terms, with the existence of a right to reject depending on the seriousness of the breach.

In each case, however, it is important to consider whether reform would be desirable only if a similar amendment were being made to the TPA and the FTA.

2. *Should the SGA be amended so as to recognise that some terms in sale of goods contracts may be intermediate terms, rather than conditions or warranties, while leaving undisturbed the classification of the existing implied terms as conditions or warranties?*
3. *Should the classification of the implied terms, or any of them, be reviewed? Specifically, should they be reclassified as intermediate terms?*

¹¹ HKLRC Report (1990) 15-16.

4. *Should these changes, or either of them, be implemented in isolation, or only in association with similar amendments of the TPA and the FTA?*

2. **WHEN SHOULD BREACH OF CONDITION BE TREATED AS BREACH OF WARRANTY?**

3.10 According to section 11(3) of the SGA -

1. where goods are unascertained,¹² the right to reject is lost once there has been acceptance, and any breach of condition can only be treated as a breach of warranty;
2. where the goods are specific,¹³ the right to reject is lost once property has passed to the buyer. Because of section 18 Rule 1, according to which "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made", rarely will a buyer of specific goods be able to reject them.

3.11 Various attempts have been made to avoid the injustice which may be caused by the loss of the right to reject. For example, the term "unconditional contract" in section 18 Rule 1 has been construed judicially as meaning not subject to any conditions in the sense of essential stipulations, rather than not being subject to any condition precedent.¹⁴ Atiyah has suggested that when goods do not accord with the contract because of a breach of an essential undertaking by the seller, they are not in a deliverable state and therefore section 18 Rule 1 will not operate.¹⁵

3.12 There is authority that acceptance is the practical test which is applied in deciding whether the right to reject is lost in the case of specific goods as well as in the case of unascertained goods. It has been suggested that courts tend to evade the strict terms of the SGA and regard acceptance¹⁶ as the test, whether property has passed or not.¹⁷ In fact, the

¹² These are goods which are not specific goods. The term is not defined by the SGA, but unascertained goods seem to fall into three main categories: (1) goods to be manufactured or grown by the seller; (2) purely generic goods, eg 100 tonnes of wheat; (3) an unidentified part of a specified whole, eg 100 tonnes out of a specified load of 200 tonnes of wheat: Atiyah 54-55.

¹³ "[G]oods identified and agreed upon at the time a contract of sale is made": SGA s 60(1).

¹⁴ See *Varley v Whipp* [1900] 1 QB 513.

¹⁵ P S Atiyah *The Right to Reject Goods for Breach of Condition* (1956) 19 MLR 315.

¹⁶ See SGA ss 34-35.

English Law Reform Committee in its Tenth Report (*Innocent Misrepresentation*)¹⁸ suggested that the right to reject for breach of condition should depend in the case of specific goods not on the passing of property but on acceptance by the buyer, and that the same test for ascertaining whether the right to reject has been lost should apply to both specific and unascertained goods. This recommendation was adopted by section 4(1) of the United Kingdom *Misrepresentation Act 1967*, which deleted the words "or where the contract is for specific goods, the property in which has passed to the buyer" from section 11(1)(c) of the *Sale of Goods Act 1893*.¹⁹

3.13 The United Kingdom *Sale of Goods Act 1893* also provided that there should be no acceptance until the buyer has had a reasonable opportunity to examine the goods. The *Misrepresentation Act 1967* added the words "(except where section 34 above otherwise provides)" to section 35, making it clear that section 34 will prevail over section 35 in cases of conflict. The fact that the buyer after delivery does something inconsistent with the seller's ownership (which by section 35 is deemed to constitute acceptance), will not deprive the buyer of the right to examine the goods for conformity within a reasonable time.²⁰ If the buyer on-sells the goods to a sub-buyer (an act inconsistent with the seller's ownership) without first examining the goods, he will still be able to reject them if on examination they are defective.

3.14 This has been followed in some Australian jurisdictions and New Zealand.²¹

3.15 Section 2(1) of the United Kingdom *Sale and Supply of Goods Act 1994* introduces additional requirements for acceptance, providing that even where a buyer intimates to the seller he has accepted the goods, there can be no acceptance until the buyer has had a reasonable opportunity to examine the goods.

3.16 Section 75A of the TPA goes further and allows goods to be rejected by a consumer for breach of a condition even though property has passed or the goods have been accepted, until a reasonable time after the consumer has had an opportunity to inspect the goods.

¹⁷ *Kearins v Robertson* (1919) 14 MCR 148; *Taylor v Combined Buyers Ltd* [1924] NZLR 627.

¹⁸ Cmnd 1782 (1962) para 15.

¹⁹ The amended s 11(1)(c) is now s 11(4) of the *Sale of Goods Act 1979* (UK).

²⁰ Some hardship was caused to the seller prior to this amendment. See *Hardy & Co v Hillerns & Fowler* [1923] 2 KB 490; *E & S Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 KB 254; *Hammer and Barrow v Coca-Cola* [1962] NZLR 723.

²¹ *Misrepresentation Act 1972* (SA) s 11; *Sale of Goods Act 1954* (ACT) s 16(4); *Contractual Remedies Act 1979* (NZ) s 14(1).

3.17 The question for the Commission is whether any of these reforms should be adopted in the SGA.

5. (a) *Should a buyer only lose his right to reject goods when there has been acceptance of them? Should the words "or where the contract is for specific goods, the property in which has passed to the buyer" be deleted from section 11(3) of the SGA?*
- (b) *Should acceptance only occur after the buyer has had a reasonable opportunity to examine the goods? Should it therefore be made clear that section 34 of the SGA prevails over section 35, by adding the words "except where section 34 otherwise provides"?*
6. *Should an equivalent of section 75A of the TPA (which allows rejection of goods by a consumer even after property has passed or acceptance has occurred) be enacted for the benefit of non-consumers?*

3. REMEDIES FOR BREACH OF THE IMPLIED CONDITIONS

3.18 Because the implied terms of description, quality and fitness are conditions, the buyer has the option to reject the goods for breach (in addition to the right to sue for damages). A court cannot prevent the buyer exercising the right to reject and instead award damages because it considers the breach is slight. Either the term is breached and the goods may be rejected or there is no breach.

3.19 The very fact that the buyer has the option to reject may explain some decisions in cases where defects in appearance or otherwise minor defects were held not to constitute a breach of the implied term in question. Because the court considered rejection unreasonable in the circumstances it concluded that there was no breach of contract.²²

3.20 The English and Scottish Law Commissions considered some alternative remedies that might be introduced for breach of the implied conditions.

²² *Millars of Falkirk Ltd v Turpie* 1976 SLT (Notes) 66; *Cehave NV v Bremer Handelgesellschaft mbH, The Hansa Nord* [1976] QB 44.

(a) Remedies for consumers

3.21 The Commissions thought it should be made as easy as possible for consumers to reject defective goods, for a number of reasons -

1. Consumers, by definition, are buying for domestic use and not with a profit motive.
2. They will usually not be content with defective goods even if the price is reduced.
3. They are not in a position to dispose of defective goods.
4. Their loss may be difficult to quantify in money terms.
5. The seller, being in a stronger bargaining position, may be able to prevail upon the buyer to either drop his claim or accept less than is due.²³

3.22 The Commissions considered a "cure" scheme for consumers, under which a buyer could reject goods except where the seller could show the breach was slight and it was therefore reasonable that the buyer should be required to accept the repair or replacement of the goods. The "cure" principle is recognised in a number of Canadian jurisdictions.²⁴ The Ontario Law Reform Commission in 1979 recommended a regime of "cure" for their *Consumer Protection Act*.²⁵ The Ontario Commission believed that consumer remedies should be flexible enough to address varying circumstances. However, the English and Scottish Law Commissions rejected a "cure" scheme as too adverse to consumers as well as leaving too many questions unanswered about how the scheme was to operate.²⁶

²³ UK Report (1987) 38-39.

²⁴ See eg *Consumer Products Warranties Act 1978* (Saskatchewan); *Consumer Product Warranty and Liability Act 1978* (New Brunswick).

²⁵ OLRC Report (1979) 510-512.

²⁶ At common law, the seller does have a limited right to "cure", or re-tender where tender is defective where the goods are not specific and the time for performance has not yet expired: Goode 298.

3.23 A provision analogous to a "cure" scheme is section 68A of the TPA (section 35 of the FTA), which provides that where goods (and services) supplied under a consumer contract are not of a kind ordinarily acquired for personal, domestic or household use, liability for breach of a condition may be limited by a term to replacement or repair of the goods or to the cost of having the goods repaired or replaced.

(b) Remedies for non-consumers

3.24 The position of non-consumers is qualitatively different from that of consumers. Non-consumers are usually able to dispose of goods of different qualities through access to appropriate markets. A breach of contract by the seller can usually be measured in monetary terms and then taken into account in calculating profits. Often a non-consumer will use a technical breach of quality as an excuse for rejection when the market price of the goods has fallen and it would be commercially advantageous for the buyer to replace the goods with similar ones bought at a lower price.²⁷

3.25 In general, there is less objection to leaving non-consumers with defective goods than consumers. Therefore, should the remedies for non-consumers be different from those for consumers?

3.26 The English and Scottish Law Commissions considered and rejected a number of options -²⁸

1. that there should be a list of circumstances which would detail whether or not rejection would be permitted. This was rejected as impractical because of the almost infinite variety of circumstances of sale transactions.
2. that there should be a statutory right of "cure". Since they did not recommend "cure" for consumers, in their opinion the case for "cure" for non-consumers was substantially weakened. It would be difficult to provide a detailed enough code covering all eventualities. The seller may try to impose "cure" on the

²⁷ UK Report (1987) 37. There are exceptions to this analysis. Some powerful consumers are in a stronger position than their suppliers, for example, a retailer who makes his profit from the standard mark up on goods.

²⁸ UK Report (1987) 40-41.

buyers or the buyers may seek "cure" for minor but irremediable defects so they can reject goods because of a fall in market prices. The cure principle may not be practical where goods are imported and the seller is far away.

3. that rejection should only be permissible where damages were inadequate. This would mean that rejection would hardly ever be permissible.
4. that rejection would only be allowed when the breach was serious.²⁹ This was considered inappropriate and too severe a test for the statutory imposed terms.

3.27 The Commissions ultimately recommended that there be no major changes to the remedies for breach available to non-consumers. Rather they suggested a slight modification to prevent rejection in bad faith. They said that the buyer ought to be entitled to reject the goods for breach of any one of the terms implied by sections 13 to 15 of the United Kingdom *Sale of Goods Act*, unless the seller can show that the nature and consequences of the breach are so slight that rejection would be unreasonable. This was directed at those buyers who are technically entitled to reject goods but do so simply for commercial advantage. In such a case, the breach was to be treated as a breach of warranty and the buyer would be confined to a remedy in damages.³⁰ This recommendation was implemented by section 4(1) of the United Kingdom *Sale and Supply of Goods Act 1994*.³¹

3.28 The OLRC recommended a regime of "cure" for commercial sales as well as consumer sales. The buyer's right to reject would be confined to substantial breaches of the seller's obligations. The OLRC recommended that even after a buyer has rejected goods, the seller should have the right to "cure", provided that the seller can reasonably notify the buyer of his intention to cure the defect, which must be curable without unreasonable prejudice, risk or inconvenience to the buyer.³²

²⁹ See the test in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

³⁰ UK Report (1987) 40-42.

³¹ It inserts a new section, s 15A, in the United Kingdom *Sale of Goods Act 1979* which provides

"(1) Where in the case of a contract of sale -

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but

(b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty." This section does not apply to Scotland.

³² OLRC Report (1979) 510.

3.29 The Law Reform Commission of Hong Kong³³ considered the establishment of a "cure" provision in the Hong Kong *Sale of Goods Ordinance* (equivalent to the United Kingdom *Sale of Goods Act 1979*), for both commercial and consumer transactions. It conceded there were strong arguments in favour of "cure" for the following reasons -

1. It was already common practice and its existence would prevent an opportunistic buyer from reneging when he no longer wanted to abide by the contract.
2. Most people acted in good faith and were reasonable in their dealings with others.

3.30 However, as well as having misgivings about removing a buyer's right to reject and imposing a statutory right of cure, the Commission felt it would be hard to devise cure provisions for commercial transactions which were simple to operate. Those in business generally found solutions through negotiation and the Hong Kong Commission was not convinced that having a statutory right to "cure" would help commercial buyers and sellers to resolve disputes about the quality of goods.

3.31 *The United Nations Convention on Contracts for International Sale of Goods (1980)* gives the buyer the option to ask for replacement where there has been a fundamental breach of contractual terms. The buyer may ask for repairs where the breach is remediable. The Convention does not give the seller the right to repair or replace defective goods.

(c) Relationship between consumer and non-consumer transactions

3.32 The English and Scottish Law Commissions Report raised the problem that under a regime which allowed "cure" for non-consumers, an inequitable situation could arise where a retailer might have to accept back goods from a customer (who had the right to reject), but the retailer might not be able to reject those goods bought from a wholesaler.

3.33 The Report answered this by saying that -

³³ HKLRC Report (1990) 17-21.

1. This situation already arises. In a contract between a wholesaler and a retailer implied terms may be excluded or modified.³⁴ This is not so in a contract between a retailer and a consumer.³⁵
2. By the time the retailer sells his goods to the consumer he may have already lost his right to reject the goods because of lapse of reasonable time, acceptance, or doing an act which is inconsistent with the wholesaler's ownership. (In practice, most wholesalers will accept the return of defective goods to preserve the business relationship.³⁶)

3.34 Apart from the above, it may be considered reasonable for a retailer to reject the goods as against the wholesaler. In addition, damages will still be available against the wholesaler.

3.35 The question for the Commission is thus whether the remedies for breach of implied terms in consumer sales should be any different from those in non-consumer sales.

