

CONTRACTS AND COMMERCIAL LAW REFORM
COMMITTEE

WORKING PAPER ON WARRANTIES IN
SALES OF CONSUMER GOODS

WELLINGTON
NEW ZEALAND
JULY 1977

This working paper represents the views of the Committee at this time. The Committee's final views will be presented later in our report to the Minister of Justice when we have taken into account comments received from interested parties. We would be grateful therefore if all comments on this paper could be sent in writing to:

The Secretary,
Contracts and Commercial Law Reform
Committee,
Department of Justice
Private Bag
Postal Centre
WELLINGTON

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WORKING PAPER ON WARRANTIES IN SALES OF CONSUMER GOODS

INTRODUCTION

A review of the Sale of Goods Act formed part of the original programme of the Contracts and Commercial Law Reform Committee, but the size of this task together with the demand for reform in other areas of the law within the committee's purview postponed full consideration of it. However, with the approbation of the Minister of Justice the committee gave its first attention to implied conditions and warranties in contracts for the sale of goods and the exclusion or limitation of those conditions and warranties. It is now able to formulate its tentative recommendations. The purpose of this working paper is to set out these recommendations in order to obtain the reactions of interested persons and organisations before the committee takes its deliberations any further.

In the circumstances, the committee has not attempted to set out in any detail the reasoning that has led it to the conclusions it has provisionally formed, and comment has been confined to the minimum necessary to make the proposals intelligible and place them in context.

CONFINED TO CONSUMER TRANSACTIONS

The committee's present recommendations are confined to sales at the consumer level, a concept that it has, however, given a fairly wide ambit. For reasons both historical and

political, moves for reform of sale of goods law in the common law world have been concerned principally with the consumer field. One reason for this may be that standard contracts propounded by one party, often with the exclusion or restriction of liability, have become particularly frequent in this field. An individual consumer dealing with a large commercial entity or with a member of an organised trade has little choice but to accept the terms demanded by the supplier of goods or do without the goods. Standard contracts, and instances of unequal resources or bargaining power, are not unknown in commercial transactions. But we believe that the person-to-person sort of bargaining that the Sale of Goods Act appears to assume is much closer to the realities of modern business than to consumer transactions. Moreover, because commercial sales generally involve greater amounts of money than do consumer sales the orientation of the Sale of Goods Act towards the settlement of disputes through the courts (or through arbitration) is more appropriate to them.

For whatever reasons the impetus for change in modern times has come from consumer interests, and while the need for such reform in the consumer field has been widely documented similar attention has not been paid in any Commonwealth country to the needs of the commercial community. This committee is charged with reviewing the Sale of Goods Act as a whole and it accepts that the law governing commercial sales also requires consideration. As a first instalment however it is felt justified in concentrating its attention on the area where need for substantial reform appears more immediate.

MAIN DEFECTS IN PRESENT LAW

From the point of view of a consumer the present sale of goods law is unsatisfactory in a number of ways.

1. The protective terms implied by the Sale of Goods Act 1908, because they have to cover a very wide range of transactions, are necessarily couched in rather vague general terms. Concepts like "merchantability" and "fitness for purpose" involve matters of degree on which only a court can give a final determination in a particular case. That may be satisfactory where large amounts are at stake but, in the ordinary consumer transaction, recourse to the courts would in a high proportion of cases be uneconomic. In real terms, the main reliance of a consumer under present law has to be on the goodwill of his retailer and the manufacturer, and particularly on the willingness of both to honour the manufacturer's guarantee. It is believed that reform should recognise these realities and, while providing improved implied terms as a "backstop", should also give attention to manufacturers' guarantees. As well, it should so far as practicable allow, to consumers, rights which will be enforceable by them without the need to have recourse to the courts.

2. A second disadvantage of the present law arises from the present legal status of representations made by a seller which have induced a contract but have not been incorporated into a subsequent (frequently standard form) contractual document. Where the merits so require, such representations ought to have the same effect as the terms of the contract itself if the just expectations of the consumer are to be realised. Our views on this matter and that discussed in the next paragraph are expanded at length in our report on Misrepresentation and Breach of Contract which still awaits the attention of the legislature.

