REFORM OF THE LAW RELATING TO CONSUMER CREDIT

By M. J. TREBILCOCK*

I INTRODUCTION

The dramatic growth in the use of consumer credit in post-war years in Australia is indicated by the increase in the average instalment debt *per* head of population for consumer goods during this period: in 1939, it was $5; in 1950, it was $18; at the end of 1968, it was $140.

Attitudes to the use of consumer credit have changed markedly in recent years. There was a time when a consumer who borrowed to buy goods was widely regarded as a second-class citizen, and one whose interests the law should not be too solicitous to protect. Either he was a pauper, or if he was not, he was attempting to live beyond his means, and the lack of discipline was bad for his character. Solid citizens always paid cash. This cynicism towards the wisdom of using credit is well-reflected in the oft-quoted observation of a County Court judge some years ago that a great part of his time on the Bench had been concerned with 'people who are persuaded by persons they do not know to enter into contracts they do not understand to purchase goods they do not want with money they have not got'.[1]

However, nowadays almost every family sooner or later has occasion to use consumer credit. The advantages which accrue to consumers from the prudent use of credit are now widely recognised, and its use almost universally sanctioned. By using consumer credit wisely, consumers are able to level out peaks in their needs and resources.[2] For example, a married couple in their mid-twenties with a young family may have their greatest need for particular household appliances now, rather than at such future time as their savings might allow, or prospects of moving to higher income brackets have materialised. Consumer credit thus enables them, perfectly reasonably, to meet present needs out of future income, and thus to maximise the benefits which flow from that income. Professor E. P. Neufeld, a noted Canadian economist, states:

> It would be rational to argue that a consumer should use consumer credit up to the point where his marginal satisfaction from the goods and services so acquired is equal to the marginal cost of credit needed to acquire them within the constraints imposed on him by his income and net worth. Certainly on an *a priori* basis it is as easy to visualise a consumer using too little consumer credit as too much.[3]

* LL.B. (N.Z.), LL.M. (Adel.); Barrister and Solicitor; Visiting Associate Professor in McGill University, Montreal. This article is based on a paper presented to the Annual Conference of the Australasian Universities Law Schools Association in August 1969.

[1] Quoted by Lord Greene (1944) 94 *Law Journal* 367.

[2] McGlashan, 'Commentary', Conference on Consumer Credit, University of Adelaide, 17 August 1966.

[3] Ziegel and Olley (ed.), *Consumer Credit in Canada* (1966) 10.

Apart from the question of maximizing the benefits accruing from resources, if consumers were required to save up and pay cash for all items purchased, many would find the austerity required too much for them. Thus, in the case of these consumers, the use of consumer credit operates as a form of compulsory saving.

Finally, and as general observation, the use of consumer credit has enabled vast numbers of consumers to purchase goods which they would otherwise never have been able to purchase, thus not only improving their own standard of living, but also, by reason of the increased level of consumption, stimulating significantly the economy at large.[4]

While, however, the dramatic increase in the use of consumer credit has brought many benefits, it has, inevitably enough, also brought many problems. A major problem is the increasing inequality in the bargaining positions of credit grantors and consumers. The argument that in a political and social system based on free enterprise and the principle of competition, bargains should be made in the market place, unimpeded by legislative interference, can no longer be accepted in relation to consumer transactions.

The principle of freedom of contract became embedded in our legal philosophy in another age, when perhaps *laissez-faire* philosophies were understandable. During the nineteenth century, the average consumer was concerned, for the most part, with the purchase of basic and essentially uncomplicated commodities. Also, he almost invariably paid cash. Consumer credit, on any significant scale, is primarily a post World War II phenomenon.

The consumer of today finds himself in a quite different environment. First, the commodities he is concerned with are not, for example, the horse or basic household furniture of yesteryear, but the mechanically complicated motor vehicle and the mechanically complicated household appliance the workings of which are for the most part beyond him. Secondly, he now buys many of his commodities on credit, rather than for cash. This means that he is required to enter into what are for him complicated legal transactions having long-term and far-reaching effects on him and his family.

Thus, in short, the consumer of today is faced with two problems which never faced his predecessor: complicated goods and complicated transactions, neither of which he is likely fully to understand.

It might be argued that a consumer should therefore consult experts on the mechanical workings of goods he is buying before purchase and experts on the legal implications of transactions into which he is entering. No doubt some consumers will do this. However, in an age of sophisticated advertising and sales techniques, the whole atmosphere of the

[4] At the end of 1968, $1687.4 million instalment credit for retail sales was outstanding.

market place conspires to encourage a consumer to buy, and to buy *now*: 'Buy *now,* pay later'; 'Drive away in a new car *today*'. The need for a consumer to take independent advice is depreciated: 'Our cars are production-line reconditioned and fully warranted for your complete protection', 'Easy terms can be arranged on the spot for your convenience'.

All these factors together combine to create one over-all problem—a marked inequality in the bargaining positions of business on the one hand and the consumer on the other. It is obvious that the man who makes his livelihood out of selling complicated goods will in time come to know more about the goods than consumers who have only infrequent dealings in them. It is equally obvious that the man who makes his livelihood out of providing credit to consumers will in time come to know more about the complicated legal transactions involved than the consumers.

This disparity in the bargaining position of the parties is increasing as goods become technically more complicated and as credit transactions become more various in their form and consequences. As an indication of the extent to which consumers are failing to keep up with these changes, personal bankruptcy figures for the post-war years are interesting. In 1946, in Australia, there was one bankruptcy, composition *etc.* for every 45,394 of population; in 1950, there was one bankruptcy for every 19,443 of population; in 1968, there was one bankruptcy for every 4,615 of population.

In this situation, the principle of freedom of contract, which assumes parties in roughly equivalent bargaining positions, cannot reasonably apply. Moreover, the competition principle, which assumes that for a market to operate efficiently, there must be both informed sellers and informed buyers, also is not satisfied. It is for these reasons that the marketplace cannot be the sole regulator of parties' bargains.

This is not, of course, a novel suggestion. If it were accepted that the market operates fairly and efficiently in this context, there would, for example, be no Hire-Purchase Acts and no Money-Lenders Acts. Yet every civilised country has for many years had such legislation. Thus, the question is not, should consumers be protected, but rather, to what extent should they be protected?

Lord Justice Diplock states:[5]

> I doubt if any lawyer would be prepared to say that any of the countries whose law of hire-purchase and conditional sale is surveyed in this volume has yet achieved a satisfactory solution to what is one of the most pressing legal problems of everyday life in the modern world.

[5] Goode and Ziegel, *Hire Purchase and Conditional Sale, A Comparative Survey of Commonwealth and American Law* (1965) foreword.