7. *Should the principal remedy available to commercial buyers (rejection) be modified in certain circumstances?*
8. *Should consideration be given to a "cure" scheme for non-consumer sales, or is this remedy appropriate only to consumer sales?*

4. EXCLUSION OF LIABILITY

3.36 As mentioned before,³⁷ a principal reform in the area of consumer sales has been a limitation on the right to exclude or modify the implied terms. The Law Commissions' *First Report on Exemption Clauses in Contracts* in 1969³⁸ led to the *Supply of Goods (Implied Terms) Act 1973*. This Act revised the implied terms in sections 12 to 14 of the United Kingdom *Sale of Goods Act 1893* and also modified and expanded section 55 so as to ban the exclusion of the implied undertakings as to title (section 12) for both consumer and non-consumer sales, and of the other implied terms in sections 13 to 15 in the case of consumer sales. In non-consumer sales, exclusion clauses could be ruled unenforceable if they were

³⁴ *Sale of Goods Act 1979* (UK) s 55.

³⁵ *Unfair Contract Terms Act 1977* (UK) s 6(2) (cf TPA s 68; FTA s 34).

³⁶ UK Report (1987) 43.

³⁷ See para 1.12 above.

³⁸ This was preceded by the report of a committee chaired by J T Molony QC: *Final Report of the Committee on Consumer Protection* (Cmnd 1781, 1962).

unreasonable. The *Supply of Goods (Implied Terms) Act 1973* was made subject to the *Unfair Contract Terms Act in 1977*, but no substantive change was made to the law relating to the exclusion of implied terms.³⁹

3.37 The Ontario Law Reform Commission in its *Report on Consumer Warranties and Guarantees in the Sale of Goods* concluded that there was no justification for "disclaimer" clauses⁴⁰ in consumer contracts.⁴¹ In its *Report on Sale of Goods* it considered whether the same idea should be extended to commercial sales. Although it accepted that in a commercial context the buyer and seller are not always bargaining on equal terms and that each party is not always capable of protecting its own interests, the Commission felt that there were sufficient differences in commercial and consumer sales to justify different approaches. An absolute ban on exclusion clauses in commercial contracts was regarded as too "draconian", the Commission preferring an approach which would be flexible enough to enable a court to take into account the circumstances of individual cases. Thus the Commission recommended that the exclusion or modification of implied terms be subject to the doctrine of unconscionability.⁴²

3.38 The question of whether different approaches are warranted depending on whether the transaction is a consumer or commercial one has arisen in other contexts. In his *Report on Harsh and Unconscionable Contracts*,⁴³ the forerunner to the New South Wales *Sales Contracts Review Act 1980*, Professor J R Peden recommended that all entities except for public corporations and government instrumentalities should be entitled to relief from harsh, oppressive or unconscionable contracts. He was mindful of concern in the business community that the great majority of normal commercial transactions should not be subjected to the uncertainty of discretionary judicial powers. Often, market conditions will determine whether a contract is particularly advantageous to one party and equally harsh on the other. Alternatively, one party may be willing to accept a particularly oppressive clause in a contract because it is obtaining a bargain. He was also aware that many large proprietary companies and some individuals were capable of protecting themselves, but felt that it would be impossible to devise criteria distinguishing these from those entities requiring protection.⁴⁴

³⁹ See *Unfair Contract Terms Act 1977* (UK) ss 6, 11 and 27(2).

⁴⁰ Clauses excluding the operation of the implied terms.

⁴¹ OLCR Warranties Report (1972) 62.

⁴² OLCR Report (1979) 228-230.

⁴³ October 1976.

⁴⁴ Id 17-19.

Contrary to Professor Peden's recommendations, the *Contracts Review Act 1980* did not grant relief to any corporation or person where the contract was entered into in the course of a trade or profession.⁴⁵ This aspect of the Act has been criticised, with some commentators arguing that there is no reason why companies, small or large, should not be entitled to relief in appropriate circumstances. They note that the courts have a history of protecting commercial interests, having always been empathetic to the needs of commerce.⁴⁶

3.39 The New South Wales Law Reform Commission has identified a need for the regulation of unconscionable terms in commercial sale contracts.⁴⁷ The unconscionability provisions of the TPA, which were originally confined to transactions involving goods or services ordinarily acquired for personal, domestic or household use (essentially consumer transactions), have recently been extended to cover commercial transactions.⁴⁸

9. *Is there a need for legislative control over clauses excluding the operation of the implied terms in commercial sale of goods contracts? If so, what form should this control take?*

⁴⁵ *Contracts Review Act 1980* (NSW) s 6(2).

⁴⁶ J Goldring, J L Pratt and D E J Ryan *The Contracts Review Act* (NSW) (1981) 4 UNSWLJ 1, 6.

⁴⁷ *Sale of Goods Issues Paper* (IP 5, 1988) 32-33.

⁴⁸ TPA s 51AA.

Chapter 4

IMPLIED TERMS RELATING TO TITLE

1. INTRODUCTION

4.1 At common law, the mere act of selling goods did not carry with it a warranty that the seller had title to the goods or a right to sell them. Such a warranty had either to be express, or raised by usage of trade. (There was an implied undertaking that the seller did not know he had no right to sell.¹)

4.2 Section 12 of the SGA has extended the protection afforded to the buyer at common law by implying an undertaking by the seller that he has a right to sell the goods. In addition, the seller impliedly undertakes that the buyer will enjoy undisturbed possession of the goods after sale and that the goods are free from any encumbrance in favour of a third party of which the buyer is unaware. As with the other implied terms, the seller is strictly liable, knowledge and fault being irrelevant.

4.3 Section 12 provides:

"In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is, -

- (I) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:
- (II) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- (III) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

¹ Benjamin 155.

2. IMPLIED CONDITION AS TO TITLE

(a) An implied condition

4.4 It has been described as "anomalous"² that the SGA should characterise the implied term with respect to the seller's title as a condition, whereas the implied terms of quiet possession and freedom from encumbrances are only treated as warranties. The implication seems to be that a breach of the latter terms will be less prejudicial to the buyer than a breach involving title, but this may not always be the case. One solution would be to eliminate the condition/warranty distinction in favour of a regime where the consequences of the breach determine the remedy.³ Such an approach would be a radical one, and as previously mentioned,⁴ consideration should be given to whether it should be undertaken in isolation from other legislation.

4.5 The alternative is to leave this dichotomy undisturbed, drawing some comfort from the fact that a breach of the implied term as to title will in many cases subsume breaches of the other implied terms in section 12, and will in many more cases have very serious consequences for the buyer. The condition/warranty distinction remains in the corresponding sections of the United Kingdom *Sale of Goods Act 1979*, the TPA and the FTA.⁵

10. *Should the implied undertaking as to title be retained as a condition, while the implied terms of quiet possession and freedom from encumbrances remain as mere warranties?*

(b) Conditional sales

4.6 The Ontario Law Reform Commission has criticised section 12(1) for not providing adequate protection for a buyer in the case of a conditional sale or hire-purchase agreement where title is transferred at some point after the buyer obtains possession. The subsection could mean that until the buyer discharges all his obligations and acquires property in the goods the buyer is not entitled to complain about a defect in the seller's title.

² OLRC Report (1979) 195.

³ See para 3.6 above.

⁴ See para 3.9 above.

⁵ *Sale of Goods Act 1979* (UK) s12; TPA s69; FTA s36.

4.7 The Ontario Law Reform Commission has recommended the insertion of a new provision to the effect that where the seller retains a security interest in the goods, the implied undertaking as to title takes effect when the goods are delivered to the buyer.⁶ Section 12(1) of the United Kingdom *Sale of Goods Act 1979* contains no such qualification, nor do the equivalent sections in the TPA or FTA.⁷ This may in part be due to the fact that the English courts implied a term at common law that the owner has title at the time he delivers the goods to the hirer.⁸

11. *Where a seller retains a security interest in the goods, should the implied condition as to title take effect when the goods are delivered to the buyer, rather than at some later stage when property passes to the buyer?*

(c) Meaning of "contract of sale" in section 12

4.8 The definition of a contract of sale in section 1(1) of the SGA is "a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer". Where the seller is not the owner and therefore can neither transfer nor agree to transfer the property in the goods, there is an argument that this is not a contract of sale and therefore the implied condition as to title may not apply. This argument may be quickly disposed of. First in other parts of the SGA, a purported sale may be a "sale"⁹ and secondly, authorities support the extended meaning of "contract of sale" in contracts relating to the sale of goods. *Rowland v Divall*¹⁰ provides a good example. The plaintiff bought a car from the defendant and later sold it to a third party. It was later discovered that the defendant had bought the car from someone who had no title and therefore the third party had to surrender the car to the true owner, recovering the purchase price from the plaintiff. The plaintiff sought to recover its purchase price from the defendant on the ground of a total failure of consideration. The English Court of Appeal found that there had been a total failure of consideration. In addition, the Court found that the implied condition as to title had been breached by the defendant because it was unable to transfer the property in the car to the plaintiff.

⁶ OLRC Report (1979) 196.

⁷ TPA s 69(1)(a); FTA s 36(1).

⁸ See eg *Karflex Ltd v Poole* [1933] 2 KB 251; *Warman v Southern Counties Car Finance Corporation Ltd* [1949] 2 KB 576.

⁹ See eg SGA ss 21-25 dealing with exceptions to the "nemo dat" rule (*nemo dat quod non habet*: no one can give a better title than he possesses).

¹⁰ [1923] 2 KB 500.

(d) Right to sell

4.9 The Ontario Law Reform Commission emphasised that the condition will only be satisfied if the seller has a "right to sell" the goods - a mere power to pass good title will not suffice to satisfy the condition. Under the exceptions to the *nemo dat* rule¹¹ a seller, although having no right to sell goods because he is not the owner, may nevertheless have power to pass a better title than he has. A dealer who has sold goods and thereby transferred title but remains in possession may effectively sell them to a third party whose title will prevail over that of the first buyer.¹² The seller, however, would not be able to resist a claim by the second buyer under section 12(1), since the *nemo dat* exceptions were intended to provide protection for innocent buyers rather than act as a shield for unscrupulous sellers.

3. IMPLIED WARRANTY OF QUIET POSSESSION

4.10 It was originally thought that the warranty that the buyer shall have and enjoy quiet possession of the goods was redundant in view of the implied condition as to title.¹³ Decisions have shown that this warranty has a wider ambit than the implied condition as to title. In the case of *Microbeads AG v Vinhurst Road Markings Ltd*¹⁴ it was held that the warranty not only applied at the time of sale but also subsequently, whereas the implied condition as to title only applied at the time of sale. In this case, at the time of the sale of a machine a patent application had been made by a third party, but both the buyer and the seller were unaware of this. Two years later, the patentee made a claim. The buyer was unable to rely on the implied condition as to title, because it only had to be satisfied at the time of sale, but was successful in the plea of breach of implied warranty of quiet possession.

4.11 The extent of the warranty is not entirely clear. The effect of the above decision has been regarded as imposing too heavy a burden on the seller, with the warranty in theory being for an indefinite period of time in favour of the buyer.¹⁵ One solution proposed is that only claims existing up to the time of delivery should be allowed.¹⁶ Another means of lessening the seller's burden is through the use of the qualification at the beginning of section 12,

11 SGA ss 21-25; for "nemo dat" see fn 9 above.

12 SGA s 25(1).

13 Sutton 242.

14 [1975] 1 WLR 218.

15 See NSWLRC WP (1975) para 12.10.

16 Ibid.

"unless the circumstances of the contract are such as to show a different intention". It would be up to the seller to prove an intention that his liability would be discharged after a reasonable time.¹⁷

4.12 Another view is that as between two innocent parties, the seller and the buyer, it is the seller who should absorb the loss. Just as the seller would be responsible for any hidden defects in goods of which he was unaware, so he should also be responsible for any interference with the buyer's possession. According to this view, the wording of the warranty is satisfactory.¹⁸

12. *Is there a need for clarification of the duration of the implied warranty of quiet possession?*

4. IMPLIED WARRANTY OF FREEDOM FROM ENCUMBRANCES

(a) Utility

4.13 The need for this implied warranty is questionable given that it is difficult to envisage undisclosed charges or encumbrances that will not also involve interference with the buyer's quiet possession.¹⁹

4.14 It has also been regarded as having little practical significance, since a charge can only exist in equity or by statute and will therefore usually be overridden by sale to a purchaser without notice.²⁰

4.15 The Ontario Law Reform Commission nevertheless has recommended its retention on the ground that it does no harm and may serve a "useful residual purpose".²¹ It is however unclear what this "residual purpose" is.

¹⁷ Sutton 244.

¹⁸ OLCRC Report (1979) 197. The warranty will not however extend to every post-delivery interference with the buyer's possession.

¹⁹ OLCRC Report (1979) 197.

²⁰ Goode 242.

²¹ OLCRC Report (1979) 197.

(b) Definition of charge, encumbrance

4.16 No difficulties have been caused by the fact that there is no definition of "charge" or "encumbrance" in the SGA. In line with its recommendation about the implied condition as to title, the Ontario Law Reform Commission has proposed the addition of the term "security interest" to "charge or encumbrance" to protect the buyer against a prior seller's reservation of title interest, so ensuring that it falls under the warranty.²²

(c) Time when warranty is operative

4.17 The wording of the warranty, "the goods shall be free", suggests that it only begins to run after property has passed. This is in contrast to the corresponding provision in the United Kingdom *Sale of Goods Act 1979* which activates the warranty from an earlier time, namely from the time of the agreement. It states that there is an implied warranty that the "goods are free, and will remain free until the time when the property is to pass . . .".²³ The reason for the United Kingdom formulation is difficult to comprehend, since goods may be unascertained, owned by a third party or even not in existence at the time of the agreement.²⁴ The Ontario Law Reform Commission has therefore recommended that it be made clear that this warranty is only operative from the time property passes and suggests that it read simply that ". . . the goods shall be delivered" free.²⁵ The equivalent provision in the TPA and FTA follows the United Kingdom *Sale of Goods Act 1979*, using both the present and future tenses.²⁶

13. *Should the implied warranty of freedom from encumbrances be retained? If so, should it be expressed to be operative only from the time when property passes or from the earlier time when the contract is made?*

5. EXCLUSION OF IMPLIED TERMS AS TO TITLE

4.18 The opening words of section 12, "unless the circumstances of the contract are such as to show a different intention . . ." suggest that the seller is able to contract out of these implied terms. Section 54 of the SGA also expressly allows any implied terms to be negated or varied. The definition of a contract of sale in section 1(1) would seem to indicate otherwise:

²² Id 198.

