

Ombudsman (Police Complaints) would not conduct adequate investigations. He said:

It will be sweet, it will be quiet and it will be like an insidious disease. It will be a total failure (*Sun*, 19 April 1988).

In its final report, the Police Complaints Authority presented a draft Bill to address some of the difficulties which the PCA had encountered in conducting its task. The suggestions included:

- permitting the PCA to conduct investigations on its own initiative in limited circumstances;
- ensuring that the PCA would be able, in the same way as the Chief Commissioner, to direct members of the police force to obey its directives during the course of investigations;
- permitting the PCA to do those things necessary and incidental to the discharge of its functions, thereby avoiding technical litigation brought to frustrate the spirit of the legislation;
- giving flexibility to the PCA in relation to powers to appoint staff.

a posthumous victory. In its final report, the PCA investigated a complaint of an assault by police on six men who were being arrested. The PCA recommended that the police involved be charged on a disciplinary basis with the use of unreasonable force. In the result, the charges brought against the six men arrested were dismissed by a magistrate in Heidelberg Magistrates Court and the Magistrate, Mr Ian Griffiths, ordered that four police officers pay a total of \$38 160 in costs for an 'unprovoked assault' on the six men (*Sun* 18 June 1988). Mr Selby commented:

... there is no longer a credible system to which members of the community can

go with legitimate complaints against the police. If the same case happened today, justice would not triumph.

Now that the Police Complaints Authority no longer exists as an avenue for complaints against police by the Victorian public, it will be a matter of considerable interest to see how effective the Deputy Ombudsman is in dealing with public concerns in this area.

* * *

sale of goods in new south wales

Corporation, n. An ingenious device for obtaining individual profit without individual responsibility.

Ambrose Bierce,
The Devil's Dictionary (1881-1911)

nswlrc issues paper. The law concerning sale of goods contracts was first enshrined in legislation in New South Wales by the Sale of Goods Act 1923 (NSW), which was based on United Kingdom legislation of the last century. Commercial and social conditions have changed significantly since then and the New South Wales Law Reform Commission has proposed, in a most interesting Issues Paper (*Sale of Goods*, IP 5, 1988), that the law should be updated to reflect the increased sophistication of today's consumer and commercial contracts and the need for consumer protection. Concepts now considered outmoded, such as *caveat emptor* ('let the buyer beware') and 'merchantable quality' should be eliminated.

commercial and consumer transactions require different treatment. The NSWLRC considers that the existing legislation is drafted from the viewpoint of the commercial contract for the sale of goods, without adequate regard for consumers. While

1974 amendments to the Act brought some relief for consumers, these may not have gone far enough. In particular, the basic philosophy behind the Act, that contracting parties have roughly equal bargaining power, remains and consumers are liable to be misled about their rights. The NSWLRC therefore tentatively proposes that there should be separate Acts, one dealing with commercial contracts and the other with consumer contracts.

commercial contracts. While the legislation has worked reasonably well in the context of commercial dealings, the NSWLRC sees a need for updating in the light of social and economic conditions prevailing today. It is also acknowledged that there needs to be continued updating as conditions alter. The NSWLRC proposes amendments to the existing Act to deal with commercial contracts for the sale of goods rather than an entirely new Act. The amendments would deal with several matters.

offer and acceptance. The Act does not deal with these fundamental matters concerning formation of contracts. The NSWLRC suggested that the UCC (Uniform Commercial Code: the Code is a model Act that has been enacted in most of the United States of America) provided a useful model for provisions that would deal with the form in which an agreement may be evidenced, the status of 'firm offers', the ways in which acceptance of an offer might be made, the effect of an acceptance containing additional terms and variations of a contract not accompanied by consideration.

privity. The doctrine of privity of contract means that only the parties to a contract are bound by it or may sue to enforce the benefits given by it. While no changes are proposed in relation to third parties who are sought to be burdened by a contract, the NSWLRC invited comments on

the operation of the privity doctrine in so far as it concerns third party beneficiaries.

misrepresentation. The NSWLRC suggested there was a need to clarify the law as concerns representations that induce a person to enter into a contract, both as to whether the representation was a term of the contract and the basis on which damages for misrepresentation would be assessed. It was noted that the Trade Practices Act 1974 (Cth) s 52 and the Fair Trading Act 1987 (NSW) s 42 had implications in this area.