In recognition of the need to attempt to meet this problem, the Standing Committee of Australian Commonwealth and State Attorneys-General in 1966 appointed a Committee of three, from the Adelaide Law School, to inquire into and report on the law relating to Consumer Credit and Moneylending.[6] The members of this Committee were Professor Arthur Rogerson (Co-ordinator), Mr. M. J. Detmold, and the author of this article. This report has been completed, and has recently been released to the public. This article outlines the broad structure of the Committee's findings.[7]

II BASIS OF THE COMMITTEE'S RECOMMENDATIONS[8]

1. *Simplification of Forms of Consumer Credit*

The forms of consumer credit have proliferated greatly in recent years. Some of these new forms simply reflect the extension of consumer credit into new fields, or the provision of genuinely new services *e.g.* revolving retail accounts. Others have less respectable origins. Some are attempts at evading protective legislation enacted for the benefit of consumers; others are attempts at evading stamp duty legislation directed at particular kinds of consumer credit; others again are attempts at evading registration requirements imposed by Bills of Sale legislation.[9]

This proliferation of the forms of consumer credit has had unfortunate consequences for the consumer. In particular, it has rendered inadequate the only legislation in Australia which confers significant protection on users of consumer credit *viz* the Hire-Purchase Acts. Historically, of course, the hire-purchase agreement was the most important form of consumer credit and, until quite recently, it remained by far the most widely used. This, however, is no longer so. Now in common use are bills of sale, chattel mortgages, personal loans, rental purchase agreements, instalment sales, revolving credit arrangements *etc.* and these are all outside the scope of the Hire-Purchase Acts. (Only a little over half of all instalment credit transactions are now within the Acts.) The consumer, however, finds it difficult to discriminate between these various forms of consumer credit. As far as he is concerned, they all serve the same function: they all simply enable him to buy goods on credit. He assumes—and reasonably assumes—that the law will treat all like transactions alike. But, unfortunately, and unknown to him, quite different legal consequences at present flow from the various forms. That the present law should pay so much attention to

[6] *Report to the Standing Committee of State and Commonwealth Attorneys General on the Law relating to Consumer Credit and Moneylending* (1969) available S.A. Government Printer.

[7] There is obviously a considerable danger of over-simplification and distortion in summarizing the findings and reasons of a fairly lengthy report. Naturally, the only authoritative statement of either is to be found in the report itself.

[8] Report chapters I, II, III.

[9] Hire-purchase was, in origin, an evasive device designed to circumvent Factors and Moneylending legislation. Rarely, if ever, in the past have firms in this area been determined by purely functional considerations.

orm, and so little to function, is one of its great weaknesses. The end esult is that consumers who enter into any of these non hire-purchase orms of consumer credit are entering into largely unregulated forms of ransactions.

The Committee considered that the law relating to consumer credit ould be much simplified, and all needs in the area adequately met, by onfining the methods of financing the acquisition of goods by consumers n credit to two:

(a) *the consumer credit sale* (in which, because the seller provides the redit, there are necessarily only two parties), and

(b) *the consumer purchase loan* (in which a third party provides the redit necessary to enable the consumer to purchase the goods from the eller).

In both cases, property in the goods should pass on the conclusion of he purchase to the consumer, but the credit grantor, if he so wishes, hould be free to take a security interest by way of charge (a mortgage) s authorised by statute, in the goods. No other form of security should e permitted. The notion of a charge seems most accurately to reflect a ecured credit grantor's interest in goods. There is no novelty in the otion of a security interest by way of charge only. It is similar in concept o methods of consumer financing by bill of sale or chattel mortgage, idely used today in Australia and particularly in the United States and anada where hire-purchase is largely unknown. It equates the interest f a 'mortgagee' of goods with that of a mortgagee of real property, which nder the Real Property Acts[10] must now be by way of charge, and not ransfer. It largely resolves the vexed question of the hirer's 'equity' in oods under hire-purchase.

The Committee considered that these two forms of transaction—the onsumer credit sale and the consumer purchase loan—and the kind of curity interest contemplated, much more truly represent the true rela- ons between the parties, and the business realities of the situation, than resent forms, and the legal rules which they have produced. In particular, e Committee's recommendations, if implemented, will mean the end of ire-purchase. The effect of this form of consumer financing on the law as been nothing but mischievous, and has distorted entirely the true ature of relations between the parties and the real nature of transactions etween them. In the three-party situation, the real seller of the goods .e. the 'dealer') is not treated as the seller, and indeed has no contractual lationship at all with the buyer, and very few obligations to him. The nance company, whose proper function is that of moneylender only, ecomes the owner of the goods, and, in effect, the seller of them to the onsumer, together with the obligations that the seller's role entails. The uyer is not buying the goods but merely hiring them and is not the owner

[10] *E.g.* s. 132 (S.A.)

of them, but merely the bailee. Nothing could be more artificial. Hire purchase had its origin as an evasive device. It betrays all the features of such an origin. As Pearson L.J. said in *Financings Ltd. v. Stimson,*[11] '[t]his hire-purchase transaction, as unhappily so often happens with hire purchase transactions, creates complicated, artificial and obscure lega relationships between the parties'. In *Campbell Discount Co. Ltd. v Bridge,*[12] Lord Denning said:

> [i]t is as well to remember what is the nature of a hire-purchase trans action. It is, in effect, though not in law, a mortgage of goods. Just as a man who buys land may raise part of the price by a mortgage of it, s also a man who buys goods may raise part of the price by hire-purchas of them. And just as the old mortgage of land was not what it appeare to be, so also the modern hire-purchase of goods is not what it seems t be. One might well say of a hire-purchase transaction what Maitland sai of a mortgage deed: '[I]t is one long *suppressio veri* and *suggestio falsi,* see his Lectures on Equity, 2nd ed., p. 182.[13]

In the Committee's view, the law should take a much more functiona view of the nature of these transactions. The law should recognise th dealer as the seller, and the finance company as merely a credit granto (*i.e.* separate the sale and loan aspects of the transactions) and impos responsibilities on the parties appropriate to these roles. Under the schem the Committee has proposed, there will be an actual contract of sal between the dealer and the consumer financed by a contract of loa between the consumer and the finance company. This seems accurately t represent the relations between the parties.

It will, of course, still be possible, much as under present hire-purchas arrangements, for the dealer to sell goods to the finance company, and th finance company to sell them to a consumer under a consumer credit sal However, a finance company would gain nothing from this, but instea incur a number of additional obligations normally carried by the selle At present, by virtue of a credit grantor's ownership of goods the subje of a hire-purchase agreement, and the value of this as security for the deb outstanding, there are advantages in this form of triangular arrangemen However, under the Committee's proposals, property in the goods wi always pass to the consumer buying the goods on credit, subject only t the retention by the credit grantor of a security interest by way of charg Thus, in terms of security, a credit grantor gains no advantage by buyin from the dealer, and becoming the owner, and then selling to the cor sumer, as opposed, on the other hand, to financing a direct purchase b the consumer from the dealer.

[11] [1962] 3 All E.R. 386, 390.

[12] [1962] A.C. 600, 626-7.

[13] For a more detailed discussion of some of the problems produced by the u realities of hire-purchase, see Ziegel, 'Hire-purchase: the Dark Horse in the Chatt Security Stable' (1968) 3 *Recent Law (New Zealand)* 228.

While this scheme entails separating, as far as possible, the sale and loan aspects of all consumer credit transactions, complete separation is not possible. In the three party situation, neither the sale nor the loan would have taken place without the other. Consequently, if the consumer has a right to terminate or rescind the contract of sale for some reason, he must be given a similar right in respect of the related contract of loan. If this were not so, the consumer would be without the goods, but still bound under the loan. Thus, the loan should be treated as terminated, and the seller be liable to repay the lender all amounts outstanding under the loan less a rebate of interest calculated on the basis of an early completion as under the present Hire-Purchase Acts.