²³ S 12(2)(a) (emphasis added).

²⁴ Benjamin 169; OLRC Report (1979) 198.

²⁵ OLRC Report (1979) 198.

²⁶ TPA s 69(1)(c); FTA s 36(1)(c).

if a seller transfers or agrees to transfer the property in goods, he cannot at the same time negate this undertaking by disclaiming his title obligations.

4.19 The lack of certainty surrounding the seller's legal right to exclude these obligations was addressed by the English and Scottish Law Commissions. They saw no justification for excluding the implied condition and warranties imposed by section 12 "save where it is clear that the seller is purporting to sell only a limited title".²⁷ Even in the case of limited titles, it was recommended that the seller should not be allowed to exclude entirely the warranties of quiet possession and freedom from encumbrances. This view is reflected in sections 12(3), 12(4) and 12(5) of the United Kingdom *Sale of Goods Act 1979*. In cases where there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third party may have, there are implied warranties that all charges and encumbrances known to the seller have been disclosed to the buyer and that the buyer's quiet possession should not be disturbed by the seller, the third party or any person claiming under them. Section 6(1)(a) of the *Unfair Contract Terms Act 1977* prohibits the exclusion of any of the implied undertakings in section 12, in both consumer and non-consumer sales.

4.20 Section 12 of the Western Australian SGA contains no provisions equivalent to those concerning sale of a limited title in section 12(3)-(5) of the United Kingdom Act. However, equivalent provisions to sections 12(3)-(5) are included in the TPA and FTA.²⁸ The Ontario Law Reform Commission recommended the inclusion in the revised Ontario Act of a provision comparable to section 12(3) but did not support the notion of the seller being unable to exclude his implied title obligations. In its view, in non-consumer sales which were governed by the Ontario *Sale of Goods Act*, the seller should be able to exclude or vary any implied terms (subject to an overriding test of unconscionability).²⁹

14. *Should there be a provision prohibiting the exclusion of the implied terms as to title and/or should more limited warranties apply when a seller intends to transfer something less than absolute title?*

²⁷ UK First Report (1969) para 17.

²⁸ TPA s 69(3); FTA s 36(3).

²⁹ OLCRC Report (1979) 200.

Chapter 5

THE IMPLIED CONDITION THAT GOODS CORRESPOND WITH THEIR DESCRIPTION

1. INTRODUCTION

5.1 Section 13 of the SGA provides:

"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

5.2 On its face, this section appears self evident, even superfluous to the SGA, although it has been described as "one of the most troublesome provisions of the Act".¹

2. WHY "IMPLIED"?

5.3 A question that immediately arises is why is the condition described as "implied"? Goode² is critical of the draftsman for thereby according this provision a rank similar to the provisions of fitness for purpose and merchantable quality³ as terms implied by law, whereas the duty to supply goods of the contract description is "a *factual* and *express* undertaking". The New South Wales Law Reform Commission recommended that the equivalent of this section in the New South Wales *Sale of Goods Act* (section 18) be phrased in terms of an express warranty⁴ since any description given to goods by the seller may be an express term of the contract. In this the Commission drew on section 12 of the American *Uniform Sales Act (1906)*, precursor to the *Uniform Commercial Code (1962)* which adopted a similar approach in section 2-313(1). Concurrence is found on this point in the Report of the Ontario Law Reform Commission on the *Sale of Goods in 1979*. That Commission remarks on the anomaly of describing the obligation as an implied condition when, as is usually the case,

1 Benjamin 454.

2 Goode 236.

3 Para 6.1 below.

4 NSWLRC WP (1975) 176-177.

description forms an express term of the contract.⁵ The English and Scottish Law Commissions admitted the incongruity, but felt it was harmless and served the useful purpose of making it clear the term was a condition, or essential term, as opposed to a warranty. Because descriptive terms are not expressly made conditions, the use of the word "implied" was not intended to negate the express obligation to supply the thing described but rather to make the description a condition of the contract by implication of law.⁶

5.4 Although the English and Scottish Law Commissions regard the use of the word "implied" in this context as "harmless", the danger exists that in so classifying the condition, it could be regarded as excludable in the same way as the implied terms of merchantable quality and fitness for purpose.⁷ Under section 54 of the SGA, "where any . . . duty . . . would arise under a contract of sale, by *implication of law*, it may be negated or varied by express agreement . . . between the parties . . .". This could lead to the absurd situation where a seller expressly promises to supply goods of a particular description but at the same time negates any liability for supplying non-conforming goods.⁸ For this reason the courts have recognised that correspondence with description is qualitatively different from the implied conditions of merchantable quality and fitness for purpose, in that it is a fundamental obligation which will not easily be excluded by an exemption clause.⁹

5.5 Although the word "implied" is retained in equivalent sections in the TPA¹⁰ and the FTA,¹¹ the condition (along with the other implied terms) cannot be excluded.¹² This is part of a general legislative philosophy and strategy directed towards redressing the disparity in bargaining power between business and consumer.¹³ In the case of these two statutes, the word "implied" is indeed "harmless".

⁵ OLRC Report (1979) 201-202.

⁶ UK First Report (1969) para 21. But see Atiyah 127.

⁷ See SGA s 14(ii), s 14(i).

⁸ The difference between this implied condition and those of merchantable quality and fitness for purpose is that in the case of the latter, express statements by the seller about the quality and fitness of the goods will be unaffected by any exclusion of the implied terms. In the case of correspondence with description, because the express statements are by the section deemed implied, they are able to be excluded.

⁹ See *Vigers Bros v Sanderson Bros* [1901] 1 KB 608.

¹⁰ S 70.

¹¹ S 37

¹² TPA s 68; FTA s 34.

¹³ Commonwealth of Australia Parliamentary Debates Senate Vol S 60 540-541 per Senator Lionel Murphy: "In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor* - meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to

5.6 There is a case for recommending the substitution of the word "express" for "implied" in section 13 of the SGA. Although some cases have highlighted the special nature of this provision, the cases do not rule out the possibility of exclusion, nor do they detail under what circumstance the provision could be excluded. Making this an express condition would allow it to be excluded only in very rare circumstances. A seller would be most unlikely to promise expressly that his goods were of a particular description while at the same time denying it. The question that must be answered, and it is one of philosophy, is whether commercial buyers should be given more protection than they already have in their dealings with commercial sellers. More specifically, should it be assumed that in commercial sales the parties are on equal footing and can make whatever agreements they choose, in which case the word "implied" causes no problem; or should it be legislatively acknowledged that even the commercial buyer has a fundamental right to receive goods which conform to the seller's description of them, in which case "implied" should be deleted in favour of "express"?¹⁴

5.7 Another means of highlighting the importance of section 13 would be specifically to exempt it from the possibility of exclusion under section 54.

15. *Should the uniqueness of section 13 be recognised by -*

- (a) *substituting the word "express" for "implied" in section 13; or*
- (b) *specifically exempting it from exclusion, even by agreement, under section 54;*
or
- (c) *relying on the common law approach?*

persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection."

¹⁴ There is a clear trend in recent amendments to the TPA in the area of unconscionability to extend protection originally only available to private consumers to include business. S 51AA of the TPA (inserted by Act No 222 of 1992) allows the Trade Practices Commission to have an involvement in unconscionable business conduct.

3. SALE BY DESCRIPTION

(a) Sales of specific goods and sales by description

5.8 The form of section 13 of the SGA is identical to section 13 of the United Kingdom *Sale of Goods Act 1893*¹⁵ and can only be fully understood by reference to history. In the 19th century, there existed a dichotomy between sales of specific goods (those whose identity was known) and sales by description (where the goods were unascertained). In the case of specific goods, because the buyer could inspect them and thus use his own judgment as to whether to buy them, the principle of *caveat emptor* applied: the seller was not liable for any undisclosed defects, that is, no implied terms as to quality applied. Protection was afforded originally only by any express warranties given by the seller. By contrast, where there was a sale by description, and the buyer was necessarily unable to inspect the goods, the seller was regarded as promising that the goods conformed to their description (and were of merchantable quality). The two types of sale were considered mutually exclusive.¹⁶ The draftsman of the United Kingdom *Sale of Goods Act 1893* apparently sought to enshrine this characteristic of sales by description in section 13.¹⁷ However, even before the enactment of the United Kingdom *Sale of Goods Act 1893*, there were some cases which interpreted the concept of sale of goods by description widely and not exclusive of sales of specific goods.¹⁸ This was to avoid the harsh incidents of a sale of specific goods, particularly the fact that there was no implied warranty of merchantable quality (because this also depended on there being a sale by description),¹⁹ and that once a contract was made, specific goods could not be rejected.²⁰ Under the Act, recognition was given to the fact that some sales of specific goods could be sales by description: section 14(2) refers to the possibility of goods being examined (ie specific goods), while at the same time being bought by description.

15 In 1973, s13 of the UK Act was amended by the *Supply of Goods (Implied Terms) Act 1973* (UK), implementing the recommendation of the UK First Report (1969) para 24.

16 *Jones v Just* (1868) LR 3 QB 197; *Beer v Walker* (1877) 37 LT 278; *Smith v Baker Son, & Death* (1878) 40 LT 261.

17 For "by definition specific goods are those identified and agreed upon at the time of the contract [s 61(1)] and if description be taken to mean that which earmarks or identifies in a broad sense, then on a contract for sale of specific goods non-correspondence with description ought logically to be impossible": Goode 246.

18 In some cases, sales were treated as by description even though goods were in existence and identified and therefore specific: see *Gardiner v Gray* (1815) 4 Camp 144, 171 ER 46; *Wieler v Schilizzi* (1856) 17 CB 619, 139 ER 1219. Stoljar comments that *Heyworth v Hutchinson* (1867) LR 2 QB 447 makes nonsense of the distinction between a sale by description and one of specific goods: S J Stoljar *Conditions, Warranties and Descriptions of Quality in Sale of Goods - II* (1953) 16 MLR 174, 176.

19 See para 6.49 below.

20 See SGA s11(3) and s18 Rule 1.

5.9 Since the enactment of the United Kingdom *Sale of Goods Act 1893*, the concept of sale by description has been widened by the courts to embrace sales where the goods are displayed in front of the buyer,²¹ as well as where they are examined by the buyer.²² The exclusive dichotomy between a sale of specific goods and goods sold by description ceased to exist. Section 2 of the *Supply of Goods (Implied Terms) Act 1973* gave legislative effect to these decisions by inserting the following provision in section 13:

"A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer".²³

The equivalent provision is also included in section 70(2) of the TPA, section 37(2) of the FTA and corresponding legislation in the Northern Territory.²⁴ This insertion represented no radical change in the law but rather the entrenching in a statute of what was already accepted in the case law.

5.10 A fairly uncontroversial case could be made for the insertion of such a provision in section 13 of the SGA. This would have the dual effect of both clarifying the law on sales by description as well as bringing about greater parity in this provision between the SGA, the FTA and the TPA.

16. *Should there be legislative recognition of the fact, already accepted in the case law, that a sale of specific goods can also be a sale by description?*

17. *Specifically, should a provision in the same terms as section 13(3) of the United Kingdom Sale of Goods Act 1979 ("A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer") be inserted in section 13 of the Western Australian SGA?*

(b) What is a sale by description?

5.11 The New South Wales Law Reform Commission makes the point that the provision discussed in paragraph 5.9 above still leaves unresolved the question as to what constitutes a

²¹ *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387.

²² *David Jones Ltd v Willis* (1934) 52 CLR 110.

²³ See now *Sale of Goods Act 1979* (UK) s 13(3).

²⁴ *Consumer Affairs and Fair Trading Act 1990* (NT) s 63.

sale by description: the section does not say that in every case where goods are "exposed for sale", there is a sale by description.²⁵

5.12 The New South Wales Law Reform Commission suggests that the important thing is not whether the buyer selects goods from a display, but whether the parties contract by reference to a description of the goods, no matter how it is conveyed - whether it be by spoken or printed words,²⁶ or conduct.²⁷ The English and Scottish Law Commissions recognised these problems but felt they existed more in theory than practice and therefore recommended only the change that is now embodied in section 13(3) of the United Kingdom *Sale of Goods Act*.²⁸

5.13 The following provision was proposed by the New South Wales Law Reform Commission:

"In a contract for the sale of goods there is an express warranty by the seller that the goods delivered under the contract will correspond with any description by which they are sold".²⁹

For this they drew on the UCC section 2 - 313(1).

5.14 This proposal is neater and more encompassing than section 13 and its subsections in the United Kingdom *Sale of Goods Act 1979*. There is no necessity to determine whether there has or has not been a "sale by description"; rather it is necessary simply to find a description, whether it be verbal, written or perhaps derived from conduct or context.³⁰

²⁵ NSWLRC WP (1975) 175.

²⁶ A possible interpretation of *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 and *David Jones Ltd v Willis* (1934) 52 CLR 110 is that there must be either spoken or written words: NSWLRC WP (1975) 174.

²⁷ Although there is no reported case where description has been derived solely from conduct or context and it has been held to be a sale by description, Bridge gives the example of a diamond sold in a jewellery store, where no words are used, as a sale by description because of the context. Obviously some words would be required, for example the customer saying "I'd like to buy this etc.", but the fact that the article was a diamond would be drawn from its position in the shop (amongst other precious gems), its price etc: Bridge 436.

