



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 89**

**The Sale of Goods Act 1895**

**REPORT**

**JUNE 1998**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

## **Commissioners**

### *Chairman*

Mr W S Martin QC LLB (Hons) (Western Australia) LLM (London)

## **Members**

Mr R E Cock QC LLB (Western Australia)

Professor R L Simmonds LLB (Hons)(Western Australia) LLM (Toronto)

## **Officers**

### *Executive Officer and Director of Research*

Dr P R Handford LLB (Hons) (Birmingham) LLM PhD (Cambridge)

(at the time)

The Commission's offices are at:

16th floor, Westralia Square  
141 St George's Terrace  
Perth Western Australia 6000

Telephone: (08) 9264 6116

Facsimile: (08) 9264 6115

E-mail: [ircwa@justice.moj.wa.gov.au](mailto:ircwa@justice.moj.wa.gov.au)

Home Page: <http://www.wa.gov.au/lrc>

To: **HON P G FOSS QC MLC**  
**ATTORNEY GENERAL**

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on the *Sale of Goods Act 1895*.

**W S MARTIN QC**, *Chairman*

June 1998

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# Chapter One

## THE DIRECTION OF REFORM

### 1. INTRODUCTION

1.1 The Commission was asked to review the *Sale of Goods Act 1895*.

1.2 The Western Australian *Sale of Goods Act 1895* reproduces, with little or no alteration, the United Kingdom *Sale of Goods Act 1893*.<sup>1</sup> This Act, drafted by Sir Mackenzie Chalmers, was part of a general movement towards the codification of commercial law in the last years of the nineteenth century.<sup>2</sup> It was adopted in all the Australian States and Territories<sup>3</sup> and New Zealand,<sup>4</sup> in all Canadian jurisdictions bar Quebec,<sup>5</sup> and in many other countries, for example Ghana and Malaysia.<sup>6</sup> It also formed the basis of the American *Uniform Sales Act 1906*.<sup>7</sup> The uniformity among Australian jurisdictions resulting from this process has been an important influence on the recommendations made by the Commission in this report.

1.3 In the century since the *Sale of Goods Act* was enacted in Western Australia there have been great changes in the world of commercial dealings, and over the last few decades consumers have emerged as a group deserving special protection in their transactions with others. However, the *Sale of Goods Act* has never been amended except in two minor respects.<sup>8</sup> Much the same is true of the Sale of Goods Acts in some other jurisdictions, both in Australia and elsewhere.

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<sup>1</sup> Now consolidated with amendments and replaced by the *Sale of Goods Act 1979* (UK).

<sup>2</sup> See also *Bills of Exchange Act 1882* (UK), *Partnership Act 1890* (UK), *Marine Insurance Act 1906* (UK).  
<sup>3</sup> *Sale of Goods Act 1895* (WA); *Sale of Goods Act 1895* (SA); *Goods Act 1896* (Vic) (see now *Goods Act 1958* (Vic)); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1923* (NSW); *Sale of Goods Ordinance 1954* (ACT) (now called the *Sale of Goods Act*); *Sale of Goods Ordinance 1972* (NT) (now called the *Sale of Goods Act*).

<sup>4</sup> *Sale of Goods Act 1908* (NZ).

<sup>5</sup> See M G Bridge, *Sale of Goods* (Toronto: Butterworths, 1988), 4. The Quebec Civil Code however retains principles derived from Napoleon's French Civil Code.

<sup>6</sup> See M Lambiris, "Reform of the Law of Sale in Australia" (1996) 20 *MULR* 690.

<sup>7</sup> This was replaced in 1933 by the *Uniform Commercial Code*: see JJ White & RS Summers *Uniform Commercial Code* (St Paul, Minnesota: West Publishing Co, 1995).

<sup>8</sup> There were no amendments at all until 1994, when the Act was amended by the *Statutes (Repeals and Minor Amendments) Act 1994* s 4 and Sch 2, substituting "course" for "cost" in s 33 (Risk where goods are delivered at distant place) (which merely brought the section into line with the wording of the United Kingdom Act), and the *Pawnbrokers and Second-hand Dealers Act 1994* s 100 and Sch 2, adding dealings with pawnbrokers to s 59(4), which excludes from the provisions of the Act relating to the contract of sale transactions in the form of a contract of sale intended to operate by way of mortgage, pledge, charge or other security. There have been no further amendments.

1.4 The position in Western Australia may be contrasted with that in the United Kingdom, where the *Sale of Goods Act* has been the subject of close scrutiny by the Law Commission on a number of occasions, and as a result has been several times amended, resulting in its repeal and replacement in 1979 by a new Act incorporating all the amendments in consolidated form.<sup>9</sup> In Australia, the Commonwealth *Trade Practices Act 1974* enacted important provisions to protect consumers in sale transactions based in part on the 1973 United Kingdom amendments to the *Sale of Goods Act*, and in some States equivalent amendments have been added to the *Sale of Goods Act*. (In others, such as Western Australia, the amendments have been inserted in other legislation.) Several Australian jurisdictions have made other amendments to their Sale of Goods Act, notably New South Wales, where sale of goods law has been extensively considered by the Law Reform Commission, resulting in a number of important amendments. These reforms, important though they are, have left the basic structure of the *Sale of Goods Act* intact. In Canada, much more far-reaching changes have been mooted, involving the abandonment of the fundamental concepts of the original 1893 legislation and a set of proposals for the adoption of a completely new Act based on the American Uniform Commercial Code.

1.5 In the light of these reforms, in 1989 the Commission suggested to the Attorney General that it be given a reference to review the *Sale of Goods Act 1895*, with a view to determining whether any of the reform initiatives proposed or implemented elsewhere, or any other changes, should be adopted in Western Australia. In 1995 the Commission issued two discussion papers dealing with various aspects of this reference,<sup>10</sup> and now submits this report.

## 2. REFORMS IN OTHER JURISDICTIONS

### (a) Reform of the implied term provisions

1.6 The first important reforms to the *Sale of Goods Act* in the United Kingdom dealt with the conditions and warranties of title, description, quality and fitness implied into contracts of

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<sup>9</sup> The reforms referred to in this paragraph are dealt with in detail in paras 1.6-1.15 below.

<sup>10</sup> *Implied Terms in the Sale of Goods Act 1895* (1995); *Equitable Rules in Contracts for the Sale of Goods* (1995). These will be referred to as the discussion papers on *Implied Terms and Equitable Rules* respectively.



sale by sections 12 to 15.<sup>11</sup> These matters were considered by the Law Commission and the Scottish Law Commission as part of its work on exemption clauses. Their report, submitted in 1969,<sup>12</sup> recommended a number of improvements to the implied term provisions to take account of problems that had been exposed by the post-1893 case law. It also recommended that there should be limitations on the ability of the seller to contract out of these implied obligations when dealing with consumers, though not in other cases. These recommendations were implemented by the *Supply of Goods (Implied Terms) Act 1973*.<sup>13</sup>

1.7 In Australia, the *Trade Practices Act* passed by the Commonwealth Parliament in 1974 set out implied conditions and warranties which were to be incorporated in all consumer transactions<sup>14</sup> covered by the Act - that is to say, all those involving sellers or suppliers who are trading, financial or foreign corporations.<sup>15</sup> These provisions, which are set out in Part V Division 2 of the Act, are generally based on the United Kingdom 1973 amendments. Thus, as compared with the provisions of the State and Territory sale of goods legislation, the *Trade Practices Act* has given consumers more complete protection and prevents contracting out by those with whom they deal.<sup>16</sup>

1.8 Most States and Territories have now enacted equivalent legislation covering dealings between consumers and suppliers who are outside the ambit of Commonwealth power and so are not covered by the *Trade Practices Act* - for example, sole traders. In Western Australia, these provisions are contained in Part III of the *Fair Trading Act 1987*. Some other jurisdictions have also inserted them in fair trading or consumer protection legislation.<sup>17</sup> In New South Wales and Victoria, on the other hand, they have been added to the *Sale of Goods*

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<sup>11</sup> These sections have the same numbers in the United Kingdom and Western Australia.

<sup>12</sup> *Exemption Clauses in Contracts - First Report: Amendments to the Sale of Goods Act 1893* (Law Com No 24; Scot Law Com No 12, 1969).