'romalpa' clauses. Such clauses seek to protect a seller against the buyer's insolvency before payment by reserving the transfer of the seller's ownership of the goods sold until payment is made. The Act does not recognise or provide for such clauses. The NSWLRC invited comments on how such clauses should be dealt with. It was noted that any relevant provisions would have to take into account the effect of the Companies Code so far as it relates to charges on goods, which is one of the effects of a Romalpa clause.

cif and fob contracts. These acronyms, literally 'cost, insurance and freight' and 'free on board', describe two types of contract for sale of goods between parties in different places. They are commonly used in international and interstate sales. There is much common law on these types of contracts but the Sale of Goods Act does not deal with them. The NSWLRC suggested that the UCC contained useful models for provisions that might be enacted in the Act dealing with the obligations arising under such contracts, including the effect of named places of delivery or shipping, and the passing of title to goods, including recognition that it was conditional on acceptance of the goods by the buyer. The NSWLRC also noted that there was a need to ensure that any provisions were consistent with the the United

Nations Convention on the International Sale of Goods, to which Australia is a party.

rejection and termination. The NSWLRC suggested that the Act did not deal satisfactorily with the rights of rejection, where a buyer rejects goods but a seller may still be able to keep the contract on foot by tendering other goods within the time set for delivery, and termination, which brings the contract to an end. There was a need to clarify the circumstances in which each right could be exercised. It was suggested that ancillary matters, dealing with the the content of the implied terms of merchantable quality and fitness for purpose, might also require some amendment. The NSWLRC sought comment on a proposal that, where a buyer rejected goods, the ground for rejection should be nominated and that only this ground could be relied on in later proceedings. Comment was also sought on a proposal that a seller should have an opportunity to 'cure' any defect which had led to rejection of goods, so long as such cure was effected reasonably quickly.

mistake and frustration. The NSWLRC noted that the provisions of the Act dealing with mistake and frustration were incomplete, in the sense that there was a lot of common law on the subject that had developed since the Act's enactment. Amendments may clarify the situation and provide greater certainty in commercial dealings. Comments were sought on whether and, if so, how, the Act should deal with these matters.

damages. It was also noted that the Act was incomplete in a similar sense as regards the matters related to damages. Comment was sought on several matters including the basis for assessment of damages, remoteness and causation, the rights of a buyer where there is late payment, the

duty of a person suffering loss to mitigate that loss and the effect of termination.

nemo dat. This rule, which is reflected in the Act, states that a buyer from a non-owner obtains no better title to goods than the seller had. Certain exceptions to the rule are also included in the Act. The NSWLRC notes that there has been some dissatisfaction with and uncertainty as to the interpretation of the relevant provisions and seeks comment on how the matter should be dealt with.

unconscionability. The NSWLRC suggested that there is a need to regulate unconscionable contracts or terms in contracts in the commercial context. Comment was sought on possible ways on doing so.

consumer contracts. The NSWLRC considered that legislation dealing with contracts relating to the supply of goods to consumers 'should reflect the legitimate expectations of consumers and provide protection from defective goods and unfair contracts'. It considered that the Sale of Goods Act did not do so and that it would be difficult to amend the Act so as to satisfy both commercial and consumer buyers and sellers. The NSWLRC noted that the provisions concerning the implied terms, particularly terms dealing with quality and fitness for purpose, were framed from the point of view of a commercial sales. In the interests of intelligibility and ease of application, the NSWLRC proposed that there should be new legislation dealing with consumer contracts and that the obligations of sellers should be expressed in terms of the rights of the buyer rather than as implied terms.

