NEW SOUTH WALES LAW REFORM COMMISSION

SALE OF GOODS

SECOND REPORT

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New South Wales Law Reform Commission

To the Honourable T. W. Sheahan BA, LLB, MP,
Attorney General for New South Wales

SALE OF GOODS

SECOND REPORT

We make this Report under the reference from your predecessor, the Honourable Sir Kenneth M McCaw, QC, MLA, to review the law relating to the sale of goods.

Keith Mason QC
(Chairman)

Paul Byrne
(Commissioner)

The Honourable Mr Justice Andrew Rogers
(Commissioner)

The Honourable Mr Justice J R T Wood
(Commissioner)

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Terms of Reference

To review the law relating to the sale of goods and to review the liability of manufacturers, sellers and other persons having a connexion in the course of trade with goods to buyers, users and other persons suffering damage through defects in goods; and to consider proposing uniform legislation on these subjects throughout the Commonwealth. The reference relating to the sale of goods does not include such special legislation as the Hire-Purchase Act, 1960, the Credit-sale Agreements Act, 1947-1960, and the Lay-by Sales Act, 1943, except as to incidental matters.

K M McCaw QC MLA
Attorney-General

13th September 1966

Participants in this Report

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For the purpose of this Report in the Sale of Goods Reference the following members of the Commission have acted as a Division constituted by the Chairman in accordance with s12A of the Law Reform Commission Act 1967.

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Preface

This reference, whose terms appear at page ix, was given in 1966. Initially work was delayed whilst it was seen whether Australia would accede to the 1964 Hague Convention regulating international sales of goods. Research was resumed when it became apparent that any accession would be subject to reservations that would have made the International Code apply only when the parties so provided in the contract.

The first report in the reference (LRC 15) which was published in 1972 set out the reasons why further work should be delayed pending anticipated developments in England in the light of work then being done by that country's Law Commission.

In 1973 the Commission was fortunate to have appointed as a full time member Professor K C T Sutton whose textbook *The Law of Sale of Goods in Australia and New Zealand* was and remains the leading authority on this topic in Australasia. A very substantial Working Paper prepared by Professor Sutton was published in 1975. Unfortunately Professor Sutton's departure from the Commission in that year and the pressure of other major references meant that the project again lapsed.

Work resumed in early 1986 when Dr John Carter of the University of Sydney was appointed as a specialist consultant. A Division was constituted (see page xi). The report was written, substantially, by Dr Carter in consultation with the Division and with research assistance from Mr Kalinga Wijeyewardene, a legal officer of the Commission.

This report represents the final proposals of the Commission on a number of unrelated and relatively non-controversial issues most of which were canvassed in Professor Sutton's 1975 Working Paper. As explained more fully in paras 1.17-1.18, a number of more significant matters have been identified and will be discussed in a forthcoming Issues Paper.

I wish to express particular thanks to Dr Carter and the members of the Division who have contributed actively to this report, as well as to Mr W J Gillooly, Assistant Director (Planning and Research) of the New South Wales Department of Consumer Affairs who has been a Consultant to the Division. To Mr Dennis Murphy QC, Parliamentary Counsel, go our special thanks for the detailed assistance he provided in drafting and redrafting the legislation appearing in Appendix A.

Keith Mason QC
Chairman

Other Publications in this Reference

The following publications have been issued up to the present time in the course of the Sale of Goods Reference.

Report

New South Wales Law Reform Commission *First Report on the Sale of Goods* (LRC 15 1972)

Working Paper

New South Wales Law Reform Commission *The Sale of Goods: Warranties, Remedies, Frustration And Other Matters* (WP 13 1975)

Summary of Recommendations

In this Report the following recommendations are made for the amendment of the Sale of Goods Act 1923 (NSW). Draft legislation to implement them is set out in Appendix A.

Innocent Misrepresentation

1. The rules of equity relating to rescission for misrepresentation should be expressly preserved for sale of goods contracts. (Para 2.16)

2. Rescission of a sale of goods contract for misrepresentation should not necessarily be precluded by the fact that the contract has been performed. (Para 2.21)

3. Rescission of a sale of goods contract for misrepresentation should not necessarily be precluded by the fact that the misrepresentation has become a term of the contract. (Para 2.24)

4. Acceptance should not bar rescission for misrepresentation unless there are words or conduct which would amount to affirmation under the general law. (Para 2.26)

Intermediate Stipulation

5. The Sale of Goods Act 1923 should be amended to make it clear that it does not exclude the right to treat a contract of sale as repudiated for a sufficiently serious breach of an intermediate stipulation. (Para 3.12)

Requirement of Writing

6. Section 9 of the Sale of Goods Act 1923 should be repealed. (Para 4.22)

Passing of Property in Specific Goods

7. The passing of property in specific goods should no longer of itself bar rejection of the goods. (Para 5.27)

Acceptance and Examination of Goods

8. The description of acceptance in s38 of the Sale of Goods Act 1923 should be subject to s37 in the case of acceptance by an act of the buyer inconsistent with the ownership of the seller. (Para 6.19)

Chapter 1
Introduction

I. SALE OF GOODS LEGISLATION IN AUSTRALIA

1.1 The story of sale of goods legislation in Australia really begins with the Sale of Goods Act 1893 (UK) on which the Australian legislation was based.

1.2 On 9th August, 1888 the Sale of Goods Bill 1888 (No 267) was introduced in the House of Lords with an explanatory memorandum by its draftsman, Sir Mackenzie Chalmers, which said that the Bill was "almost entirely a reproduction of the common law".[1] The Bill lapsed, but was followed by a number of other Bills leading, eventually, to the Sale of Goods Bill 1893 (No 441)[2] which passed through Parliament and received the Royal Assent on 20th February 1894.[3] The Act was soon adopted in all Australian States except New South Wales.[4]

1.3 In New South Wales it was not until 1st January, 1924 that the Sale of Goods Act 1923 came into force. Notwithstanding this delay, and the opportunity to observe the working of the legislation, there were only minor departures from the United Kingdom Act. It is doubtful, however, whether this implied legislative approval to the decisions which had been reached by the English (and Australian) Courts since 1893.[5]

1.4 Similarly there was no attempt to improve on the United Kingdom legislation when the Sale of Goods Ordinance 1954 (ACT) and Sale of Goods Ordinance 1972 (NT)[6] were passed. But the adoption in the Territories at least meant that throughout Australia there was uniform legislation dealing with the sale of goods.

II. AMENDMENT TO THE LEGISLATION

1.5 Again it is useful to begin with the Sale of Goods Act 1893 (UK), because the amendments in Australia, until recently, have followed amendments to that Act. There were three significant pieces of legislation.

1.6 Section 4 of the Sale of Goods Act 1893 (UK), which had re-enacted s17 of the Statute of Frauds 1677 (Imp), was repealed by s2 of the Law Reform (Enforcement of Contracts) Act 1954 (UK).[7] Secondly, by virtue of s4(1) and s4(2) of the Misrepresentation Act 1967 (UK) amendments were made to s11(1)(c),

dealing with the effect of the passing of property in specific goods,[8] and s35 relating to "acceptance" of goods.[9] Thirdly, significant amendments were made to the implied term provisions when new ss12 and 14 were substituted by the Supply of Goods (Implied Terms) Act 1973 (UK). In addition, s4 of that Act substituted a new s55, relating to the exclusion of implied rights, duties and liabilities, and imposed restrictions (particularly in relation to "consumer" sales) on the exclusion of ss13-15.[10] A definition of "merchantable quality" was also inserted in s62(1A) of the Act.

1.7 The Sale of Goods Act 1893 (UK) was repealed and replaced by the Sale of Goods Act 1979 (UK) which was passed to "consolidate the law relating to the sale of goods".

1.8 Some of the changes referred to above have been adopted in Australia. However, this has not been done on a uniform basis and there are now significant differences between Australian jurisdictions. In particular, amendments to the Goods Act 1958 (Vic) made by the Goods (Sales and Leases) Act 1981 (Vic) have resulted in the Victorian Act being significantly different, particularly in relation to "consumer" sales, from the sale of goods legislation in all other Australian jurisdictions. The Victorian Act is not limited to "sale": it now has provisions dealing with goods leased to consumers and this also sets it apart from legislation in the other States (and Territories).[11]

1.9 In New South Wales, leaving aside statute revision and changes made necessary by the adoption of decimal currency, the Sale of Goods Act 1923 (NSW) has been amended by five pieces of legislation.

1.10 First, the Sale of Goods (Amendment) Act 1937 (NSW) added what is now s61(1), relating to draft allowances to be made on wool. Secondly, the Sale of Goods (Amendment) Act 1953 (NSW) added s61(2), relating to draft allowances on sheep skins. Neither of these amendments has any general significance. Thirdly, the Minors (Property and Contracts) Act 1970 (NSW) amended s7, dealing with capacity to buy and sell, but only in relation to the application of the proviso to minors' contracts. Fourthly, and most significantly, Part VIII (ss62-64) was inserted by the Commercial Transactions (Miscellaneous Provisions) Act 1974 (NSW). This deals with "consumer sales" (as defined by s62), and has the following consequences:

1. Provisions in contracts for consumer sales which purport to exclude or restrict the operation of ss18,19 and 20 (except s19(4)) or any liability of the seller for breach of a condition or warranty implied by any of those sections are rendered "void": s64(1).

2. A definition of "merchantable quality" is stated for consumer sales: s64(3).

3. There is no implied condition that goods shall be of merchantable quality as regards defects brought to the buyer's notice before the contract was entered into: s64(4).

4. The court is empowered, by s64(5), to add the manufacturer of goods to proceedings arising out of a contract for a consumer sale and to make limited orders against the manufacturer in cases where the goods are not of merchantable quality.

5. In legal proceedings for breach of the condition of merchantable quality implied in a consumer sale relating to second-hand goods, the liability of the seller is, subject to contrary agreement, limited to the amount of the cash price of the goods: s64(9).

Fifthly, the Sale of Goods (Registrable Interests) Amendment Act 1986 (NSW) amended s26, dealing with sale by a person not the owner, by adding the Registration of Interests in Goods Act 1986 (NSW) to subsection 2(a) of s26, thus making it clear that the provisions of the Sale of Goods Act 1923 (NSW) do not affect the Registration of Interests in Goods Act 1986 (NSW).

1.11 Apart from amendments to the original sale of goods legislation there is the significance of the entry into the field by the Commonwealth Parliament by virtue of the Trade Practices Act 1974 (Cth). In particular, in any consideration of the terms to be implied into the contract, and the rights of the buyer for breach by the seller, regard must be had to the position of the buyer under that Act. Generally, where the Commonwealth Act applies, the buyer is in a more favourable position than under the sale of goods legislation of this State. Of course, for the Trade Practices Act to apply the buyer must usually be a "consumer"[12] as defined by the Act.

III. APPROACH TO THE LEGISLATION

1.12 The preamble to the Sale of Goods Act 1923 (NSW) states that it is an "Act to codify and amend the law relating to the Sale of Goods". The general approach to a codifying enactment was stated as follows by Lord Herschell in *Bank of England v Vagliano Bros*:[13]

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

> If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code . . . words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, . . . the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.[14]

1.13 Therefore, one should not look beyond the terms of the Act when resolving a sale of goods issue unless there is an element of uncertainty or ambiguity in the words used. However, in order to apply these principles the rules of law set out in the Act should have sufficient detail to allow an interpretation which does not require an analysis of case law outside the Act. In fact this has never really been possible since the Act assumes a fairly sophisticated knowledge of contract law.

1.14 Take, for example, s34(2) of the Act dealing with the rights of the parties in respect of the breach of a contract for the sale of goods "to be delivered by stated instalments which are to be separately paid for".[15] If either party breaches the contract, s34(2) states that:

> it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

The cynic might say that all s34(2) states is that there is a right to treat the contract as repudiated when it has been repudiated by the other party. After all, the only guidance which s34(2) gives on the issue of repudiation is to say that it depends on the most general factors imaginable, namely the terms of the contract, and the circumstances of the case. Thus, the courts have filled out the detail of the provision,[16] frequently by reference to prior cases.[17]

1.15 Although the potential for tension is always there, codification has only on rare occasions given rise to any difficulty.[18] In fact the generality of the language of the Act has been one of its virtues and helps to explain why there have been so few amendments. During the first 60 years of its operation in the United Kingdom the Act was regarded as the best general statement of the law of contract available, so that the rules stated in the context of the sale of goods contract were given a general application. For example, the condition/warranty distinction, which is the cornerstone of the Act, was adopted as part of the general law.[19]

1.16 More recently a reverse process has operated, and the courts have been concerned to ensure that developments in the general law are reflected in the law of sale of goods.[20] It is, in fact, sometimes difficult to know whether decisions on sale of goods contracts are being reached on the basis of the rules stated in the Act, or on the basis of the common law preserved by the Act, particularly in the context of cif and fob contracts which are now more sophisticated than in 1893. Indeed, today it is fairly common for decisions on sale of goods contracts to be reached without detailed reference to the sections of the Act.[21] However, we take the view that it is undesirable for a codifying Act to be allowed to fall behind developments in the general law (see eg Chapter 3). This implies a policy of keeping the Act under review so as to ensure that it continues to reflect commercial (and consumer) expectations.