3. The distinction between conditions and warranties, whatever its advantages in the commercial field is seen as an unsatisfactory way of determining in a consumer transaction whether a buyer should have a right to reject. Rather more sophisticated tests are believed to be necessary.
4. Under the present law, the right of a seller to limit his potential liability to a buyer is, at least in theory, virtually unlimited. The devices used by the courts to contain this power tend to be somewhat arbitrary in their application. It would seem preferable that the matter be covered by statute.
5. Yet another source of difficulty at the consumer level is the common law doctrine of privity under which only a person who is a party to a contract can sue to enforce it. This doctrine can put in doubt a manufacturer's liability to honour his guarantee - certainly to the successors in title of the original purchaser of the goods. It can also mean that other users of goods, such as members of the buyer's family, may have no remedy against the seller unless negligence or some other tort can be established.
6. A final difficulty is that the use of implied terms in the contract of sale is not a particularly strong method of ensuring that a consumer obtains title to goods he has purchased. Title problems are most likely to arise where one of the parties is a fraudulent cheat who, if he can be found, may very well prove to be a man of straw. An action for damages against him would then be useless. In dealing with

questions of title in this present paper, the committee has confined its attention to the use of implied terms. But, in the context of chattels securities, it has under consideration other methods of protecting title.

UNIFORMITY NO LONGER ATTAINABLE

A final general point is that the near-uniformity of sale of goods law which used to obtain through the common law world through the almost universal adoption of the English Sale of Goods Act has now, it seems, been irretrievably lost. The United States, with its Uniform Commercial Code, made the first significant break. Over the last few years a wide range of differing reforms has been recommended or adopted, particularly in the United Kingdom and in the states of Canada and Australia. This variety of solution has removed at least one constraint against this country's evolving its own unique solutions. In New Zealand the joint report of the English and Scottish Law Commissions, on which was based the terms implied by the Supply of Goods (Implied Terms) Act 1973 (U.K.) was made the model of the terms implied by ss. 11 to 14 of our own Hire Purchase Act 1971. Since this committee has been engaged in a more wide ranging review than was called for at the time of that Act, it has felt free at this stage to formulate its own proposals independently of the provisions of the Hire Purchase Act.

ACKNOWLEDGEMENTS

In the course of its deliberations the Committee has had the advantage of being able to refer to several reports from other countries, in particular the Moloney Report on Consumer Protection (U.K.), the First Report of the English and Scottish Law Commissions on Exemption Clauses in

Contracts, the Report on Consumer Warranties and Guarantees in Sale of Goods of the Ontario Law Reform Commission and other reports from New Brunswick, South Australia and Victoria. The committee's chief indebtedness is to the Ontario report. This proved to be so close in approach to the committee's own thinking that its recommendations formed a convenient starting point when this committee came to draft its own recommendations.

THE RECOMMENDATIONS

1. There should be a separate new Act (hereinafter referred to as "the new Act") dealing comprehensively with consumer warranties and associated subjects.

I : Scope of the new Act

2. The new Act should be confined to consumer sales (as defined in paragraph 3 hereof) and the liabilities of the manufacturers, importers and suppliers of goods the subject of consumer sales. Subject to the provisions of the new Act, the Sale of Goods Act 1908 should continue to apply. The new Act would not be concerned with personal injury by accidents caused by or through goods the subject of consumer sales, these matters being already covered by the Accident Compensation Act 1972.

3. By "consumer sale" is meant a sale of goods to an "end user" (other than a sale by auction or by competitive tender) by a seller in the course of a business where goods

- (a) are of a type ordinarily bought for private use or consumption; or
- (b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

By "end user" is meant a person who buys goods other than for the purpose of resale.

Comment

This definition is adapted from s.4 Supply of Goods (Implied Terms) Act (U.K.) but between subparagraphs (a) and (b) we have substituted the word "or" for the word "and" in the U.K. Act. The intention is to ensure that the new Act should apply to sales of consumer goods by way of business to parties who are in fact in the position of a consumer, whether the buyer is buying for his business or as a private citizen and additionally, in the case of private consumers, whether or not the goods are of the kind generally thought of as consumer goods. Sales by auction or competitive tender are excluded on practical grounds; but chiefly because market pressures apply more freely to such sales than they do to the ordinary consumer transaction. Sales other than by way of business are excluded because the obligations to be implied under the new Act presuppose that the seller has resources which a private seller could not be expected to command.