meaning of 'consumer'. The NSWLRC noted that there were two aspects to this question, one philosophical and

the other with uniformity with the Trade Practices Act 1974 (Cth). The complexity of the federal provision was criticised and its apparently unintended effects demonstrated. It was also noted that the protections afforded by the Act generally only arose where the seller was a corporation, a limitation imposed for constitutional reasons. The NSWLRC argued that State legislation should not be similarly restricted and that it should apply to all appropriate contracts regardless of the status of the seller. The NSWLRC suggested that any definition should be broad enough to bring within its operation the operator of a small business, who, in relation to dealings with large enterprises, was in need of just as much protection as the individual buying goods for consumption at home. It was tentatively proposed that the definition should be based on the concept of sales of goods not acquired for re-supply, perhaps with a money ceiling of \$20 000 (not applicable to motor vehicles and farm machinery). A further limitation noted might be to exclude sales to persons who dealt in goods of the type purchased. An alternative noted, but not favoured, by the NSWLRC was a definition encompassing only goods not purchased in the course of a business or not for re-supply. Such a narrow definition, it was suggested, would make it imperative to regulate unfair terms in commercial contracts. A possible limitation on the first proposal was to allow 'reasonable' exclusion of the protections available under the proposed legislation where the goods were purchased in the course of a business.

consumer rights. Instead of the implied terms which give rise to certain obligations on the part of sellers and corresponding rights on the part of buyers, the NSWLRC proposes that the rights of consumers and the circumstances in which they may be exercised be specifically stated. The principle right would

be termination, carrying with it an obligation on the part of the consumer to return the goods, except where it is unreasonable to expect that this should be done. The NSWLRC discusses two alternatives on the grounds for termination, one the concept of 'acceptable quality' as used in the Saskatchewan Consumer Products Warranties Act 1977, the other that the goods are 'defective', defined by reference to the terms of the contract, reasonable quality, utility and durability of the goods. The right to terminate would not depend on the technicalities of the present law concerning passing of property and 'acceptance', but a limitation would be that the right must be exercised within a reasonable time, suggested as one calendar month, after purchase. Ordinary use within that time would not bar exercise of the right, but misuse would. There would be no need to produce the sales docket when goods were returned so long as some proof of purchase from the seller could be given.

exclusion of terms or liability. The paper notes that Part VIII of the Sale of Goods Act is primarily intended to prohibit sellers from excluding their liability to consumer buyers under the implied terms. A similar prohibition would apply in relation to the consumer rights proposed in the new legislation and this prohibition would also apply where a seller purported to give a consumer greater rights by express statements in the contract. The use of exclusionary clauses should be an offence attracting criminal penalties, so as to prevent sellers from misleading consumers by including terms in contracts which are by operation of law void.

damages. The other right available to buyers would be damages, that is, money compensation. Where a buyer did not terminate a contract, he or she would be

able to recover the reasonable cost of repairs to the goods to bring them up to the contract specifications. Consequential losses would also be compensated, subject to apportionment for contributory negligence on the part of the buyer.

privity. A person suing on a contract has to prove only that the contract was breached, for example, that a toaster did not work, not why the toaster did not work or that the seller's conduct had caused the toaster not to work. However the doctrine of privity means that persons who are not a party to a contract have a much more difficult task. They have to prove fault or negligence in order to succeed in a claim for damages. The Trade Practices Act 1974 (Cth) Part V, Division 2A confers contractual-type rights on buyers and subsequent owners of goods against manufacturers even though there is no contract between them. The NSWLRC proposes that a similar right should be conferred on buyers and other persons allowed by the buyer to use the goods in respect of express undertakings, for example, representations made in warranty cards, of manufacturers. Also, manufacturers should be liable for personal injuries to buyers and, where the injury was reasonably foreseeable, to others, caused by a defect in the goods. Contributory negligence would be a defence and comment is sought on a possible defence, namely, that the manufacturer has taken reasonable care in the manufacture of the goods.