IV. WHAT IS WRONG WITH THE NEW SOUTH WALES ACT?

1.17 At the most general level there are two main issues. First, is the Act outmoded? Is an Act which can be traced back to the 1880s appropriate to govern contracts entered into in the 1980s? For example, how can the Act be applied to computer software? And how can an Act expressed in general terms cope with sophisticated cif and fob transactions?[22] Secondly, is it appropriate today for codifying legislation to be stated so generally, or ought the Act to follow a more detailed approach, exemplified by the Uniform Commercial Code (US)?[23] Only if the Act were redrafted in specific and detailed terms would it accurately reflect current commercial practice. Moreover, it might now be appropriate, especially in view of legislation such as the Trade Practices Act 1974 (Cth), to enact a second Act dealing exclusively with consumer transactions.

1.18 More specifically, in New South Wales consideration must be given to the specific defects in the legislation which have been remedied in England and in some Australian jurisdictions. The stage has now been reached that, in respect of some provisions of the Act, there is consensus that amendment must take place. It seems important, in such a fundamental piece of legislation, that uniformity should exist. The main purpose of this Report is to suggest ways in which the Act should be amended to achieve greater uniformity within Australia.

V. SCOPE OF THIS REPORT

1.19 In this Report we attempt to deal with the specific (and largely uncontroversial) defects in the legislation which have been exposed, and acted on in some other jurisdictions. It is proposed to deal with the more general problems referred to in paras 1.17-1.18 in an *Issues Paper* to be circulated at a later stage.

1.20 Five specific issues are dealt with:

1. rescission for innocent misrepresentation (chapter 2);
2. the application of the Act to intermediate contractual terms (chapter 3);
3. the requirement of writing in s9 of the Act (chapter 4);
4. the passing of property in specific goods (chapter 5); and
5. acceptance and the examination of goods (chapter 6).

1.21 Most of the matters dealt with in this Report were canvassed by the Commission in a *Working Paper* published in 1975.[24] However, it is not intended at this stage to propose legislation which would take account of all the matters discussed in that Paper.

Footnotes

1. See *House of Lords Parliamentary Papers*, vol 8 p253.
2. See *House of Commons Parliamentary Papers*, vol 7 p417.
3. The Act was retrospective to 1st January, 1894.
4. In chronological order, as follows: Sale of Goods Act 1895 (SA); Sale of Goods Act 1895 (WA); Goods Act 1896 (Vic); Sale of Goods Act 1896 (Qld); Sale of Goods Act 1896 (Tas). The current Victorian Act is the Goods Act 1958.
5. See the comment by McHugh JA in *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475 at 492.
6. See now Sale of Goods Act 1972 (NT).
7. See also para 4.17.
8. See also para 5.25.
9. See also para 6.14.
10. Subsequently s55 was amended by the Unfair Contract Terms Act 1977 (UK).
11. But see also Consumer Transactions Act 1972 (SA).
12. See s4B and the analysis in Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (3rd ed 1983) para 1320.
13. [1891] AC 107.

14. [1891] AC at 144-145. For a recent, similar statement of principle see *Boughey v The Queen* (unreported) 3 June 1986, High Court of Australia, transcript at 22, per Brennan J. Although Lord Herschell's statement was made in the context of the Bills of Exchange Act 1882 (UK) the same principles apply to sale of goods. See generally Sutton, *Sales and Consumer Law in Australia and New Zealand* (3rd ed 1983) pp4-5; *Benjamin's Sale of Goods* (2nd ed 1981) para 3.

15. See generally Carter, *Breach of Contract* (1984) paras 828-841.

16. The leading case is *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148.

17. For example, *Mersey Steel and Iron Co Ltd v Naylor Benzon and Co* (1884) 9 App Cas 434.

18. For example, in the context of the saving provision; see para 3.8.

19. See *Bentsen v Taylor Sons and Co (No 2)* [1893] 2 QB 274, which was decided in June 1893 and clearly influenced by the terminology of the Sale of Goods Bill. However, Chalmers, the draftsman of the Act, had reservations: see *Chalmers' Sale of Goods* (1st ed 1894) pp168-169.

20. See Ch 3.

21. See, eg *Handbury v Nolan* (1977) 13 ALR 339; *Warinco AG v Samor SpA* [1979] 1 Lloyd's Rep 450.

22. For example, in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44 at 67 Roskill LJ said that it has "long been recognised that there are what one might, for want of a better phrase, describe as intellectual difficulties regarding the application of these statutory provisions to the basic principles governing cif contracts".

23. The current text was approved in 1978.

24. New South Wales Law Reform Commission, *Working Paper on Sale of Goods* (WP 13 1975).

Chapter 2
Rescission for Innocent Misrepresentation

I. INTRODUCTION

2.1 The Sale of Goods Act 1923 (NSW) does not purport to deal generally with the law of misrepresentation. Section 4(2) does, however, preserve the rules relating to the effect of fraud and misrepresentation. This subsection provides:

> The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress, or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods, provided that there shall not be deemed to be or to have been any market overt in New South Wales.

Except for the proviso, the words of the subsection are copied exactly from s61(2) of the Sale of Goods Act 1893 (UK).[1]

2.2 The problem with s4(2) is that it does not preserve the rules of equity which apply to misrepresentation[2] unless the expression "rules of the common law" is wide enough to include general equitable principles.

2.3 It can be seen from the above that whether equitable rules governing misrepresentation are saved by s4(2) depends on a wider issue of statutory interpretation. It is therefore impossible to deal with the particular problems of misrepresentation without also considering the meaning of the expression "the rules of the common law".[3]

II. "THE RULES OF THE COMMON LAW"

A. Introduction

2.4 "The rules of the common law" could refer to the rules administered by the common law courts in England prior to the fusion of law and equity in England in 1873. Alternatively, the expression could refer to the non-statutory rules, both legal and equitable, governing contracts.

2.5 It is stated in the current edition of *Benjamin's Sale of Goods*[4] that the issue "has never been authoritatively determined" in England. The same comment may be made of the law of New South Wales.[5] However, the Victorian Full Court's decision in *Watt v Westhoven*[6] supports the narrower interpretation of the provision, namely that the rules of equity are not included within the expression "rules of the common law". Taken to an extreme conclusion this view would prevent the application of equitable rules governing the rectification of sale of goods contracts expressed in written documents, exclude the equitable principles of estoppel, preclude the equitable assignment of the benefit of a sale of goods contract and rule out the possibility of applying equitable principles governing relief against forfeiture in favour of a buyer under a conditional sale. It is scarcely possible to believe that this was intended.

B. Misrepresentation

2.6 The operation of s4(2) has been debated chiefly in relation to issues created by misrepresentations which are not fraudulent. In order to decide whether a buyer (or seller) may rescind a contract *ab initio* for an innocent misrepresentation, is a court entitled to apply equitable principles, or restricted to the common law? The common law rule, stated by Blackburn J in *Kennedy v Panama New Zealand and Australian Royal Mail Co Ltd*,[7] is that there is no right to rescind unless a "complete difference in substance" between what was obtained and what was represented by the seller or buyer is established. His Lordship gave, as an example of a case where rescission would not be possible, the purchase of a horse following a representation as to its soundness. In the case of an innocent misrepresentation, his Lordship said, the buyer would have no right to rescind. On the other hand, under the general law of contract it seems to be accepted[8] that rescission under equitable principles would be available in such a case, provided substantial restitution could be made by the court, and assuming, of course, that the representation induced entry into the contract. Under the general law there is no requirement of a "complete difference in substance". At most there is a requirement that the representation relate to a material fact.

2.7 In *Watt v Westhoven*[9] an action was brought for the balance due under a contract for the sale of a motor car. The defence was that the buyer was induced to enter the contract by an innocent misrepresentation which justified rescission of the contract. The defence was held to be unavailable because there was no complete difference in substance between the vehicle as represented and the

vehicle delivered. Each member of the Court agreed with the interpretation placed on the "rules of the common law" by the Court of Appeal of New Zealand in *Riddiford v Warren*[10] and held that the words were used in contradistinction to "rules of equity". Mann ACJ said that the effect of allowing rescission for innocent misrepresentation would be to make every statement inducing the contract a condition, and the Court said that there was nothing in the Goods Act 1928 (Vic)[11] to require it to reconsider a case decided prior to the Act[12] which adopted the doctrine of *Kennedy v Panama New Zealand and Australian Royal Mail Co Ltd*.[13] Similar views were expressed in the Supreme Court of Queensland by Griffith CJ in *Hynes v Byrne*.[14]

2.8 In *In re Wait*[15] Atkin LJ said that the "total sum of legal relations (meaning by the word 'legal' existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code." His Lordship went on to say[16] that it would have been "futile" in a statute intended to create an "elaborate structure of rules dealing with rights at law" to have a subsisting set of equitable rights inconsistent with the legal rights. However, in *In re Wait* the issue was whether sub-buyers of goods (which were future or unascertained goods) obtained an equitable interest in the goods. His Lordship's statement was approved, tentatively, by the House of Lords in *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd*.[17] In neither case did any issue of misrepresentation arise.

2.9 In a series of English cases courts have proceeded on the basis that rescission *ab initio* is available under equitable principles in respect of a sale of goods contract induced by innocent misrepresentation.[18] Moreover, the Full Court of the Supreme Court of South Australia in *Graham v Freer*[19] refused to adopt the narrow interpretation placed on the "rules of the common law" in *Riddiford v Warren* and *Watt v Westhoven*.

2.10 In New South Wales, Street CJ said in *Irwin v Poole*[20] that an innocent misrepresentation "does not form a cause of action . . . unless it is a term of the contract between the parties". However, this statement is directed primarily to the issue of damages rather than rescission, which does not of itself constitute a "cause of action". And in *Leason Pty Ltd v Princes Farm Pty Ltd*[21] Helsham CJ in Eq could find no authority precluding a decision that the buyer of a racehorse was entitled to rescind the contract for innocent misrepresentation by the seller. Unfortunately there was no discussion by his Honour of whether the Sale of Goods Act 1923 (NSW) permits reliance on equitable principles, beyond saying,[22] for the purpose of distinguishing *Kennedy v Panama New Zealand and Australian Royal Mail Co Ltd*,[23] that a "[total] failure of consideration is not now necessary to support an action for innocent misrepresentation".[24] However, the focus of the debate on rescission in the context of sale of goods is whether a total failure of consideration *is* a necessary element for rescission, because the "rules of the common law" (narrowly interpreted) do not include the rules of equity which permit rescission in cases where there is no such total failure.

2.11 There is no reason in logic why the principles governing rescission for innocent misrepresentation in the law of sale of goods should be different from the general law of contract.

2.12 In *Watt v Westhoven* Mann ACJ argued that the effect of allowing rescission for innocent misrepresentation would be to make all pre-contractual representations conditions of the contract (see para 2.7). However, that argument is unsound as it confuses termination for breach of condition with rescission *ab initio* for misrepresentation.[25] Where a buyer terminates the performance of the contract for breach of condition the contract is not rescinded and the buyer is able to bring an action for damages. On the other hand, when a contract is rescinded for innocent misrepresentation the contract ceases to exist and there is no right to damages. Although the buyer must allow the seller to recover any goods received from the seller in both cases, that is purely coincidental, and the inability to claim damages for innocent misrepresentation[26] is an important feature distinguishing rescission from termination.

III. OTHER JURISDICTIONS

2.13 In the Australian Capital Territory s62(1A) of the Sale of Goods Ordinance 1954[27] provides:

> Nothing in this Ordinance affects, or shall be deemed to have affected, any remedy in equity of the buyer or the seller in respect of a misrepresentation.

This allows equitable principles to be applied in the context of misrepresentation, but it does not expressly preserve equitable principles in other contexts, such as estoppel and relief against forfeiture.

2.14 Section 100(1) of the Goods Act 1958 (Vic)[28] allows rescission of a consumer sale of goods contract in respect of a misrepresentation which was not fraudulent where, if it had been fraudulent, the misrepresentation would have given rise to a right of rescission.

2.15 In no other Australian jurisdiction has the legislation been amended to make it clear that rescission for misrepresentation in a sale of goods context may be based on equitable principles. However, there are examples of statutes in Australia which deal with the right to rescind for misrepresentation.[29] These make no mention of special rules for sale of goods but arguably are general in their effect and thereby render the question of interpretation of earlier sale of goods legislation academic. The same is true in England,[30] where the Law Reform Committee treated the general principles as applicable to sales of goods.[31] Accordingly no amendment was made to the saving provision of the Sale of Goods Act 1893 (UK) by the Misrepresentation Act 1967 (UK).