<sup>13</sup> The provisions of the 1973 Act also applied to hire purchase contracts. The provisions limiting contracting out were re-enacted, and extended to other kinds of contracts involving the supply of goods, by the *Unfair Contract Terms Act 1977* (UK) ss 5-7.

<sup>14</sup> Their "consumer" character is located in the price of the goods not exceeding the prescribed amount (currently, \$40,000) or, for goods whose price exceeds that amount, that the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption or that they are a commercial road vehicle: s 4B. As the following text notes they must also satisfy the statutory nexus with Commonwealth legislative competence, in Constitution s 51 (xx).

<sup>15</sup> See discussion paper on *Implied Terms*, para 2.4.

<sup>16</sup> Note also the recommendations of the New South Wales Law Reform Commission in 1972; *First Report on the Sale of Goods* (LRC 15, 1972), and of the Tasmanian Law Reform Commission in 1983: *Report and recommendations relating to Exclusion Clauses and Implied Obligations in Contracts for the Supply of Goods and Services* (Report No 33 1983).

<sup>17</sup> *Consumer Affairs and Fair Trading Act 1970* (NT) Pt V Div 2; *Consumer Transactions Act 1972* (SA) s 8.

Act.<sup>18</sup> In each case, however, the original implied term provisions in the *Sale of Goods Act* have not been affected. The situation in Australia, therefore, is that non-consumer transactions are still governed by the original *Sale of Goods Act* implied terms (unless excluded). The newer legislation which provides greater protection for consumers is completely separate.<sup>19</sup>

1.9 In some instances, the 1973 United Kingdom implied terms reforms went further and applied to all sale of goods contracts, and not just those involving consumers. Thus, for example, the amendments to section 12 under which a seller may agree to transfer only a limited title, and the addition to section 13 of a clause making it clear that a sale is not prevented from being a sale by description by reason only that the goods, being exposed for sale, were selected by the buyer, applied to all sales transactions whether the buyer was a consumer or not. However, the implied conditions of quality and fitness for purpose in section 14 have always been limited to professional, rather than private, sellers, and the 1973 amendments reinforced this limitation by providing that these obligations only applied to persons who sold goods in the course of a business. (The requirement that the seller sell in the course of a business was one of the elements of a consumer sale as defined by the Act.)

1.10 In 1987 the English and Scottish Law Commissions again examined the implied terms dealing with the sale and supply of goods,<sup>20</sup> and recommended a number of reforms to the implied terms themselves (for example, the replacement of "merchantable quality" by "satisfactory quality") and to the remedies available to the buyer on breach.<sup>21</sup> Some of the recommended reforms were implemented by amendments to the *Sale of Goods Act* in 1994.<sup>22</sup> Again, some of these reforms apply to all sale of goods transactions and not just those involving consumers.

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<sup>18</sup> *Sale of Goods Act 1923* (NSW) Part 8; *Goods Act 1958* (Vic) Part IV.

<sup>19</sup> S 33(3) of the *Fair Trading Act 1987* provides that where there is an inconsistency between a provision of Part III and a provision of the *Sale of Goods Act 1895* the provision of Part III prevails and the provisions of the *Sale of Goods Act* are inoperative to the extent of the inconsistency. Similar provisions appear in equivalent legislation in the other Australian jurisdictions.

<sup>20</sup> *Sale and Supply of Goods* (Law Com No 160; Scot Law Com No 104, 1987). In an earlier report, *Implied Terms in Contracts for the Supply of Goods* (Law Com No 95, 1979), the Law Commission had dealt with the terms to be implied in contracts of hire and other contracts analogous to sale.

<sup>21</sup> These reforms are considered in detail in the Commission's discussion paper on *Implied Terms*, paras 3.18-3.35 (remedies), 6.34-6.38 (definition of merchantable quality).

<sup>22</sup> *Sale and Supply of Goods Act 1994* (UK).

1.11 The reforming activity in the United Kingdom has aroused interest in other countries besides Australia. For example, the Law Reform Commission of Hong Kong reported on implied terms in sale of goods contracts and related matters in 1990.<sup>23</sup>

**(b) Reform of other provisions of the Act**

1.12 Reform of the *Sale of Goods Act* in the United Kingdom has not been confined to the implied conditions and warranties in sections 12 to 15. The earliest amendment, in 1954, involved abolition of the formal requirements for contracts of sale for 10 pounds and upwards.<sup>24</sup> In 1967 there were important amendments to the provisions on breach of condition, examination and acceptance,<sup>25</sup> implementing recommendations made by the Twelfth Report of the Law Reform Committee on Transfer of Title to Chattels.<sup>26</sup> More recently, the adoption of the recommendations in the 1987 report of the English and Scottish Law Commissions<sup>27</sup> has resulted in further amendments to the provisions on breach of condition, examination and acceptance;<sup>28</sup> the market overt exception<sup>29</sup> to the rule that a seller may only transfer such title as he possesses has been abolished;<sup>30</sup> and the Law Commissions' 1993 recommendations about sales of goods forming part of a bulk<sup>31</sup> have been implemented.<sup>32</sup>

1.13 There has also been an important and ongoing process of reform in New South Wales. The New South Wales Law Reform Commission was given a reference on the law relating to the sale of goods and the liability of manufacturers in 1966. In 1975 it issued a working paper dealing with implied terms, formalities, frustration and various other matters.<sup>33</sup> The reference

<sup>23</sup> *Report on Sale of Goods and Supply of Services* (Topic 21, 1990).

<sup>24</sup> S 4, abolished by the *Law Reform (Enforcement of Contracts) Act 1954* (UK).

<sup>25</sup> SS 11 and 35, amended by the *Misrepresentation Act 1967* (UK) s 4.

<sup>26</sup> Law Reform Committee, *Twelfth Report (Transfer of Title to Chattels)* Cmnd 2958, 1966. It should also be noted that Parliament repealed the exception to the market overt rule, dealing with the sale of horses in 1967 (s 22(2), repealed by the *Criminal Justice Act 1967* (UK)) and the provisions on reversion of property in stolen goods on conviction of the offender in 1968 (s 24, repealed by the *Theft Act 1968* (UK)).

<sup>27</sup> *Sale and Supply of Goods* (Law Com No 160; Scot Law Com No 104, 1987).

<sup>28</sup> *Sale and Supply of Goods Act 1994* (UK).

<sup>29</sup> S 22.

<sup>30</sup> *Sale of Goods (Amendment) Act 1994* (UK).

<sup>31</sup> *Sale of Goods Forming Part of a Bulk* (Law Com No 215; Scot Law Com No 145, 1993).

<sup>32</sup> *Sale of Goods (Amendment) Act 1995* (UK).

<sup>33</sup> *Working Paper on the Sale of Goods (Warranties, Remedies, Frustration and Other Matters)* (1975). In 1972 the Commission had submitted its *First Report on the Sale of Goods* (LRC 15, 1972) recommending that no action be taken to introduce reform to the implied terms based on the recommendations of the English and Scottish Law Commissions (see n 12 above) pending their implementation in the United Kingdom.

then went into abeyance for some years, but in 1986 it was revived and in 1988 the Commission submitted a report recommending the adoption of legislation to deal with specific and largely uncontroversial defects in the Act, following proposals already acted on in other jurisdictions.<sup>34</sup> This report was implemented in 1988.<sup>35</sup> The report anticipated that the Commission would deal with a number of more significant matters in a forthcoming issues paper, which was duly published in 1988.<sup>36</sup> This paper canvassed more fundamental reforms, both in the area of commercial and consumer contracts. The Commission has not yet issued any further reports.

**(c) Root and branch reform**

1.14 The reforms and proposed reforms described above do not affect the basic conceptual structure of the *Sale of Goods Act*. Nonetheless, a number of writers have suggested that the basic principles of the Act are unsatisfactory and that it is time to abandon it and start afresh.<sup>37</sup> In essence, this was the step taken in the United States in 1933 when article 2 of the American *Uniform Commercial Code* replaced the *Uniform Sale of Goods Act 1906*. The Code abandoned fundamental principles of the *Sale of Goods Act*, such as the division of all terms into conditions and warranties, and brought about what many consider to be a much more satisfactory codification.