These recommendations for simplifying the present forms of consumer credit by reference to functional considerations could be given effect to by providing that 'consumer credit transactions' should embrace all methods (including hire-purchase and the other various methods in current use) of financing the acquisition of goods on credit. It should then be provided that the only valid method of entering into a consumer credit transaction, as defined, should in future be by the use of the consumer credit sale or the consumer purchase loan. Suitable sanctions should attach to non-compliance with this requirement.

2. *Revolving Credit Arrangements*

In addition to this classification of consumer credit transactions as either consumer credit sales or consumer purchase loans, a further sub-classification is required: single-unit transactions, and revolving credit transactions. The latter form of credit is at present largely confined to retail stores (*e.g.* budget accounts) but lender credit arrangements (*e.g.* credit cards), which are used extensively in the United States, also operate on the same principle. Thus, using the terminology of the United States Uniform Consumer Credit Code, there will be consumer credit sales pursuant to revolving charge accounts, and consumer credit sales not pursuant to revolving charge accounts (*i.e.* single-unit sales). Similarly, in the case of consumer purchase loans.

There are several reasons why this distinction between single-unit and revolving credit arrangements has to be drawn:

(a) The most important is that no security interest should be possible in revolving credit arrangements. This accords with present practice. There is no feasible method of tying-up individual purchases under such an arrangement with periodic repayments of credit granted, and interest, and thus it would not be fair or practicable to allow a credit grantor to claim security over goods bought under it. If a credit grantor wishes to take security, he has only to resort to a single-unit consumer credit transaction.

(b) Requirements for the disclosure of effective interest rates must, of necessity, operate slightly differently in the case of revolving credits from that of single-unit transactions. In the former case, interest charges are

normally calculated on a consumer's periodic billing day, irrespective of when purchases or payments are made. Thus one cannot accurately predict how much credit will be outstanding over a given period of time. This is much easier in the case of single-unit transactions with regular repayment schedules.

(c) Any prescribed documentation which is required to be furnished to a consumer before he enters into a revolving credit arrangement, would, in the nature of things, if only because of factor (b), have to be in some respects different from the documentation required in single-unit transactions.

Apart from these differences, revolving credit arrangements should be treated as far as possible like single-unit transactions, and the loan aspect of a consumer credit sale treated as far as possible in the same way as a consumer purchase loan.

It is, of course, appreciated that not all loans of a 'consumer' character are made to enable the purchase of goods. The Committee would restrict consumer purchase loans to loans where the credit grantor, as a condition of the loan, requires that the proceeds be spent on the acquisition of goods (normally where he has a right to take a security interest over the goods being acquired). Other consumer loans, referred to as consumer non-purchase loans, are dealt with later in this article.

3. *What is 'Consumer' Credit?*

Obviously, not all loans to enable the purchase of goods or sales of goods by instalments fall within the concept of 'consumer' credit. Probably a fairly widely accepted concept of what a 'consumer' credit transaction is would be the purchase of goods on credit by a private individual for his personal use, or for the use of his family or his household. Indeed the United States Uniform Consumer Credit Code expressly requires, in order to bring transactions within its scope, that the goods be purchased 'primarily for a personal, family, household or agricultural purpose'. However, with all respect to the framers of the Code, this kind of definition, as a working legal rule, does not seem free from difficulty. In the case for example, of the doctor, commercial traveller, or farmer who uses his car partly for business purposes and partly for private purposes, what enquiries could reasonably be expected of a credit grantor in determining whether a transaction, in a particular case, was within the statute?

The United States Uniform Consumer Credit Code also excludes from its scope 'organisations'. 'Organisation' is defined[14] as 'a corporation government or governmental subdivision or agency, trust, estate, partnership, co-operative, or association'. This definition again seems to give rise to certain difficulties. Presumably, the thrust of the exception is at buyer

[14] S. 1. 301 (10).

who can be taken to have sufficient business experience and standing adequately to look after their own interests, without the need for any pecial statutory protection. However, the definition, as it stands, would xclude small 'one-man', family, tax and farming companies and partnerhips, and also incorporated clubs and societies. This seems to go too far. he more limited exclusion provided for in the Hire-Purchase Act 1965 U.K.), of companies alone, is perhaps to be preferred (it may be argued hat to forego protection under consumer credit legislation is a fair price o pay for limited liability) but even here the fact of incorporation may say othing as to the business expertise or standing of the incorporators, and hus again the exclusion can operate quite arbitrarily.

The best solution to the problem of finding a workable concept of onsumer credit for present purposes seemed to the Committee to be to ıpose the following limitations on the scope of consumer credit legisıtion:

(a) Transactions involving a grant of credit in excess of (say) $5,000 hould be excluded. The Hire-Purchase Act 1965 (U.K.) has a similar ıonetary ceiling, and while, in some respects, it is crude, it does exclude ırge transactions which will normally not be of a consumer character, it . relatively precise, and it avoids needless demarcation problems.

(b) Transactions with persons dealing in the goods for which they are btaining the credit should be excluded. The exclusion of dealers is lready provided for in the present Australian Hire-Purchase Acts.

(c) Only transactions in which the credit grantors are regularly engaged ı the business of granting credit should be included.

(d) Only transactions involving the imposition of a finance charge or ıur or more repayments (including any down payment) should be ıcluded.

The Committee believed that, in practical effect, this would come close ı its general concept of consumer credit. It would embrace almost all ansactions that could fairly be regarded as within this concept, and hile other transactions may also be embraced (*e.g.* the case of the large ɔrporation obtaining credit), the Committee considered that these cases ould occur relatively rarely. When they did occur, little injustice would ɛ done. One of the main objectives of the Committee throughout was to ɛvise rules which would give to all consumers the full ability to bargain eely, which, for example, the large corporation may already have, not y virtue of legislation, but by virtue of its business expertise and standg. If it was thought necessary, however, power could be given to an ɔpropriate person or body to exempt parties from compliance with the gislation if this was in their interests.

III DOCUMENTATION[15]

Apart from precise details as to the financial arrangements between th parties, there should also be set out in a consumer credit contract i prescribed and readily comprehensible language, the statutory rights an obligations of the parties. These would include statutorily implied term as to title and quality, remedies for breach thereof, grounds for reposses sion, and a consumer's rights prior to, and following repossession. It i pointless for the law to imply all sorts of terms into consumer credi transactions, and to give the consumer all sorts of remedies, if these ar not brought to his notice in a form in which he can readily understan them.

The question then arises, if this degree of regulation of the contents c consumer credit contracts is necessary, should not the law go further an prescribe standard forms for consumer credit sales and consumer purchas loans? From the consumer's point of view, there would seem to be con siderable advantages in setting out forms in the same way, stating term in the same terminology *etc.*, so that in the course of time, he woul become accustomed to 'finding his way around' the various agreements i use. Opposition to the prescription of standard forms seems to be base largely on their lack of flexibility. However, an examination of many c the forms in common use reveals a very substantial degree of uniformity Moreover, the Australian Finance Conference conceded, in its submission that rarely, if ever, were members called on to depart from their ow standard forms. Thus the objection to prescribed standard forms become largely philosophical, and an objection on this basis would not seer sufficient to outweigh the very tangible advantages to consumers whic would follow from their use.

