

NSW Law Reform Commission REPORT 15 (1972) - FIRST REPORT OF THE LAW REFORM COMMISSION ON THE SALE OF GOODS

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Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

The Honourable Mr Justice Reynolds, Chairman.

Mr R. D. Conacher, Deputy Chairman.

Mr C. R. Allen.

Professor D. G. Benjafield.

Mr D. Gressier.

Mr T. W. Waddell, Q.C.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. The Secretary of the Commission is Mr R. J. Watt. Letters should be addressed to him.

This is the fifteenth report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 15.

REPORT

To the Honourable K. M. McCaw, Q.C., M.L.A.,

Attorney General.

1. This Commission has the following reference from you:

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.

2. In a letter of 9th February, 1971, you invited the Commission to make a short interim report on the significance, for this State, of the first report of the Law Commission and the Scottish Law Commission on exemption clauses in contracts (Law Com. No. 24; Scot. Law Com. No. 12), which dealt, *inter alia*, with exemption clauses in contracts for the sale of goods. You drew particular attention to problems of concern to this State relating to contracts for the sale of secondhand motor cars. By letter to you of 18th May, 1971, the Commission, in effect, advised that:

(a) it would be feasible to adopt the Law Commissions' proposals, with some amendments;

(b) it was desirable to obtain uniformity throughout the Commonwealth of Australia on any such adoption, for which purpose opinions on the proposed changes should be widely canvassed before settling new legislation; and

(c) it would be wise to await the decision of the United Kingdom Parliament as to which of the Commissions' alternative proposals it would adopt, or what other action it might take, concerning the regulation of exemption clauses.

3. However, the United Kingdom Government has not yet brought forward any bill to implement the Commissions' proposals. Those Commissions are now at an advanced stage of their work for a *Second Report* (see Law Commission Published Working Paper No. 39) which is to deal with the exclusion of liability for negligence in contracts for the sale of goods, and with exemption clauses in contracts for the supply of services and other contracts. It may be that the United Kingdom Government will wait for that *Second Report* and then bring down a single piece of legislation based on both reports.

4. In these circumstances, this Commission feels it would be better for New South Wales not to proceed with legislation confined to the "Conditions and Warranties" and related sections of the Sale of Goods Act. There are several reasons:

(a) The Sale of Goods legislation is, at present, in relevant respects uniform throughout Australia, even though embodied in State Acts and in Ordinances of the Territories. Because of the extent of cross-border dealings in goods it would be better to avoid loss of that uniformity. Uniformity would be diminished if New South Wales introduced regulation of exemption clauses and otherwise varied the "Conditions and Warranties" provisions. It seems doubtful whether the Law Commissions' *First Report* would commend itself to all State Governments. We observe, for example, that in a recent report by a subcommittee (under the chairmanship of Mr Justice Stephen) to the Chief Justice's, Law Reform Committee of Victoria, it is recommended that the Commissions' *First Report* should not be adopted in that State. Before adoption could be considered, the subcommittee felt that a "thorough-going investigation by a suitably equipped fact finding body" would be essential, and that such investigation should extend to "exemption clauses in contracts with particular reference to the exclusion of liability for negligence in contracts for the supply of services and the exclusion of implied warranties and conditions in contracts for the sale and hiring out of goods".

(b) The same subcommittee, justifying its proposal for an investigation, considered that "not only is there no certainty that the commercial environment of Victoria is the same as that of the U.K. but it appears . . . to be probable that there exist substantial respects in which it will differ". This Commission, for similar reasons, would find it necessary to prepare a working paper and to canvass, and perhaps solicit, opinions on it throughout the Commonwealth. The same process will have to be gone through for the purposes of the pending reference to review the law relating to the sale of goods. That duplication of effort seems uneconomical, and prospective informants - who may volunteer much time and effort to assist - may resent being approached twice on similar subject matters.

(c) The Law Commissions' proposal, if adopted here, would require modification. The views of the House of Lords and of the High Court of Australia have diverged on the meaning and assessment of "merchantable quality",* and there are other, though less important, aspects on which English and Australian decision do not entirely correspond. The English and Australian legislation has already become disparate because of amendments to the Sale of Goods Act (U.K.) by the Misrepresentation Act 1967. The adoption here of variations of the Law Commissions' proposals, which may or may not become law in England, would make for greater divergence. On the other hand, this Commission does not at present recommend adopting the Misrepresentation Act 1967. The working of the latter Act has received some strong criticism (see, for instance, Atiyah and Trietel, "Misrepresentation Act 1967" (1967) 30 *Modern Law Review*, 369) and it requires detailed examination for possible adaptation to Australian Purposes.

(d) Legislation, adopting with variations the Law Commissions' proposals, would probably be only a temporary measure. It is doubtful that the principles and concepts contained in it would be continued in any recommendations which this Commission may make under the general reference, for the different approach of the American Uniform Commercial Code seems to have much to commend it as a basis for the law relating to the sale of goods.

(e) There has been much discussion in learned journals and books of lawaround which the Law Commissions' *First Report* is written. Such discussion suggests a need for caution before adopting the *Report*. This Commission is impressed, for example, by Dr Brian Coote's criticism of the proposals for regulating exemption clauses (Coote, "Controlling Exception Clauses in Contracts: the Law Commissions' First Attempt, (1970) *The Conveyancer and Property Lawyer*, 254). In his view, the draft legislation would not have the intended effect of prohibiting "contracting out" of the implied conditions and warranties under the Sale of Goods Act but would merely impose obstacles and difficulties which draftsmen could overcome with some ingenuity.

(f) This Commission thinks that it is probable that the future law as to sale of goods will vary as between England and Australia. British entry into the European Economic Community is likely to lead to assimilation of its law to that of the Market countries. Australia will not necessarily wish to follow that course. There seems to be justification for proceeding to a general revision of the law relating to the sale of goods for Australian purposes without adopting for the time being reforms now being undertaken or considered in England. A general review of this area of law is likely to be more beneficial and easier of implementation than measures of interim relief. That is the object of the reference to this Commission set out in paragraph 1.

5. This Commission accordingly recommends that any classes of contract for the sale of goods- including those affecting secondhand cars mentioned in your letter of 9th February, 1971-calling for urgent attention, be dealt with by special legislation on proposal by the Minister concerned and that, for the present at least, no other action be taken on the Law Commissions' *First Report on Exemption Clauses in Contracts*.

R. G. REYNOLDS, Chairman.

R. D. CONACHER, Commissioner.

27th April, 1972.

* See, for example, on the one hand, *Australian Knitting Mills v. Grant* [(1933) 50 C.L.R., 387 at 418, per Dixon, J.] and *George Wills & Co. Limited v. Davids Pty Limited* [(1956-7) 98 C.L.R., 77 at 88-9] and, on the other hand, the *Hardwick Game Farm Case* ([1969] 2 A.C., 31 at 74, per Lord Reid) and *Brown & Son v. Craiks* ([1970] 1 W.L.R., 752).