4. The onus of proving that a sale is not a consumer sale should be on the party so contending.

5. "Sale" in the new Act should include all near-sale transactions, including leases with an option to purchase and leases for substantial terms, and should cover materials transferred under a contract for work and materials. Consequential amendments to the Hire Purchase Act 1971 would be necessary. "Sale" should also include transactions which embrace the supply of incidental services such as the installation of the goods.

6. The new Act should contain the following:
 - (a) a statement of the minimum liabilities of the seller of goods the subject of consumer sale to the buyer of those goods

 - (b) provisions governing recourse by the seller against the manufacturers and suppliers of goods the subject of a consumer sale

- (c) provisions governing the rights of third parties against the seller and against the manufacturer of goods the subject of a consumer sale
- (d) a code prescribing minimum requirements for manufacturers' guarantees.

II : Liabilities of the Seller to the Buyer

7. The distinctions between

- (a) contractual and non-contractual representations, and
- (b) conditions and warranties

should be abolished and be replaced by the single concept of a warranty.

Comment

The chief significance of the condition-warranty distinction in the Sale of Goods Act 1908 has been in relation to the right of a buyer to reject, and the right of both parties to discharge the contract for breach. Recommendation 15 (infra) substitutes more comprehensive tests.

A. Express Warranties

8. Any affirmation of fact, description of the goods, or promise relating to the goods made by the seller should be a warranty if the natural tendency of such affirmation, description or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon.

Affirmations of fact, descriptions and promises contained in labels or markings attached to the goods, or other forms of descriptive materials accompanying the goods should be deemed to have been adopted by the seller as his own.

Affirmations of fact, descriptions and promises contained in advertisements relating to the goods, should be deemed to have been adopted by the seller as his own if they were authorised by the manufacturer or importer of the goods or by any intermediate dealer. The onus of showing that the advertisement was not so authorised should be on the party so alleging.

On a sale by sample the sample should be treated as a description of the goods.

9. The parol evidence rule should cease to apply to "consumer sales" and evidence should be admissible of representations which do not appear in the written agreement.

10. Effect should be denied in consumer sales to clauses which purport to limit or exclude the authority of agents or employees of the seller to make representations which would otherwise fall within their ostensible authority.

Comment

The purpose of recommendations 8 - 10 is to ensure that all representations relating to goods shall be treated as contractual if their natural tendency is to induce the buyer to purchase and the buyer is so induced. All such representations should bind the seller, whether made by him or his actual or ostensible agent or by the manufacturer or his agent, and in whatever form they are made.

11. The adoption of the single concept of a warranty should be accompanied by the adoption of the new set of remedies set out in paragraph 15 below.

B. Implied Warranties

12. The new Act should contain implied warranties of title, freedom from encumbrances and quiet possession along the lines of those in s.14, Sale of Goods Act 1908, but with the following modifications:

- (a) The measure of damages recovered by a buyer should be based not on a total failure of consideration under which approach the buyer is entitled to recover the price in full but should instead be measured by the buyer's actual loss so that he would be required to reduce his claim by the value of his use of the goods but will be entitled to recover from the seller amounts he may have to pay on a claim in conversion by the true owner. As the law now stands he would be entitled to recover such items as insurance and repairs. It is not proposed to alter this.
- (b) Acceptance of the goods by the buyer without knowledge of the defect in title should not prejudice the buyer's right to reject them.
- (c) Contracting out of the new s.14 warranties should be prohibited.

[Note: The committee considered whether in view of the conflict between English and New Zealand authority it should propose legislation to clarify the effect of s.27, Sale of Goods Act 1908. It is also sympathetic to the view that the courts should be granted a discretion to allocate loss amongst innocent parties in title cases. But it considers that both these matters would more appropriately be dealt with in a reform of the law relating to chattel securities.]