1.15 In the 1970s a number of Canadian jurisdictions explored the possibility of replacing their sale of goods legislation (based on the English model) with a more modern Act based on article 2 of the *Uniform Commercial Code*. In 1979 the Ontario Law Reform Commission issued a three-volume report making detailed proposals for a revised Act.<sup>38</sup> As a result, the Uniform Law Conference of Canada set up a sub-committee to look at the adoption of a new Uniform Sale of Goods Act based on the Ontario proposals.<sup>39</sup> Their draft Act was

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<sup>34</sup> *Sale of Goods: Second Report* (LRC 51, 1987). This report dealt with rescission for innocent misrepresentation, termination for breach of an intermediate contractual term, the requirement of writing, the passing of property in specific goods, and acceptance and the examination of goods.

<sup>35</sup> *Sale of Goods (Amendment) Act 1988* (NSW).

<sup>36</sup> *Sale of Goods: Issues Paper* (IP 5, 1988).

<sup>37</sup> For the most recent such suggestion, see M Lambiris, "Reform of the Law of Sale in Australia" (1996) 20 *MULR* 690. See also P S Atiyah, *The Sale of Goods* (London: Pitman, 9th ed, 1995 by J Adams), 3 ("As will appear during the course of this book, the Sale of Goods Act has not proved one of the more successful pieces of codification undertaken by Parliament towards the end of the nineteenth century"). For a more nuanced view, which has much influenced the Commission (see paragraph 1.20, *infra*), see M G Bridge, *The Sale of Goods* (Oxford: Clarendon Press; New York: Oxford University Press, 1997), 1-6.

<sup>38</sup> *Report on Sale of Goods* (1979).

<sup>39</sup> See Uniform Law Conference of Canada, *Proceedings of the Sixty-third Annual Meeting* (1981), 34; *Proceedings of the Sixty-fourth Annual Meeting* (1982), 531ff.

subsequently considered by the Alberta Institute of Law Research and Reform<sup>40</sup> and the Manitoba Law Reform Commission.<sup>41</sup> However, all this reforming effort has not resulted in the adoption of the new Act by any Canadian jurisdiction.

### 3. THE COMMISSION'S DISCUSSION PAPERS

1.16 In view of the number of different issues requiring examination, the Commission decided to issue a number of discussion papers dealing with particular aspects of the *Sale of Goods Act*. The first discussion paper, issued in August 1995, dealt with the implied terms in sections 12 to 15, together with a number of general issues such as the relationship between the *Sale of Goods Act* and the *Trade Practices Act*, the distinction between conditions and warranties, remedies for breach of implied conditions and exclusion of liability. The second discussion paper, issued in October 1995, dealt with the interpretation of section 59(2), which provides that "[t]he rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act ... shall continue to apply to contracts for the sale of goods", so raising the issue whether there is room for the application of principles of equity in a sale of goods context. This issue was discussed with particular reference to misrepresentation, other invalidating causes such as duress, mistake and fraud, equitable interests and equitable remedies. The paper opened with a consideration of the general approach to be adopted to reform of the *Sale of Goods Act*. The Commission contemplated a further discussion paper or papers dealing with other issues such as formalities, mistake and frustration, acceptance, the passing of property, and the *nemo dat* rule<sup>42</sup> and its exceptions.

1.17 The Commission had the benefit of detailed responses to the two papers from four experts in the area: Professor John Carter of Sydney University, who had acted as consultant to the New South Wales Law Reform Commission on its sale of goods reference; Professor Anthony Duggan of Monash University; Professor Michael Bridge of Nottingham University and formerly of McGill University in Canada, author of leading textbooks on sale of goods law both in Canada and in England<sup>43</sup> and a consultant to the Alberta Institute of Law Research and Reform for its report on the *Uniform Sale of Goods Act*; and Professor Ralph Simmonds

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<sup>40</sup> *The Uniform Sale of Goods Act* (Report No 38, 1982).

<sup>41</sup> Report on the *Uniform Sale of Goods Act* (Report 57, 1983).

<sup>42</sup> *Nemo dat quod non habet*: no one may give a better title than he possesses.

<sup>43</sup> *Sale of Goods* (1988); *The Sale of Goods* (1997).

of Murdoch University (who subsequently became a member of the Commission). The Commission was also able to meet with Professor Bridge to discuss the future direction of the reference when he visited Perth in late 1997. The Commission thanks all the commentators for the time and trouble they took. Their contributions have played an important part in shaping the Commission's ultimate recommendations.

#### 4. THE COMMISSION'S RECOMMENDATIONS

1.18 After extensive consideration of the issues dealt with in the two discussion papers and the other issues raised by the reference, and aided by the submissions and discussions referred to in the previous paragraph, the Commission concluded that it should recommend only minimal reforms to the Act. It therefore decided not to issue any further discussion papers, and instead to submit a short report setting out its conclusions.

1.19 In the Commission's view, it is of paramount importance to preserve the uniformity produced by the adoption of the United Kingdom *Sale of Goods Act* in all Australian jurisdictions in almost exactly the same terms, and more recently by the enactment of the Commonwealth *Trade Practices Act 1974* setting out implied obligations which apply to all consumer transactions covered by Commonwealth law, together with mirror legislation in most States and Territories adopting the same provisions for all consumer transactions falling outside the Commonwealth sphere. If Western Australia were to adopt different provisions based on United Kingdom reforms which have not been adopted in any Australian jurisdiction, or if it were to go further and attempt to reformulate the Act along the paths laid down by the *Uniform Commercial Code*, that uniformity would disappear.

1.20 Two more particular considerations strengthened the Commission's conclusions. First, the research it carried out for the discussion paper on *Implied Terms* confirmed that, whatever might be the position in the United Kingdom, in Australia reforms had been confined to consumer transactions, and all other sales continued to be governed by the original unamended provisions of the *Sale of Goods Act*. In other words, commercial and consumer transactions are governed by two different legal regimes. No commentator suggested that any change was desirable. Secondly, Professor Bridge, both in his published writing and in his discussions with the Commission, stressed that much of the reforming activity in the United Kingdom has been driven by the need to regulate large-scale commodities agreements on

forward delivery terms, and in particular the grain trade between the United Kingdom and the United States.<sup>44</sup> The case for following some of these reforms is therefore not compelling.

Nor is it evident to the Commission that the Act, which as Professor Bridge has noted is "largely presumptive and rarely mandatory"<sup>45</sup>, has proven problematic for commerce in this state<sup>46</sup>. Thus, no demand for reform of any root and branch sort was pressed on us by the business or legal communities. Nor do we have the case for reform represented for Canadians by having a substantially different common law based sales law regime in force in almost all states of their major trading partner, the United States<sup>47</sup>. The Commission also notes, as it has earlier in this Report, that in any event no Canadian jurisdiction has yet enacted any such reform based on this or any other case, and this in the face of even closer international trade relations with that trading partner represented by the North American Free Trade Agreement<sup>48</sup>.

1.21 Accordingly, in the Commission's view, reform of the *Sale of Goods Act* should be restricted to the adoption of a few uncontroversial reforms of a minor nature which have already been adopted in some or all other Australian jurisdictions. These are:

1. Abolition of the formal requirements in section 4.
2. Abolition of the market overt exception to the rule that no one can give a better title than he possesses (section 22).
3. Repeal of the provisions in section 11 dealing with the passing of property in specific goods, because the interaction between this provision and the rules in section 18 dealing with when the property in such goods passes produces an unfair result for the buyer.

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<sup>44</sup> See MG Bridge, *The Sale of Goods* (Oxford: Clarendon Press; New York: Oxford University Press, 1997), 2. The Law Commission's report on *Sale of Goods Forming Part of a Bulk* (Law Com No 215; Scot Law Com No 145, 1993) is a prominent example.

<sup>45</sup> MG Bridge, *The Sale of Goods*, see *ibid* at 2.

<sup>46</sup> For a similar conclusion about the Act in the United Kingdom, see *ibid*, at 2 -3.

<sup>47</sup> For the influence of this factor on the Ontario Law Reform Commission, see their *Report on Sale of Goods* (1989), Vol 1, 27.

<sup>48</sup> For a recent review of the general significance of NAFTA, see "Symposium: NAFTA and the Expansion of Free Trade: Current Issues and Future Prospects" (1997) 14 *Arizona Journal of International and Comparative Law* 285 -526.

4. Amendment of the provisions of section 35, dealing with acceptance, to give the buyer a realistic right of examination before he is deemed to have accepted the goods.
5. The insertion of provisions in sections 59 and 35 to make it clear that equitable principles, as well as those derived from common law, have a part to play in contracts for the sale of goods.