Apart from formal requirements relating to the contract itself, ther remains the question of what other documentation in terms of notice should be furnished to the consumer. In place of the present First an Second Schedule notices under the Hire-Purchase Acts, the Committe recommended that at the time a consumer enters into a contract, he b furnished with a set of 'explanatory notes' setting out in summary for and expressing in colloquial language his principal rights and obligation Such a document would serve an invaluable function, and is entirely practi able. The leaflet published by the Australian Finance Conference,[16] slightly expanded form, would serve this function admirably. Much of th other information contained in this leaflet could also, to advantage, b included in these explanatory notes. The present Third and Four Schedule notices relating to repossession should be retained; these a dealt with in the report in the context of repossession.

[15] Report ch. VI.

[16] *Credit Care or Credit Cares.*

IV SECURITY OVER GOODS[17]

The nature of the security interest in goods which credit grantors should be permitted to take under consumer credit transactions has already been dealt with, and it has been emphasized that this should be by way of charge only.

The question of security in consumer credit transactions is important in two respects: first, in what circumstances is a security interest to be enforceable against the consumer? Secondly, in what circumstances is a security interest to be enforceable against third parties?

. *The Security Interest as between Credit Grantor and Consumer*

While, obviously, the existence of the possibility of repossession is a very valid threat which the credit grantor has, and should have, at his command to encourage a consumer to keep to his obligations, the great majority of consumer credit contracts in use today give the credit grantor the right to repossess on any breach whatever. This seems to go beyond what is justified. In the Committee's opinion the only breaches which should entitle the credit grantor to take possession of the goods are those which:

(a) indicate the consumer's intention not to keep to the obligations of the contract (*i.e.* repudiations of the contract), or

(b) place the security in jeopardy.

To this end, legislation should spell out the circumstances which are to give the credit grantor a right of repossession. Examples of these circumstances are enumerated in the report.[18]

In other respects, the principles embodied in the Hire-Purchase Acts appear, for the most part, to be satisfactory (*e.g.* the requirements as to Third and Fourth Schedule notices, reinstatement of the agreement after repossession, deficiency claims by credit grantors, claims by consumers for an account of surplus after realisation). A number of submissions received by the Committee, however, advocated various changes in the rules governing realisation of the security. After considering these in some detail, the Committee felt unable to recommend any substantial changes. It is obvious that the credit grantor has an interest in getting the best price for the goods (after all, the credit grantor often has little hope of looking to the consumer for any deficiency), and this is some guarantee that he will use his best efforts to obtain a reasonable price. The practice of some South Australian finance companies of putting up their repossessed goods at a well-advertised and accessible auction (often with finance available to buyers) seems sound, and legislation could perhaps provide that

[17] *Ibid.* chapters III, XVII, XIX. [18] P. 55.

the price realised at such an auction should be regarded *prima facie* as th best price available. The conditions of validity of the auction would, o course, have to be specified in the legislation.

2. *The Effect of a Security Interest on Third Parties*

Where a consumer wrongfully disposes of goods in which a credi grantor has a security interest, problems arise in settling the conflictin claims of the innocent third party and the innocent credit grantor, to th goods. At present, a credit grantor under a hire-purchase agreement, b virtue of his ownership of the goods and because the consumer has nc 'agreed to buy' under section 25(2) of the Sale of Goods Acts, retains good title as against the third party. This, however, produces injustices fo the third party who, in most cases, will have no means of discovering th credit grantor's interest in the goods.

In respect of motor vehicles, where as a general rule, innocent partic stand to suffer their greatest losses in the event of a wrongful dispositio by the consumer, the Committee considered that an adaptation of th normal registration system for vehicles prevailing in all States would go long way towards meeting the problem. A system of registration of securit interests in motor vehicles of this kind is already in operation in Victori by virtue of the Motor Car Act 1959, and has apparently reduced wron ful dispositions of motor vehicles in that State practically to nil. Und such a system, all security interests must be noted in the Register mai tained by the Registrar of Motor Vehicles, and this is open to search b any member of the public. A *bona fide* purchaser of a motor vehicle i respect to which a credit grantor has failed to register a security intere takes free of that interest. If an interest is registered, third parties will t deemed to have constructive notice of its existence, and will take subje to it.

In respect of other consumer goods, it is doubtful whether any syste of public registration of security interests is practicable, or worthwhil Here, in the event of a wrongful disposition by the consumer, the Con mittee recommended that the security interest be enforceable only again dealers in goods of the description re-sold, persons related to the co sumer by blood or marriage who live in his household, and re-purchase who had actual knowledge that the goods were encumbered at the tin when the unlawful disposition took place. The burden of proof of lack knowledge should be on the re-purchaser. These proposals seemed to t Committee to represent as satisfactory a balance as could be struck b tween the rights of a credit grantor with a security interest on the o hand, and the expectations of the innocent purchaser of an unencumber chattel on the other.

Where a security interest is claimed to be enforceable against a thi party under the foregoing proposals, normally the credit grantor should t required to obtain a court order before repossessing. If the third party do

not dispute the credit grantor's claim, he will hand over the goods and no court proceedings will be necessary; but in cases of dispute, the credit grantor will usually be better equipped to bear the onus of litigation. Where a security interest is claimed to be enforceable against a third party in respect of a motor vehicle, a credit grantor should be able to take possession without a court order: first, motor vehicles are easily removable, and delays could easily prejudice enforcement of the credit grantor's security; secondly, because of the registration system proposed for security interests in motor vehicles, there will rarely be room for doubt or dispute as to whether the security is enforceable against the third party.

In all cases where a security interest is enforceable against a third party, the third party should have the right to pay out the agreement and get a clear title to the goods. Moreover, should the credit grantor choose not to repossess but to sue the third party in conversion, liability should again not exceed the amount outstanding under the agreement. Both these latter proposals merely recognise the real interests of the respective parties in the goods.

V MINIMUM DEPOSITS, CONSENT OF SPOUSE[19]

Neither of these requirements, as methods of discouraging over-commitment, commended themselves to the Committee.

Proponents of minimum deposit requirements claim that the provision of the required deposit, first, is some evidence of credit-worthiness and, secondly, provides an inducement to the consumer to protect his 'equity' in the goods by going on and completing the agreement.

Unfortunately, a major problem with minimum deposit requirements is their enforceability. The widespread practice in Australia of trading-in goods by way of deposit on goods being purchased has provided a fertile means of evading these requirements. By means of the process known as the 'jack-up', an inflated trade-in allowance is offered to the consumer and then the amount by which the trade-in has been inflated over its true worth is included in the price of the goods on which the trade-in is made, thus making the deposit appear to be worth the required proportion of the cash price. Often the consumer is a party to this evasion. A number of possible solutions to the problem of making minimum deposit requirements enforceable were considered by the Committee, but no entirely satisfactory solution could be found.

Moreover, apart from this question of enforceability, there is still the question of whether in fact the provision of the required deposit does provide reliable evidence of ability to complete an agreement. A number of submissions to the Committee made the point that a person's credit-worthiness depends on many other factors besides the ability to provide a deposit. Whether a person is credit-worthy depends, obviously enough,

[19] *Ibid.* chapters VII, VIII.

on his income, his present and future commitments and various contingencies such as over-time and sickness. The provision of a deposit says nothing as to these factors. The requirement of a deposit may well inhibit proper regard being paid to them.