²⁸ UK First Report (1969) para 24. The Commissions felt that no amendment was necessary on the basis that the section had in practice caused little difficulty. See Bridge 434-436; Benjamin 459; NSWLRC WP (1975) 176.

²⁹ NSWLRC WP (1975) para 10.17.

³⁰ Classifying the last two as "description" could still be contentious.

5.15 Could a similar provision be adopted in the Western Australian SGA? Although its adoption would lead to a greater divergence between the SGA on the one hand and the TPA and the FTA on the other, an argument could be mounted that as this part of the SGA relates to commercial transactions (not consumer ones), the divergence from the other legislation is irrelevant. To counter this, it could be argued that although change should not be objected to simply because it will lead to a lack of conformity with other legislation, where that change makes little practical difference it should be avoided.

18. *Is there a need to retain the concept of a sale by description in section 13? Should the New South Wales Law Reform Commission's proposal, or a modified version of it, be adopted in order to obviate the need for determining whether there has been a sale by description, while still retaining the need for goods to comply with their description?*

4. ASCERTAINING THE DESCRIPTION

5.16 Once a sale by description is identified, the words which form part of the description must be determined, so that it may be ascertained whether the goods fail to correspond with the description. Since *Ashington Piggeries Ltd v Christopher Hill Ltd*³¹ (the "herring meal" case) and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*,³² it has been clear in the case of both specific and unascertained goods that the words which identify the goods concerned are part of the description – identify in the sense of naming a substantial ingredient, the essence of the goods. In *Ashington Piggeries*, the appellants were mink breeders who approached the respondents, animal feeding stuff compounders, to compound feed for their mink (in accordance with a formula supplied by the breeders). One of the ingredients in the formula was herring meal. A particular chemical reaction (which produced DMNA) in the herring meal rendered it highly toxic to mink (unbeknown to either party) and substantial numbers of mink died after eating the feed. The appellants alleged there was a breach of section 13 of the *Sale of Goods Act 1893* because the herring meal did not correspond with its description in the contract as it was contaminated with DMNA. This argument was rejected by a majority of the House of Lords who said there was no difference in substance between the herring meal in fact and the herring meal in the description – the defect was a matter of quality or condition rather than one of identity or description. In *Reardon Smith* a charterparty contract referred to a vessel being constructed as one to be built at Osaka with the yard or hull number 354. The vessel was in fact built elsewhere (Oshima 8) and bore a different yard or hull number, 1004.

³¹ [1972] AC 441.

³² [1976] 1 WLR 989.

Its physical attributes complied with requirements under the contract. On completion, the charterers sought to reject the vessel on the ground that it did not correspond with its contract description in that it was Oshima 1004 and not Osaka 354. The House of Lords found against the charterers, holding that it was only where a particular item in a description constituted a substantial ingredient of the identity of the thing sold that it was to be treated as a condition. From the case law, a difference between unascertained and specific goods has emerged in that in the former case, the details of the description of the goods assume greater importance than in the case of the latter.³³

5.17 This is in contrast to words of quality. Although the dividing line is sometimes difficult to draw, that part of the description which is determined to be qualitative rather than essential in any particular case will probably form part of an express warranty or condition and be relevant to the question of whether the goods are of merchantable quality.

5.18 There has never been any suggestion or recommendation that there be legislative clarification of what words are words of description. This may be because to do so would be to remove the judicial flexibility necessary in dealing with different cases.

19. *Should there be some legislative clarification of the meaning of words of description?*

5. POSSIBLE RESTRICTION TO SALES IN THE COURSE OF THE BUSINESS

5.19 As it stands, section 13 is not restricted to sales in the course of business.³⁴ Should it be so restricted? The corresponding condition in the TPA and FTA is so restricted. The equivalent condition in the United Kingdom *Sale of Goods Act 1979* is not, nor are various Canadian provisions, for example, the Ontario *Sale of Goods Act 1990*.

5.20 Although the implied conditions of merchantable quality and fitness for purpose are restricted to business sales, there would seem to be no logical reason for removing the liability of a private seller who sells goods which do not correspond with their description, simply because he is a private seller. The rationale for the business requirement in the two other

³³ Benjamin 456 describes s13(1) as having been interpreted to cover two types of breach: failure to secure exact conformity with the contract description of goods, for example if they are packaged: see *Re Moore & Co Ltd and Landauer & Co* [1921] 2 KB 519, and second, a total failure to perform the contract by supplying goods of a different kind, for example, as in *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 KB 17 (supplying a second hand car instead of a new one).

³⁴ This has been interpreted widely, see 6.54 below.

implied conditions is clear: the common thread of reasonable reliance by a buyer on a commercial seller (reputation, know-how, experience) as opposed to a layman. As far as the description of goods is concerned, it would seem not unreasonable for a buyer to rely on a description of goods given by the owner, whether a commercial or private seller. The New South Wales Law Reform Commission in 1975 recommended against the restriction of the New South Wales equivalent of section 13 to business sales.³⁵ At that time, the implied terms of the New South Wales *Sale of Goods Act 1923* also covered consumer sales,³⁶ where the likelihood of a private sale was greater than in a non-consumer sale. It could be argued that this was a significant factor in the New South Wales Law Reform Commission's recommendation. The argument would continue that since the implied terms of the SGA, specifically section 13, now cover mostly transactions where the buyer at least, and usually also the seller, are engaged in commerce, a commercial buyer who does buy from a private seller should be in no need of the protection of section 13 because of the buyer's superior bargaining power. Therefore section 13 should be restricted to sellers who sell in the course of business. The strength of this argument diminishes in the light of the fundamental nature of section 13 - an owner, whether a private or commercial seller, is surely able to be relied on for something as basic as the description of his goods.

5.21 There appear to be no compelling reasons for adding any business qualification to section 13.³⁷

20. *Should section 13 be restricted to sellers who sell in the course of business, particularly in view of the fact that most buyers who make use of section 13 would be commercial ones and therefore unlikely to be disadvantaged by a private seller's misdescription, or should section 13 remain unrestricted in its application because of the fundamental nature of description?*

6. REPEAL?

5.22 There are views that this implied condition should be deleted altogether from the SGA. Bridge suggests that its function could be performed by the equivalent to section 27, the seller's basic delivery obligation.³⁸ However, there is no right of repudiation for breach of

³⁵ NSWLRC WP (1975) para 10.16.

³⁶ As well as non-consumer sales. This was prior to the passing of the *Fair Trading Act 1987*(NSW).

³⁷ There is a strong case to be made for the business restrictions to be removed from the equivalent section (s37) of the FTA since private sales are more likely than under s13 of the SGA.

³⁸ Bridge 450-451.

this obligation, damages being the only remedy available³⁹ and in addition the generality of section 27 may not always be adequate to cover cases of nonconformity with description.

5.23 The Ontario Law Reform Commission, although it recommended the elimination of the distinction between warranties and conditions, was of the view that the implied term of correspondence with description should be retained because of its description "constitute[s] a part of the contract, without the buyer having to show any particular reliance on the descriptive terms or, [in other words,] that he intended to accept the offer implicit in the seller's terms".⁴⁰ Although reliance on the description by the buyer is an essential ingredient of a contract of sale by description, proof of reliance is not onerous and will normally be assumed.⁴¹

5.24 Goode is of the view that section 13 is not indispensable and moots the possibility of dropping it (recognising that a contract description is anyway an express term) in favour of a general provision entitling the buyer "to reject, and/or to pursue other remedies for breach of contract, where as the result of the goods differing in a material respect (whether as to description, quality, quantity or otherwise) from those which the buyer contracted to buy the commercial value of the bargain to the buyer is substantially impaired".⁴² All "material" breaches of express undertakings, whether they concern identity or attributes, would entitle the buyer to contractual remedies, and it would be the consequences of the breach that matter, rather than any *a priori* classification of the seller's undertakings.

5.25 In effect if this kind of provision were adopted, the problem of distinguishing between identity and attributes would be being exchanged for the problem of determining when a material breach occurred. Given the fundamental nature of the implied term of correspondence with description, a case can be made for its retention in its specific form.

21. *Should the implied condition that goods correspond with their description be retained?*

39 SGA s 49.

40 OLRC Report (1979) 203.

41 Goode 253.

42 Id 255.

Chapter 6

THE IMPLIED CONDITION OF MERCHANTABILITY

1. INTRODUCTION

6.1 Section 14 of the SGA provides:

"Subject to the provisions of this Act, and of any Statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:-

...

(II) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed".

6.2 Although the equivalent of this provision has now been amended in many other jurisdictions these amendments generally have not constituted substantive changes in the law. Rather they have simply reflected the position that existed in the case law.¹ Some changes have clarified uncertainties that existed in the authorities.

2. THE CONCEPT OF MERCHANTABILITY

6.3 This aspect of the provision has generated (unsurprisingly) the most discussion. There is no definition of this concept in the SGA, and until now it has been left to the courts to interpret it. It has been statutorily defined in other jurisdictions.²

(a) The judicial definition of merchantable quality

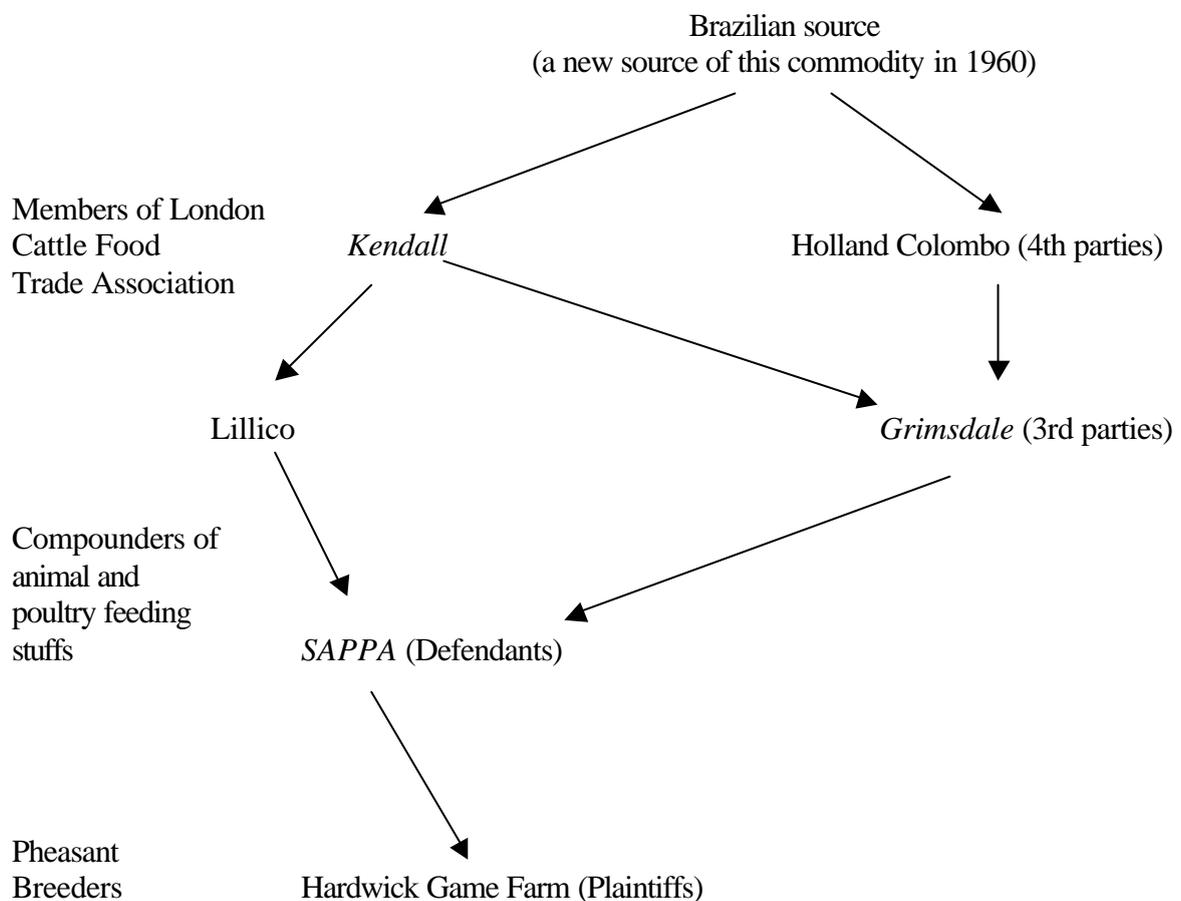
6.4 The meaning of merchantable quality was exhaustively discussed in *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd.*³ The plaintiffs bought from the defendants animal

1 UK Report (1987). This report resulted in the enactment of the *Sale and Supply of Goods Act 1994* (UK) which, inter alia, amended s 14(2) of the *Sale of Goods Act 1979* (UK).

2 TPA s66(2); FTA s33(2); UCC s 2-314(2); Canadian *Uniform Sale of Goods Act 1981* s44(1).

feeding stuff for their pheasants which turned out to be contaminated due to the presence of a poison in the Brazilian ground nut extractions, an ingredient in the feeding stuff. As a result many of the plaintiff's young birds died or grew up stunted. The defendants had bought their supplies from third parties who in turn had bought them from fourth parties. The defendants were held liable to pay damages to the plaintiffs. The defendants claimed those damages from one of the third parties who in turn claimed damages from one of the fourth parties.

6.5 The chains of transactions were as follows, commencing with the original Brazilian sellers at the top; the arrows indicate sales.



The chain which was effectively the subject of the appeals before the House of Lords was the chain Kendall - Grimsdale - SAPPA.

6.6 The third and fourth parties (Grimsdale and Kendall) were held not to be liable under section 14(2) of the United Kingdom *Sale of Goods Act 1893* on the ground that the ground nut extraction was not of unmerchantable quality. This was because the extraction was

³ [1969] 2 AC 31.

suitable for making up animal feeding stuff for cattle and other animals. It was only harmful to poultry.