1.22 The Commission thus confirms the views foreshadowed in its second discussion paper in which it summarised its approach to the reform of the Act. This, it said, was likely to result in modest, rather than radical, reform of the law.<sup>49</sup>

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<sup>49</sup> Discussion paper on *Equitable Rules*, para 1.11.



## **Chapter 2**

### **FORMAL REQUIREMENTS FOR CONTRACTS OF SALE**

#### **1. THE EXISTING LAW**

2.1 Section 4 of the *Sale of Goods Act 1895* provides:

"(1) A contract for the sale of any goods of the value of Ten pounds 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."

2.2 According to section 5 of the *Decimal Currency Act 1965* (Cth), the reference in s 4(1) to ten pounds is now to be read as a reference to twenty dollars.

#### **2. COMMENT**

2.3 Section 4, like the other provisions of the *Sale of Goods Act 1895*, reproduced the equivalent section in the United Kingdom *Sale of Goods Act 1893*, which re-enacted a provision of the *Statute of Frauds 1677*. As a consequence, the Schedule to the United Kingdom Act repealed that provision, and the Schedule to the Western Australian Act does likewise for Western Australia. The history of the section shows how out of date it is in the modern context. The Statute of Frauds was passed to prevent perjury and fraudulent practices. Since in 1677 ten pounds was a substantial sum of money, it imposed a requirement of written evidence for only a small minority of sale transactions. Even in the 1890s, when the Sale of Goods Acts of the United Kingdom and Western Australia were enacted, ten pounds was still a considerable sum - well over ten times the ordinary weekly wage. Today, as a result of

inflation, the section has a very different effect from that originally intended: it makes it necessary for nearly all contracts for the sale of goods to be evidenced in writing.

2.4 There is no evidence that this requirement is necessary, either in its present form, in which it affects all except the smallest sales transactions, or in a form closer to the original intention and so catching only very large purchases. Much law has resulted from attempts to evade the requirements of section 4. For example, the courts have recognised a distinction between contracts which are in substance sale of goods contracts<sup>1</sup> and those which are in substance contracts for work and materials, even though property incidentally changes hands.<sup>2</sup> The distinction is said to turn on whether the substance of the contract is the skill and labour of the supplier, or the production of something to be sold by the supplier where the skill of the supplier is ancillary only.<sup>3</sup> If the courts are able to find that the case falls into the latter category, the parties are able to avoid the requirement of writing. The New South Wales Law Reform Commission has commented: "The distinction between the two types of contracts is obviously often a fine one, and the tests applied have been said to be 'unsatisfactory and imprecise'".<sup>4</sup>

2.5 The New South Wales report sets out in detail the legal consequences of section 4.<sup>5</sup> Apart from troublesome cases involving the meaning of goods (for example, in relation to growing crops, and removing slate from land), which can arise under any of the provisions of the *Sale of Goods Act*,<sup>6</sup> the section brings into play all the law about what is a note or memorandum in writing, and what constitutes part performance, which applies also in contracts for the sale of land by virtue of section 4 of the *Statute of Frauds*.<sup>7</sup> Non-compliance renders the contract unenforceable, but not void, and so claims not based on contract, such as

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<sup>1</sup> See eg *Samuels v Davis* [1943] 1 KB 526 (contract to supply false teeth); *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48 (contract to supply computer system).

<sup>2</sup> See eg *Robinson v Graves* [1935] 1 KB 579 (contract to paint portrait); *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405 (contract to install cocktail cabinet).

<sup>3</sup> *Robinson v Graves* [1935] 1 KB 579, Greer LJ at 587.

<sup>4</sup> *Sale of Goods: Second Report* (LRC 51, 1987), para 4.6, quoting *Hewett v Court* (1983) 149 CLR 639, Gibbs CJ at 646.

<sup>5</sup> Id paras 4.2-4.11.

<sup>6</sup> See the definition of "goods" in s 5, and also *Morgan v Russell* [1909] 1 KB 357; *Mills v Stokman* (1966) 116 CLR 61.

<sup>7</sup> See J W Carter and D J Harland, *Contract Law in Australia* (Sydney: Butterworths, 3rd ed, 1996), paras 513-515, 521-524.

a restitutionary claim to recover money had and received, may be available.<sup>8</sup> The rule applies also to a variation of the contract, but not to a rescission.<sup>9</sup>

2.6 All this would be unnecessary if section 4 were repealed. The removal of the requirement would make very little difference in practice, since there are very few sale of goods contracts which are unenforceable for lack of written evidence.<sup>10</sup>

2.7 Following criticism of the rule by the English Law Revision Committee in 1937,<sup>11</sup> section 4 of the United Kingdom Act was repealed in 1954.<sup>12</sup> A similar step has been taken in New Zealand, Queensland, South Australia, New South Wales and Victoria.<sup>13</sup> This means that Tasmania, the Northern Territory and Western Australia are the only Australian jurisdictions in which the rule survives - and in Northern Territory there has been some attempt to modify the effect of the rule by raising the lower limit to fifty dollars.<sup>14</sup> Abolition of the rule would further the Commission's basic objective of adopting reforms to the *Sale of Goods Act* which would promote greater uniformity of Australian sale of goods legislation.

### 3. RECOMMENDATION

2.8 The Commission recommends that section 4 of the *Sale of Goods Act 1895* be repealed.

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<sup>8</sup> Id para 520.

<sup>9</sup> Id paras 525-526. "Rescission" here refers to a discharge of the contract by agreement. Elsewhere in this report the word is used to refer to the equitable remedy for misrepresentation whereby parties to a contract are restored so far as possible to the position as if no contract had been made.

<sup>10</sup> New South Wales Law Reform Commission, *Sale of Goods: Second Report* (LRC 51, 1987), para 4.7.

<sup>11</sup> *Statute of Frauds and the Doctrine of Consideration, Sixth Interim Report*, Cmd 5449 (1937), para 9.

<sup>12</sup> *Law Reform (Enforcement of Contracts) Act 1954* (UK).

<sup>13</sup> *Contracts Enforcement Act 1956* (NZ) s 4; *Statute of Frauds Act 1972* (Qld) s 3; *Statutes Amendment (Enforcement of Contracts) Act 1982* (SA) s 4; *Sale of Goods (Vienna Convention) Act 1987* (Vic) s 9; *Sale of Goods (Amendment) Act 1988* (NSW), Sch 1(2).

<sup>14</sup> *Sale of Goods Act 1972* (NT) s 9, as amended by *Ordinances Revision Ordinance 1973* (NT) s 2.

## Chapter 3

### SALES IN MARKET OVERT

#### 1. THE EXISTING LAW

3.1 Section 22 of the *Sale of Goods Act 1893* provides:

"Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

The selling of goods in market overt is one of a number of exceptions provided by the Act to the general principle set out in section 21(1), commonly expressed in the maxim *nemo dat quod non habet* (no one may give what he does not have):

"Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The other exceptions recognised by the Act are estoppel (referred to in the final words of the section just quoted), sale under a voidable title,<sup>1</sup> sale by a seller in possession<sup>2</sup> and sale by a buyer in possession.<sup>3</sup>

#### 2. COMMENT

3.2 The market overt rule is of ancient origin. Even in England, it was practically obsolete by 1893:<sup>4</sup> in the words of Atiyah, "This exception could be explained, but scarcely justified, on historical grounds only, and it may be regretted that it was included in the 1893 codification".<sup>5</sup> There is no justification whatever for its retention in Australia.

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<sup>1</sup> *Sale of Goods Act 1893* s 23.

<sup>2</sup> *Id* s 25.

<sup>3</sup> *Id* s 26.

<sup>4</sup> S 22(3) of the *Sale of Goods Act 1893* (UK) provides that the rule does not apply to Scotland.

<sup>5</sup> P S Atiyah, *The Sale of Goods* (London: Pitman, 9th ed, 1995, by J N Adams), 341.