IV. RECOMMENDATION ON THE SAVING OF EQUITABLE RULES

2.16 We therefore recommend that **the rules of equity relating to rescission for misrepresentation should be expressly preserved for sale of goods.**

2.17 If s4(2) of the Sale of Goods Act 1923 (NSW) were to be amended by a general saving of the rules of equity, the narrow interpretation favoured in cases such as *Watt v Westhoven* would be unarguable and rescission for innocent misrepresentation would be freed from any requirement of a "complete difference in substance" (see para 2.6). However, such a reform would make all equitable principles not inconsistent with the Act potentially applicable. Having regard to statements such as that of Atkin LJ in *In re Wait* (see para 2.8) and the controversy which has arisen in relation to other matters, such as the application of principles governing relief against forfeiture,[32] it would in our view be premature to introduce general equitable principles without a full and detailed consideration of the impact of such principles.[33] Accordingly, our recommendations at this stage of the reference will be restricted to innocent misrepresentation.

V. FURTHER ISSUES

2.18 Saving equitable rules in the context of innocent misrepresentation will bring the law applicable to sale of goods contracts into line with that applicable to contracts generally, or at least settle the issue of whether the general principles are applicable to the specific context of sale of goods. In this way there will be uniformity, not only with respect to contract law in New South Wales, but also with those jurisdictions which have chosen to amend the law. However, there are three controversial issues which arise for discussion in consequence, namely,

* the effect of performance of the contract;
* the effect of the misrepresentation being incorporated as a term of the contract;
* whether the right to rescind is lost if the buyer "accepts" the goods.

These issues are dealt with in paras 2.19 to 2.26 below.

A. Performance of the Contract

2.19 The effect of performance, that is execution of a contract, on the right to rescind for misrepresentation has been the subject of considerable debate. Under the so called "rule in *Seddon's case*"[34] execution of the contract is a bar to rescission for an innocent misrepresentation. The rule has been applied to executed leases,[35] sales of land[36] and sales of businesses.[37] Although its application to sales of goods was rejected by Helsham CJ in Eq in *Leason Pty Ltd*

v Princes Farm Pty Ltd,[38] our recommendation in para 2.16 could, unless qualified, lead to a reconsideration of his Honour's conclusion.

2.20 It is difficult to find a rationale for the rule in *Seddon's case* apart from the proposition that *restitutio in integrum* is not possible once the representee has had the benefit of performance of the contract. In the context of a sale of goods contract this involves the proposition that the transfer of title to the goods and payment of the price preclude rejection of the goods for innocent misrepresentation. There is a clear connection between this proposition and one rule stated in s16(3) of the Act, namely that the passing of property in specific goods precludes rejection of the goods for breach of condition. In Chapter 5 of this Report we explain (see especially para 5.21) that this part of s16(3) is based on two misconceptions: first, that *restitutio in integrum* is a requirement for an effective election to terminate the performance of a contract for breach of condition; and, secondly, that a buyer's rejection of specific goods is not effective to revest title in the seller. Although *restitutio* is a requirement of rescission it is clear that under equitable rules a buyer's election to rescind for innocent misrepresentation would be effective to revest title in the seller. The result is that substantial restitution—which is all that is required under equitable principles governing misrepresentation[39]—can be achieved by an order for the repayment of the price subject to an allowance (where appropriate) for intermediate use of the goods or their deterioration in the hands of the buyer. To the extent that rescission for misrepresentation involves a rejection of goods, our recommendation in respect of s16(3) (see para 5.27) involves disapproval of part of the rationale for the rule in *Seddon's case*.

2.21 The rule in *Seddon's case* has been the subject of considerable academic[40] and judicial[41] criticism. Moreover, it was abolished by s1(b) of the Misrepresentation Act 1967 (UK), a reform which has been followed in South Australia[42] and the Australian Capital Territory.[43] We recommend that **rescission of a sale of goods contract for misrepresentation should not necessarily be precluded by the fact that the contract has been performed.**

B. Incorporation of the Representation as a Term

2.22 A pre-contractual statement of fact may be incorporated as a term of the contract. In such a situation the statement will almost invariably take effect as a contractual undertaking, rather than a mere representation, in which case its falsity will give rise to a right to claim damages. In addition, if the term is a condition, the breach will give rise to a right to terminate the performance of the contract. This right of termination will also accrue if the term is intermediate in character and the breach has had serious consequences for the other party to the contract (see chapter 3). If the statement of fact induced the contract, and was material, the issue may arise whether the right to rescind for misrepresentation survives the incorporation of the statement as a term. The issue is the subject of conflicting authority. The older cases tend towards a denial of the right of rescission for misrepresentation.[44] However, the more recent authorities,

particularly in Australia, suggest a contrary view.[45] The issue has not been authoritatively determined, except in the context of a fraudulent misrepresentation where it is clear that the right to rescind survives.[46]

2.23 In principle there is no reason why incorporation should be a bar to rescission, irrespective of whether there is a right to terminate the performance of the contract for breach of the term, since the two rights are distinct from one another. Section 1 of the Misrepresentation Act 1967 (UK) states that incorporation is not of itself a bar to rescission. This reform has been followed in s6(1)(a) of the Misrepresentation Act 1971 (SA) and by s3 of the Law Reform (Misrepresentation) Ordinance 1977 (ACT). More limited provisions, one of which expressly relates to sale of goods transactions, are to be found in ss100(2) and 111(2) of the Goods Act 1958 (Vic)[47] which state that incorporation is not a bar in respect of consumer sales and leases.

2.24 We therefore recommend that **rescission of a sale of goods contract for misrepresentation should not necessarily be precluded by the fact that the misrepresentation has become a term of the contract.**

C. Acceptance of Goods

2.25 Section 16(3) of the Act states that "acceptance" of goods precludes the rejection of the goods for breach of condition. The concept of acceptance is considered in Chapter 6 of this Report. In the present context the problem is whether, as Denning LJ considered in *Leaf v International Galleries*,[48] rescission for innocent misrepresentation should be regard as a lesser right than rescission (ie "termination") for breach of condition. In *Leason Pty Ltd v Princes Farm Pty Ltd* Helsham CJ in Eq held that acceptance of goods does not, of itself, preclude rescission for misrepresentation. He therefore declined to follow Denning LJ's statement of the law in *Leaf v International Galleries*. The basis on which Helsham CJ in Eq's view can be justified is that rescission and termination are distinct rights (see para 2.23) so that the unavailability of one right does not necessarily imply that the other is not available. However, to the extent that s38 of the Act reflects general principles of election between rights (see para 6.3) acceptance of goods will frequently imply that the representee has elected to continue with the performance of the contract, that is "affirmed" the contract. In such cases the representee (promisee) will cease to be in a position either to rescind the contract for misrepresentation or to terminate its performance for breach. In Victoria s100(1) of the Goods Act 1958[49] allows rescission of a consumer sale before, or within a reasonable period after, acceptance of the goods. In all other jurisdictions the relationship between acceptance and the right to rescind remains unsettled. The issue is particularly important where the representation is not incorporated as a term since in such a case the representee will be without any right to claim damages. The English Court of Appeal in *Long v Lloyd*[50] seems to have held that the right to rescind is lost by acceptance even if the representation is not a term, although the facts of the case are consistent with the representee having elected to affirm the contract notwithstanding

existence of facts giving rise to a right to rescind. Be that as it may, it seems particularly unjust for the concept of acceptance, which is arguably intended to apply only to breach of condition, to be used as a basis for denying the right to rescind for misrepresentation.

2.26 Although it can be argued that the issues raised by performance of the contract and the incorporation of a statement as a term of the contract are issues of general contract law, the same cannot be said of the problem of "acceptance"; it is clearly an issue of the scope of s38 of the Act. In any event, all three issues arise mainly in the context of sale of goods contracts and it would in our view be inappropriate to preserve the rules of equity governing innocent misrepresentation without also settling the consequential issues. In the present context we recommend that **acceptance should not bar rescission unless there are words or conduct which would amount to affirmation under the general law.**

VI. HOW SHOULD THE ACT BE AMENDED?

2.27 The form of the amendment of s4 pursuant to the recommendation suggested in para 2.16 should be such as to make it clear that it is without prejudice to the generality of the words currently contained in s4(2).

2.28 The form which the amendments designed to incorporate the recommendations in paras 2.21, 2.24 and 2.26 should take is a little more difficult. One possibility is to include a statement in s4, perhaps as a proviso to the saving of equitable rules. Another possibility is to add a new subsection to s16, as that provision deals with restrictions on the rights and remedies of a buyer. Our preference is for an amendment in the first of the two suggested forms.

VII. DAMAGES

2.29 No attempt has been made to confer a right to damages for innocent misrepresentation as that is clearly an issue of general contract law. However, now that recommendations have been made in respect of the other issues—*Seddon's Case* and incorporation—but limited to the sale of goods context, there would be considerable advantage in a reference being given to the Commission on whether there should be a general Misrepresentation Act.

Footnotes

1. See now Sale of Goods Act 1979 (UK) s62(2).
2. See para 2.6-2.7.
3. See para 2.4-2.12.
4. (2nd ed 1981) para 7.

5. In *Hewett v Court* (1983) 149 CLR 639 the High Court left open for future decision whether the sale of goods legislation precludes the creation of equitable liens by operation of law in respect of a sale governed by the legislation. See also para 2.8.

6. [1933] VLR 458, see further para 2.7.

7. (1867) LR 2 QB 580 at 587.

8. See Treitel, *The Law of Contract* (6th ed 1983) pp280-281; Lindgren, Carter and Harland, *Contract Law in Australia* (1986) para 1127.

9. [1933] VLR 458.

10. (1901) 20 NZLR 572 at 576-577, 579, 582, 584. See also *Taylor v Combined Buyers Ltd* [1924] NZLR 627 at 638; *Holmes v Burgess* [1975] 2 NZLR 311 at 317. But cf *Thomas Borthwick and Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538 at 545.

11. See further para 2.14.

12. *Picturesque Atlas Publishing Co Ltd v Phillipson* (1890) 16 VLR 675 at 680.

13. (1867) LR 2 QB 580 (see para 2.6).

14. (1899) 9 QLJ 154 at 159-163 (affirmed without reference to the point (1899) 9 QLJ 198).

15. [1927] 1 Ch 606 at 635.

16. [1927] 1 Ch 606 at 635, 636. See also *King v Greig* [1931] VLR 413 at 431-432. But see W Goodhart and G Jones, "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 *Mod LR* 489.

17. [1986] 2 WLR 902 at 911.

18. See *Leaf v International Galleries* [1950] 2 KB 86, esp at 90-91, 94-95; *Long v Lloyd* [1958] 1 WLR 753; *Goldsmith v Rodger* [1962] 2 Lloyd's Rep 249.

19. (1980) 35 SASR 424. And see *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 1 Qd R 1 at 7 (reversed without reference to the point [1983] 2 Qd R 261).

20. (1953) 70 WN (NSW) 186 at 187. See also *Marks v Hunt Bros (Sydney) Pty Ltd* (1958) 58 SR (NSW) 380 at 383.

21. [1983] 2 NSWLR 381. See further para 2.19.

22. [1983] 2 NSWLR 381 at 384.

23. (1867) LR 2 QB 580 (para 2.6).

24. Couched in such terms his Honour's statement is arguably inconsistent with Street CJ's comment in *Irwin v Poole* (1953) 70 WN (NSW) 186 at 187. With respect, it would have been sufficient for Helsham CJ in Eq to say that rescission can take place even though there is no total failure of consideration.

25. See also para 2.20.

26. In the Australian Capital Territory and South Australia the court may award damages for an innocent misrepresentation, which would be assessed on a tortious, rather than contractual, basis: see note 29.

27. Added by s5 of the Sale of Goods Ordinance 1975 (ACT).

28. Added by s2 of the Goods (Sales and Leases) Act 1981 (Vic).

29. See Law Reform (Misrepresentation) Ordinance 1977 (ACT); Misrepresentation Act 1971 (SA). See also Contractual Remedies Act 1979 (NZ) s26.

30. See Misrepresentation Act 1967 (UK). And see Treitel, *The Law of Contract* (6th ed 1983) pp285-286.

31. England Law Reform Committee, *Innocent Misrepresentation*, 10th Report, Cmnd 1782 (1962).

32. See *Stockloser v Johnson* [1954] 1 QB 476 at 487-488, 492, 499.

33. We note in passing that cl4(b) of the Draft Bill attached to the New South Wales Law Reform Commission's *Working Paper on the Sale of Goods* (WP 13 1975) proposed such an amendment and that no criticism of this reform was made in comments on the Working Paper received by the Commission.

34. *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326.

35. *Angel v Jay* [1911] 1 KB 666. But cf *Solle v Butcher* [1950] 1 KB 671 (mistake).

36. See *Wilde v Gibson* (1848) 1 HLC 605; 9 ER 897. Cf *Svanosio v McNamara* (1956) 96 CLR 186 (mistake).

37. *Vimig Pty Ltd v Contract Tooling Pty Ltd* (unreported) 18 April 1986, Supreme Court of New South Wales, Wood J.

38. [1983] 2 NSWLR 381. See also *Leaf v International Galleries* [1950] 2 KB 86 at 90.