6.7 In the course of discussion by the House of Lords on merchantable quality, two different tests emerged: a "usability" test, according to which goods must be usable for at least one of their normal purposes to be of merchantable quality, and an "acceptability" test. The former test was based on a standard laid down by Lord Wright in *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd*⁴ that goods were not of merchantable quality when they were of no use for any purpose for which such goods would normally be used. The latter test had its origin in two earlier cases, *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd*⁵ and *Australian Knitting Mills Ltd v Grant*.⁶ Farwell J in *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* laid down that an article was of merchantable quality where it "is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again".⁷

6.8 This test was later varied and amplified by Dixon CJ in *Australian Knitting Mills Ltd v Grant*⁸ when he said that goods were of merchantable quality if they were in "such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods".⁹

(b) Should there be a statutory definition?

6.9 It could be argued that the SGA (including section 14(II)) has worked well in practice. There has been comparatively little litigation over the meaning of its terms and therefore there should be little, if any, legislative tampering with it.¹⁰

⁴ [1934] AC 402, 430.

⁵ [1910] 2 KB 831.

⁶ (1933) 50 CLR 387.

⁷ [1910] 2 KB 831, 841.

⁸ (1933) 50 CLR 387, 418.

⁹ It was made clear in *B S Brown & Son Ltd v Craiks Ltd* [1970] 1 All ER 823 that even though goods supplied under a contract may be commercially saleable, they will not be merchantable if they are only saleable at a price *substantially* lower than the contract price.

¹⁰ UK Report (1987) 4.

6.10 Bridge contends that merchantable quality should be left to judicial exposition since its definition is so elusive and dependent on the type of goods and market. In his opinion, there is also some danger of its being stifled if the "restrictive canons of statutory interpretation are brought to bear on" it.¹¹

6.11 As a counter, it could be argued that whereas "merchantable" was perhaps once clearly understood by merchants and traders (and was therefore left undefined in the SGA originally), as we move further away from the 19th century, this is no longer the case. The word has fallen out of general use and become virtually obsolete. Consequently, its meaning has become less certain.¹²

(c) United Kingdom definition of merchantable quality

6.12 Section 14(6) of the United Kingdom *Sale of Goods Act 1979*, prior to its amendment in 1994, provided:

"Goods of any kind are of merchantable quality within the meaning of subsection (2) above 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 the other relevant circumstances."

6.13 This definition was introduced into the Act in 1973,¹³ implementing the recommendation of the English and Scottish Law Commissions in 1969.¹⁴ It is consistent with the UCC.¹⁵ It is also incorporated in the TPA and FTA.¹⁶

6.14 This definition is slanted towards the fitness for purpose test or "usability" test, as enunciated by Lord Wright in *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd*,¹⁷ who said that goods were not of merchantable quality when they were of no use for any purpose for which such goods would normally be used.¹⁸ A variation on the "acceptability

¹¹ Bridge 501.

¹² NSWLRC WP (1975) 130.

¹³ By the *Supply of Goods (Implied Terms) Act 1973* (UK) s 7(2).

¹⁴ UK First Report (1969) para 43.

¹⁵ S 2-314(2).

¹⁶ See fn 2 above.

¹⁷ [1934] AC 402, 430.

¹⁸ See also *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, 76-79 per Lord Reid, 97-98 per Lord Morris of Borth-y-Gest.

test", the other test of merchantable quality developed by the courts, was considered by the Commissions but rejected.¹⁹

(d) Criticisms of the United Kingdom definition

6.15 The statutory definition of merchantable quality has been criticised on a number of grounds.

(i) Inappropriateness

6.16 It has been suggested that the word "merchantable" should not be included at all as it is outmoded and inappropriate.²⁰

(ii) Narrowness

6.17 It has been said that this definition concentrated too much on fitness for purpose and does not make it sufficiently clear that other aspects of quality, such as appearance, finish and freedom from minor defects, are also important.²¹ Does this test cover, for example, the case of a new car delivered to the buyer with an oil stain on the carpet, but still fit for performing its primary function of being driven in comfort and safety?

6.18 The OLRC regarded the usability test as too narrow, in conflict with some decisions, and inconsistent with the statutory definition of "quality" (of goods)²² which is not restricted to functional characteristics.

6.19 In addition, the phrase "as it is reasonable to expect" may have lowered the standard of merchantable quality where a seller is able to establish that certain goods (for example, new cars) can reasonably be expected to possess a number of minor defects on delivery. As the defects that "it is reasonable to expect" increase, the chance of their constituting a breach of contract diminishes. For example in *Millars of Falkirk Ltd v Turpie*²³ a new car was delivered with a slight oil leak. It could have been cheaply repaired. The buyer rejected it on the

¹⁹ See para 6.34 below.

²⁰ UK Report (1987) 8.

²¹ Ibid.

²² SGA s 60(1). "Quality of goods" includes their state or condition.

²³ 1976 SLT (Notes) 66.

ground that it lacked merchantable quality. The court held that the car was of merchantable quality, because *inter alia*, the defect was slight, easily cured and the type of defect was not unusual in new cars when they were delivered.

6.20 However the fact that a defect could be repaired did not prevent it from rendering the goods unmerchantable.²⁴ Hence the position was still unclear as to when defects, no matter how slight, would render goods unmerchantable.

6.21 Benjamin too is aware of these concerns about the statutory definition, both in the commercial and consumer field. This work also notes the criticism of the clause "as it is reasonable to expect" which could lead to a lowering of commercial standards and may "provide a rubric under which the courts can decide that it is not reasonable to expect articles to be delivered in perfect order".²⁵

6.22 On balance, however, Benjamin's view is that the statutory definition while not ideal had sufficient flexibility for a court to reach just decisions on the facts of particular cases. In the author's opinion, there is also enough judicial support for the stance that slightly defective goods could still be regarded as unmerchantable.²⁶ Benjamin cites Goode who noted that "purpose" was not confined to functional use, but also encompassed enjoyment which buyers could reasonably expect from their purchases and this included comfort, aesthetic pleasure, even the admiration of friends.²⁷

(iii) *Purpose or purposes*

6.23 The statutory definition of merchantable quality required goods to be fit for their "purpose or purposes".

6.24 This part of the definition appeared to reverse the formulation of the test in *Henry Kendall*²⁸ and *Cammell Laird*,²⁹ according to which goods were still regarded as merchantable even if unfit for some of their normal purposes.

²⁴ *Jackson v Rotax Motor & Cycle Co* [1910] 2 KB 937; *International Business Machines Co Ltd v Shcherban* [1925] 1 DLR 864; *Rogers v Parish (Scarborough) Ltd* [1987] 1 QB 933.

²⁵ Benjamin 479.

²⁶ Id 460-461.

²⁷ Goode 262.

²⁸ *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31.

6.25 In *Henry Kendall* itself, the groundnut extraction was unsuitable for poultry, one of its normal uses, yet it was still held to be merchantable because it was suitable for cattle. Under the statutory definition it seemed that a different result might be reached.³⁰

6.26 The OLRC welcomed this apparent change and reversal of the rule in *Henry Kendall*, rejecting the NSWLRC's criticism. It felt that in both consumer and non-consumer sales, the burden of warning the buyer that goods were not fit for all their regular purposes should fall on the seller.³¹

6.27 The case of *M/S Aswan Engineering Establishment Co v Lupdine Ltd*³² held that the change of wording in the statutory definition had not altered the previous law, and that goods could still be merchantable though not suitable for all their normal purposes. Lord Denning MR in *Cehave NV v Bremer Handelgesellschaft mbH, The Hansa Nord*³³ said of the statutory definition that it was "the best that has yet been devised",³⁴ accurately reflecting the common law position.

6.28 By contrast the Full Court of the Queensland Supreme Court in *Rasell v Cavalier Marketing (Australia) Pty Ltd*,³⁵ referring to the statutory definition of merchantability in section 66(2) of the TPA, held that it was "unnecessary and undesirable to look to the common law definition of merchantability for the purpose of construing" the statutory definition. The court agreed with the observations made by the Court of Appeal in *Rogers v Parish (Scarborough) Ltd*.³⁶ It was pointed out in that case that the judicial tests, relating as they did to the saleability of goods, were the tests of merchants and were more appropriate to commercial sales. By contrast, the statutory definition was different, focusing on the reasonable objective expectations of the consumer. This definition was not concerned with goods purchased for resale. It was part of a whole remedial regime giving consumers rights and protection which previously were not available.³⁷

²⁹ *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd* [1934] AC 402.

³⁰ NSWLRC WP (1975) 143.

³¹ OLRC Report (1979) 214.

³² [1987] 1 WLR 1.

³³ [1976] QB 44.

³⁴ *Id* 62.

³⁵ [1991] 2 Qd R 323, 348 per Cooper J.

³⁶ [1987] 1 QB 933.

³⁷ See also *Truck Wreckers (1979) Pty Ltd v Waters* (1994) 10 SR (WA) 32.

6.29 If this statutory definition were adopted in the SGA the approaches taken in the *Aswan Case and Rasell v Cavalier Marketing (Australia) Pty Ltd* could both support reliance on the common law tests of merchantability, given that the primary focus of the implied terms of the Act is on commercial transactions. Thus the narrower ambit of "purpose or purposes" would apply, with goods being merchantable as long as they were fit for at least one of their normal purposes.

6.30 If the Ontario Law Reform Commission's approach was the preferred one, with the statutory definition interpreted literally with more of an onus on the seller, some ambiguity could be resolved by the inclusion of the word "every" before "purpose" and the deletion of "or purposes".

(iv) *Durability*

6.31 The statutory definition made no mention of how long the goods should be of merchantable quality.

6.32 The Ontario Law Reform Commission recommended that durability be one of the requirements of merchantable quality. They said that the definition of merchantable quality should require goods to perform satisfactorily for a reasonable length of time, having regard to all circumstances.³⁸ The Ontario Law Reform Commission regarded this as a clarification of the law rather than an innovation.³⁹

6.33 The New South Wales Law Reform Commission⁴⁰ recommended that the time at which the goods should be of merchantable quality, namely the date of delivery to the buyer, should be inserted in the statutory provision. That Commission however was not in favour of the inclusion of a requirement of durability in a provision of the New South Wales *Sale of Goods Act 1923*. It said that the Act should adhere to the generality of the concepts of fitness

³⁸ See OLRC Warranties Report (1972) 37-38 and the revised proposals in OLRC Report (1979) 215-216. Most of the Canadian provinces have enacted consumer protection legislation prescribing an implied warranty of reasonable durability.

³⁹ See eg *Lambert v Lewis* [1982] AC 225. In this case, at 276, Lord Diplock did not doubt that it was a "continuing warranty that the goods will continue to be fit . . . for a reasonable time after delivery . . .". (Although he was referring to the implied condition of fitness for purpose, his words are equally applicable to the implied condition of merchantable quality.)

⁴⁰ NSWLRC WP (1975) 151.

for the buyer's purpose and merchantability. It did support such a requirement in consumer legislation. The rationale for this distinction is unclear.⁴¹

22. *Is the concept of merchantable quality in need of statutory definition?*
23. *Should the definition of merchantable quality introduced into the United Kingdom Sale of Goods Act in 1973 be adopted (as it has been by the TPA and the FTA) with its emphasis on functionality and reasonable buyer expectations? Is there a danger of this definition causing a decline in the quality of goods sold?*
24. (a) *If this statutory definition were adopted, should the word "any" be substituted for "the purpose or" to make clear what is already established at common law, that goods do not have to be fit for all their normal purposes to be of merchantable quality? or*
 (b) *If this statutory definition were adopted, should the word "every" be included before "purpose" to make clear that goods must be fit for all their normal purposes to be of merchantable quality?*

(e) Is there a better definition?

- (i) *The proposed 1968 definition of merchantable quality*

6.34 In their 1968 Working Paper, the English and Scottish Law Commissions suggested that a version of the acceptability test (one of the two definitions of merchantable quality developed by the courts⁴²) be adopted as a statutory definition. The test suggested was "Merchantable quality means that the goods tendered in performance of the contract shall be of such type and quality and in such condition that having regard to all the circumstances, including the price and description under which the goods are sold, a buyer, with full knowledge of the quality and characteristics of the goods, including knowledge of any defects, would, acting reasonably, accept the goods in performance of the contract".⁴³

6.35 This definition was not adopted, being criticised as too complicated and circular⁴⁴ in the sense that it is defining the standard in terms of the buyer's conduct while at the same time

⁴¹ The Law Reform Commission of Hong Kong Report also recommended that there be express reference in the Hong Kong Ordinance to the concept of durability, but only for consumer sales: HKLRC Report (1990) 11. No reasons are given for this limitation.

⁴² See para 6.7 above.

⁴³ UK WP (1968) para 23.

⁴⁴ Even though the OLRC assert that there is no essential distinction between Dixon's test and the present statutory definition: OLRC Report (1979) 211.

using the buyer's conduct to determine if the standard has been met.⁴⁵ Instead, the *Supply of Goods (Implied Terms) Act 1973*⁴⁶ amended the *Sale of Goods Act 1893* so as to adopt a definition of merchantable quality modelled on the other judicial definition - the usability test.

6.36 Bridge however is of the opinion that the definition put forward in the 1968 Working Paper was and is superior to the definition adopted in 1973. He says that the idea of reasonable acceptability is well established in the case law and should not be omitted.⁴⁷

(ii) *The 1994 United Kingdom definition of satisfactory quality*

6.37 In 1994, section 1(1) of the United Kingdom *Sale and Supply of Goods Act* amended section 14 of the *Sale of Goods Act 1979* so as to replace the concept of "merchantable quality" by that of "satisfactory quality". The Act now provides:

"(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

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

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods -

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

⁴⁵ See Salmond J in *Taylor v Combined Buyers Ltd* [1924] NZLR 627, 646.