Comment

Section 14 of the Sale of Goods Act 1908 reads as follows:

Implied undertaking as to title, etc. - In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is -

- (a) *An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:*
- (b) *An implied warranty that the buyer shall have and enjoy quiet possession of the goods:*
- (c) *An implied warranty that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.*

The purpose of modification (a) is to meet the effect of cases such as Rowland v. Divall [1923] 2 KB 500 where it was held that, if a seller were unable to provide title, the buyer could recover any payments he had made without having to make any allowance to the seller for the use the buyer had had of the chattel during the period before the defect in title was discovered.

Modification (b) is intended to make clear that the ordinary consequences of acceptance of goods do not apply in the case of a defect in title.

13. There should be no separate statutory warranty of correspondence with description, such a warranty being made unnecessary by the combined effects of paragraphs 8 and 14 hereof.

Comment

The present s.15 reads as follows:

Sale by description - Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the

description; and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

In the committee's view that section was and is unnecessary. A contractual description binds, not by implication, but because it is a term of the contract.

If recommendations 8 and 14 are adopted, s.15 would lose whatever point it might previously have had.

14. The new Act should contain an implied warranty governing both ordinary and special fitness.

(a) The warranty should be called a "warranty of acceptability" and should have two aspects:

(i) Ordinary acceptability

Goods should be acceptable in accordance with the new Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any statement, description or promise applied to them, their age, the presence of defects of which, at the time of sale, the buyer had actual knowledge, and all other relevant circumstances including the price at which they were sold. [Our intention is that the fact goods have been sold at reduced or "discount price" should not by itself lessen the sellers' obligations under this warranty.]

(ii) Special acceptability

Where a buyer of goods of a kind which it is in the course of a seller's business to sell makes

known to the seller the particular purpose for which he requires the goods there should also be an implied warranty that the goods are fit for such purpose unless the circumstances are such as to show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment. The words "particular purpose" should be so defined as to make it clear that they cover not only an unusual or special purpose, but also a normal or usual purpose.

- (b) Goods and components of goods should be acceptable within the warranty of acceptability:
- (i) only if they are durable if used for the purposes and in the manner contemplated by the contract for a period of time after delivery which is reasonable having regard to the circumstances surrounding the sale;
 - (ii) in the case of new goods (other than disposable goods) only if for a reasonable period from the time of the sale spare parts and repair facilities will be available from normal trade sources at or within a reasonable distance from the seller's place of business unless before the sale the buyer knew or ought to have known that the risk of the availability of parts or of repair facilities or of both would be upon him.
 - (iii) only if the goods are new and unused, unless they are otherwise described or it is apparent from their appearance and condition that they are not;

- (iv) only if the goods conform with the requirements of any other statute or statutory regulations relating to them;
- (v) where the sale includes the installation of the goods, only if the installation is carried out in a proper and workmanlike manner.

Comment

The suggested warranty of acceptability subsumes the ground at present covered by ss. 16(a) and (b) ("merchantability" and "fitness for purpose"). The warranty of ordinary acceptability is an adaptation of the merchantability provisions of the Supply of Goods (Implied Terms) Act 1973 (U.K.) and the warranty of special acceptability is adapted from s.7 of the same Act.

The suggested requirements in 14(b)(i), (ii), (iii) and (iv) are intended to give particular, as distinct from merely general, rights to buyers.

C. Buyer's Remedies

15. The buyer's remedies for breach of the seller's warranties should be along the following lines:

- (a) If the breach is not of a fundamental character, and is remediable, the seller should have a reasonable opportunity to make good the breach.
- (b) Breach of a fundamental character means:
 - (i) in the case of a breach of warranty of title, that the breach is not remediable:
 - (ii) in the case of a breach of any other express or implied warranty (including the implied warranties of freedom from encumbrances and quiet possession) that:-

(aa) the effect of the breach is to deprive the party aggrieved substantially of the benefit of the contract or

(bb) the goods depart in a significant respect from the characteristics, quality, performance or description prescribed, expressly or impliedly, in the contract or

(cc) the goods are substantially unfit for their ordinary and (where applicable) special purposes:

(iii) in any case, that due to a breach of the contract the goods constitute a potential hazard to the health or property of the buyer or any other person.