39. See *Alati v Kruger* (1955) 94 CLR 216.

40. See, eg Treitel, *The Law of Contract* (6th ed 1983) p288; Sutton, *Sales and Consumer Law in Australia and New Zealand* (3rd ed 1983) pp11-14.

41. See the cases cited in para 2.19.

42. Misrepresentation Act 1971 (SA) s6(1)(b).

43. Law Reform (Misrepresentation) Ordinance 1977 s3.

44. See *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167. Cf *Holmes v Burgess* [1975] 2 NZLR 311 at 317.

45. See *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254; *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30. For an older authority see *Compagnie Francaise des Chemins de Fer Paris-Orleans v Leeston Shipping Co Ltd* (1919) 1 Ll L Rep 235.

46. See *Alati v Kruger* (1955) 94 CLR 216 at 222.

47. Added by s2 of the Goods (Sales and Leases) Act 1981 (Vic).

48. [1950] 2 KB 86 at 90-91. See also *Long v Lloyd* [1958] 1 WLR 753.

49. Added by s2 of the Goods (Sales and Leases) Act 1981 (Vic).

50. [1958] 1 WLR 753.

Chapter 3

Termination for Breach of an Intermediate Contractual Term

I. COMMON LAW RULES PERMITTING TERMINATION

3.1 At common law there are four main bases of termination for breach: express contractual right; breach of condition; breach of intermediate term with sufficiently serious consequences; and repudiation of obligation.[1] Throughout the Sale of Goods Act 1923 (NSW) the right to terminate is described as a right to "treat the contract as repudiated".

3.2 The Sale of Goods Act 1923 (NSW) expressly allows termination for breach of condition[2] and for repudiation of an instalment goods contract.[3] There is implicit recognition of termination pursuant to an express contractual right,[4] but no recognition of a right to terminate for breach of an intermediate term or for repudiation of obligation. However, there is no doubt that the saving of the "rules of the common law" in s4(2) preserves the right to terminate in cases of repudiation of obligation.[5] Any doubts therefore relate solely to termination for a sufficiently serious breach of an intermediate term.

II. INTERMEDIATE TERMS

A. Definition

3.3 An intermediate term, frequently described as an "innominate term", is a contractual term the importance of which lies somewhere between a condition and a warranty. Every breach of such a term gives rise to a right to claim damages, but only a serious breach gives rise to a right to terminate the performance of the contract. The seriousness of the breach depends on its consequences (both actual and foreseeable) for the promisee.

B. General Law of Contract

3.4 The intermediate term concept is derived from the decision in 1961 of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd.*[6] The English Court of Appeal held that where shipowners breached a charterparty contract by delivering an unseaworthy vessel, the fact that the term could not be classified as a condition did not mean that the charterers were necessarily precluded from terminating the performance of the contract. According to Upjohn LJ[7] even if the term were a warranty the charterers would have been justified in terminating if the breach of the term was sufficiently serious. Diplock LJ said[8] the term was too complex to be classified and that the charterers would have been entitled to terminate had the shipowners' breach deprived the charterers of substantially the whole benefit which it was intended they should obtain from performance of the contract.

3.5 The judgments in the *Hongkong Fir* case relied on nineteenth century decisions, prior to the enactment of the Sale of Goods Act 1893 (UK). These cases certainly justified the view that breach of condition is not the only basis for termination for breach of a contractual term. Surprisingly, however, the terminology of "intermediate" or "innominate" terms is not to be found in either the nineteenth century cases or the *Hongkong Fir* case itself. Thus, although there was nothing particularly novel in the *Hongkong Fir* decision, the terminology adopted by the courts in reliance on the case is not reflected in the sale of goods legislation.

C. Sale of Goods Law

3.6 In its *Working Paper on the Sale of Goods*[9] the Commission tentatively suggested that amendment to the *Sale of Goods Act* 1923 (NSW) would be necessary (and desirable) for the decision in the *Hongkong Fir* case to be applied to a sale of goods contract. Although not referred to in the *Working Paper* (no doubt because the report of the case had not arrived in time) Mocatta J in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*[10] had reached the same conclusion and held that the *Hongkong Fir* analysis could not be applied to a sale of goods contract. Subsequently, however, Mocatta J's decision was reversed by the English Court of Appeal[11] and the *Hongkong Fir* analysis applied.

3.7 In *The Hansa Nord* a clause in a cif contract for the sale of citrus pulp pellets required "shipment to be made in good condition". This term was breached by the sellers and the buyers claimed that as the term was a condition their rejection of the goods was justified. Although Mocatta J had upheld that contention the Court of Appeal was unanimous in holding that the term was not a condition. The question then arose whether the buyers could base their decision to terminate on the common law stated in the *Hongkong Fir* case. Although the Court unanimously accepted the proposition that the *Hongkong Fir* case could be applied, it was held that, on the facts, the sellers' breach was not serious enough to justify termination by the buyers.

3.8 Each member of the Court of Appeal in *The Hansa Nord* thought that s61(2) of the Sale of Goods Act 1893 (UK),[12] saving the "rules of the common law", allowed recourse to the common law as interpreted in the *Hongkong Fir* case because it was not inconsistent with the provisions of the Act. Lord Denning MR and Roskill LJ considered that there was nothing in the Act to prevent the relevant clause being interpreted as an intermediate or innominate term. Ormrod LJ doubted, however, whether it was necessary to create a third category of contractual terms. In his view the *Hongkong Fir* case involved the recognition of a basis for termination for breach of warranty, namely, "that, de facto, the consideration for his [ie the buyer's] promise has been wholly destroyed".[13] Although this difference of opinion has not been finally resolved in England, the House of Lords gave its approval to *The Hansa Nord* in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*.[14]

D. Justification of the English Law

3.9 There are sound commercial reasons to justify the decision in *The Hansa Nord*. The main justification is the flexibility generated by the *Hongkong Fir* case. Under a literal interpretation of the Sale of Goods Act 1923 (NSW) there is a choice between two types of terms: conditions and warranties. A third category of terms gives greater choice and precludes the argument that a breach of condition is the only basis for termination. Where, as in *The Hansa Nord*, a standard form contract is in issue, the classification of the term by the court will bind subsequent parties using the same form and there is the danger that justice will not be achieved in all cases. The Court in *The Hansa Nord* was reluctant to construe the term as a condition because the sellers' breach, objectively considered, was not particularly serious. It would have served to encourage the avoidance of contractual obligations for technical breaches associated with a downward movement in market prices. On the other hand, construing the term as a warranty would have implied that, subject to Ormrod LJ's suggestion,[15] no breach of the same term in a subsequent contract, no matter how serious, would justify termination by a buyer. The main application of the *Hongkong Fir* analysis is to terms capable of being breached with varying degrees of seriousness, such as those relating to the quality or condition of goods,[16] and it seems eminently sensible to allow a flexible approach to such terms. On the other hand, it is difficult to see how a sale of goods contract can contain intermediate (innominate) terms when the Act implicitly[17] requires terms to be classified as either conditions or warranties.

E. Australian Law

3.10 Although the intermediate term concept has yet to be approved by the High Court,[18] the *Hongkong Fir* case has been referred to with approval in the State Supreme Courts on a number of occasions.[19] Given this approval under the

general law of contract, it would be sufficient, in any statutory adoption of the concept in the sale of goods context, merely to state expressly that the concept is not to be seen as excluded by the terms of the Act (see para 3.12).

3.11 Further discussion is necessary, however, on the relationship between the concept of warranty (as employed in the Act) and the repudiation doctrine (implicitly preserved by s4(2)). Under the common law even a breach of warranty will justify termination if the promisor has also repudiated his contractual obligations.[20] But in *The Hansa Nord*[21] Lord Denning MR was of the opinion that the term "repudiation" should be restricted to cases of "anticipatory" breach, and not applied to termination based on the "actual" breach of a contractual term. There is a valid distinction between the *Hongkong Fir* approach and the repudiation doctrine.[22] Under the former, termination is justified because of the consequences of the promisor's breach. Evidence must be produced indicating that serious loss or damage has been (or will be) suffered by the promisee. Under the repudiation concept, there must be an express or implied refusal to perform and the promisee must therefore produce evidence which shows such a refusal on the part of the promisor. There is clearly an overlap between the concepts, but in many cases it would be artificial to ask whether a seller has impliedly refused to perform the contract by tendering or delivering defective goods. The complaint of a buyer in cases such as *The Hansa Nord* is not the conduct of the seller, who may be doing the very best to perform, but rather the consequences of receiving goods which are not in accordance with the contract.

III. RECOMMENDATION

3.12 We recommend that **the Act be amended to make it clear that the Sale of Goods Act does not exclude the right to treat a contract of sale as repudiated for a sufficiently serious breach of an intermediate stipulation.** Two problems then arise: first, the terminology to be employed; and, secondly, the way in which the Act should be amended.

3.13 There are two possible approaches to terminology: either the amendment can be expressed by reference to the consequences of breach; or the terminology of the intermediate term itself can be employed.

3.14 One approach to amendment of the Act would be to expand s4(2), so that it contained the words "the effect of breach of an intermediate stipulation" after the word "agent". A second possibility would be to insert a new subsection, to the following effect:

> (2A) Nothing in this Act shall be construed as excluding a right to treat a contract of sale as repudiated for a sufficiently serious breach of a stipulation that is neither a condition nor a warranty but is an intermediate stipulation.

The expressions "intermediate stipulation" and "treat contract of sale as repudiated" have been chosen to achieve consistency with other sections of the Act, particularly s16. A third possibility would be to enact the first reform with the words "the effect of breach of a stipulation not classified as either a condition or a warranty", after "agent" in s4(2). A fourth possibility would be to enact a new subsection (2A) in s4, similar to that proposed in the second reform, but ending with the words "breach of a stipulation which is not classified as either a condition or a warranty". We favour the second of these four possible approaches.

3.15 It might be objected that, given the discussion of s4 in Chapter 2, it is not appropriate to give that section more work to do, and that s16 is the appropriate place in which to bring in the intermediate term concept. However, we take the view that it would be inappropriate to insert an amending provision in such a specific section of the Act without also amending the terms of other sections of the Act, such as s54.

IV. OTHER ISSUES

3.16 A number of other issues arise in relation to the breach of contractual terms, such as the quantum of damages recoverable where a buyer (or seller) terminates the performance of a contract of sale, for breach by the seller (or buyer), in reliance on an express contractual right to terminate. Is it necessary, in order for the buyer (or seller) to recover loss of bargain damages, to prove a repudiation or fundamental breach by the seller (or buyer)?[23] We propose to deal with this issue, and other controversial issues, in the *Issues Paper* foreshadowed earlier in this Report.[24]

Footnotes

1. See Carter, *Breach of Contract* (1984) Ch 3.
2. See s16.
3. See s34(2).
4. See, eg s16(3).
5. See, eg *Francis v Lyon* (1907) 4 CLR 1023; *Peter Turnbull and Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235.
6. [1962] 2 QB 26.
7. [1962] 2 QB 26 at 64. It seems that Sellers LJ took the same view.
8. [1962] 2 QB 26 at 69-70.
9. New South Wales Law Reform Commission, *Working Paper on Sale of Goods* (WP 13 1975) para 13.18.
10. [1974] 2 Lloyd's Rep 216. But see *W N Lindsay and Co Ltd v European Grain Shipping Agency Ltd* [1963] 1 Lloyd's Rep 437 at 443.
11. [1976] QB 44.
12. See now s62(2) of the Sale of Goods Act 1979 (UK). This provision is relevantly in identical terms to s4(2) of the Sale of Goods Act 1923 (NSW) (set out at para 2.1).

13. [1976] QB 44 at 84.

14. [1976] 1 WLR 989. See also *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109; *Bunge Corp New York v Tradax Export SA Panama* [1981] 1 WLR 711.

15. See para 3.8.

16. Thus, it is not usually applied to time stipulations: *Bunge Corp New York v Tradax Export SA Panama* [1981] 1 WLR 711.

17. For example, s16(2) seems to assume that a breach of condition is the only basis for termination for breach of a contractual term.

18. Cf *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 626, 637; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 59 ALJR 373 at 380.

19. See *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWR 1504 at 1510-1511 per Walsh J with whom the other members of the Full Court agreed; *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254 at 264; *Honner v Ashton* (1979) 1 BPR 9478 at 9490 per Mahoney JA; *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 at 144-145 per McHugh JA.

20. See *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322.

21. [1976] QB 44 at 59.

22. See Carter, *Breach of Contract* (1984) paras 639-643.

23. See *Shevill v Builders Licensing Board* (1982) 149 CLR 620 and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 59 ALJR 373 (both cases on leases of land) and cf *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605 (sale of goods).