On these grounds the Committee decided to recommend against the imposition of minimum deposit requirements.

The arguments in favour of a requirement that both spouses sign a consumer credit contract seem to be (a) that this protects the housewife against importuning door-to-door salesmen, and (b) that because credit purchases affect the welfare of both husband and wife, the consent of both should be required.

The first ground, the Committee believed, is taken care of by other proposals designed to regulate door-to-door sales. The second is more difficult, but, if applied logically, would extend to a large variety of ways by which the welfare of a marriage or a home may be impaired by improvidence. It seems unfair to single out consumer credit transactions alone for such a requirement. It seemed to the Committee that a requirement of a joint signature would cause administrative difficulties for businesses quite disproportionate to the number of genuine cases of hardship that such a requirement would prevent.

However, while each spouse will always be free to bind *himself* or *herself* without the consent of the other, one should not be able to bind the *other* without his or her express written authority (an exception should be made in respect of a wife's ability to pledge her husband's credit for necessaries). This means, in practical terms, that in many cases, a credit grantor, in order to obtain a worthwhile right of action, will need to procure the other spouse's consent to the agreement.

VI DISCLOSURE OF INTEREST RATES[20]

The case for disclosure of effective interest rates turns on the need for a consumer to be able to shop for credit comparatively. At present, interest charges in consumer credit transactions, while disclosed as a total sum (*i.e.* dollars and cents disclosure), commonly are not also disclosed as a rate percentage, or if a rate percentage is disclosed, this is done in a variety of ways which makes comparison by the average consumer of the relative cost of credit being offered by competing sources of credit difficult, if not impossible.

An attempt at rating, in order of cheapness, the various sources of credit available in the following example, will demonstrate the difficulty of this task. A consumer wishes to buy a refrigerator with a cash price of $500 from a retail store, and needs credit from somewhere to finance the

[20] *Ibid.* chapters IX, XI.

purchase. He wishes to spread the loan over two years with equal monthly repayments, and he has the following options open to him from various sources of credit:

(a) Interest will be charged at the rate of 6½ *per cent per annum* flat.

(b) Total interest is $74.77.

(c) A charge of one *per cent per* dollar on the opening monthly balance of account will be made.

(d) Interest will be charged at the rate of 7½ *per cent per annum* on the daily balance (compounded half-yearly) and, in addition, a service fee of $10 must be paid now, and again in one year's time.

(e) Interest will be charged at the rate of 13 *per cent* effective.

(f) The same refrigerator is available at another store for $520 with interest to be charged at 5½ *per cent* flat.[21]

The only method by which a consumer can be assured of a reasonable opportunity of shopping effectively for credit is by the disclosure of credit charges in all consumer credit transactions as an effective rate of interest *per annum* calculated in accordance with a uniform formula.

The disclosure controversy has proved one of the most bitter issues ever fought in the field of consumer affairs. Professor Robert L. Jordan and Professor William D. Warren in a leading article on disclosure remark that 'the issue of fair disclosure of finance charges has become a rallying point for consumers and a battle-line for industry'.[22] The efforts of Senator Paul H. Douglas in the United States and Senator David A. Croll in Canada throughout the 1960's to have enacted truth-in-lending legislation are well-known. Their efforts, in both cases, have ultimately been successful. In Canada, seven provinces and the Federal Government have now passed disclosure legislation. In the United States, Congress has passed the Consumer Credit Protection Act 1968, which provides for disclosure of effective interest rates in all consumer credit transactions. In addition, the United States National Conference of Commissioners on Uniform State Laws has recently promulgated the Uniform Consumer Credit Code, a most detailed piece of model legislation which is the result of nearly 10 years of reports, research and working drafts. One of the central features of this Code is the very detailed interest rate disclosure requirements imposed in most consumer credit transactions. Moreover, almost all committees of inquiry which have inquired into consumer credit in recent years have recommended disclosure requirements. There are no objections of substance to disclosure. As was remarked by the Joint Committee of the Canadian Senate and House of Commons on Consumer Credit, full disclosure is in complete harmony with the classical free-market theory of economics. If prices are to be left to be fixed by the

[21] The effective rates are: (a) 12.7, (b) 14.7, (c) 12.7, (d) 11.5, (e) 13.0, (f) 14.6.
[22] 'Disclosure of Finance Charges: A Rationale' (1966) 64 *Michigan Law Review* 285.

market, then for the market to do this efficiently depends upon the existence of properly informed sellers and properly informed buyers. In the absence of this, the market cannot be properly competitive.

Objections to disclosure on the basis of the administrative inconvenience involved are readily overcome by settling upon a uniform actuarial formula from which effective rates can be derived, and by compiling tables from this formula which can, if necessary, be incorporated into the legislation. Those compiled under the Nova Scotia disclosure legislation are about the size of a small pocket diary, and are so simple to use a primary school pupil could manage them. Mr. Mitchell, from the Department of Commerce of the University of Adelaide, whose advice we sought on the question of disclosure, and whose assistance in this respect we found invaluable, has shown how readily calculations of effective interest rates can be made once tables are provided.

Professor Ziegel states that '[t]o all intents and purposes the battle [for disclosure] in Canada is over'.[23] The latter observation appears now equally applicable to the United States. It is to be hoped that in Australia a battle will not be necessary.

Two subsidiary issues arising out of the disclosure question should be mentioned.

First, there is the question of the time at which disclosure should be made to the consumer. Unless rate information can be got to a consumer before he is committed to dealing with a particular credit grantor, all the disclosure in the world will be of no avail to him. In the Committee's view, while disclosure in the contract should be required, this in itself is not enough. At the contract signing stage, a consumer is often committed psychologically at least, to dealing with a particular credit grantor. This problem is a very difficult one to meet. The Committee advanced proposals designed to ensure that advertisements relating to credit which stated rates should state the effective rates and advertisements which stated part of the terms of a typical proposition available should state the whole of the relevant terms, including the effective interest rate. However, these by themselves, will not ensure that rates are set out in advertisements. Moreover, it would not be reasonable to insist on this. A credit grantor may wish to fix a particular rate for each consumer in the light of his creditworthiness, and he should be free to do this. Advertisements could not take account of variables such as this.

The only way, it seemed to the Committee, that legislation could attempt to meet this problem would be either to spell out with some preciseness the circumstances in which a consumer could demand rate information from a credit grantor, or, at the very least, provide in general terms that such

[23] Ziegel, 'Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint' (1968) 68 *Columbia Law Review* 488, 507.

information must be made available to a consumer following any reasonable request by him for it. Admittedly, this is not entirely satisfactory, but it is as far as one can reasonably go. It can only be hoped that competition for direct consumer business (as opposed to competition merely for dealer 'tie-ups') will in time ensure that rate information is widely advertised, and that consumers have ready access to it.