(c) Where the breach is of a fundamental character and appears within a reasonable period after delivery of the goods to the purchaser, the purchaser should be entitled, within a reasonable time after the defect became apparent

(i) where appropriate, and at his option, to give the seller an opportunity to make the goods conform with the contract or

(ii) to reject the goods and either recover a refund of the purchase price or require the seller to supply goods which do conform with the contract, subject in either case to a reasonable reduction for any use made of the rejected goods.

- (d) A breach should be "remediable" if the goods are capable of being repaired or otherwise made to conform with the contract without unreasonable delay. But a defect which, by itself, would not prevent the breach being remediable shall be deemed so to do if the time which would be taken to make the goods conform with the contract, when added to the time taken to remedy other defects in the goods which have become apparent in the goods whether previously or contemporaneously, would be unreasonable.
- (e) In any case where the seller has been given the opportunity to remedy the breach and has failed to do so within a reasonable time the purchaser should have the right, within a reasonable time after it has become apparent that the seller will not remedy the breach
- (i) to have the defect remedied elsewhere and recover the cost thereof from the seller, together with any damages recoverable under the ordinary law of contract, or
 - (ii) in the case of a breach of a fundamental character to exercise the other rights given by subparagraph (c) above.
- (f) In every case, in addition to the other rights proposed under this paragraph, the buyer should be entitled to recover damages at large for any breach of the contract under the ordinary law of contract.
- (g) In any case where the buyer is entitled to and does reject the goods, the goods should remain the property of the buyer until any required refunds have been made.

Comment

The recommendation divides breaches into two categories, viz., those which are, and those which are not, of a fundamental character. Breach of a fundamental character is defined in 15(b) and the remedies for such a breach are set out in 15(c) and following. In the case of a less important breach, the seller would have a reasonable opportunity to repair the breach if it could be remedied. If he failed to do so, the buyer would have the right to have the repairs done elsewhere, at the expense of the seller. In any case, he would also have a right to damages to the extent that these could be proved.

D. The Exclusion of Liability

16. (a) Subject to paragraph 12(c) the new Act should prohibit the use of exception clauses to exclude, restrict or diminish express or implied warranty rights or the remedies otherwise available to the buyer for breach of them in a consumer sale.
- (b) The prohibition of the use of exception clauses should extend to sales of second-hand goods and goods sold with disclosed defects. The standard to be applied to goods sold in such circumstances would be that formulated under the implied warranty of acceptability, with proper allowance made for the age of the goods, the price paid for them, and all surrounding circumstances of the transaction.
- (c) The prohibition should make no exception allowing the limitation or exclusion of consequential damages.
- (d) The scope of the prohibition should include oral as well as written exception clauses.

- (e) Section 56 of the Sale of Goods Act 1908 should be amended to make it clear that it does not apply to consumer sales governed by the new Act.
- (f) The presence in a consumer sale of a prohibited exception clause should not by itself render the contract of sale illegal but the prohibited clause should be treated as void and the use of such clauses should be an offence against the new Act.

Comment

While it is recommended that there be an absolute prohibition on the use of exception clauses in relation to the new implied terms, the warranty of acceptability is itself so drawn as to allow the court to apply standards which would be reasonable in cases like the sale of goods as "seconds", or with stated defects. The most controversial recommendation under this paragraph is no doubt 16(c), which would prevent the exclusion of liability for consequential property loss (personal injury by accident now being covered by the Accident Compensation Act 1972). With the possible exception of motor vehicles and electrical appliances, goods purchased under a "consumer sale" are unlikely to give rise to substantial claims for consequential damages. A choice has to be made, as between supplier and consumer, as to whom should bear the risk, and the committee believes the seller to be in the stronger position to do it.

E. Seller's Rights to "Vouch Over"

- 17. (a) Where the seller is being sued by the buyer under a consumer sale of new goods he should be able to have recourse against the person from whom he bought the goods and so on, back to the manufacturer or in the case of imported goods the importer, as the case may be.
- (b) To this end there should be implied into the contract between the seller and the person from

whom he bought the goods (and so on, back to the manufacturer or importer) the same terms as would have been implied had the sale between those parties been a consumer sale.