3.3 "Market overt" means an "open, public, and legally constituted market".<sup>6</sup> Such a market might be held under a charter or statute. As the result of ancient custom, every shop within the City of London was market overt for the purposes of this rule,<sup>7</sup> and according to the Law Reform Committee, which reported in 1966 on the transfer of title to chattels, this represented the most valuable aspect of the rule in twentieth century conditions.<sup>8</sup> The Committee pointed out that market overt had never applied in Wales, did not apply to privately-owned markets (which accounted for more than half the livestock markets in England and Wales) and did not affect the law relating to the sale of horses.<sup>9</sup> The rule applied to all sales in the market, whether or not by a trader in the market, but the goods had to be such as were usually sold in the market, and the sale must take the form which is usual in that market.<sup>10</sup> The sale had to be open, and take place between the hours of sunrise and sunset.<sup>11</sup> The Law Reform Committee said the rule was capricious in its operation and recommended that the rule should be either abolished or extended to cover all retail sales at trade premises and sales by auction. In 1994 a government Consultation Paper made a similar recommendation: that the rule should be abolished and replaced with a rule that would confer a good title on bona fide purchasers through retail outlets or auctions.<sup>12</sup> Later the same year the rule was abolished by the *Sale of Goods (Amendment) Act*, without putting a modern equivalent in its place.

3.4 It is highly doubtful whether there is any market or other place in Australia which constitutes market overt,<sup>13</sup> and it is regrettable that the rule was copied into the Western Australian *Sale of Goods Act* in 1895.<sup>14</sup> Since the rule is based on obsolete conditions, and there is no circumstance when it can operate, it should be repealed. Of the other Australian jurisdictions which enacted sale of goods legislation in the 1890s, South Australia and Tasmania, like Western Australia, copied the market overt rule from the United Kingdom

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<sup>6</sup> *Lee v Bayes* (1856) 18 CB 599, 139 ER 1504, Jervis CJ at 601.

<sup>7</sup> *Case of Market Overt* (1596) 5 Co Rep 83b, discussed by Scrutton J in *Clayton v Leroy* [1911] 2 KB 1031.

<sup>8</sup> *Twelfth Report (Transfer of Title to Chattels)* Cmnd 2958 (1966), para 30.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Bishopsgate Motor Finance Corporation v Transport Brakes* [1949] 1 KB 332.

<sup>11</sup> *Reid v Commissioner of Metropolitan Police* [1973] QB 551.

<sup>12</sup> *Transfer of Title: ss 21-26 of the Sale of Goods Act 1979* (1994).

<sup>13</sup> "Markets overt are not important in Australia, and ... the instances where such sales arise will be very rare": R B Vermeesch and K E Lindgren, *Business Law of Australia* (Sydney: Butterworths, 8th ed, 1995), para 24.48.

<sup>14</sup> The Western Australian Act did not incorporate the UK provision that the section did not affect the law relating to horses: *Sale of Goods Act 1893* (UK) s 22(2). It thus seems that the Act attempts to give market overt a wider operation in Western Australia than in England.

Act,<sup>15</sup> but Queensland excluded it<sup>16</sup> and it has now been abolished in Victoria.<sup>17</sup> The same is true of New Zealand.<sup>18</sup> The Acts of more recent vintage - those of New South Wales, the Northern Territory and the Australian Capital Territory - do not include it, and the New South Wales Act specifically declared that there shall not be deemed to be or have been any market overt in that State.<sup>19</sup> Only two jurisdictions, apart from Western Australia, thus retain the rule. To abolish it would be consistent with the Commission's aim of securing greater uniformity in Australian sale of goods legislation.

### 3. RECOMMENDATION

3.5 The Commission recommends that section 22 of the *Sale of Goods Act 1985* be repealed.

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<sup>15</sup> *Sale of Goods Act 1895* (SA) s 22; *Sale of Goods Act 1896* (Tas) s 27.

<sup>16</sup> The practice of sale in market overt forms no part of the law of Queensland: *Sorley and Stirling v Surawski* [1953] St R Qd 110.

<sup>17</sup> *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 34, repealing *Goods Act 1958* (Vic) s 28.

<sup>18</sup> *Sale of Goods Amendment Act 1961* (NZ) s 2, repealing *Sale of Goods Act 1908* (NZ) s 24 and substituting a new section providing: "The law relating to market overt shall not apply in New Zealand".

<sup>19</sup> *Sale of Goods Act 1923* (NSW) s 4(2).

## Chapter 4

### PASSING OF PROPERTY IN SPECIFIC GOODS

#### 1. THE EXISTING LAW

4.1 Section 11(3) of the *Sale of Goods Act 1895* 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."

#### 2. COMMENT

4.2 Under the scheme of the *Sale of Goods Act*, the statutory implied terms are either conditions, breach of which gives the buyer a right to treat the contract as repudiated, or warranties, breach of which merely entitles the buyer to sue for damages.<sup>1</sup> However, sale of goods contracts may also contain express conditions. Under general contract law the existence of a right to treat the contract as repudiated depends on a number of factors, including the nature and effect of the breach, and not just on the status of the term broken. The courts have confirmed that, in addition to conditions and warranties, there are "innominate" or "intermediate" terms under which breach may or may not give rise to a right to terminate the contract,<sup>2</sup> and that this applies in the case of contracts for the sale of goods just as much as any other kind of contract.<sup>3</sup>

4.3 The provisions of section 11 apply not just to the statutory implied conditions and warranties, but to all conditions and warranties express or implied, and thus lay down general principles about the effect of breach. Section 11(1) says that where there is a breach of condition the buyer may waive it or elect to treat it as a breach of warranty and not as a ground for treating the contract as repudiated. Section 11(2) provides that where a stipulation in a contract of sale is a condition breach of which gives rise to a right to treat the contract as

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<sup>1</sup> "Warranty" is defined in these terms in s 60(1). "Condition" is nowhere defined, but it appears that the intention was that stated in the text.

<sup>2</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

<sup>3</sup> *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44.

repudiated, or a warranty which gives rise to a right to damages but not a right to treat the contract as repudiated, depends on the construction of the contract. Both these provisions are consistent with general contractual principles.

4.4 Section 11(3) then provides that in two circumstances the buyer must treat a breach of condition as a breach of warranty, whether he wishes to do so or not (unless there is a contrary term of the contract, express or implied). The first such case is where the contract of sale is not severable and the buyer has accepted the goods or part thereof. This is a rational rule: once the buyer has accepted, then provided he has had a reasonable opportunity to examine the goods before acceptance<sup>4</sup> he should not be allowed to change his mind. The second case is where the contract is for specific goods the property in which has passed to the buyer. It is this second case that in the Commission's view requires reconsideration.<sup>5</sup>

4.5 Section 18 of the *Sale of Goods Act* sets out rules which determine when the property in goods (that is, the ownership of them) passes from seller to buyer. Unless a different intention appears, under section 18 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."

A contract is unconditional unless it is subject to a particular condition precedent. Specific goods are "goods identified and agreed upon at the time a contract of sale is made".<sup>6</sup> This covers most consumer and commercial sales, including sales by auction, providing the buyer is purchasing a particular item, rather than something which conforms to a particular description, such as "a 1998 Holden Barina" or "100 tonnes of wheat". 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".<sup>7</sup> The effect of section 18 rule 1 in conjunction with section 11(3) is that in most sales of specific goods property will pass to the buyer when the contract is made, even if delivery and/or payment does not take place immediately, and so the buyer will never have any effective right of rejection.

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<sup>4</sup> See Ch 5.

<sup>5</sup> See also the discussion paper on *Implied Terms* paras 3.10-3.17.

<sup>6</sup> *Sale of Goods Act 1895* s 60(1).

<sup>7</sup> *Id* s 60(4).



4.6 The New South Wales Law Reform Commission, which examined this rule in detail in its second report on sale of goods,<sup>8</sup> said that the second limb of section 11(3) could be criticised on a number of grounds:<sup>9</sup>

1. 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 has passed under the contract.
2. The provision does nothing to encourage performance of the contract by the seller, who may retain the price even though defective goods have been delivered, with the buyer being compelled to resort to litigation to obtain compensation.
3. The provision does not accord with the understanding of lay people who would ordinarily assume that goods can be rejected when they are defective.
4. The provision is out of line with what is accepted as sound commercial practice. It is common knowledge that many commercial sellers (for example, large department stores) will allow defective goods to be returned. This should be reflected in the Act.
5. The rule is based on unsound legal premises: that the buyer cannot revest title in the seller once the property has passed, and that for rejection to take effect the parties must be restored to their pre-contractual positions.<sup>10</sup> The New South Wales Commission suggests that the modern authorities reject these notions, holding that the buyer's election to terminate has the effect of re-transferring the property in the goods to the seller,<sup>11</sup> and that the requirement that the parties be restored to their pre-contractual positions applies to rescission ab

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<sup>8</sup> *Sale of Goods: Second Report* (LRC 51, 1987), ch 5.