⁴⁶ S 7(2).

⁴⁷ Bridge 501-502. Bridge is not concerned by the definition's complexity since he says merchantable quality is a complex concept; nor by its circularity since "circular definitions are not unknown to the law; besides they do have the merit of covering the ground well."

(e) durability."

6.38 This implements a recommendation made in the report of the English and Scottish Law Commissions in 1987. The Commissions suggested that there should be a new definition of merchantable quality, consisting of two limbs -

1. a basic principle formulated in general language, referring to description, price and other relevant factors; and
2. a list of aspects of quality, which would not be exhaustive.⁴⁸

(iii) *First limb of the 1994 definition*

6.39 The first limb of the new definition reflects the recommendation of the English and Scottish Law Commissions that the quality of goods sold or supplied under a contract should be such as would be acceptable to a reasonable person, bearing in mind the description of the goods, their price (if relevant) and all the other circumstances, that is, the test turned on what was acceptable to a reasonable person.⁴⁹

6.40 The Commissions preferred their formulation to the former definition of merchantable quality because it moved away from "extreme reliance on 'fitness for purpose' and made it clear that merchantable quality was not confined to functional fitness but extended to minor or cosmetic imperfections. This was so, the Commissions asserted, because a reasonable person would not in general find the standard of goods "acceptable" if they were new and had minor or cosmetic defects.

6.41 The Commissions distinguished between what was an acceptable standard to the reasonable buyer and what were the reasonable buyer's expectations.⁵⁰ They did not think that the latter should form the basis of the test, since this might allow the required standard of quality to decline - if it could be established that goods of a particular type might be expected

⁴⁸ UK Report (1987) 24-27.

⁴⁹ Id 25-26. The Commissions reject the use of the word "good" to denote a quantitative standard as inappropriate, and "proper" as a neutral standard which was meaningless.

⁵⁰ The buyer's expectations are the criterion in the present statutory definition.

to have minor defects, they would still be merchantable even if defective. The test should therefore be based on what was an acceptable standard to the reasonable buyer.

6.42 At first sight the distinction between the two seems very finely drawn, and it would seem logical that expectations would influence acceptability. However, they are conceptually distinct. Simply because it may be commonplace for new cars to have various minor imperfections (expectation), this would not necessarily make them any more acceptable (acceptability).

(iv) *Second limb of the 1994 definition*

6.43 One of the criticisms of the former definition of merchantable quality made by the English and Scottish Law Commissions in 1987 was the heavy emphasis on fitness for purpose to the exclusion of other criteria of quality. The Commissions thought it would be helpful to buyers and sellers to have their attention drawn to a number of matters which make up the quality of the goods. The listed factors would not all be relevant in every case, and would not be exhaustive.⁵¹ The Commissions also thought that although "quality" was already defined in the interpretation section of the Act as including "state or condition",⁵² this should be included in the implied term itself, for clarity and emphasis.

6.44 These recommendations were implemented by the 1994 Act. The *Sale of Goods Act 1979*, as amended, now provides that the quality of goods includes their state and condition, and provides that the following are in appropriate cases aspects of quality -

1. Fitness for all the purposes for which goods of the kind in question are commonly supplied;

Although the Commissions admitted that the former statutory definition was not intended to alter the pre-1973 law, and thus that goods need not be fit for *all* their normal purposes to be merchantable,⁵³ they thought that, as a matter of

⁵¹ UK Report (1987) 27-34.

⁵² *Sale of Goods Act 1979* (UK) s 61(1). The SGA contains the same provision: s 60(1) provides: "In this Act, unless the context or subject matter otherwise requires 'quality of goods' includes their state or condition".

⁵³ This was confirmed in *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1

policy, for goods to be merchantable they should be fit for all their common purposes. The responsibility should be on the seller to indicate otherwise.

2. Appearance and finish;
3. Freedom from minor defects;

The separation of these two aspects was seen as necessary to allow for defects which were not of appearance or finish. The second of these components removes any doubt that goods may be unmerchantable if not free from even small imperfections.

4. Safety;
5. Durability.

6.45 The Commissions discussed durability at some length and recommended that:

1. the requirement of durability should be that goods last a reasonable time, depending on the nature of the goods;
2. following the case law,⁵⁴ a defect which manifests itself some time after supply should be evidence that the goods were not of the appropriate quality at the time of supply, and not at some later time which would place an unacceptably harsh burden on the seller;⁵⁵
3. the requirement of durability should not be a separate term but should be included as an aspect of quality - that is, it should be one of the determinants of whether the goods would be acceptable to a reasonable person.

⁵⁴ See *Crowther v Shannon Motor Co* [1975] 1 WLR 30; *Lambert v Lewis* [1982] AC 225.

⁵⁵ UK Report (1987) 32. The seller should not be held responsible for faults introduced into goods after the time of supply; if the durability term could be broken later than other implied terms, the limitation period would run from a different date and could even make sellers liable indefinitely.

Significantly, the Commissions did not think the requirement of durability should be confined to consumer sales.

6.46 Goode⁵⁶ had pointed out that according to the pre-1994 law, the breakdown and malfunctioning of goods within an unusually short time after delivery raised a presumption that the goods were not of proper quality at the time of delivery. However, there was no implied term that goods in proper order when delivered should remain in good order for a reasonable period thereafter.

6.47 Goode was in favour of a warranty of durability, saying that its main effect would be to shift the onus of proof, imposing on the seller the onus of establishing that goods which failed within the appropriate durability period were in fact delivered to the buyer in such condition that, with normal use and care, they would have continued in good order and condition for the durability period. This, he said, would amount to a significant and welcome change in the law: the seller who has the expertise in, and knowledge of, the product would have the onus of demonstrating its quality.⁵⁷

6.48 Goode and others also advocated the incorporation into contracts of sale of a requirement that there be adequate spare parts and servicing facilities.⁵⁸ However, the Commissions rejected this as a component of the list. Such an inclusion, in their opinion, could cause hardship to retailers.⁵⁹

25. *Should the expression "satisfactory quality" be substituted for "merchantable quality", as it has been by section 1(1) of the United Kingdom Sale and Supply of Goods Act 1994?*
26. *Should the definition of "satisfactory quality" as set out in section 14(2A) and (2B) of the United Kingdom Sale of Goods Act 1979 be adopted?*

⁵⁶ Goode 288-290.

⁵⁷ Goode thus answers Benjamin's reservations about express reference to durability, specifically the difficulty of a buyer proving that lack of durability resulted from a defect in the goods themselves, rather than from subsequent treatment by the buyer: Benjamin 488.

⁵⁸ See also OLRC Warranties Report (1972) 40-41; OLRC Report (1979) paras 216-217.

⁵⁹ TPA s 74F only refers to manufacturer's obligations to provide facilities for repairs and spare parts.

3. THE REQUIREMENT THAT GOODS MUST BE 'BOUGHT BY DESCRIPTION'⁶⁰

6.49 Although most sales would now be classified as sales by description, it could be argued that an article which is easily identified but not described in any way is not a sale by description, for example, "all stock contained in No 2 warehouse", or a table of socks or umbrellas on display in a supermarket, unmarked except for price. If such a sale were not a sale by description, then a problem could exist for the buyer if such goods were found to be defective: there would be no breach of section 13 since there was no sale by description,⁶¹ nor any breach of section 14(II) of the SGA (implied condition of merchantable quality), since according to section 14(II) the goods must be "bought by description".

6.50 This prerequisite of a sale by description for the implied condition of merchantable quality was abolished in the United Kingdom by section 3 of the *Supply of Goods (Implied Terms) Act 1973*, and it does not appear in the implied condition of merchantable quality in the TPA (section 71) or the FTA (section 38).

6.51 Even though a sale which is not one by description is probably more likely to occur in a consumer context, it could also occur in a commercial one. For this reason, the removal of the "bought by description" requirement from section 14(II) of the SGA would be desirable.

6.52 The fact that the implied condition of merchantable quality in the SGA can be excluded if the contracting parties so agree (section 54),⁶² reinforces the need for deleting the requirement of description from section 14(II), for this will ensure the section's full utility when not excluded.

6.53 There has been a general consensus by various law reform commissions that this precondition should be discarded, in order that the condition of merchantable quality should apply to all sales, not simply those by description.⁶³ Even though this concept has been liberally interpreted by the courts, there may be some sales which are not by description⁶⁴ and

⁶⁰ See Ch 5.

⁶¹ See Bridge 434-436; Benjamin 459-460; NSWLRC WP (1975) 126.

⁶² Unlike the implied condition in the FTA and the TPA, which is non-excludable so that consumers can never be denied this basic protection.

⁶³ See eg NSWLRC WP (1975) 126; OLCRC Report (1978) 208. This is a hangover from the time when there was an exclusive dichotomy between sales by description and sales of specific goods.

⁶⁴ See para 6.49 above.

therefore the goods which are the subject of these sales would not have to be of merchantable quality. Buyers would be denied an important legal protection.

27. *Should the requirement that goods be "bought by description" be deleted from the implied condition of merchantability in order to -*
- (a) *bring the SGA into line with other legislation; and*
 - (b) *enable the implied condition of merchantability to be more all-encompassing?*

4. THE REQUIREMENT THAT THE SELLER MUST DEAL IN GOODS OF THAT DESCRIPTION

6.54 Clearly, the implied condition of merchantable quality does not apply to private sales. At one stage it was thought that this requirement meant that the seller had to be a dealer in goods of the same precise contract description.⁶⁵ This was later clarified by the House of Lords when it was said that the requirement was satisfied if the seller accepted orders to supply the goods in the way of business whether or not he had previously accepted orders for goods of that description.⁶⁶ The effect of this requirement was to limit the implied condition to persons who sell in the way of business and not as private sellers. The idea that a seller must deal occasionally, if not habitually, in goods of a certain description did not underlie the provision.⁶⁷

6.55 This interpretation accorded with the recommendations of the Molony Committee⁶⁸ and the English and Scottish Law Commissions⁶⁹ that the existing requirements be replaced by the stipulation that the goods be sold by a seller acting in the course of trade or business, irrespective of whether he had previously traded in the goods (a fact often unknown to a buyer).

6.56 This recommendation was adopted in the United Kingdom *Supply of Goods (Implied Terms) Act 1973* and subsequently in the United Kingdom *Sale of Goods Act 1979*. It is also adopted in the TPA and the FTA.

⁶⁵ *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All ER 1496.

⁶⁶ *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 495 per Lord Diplock.

⁶⁷ Sutton 224.

⁶⁸ *Final Report of the Committee on Consumer Protection* (Cmnd 1781, 1962) (Chairman J T Molony QC).

⁶⁹ UK First Report (1969) paras 31, 46.

6.57 Although the English Law Commission adopted a broad view and thought that the requirement could extend, for example, to a coal merchant selling one of its delivery vehicles, or to a farm concern selling machinery it no longer needed, other law reform bodies and writers have disagreed, arguing that the seller in the type of sales described is acting in a private capacity and therefore does not fall within the requirement.⁷⁰

6.58 The English and Scottish Law Commissions were of the view that where a seller who was a trader acted as agent for a private seller, this should be regarded as a business sale, primarily because the buyer would be ignorant of the status of the owner. This became law in the United Kingdom.⁷¹

6.59 By contrast, the OLRC did not recommend following the view of the English and Scottish Commissions.⁷² According to the OLRC, the equities are fairly evenly divided between a private seller and a buyer. It argued that it would not occur to the average principal that he must instruct his agent to be sure not only to disclose his status as agent, but also the fact that he is acting for a private seller. Even if he did give such an instruction, it is not clear whether the requirements of taking reasonable steps to bring the facts to the notice of the buyer would be satisfied. In the opinion of the OLRC, the United Kingdom amendment raises as many difficulties as it purports to resolve, whereas the existing law has not caused serious practical problems.

28. *Should the requirement that the seller deal in goods of that description be replaced by the requirement that the goods be sold by a seller who sells goods in the course of a business, to bring the SGA into line with comparable legislation which reflects the development of the common law in this area?*

29. *Should the sale by a person who in the course of his business acts as agent for a private seller be regarded as a sale "in the course of a business"? If so, should this be expressly enacted?*

5. TO WHAT DOES THE IMPLIED CONDITION OF MERCHANTABILITY QUALITY APPLY?

6.60 Section 14(II) refers to "goods" only. The United Kingdom *Supply of Goods (Implied Terms) Act 1973* added the wording "supplied under the contract" to make clear that it was

⁷⁰ NSWLRC WP (1975) 127-128; Benjamin 473; OLRC Report (1979) 209.

⁷¹ *Sale of Goods Act 1979* (UK) s 14(5).

⁷² OLRC Report (1979) 209-210.

not only the contract goods, but everything that was supplied in performance of the contract, that had to be of merchantable quality, including containers and additives. This had already been firmly established in the cases.⁷³ Adding these words to the SGA would be uncontroversial and would have negligible practical impact. The words are included in the FTA and the TPA.

30. *Should the words "supplied under the contract" be added to "goods" in section 14(II) to give statutory effect to the common law, and bring about conformity with the TPA and FTA?*

6. SELLER'S LIABILITY FOR DESCRIPTION OF GOODS BY THIRD PARTY

6.61 In both consumer and non-consumer sales, it could be argued that just as a seller is responsible for the merchantability and fitness of goods manufactured by others, the seller should also be responsible for the manufacturer's labelling. This would in many cases facilitate a buyer's avenue of redress in the case of inaccurate labelling. The Ontario Law Reform Commission favours the UCC's approach⁷⁴ according to which conformity with any description on a label or container is one of the requirements of merchantability.⁷⁵ As description is necessarily a determinant of merchantability, it is arguable that the seller may already be liable for descriptions by third parties.