- (c) In the case of such sales, however, the restrictions against contracting out should not apply. Instead, any purported contracting out should be unenforceable to the extent that the court determines that in all the circumstances of the case it would not be fair or reasonable to allow reliance on the purported contracting out.
- (d) The new Act should contain provisions enabling prior sellers to join or be joined in actions brought by the buyer under a consumer sale similar to those of section 2-607(5) of the Uniform Commercial Code, which states:

"Where the buyer is sued for breach of warranty or other obligation for which his seller is answerable over

- (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound
- (b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred."

Comment

While a consumer's recourse ought in the normal case be against the party from whom he purchased the goods, it is intended that the seller in his turn ought to have recourse against his supplier, and so on, back to the manufacturer or importer.

In these commercial transactions, it is proposed that contracting out should be permitted, to the extent that it is fair and reasonable. The intention is that the commercial parties involved should be permitted to make their own arrangements, as between themselves, in relation to such things as repair facilities, the availability of spare parts, and the allocation of insurance risks.

III : Manufacturer's LiabilityA. In respect of original consumer sale

18. Wherever the death, disappearance or bankruptcy of the seller under a consumer sale precludes a claim by the buyer against the seller, or the enforcement of a judgment obtained by the buyer against the seller, the buyer should be entitled to have recourse against the next person back in the chain between the supplier and the manufacturer or importer of the goods, who is both solvent and available, in all respects as though that person had been the seller to the buyer.

[Note: The claim which would be given to the buyer under this paragraph would in effect be a derivative one. The Committee is divided on this point, which is essentially one of policy. A substantial minority of the Committee is of the opinion that any claim given the buyer in these circumstances should be limited to the liability the person being sued would have had to the person to whom he sold the goods. Clearly, this liability could be substantially less than the liability owed the ultimate consumer buyer by the seller to him.]

B. Directly to the buyer and third parties

19. The following provisions should be substituted for the existing tort liability of manufacturers to buyers who have bought goods under consumer sales:

- (a) It should be no bar to a claim against the manufacturer for loss or damage suffered by a buyer of goods which have been the subject of a consumer sale that the buyer has provided no consideration to the manufacturer and that no privity of contract exists between them.
- (b) The manufacturer of goods which have been the subject of a consumer sale shall be liable to the buyer in all respects as though the manufacturer had made a consumer sale to the buyer upon the terms of the warranties implied under the new Act and any express statements, affirmations, descriptions or promises made or published by the manufacturer or with his express or implied authority known to the buyer at the time of the original consumer sale.
- (c) The existence of the manufacturer's liability under this paragraph should not relieve the seller of goods the subject of a consumer sale of his obligations under the consumer sale and a manufacturer sued under these provisions should have rights to join in the seller similar to those set out in paragraph 17(d) hereof.
- (d) For the purposes of this paragraph "manufacturer" should be defined to include:
 - (i) the person who manufactures or assembles the goods, except where the goods are manufactured or assembled for another person who attaches his own brand name to the goods.
 - (ii) any person who describes himself or holds himself out to the public as the manufacturer of the goods

- (iii) any person who attaches his brand name to the goods
- (iv) in the case of imported goods, the importer of the goods where the foreign manufacturer does not have a regular place of business in New Zealand.

Comment

The committee is in some doubt whether a provision of this kind is either desirable or necessary, for the following reasons:-

- (a) *The combined effects of paragraphs 17 and 18 may well achieve most of what this paragraph could accomplish.*
- (b) *The Torts and General Law Reform Committee has already advised that it sees no need to reform the law as to manufacturers' liability in tort.*
- (c) *There are conceptual difficulties in implying a contract between parties whom ex hypothesi there have never been any relations.*

C. In respect of guarantees

20. A manufacturer's guarantee proffered with goods under a consumer sale should have the effect of a contract between the manufacturer and the buyer (in each case, as defined in the new Act).

IV : Lateral Privity

- 21. (a) "Buyer" under a consumer sale should be defined to include any person who has other than for the purposes of resale acquired title to the goods from or through the original buyer, whether by purchase, gift, operation of law or otherwise. A bailee or consensual user of the goods should

have the same protection as the buyer for any loss or damage suffered by the bailee or consensual user as the result of any breach of any duty owed to the buyer under the new Act.

- (b) In no case should the rights of a successor in title or of a bailee or consensual user exceed those of the buyer under the original consumer sale.