<sup>9</sup> *Id* paras 5.14-5.22.

<sup>10</sup> See *id* paras 5.2-5.4, suggesting that these rationales result from two pre-1893 decisions: *Street v Blay* (1831) 2 B & Ad 456, 109 ER 1212; *Behn v Burness* (1863) 3 B & S 751, 122 ER 281.

<sup>11</sup> Citing eg *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 WLR 1126, and the unpaid seller's right of resale under the *Sale of Goods Act 1895* s 47(3) and (4).

initio for mistake or misrepresentation but does not generally apply to termination for breach.<sup>12</sup>

4.7 As the New South Wales Commission points out, Australian Sale of Goods Acts are not uniform on this point, since a number of them have repealed the second limb of section 11(3), following the example set by the United Kingdom *Misrepresentation Act 1967* section 4, which removed the words "or where the contract is for specific goods, the property in which has passed to the buyer" from the *Sale of Goods Act 1893*.<sup>13</sup> A similar repeal has since been effected in South Australia,<sup>14</sup> the Australian Capital Territory,<sup>15</sup> Victoria (in relation to consumer sales)<sup>16</sup> New South Wales<sup>17</sup> and New Zealand.<sup>18</sup> The New South Wales Commission points out that under section 75A of the Commonwealth *Trade Practices Act 1974* the right of rescission remains available notwithstanding that property in goods has passed under the contract.<sup>19</sup>

4.8 Finally, the New South Wales report comments that the rule reflects the view of nineteenth century lawyers that once a contract conferred rights in property, contractual principles took on a diminished significance. Today, the argument that the transfer of property prevents the application of ordinary contractual principles would not ordinarily be acceptable.<sup>20</sup>

### 3. RECOMMENDATION

4.9 In the Commission's view, it is undesirable to retain a rule which prevents most buyers of specific goods from having any effective right of rejection for breach of condition. Further, abolition of the rule would further the Commission's basic objective of adopting reforms to the *Sale of Goods Act* which would promote greater uniformity of Australian sale of goods

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<sup>12</sup> Citing eg *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Heyman v Darwins Ltd* [1942] AC 356; *Johnson v Agnew* [1980] AC 357; J W Carter, *Breach of Contract* (Sydney: Butterworths, 1984) paras 1054-1056, 1201, 1206, 1215 (see now J W Carter, *Breach of Contract* (Sydney: Law Book Co, 2nd ed, 1991)).

<sup>13</sup> Implementing the recommendations of the Law Reform Committee's *Tenth Report (Innocent Misrepresentation)* (1962).

<sup>14</sup> *Misrepresentation Act 1971* (SA) s 11.

<sup>15</sup> *Sale of Goods Ordinance 1975* (ACT) s 3.

<sup>16</sup> *Goods Sales and Leases Act 1981* (Vic) ss 118(1) and 99(1).

<sup>17</sup> *Sale of Goods (Amendment) Act 1988* (NSW), Sch 1(3).

<sup>18</sup> *Contractual Remedies Act 1979* (NZ) s 14(1)(a).

<sup>19</sup> *Sale of Goods: Second Report* (LRC 51, 1987), paras 5.23-5.24.

<sup>20</sup> *Id* para 5.22.

legislation. It therefore recommends that the words "or where the contract is for specific goods, the property in which has passed to the buyer" should be deleted from section 11(3).<sup>21</sup>

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<sup>21</sup> See also the discussion paper on *Equitable Rules*, paras 2.25-2.46, which refers to the earlier discussion of the issue in the Law Reform Committee's working paper on *Innocent Misrepresentation* (project No 22, 1972).

## **Chapter 5**

### **ACCEPTANCE AND EXAMINATION OF GOODS**

#### **1. THE EXISTING LAW**

5.1 Section 34 of the *Sale of Goods Act 1895* provides:

"(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

Section 35 provides:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or 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, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

#### **2. COMMENT**

5.2 Section 35 sets out three ways in which the buyer is deemed to have accepted the goods under a sale of goods contract. The importance of acceptance is that, under the terms of section 11(3) (considered in the previous chapter) the buyer loses the right to reject the goods for breach of condition, thus terminating the contract, and is limited to suing for damages. Section 34 says that where goods are delivered which the buyer has not previously examined, he is not deemed to have accepted them unless he has had a reasonable opportunity of examining them. The issue is whether section 35 is intended to be subject to section 34.

5.3 The New South Wales Law Reform Commission, in a valuable study of this problem,<sup>1</sup> pointed out that acceptance is the equivalent in a sale of goods context of an express election to affirm the contract under general contractual principles. However, the difficulty is that, whereas under general contract law such an affirmation would require knowledge, nothing is

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<sup>1</sup> *Sale of Goods: Second Report* (LRC 51, 1987), paras 6.1-6.12.

said in section 35 as to the knowledge of the buyer. Under section 35 there are a number of situations in which acceptance can take place even though the buyer has no knowledge of a defect. If, then, the defect from which the goods are suffering is latent, is the buyer deemed to have accepted them under the terms of section 35 (for example, by intimating to the seller that he has accepted them) in circumstances where he has not been given a reasonable opportunity of examining them under section 34?

5.4 The courts have reached the conclusion that in such circumstances a buyer may be deemed to have accepted the goods. In *Hardy & Co v Hillerns and Fowler*<sup>2</sup> a contract for the sale of wheat provided for payment in London (on tender of shipping documents) and delivery to Hull. After the wheat had been delivered in Hull, the buyers resold some of it to third parties in Barnsley, Nottingham and Southwell and despatched it to them. The buyers then examined samples which showed that the wheat delivered did not comply with the contract description, and purported to reject the goods. The English Court of Appeal held that the rejection was too late, because the buyers had accepted the goods by doing acts inconsistent with the ownership of the sellers, even though a reasonable period for examining the goods had not elapsed at the time of the purported rejection.

5.5 This rule has been held to apply even where the place of delivery was the seller's place of business. In a subsequent English case,<sup>3</sup> delivery of rubber sheeting was made at the seller's premises before the seller, as agent for the buyer, shipped the goods to the sub-buyer. It was held that the act of dispatching them to the sub-buyer was inconsistent with the seller's ownership. Even though the buyer had not had a reasonable opportunity of examination, he had lost his right to reject. However, a different result has been reached by courts in New Zealand<sup>4</sup> (where the English case was distinguished) and Canada.<sup>5</sup>

5.6 The law laid down in *Hardy* has been universally condemned,<sup>6</sup> and law reform bodies have recommended that it be made clear that acceptance cannot take place until the buyer has had a reasonable opportunity of examining the goods.<sup>7</sup> In the United Kingdom, the

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<sup>2</sup> [1923] 2 KB 490.

<sup>3</sup> *E & S Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 KB 254.

<sup>4</sup> *Hammer and Barrow v Coca Cola Export Corporation* [1962] NZLR 723.

<sup>5</sup> *A J Frank & Sons Ltd v Northern Peat Co* [1963] 2 OR 415.

<sup>6</sup> See eg K C T Sutton, *Sales and Consumer* (4th ed, 1995) para 20.7; P S Atiyah, *The Sale of Goods* (London: Pitman, 9th ed, 1995, by J Adams), 462.

<sup>7</sup> Law Reform Committee, *Tenth Report (Innocent Misrepresentation)*; New South Wales Law Reform Commission, *Sale of Goods: Second Report* (LRC 51, 1987), para 6.19.

*Misrepresentation Act 1967* remedied the situation by inserting words in section 35 to make it clear that the buyer could not accept by doing an act inconsistent with the seller's ownership following delivery unless he had been afforded a reasonable opportunity of examination.<sup>8</sup> A similar reform has subsequently been adopted in South Australia,<sup>9</sup> Victoria<sup>10</sup> and New South Wales,<sup>11</sup> and also in New Zealand.<sup>12</sup> The Australian Capital Territory has gone further and made all three cases of acceptance in section 35 subject to the right of examination in section 34.<sup>13</sup> Adoption of the English reform in Western Australia would promote the cause of uniformity in Australian sale of goods law.