24. See para 1.19.

Chapter 4
Requirement of Writing

I. THE PRESENT LAW

4.1 Section 9 of the Sale of Goods Act 1923 (NSW) provides:

> 9. (1) A contract for the sale of any goods of the value of twenty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.
>
> (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made procured or provided or fit or ready for delivery or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

4.2 It can be seen that the structure of s9(1) is to state that a contract for the sale of any goods of value $20 or more is unenforceable by action in the absence of some note or memorandum in writing signed by the party to be charged (or the party's agent), unless the buyer has accepted and received part of the goods or given something in earnest or in part payment for the goods. Section 9(2) gives the provision a wide operation by providing that s9 applies even though the goods were to be delivered at a future time. Section 9(3) states a definition of "acceptance" which is wider than the description of acceptance in performance stated in s38.[1]

4.3 Section 9 was based on s4 of the Sale of Goods Act 1893 (UK).[2] That provision re-enacted s17 of the Statute of Frauds 1677 (Imp), with changes in language reflecting case law on the provision. As a consequence s17 of the Statute of Frauds was declared to be no longer in force in New South Wales.[3]

4.4 For s9 to operate the contract must relate to "goods" and those goods must be of value $20 or more. The former requirement has attracted a lot of discussion and a distinction has been drawn between contracts for the sale of goods on the one hand, and contracts for work and materials on the other.

4.5 "Goods" are defined by s5(1) as including all chattels personal other than things in action and money. It is also expressly stated that "emblements" and things attached to or forming part of the land which are agreed to be severed before the sale or under the contract are "goods". Thus, growing crops such as wheat are included, as is fruit growing on trees which is agreed to be harvested prior to the property in the fruit passing to the buyer, whereas a right to remove slate (in the form of dross from quarrying operations) from land is not a sale of goods if there is no agreement to sever the slate from the land.[4]

4.6 The distinction between a sale of goods contract and one for the doing of work and supply of materials has been drawn for the purpose of avoiding the requirement of writing in s9. The distinction is an artificial one[5] which is said to depend on whether the substance of the contract is the skill of the supplier, rather than the supply of a finished item where the skill of the supplier is ancillary only.[6] In the former case the contract is for work and materials, in the latter a sale of goods is involved. Examples of work and materials contracts include the painting of a portrait[7] and the construction and installation of a cocktail cabinet.[8] Examples of sale of goods contracts include a dentist's contract to supply false teeth[9] and a contract for a computer system.[10] The distinction between the two types of contracts is obviously often a fine one,[11] and the tests applied have been said to be "unsatisfactory and imprecise".[12]

4.7 In cases where there is no note or memorandum a payment by the buyer, either in earnest or as part payment for the goods, will enable the contract to be enforced, as will the acceptance of part of the goods by the buyer. These alternatives do significantly narrow the operation of the requirement of written evidence and it is perhaps fair to say that there are not many sale of goods contracts which are unenforceable for want of written evidence.

4.8 Sometimes there will be some written evidence of the contract and the question will arise whether the note or memorandum is sufficient. As there is no distinction of principle between the note or memorandum under s4 of the Statute of Frauds 1677 (Imp) (and the provisions derived from that section such as s54A of the Conveyancing Act 1919 (NSW)), a substantial body of complex case law exists in relation to the contents of the note or memorandum, and the requirement that it be signed by the party to be charged.[13]

4.9 If there is no sufficient note or memorandum signed by the party to be charged, and no part payment or acceptance, the effect of s9 is to render the contract unenforceable rather than void. Thus, claims dehors the contract, such as restitutionary claims to recover money had and received, are sometimes available notwithstanding s9.[14] But the equitable doctrine of part performance,

whilst perhaps theoretically applicable, does not appear to have been applied in the context of s9.[15]

4.10 As well as applying to a contract for the sale of goods of value $20 or more, s9 applies to any variation of the contract. Accordingly, variation must be evidenced by the writing and signed by the party to be charged, and an oral variation will be unenforceable. On the other hand, an agreement for rescission of the contract need not be so evidenced. The view has been rejected that every variation of a contract involves a rescission of the old contract and the substitution of a new one.[16] The distinction between variation and rescission is frequently difficult and has been criticised.[17]

4.11 The requirement that a variation of the contract be evidenced by writing has given rise to further refinement between, for example, a variation to the contract and a variation in the mode of its performance, written evidence of the latter not being required.[18] As with the distinction between sale of goods contracts and work and materials contracts, the refinements have been made for the purpose of ensuring that s9 is not used as a technical evasion of contractual responsibility.

II. CRITICISM OF SECTION 9

4.12 A number of criticisms can be levelled at s9. First, the section applies too widely. Secondly, too much importance is attached to form. Thirdly, interpretation of the section has given rise to unsatisfactory distinctions. Fourthly, it detracts from uniformity, because there is no requirement of writing in a number of other Australian jurisdictions. These are discussed in the following paragraphs.

4.13 Section 17 of the Statute of Frauds 1677 (Imp) applied to contracts for the sale of goods at a price of 10 pounds sterling or upwards. Thus, the amount currently stated in s9 is the decimal equivalent to that figure. It goes without saying that s9 applies to a much larger number of contracts than did the Statute of Frauds when enacted. Therefore, it seems obvious that an initial criticism of s9, even allowing for the alternative means of satisfying the section (which were also present in the Statute of Frauds), is that a greater number of contracts is caught by s9 than can be justified. In fact, in the jurisdictions of Australia with provisions equivalent to s9, only in the Northern Territory has the statutory amount been revised, in that case to $50.[19]

4.14 The Statute of Frauds 1677 (Imp) was passed to prevent perjury and fraudulent practices. Although that justification has contemporaneous relevance, social conditions have changed considerably in the past 300 years, and too much importance can be attached to formal requirements.[20] In particular, standards of literacy have improved considerably. The English Law Revision Committee thought the ability of the parties to a contract to testify rendered the provisions of s4 of the Sale of Goods Act 1893 (UK) an "anachronism".[21] Moreover,

commercial contracts are almost invariably evidenced by writing and the opportunity for false accusations of oral contractual obligations is correspondingly diminished. Section 8 of the Sale of Goods Act 1923 (NSW) provides that a contract for the sale of goods may be written (either with or without seal), oral, partly oral and partly written, or may be implied from the conduct of the parties. At present this is subject to the other provisions of the Act, such as s9, and any other statute. Deletion of s9 would reduce the importance of form, and allow s8 to operate more widely, but still leave open the imposition of a requirement of writing in other contexts, such as consumer credit contracts involving a sale of goods.[22]

4.15 The third criticism focuses on the interpretation of s9 by the courts. It has been explained that in order to narrow the application of s9 the courts have drawn fine distinctions between contracts for the sale of goods and contracts for work and materials, between variations of the contract and alterations to its mode of performance. This makes the law excessively technical and difficult to state. It also makes the operation of s9 less certain than it should be. In particular, the distinction between sale of goods contracts and contracts for work and materials has been the subject of much criticism.[23] These difficulties would disappear if s9 were deleted from the statute. So too would the difficulties inherent in the cases on "note or memorandum" and "signed by the party to be charged". There are literally hundreds of such cases and the difficulties of reconciling the decisions is notorious.

4.16 Finally, in some Australian jurisdictions writing is no longer required.[24] Moreover, the Statute of Frauds 1677 (Imp) has ceased to apply at all in New South Wales[25] and it seems odd that a sale of goods should be seen as in need of a requirement of writing when the only other survivor from the classes of contract enumerated in the Statute of Frauds is a contract involving land.[26] It might be argued, for example, that there was a stronger case for requiring a contract of guarantee to be evidenced by writing than for retaining the requirement in the context of a sale of goods.[27]

III. OTHER JURISDICTIONS

4.17 In the United Kingdom the provision corresponding to s9 of the New South Wales Act was repealed in 1954.[28]

4.18 The first Australian jurisdiction to follow the English lead was Queensland, where s3 of the Statute of Frauds 1972 (Qld) repealed the relevant provision.[29] The Australian Capital Territory followed three years later[30] and the most recent repeal, in South Australia, took place in 1982.[31]

4.19 The corresponding provision in New Zealand has also been repealed.[32]

4.20 There is no evidence that the repeal of the equivalents of s9 has caused any problems,[33] notwithstanding that, at least in England and New Zealand, a substantial period of time has elapsed.

4.21 An alternative to the repeal of s9 would be the substitution of a larger threshold point for its operation. This has been done in the Northern Territory.[34] The figure there is $50 and it might be argued that this is still too low a figure. In the United States, section 2-201(1) of the *Uniform Commercial Code* (1978 text) operates on contracts for the sale of goods the price of which is US$500 or more. This seems a more realistic figure, aimed at exempting commercially insignificant contracts from any such requirement. However, it should be noted that section 2-601 is a fairly complex provision with exceptions extending further than acceptance and part payment.[35]

IV. RECOMMENDATION

4.22 In view of the significant criticisms of s9, and the decreased importance of form in contracts generally it would not be satisfactory simply to revise the monetary threshold. **We recommend that s9 be repealed.**

Footnotes

1. See para 6.2.
2. Section 4 did not extend to Scotland. For the present position in the UK see para 4.17.
3. See the Schedule to the Act which states that ss15 and 16 (commonly cited as ss16 and 17) were repealed.
4. See *Mills v Stokman* (1966) 116 CLR 61.
5. *Hewett v Court* (1983) 149 CLR 639 at 655.
6. *Robinson v Graves* [1935] 1 KB 579 at 587.
7. *Robinson v Graves* [1935] 1 KB 579.
8. *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405.
9. *Samuels v Davis* [1943] 1 KB 526 at 529.
10. *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48.
11. For further illustrations see Sutton, *Sales and Consumer Law in Australia and New Zealand* (3rd ed 1983) pp56-61.
12. *Hewett v Court* (1983) 149 CLR 639 at 646 per Gibbs CJ.
13. For a general discussion see Lindgren, Carter and Harland, *Contract Law in Australia* (1986) paras 513-516.
14. See Lindgren, Carter and Harland, *Contract Law in Australia* (1986) para 520.
15. See Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (2nd ed 1984) para 2043.
16. *United Dominions Corp (Jamaica) Ltd v Shoucair* [1969] 1 AC 340 at 348,349.
17. See *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 113.
18. See *Hartley v Hymans* [1920] 3 KB 475.
19. Sale of Goods Act 1972 (NT) s9.
20. For a general discussion of the functions of requirements of writing see New South Wales Law Reform Commission, *Wills—Execution and Revocation* (LRC 47 1986) paras 2.40-2.49.

21. England Law Revision Committee, *Statute of Frauds and the Doctrine of Consideration*, 6th Interim Report Cmd 5449 (1937) para 9.
22. See, eg Credit Act 1984 (NSW) s31.
23. *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454 at 476.
24. See para 4.18.
25. See Imperial Acts Application Act 1969 (NSW) s8(1).
26. See Conveyancing Act 1919 (NSW) s54A.
27. Cf Credit Act 1984 (NSW), s136. The Queensland Law Reform Commission thought it "illogical" to retain the requirement of written evidence for a sale of goods contract after the repeal of s4 of the Statute of Frauds: see Queensland Law Reform Commission, *Report on a Review of the Statute of Frauds*, QLRC 6 (1970) p7; but the requirement for contracts of guarantee was retained: Property Law Act 1974 (Qld) s56.
28. By the Law Reform (Enforcement of Contracts) Act 1954 (UK).
29. The repeal of that section by the Property Law Act 1974 (Qld) does not revive the earlier provision.
30. See Sale of Goods Ordinance 1975 (ACT) s3.
31. See Statutes Amendment (Enforcement of Contracts) Act 1982 (SA) s4.
32. Contracts Enforcement Act 1956 (NZ) s4.
33. See Law Reform Committee of South Australia, *Report Relating to the Repeal of the Statute of Frauds and Cognate Enactments in South Australia* 34th Report 1975 p9.
34. See para 4.13.
35. See ss2-601(2)-(3), 2-602.

Chapter 5
Passing of Property in Specific Goods

I. INTRODUCTION

5.1 Section 16(3) of the Sale of Goods Act 1923 (NSW) provides:

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

There are two limbs to this provision. Under the first limb "acceptance"[1] of goods has the effect that breach of condition may only be treated as a breach of warranty. Under the second limb, the passing of property in specific goods has this effect. In either case the buyer may claim damages in respect of the seller's breach, but the buyer's remedy of rejection of the goods is barred unless there is a term in the contract, express or implied, preserving the remedy.

5.2 The terms of s16(3) are derived from s11(1)(c) of the Sale of Goods Act 1893 (UK).[2] That provision was, it would seem,[3] based on the law stated in two decisions: *Street v Blay*[4] and *Behn v Burness*.[5]

5.3 In *Street v Blay* the plaintiff sued in *assumpsit* to recover the price of a horse "warranted sound" which had been sold to the defendant. The defence was that the horse had been unsound and the contract consequently "rescinded" by the defendant. To this the plaintiff replied that the right of rescission had been lost by the defendant's sale of the horse to a third party. The jury having found for the defendant, a rule nisi was obtained by the plaintiff which was made absolute by the court thereby effectively reversing the verdict. Lord Tenterden CJ reasoned[6] that once property in a specific chattel has passed to a buyer, the buyer is unable by a unilateral act to revest property in the seller, so that in the instant case the defendant could not revest title without the consent of the seller even though he had repurchased the horse from the third party. In addition it was said

that once the buyer had exercised dominion over goods the subject of the contract, the buyer was unable to return them. Thus, in the present case the defendant had dealt with the horse—and so accepted the goods—by selling it to the third person. A further rationale was given, namely, that as the defendant had derived "an intermediate benefit as a consequence of the bargain, which he would still retain", the parties could not be placed in their pre-contractual position by rejection of the goods.