31. *Should it be made clear that where labelling of products is inaccurate, there is a breach of section 14 by the seller (and/or section 13)?*

7. EFFECT OF THE BUYER'S EXAMINATION OF THE GOODS

(a) Type of examination required

6.62 Section 14(II) contains the proviso that ". . . if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed". This was the wording of the proviso of the United Kingdom *Sale of Goods Act* prior to 1973.

⁷³ *Gedding v Marsh* [1920] 1 KB 668; *Niblett Ltd v Confectioners' Materials Co Ltd* [1921] 3 KB 387; *Wilson v Rickett Cockerell & Co Ltd* [1954] 1 QB 598.

⁷⁴ UCC s2-314(2)(f).

⁷⁵ OLCRC Report (1979) 204-205.

6.63 The wording of the proviso in the United Kingdom *Sale of Goods Act 1979*⁷⁶ is ". . . if the buyer examines the goods *before the contract is made*, as regards defects which *that examination ought to reveal*".

6.64 The most obvious difference between this and the original proviso is that it is clear from the newer proviso that the examination must take place before the contract is made (although this was implicit before).

6.65 One of the problems with the original wording was that it was unclear when an examining buyer would be unable to rely on the implied condition. According to *Frank v Grosvenor Motor Auctions Pty Ltd*,⁷⁷ only if a reasonable buyer making the type of examination that the actual buyer made would have discovered defects in the goods would the implied condition of merchantable quality not apply. However cursory the examination, only those defects which would have been revealed by such an examination would be operative.

6.66 The other view of the meaning of the proviso was that irrespective of the type of examination the buyer actually conducted, if the reasonable buyer making an examination that was reasonable in the circumstances would have detected the defects, then the actual buyer would also be deemed to have detected them.⁷⁸

6.67 It is considered that the new wording - the substitution of "that" for "such" - overcomes this problem.⁷⁹

6.68 Two observations can be made here. First, for the proviso to apply, however it is interpreted, there must have been an examination by the buyer. There is no obligation on the buyer to examine, no matter how unreasonable this may be.⁸⁰ Clearly, there is an anomaly in that a buyer who does not bother to examine the goods at all may be in a better position than a buyer who does examine.

⁷⁶ S 14(2)(b). See also TPA s 71(1)(b); FTA s 38(1)(b).

⁷⁷ [1960] VR 607.

⁷⁸ *Thornett & Fehr v Beers & Son* [1919] 1 KB 486.

⁷⁹ Benjamin 486. Bridge 512 remarks that it is hard to see why.

⁸⁰ This was not the law prior to 1893, which held that an opportunity for inspection had the same effect as an actual inspection: see *Jones v Just* (1868) LR 3 QB 197.

6.69 Second, it could be argued that the *Frank v Grosvenor Motor Auctions Pty Ltd* approach⁸¹ encourages a cursory examination as opposed to a thorough one. A buyer who conducts a perfunctory examination and discovers no defect may be better off than a diligent buyer who conducts a thorough examination but does not discover the defects which "that" examination ought to have revealed.

6.70 The New South Wales Law Reform Commission advocated a return to pre-1893 law and recommended that the New South Wales equivalent of section 14(II) should fall into line with the equivalent of section 15 (sale by sample), and that the implied term should be excluded as regards defects apparent on a reasonable examination.⁸²

6.71 The Ontario Law Reform Commission commented that the inconsistency with the buyer's position in a sale by sample is more apparent than real, since the purpose of the sample is to enable the buyer to determine for himself the quality of the goods offered.

6.72 The Ontario Commission, in agreement with the English and Scottish Law Commissions, also felt that it was not desirable to return to the pre-1893 position which deemed the buyer to have notice of any defects discoverable on examination whether or not the buyer conducted any examination.

6.73 Certainly, in a consumer context, the pre-1893 position is undesirable but in commercial sales (at which the implied terms in the SGA are directed) there is less objection to expecting the buyer to examine where possible.

6.74 The Ontario Law Reform Commission did express some concerns over the fact that a buyer who conducts a casual examination may be better off than one who is more thorough. On balance, however, that Commission felt that there was "sufficient elasticity in the language of the proviso, coupled with the general requirement of good faith, to enable a court to avoid its unfair operation against either party".⁸³

32. (a) *Should the wording of the proviso to section 14(II) be altered to conform to that in the United Kingdom Sale of Goods Act 1979 (and the TPA and FTA) i.e. ". . . if the buyer examines the goods before the contract is made, as*

⁸¹ See para 6.65 above.

⁸² NSWLRC WP (1975) 158-159.

⁸³ OLCRC Report (1979) 219.

regards defects which that examination ought to reveal," wording which has been interpreted to impose less of an onus on a buyer to examine, or examine thoroughly?

- (b) *Given the commercial focus of the SGA, is there less of an imperative to alter the existing wording?*

(b) Defects specifically drawn to the buyer's attention

6.75 The United Kingdom *Sale of Goods Act 1979* contains another proviso, section 14(2)(a),⁸⁴ introduced in 1973, which has no counterpart in the original provision. The implied condition will not apply "as regards defects specifically drawn to the buyer's attention before the contract is made". The Ontario Law Reform Commission supports this exclusion. Goode highlights some criticisms and unresolved questions about it. He comments on the sloppiness of the drafting: the condition applies not to defects but to goods. What the draftsman intended to convey was that the condition was not to be regarded as broken by reason of defects disclosed to the buyer before the contract. This could be easily remedied by adding "goods which have" before the word "defects".

6.76 Goode also notes that the meaning of "specifically drawn to the buyer's attention" is unclear. He asks how much information about the defect must be communicated to the buyer to satisfy this and how much detail about the causes of the defect needs to be conveyed.

6.77 These questions are unresolved because there has been no case law on this provision.⁸⁵

33. *Is there a need for the insertion in section 14(II) of the SGA of the equivalent (or a variation thereon) of section 14(2)(a) of the United Kingdom Sale of Goods Act 1979?*

8. MISCELLANEOUS

(a) Preamble

6.78 The Ontario Law Reform Commission recommends deletion of the preamble to section 14, which provides: "Subject to the provisions of this Act . . . there is no implied

84 See TPA s 71(1)(a); FTA s 38(1)(a).

85 Goode 259.

warranty or condition as to the quality or fitness for any particular purpose of goods . . . except as follows..." That Commission argued that the preamble diminished the importance of the implied terms, conveying the impression that they are merely exceptions to the general rule of caveat emptor, when in fact the exception has grown to be greater than the rule.⁸⁶

6.79 The United Kingdom *Sale of Goods Act 1979* has retained the preamble.

34. *Should the preamble to section 14 be retained?*

(b) Position

6.80 The Ontario Law Reform Commission recommended that the implied term of merchantable quality appear before that of fitness for purpose. This is the case in the TPA and FTA signifying the comparative generality of the implied term of merchantable quality.

35. *Should the implied term of merchantable quality appear before that of fitness for purpose?*

⁸⁶ OLRC Report (1979) 207. See also HKLRC Report (1990) 7, which also makes the point that a casual reader could be misled. See also Goode 256.

Chapter 7

THE IMPLIED CONDITION OF FITNESS FOR PURPOSE

1. INTRODUCTION

7.1 Section 14 of the SGA provides:

"Subject to the provisions of this Act, and of any Statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:-

- (I) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose".

7.2 The United Kingdom equivalent of this section was repealed and replaced by the *Supply of Goods (Implied Terms) Act 1973*.¹ Section 14(3) of the *Sale of Goods Act 1979* now provides:

"Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known -

- (a) to the seller,

1 That provision was repealed and replaced by the *Consumer Credit Act 1974* (UK).

.....

any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller . . . ".

7.3 In the main, the changes embodied in section 14(3) gave legislative effect to judicial interpretation of the original provision. Section 71(2) of the TPA and section 38 of the FTA also reflect these changes.

7.4 There is a strong case for amending section 14(1) of the SGA similarly for the following reasons -

- * There will be more clarity in the law with the alignment of statute and case law.
- * Uniformity will be achieved with corresponding provisions in the TPA and the FTA and as a consequence there will be greater simplicity in the law.
- * After a review of section 14(3) by the English and Scottish Law Commissions in 1987, it was noted that there was no criticism of the section and therefore no reason to alter it.²

2. GOODS OF A DESCRIPTION WHICH IT IS IN THE COURSE OF THE SELLER'S BUSINESS TO SUPPLY

7.5 This requirement was interpreted in *Ashington Piggeries Ltd v Christopher Hill Ltd*³ as meaning that the seller had to deal generally in the type of goods in question, although it could even extend to a seller who deals in the goods in question for the first time.⁴ The effect of this requirement was to confine the implied condition to commercial sellers.

² See UK Report (1987) 11.

³ [1972] AC 441, 495 per Lord Diplock.

⁴ See para 6.54 above.

7.6 The new wording, "in the course of a business" makes it clear that the section does not apply to a private seller, but in addition that the nature of the commercial seller's business is irrelevant.

7.7 The Ontario Law Reform Commission recommended that this condition be restricted to sellers who deal in goods of the kind supplied under the contract of sale. It suggested that for other commercial sellers to be liable they would have to warrant expressly the fitness of the goods for the purpose indicated.⁵

7.8 This restriction proposed by the Ontario Law Reform Commission could have the effect of complicating the provision, in particular by raising questions about the meaning and width of the concept of dealing in goods "of the kind" supplied under the contract. If the Ontario Law Reform Commission were worried about the imposition of too heavy a burden on the seller with no prior experience in selling a particular type of goods, it should be noted that it is always open to the seller to disclaim expertise.

36. *Should the words "and the goods are of a description which it is in the course of the seller's business to supply . . ." in section 14(I) be altered to "goods sold in the course of a business" (or words to that effect)?*

3. GOODS SUPPLIED UNDER THE CONTRACT

7.9 According to established case law the implied condition of fitness for purpose also extends to containers in which goods are supplied even if the containers remain the property of the seller.⁶ In the preamble to section 14 the words "goods supplied under a contract of sale" are used but not in section 14(I) where only the word "goods" is used. In section 14(3) of the United Kingdom *Sale of Goods Act 1979*, the words "goods supplied under the contract" are used, acknowledging the effect of the case law. These words are also used in corresponding provisions in the TPA and the FTA.⁷

37. *Should the words "goods supplied under the contract" be used in section 14(I) instead of simply "goods"?*

⁵ OLRC Report (1979) 221. The Commission expressed similar views as regards the seller's qualification in the implied condition of merchantable quality: id 209.

⁶ See eg *Gedding v March* [1920] 1 KB 668.

⁷ TPA s 71(1); FTA s 38.

4. EXPRESSLY OR BY IMPLICATION MAKES KNOWN THE PARTICULAR PURPOSE FOR WHICH THE GOODS ARE REQUIRED

7.10 The case law has established that "particular purpose" does not mean only special purpose.⁸ If no purpose was indicated by the buyers, it could be assumed the goods were ordered for their normal purpose. This has now been clarified beyond doubt by the wording of the amended provision in the United Kingdom *Sale of Goods Act 1979*, which includes the words "whether or not that is a purpose for which such goods are commonly supplied". Equivalent provisions in the TPA and FTA include these words.⁹

38. *Should the words "whether or not that is a purpose for which such goods are commonly supplied" be included in section 14(I)?*

5. RELIANCE

7.11 Section 14(I) stipulates that reliance must be shown by the buyer, "so as to show that the buyer relies on the seller's skill or judgment". Courts have not interpreted this as an onerous requirement, readily inferring reliance. The very fact that a buyer chooses to effect his purchases in a shop has been said to evidence his reliance on the shopkeeper's selection.¹⁰

7.12 There were even cases where it was held that reliance would be presumed as long as the seller had knowledge (deemed or otherwise) of the buyer's purpose.¹¹ The amended United Kingdom provision gives effect to this and there is a presumption of reliance as long as the buyer's purpose is made known to the seller expressly or by implication. Where goods have only one purpose, the seller will be presumed to know this. It is now for the seller to establish that in all the circumstances it was not reasonable for the buyer to rely on the seller's skill or judgment.

⁸ See *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31.

⁹ TPA s 71(2); FTA s 38.

¹⁰ *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 99.

¹¹ See *Manchester Liners Ltd v Rea Ltd* [1922] 2 AC 74.

7.13 The New South Wales Law Reform Commission¹² considered the suggestion that the requirement of reliance should be deleted altogether since the concept of reliance was largely a fiction. That Commission outlined the theory that in the circumstances a reasonable man in the position of the seller would know that the buyer was relying on him to supply goods fit for their purpose and that his agreement to do so after disclosure of the purpose would mean that he accepted the responsibility, but said that it bore little resemblance to reality. Nevertheless, the fact that, according to the United Kingdom provision (now section 14(3)), reliance may be presumed, rather than needing to be proved, goes some way towards addressing their concerns, and this approach was recommended by the New South Wales Commission. That Commission also recommended that the clause in section 14(3) regarding reliance where it is shown not to exist or be unreasonable also be included in the implied condition of merchantable quality. The same qualifications should cover both implied conditions because they were "exactly complementary".¹³

39. *Should it be made clear in section 14(I) that reliance by the buyer on the seller is presumed as long as the buyer makes his purpose known to the seller expressly or impliedly?*

6. PATENT OR TRADE NAME EXCEPTION

7.14 In section 14(I) there is a proviso that where an article is sold under its patent or trade name, the implied condition of fitness for purpose will not apply. A literal interpretation of this proviso would mean that if the trade name of an article bought was used at any time during negotiations the implied condition would not apply and consequently a buyer would be severely disadvantaged. In fact, judicial interpretation of the proviso has been heavily in favour of the buyer. The proviso has been held not to apply unless the patent or trade name is specified in such a way as to show that the buyer did not intend to rely on the seller's skill or judgment.¹⁴ This interpretation made the proviso superfluous and it does not appear in the equivalent section in the present United Kingdom Act. The situation where goods are ordered by their trade name may indicate a lack of reliance by the buyer and no special proviso is needed to negate the operation of the implied condition.