The other subsidiary issue which arises out of the disclosure question is that of dealers' commissions. The practice of finance companies paying dealers' commissions or conferring some other benefit on them in return for referrals of consumer credit business is highly undesirable: first, the consumer commonly believes he is receiving disinterested advice from the dealer on the matter of finance, given with reference only to the consumer's own interests, whereas the dealer may be largely or even entirely motivated by considerations of personal gain. If efficient and informed shopping for credit by consumers is to be facilitated, this practice must be prohibited. An attempt at this has been made in the present Hire-Purchase Acts,[24] but the provisions are badly drawn, leave untouched several forms of 'commissions' that ought to be embraced, and are rarely enforced. The provisions ought to be redrawn to meet the first two deficiencies; the difficulty of enforcement will be much mitigated if, as the Committee has advocated, a Commissioner of Consumer Affairs is appointed in each State with wide powers to investigate suspected breaches of the Act.

VII REGULATION OF INTEREST RATES[25]

There appear to be two possible objectives in imposing limitations on interest rates:

(a) to lay down a rate which the law considers gives a reasonable return to the credit grantor and involves a reasonable charge to the consumer, or

(b) the more limited objective of merely preventing the occasional case of unconscionably high interest charges.

The Committee became convinced that there were a number of difficulties in the way of the law seeking to stipulate 'reasonable' interest rates. To do this, ceilings would have to be geared very closely to costs in the industry. This would involve a close and continuing analysis of cost structures throughout the industry, which, administratively, would be a very demanding task. The delicacy of the rate-fixing process, when designed to serve these ends, is emphasized:

(a) by the fact that unduly restrictive interest rates may not in fact benefit the consumer at all, because available credit may be driven into other areas, and

[24] *E.g.* s. 29 (S.A.).

[25] Report ch. X.

(b) by the fact that interest rates set just above the market rates, according to experience in some overseas jurisdictions, is sometimes seen by credit grantors as encouragement to lift their rates to the 'government' rate, which again does not benefit the consumer.

These administrative problems aside, the assumption that the law needs to fix reasonable rates appears to be open to question. A writer in a recent article,[26] argues from the widely-accepted economic theory that any market which is perfectly competitive should not need any form of government price control, that if the consumer credit market is perfectly competitive, the imposition of rate ceilings which, after all, are a form of price control, should be unnecessary. The Committee accepted this view. In its view, the only function that rate ceilings can usefully serve is the prevention of cases of unconscionably high interest charges. To this end, a relatively high rate ceiling, fixed comfortably above the level of rates dictated by the market, was recommended. The precise definition of the ceiling is discussed in the report.

In coming to this conclusion, the Committee regarded its views on disclosure of effective interest rates as crucial. Without that degree of information on the part of the consumer, it is doubtful whether the market is sufficiently competitive to settle rates in the way envisaged. If disclosure is to be required, so that proper competition is promoted, it would be inconsistent also to introduce rigorous rate ceilings designed to impose 'reasonable' rates on the parties. Criticisms by consumer organisations in the U.S. of provisions in the Uniform Consumer Credit Code which reflect this view, as 'a handout to those who sell debt', seem misconceived.[27] If, however, disclosure is not to be required, there would then seem to be a case for the law attempting to stipulate 'reasonable' rates of interest, despite the difficulties in the way of this which have been outlined.

VIII IMPLIED TERMS[28]

1. *Generally*

As, under the Committee's proposals, there will invariably be a contract of sale between the dealer and the consumer (either a consumer credit sale, or a cash sale with the cash provided by a third party lender under a consumer purchase loan), the appropriateness of the terms implied by the Sale of Goods Acts into contracts of sale becomes relevant.

(a) TITLE

The following modifications to terms as to title implied by section 12 of the Sale of Goods Acts were recommended:

(i) The term as to title implied by section 12(1) should not be excludable, at least in the context of consumer sales.

[26] Johnson, 'Regulation of Finance Charges on Consumer Instalment Credit' (1967) 66 *Michigan Law Review* 81.
[27] "Economics for Consumers" Consumers' Union (March 1969) 121.
[28] Report chapters XII, XIII.

(ii) If a consumer repudiates for breach of the term implied by section 12(1), he should be required to make an allowance, as on a *quantum valebant,* for goods consumed or use enjoyed. This overcomes the unsatisfactory features of the decision in *Rowland v. Divall.*[29]

(iii) The term implied by section 12(3) that the goods are free of encumbrance should be made a condition, breach of which justifies repudiation. The consequences for a third party who buys goods subject to a security interest enforceable against him are serious enough to warrant this. This term should, again, not be excludable.

(b) QUALITY

An implied term that goods are reasonably fit for the purpose for which they are bought seems largely adequate to protect the consumer against defective goods. The term as to merchantability implied by the Sale of Goods Acts, on its present interpretation, adds little or nothing to the former term and might just as well be abandoned. The requirement that the consumer show reliance on the seller's skill or judgment when asserting lack of reasonable fitness has, in effect, been removed by judicial interpretation and should also be abandoned. If the goods are required for an extraordinary purpose, then, of course, that purpose would be required to be made known to the seller. In the case of new goods, there should be a further term that the goods are free from all defects, to deal with cases where there are defects, but these are not sufficient to render the goods unfit for their purpose. Breach of the term as to reasonable fitness should justify repudiation; breach of the term as to freedom from defects should give rise to an action in damages only. Neither term should, in any circumstances, be excludable, but in the case of second-hand goods, the question of whether they are reasonably fit for the purpose should be solved by taking into account all the circumstances of the case, including the price paid for the goods, any defects disclosed in writing by the seller or revealed to the consumer on examination, their age, and apparent condition.

The present law of sale gives no effective right of repudiation for breach of conditions as to quality, since in nearly every case, a buyer is obliged to treat a condition as a warranty. The Committee recommended that a consumer should have a right to repudiate for breach of condition until such time as he has elected to affirm the contract after knowledge of the breach.

2. *Used Car Transactions*

These are a source of frequent complaint by consumers. There is ample evidence that there are a number of unsatisfactory practices in the used car trade which require regulation. Some of these have particular ramifi-

[29] [1923] 2 K.B. 500.

cations in the field of consumer credit. A consumer buying a used car on credit who finds that it is defective and that he has to meet a heavy repair bill, will often be unable both to meet the bill and keep up with his repayments. He may, as a result, have his car repossessed.

To meet this situation, the Committee considered that stringent measures were called for. It recommended that certain information should be disclosed on a prescribed form to be affixed to the inside of the windscreen of every car displayed for sale. This should indicate the make, type, approximate date of manufacture and model of the vehicle. There should be an undertaking that, as far as is known or could reasonably be known by the dealer or his staff, the mileage done by the vehicle is that which is recorded on its speedometer. There should also be an undertaking that no concealment of any defect has been attempted. The name and address of at least the last of the car's private owners or possessors should be given. Any breach of these undertakings should entail severe criminal penalties and should give the consumer the right to repudiate the contract and/or sue for damages.

In addition to these requirements, certain other measures were proposed aimed at solving the problem of latent defects. The broad nature of these proposals follows. Where a dealer fails to disclose latent defects in the car to the consumer (together with an estimate of the cost of repair), he should be liable for the cost of certain repairs to the car which are required within three months or 3,000 miles of the date of the sale. If the estimated cost of repair certified by a person authorised to give such estimates is more than (say) $60 the consumer should be entitled to rescind the contract by returning the car to the dealer, and should receive back any sums which he has paid under the contract of sale or any ancillary loan. Thus, unless a used car dealer accurately informs the consumer of defects in the condition of the vehicle, he should be treated, in effect, as the guarantor of its soundness in all respects.