### 3. RECOMMENDATION

5.7 The Commission recommends that section 35 of the *Sale of Goods Act 1895* be amended by insertion of the words "subject to section 34" before the words "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".

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<sup>8</sup> *Misrepresentation Act 1967* (UK) s 4(2).

<sup>9</sup> *Misrepresentation Act 1971* (SA) s 12.

<sup>10</sup> *Goods Sales and Leases Act 1981* (Vic) s 3.

<sup>11</sup> *Sale of Goods (Amendment) Act 1988* (NSW), Sch 1(4).

<sup>12</sup> *Contractual Remedies Act 1979* (NZ) s 14.

<sup>13</sup> *Sale of Goods Ordinance 1975* (ACT) s 4.

## Chapter 6

### RESCISSION FOR INNOCENT MISREPRESENTATION

#### 1. THE APPLICABILITY OF EQUITABLE RULES TO SALE OF GOODS

6.1 Section 59(2) of the *Sale of Goods Act 1895* 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."

6.2 Section 59(2) makes it clear that the Act is not a complete code and that principles of the general law continue to apply to contracts for the sale of goods. The problem is whether the phrase "the common law" refers to the whole of the non-statutory law, or that part of it which was originally developed in courts having common law rather than equity jurisdiction. If the former, equitable principles apply to sale of goods contracts to the same extent as any other kind of contract; if the latter, they are excluded.

6.3 The issue was exhaustively considered by the Commission in its second discussion paper. As analysed in that paper, the problem arises in the following contexts:

1. Whether the equitable rules relating to misrepresentation apply to sale of goods contracts.<sup>1</sup>
2. Whether the equitable rules relating to duress or coercion, mistake, fraud and other invalidating causes apply to sale of goods contracts.
3. Whether there is room for equitable concepts relating to property in sale of goods contracts.<sup>2</sup>

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<sup>1</sup> It has been held in New Zealand and Victoria that only the common law rules for misrepresentation apply in contracts for the sale of goods: *Riddiford v Warren* [1901] 20 NZLR 572; *Watt v Westhoven* [1933] VLR 458. However, more recent cases in South Australia and New South Wales hold that the equity rules also apply: *Graham v Freer* (1980) 35 SASR 424; *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381.

<sup>2</sup> Two English judges have stated that there is no room for equitable property concepts in sale of goods: *Re Wait* [1927] 1 Ch 606, Atkin LJ at 635-636; *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd (The "Aliakmon")* [1986] 2 WLR 902, Lord Brandon of Oakbrook at 910-911.

4. Whether the equitable remedies of specific performance, injunction, relief against penalties, relief against forfeiture and rectification are available in sale of goods contracts.

6.4 In the discussion paper the Commission expressed the provisional view that the *Sale of Goods Act* should be amended to state expressly that the equitable rules of misrepresentation applied to sale of goods contracts. However, it saw the issues relating to the applicability of equitable property concepts and equitable remedies as more contentious.

6.5 As the discussion paper recognised, the need to maintain and further the uniformity of sale of goods legislation in Australia militates against the introduction of new legislative provisions to deal with equitable rules. It would be preferable for the courts to rule on such matters when occasion offers - aided by the extensive analysis in the discussion paper. Those who commented on the paper also stressed the drawbacks of innovative legislation in this area because of the need to maintain uniformity.

6.6 As stated in Chapter 1, the Commission has decided to recommend only a few uncontroversial reforms which would bring about greater uniformity among Australian Sale of Goods Acts. Consistently with this policy, it has decided that this report should deal only with equitable rules relating to misrepresentation. This is because the other legislative provisions dealing with equitable rules are confined to this issue.<sup>3</sup>

## **2. RESCISSION FOR INNOCENT MISREPRESENTATION IN SALE OF GOODS - THE ISSUES**

6.7 Chapter 2 of the discussion paper provides a full discussion of the issues relating to misrepresentation in its applicability to contracts for the sale of goods. This and the next three sections of this chapter are intended merely to provide a concise summary for the purposes of this report.

6.8 If the equitable rules for misrepresentation do not apply to contracts for the sale of goods, only the common law rules will apply. Under these rules, a misstatement may become a term of the contract, giving rise to common law remedies relating to contractual terms. Whether or not the misstatement becomes a term, there may be a remedy in damages if it is

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<sup>3</sup> *Sale of Goods Act 1954* (ACT) s 62(1A); *Sale of Goods Act 1923* (NSW) s 4(2A).



made fraudulently or negligently, and if it is fraudulent the remedy of rescission may be available. If a misstatement is neither a term nor made fraudulently, it may nevertheless be possible to rescind the contract if there is such a complete difference between the position as it actually was and was represented to be as to constitute a failure of consideration. In any other case, a misstatement has no effect and gives rise to no remedy at common law.

6.9 If the equitable rules do apply, the remedy of rescission is potentially available for all misrepresentations. However, a number of consequential issues arise about the interaction of equitable and common law remedies.

- (1) Whether, if the misrepresentation becomes a term of the contract, the equitable remedy is superseded by the common law remedies for breach of a term ("the merger issue"). If so, the equitable remedy is confined to misrepresentations which are not terms. If not, both common law and equitable remedies are available for the same misstatement.
- (2) If the misrepresentation has become a condition of the contract, how (if at all) the remedies of rescission for misrepresentation and termination for breach are to be reconciled ("the potency issue").<sup>4</sup> The two remedies are similar but distinct. A number of anomalous situations may arise:
  - (i) Even if the equitable remedy is confined in its scope to misrepresentations which are not terms, rescission may be available where rejection of the goods and termination may not be possible.
  - (ii) If both common law and equitable remedies are available for a misrepresentation which is also a term, where the term is a warranty rescission will be available even though rejection and termination are not. Where the term is a condition, rescission may remain available even though the right to reject and terminate has been lost, because of

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<sup>4</sup> So called because Denning LJ in *Leaf v International Galleries* [1950] 2 KB 86 at 90-91 expressed the view that innocent misrepresentation was "much less potent" than a breach of condition.

differences in the circumstances in which the right to terminate for breach and the right to rescind for misrepresentation may be lost.<sup>5</sup>

- (3) Whether the rule in *Seddon v North Eastern Salt Go Ltd*<sup>6</sup> applies. Under this rule, a right to rescind for non-fraudulent misrepresentation may be barred after a contract has been "executed". The rule gives rise to many difficulties. If it applies, there is doubt as to what constitutes "execution" in a sale of goods context.<sup>7</sup>

6.10 The discussion paper notes that the practical importance of these difficulties is greatly reduced by the existence of remedies for misleading and deceptive conduct in section 52 of the Commonwealth *Trade Practices Act 1974* and its State equivalents.<sup>8</sup> These have virtually supplanted the general rules of common law and equity relating to misrepresentation in contracts made in trade or commerce. The major practical problem raised by the issue of whether equitable rules for misrepresentation apply in contracts for the sale of goods is whether, in private contracts of sale, there is a remedy of rescission for a non-fraudulent misrepresentation which has not become a term of the contract, and an additional remedy of rescission for a non-fraudulent misrepresentation which has become a term of the contract.

### 3. THE LEGAL POSITION

#### (a) Whether the equitable rules on misrepresentation apply

6.11 Essentially, the issue here is whether "the rules of the common law" in section 59(2) means general law, or common law as distinct from equity. Two older cases, one from New Zealand<sup>9</sup> and one from Victoria,<sup>10</sup> have expressed the view that the equitable rules of misrepresentation are thereby excluded from sale of goods contracts. However, more recent cases in England<sup>11</sup> and South Australia<sup>12</sup> have held that those rules do apply. The proper

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<sup>5</sup> The problem is increased as a result of the rule in s 11(3) of the *Sale of Goods Act 1895* (dealt with in Ch 4) under which the right to reject is lost in the case of sales of specific goods when the property passes to the buyer.

<sup>6</sup> [1905] 1 Ch 326.

<sup>7</sup> The discussion paper suggests passing of property, delivery and loss of the right to reject as possible contenders.

<sup>8</sup> Eg *Fair Trading Act 1987* (WA) s 10.

<sup>9</sup> *Riddiford v Warren* (1901) 20 NZLR 572.

<sup>10</sup> *Watt v Westhoven* [1933] VLR 675.

<sup>11</sup> *Goldsmith v Rodger* [1962] 2 Lloyd's Rep 249.

interpretation of section 59(2) was extensively considered by Zelling J in the South Australian case, and he expressly rejected the earlier authorities.<sup>13</sup> There is no direct authority in Western Australia.

