

the Report for the recognition of traditional hunting and fishing rights to Aboriginal people have been outlined above.

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pre-paid consumer contracts

All sensible people are selfish, and nature is tugging at every contract to make the terms of it fair.

Ralph Waldo Emerson, *Wealth*

The Law Reform Commission of British Columbia (Canada) recently released a Report entitled *The Buyer's Lien: A New Consumer Remedy* (LRC 93, August 1987). The Report deals with the rights of a buyer of consumer goods who has pre-paid all or part of the purchase price but has not received possession of the goods, for instance when the seller of the goods becomes insolvent before delivery to the buyer and control of them is taken over by a receiver or liquidator (or a trustee in bankruptcy). The report illustrates the problems which arise with a number of examples including the following from the Vancouver Province newspaper:

Complaint. Last February, I spend \$358.50 on house insulation at [seller's] Lumber . . . about forty miles from Port Alice where I was living at the time. I also paid another \$20.00 for delivery. It was my bad luck that the store went into receivership a couple of days later — before the insulation could be delivered. . .

I was told [by the receiver] that because the goods had not been set aside for me there was nothing I could do to get the insulation or to get my money back . . . Surely there is some way that consumers can be protected in situations such as these.

Action Line's Reply. Afraid not, according to the receiver — manager who spelled out the details for us. 'Section 23 of the Sale of Goods Act. . . provides that title in goods passes generally when the goods are specific and ascertained', said the receiver. 'In practice, we understand that this in is intended to involve the separation and marking of goods for a customer or contract' . . .'

'Our conclusion', he said, 'is that the merchandise which [the buyer] ordered was never removed from stock, in such a way as to become specific or ascertained and that the goods were also available to a subsequent purchaser who wished to take immediate delivery.

We do not suggest that there appears to have been anything improper in the manner in which the seller accepted [the buyer's] orders, however, it does point out the problems involved in pre-paying an account before taking custody of the merchandise. We are sympathetic towards [the buyer's dilemma], but regret that we have no legal grounds on which to supply the goods that she claims.' He added that you would be an unsecured creditor in any bankruptcy proceedings, but said, '. . . it is most improbable that there would be any funds available to the unsecured creditors in such a bankruptcy'.

Action line knows this will be absolutely no help to you, but we hope your experience will help other readers.

The Report recommends that a consumer who pre-pays for goods in this way should be entitled to some form of protection in the event of the seller's insolvency. The report puts forward the following arguments in support of a remedy for a consumer who pre-pays for goods:

- While both a consumer buyer and supplier of goods to a retail merchant both extend credit, the supplier of goods expects to make a

profit from the extension of credit and there is justification for treating this person in a different way (in terms of the legal position) from a person who extends credit without any such expectation.

- A supplier of goods is in a much stronger position to ascertain appropriate credit information and accordingly minimise risk or charge a higher price or interest rate to compensate for assuming such higher degree of risk.
- A supplier of goods is also able to obtain some protection through techniques such as a conditional sale agreement under which title to goods is retained until the purchase price is received (Romalpa clause). Suppliers of goods are usually in a position where they may demand consensual security to safeguard a pre-payment for goods, an option not open to the consumer buyer.
- A consumer buyer's rights of recovery may depend on fortuitous circumstances over which he has no control. It may depend upon the internal procedures of the seller as to whether particular items that have been sold are identified as being the subject matter of a sale.

The arguments against treating the consumer pre-payer differently include:

- The existing law reflects the operation of a general set of rules designed to promote equality among creditors in the case of an insolvency and on the whole work satisfactorily.
- Attempting to differentiate the competing claims or rights of all

unsecured creditors achieves nothing because there is a limited pool of assets and an advantage to one group is to the detriment of another.

- The overall result of the current law, while it may give the appearance of being unfair to certain groups, is not unfair as it seeks to ensure that losses are borne equally.

The report found the arguments in favour persuasive. It summarised the position as follows:

There is a real distinction between [the pre-paying consumer's] position and that of the commercial creditor. The commercial creditor extends credit with a profit motive in mind; he is in a position to acquire accurate information and weigh his risks carefully; he is able to extract higher prices or interest rates to compensate for that risk; he is able to spread his losses efficiently among others with whom he does business and he may be in a position to extract security to minimize his risk.

None of these avenues is open to the consumer creditor who has made a pre-payment.

The report thus recommends the creation of a new structure of property rights. In its view the most appropriate method of protecting the consumer who pre-pays for goods is by giving the consumer a lien, which is a form of security interest, over either the goods or the pre-paid purchase money. Furthermore, the report recommends that the buyer's lien should have priority over any consensual security interest in the goods or the account which is subject to the lien. The report also proposes that where there are insufficient goods or funds to satisfy all buyer's liens the fund created from the liquidation of

assets should be shared rateably between them.

The Australian Law Reform Commission's Discussion Paper No 32 on its *General Insolvency Inquiry* published in August 1987 briefly considered the question of pre-paid consumer contracts. The conclusion reached in that Paper was that there was not a sufficiently strong case regarding pre-paid consumer contracts to justify creating a new priority. Rather the Commission supported the fundamental principle of a rateable distribution of available assets among creditors and it favoured limiting, rather than extending the range of priority creditors in the existing, insolvency legislation.

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prisons in the spotlight

We tried to implement Christian principles.

Attributed to the architect
of Jika Jika prison

long bay. Recent events in New South Wales and Victorian jails have placed the prison system under public scrutiny. In New South Wales an eighteen year old fine defaulter in Long Bay Jail was bashed by another inmate in the prison yard. His injuries were so severe he had to be rushed to nearby Prince Henry Hospital where doctors performed an emergency operation to relieve pressure on his brain.

The victim, Jamie Partlic, had entered jail less than 24 hours earlier to eradicate \$1250 in traffic fines, including one for bald tyres, breaching bail conditions and other offences. He was in a section reserved for fine defaulters,

although according to witnesses a convicted double murderer was also in the yard.

After the assault, the NSW Government moved quickly to place a moratorium on fine defaulters serving short jail terms in lieu of paying fines. Fine defaulters and minor criminals will be given the option of car licence cancellation and/or community service. Speaking after a State Cabinet Meeting the Premier, Mr Unsworth criticised prison procedures saying:

Clearly there has to be appropriate classification of prisoners to ensure that the minor offenders are not placed in circumstances where they would come into contact with hardened criminals.

The assault is the subject of an inquiry by Judge Muir of the District Court. It has all the powers of a Royal Commission, except witnesses can refuse to give evidence that might incriminate them.

jika jika. In Melbourne five prisoners died in October when they barricaded themselves in their cell block and set fire to the barricade. They were apparently protesting against the reversal of a decision to move a prisoner from the maximum security jail Jika Jika, a division of Pentridge, back into the main prison. Several days later the Victorian Attorney-General, Mr Kennan announced the closure of the controversial section describing Jika Jika as 'an electronic zoo'.

Jika Jika — once the pride of the Victorian prison system — was designed in keeping with the maxim that there is some good in everyone.

According to *The Australian* of 31 October 1987.