The argument in support of these proposals runs thus: the dealer buying a car is in the best position to have its condition examined, and is in the best position to distribute loss occasioned by undiscoverable defects. If he does have the car examined, he will when negotiating the price, be aware of most of its defects, and thus pay less for it. He either remedies these defects, or discloses them to the consumer. If he discloses them, he is not responsible for them. The consumer will, no doubt, pay less for the car. The dealer, however, has also paid less for it, so will lose nothing except the cost of the examination. This is not great compared with the value of the car: the cost of labour in even a full professional 3½ hours inspection is, in South Australia, only $18.40. The cost would no doubt be tax deductible. If he does not disclose defects, he is for three months or 3,000 miles,

responsible for the cost of defects whether he knew of them or not. If he discloses the defect but gives an estimate of the cost of repair which is outside a given tolerance he is liable for the difference in cost. Defects occasioned by a *nova causa interveniens* should be excluded. If the cost of repair of undisclosed defects is more than a certain amount, the consumer should be entitled to rescind, as against both dealer and credit grantor. The credit grantor should have a right of recourse against the dealer. The exercise of the right of rescission should not be contestable at the time of its exercise. If the dealer contends that it has been wrongful, he should be entitled subsequently to bring an action in damages for wrongful rescission. Cars with a sale price below (say) $400 could perhaps be excluded from this scheme. The terms applying to secondhand goods generally could apply in this case.

Obviously, if the foregoing proposals relating to implied terms in consumer credit transactions were confined to such transactions, consumer cash buyers would be placed at a most unfair disadvantage. There would seem no reason whatever why these proposals should not apply equally to consumer credit and cash transactions. However, cash transactions were not within the Committee's terms of reference and were, on that account, not specifically considered.

IX DOOR-TO-DOOR SALES[30]

The case for regulating the activities of door-to-door salesmen is now so widely acknowledged as no longer to require argument. All States of Australia, except South Australia, now have Door-to-Door Sales Acts providing for a 'cooling-off' period in door-to-door sales during which a consumer is entitled to cancel a transaction. Many overseas jurisdictions have similar legislation. A general 'cooling-off' period in all consumer credit sales of goods and services made at the door is clearly desirable. In addition, some jurisdictions have some form of licensing or registration system for door-to-door salesmen. The Committee believed that a full system of licensing was necessary, with the functions of investigation and opposition entrusted to the Commissioner of Consumer Affairs, whose appointment the Committee advocated in each State. Even with a 'cooling-off' provision, unscrupulous sellers may still feel it worth the risk of an occasional cancellation in order to persist with undesirable, but successful, sales practices. Some consumers will not be sufficiently assertive to exercise their rights of cancellation and even those who do are put to some embarrassment and inconvenience. It is important that it be possible to prevent sellers who are demonstrated to be persisting with undesirable selling practices from carrying on business.

[30] Report ch. XXI.

X THE SICKNESS AND UNEMPLOYMENT OF THE CONSUMER[31]

The Committee recommended that in periods of non-culpable unemployment, the consumer's obligations should be suspended. This apparently is already the practice of the more reputable credit grantors.

In the case of unemployment caused by illness, if the consumer produces a certificate by a doctor, which is specifically addressed to the credit grantor and which states that the consumer is incapacitated for employment, and the consumer's ability to pay the instalments (reasonably) depends upon his employment, the instalment obligations should be suspended.

Determination of genuine inability to obtain employment for reasons other than sickness is more difficult. Perhaps a determination by the Commonwealth Department of Social Services of an entitlement to unemployment benefits may be suitable for present purposes.

It would not be reasonable to expect credit grantors to suspend obligations indefinitely. The period of suspension should terminate (say) at the expiration of three months, or one month after the resumption of employment, whichever is the sooner. On resumption of payments, the consumer should continue to pay at the intervals and in the instalments originally fixed by the contract, although the credit grantor should be entitled to charge interest at the contract rate for the additional time for which credit has been outstanding. Additional instalments should be added to the contract to accommodate these charges. This would ensure that the credit grantor loses nothing by the suspension.

XI MONEYLENDING[32]

In addition to the consumer purchase loan already dealt with, there are many other loans of different kinds. Some of these are clearly of a 'consumer' character such as loans to finance holidays or trips, or loans to extend or renovate homes.

Without denying the need for regulation in the moneylending field as a whole, the Committee decided that the nature of its investigation had equipped it to deal only with moneylending of a 'consumer' character, as this is defined in the report, *viz* loans under $5,000, loans made by moneylenders regularly engaged in moneylending, loans other than to dealers to finance the purchase of goods in which they are dealing, loans where either a finance charge is payable or the loan is repayable in four or more instalments (including any down payment).

[31] *Ibid.* ch. XV.

[32] *Ibid.* ch. XXII.

In relation to loans of this kind (referred to as consumer non-purchase loans), the proper approach would seem to be to apply to them, as far as possible, the provisions applicable to consumer purchase loans. The largely formalistic requirements of the present Moneylenders Acts are often inconvenient to the parties, and of doubtful value to consumers.

There is no reason, for example, why the licensing procedures advocated in the report for other credit grantors should not apply to moneylenders, at least in respect of those making consumer loans; other proposals relating to consumer credit transactions such as those relating to disclosure of financial terms, including effective interest rates, regulation of interest rates, formal requirements, consent of spouse, power to re-open transactions, assignment by the credit grantor, and advertising, could be applied, probably without any modification.

The main factor of any consequence which requires a distinction to be drawn between consumer purchase loans and consumer non-purchase loans is the question of security. In the former case, where security is taken, it will invariably be over goods and the various incidents of the security can be fairly precisely regulated. In the latter case, the security may not be over goods; indeed the possible forms of security that can be involved in these loans are of a very wide and various kind. In relation to some of these forms of security, the concept of a security interest by way of charge only would be inappropriate. In those cases, some modification, at least to the terms of the provisions governing repossession in other consumer credit transactions, if not to the principles they embody, might be necessary. However, the provisions defining and delimiting the grounds on which repossession is permissible, the obligation on the credit grantor to give notice of his intention to repossess, the consumer's right to reinstate following repossession or deficiency claims could (with suitable changes in terminology so as to refer in non-specific terms to 'the security') be made to apply, with little difficulty, to the enforcement of any security. It may still be feasible to require standard forms by proceeding on this basis.

A further problem which arises out of the question of security in consumer non-purchase loans is the extent of the security that can be taken. The dangers in blanket security over a consumer's entire effects are obvious: first, enforcement may virtually ruin him and his family; secondly, credit grantors may concern themselves more with security than with ability to pay, which is undesirable. In the case of consumer purchase loans, the Committee recommended that the credit grantor should not be able to take security over any goods in addition to the goods which are purchased as a result of the grant of credit. Such a requirement would not be appropriate in the case of consumer non-purchase loans. Here, provisions should be worked out which would require the lender to make and

provide a written valuation of the security to be taken, and which would restrict the security which can be taken to, for example, not more than 30 *per cent* more than the total sum payable under the loan.

One other distinction which should be drawn between consumer purchase loans and consumer non-purchase loans is in relation to the question of rescission of a sale contract entered into by a consumer with the proceeds of a loan. In the case of consumer non-purchase loans, the lender should not be in any way affected by termination of the sale contract.