V : Requirements for Manufacturers' Express Guarantees

22. The new Act should include provisions regulating express guarantees given by manufacturers or other suppliers of goods the subject of consumer sales.

23. The new Act should require that all written guarantees issued in respect of all goods, whether new or used, the subject of a consumer sale conform with the following minimum requirements:-

- (a) the guarantee shall state clearly the name and address of the person offering the guarantee and his New Zealand agent in respect of imported goods (a telegraphic address or code address shall not be sufficient address for this purpose);
- (b) the guarantee shall be clearly legible and shall refer only to one article or to one class of goods;
- (c) the guarantee shall not be deceptively worded;

- (d) the guarantor must undertake at least to repair or replace any defective part free of charge to the consumer whether for the part or for labour or to make him a fair allowance for the defective article on the purchase of a new article of comparable price and quality;
- (e) the guarantee must cover all the major components of the article;
- (f) the document shall state clearly the duration of the guarantee but different periods may be stated for different components;
- (g) the duration of the guarantee shall be extended by any period during which the article is out of use pending repair;
- (h) the document shall state clearly the procedure for the presentation of a claim under the guarantee;
- (i) no guarantee shall make the guarantor or any person related to him commercially the sole judge whether an article is defective or whether the buyer is otherwise entitled to present a claim;
- (j) the recognition of a claim under the guarantee shall not be made contingent on the buyer's returning the article to the manufacturer or selling dealer, at his own expense or otherwise, where the requirement is an unreasonable one;

- (k) subject to any regulations, a guarantee shall not exclude or limit the express or implied warranties otherwise created by law or the buyer's right to claim damages or other forms of relief for breach of the express or implied warranties or for breach of the written warranty;
- (l) every written warranty shall state clearly when and on what conditions it shall come into effect.

24. The new Act should empower the making of regulations for the following purposes:-

- (a) to complete the legislative scheme and adjust it to the circumstances and needs of particular industries;
- (b) to set requirements for the availability of spare parts and services facilities;
- (c) providing for enforcement of the requirements of the new Act and the regulations made under it;
- (d) providing for the administration of this aspect of the legislation;
- (e) giving power to require the adoption of standard form guarantees and other documents where desirable in relation to particular categories of goods;
- (f) giving a dispensing power in appropriate cases.

25. It should be an offence for any person to represent or to use any means calculated to give the impression that goods

the subject of a consumer sale are "guaranteed" or "warranted" unless the goods are the subject of a guarantee which complies with the requirements of this paragraph.

Comment

It is not proposed that manufacturers be compelled to issue guarantees. It is intended merely to regulate the use and content of such guarantees where they are offered.

VI : Miscellaneous

Truth in Advertising

26. The committee takes the view that without some statutory requirement of truth in advertising, consumer protection in this area would not be complete. It may well be that something more is required than such existing provisions as s.9, Consumer Information Act 1969; ss. 8, 9, 10 and 11, Food and Drug Act 1969; and Regulation 8, Food and Drug Regulations 1973.

Enforcement Agencies

27. The committee notes that in some other countries agencies have been established for the enforcement of consumer rights but the committee is not convinced that such an agency is appropriate for New Zealand.

Conclusion

In conclusion, the committee wishes to make two further points.

The cost of reforms

The first is that any increase in the requirements exacted from the manufacturers and distributors of goods must be at some commercial cost. A balance has to be found between benefits to the consumer and the cost of those benefits which, ultimately, the consumer will have to pay.

Commercial sales

The second is that, as we have already stated, sale of goods reform throughout the Commonwealth has been concentrated on the consumer field to the neglect of the law governing commercial transactions. This committee too has confined its working paper to consumer sales, but it is not satisfied to rest there. In the first place the boundary between consumer and non-consumer sales is necessarily arbitrary and elusive. Second, the implication of terms, the extent to which they may be excluded, and remedies for breach of terms form only part of sale of goods law, and this law has effectively not been looked at since 1895. Third, much of what we propose in respect of consumer sales may prove relevant to other classes of sale. The committee therefore particularly invites submissions from the commercial community on desirable changes on any aspect of the law relating to the sale of goods.