5.4 *Behn v Burness* was a decision of the Exchequer Chamber on a charterparty contract, but the judgment of the court (delivered by Williams J) was regarded in the nineteenth century as an authoritative statement of the law on conditions and warranties. His Lordship said:

> Accordingly, if a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract; . . .) but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or in other words, that the condition expressed in the contract has not been performed. Still if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages.[7]

Again there is the rationale that the benefit of property precludes rejection. In terms of remedies, the term which was originally a condition ceases to be available as such[8] and so the buyer is forced to limit the claim to one for damages.

II. OPERATION OF THE SECOND LIMB OF SECTION 16(3)

5.5 The present concern is the second limb of s16(3),[9] stating that the passing of property in specific goods precludes rejection. Consideration will be given later to the operation of the first limb.[10]

5.6 In order to analyse the operation of the second limb of s16(3) the concept of "specific goods" must be explained. Section 5(1) of the Act states that specific goods are "goods identified and agreed upon at the time a contract of sale is made". Most consumer sales are within this description. For example, if a customer selects a pair of shoes displayed at a department store, the contract in relation to the shoes is for specific goods. But the concept is not restricted to consumer sales. Thus, if

a farmer selects a second-hand tractor displayed in the dealer's showroom the contract will be in relation to specific goods, as will a commercial contract for the purchase of, say, a load of scrap iron displayed by the seller at its place of business. And a sale conducted by way of auction will generally be a sale of specific goods, the goods being identified and agreed upon on (or before) the fall of the hammer. It is also clear, however, that goods may be identified merely by way of description, as where a buyer purchases a particular machine described as "packed in container 1234 on SS Columbus" (there being only one such machine in the container). By way of contrast, a contract for the sale of "100 tonnes of wheat" is a contract in relation to unascertained, rather than specific, goods. It is unclear whether the goods must be in existence at the time of the contract, that is whether goods to be manufactured, or grown by the seller may be specific by reason of a particular description such as "the crop of wheat to be produced" by the seller in a particular place.[11]

5.7 Section 23, Rule 1 of the Act provides guidance on the passing of property in specific goods. Unless a "different intention appears", s23 states:

> Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Therefore, assuming that the goods are in a "deliverable state" and the contract is "unconditional", property passes to the buyer when the contract is made, even if the time of payment or delivery (or both) is postponed by the contract. Assuming that the goods referred to in the examples stated earlier [12] were in a deliverable state, and the contracts were unconditional, property would have passed to the buyer in each case at the time of the contract, even if the buyer promised to pay for the goods at a later date or the seller agreed to deliver the goods to the buyer's residence or place of business, or both payment and delivery were postponed. Thus, for example, property in the pair of shoes will have passed to the buyer at the time of the contract even if the time of payment was postponed.

5.8 Section 5(4) states that goods are in a deliverable state "when they are in such a state that the buyer would under the contract be bound to take delivery of them". Although this might have been interpreted as providing that whenever there is a breach of condition the buyer's ability to reject means that the goods were not in a deliverable state,[13] the provision has, generally speaking, been narrowly interpreted.[14] In respect of most sales of specific goods the goods will have been in a deliverable state. To return, however, to one of the examples given earlier,[15] if the seller of the scrap iron has agreed to place it in bags for the purpose of delivery, the goods cannot be regarded as having been in a deliverable state. The result in such cases is that Rule 2 of s23 applies and property only passes once the act has been done and the buyer has notice. Thus, the seller must place the scrap iron in bags and the buyer must have notice of this.

5.9 The other concept introduced by s23 Rule 1[16] is the "unconditional contract". Two meanings have been canvassed. One view is that a contract is unconditional only if there are no essential terms in the contract. The other view is that a sale is not unconditional if there is a condition precedent to the operation of the contract.

5.10 The first view is inherently implausible as there can be no sale if there are no essential terms, and the implied term provisions (ss17-20) virtually ensure that there will be some conditions in the contract. In other words, if the first view were correct the class of "unconditional contracts" would be virtually empty.[17]

5.11 Turning then to the second view, there must be a "condition precedent" (or "contingency") to the operation of the contract. For example, if the farmer in the example given in para 5.6 agrees to purchase the tractor "subject to" the receipt of a certificate by a named third party showing that the vehicle is in good mechanical condition, the farmer's obligation to purchase is contingent on such a certificate being received. It is irrelevant, it would seem, whether the condition precedent qualifies the existence of a contract between the parties[18] or the obligation of the buyer to perform.[19] In either case the contract can be regarded as "conditional". For example in *Minister for Supply and Development v Servicemen's Co-operative Joinery Manufacturers Ltd*,[20] a contract for the sale of specific goods provided for payment by "net cash before delivery" and this was held by the High Court to make the contract conditional. That is to say, property in the goods was not to pass until the goods were paid for. On the other hand it has been said[21] that a "resolutive" condition (or "condition subsequent") does not make the contract conditional.[22] This interpretation is to some extent confirmed by s6(2), distinguishing "absolute" and "conditional" contracts,[23] although it might be argued that a contract subject to a resolutive condition is not an absolute one.[24]

5.12 The upshot of the above discussion is that, notwithstanding the complexity of concepts involved in the second limb of s16(3), in most sales of specific goods property will pass by virtue of the contract and the buyer will lose the right to reject (assuming there is a breach which would justify rejection) unless there is a term of the contract to the contrary. Although the existence of an express term to this effect is a distinct possibility in a commercial sale, it is most unlikely in a consumer sale. In most consumer sales there is no memorandum of the express terms and, if a document is present, it is likely to be drafted in the seller's favour.

5.13 The final question, then, is whether there is likely to be any implied term preserving the buyer's right to reject. It might be argued that in all sales of specific goods there is an implied term to the effect that the passing of property is conditional on the goods being in accordance with the contract.[25] However, the cases on which s16(3) was based[26] provide no basis for such a proposition and the clear intention of s16(3) is to make the passing of property a general limitation on the right to reject specific goods. It no doubt comes as a surprise to consumers and commercial buyers alike to discover that their right to reject specific goods for breach of condition by the seller is lost the very moment the contract is entered

into, but that is almost invariably the position,[27] unless the seller had no title to transfer and so transferred nothing to the buyer.[28]

III. CRITICISM OF THE LAW

5.14 The second limb of s16(3) of the Sale of Goods Act 1923 (NSW) can be criticised on at least seven grounds.

5.15 First, the provision is unfair. It is unfair that a buyer should be limited to claiming damages from a seller who has breached a condition simply because property in the goods passed under the contract.

5.16 Secondly, the provision does nothing to encourage performance of the contract by the seller. The seller is entitled to retain the price even though defective goods have been delivered and the buyer is forced to litigation for the purpose of obtaining compensation. If the buyer were entitled to reject the goods the seller would have greater incentive to deliver goods in conformity with the contract.

5.17 Thirdly, the provision does not accord with the understanding of the layperson who treats the supply of defective goods as being a basis for rejection of the goods in most situations.

5.18 Fourthly, the provision is out of line with what is accepted as sound commercial practice, namely to promote goodwill by allowing buyers to return defective goods. It is common knowledge that sellers, particularly the larger department stores, will allow defective goods to be returned. No doubt the practice goes beyond any legally justifiable course of conduct since even a buyer who has merely changed his or her mind will often be given a refund on goods purchased, but the practice should be reflected by the Act in cases where the seller has breached a condition.

5.19 Fifthly, there is a lack of uniformity in Australia, and the New South Wales provision now reflects a "minority view". As will be explained,[29] in some other jurisdictions this restriction is no longer part of the sale of goods legislation. Moreover, the limitation is not present for buyers who can bring themselves within s75A of the Trade Practices Act 1974 (Cth).[30]

5.20 Sixthly, and perhaps most fundamentally, the second limb of s16(3) is based on unsound legal premises. As has been explained, the two bases for the provision are that a buyer cannot unilaterally revest title, and that for rejection to take effect the parties must be restored to their pre-contractual positions.

5.21 Now it can be conceded that for rejection to take effect the buyer must re-transfer the property in the goods, since the retention of property would be inconsistent with the election to terminate. But the modern authorities[31] clearly

show that the buyer's election has that effect. The modern cases[32] on the general law of contract also reject the notion that for termination of a contract to take effect the parties must be restored to their pre-contractual positions. This notion of *restitutio in integrum*, whilst certainly applicable to cases of rescission *ab initio* for misrepresentation or mistake,[33] does not, generally speaking, apply to termination for breach or repudiation. This is because termination relates to the future only; it is the performance of the contract, not the contract itself, which is terminated. There is no reason why any other rule should apply to a sale of goods and it should be sufficient to revest title that the buyer has communicated a rejection of the goods to the seller.

5.22 Finally, the present provision can be seen as a reminder of the importance attached by nineteenth century lawyers to the distinction between contract and property. That is to say, once a contract has had the effect of passing a legal interest in property, the lawyers of the nineteenth century tended to treat contractual principles as less significant. Nowadays the argument that the transfer of an interest in property prevents the application of normal contractual principles is almost always rejected.[34]

IV. THE TRADE PRACTICES ACT 1974 (CTH)

5.23 Section 75A(1) of the Trade Practices Act 1974 (Cth) confers a right of "rescission" for breach of a condition implied by virtue of Division 2 of Part V into a contract for the supply of goods by a corporation to a consumer. The subsection also specifies the way in which rescission must be effected, and s75A(2) specifies circumstances in which rescission will not be effective. Section 75A(3) provides:

> Where a contract for the supply of goods by a corporation to a consumer has been rescinded in accordance with this section—
>
> (a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to, the corporation—the property in the goods re-vests in the corporation upon the service of the notice or the return of the goods; and
>
> (b) the consumer may recover from the corporation, as a debt, the amount or value of any consideration paid or provided by him for the goods.

Section 75A(4) states expressly that the right of rescission under the section is in addition to, *inter alia*, any other right or remedy under any State Act or "any rule of law". Thus, the restriction on the right of rescission imposed by s16(3) of the Sale of Goods Act 1923 (NSW) will not apply if the buyer is able to invoke s75A.[35]

5.24 Since s75A(3)(a) of the Trade Practices Act 1974 (Cth) provides for the revesting of property in goods where this has passed to the consumer, the clear intention is that the right of rescission should be available notwithstanding that property in the goods has passed under the contract.[36] Thus, if a buyer happens to be a consumer who has purchased from a corporation, as these terms are defined by the Trade Practices Act, the buyer will be in a more favourable position than a buyer who is not a consumer, or where the buyer has not purchased from a corporation.[37] Although there is little doubt that consumer buyers are those most in need of protection in this context, since s16(3) of the Sale of Goods Act 1923 (NSW) has its primary operation in the context of consumer contracts, it is unsatisfactory that the scope of protection should be dictated by the scope of the Commonwealth Government's legislative powers. This has the result that, in New South Wales, a consumer purchase from a sole trader or partnership is subject to the restriction imposed by s16(3).

V. OTHER JURISDICTIONS

5.25 In the United Kingdom, the provision corresponding[38] to s16(3) of the Sale of Goods Act 1923 (NSW) was amended by s4(1) of the Misrepresentation Act 1967 (UK) and the words "or where the contract is for specific goods, the property in which has passed to the buyer", deleted. Thus, the passing of property in specific goods is not of itself a bar to rejection of goods under the Sale of Goods Act 1979 (UK). There are no features peculiar to the conditions in the United Kingdom which would justify the divergence of New South Wales law.