XII CREDIT INFORMATION[33]

One problem which occasioned concern to the Committee was the case of a person mistakenly placed on a 'black-list' as a poor credit risk, with the result that he is unable to obtain credit. At present, he will often be unable to discover the source of the information upon which a credit grantor is acting, and thus will have little chance of attempting to rectify the mistake. This problem is likely to increase with the computer-assisted growth of stored personal data.

To meet this problem, the Committee recommended that where credit is refused a consumer by a person whose business it is in whole or in part to grant credit, and the consumer asks reasons for that refusal, the credit grantor should be obliged to disclose in writing any relevant information about the consumer (together with the source of that information) which he has received from a credit bureau or another credit grantor. The consumer should have the same right against the disclosed source. Disclosures so made by credit grantors, other than credit bureaux, should be subject to the defence of qualified privilege. These proposals will give the consumer an opportunity of securing voluntary rectification of the mistake. They will not interfere with a credit grantor's discretion to grant or withhold credit; he will still be free to exercise his discretion in any way he sees fit. The party who has made the mistake will not need to correct it if he does not wish to do so (although if he continues to supply information known to be mistaken, he may lose any defence of qualified privilege).

XIII MISLEADING ADVERTISING[34]

The Committee considered that not only misleading advertising of the terms on which credit is available should be proscribed but also misleading advertising at large. A number of practices noted by the Committee in the course of its inquiry, for example the advertising of bogus trade-in allowances, while not involving consumer credit directly or exclusively have important ramifications in this field. The Committee considered that a general proscription of false, misleading or deceptive advertising was both feasible and necessary. The generality of such a provision did not seem to

[33] *Ibid.* ch. XXIII.

[34] *Ibid.* ch. V.

he Committee to be an objection. The law has in many other fields roved itself to be capable of identifying and sanctioning misstatements of fact and misleading half-truths, and distinguishing these from mere uffs or padding which cannot be expected to attract liability. There is o reason why it should find the task harder here. Examples of such pro-isions are already to be found in a number of jurisdictions and are cited n the report. The policing of this legislation would be an important func-ion of the Commissioner of Consumer Affairs, whose appointment in ach State the Committee advocated.

XIV THE ADMINISTRATION OF LEGISLATION[35]

The need for an effective enforcement agency in this area of the law annot be over-emphasized. All too often in the past, beneficial legislation as failed in its aims because of ineffective enforcement. The Committee onsidered that this need could best be met by the appointment of a Commissioner of Consumer Affairs in each State. The need for such an fficer has been widely recognised in overseas jurisdictions. The Committee nvisaged this officer as having a wide range of functions:

(i) The Commissioner could do much to assist the consumers in an nformal way. He could advise consumers on their rights, referring them o lawyers where proceedings were necessary. He could also receive com-laints from consumers, and attempt to negotiate settlements of the com-laints with the traders concerned. The Victorian Consumers' Protection Council (set up under the Consumers' Protection Act 1964) has enjoyed onsiderable success in the informal resolution of complaints. A consumer ften finds, when prosecuting a complaint himself with a trader, that he as difficulty in getting to someone in the hierarchy of the trader's organ-sation with the authority necessary for a proper review of his complaint. The availability of a Commissioner to make an approach on the con-umer's behalf would largely overcome this difficulty. This would be an mportant function of the Commissioner.

(ii) In certain matters where particular rules may in rare cases operate gainst a consumer's interests,[36] the Commissioner should be given a iscretion to relax the rule. This should only be done in non-contentious ases, and only where the Commissioner is satisfied that to do so is in the onsumer's interests.

(iii) The Committee recommended the licensing of all consumer credit rantors, secondhand dealers, door-to-door salesmen and pawnbrokers. Many of these are already required to be licensed. The Committee sug-ested that the licensing body for all these licences should be a special dministrative tribunal, consisting of part-time members. Licences would e granted or renewed without a hearing, unless the Commissioner ob-

[35] *Ibid.* ch. XXV.

[36] *E.g.* rate ceilings.

jected. Prior notice of all applications would be required to be given t him. The Committee considered that the Commissioner could perform a invaluable function in investigating, and if necessary, opposing the gran of licences. Because of the specialist knowledge he would acquire in thi field, he could be expected to perform these functions more efficientl than, for example, the police. The Commissioner would also be respon sible for initiating proceedings before the tribunal for the revocation o licences. A right of appeal to a court from decisions of the tribunal would of course, be necessary. The Commissioner would, in addition, administe generally such legislation as might be assigned him.

(iv) The Commissioner would also have several general but very im portant functions, for example, general research into problems in th field of consumer affairs, organising consumer education programme recommendations to governments and parliaments on legislative change and in the initial stages, assisting in the settling of such matters a interest tables and standard forms.

To discharge the foregoing functions efficiently, the Commissione must be given certain powers. Where the Commissioner has probabl cause to believe that breaches of legislation are occurring, he shoul be entitled to make an investigation and for that purpose, subpoen witnesses, compel the production of books, and administer oaths. Failur to comply with the Commissioner's orders under this power shoul entitle him to apply to a court for enforcement. The Commission should have power to prosecute for breaches of the legislation, c alternatively, having investigated the breaches, have the police institut proceedings in the ordinary way. The Commissioner should also hav power to apply to the Court for an injunction against a credit grant who is committing breaches of the Act or who is engaging in a cour of unconscionable or fraudulent conduct. Whether, as in the case c the Victorian Consumers' Protection Council, the Commissioner shoul also have the power, with privilege, to name malpractising traders i reports to Parliament, is a difficult question; the effectiveness of th sanction is undoubted, but so are its dangers. The Committee ha reservations on this matter.

The Commissioner should be assisted in the discharge of his functio by an Advisory Committee drawn to some extent from affected interest

It is obviously important that the Commissioner be subject to th proper ministerial and judicial control. The Committee considered th its proposals adequately ensured that this was so.

XV CONCLUSION

Many matters dealt with by the Committee have not been touch on in this article. Others have been mentioned only briefly. Howeve it is hoped that some indication may have been given of the Committe

main areas of concern, and the broad structure of its findings. The over-riding aim of the Committee's proposals can be shortly stated: to produce a better informed consumer — better informed as to his rights and obligations, better informed as to the cost of the credit he is obtaining, better informed as to the condition of the goods he is buying. In a competitive economy, such an aim is surely unassailable. None of the Committee's proposals to this end are particularly radical: few, indeed, are even original. Most are already in successful operation somewhere in the common law world. Almost all have been supported by other committees of inquiry in the same field. Most merely provide what any fair and sensible person would accept as necessary solutions to obvious and undeniable deficiencies in the present law in this area. It is to be hoped that any debate on these proposals is directed not so much to the question of their adoption or rejection, but rather at the problem of translating general and obviously desirable principles into detailed, working, legal rules. As Professor Ziegel has pointed out, 'when business should be concentrating on making the details of a measure workable, it is often too busy opposing the principle of it'.[37]

Given a constructive attitude from business, there is no reason whatever why the Committee's proposals should not be shaped into efficient, working, legal rules which will cause a minimum of expense and inconvenience to business while, at the same time, providing real and badly needed improvements in the lot of the consumer.

[37] *Op. cit.* 492.