second-hand goods. The NSWLRC proposes that the rights conferred by the new legislation should apply to cases where second-hand goods are supplied under contract. Persons who do not sell in the course of a business should be permitted to limit their liability under the rights conferred to the cash price of the goods, but this would not be permitted where loss was caused because the seller had failed,

through operation of the *nemo dat* rule, to effect transfer of ownership in the goods to the buyer.

enforcement of consumer rights. The NSWLRC notes that the expense of litigation provides an obstacle to the enforcement of rights, even where alternative and cheaper avenues than the courts, such as the Consumer Claims Tribunal, exists. The termination right has one advantage in this regard because it is a 'self-help' remedy, requiring enforcement only where the seller refuses to take back goods returned. The NSWLRC proposes an extensive education program to make both sellers and buyers aware of their rights and obligations. The legislation should also be drafted in 'plain English' to assist understanding of the law.

scope of sale of goods legislation. The NSWLRC also discusses several matters that affect the scope of the sale of goods legislation and issues concerning contracts involving particular types of goods.

- *exchange of goods:* The Act presently applies only where there is 'money consideration' for the sale. It is proposed that the Act be amended so that exchanges of goods also be regulated, and sales where the price is partly goods and partly money.
- *lease, hire and hire-purchase:* The NSWLRC notes that, since the enactment of the Credit Act 1984 (NSW) and the repeal of the Hire-Purchase Act 1960 (NSW), there is a need for clarification as regards the law governing rights of lessors and lessees under lease, hire and hire-purchase contracts. It is proposed that at least consumer lease, hire and hire-purchase contracts should be controlled by legislation similar to, or as part of, that proposed for consumer contracts of sale. Comment is sought on whether commercial lease, hire

and hire-purchase contracts should also be regulated.

- **services:** Several unsatisfactory features, including uncertainty, are demonstrated about the present law dealing with the service contracts, particularly service contracts which include a goods supplied component. Tentative proposals are made for regulating both consumer and commercial service contracts and comments are sought, particularly as regards the appropriateness of the definition of 'services' in the Trade Practices Act 1974 (Cth).
- **computer software:** The NSWLRC discusses the inappropriateness of many of the features of sale of goods legislation to contracts concerning the supply of computer software. Given their unusual features, it is proposed that there be specific legislation dealing with such contracts. Comment is invited on the form of such legislation and particularly on two issues: the manner of creation and the scope of the obligations which should be imposed on the supplier of software; and the relationship between such obligations and copyright under the Copyright Act 1968 (Cth).

economic impact. Throughout the issues paper the NSWLRC acknowledges that consideration of any proposals for reform must take account of their likely economic impact. In particular, costs of insurance and the pricing of goods are relevant to the proposals put forward in relation to consumer contracts. Comment is sought on these matters.

* * *

medical treatment for the dying

One should part from life as Odysseus parted from Nausicaa – blessing it rather than in love with it

Nietzsche, *Beyond Good and Evil*, (1886)

The last issue of *Reform* contained an article on the reaction to the Victorian Government's 'dying with dignity' legislation ([1988] *Reform* 82).

The Law Reform Commission of Western Australia now invites public comment on a discussion paper it has issued on medical treatment for the dying. The Commission will make final recommendations to the Government in the light of comments received on the paper.

existing position. The discussion paper 'Medical Treatment for the Dying' comments that many illnesses and conditions eventually reach a point of hopelessness where there is neither any prospect of the patient being cured nor any prospect of a further period of life of reasonable quality. Yet with the use of life support systems a patient may still live for a time though in considerable pain, stress or discomfort. In these situations it may seem inhumane to prolong the patient's life. The patient, if able to make a rational decision, may ask that treatment aimed at prolonging life should cease and instead they receive palliative care designed to ensure that he or she suffers the minimum of pain and distress before dying. Alternatively a patient may not be able to make such a request, for example if he or she is unconscious or enfeebled by illness or medication, but people with close associations with the patient may consider that course to be in the patient's best interests.

dying with dignity. The WALRC reports that a number of people who made preliminary submissions expressed concern that they would be forced through the efforts of modern medicine to endure