5.26 More telling is the fact that the Australian Capital Territory [39] and South Australia[40] have followed the British lead. In Victoria s16(3) of the Goods Act 1958 (Vic) corresponds exactly to s16(3) of the New South Wales Act, except that in consumer sales[41] it has no operation.[42] Thus, in respect of consumer sales "acceptance" of goods (as defined by s99 of the Goods Act 1958 (Vic)) is the criterion for loss of the right to reject.[43]

VI. RECOMMENDATION

5.27 We recommend that **the passing of property in specific goods should no longer of itself bar rejection.** The consequence of implementation would be for the loss of a buyer's right of rejection to depend on whether the goods have been accepted under s38.[44]

Footnotes

1. This is defined in s38; see para 6.2.
2. For the current position in the United Kingdom see para 5.25.
3. See *Chalmers' Sale of Goods* (1st ed 1894) p24 n1, p172.
4. (1831) 2 B & Ad 456; 109 ER 1212.
5. (1863) 3 B & S 751; 122 ER 281.
6. See (1831) 2 B & Ad 456 at 462-464; 109 ER 1212 at 1214-1215.
7. (1863) 3 B & S 751 at 755-756; 122 ER 281 at 283.
8. This is often expressed by saying that the condition becomes a warranty "*ex post facto*" (*Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at 252 (reversed on other grounds [1951] 1 KB 240 at 255)). But cf *Wallis v Pratt* [1911] AC 394 at 395.
9. See paras 5.6-5.13
10. See Ch 6.
11. See *Benjamin's Sale of Goods* (2nd ed 1981) paras 122-133.
12. Para 5.6.
13. Atiyah, "The Right to Reject Goods for Breach of Condition" (1956) 19 *Mod LR* 315.
14. See *Benjamin's Sale of Goods* (2nd ed 1981) para 308.
15. Para 5.6.
16. Para 5.7.
17. But see *Taylor v Combined Buyers Ltd* [1924] NZLR 627 at 648-649. Cf *Varley v Whipp* [1900] 1 QB 513.
18. *Pym v Cambell* (1856) 6 E & B 370; 119 ER 903 is a well known example.
19. The modern tendency, in the general law of contract, is to construe most "subject to" provisions in this way (see, eg *Meehan v Jones* (1982) 149 CLR 571 ("subject to finance")), although use of the expression "subject to contract" creates a presumption that the existence of a contract is contingent on the execution of a formal document (see *Masters v Cameron* (1954) 91 CLR 353).
20. (1951) 82 CLR 621.
21. *McPherson Thom Kettle & Co v Dench Bros* [1921] VLR 437 at 444.
22. However, this view can be criticised on the ground that the condition precedent/condition subsequent distinction tends to depend more on form than substance; see Lindgren, Carter and Harland, *Contract Law in Australia* (1986) para 741.
23. See *Benjamin's Sale of Goods* (2nd ed 1981) paras 304-306.
24. See *Bannerman v White* (1861) 10 CB(NS) 844 at 860; 142 ER 685 at 692.
25. Cf *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 at 487 (cif contract).
26. See paras 5.3-5.4.
27. See Smith, "The Right to Rescind for Breach of Condition in a Sale of Specific Goods under the Sale of Goods Act, 1893" (1951) 14 *Mod LR* 173.
28. *Rowland v Divall* [1923] 2 KB 500.
29. See paras 5.25-5.26.
30. See paras 5.23-5.24.
31. See, eg *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 WLR 1126. And cf s50(3),(4) (resale by unpaid seller).

32. See, eg *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Heyman v Darwins Ltd* [1942] AC 356; *Johnson v Agnew* [1980] AC 367 and see Carter, *Breach of Contract* (1984), paras 1054-1056, 1201, 1206, 1215.

33. Clearly the requirement is the strict requirement of the common law (see Lindgren, Carter and Harland, *Contract Law in Australia* (1986) para 1126) so there is no question of "substantial" restitution as would be possible in equity.

34. A recent example is *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 59 ALJR 373 (lease of land—application of repudiation concept).

35. Alternatively the consumer may invoke the provisions of the Consumer Claims Tribunal Act 1974 (NSW) and obtain an order under s23; but the consumer cannot obtain more than $500.

36. See *Polgardy v Australian Guarantee Corp Ltd* (1981) 52 FLR 240 at 242.

37. The Act may have a more extended operation in certain cases.

38. Section 11(1)(c) of the Sale of Goods Act 1893 (UK); see para 5.2.

39. See s16(4) of the Sale of Goods Ordinance 1954 (ACT) as substituted by s3 of the Sale of Goods Ordinance 1975 (ACT).

40. Section 11(3) of the Sale of Goods Act 1895 (SA) was amended by s11 of the Misrepresentation Act 1971 (SA).

41. As defined by s85 of the Act which was inserted by s2 of the Goods (Sales and Leases) Act 1981 (Vic).

42. See s118 of the Act, inserted by s2 of the Goods (Sales and Leases) Act 1981 (Vic).

43. See further para 5.27.

44. There is some support for the view that at present s38 does not apply to a sale of specific goods where property has passed to the buyer: *Lucas v Smith* [1926] VLR 400 at 403. The contrary was, it seems, assumed by the Court of Appeal in *Leaf v International Galleries* [1950] 2 KB 86.

Chapter 6

Acceptance and the Examination of Goods

I. INTRODUCTION

6.1 Section 37(1) of the Sale of Goods Act 1923 (NSW) provides that where goods which the buyer has not previously examined are delivered, the buyer is "not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them" for the purpose of discovering whether the goods conform to their contractual requirements. Section 37(2) imposes an obligation on a seller tendering goods to afford the buyer a reasonable opportunity of examining the goods, for the purpose of ascertaining whether they conform, unless the parties have reached a contrary agreement.

6.2 Section 38 defines the acceptance concept. It deems acceptance to have taken place in three situations: where the buyer intimates acceptance to the seller of the goods; where the buyer does any act in relation to the goods "which is inconsistent with the ownership of the seller"; or where the buyer retains the goods for longer than a reasonable period of time without intimating rejection.

6.3 Superficially, s38 looks to be a codification of three recognised cases of election between the rights of rejection and acceptance, in favour of acceptance.[1] Under the general law of contract "acceptance" corresponds with "affirmation", that is an "election to continue the performance of a contract". Accordingly, intimation of acceptance is equivalent to an express election to affirm the contract or to continue with its performance; doing an act inconsistent with the ownership of the seller corresponds with an act justifiable only if the buyer has elected in favour of continuing with the contract; and retention of goods for an unreasonable time is simply the failure to elect to terminate the performance of the contract within the period which would be allowed under the general law of contract.

6.4 This interpretation is reinforced by the first limb of s16(3) of the Act which, as was explained earlier,[2] states that acceptance limits the buyer's claim to one for damages: the right to reject the goods and terminate the performance of the contract is therefore lost. In *Wallis v Pratt*[3] Fletcher Moulton LJ said that after acceptance the buyer is in "precisely the same position . . . as if he had voluntarily elected to take the remedy of damages" rather than termination.

6.5 The problem with the analysis of the acceptance concept in terms of election is that nothing is said in s38 as to the knowledge of the buyer. Under the general law of contract a promisee entitled to terminate the performance of a contract for breach (or repudiation) by the promisor, may elect to continue with the contract, but such an election requires "knowledge" on the part of the promisee.[4] The extent of the knowledge required is uncertain and still to be settled by the High Court . Knowledge of the right to terminate is sufficient, and on one view of the law[5] is necessary, if an election is to be inferred from the promisee's conduct. But it is frequently said that knowledge of the circumstances giving rise to the right to terminate is sufficient.[6] However, there is nothing in s38 which expressly incorporates either type of knowledge as a requirement for "acceptance".

II. THE ISSUE

6.6 The question which arises is whether s38 is intended to be subject to s37. Clearly, if a buyer has examined the goods the buyer will have knowledge of the circumstances, and may even know of a right to reject the goods for breach by the seller. Section 38 contemplates that the seller may have breached the contract in such a way as to justify rejection of the goods. But what is the position if the buyer has not been given the opportunity to examine the goods, or the failure of the goods to conform with the requirements of the contract was not ascertainable by inspection?

6.7 It seems clear that acceptance may arise even though, for example, the defect in the goods was latent. There is nothing in s38 to preclude the acceptance of such goods.[7] Moreover, there is nothing to preclude "waiver" by the buyer of the right of examination. And so, for example, a communication of acceptance may be effective as such even though the buyer has not examined the goods. These facts indicate that s38 cannot be looked at solely by reference to general principles of election.

6.8 The tension between s38 and s37 is most acute where the buyer does an act in relation to the goods inconsistent with the ownership of the seller prior to examination of the goods. If s38 is independent of s37 the buyer will be deemed to have accepted the goods in such circumstances. However, if s38 is subject to s37 no acceptance can take place by such an act, and the buyer's subsequent examination of the goods would lead to an effective rejection if the buyer found that the goods were not in conformity with the contract, assuming, of course, that the disconformity justified rejection.

III. THE CASE LAW

6.9 The cases discussing the relation between s37 and s38 are not satisfactory. The law is extremely complicated, and some fine distinctions have been drawn due to the failure of the Act to express the relationship between the two sections.

6.10 In *Hardy & Co v Hillerns*[8] an agreement for the sale of wheat provided for payment in London (against shipping documents) and for delivery to Hull. After discharge of the wheat at Hull had commenced, the buyers resold a quantity to sub-purchasers at Barnsley, Nottingham and Southwell. The wheat destined for Barnsley and Nottingham was then taken to a railway company's wharf, bagged and despatched by rail, and that destined for Southwell forwarded by barge. On the same day, and the day following, samples were taken by the original buyers which showed that the wheat delivered was not of the description provided for by the contract. Notice of rejection was then given. Greer J held that rejection came too late as the wheat had been accepted by the buyers who had done acts inconsistent with the ownership of the sellers. That decision was affirmed by the Court of Appeal, even though there was no doubt that a reasonable period for examining the goods had not expired at the time of the buyers' purported rejection. Bankes LJ said[9] "[s38] is, in my opinion, independent of [s37], and it is quite immaterial for the purposes of that section that the reasonable time for examining the goods had not expired" when the inconsistent acts were done. His Lordship explained that it is not enough for a buyer to be in a position to give the seller possession at some time, for rejection to be effective the buyer must be in a position to give possession at the time of rejection. In the instant case the sale and despatch to the sub-purchasers precluded this.

6.11 *Hardy & Co v Hillerns* does not lay down the proposition that every dealing with the goods is an act by the buyer inconsistent with the ownership of the seller. For example, a buyer under a cif contract may sell (or pledge) the documents representing the goods without doing an act inconsistent with the ownership of the seller, provided that the buyer purports to deal only with the conditional property in the goods obtained on receipt of the documents.[10] And if it is contemplated by the contract that the examination by the buyer will take place at the premises of the sub-buyer, taking delivery of the goods and despatching them to the sub-buyer will not, it seems, be regarded as acts inconsistent with the seller's ownership.[11]

6.12 Professor Sutton says[12] that *Hardy & Co v Hillerns* has been regarded with "universal disfavour". In 1975 the Commission tentatively suggested[13] that it was "highly desirable" that it be made clear that acceptance cannot take place until the buyer has had a reasonable opportunity of examining the goods.

IV. REFORM IN OTHER JURISDICTIONS

6.13 In a number of jurisdictions the provision equivalent to s38 of the Sale of Goods Act 1923 (NSW) has been amended so as to make s37 the dominant provision, but usually only in respect of acts inconsistent with the ownership of the seller.

6.14 Section 35 of the Sale of Goods Act 1979 (UK) states, so far as is material:

> The buyer is deemed to have accepted the goods . . . (except where section 34 above otherwise provides) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller . . . .

The parenthetic exception was introduced by s4(2) of the Misrepresentation Act 1967 (UK) into s36 of the Sale of Goods Act 1893 (UK) and, as can be seen, is present in the consolidating Act.

6.15 The first Australian jurisdiction to adopt the United Kingdom amendment was South Australia, where s12 of the Misrepresentation Act 1971 (SA) amended the Sale of Goods Act 1895 (SA). Victoria adopted the amendment when s3 of the Goods (Sales and Leases) Act 1981 (Vic) amended s42 of the Goods Act 1958 (Vic). The reform was also adopted in New Zealand when s14 of the Contractual Remedies Act 1979 (NZ) amended s37 of the Sale of Goods Act 1908 (NZ).

6.16 In the Australian Capital Territory, s4 of the Sale of Goods Ordinance 1975 (ACT) amended s39 of the Sale of Goods Ordinance 1954 (ACT) so as to make the description of acceptance subject to s38 in each of the three cases mentioned. It therefore went further than the United Kingdom amendment.

V. RECOMMENDATION

6.17 Consideration of the amendments made in other jurisdictions raises one further question. Should s38 be amended by making the entire section subject to s37, as in the Australian capital Territory,[14] or should the more limited amendment adopted in the United Kingdom, South Australia, Victoria and New Zealand be followed?

6.18 The main justification for making s38 as a whole subject to s37 is that, in essence, s38 is a statutory embodiment of a principle of election.[15] Unless s38 is subject to prior examination of the goods by the buyer the section cannot truly reflect election principles because the buyer may not know of the defect in the goods which justifies rejection.