12 NSWLRC WP (1975) 167.

13 Ibid.

14 *Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831; *Baldry v Marshall* [1925] 1 KB 260.

7.15 This proviso does not appear in corresponding provisions in the TPA or the FTA.

40. *Should the proviso in section 14(I) be deleted?*

Chapter 8

SALE BY SAMPLE

8.1 Section 15 of the SGA provides:

- "(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
- (2) In the case of a contract for sale by sample -
- (a) There is an implied condition that the bulk shall correspond with the sample in quality:
 - (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:
 - (c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."¹

8.2 There are two possible approaches to this section -

1. The section could be left as it is in spite of any possible inconsistencies with, or unnecessary duplication of, other parts of the SGA. No difficulty has been caused by the provision in practice.² There is uniformity with the TPA as this section is mirrored in section 72.
2. The section could be amended so as to eliminate any inconsistencies with other parts of the SGA and any unnecessary drafting.

8.3 According to Bridge the section should be deleted altogether because, according to him, there is no justification for a separate concept of sale by sample. Because of its separateness Bridge asserts that it will not keep pace with the development of general sales

1 This section was identical to sections 15(1) and (2) of the *Sale of Goods Act 1979* (UK), which have been reorganised by the *Sale and Supply of Goods Act 1994* (UK). S 1(2) has substituted "making their quality unsatisfactory" for "rendering them unmerchantable"; s 15(2)(b) has been incorporated into s 35.

2 NSWLRC WP (1975) 182.

law, noting that the sale by sample rules crystallised before the evolution of the general implied term of fitness for purpose, and therefore the fitness for purpose obligation is, illogically, not included in the provision.³

8.4 In addition, according to Bridge, sales by sample have nowadays been almost entirely superseded by sales by grade, the latter being more likely to ensure the required quality than the former.⁴

8.5 A less extreme but still radical approach to section 15 would be to follow the recommendations of the Ontario Law Reform Commission, which suggests that there be no separate provision dealing with sale by sample, but rather certain aspects of the existing provision should be absorbed into other parts of the SGA.

8.6 It has been suggested that the implied condition that the bulk correspond with the sample in quality (SGA section 15(2)(a)) should be included as part of section 13, the provision dealing with correspondence with description.⁵

8.7 Atiyah notes that the United Kingdom *Sale of Goods Act* makes no provision for a "sale by model", where a consumer buys an article after examining an identical product. This is not a sale by sample since there is no "bulk", but the need for there to be an implied condition that the goods bought be identical with those examined (the model) is no less compelling than in the case of a sale by sample.⁶

8.8 The Ontario Law Reform Commission suggested that the implied condition that a buyer have a reasonable opportunity of comparing the bulk with the sample (SGA section 15(2)(b)) is redundant since the equivalent of section 34 confers on the buyer a general right to examine goods at the time of delivery if the buyer has not examined them previously.⁷ Atiyah agreed that section 15(2)(b) was a special instance of the general right of examination. He did not, however, regard section 15(2)(b) as entirely superfluous an opportunity of

3 Bridge 519.

4 Bridge 516. In *James Drummond & Sons v E H Van Ingen & Co* (1887) 12 App Cas 284 it was held that a buyer was only entitled to expect the bulk to correspond with the sample only in regard to those qualities apparent from an examination that was normal in the trade.

5 OLCR Report (1979) 223.

6 Atiyah 197.

7 OLCR Report (1979) 223.

comparing the bulk with the sample is not the same as examining the delivered goods.⁸ In 1987 the English and Scottish Law Commissions recommended that section 15(2)(b) should be transferred to section 34 of the Act.⁹ In 1994, this recommendation was implemented by the United Kingdom *Sale and Supply of Goods Act 1994*.¹⁰

8.9 Section 15(2)(c) imposes a higher degree of care on a buyer where a sale is by sample than does the general condition of merchantable quality in section 14(II). Where a sale is by description, a buyer who does not examine the goods will not be prevented from relying on the implied condition of merchantable quality even if the goods have apparent defects. According to section 15(2)(c), it would seem that whether or not the buyer examines the goods, the implied condition of merchantable quality will not apply if there are defects in the goods which would be apparent on reasonable examination. Thus where a sale by sample is also a sale by description the buyer who does not examine the goods will be in a more favourable position by suing under section 14(II) than under section 15. The Ontario Law Reform Commission notes that although this inconsistency does exist, it has little practical significance since the whole purpose of a sample is to enable the buyer to ascertain the quality of goods offered by means of examination.¹¹ It suggests including this sub-section as one of the exceptions to the general provision on merchantable quality.¹² A similar position is taken by the New South Wales Law Reform Commission.¹³

8.10 This would mean that the requirement of merchantable quality for goods sold by sample, like the general requirement of merchantable quality, would only apply where the seller was a merchant, selling goods in the course of a business. Section 15 is currently not so limited.

41. (a) *Should section 15 be left as it is; or*
- (b) *should section 15 as well as the concept of sale by sample be eliminated altogether; or*

⁸ Atiyah 196.

⁹ UK Report (1987) 63.

¹⁰ S 2(1). S 2(1) revises the drafting of ss 34 and 35 of the *Sale of Goods Act 1979* (UK). S 35(2)(b) provides that, in the case of a contract for sale by sample, the buyer is not deemed to have accepted goods until he has had a reasonable opportunity of comparing the bulk with the sample.

¹¹ OLC Report (1979) 223. See also Benjamin 506-507; Goode 280:

"As a working rule, it may be said a sale is unlikely to be considered a sale by sample unless the sample is released by the seller to the buyer . . . for the purpose of providing a means of checking whether the goods subsequently correspond with the sample".

¹² OLC Report (1979) Draft Bill 5.13(3)(c).

¹³ NSWLRC WP (1975) 186.

- (c) *should section 15 be eliminated but the concept of sale by sample be absorbed into other parts of the SGA?*

Chapter 9

QUESTIONS AT ISSUE

The Sale of Goods Act and the Trade Practices Act

1. Should the SGA be amended? If so,
 - (a) should the purpose of the amendments be simply to bring about conformity between the SGA, TPA and FTA, for the sake of simplicity?
 - (b) which amendments can be made to the SGA in isolation from other legislation?

Paragraphs 2.11-2.13

Some general issues

2. Should the SGA be amended so as to recognise that some terms in sale of goods contracts may be intermediate terms, rather than conditions or warranties, while leaving undisturbed the classification of the existing implied terms as conditions or warranties?
 3. Should the classification of the implied terms, or any of them, be reviewed? Specifically, should they be reclassified as intermediate terms?
 4. Should these changes, or either of them, be implemented in isolation, or only in association with similar amendments of the TPA and the FTA?
- Paragraphs 3.2-3.9*
5. (a) Should a buyer only lose his right to reject goods when there has been acceptance of them? Should the words "or where the contract is for specific goods, the property in which has passed to the buyer" be deleted from section 11(3) of the SGA?

- (b) Should acceptance only occur after the buyer has had a reasonable opportunity to examine the goods? Should it therefore be made clear that section 34 of the SGA prevails over section 35, by adding the words "except where section 34 otherwise provides"?
6. Should an equivalent of section 75A of the TPA (which allows rejection of goods by a consumer even after property has passed or acceptance has occurred) be enacted for the benefit of non-consumers?
- Paragraphs 3.10-3.17*
7. Should the principal remedy available to commercial buyers (rejection) be modified in certain circumstances?
8. Should consideration be given to a "cure" scheme for non-consumer sales, or is this remedy appropriate only to consumer sales?
- Paragraphs 3.18-3.35*
9. Is there a need for legislative control over clauses excluding the operation of the implied terms in commercial sale of goods contracts? If so, what form should this control take?

Paragraphs 3.36-3.39

Implied terms relating to title

10. Should the implied undertaking as to title be retained as a condition, while the implied terms of quiet possession and freedom from encumbrances remain as mere warranties?
- Paragraphs 4.1-4.5*
11. Where a seller retains a security interest in the goods, should the implied condition as to title take effect when the goods are delivered to the buyer, rather than at some later stage when property passes to the buyer?

Paragraphs 4.6-4.7

12. Is there a need for clarification of the duration of the implied warranty of quiet possession?

Paragraphs 4.10-4.12

13. Should the implied warranty of freedom from encumbrances be retained? If so, should it be expressed to be operative only from the time when property passes or from the earlier time when the contract is made?

Paragraphs 4.13-4.17

14. Should there be a provision prohibiting the exclusion of the implied terms as to title and/or should more limited warranties apply when a seller intends to transfer something less than absolute title?

Paragraphs 4.18-4.20

The implied condition that goods correspond with their description

15. Should the uniqueness of section 13 be recognised by -
- (a) substituting the word "express" for "implied" in section 13; or
 - (b) specifically exempting it from exclusion, even by agreement, under section 54; or
 - (c) relying on the common law approach?

Paragraphs 5.1-5.6

16. Should there be legislative recognition of the fact, already accepted in the case law, that a sale of specific goods can also be a sale by description?

17. Specifically, should a provision in the same terms as section 13(3) of the United Kingdom *Sale of Goods Act 1979* ("A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer") be inserted in section 13 of the Western Australian SGA?

Paragraphs 5.8-5.10

18. Is there a need to retain the concept of a sale by description in section 13? Should the New South Wales Law Reform Commission's proposal, or a modified version of it, be adopted in order to obviate the need for determining whether there has been a sale by description, while still retaining the need for goods to comply with their description?
Paragraphs 5.11-5.15
19. Should there be some legislative clarification of the meaning of words of description?
Paragraphs 5.16-5.18
20. Should section 13 be restricted to sellers who sell in the course of business, particularly in view of the fact that most buyers who make use of section 13 would be commercial ones and therefore unlikely to be disadvantaged by a private seller's misdescription, or should section 13 remain unrestricted in its application because of the fundamental nature of description?
Paragraphs 5.19-5.21
21. Should the implied condition that goods correspond with their description be retained?
Paragraphs 5.22-5.25

The implied condition of merchantable quality

22. Is the concept of merchantable quality in need of statutory definition?
23. Should the definition of merchantable quality introduced into the United Kingdom *Sale of Goods Act* in 1973 be adopted (as it has been by the TPA and the FTA) with its emphasis on functionability and reasonable buyer expectations? Is there a danger of this definition causing a decline in the quality of goods sold?
24. (a) If this statutory definition were adopted, should the word "any" be substituted for "the purpose or" to make clear what is already established at common law, that goods do not have to be fit for all their normal purposes to be of merchantable quality? or

- (b) If this statutory definition were adopted, should the word "every" be included before "purpose" to make clear that goods must be fit for all their normal purposes to be of merchantable quality?

Paragraphs 6.1-6.30

- 25. Should the expression "satisfactory quality" be substituted for "merchantable quality", as it has been by section 1(1) of the United Kingdom *Sale and Supply of Goods Act 1994*?

- 26. Should the definition of "satisfactory quality" as set out in section 14(2A) and (2B) of the United Kingdom *Sale of Goods Act 1979* be adopted?

Paragraphs 6.34-6.48

- 27. Should the requirement that goods be "bought by description" be deleted from the implied condition of merchantability in order to -

- (a) bring the SGA into line with other legislation; and
- (b) enable the implied condition of merchantability to be more all-encompassing?

Paragraphs 6.49-6.53

- 28. Should the requirement that the seller deal in goods of that description be replaced by the requirement that the goods be sold by a seller who sells goods in the course of a business, to bring the SGA into line with comparable legislation which reflects the development of the common law in this area?

- 29. Should the sale by a person who in the course of his business acts as agent for a private seller be regarded as a sale "in the course of a business"? If so, should this be expressly enacted?

Paragraphs 6.54-6.59

- 30. Should the words "supplied under the contract" be added to "goods" in section 14(II) to give statutory effect to the common law, and bring about conformity with the TPA and FTA?

Paragraph 6.60

31. Should it be made clear that where labelling of products is inaccurate, there is a breach of section 14 by the seller (and/or section 13)?

Paragraph 6.61

32. (a) Should the wording of the proviso to section 14(II) be altered to conform to that in the United Kingdom *Sale of Goods Act 1979* (and the TPA and FTA) i.e. ". . . if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal," wording which has been interpreted to impose less of an onus on a buyer to examine, or examine thoroughly?
- (b) Given the commercial focus of the SGA, is there less of an imperative to alter the existing wording?

Paragraphs 6.62-6.74

33. Is there a need for the insertion in section 14(II) of the SGA of the equivalent (or a variation thereon) of section 14(2)(a) of the United Kingdom *Sale of Goods Act 1979*?

Paragraphs 6.75-6.77

34. Should the preamble to section 14 be retained?

Paragraph 6.78

35. Should the implied term of merchantable quality appear before that of fitness for purpose?

Paragraph 6.80

The implied condition of fitness for purpose

36. Should the words "and the goods are of a description which it is in the course of the seller's business to supply . . ." in section 14(I) be altered to "goods sold in the course of a business" (or words to that effect)?

Paragraphs 7.5-7.8

37. Should the words "goods supplied under the contract" be used in section 14(I) instead of simply "goods"?

Paragraphs 7.9

38. Should the words "whether or not that is a purpose for which such goods are commonly supplied" be included in section 14(I)?

Paragraphs 7.10

39. Should it be made clear in section 14(I) that reliance by the buyer on the seller is presumed as long as the buyer makes his purpose known to the seller expressly or impliedly?

Paragraphs 7.11-7.13

40. Should the proviso in section 14(I) be deleted?

Paragraphs 7.14-7.15

Sale by sample

41. (a) Should section 15 be left as it is; or
- (b) should section 15 as well as the concept of sale by sample be eliminated altogether; or
- (c) should section 15 be eliminated but the concept of sale by sample be absorbed into other parts of the SGA?

Paragraphs 8.1-8.10