6.19 For two reasons, however, we conclude that the more limited amendment should be made. First, there is no evidence of s38 operating unsatisfactorily except in relation to acts of the buyer inconsistent with the ownership of the seller. Secondly, there is no reason, in principle, why a buyer should not be permitted to accept goods in advance of examination if the buyer chooses to do so. If s38 is made subject to s37 in all cases a court would need to ask whether the buyer has waived the right of examination. It seems preferable that that issue should directly arise only in relation to the buyer's dealings with the goods after delivery by the seller. We therefore **recommend that the description of acceptance in s38 be subject to s37 in the case of acceptance by an act of the buyer inconsistent with the ownership of the seller.**

Footnotes

1. See Carter, *Breach of Contract* (1984) para 1092.
2. See para 5.1
3. [1910] 2 KB 1003 at 1013 (adopted [1911] AC 394).
4. See the statement of principle by Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30 and generally Carter, *Breach of Contract* (1984) paras 1065-1067.
5. See *Coastal Estates Pty Ltd v Melevende* [1965] VR 433 followed by Lee J in *Parker v Registrar-General* [1976] 1 NSWLR 342 (misrepresentation); *Peyman v Lanjani* [1985] Ch 457.
6. See cases cited in Carter, *Breach of Contract* (1984) para 1069. It may be necessary to draw a distinction between cases where the right is conferred by law and cases where the right is conferred by the contract; see *Khoury v GIO of NSW* (1984) 58 ALJR 502.
7. But acceptance cannot take place if the seller was not the owner of the goods and the implied term stated in s17(1) was present in the contract: *Rowland v Divall* [1923] 2 KB 500.
8. [1923] 2 KB 490.
9. [1923] 2 KB 490 at 495. The New South Wales section numbers have been inserted for ss34 and 35 of the Sale of Goods Act 1893 (UK). For the present position in the UK see para 6.14.
10. See *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459; *J S Robertson (Aust) Pty Ltd v Martin* (1956) 94 CLR 30 at 44, 51-52, 59-60.
11. Compare *E & S Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 KB 254 with *Hammer v Coca-Cola* [1962] NZLR 723.
12. *Sales and Consumer Law in Australia and New Zealand* (3rd ed 1983) p380.
13. New South Wales Law Reform Commission, *Working Paper on the Sale of Goods* (WP 13 1975) para 3.41.
14. See para 6.16.
15. See para 6.3.

Appendix A

SALE OF GOODS (AMENDMENT) BILL 1987

A BILL FOR

An act to amend the Sale of Goods Act 1923 for the purpose of reforming and clarifying aspects of the law relating to the rescission of contracts of sale of goods on the ground of misrepresentation, the enforceability of certain unwritten contracts and the acceptance of goods; and for other purposes.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

Short title

1. This Act may be cited as the "Sale of Goods (Amendment) Act 1987".

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Amendment of Act No 1, 1923

3. The Sale of Goods Act 1923 is amended in the manner set forth in Schedule 1.

Transitional provisions

4. (1) Subject to this section, the amendments made by this Act apply to contracts made after, but not before, the commencement of this Act.

(2) The amendments made by Schedule 1 (1) (b) and (2) also apply to contracts made before the commencement of this Act, but not so as to affect cases that were finally litigated or settled before that commencement.

(3) The fact of the enactment of section 4 (2A) and section 38(2) of the Sale of Goods Act 1923, and of this section, shall be treated as affecting neither—

(a) the rights of the parties to a contract made before the commencement of this Act; nor

(b) the construction of the Sale of Goods Act 1923 in its application to such a contract.

SCHEDULE 1

(Sec 3)

AMENDMENTS TO THE SALE OF GOODS ACT 1923

(1) Section 4 **(Savings)**—

(a) Section 4 (2A)—

After section 4(2), insert:

(2A) Without affecting the generality of subsection (2), the rules of equity relating to the effect of misrepresentation apply to contracts for the sale of goods, but such a contract may be rescinded under those rules for a misrepresentation even though either or both of the following apply:

(a) the misrepresentation has become a term of the contract;

(b) the contract has been performed.

(b) After section 4(4), insert:

(5) Nothing in this Act shall be construed as excluding a right to treat a contract of sale as repudiated for a sufficiently serious breach of a stipulation that is neither a condition nor a warranty but is an intermediate stipulation.

(2) Section 9 **(Contract of sale for twenty dollars and upwards)—**

Omit the section.

(3) Section 16 **(When condition to be treated as warranty)—**

Section 16 (3)—

Omit "or where the contract is for specific goods the property in which has passed to the buyer,".

(4) Section 38 **(Acceptance)—**

(a) Section 38—

Omit "or when the goods", insert instead "or, subject to section 37, when the goods".

(b) Section 38(2)—

At the end of section 38, insert:

(2) The buyer's acceptance of the goods as referred to in subsection (1) does not preclude rescission of the contract for an innocent misrepresentation, unless the acts constituting acceptance amount to affirmation of the contract.

Appendix B

Table of Statutes

	Para

Australia

Commonwealth

Statute	Para
Trade Practices Act 1974	1.11, 1.17, 5.19, 5.23, 5.24

New South Wales

Statute	Para
Commercial Transactions (Miscellaneous Provisions) Act 1974	1.10
Consumer Claims Tribunal Act 1974	5.23
Conveyancing Act 1919	4.8, 4.16
Credit Act 1984	4.14, 4.16
Imperial Acts Application Act 1969	4.16
Minors (Property and Contracts) Act 1970	1.10
Registration of Interests in Goods Act 1986	1.10
Sale of Goods Act 1923	1.3, 1.9, 1.10, 1.12, 2.1, 2.10, 2.17, 3.1, 3.2, 3.6, 3.8, 3.9, 4.1, 4.14, 5.1, 5.14, 5.23, 5.24, 5.25, 6.1, 6.13
Sale of Goods (Amendment) Act 1937	1.10

	Para
Sale of Goods (Amendment) Act 1953	1.10
Sale of Goods (Registrable Interests) Amendment Act 1986	1.10

Victoria

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Goods Act 1928	2.7
Goods Act 1958	1.2, 1.8, 2.14, 2.23, 2.25, 5.26, 6.15
Goods (Sales and Leases) Act 1981	1.8, 2.14, 2.23, 12.25, 5.26, 6.15

Queensland

Property Law Act 1974	4.16, 4.18
Sale of Goods Act 1896	1.2
Statute of Frauds 1972	4.18

South Australia

Consumer Transactions Act 1972	1.8
Misrepresentation Act 1971	2.15, 2.21, 2.23, 5.26, 6.15
Sale of Goods Act 1895	1.2, 5.26, 6.15
Statutes Amendment (Enforcement of Contracts) Act 1982	4.18

	Para

Western Australia

Sale of Goods Act 1895	1.2

Tasmania

Sale of Goods Act 1896	1.2

Australian Capital Territory

Law Reform (Misrepresentation) Ordinance 1977	2.15, 2.21, 2.23
Sale of Goods Ordinance 1954	1.4, 2.13, 5.26, 6.16
Sale of Goods Ordinance 1975	2.13, 4.18, 5.26, 6.16

Northern Territory

Sale of Goods Ordinance 1972 (now Sale of Goods Act 1972)	1.4, 4.13

Overseas

New Zealand

Contracts Enforcement Act 1956	4.19
Contractual Remedies Act 1979	2.15, 6.15
Sale of Goods Act 1908	6.15

United Kingdom

	Para
Bills of Exchange Act 1882	1.12
Law Reform (Enforcement of Contracts) Act 1954	1.6, 4.17
Misrepresentation Act 1967	1.6, 2.15, 2.21, 2.23, 5.25, 6.14
Sale of Goods Act 1893	1.1, 1.5, 1.6, 1.7, 2.1, 2.15, 3.5, 3.8, 4.3, 4.14, 5.2, 5.25, 6.10, 6.14
Sale of Goods Act 1979	1.7, 2.1, 3.8, 6.14
Statute of Frauds 1677	1.6, 4.3, 4.8, 4.13, 4.14, 4.16
Supply of Goods (Implied Terms) Act 1973	1.6
Unfair Contract Terms Act 1977	1.6

United States

Uniform Commercial Code (1978 text)	1.17, 4.21

Appendix C

Table of Cases

	Para
Academy of Health and Fitness Pty Ltd v Power [1973] VR 254	2.22, 3.10
Alati v Kruger (1955) 94 CLR 216	2.20, 2.22
Angel v Jay [1911] 1 KB 666	2.19
Associated Newspapers Ltd v Bancks (1951) 83 CLR 322	3.11
Bank of England v Vagliano Bros [1891] AC 107	1.12
Bannerman v White (1861) 10 CB(NS) 844; 142 ER 685	5.11
Behn v Burness (1863) 3 B & S 751; 122 ER 281	5.2, 5.4
Bentsen v Taylor Sons and Co (No 2) [1893] 2 QB 274	1.15
Boughey v The Queen (unreported) 3 June 1986, High Court of Australia	1.12
Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109	3.8
Brooks Robinson Pty Ltd v Rothfield [1951] VLR 405	4.6
Bunge Corp New York v Tradax Export SA Panama [1981] 1 WLR 711	3.8, 3.9
Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] QB 44	1.17, 3.6, 3.7, 3.8, 3.9, 3.11
Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 240	5.4

	Para
Coastal Estates Pty Ltd v Melevende [1965] VR 433	6.5
Compagnie Francaise des Chemins de Fer Paris - Orleans v Leeston Shipping Co Ltd (1919) 1 Ll L Rep 235	2.22
Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd [1965] NSWR 1504	3.10
E & S Ruben Ltd v Faire Bros & Co Ltd [1949] 1 KB 254	6.11
Francis v Lyon (1907) 4 CLR 1023	3.2
Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1985) 3 NSWLR 475	1.3
Goldsmith v Rodger [1962] 2 Lloyd's Rep 249	2.9
Graham v Freer (1980) 35 SASR 424	2.9
Hammer v Coca-Cola [1962] NZLR 723	6.11
Handbury v Nolan (1977) 13 ALR 339	1.16
Hardy & Co v Hillerns [1923] 2 KB 490	6.10, 6.11, 6.12
Hartley v Hymans [1920] 3 KB 475	4.11
Hewett v Court (1983) 149 CLR 639	2.5, 4.6
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Holmes v Burgess [1975] 2 NZLR 311	2.7, 2.22
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Honner v Ashton (1979) 1 BPR 9478	3.10
Hynes v Byrne (1899) 9 QLJ 154; (1899) 9 QLJ 198	2.7
Irwin v Poole (1953) 70 WN (NSW) 186	2.10

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Johnson v Agnew [1980] AC 367	5.21
Kennedy v Panama New Zealand and Australian Royal Mail Co Ltd (1867)LR 2 QB 580	2.6, 2.7, 2.10
Khoury v GIO of NSW (1984) 58 ALJR 502	6.5
King v Greig [1931] VLR 413	2.8
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Lucas v Smith [1926] VLR 400	5.27
Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd [1934] 1 KB 148	1.14
Marks v Hunt Bros (Sydney) Pty Ltd (1958) 58 SR (NSW) 380	2.10
Masters v Cameron (1954) 91 CLR 353	5.11
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457	5.21
McDougall v Aeromarine of Emsworth Ltd [1958] 1 WLR 1126	5.21
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Mersey Steel and Iron Co Ltd v Naylor Benzon and Co (1884) 9 App Cas 434	1.14
Mills v Stokman (1966) 116 CLR 61	4.5
Minister for Supply and Development v Servicemens Co-operative Joinery Manufacturers Ltd (1951) 82 CLR 621	5.11
Parker v Registrar-General [1976] 1 NSWLR 342	6.5
Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All ER 1167	2.22
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Picturesque Atlas Publishing Co Ltd v Phillipson (1890) 16 VLR 675	2.7
Polgardy v Australian Guarantee Corp Ltd (1981) 52 FLR 240	5.24
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 59 ALJR 373	3.10, 3.16, 5.22
Pym v Cambell (1856) 6 E & B 370; 119 ER 903	5.11
Reardon Smith Line Ltd v Yngvar Hansen - Tangen [1976] 1 WLR 989	3.8
Riddiford v Warren (1901) 20 NZLR 572	2.7, 2.9
Robinson v Graves [1935] 1 KB 579	4.6
Rowland v Divall [1923] 2 KB 500	5.13, 6.7
Samuels v Davis [1943] 1 KB 526	4.6
Seddon v North Eastern Salt Co Ltd [1905] 1 Ch 326	2.19, 2.20 2.21, 2.29
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Solle v Butcher [1950] 1 KB 671	2.19
Sotiros Shipping Inc v Sameiet Solholt (The Solholt) [1983] 1 Lloyd's Rep 605	3.16
Stockloser v Johnson [1954] 1 QB 476	2.17
Street v Blay (1831) 2 B & Ad 456; 109 ER 1212	5.2, 5.3
Svanosio v McNamara (1956) 96 CLR 186	2.19
Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd (1957) 98 CLR 93	4.10
Taylor v Combined Buyers Ltd [1924] NZLR 627	2.7, 5.10
Thomas Borthwick and Sons (Australasia) Ltd v South Otago Freezing Co Ltd [1978] 1 NZLR 538	2.7
Timmerman v Nervina Industries (International) Pty Ltd [1983] 1 Qd R 1; [1983] 2 Qd R 261	2.9
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United Australia Ltd v Barclays Bank Ltd [1941] AC 1	6.5
United Dominions Corp (Jamaica) Ltd v Shoucair [1969] 1 AC 340	4.10
Varley v Whipp [1900] 1 QB 513	5.10
Vimig Pty Ltd v Contract Tooling Pty Ltd (unreported) 18 April 1986 Supreme Court of New South Wales	2.19
W N Lindsay and Co Ltd v European Grain Shipping Agency Ltd [1963] 1 Lloyd's Rep 437	3.6
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Wood Factory Pty Ltd v Kiritos Pty Ltd [1985] 2 NSWLR 105	3.10
Young & Marten Ltd v McManus Childs Ltd [1969] 1 AC 454	4.15