**(b) The merger issue**

6.12 The recent cases referred to in the previous paragraph held that rescission was available for a misrepresentation which is not a term, and therefore provide no direct authority as to the position where the misrepresentation is also a term. However, there are obiter dicta to the effect that a misrepresentation which is also a term can give rise to rescission.<sup>14</sup> However, there is again no direct authority in Western Australia.

**(c) The potency issue**

6.13 Denning LJ in the English Court of Appeal expressed the view that the right to rescind could not survive loss of the right to terminate.<sup>15</sup> However, the view that loss of the right to terminate precludes the right to rescind was expressly rejected by Helsham CJ in Eq in New South Wales.<sup>16</sup> There is again no direct authority in Western Australia.

**(d) The *Seddon* rule**

6.14 There is debate about the correctness and applicability of the rule in *Seddon's case* in the law of contract generally. In New South Wales, Helsham CJ in Eq, after an extensive consideration of the matter, concluded that the rule did not apply in sale of goods contracts.<sup>17</sup>

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<sup>12</sup> *Graham v Freer* (1980) 35 SASR 424.

<sup>13</sup> Note also *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381, where Helsham CJ in Eq commented on the merger issue, which can only arise on the assumption that the equitable rules of misrepresentation apply.

<sup>14</sup> *Graham v Freer* (1980) 35 SASR 424, Zelling J at 436; *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381, Helsham CJ in Eq at 388.

<sup>15</sup> *Leaf v International Galleries* [1950] 2 KB 86 at 90-91. On one view, *Long v Lloyd* [1958] 1 WLR 753 may have been decided on this basis.

<sup>16</sup> *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381 at 387 - 388.

<sup>17</sup> Id at 387. See also *Leaf v International Galleries* [1950] 2 KB 86, Denning LJ at 90.

#### 4. THE CASE FOR REFORM

6.15 At present, the law suffers from the uncertainty of not knowing whether the rules of equity relating to misrepresentation apply in sale of goods contracts. This uncertainty could be eliminated by providing either that those rules apply, or that they do not. In the latter situation, however, there would be no remedy at all for a non-fraudulent misrepresentation which does not become a term of the contract. In this respect, contracts for the sale of goods would be out of step with other kinds of contract. The discussion paper suggests that this could lead to decisions in which the common law rules are manipulated to achieve a fair result, or fine distinctions are drawn between different types of contract. On the other hand, if both the common law and the equitable rules of misrepresentation are applicable the law is rendered more complex.

6.16 A number of jurisdictions have enacted reforms which provide a solution to some or all of the above problems. These reforms are fully reviewed in the discussion paper. In some jurisdictions there has been reform of the general law relating to misrepresentation. For example, the United Kingdom *Misrepresentation Act 1967* has given the courts a discretion to award damages in lieu of rescission<sup>18</sup> and introduced a new remedy of damages for untrue representations made without reasonable belief in their truth.<sup>19</sup> It also dealt with some of the issues reviewed above, abolishing the merger rule and the rule in *Seddon's case* for all contracts,<sup>20</sup> including of course contracts for the sale of goods.<sup>21</sup> Similar reforms have been introduced in South Australia and the Australian Capital Territory.<sup>22</sup>

6.17 As it made clear in the discussion paper,<sup>23</sup> it is not within the Commission's terms of reference to recommend reform of the law of misrepresentation generally.<sup>24</sup> Of more significance, therefore, are those jurisdictions which have dealt specifically with the problem of equitable misrepresentation rules in sale of goods contracts. In the Australian Capital

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<sup>18</sup> S 2(2).

<sup>19</sup> S 2(1).

<sup>20</sup> S 1.

<sup>21</sup> It also introduced the reforms dealt with in paras XXX above.

<sup>22</sup> *Misrepresentation Act 1972* (SA); *Misrepresentation Ordinance 1975* (ACT) (see now *Law Reform (Misrepresentation) Act 1977* (ACT)).

<sup>23</sup> Para 2.47.

<sup>24</sup> In the Commission's report on *Innocent Misrepresentation* (Project No 22, 1973) the three members each took a slightly different approach to the question of reform of the law of misrepresentation generally. No legislative action was taken on the report.

Territory, section 62 of the *Sale of Goods Act 1954*, the equivalent of section 59 of the Western Australian Act, has been amended to provide:

"Nothing in this Act affects, or shall be deemed at any time to have affected, any remedy in equity of the buyer or the seller in respect of a misrepresentation."<sup>25</sup>

This amendment was clearly intended to overcome the effect of the decisions holding that equitable misrepresentation rules did not apply in sale of goods,<sup>26</sup> assuming they were applicable in the Australian Capital Territory. However, it has been pointed out that they may not have achieved that effect.<sup>27</sup> The reasoning in those decisions is that the rules of equity relating to misrepresentation have never applied to contracts for the sale of goods.<sup>28</sup> If this is so, the amendment does not alter the position.

6.18 More recently, a better worded amendment was introduced in New South Wales, adopting the recommendations of the New South Wales Law Reform Commission.<sup>29</sup> In 1988 a sub-section was added to section 4 of the New South Wales *Sale of Goods Act 1923* (the equivalent of the Western Australian section 59) providing:

"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...."<sup>30</sup>

6.19 To be fully effective, a reform which makes it clear that the equitable rules of misrepresentation apply in sale of goods contracts must also address the merger, potency and *Seddon* issues. This the New South Wales amendment does. Section 4(2A) goes on to provide:

"... 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."

A new subsection, section 38(2), was also added to the section dealing with acceptance:

<sup>25</sup> *Sale of Goods Act 1954* (ACT) s 62(1A), inserted by *Sale of Goods Ordinance 1975* (ACT) s 5.

<sup>26</sup> *Riddiford v Warren* (1901) 20 NZLR 572; *Watt v Westhoven* [1933] VLR 458. See para 6.11 above.

<sup>27</sup> J G Starke and others, *Cheshire & Fifoot's Law of Contract* (Sydney: Butterworths, 6th Aust ed, 1992), 366; D W Greig & J L R Davis, *The Law of Contract* (Sydney: Law Book Co, 1987) 880.

<sup>28</sup> See discussion paper on *Equitable Rules* paras 2.7-2.8.

<sup>29</sup> *Sale of Goods: Second Report* (LRC 51, 1987) ch 2.

<sup>30</sup> *Sale of Goods Act 1923* (NSW) s 4(2A), added by *Sale of Goods (Amendment) Act 1988* (NSW) Sch 1(1).

"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."<sup>31</sup>

In the Australian Capital Territory, the merger, potency and *Seddon* issues have been addressed by the general legislation on misrepresentation.<sup>32</sup>

6.20 Unlike the other issues dealt with in earlier chapters of this report, it cannot be argued that the introduction of amendments to sections 59 and 35 along the lines of those now in force in New South Wales will promote the cause of uniformity in sale of goods legislation in Australia. However, two jurisdictions have introduced legislation designed to make it clear that the equitable rules relating to misrepresentation apply to such contracts, and others have dealt with the merger, potency and *Seddon* issues by legislation affecting contracts generally, including sale of goods.<sup>33</sup> In the discussion paper the Commission stated as its tentative view that equitable remedies should be available in contracts for the sale of goods,<sup>34</sup> confirming a view expressed in its earlier report of 1973.<sup>35</sup> Other reports have taken the same view.<sup>36</sup> Legislation implementing this reform will end the uncertainty that presently prevails and bring contracts for the sale of goods much closer to other contracts in this respect.<sup>37</sup>

## 5. RECOMMENDATION

6.21 The Commission recommends that the *Sale of Goods Act 1895* be amended by the insertion of the following provisions:

- (1) in section 59, a provision based on section 4(2A) of the New South Wales *Sale of Goods Act 1923*;
- (2) in section 35, a provision based on section 38(2) of the New South Wales Act.

<sup>31</sup> Added by *Sale of Goods (Amendment) Act 1988* (NSW) Sch 1(4). The equivalent section in the Western Australian *Sale of Goods Act 1895* is s 35.

<sup>32</sup> See para 6.16 above.

<sup>33</sup> *Misrepresentation Act 1967* (UK); *Misrepresentation Act 1972* (SA); *Law Reform (Misrepresentation) Act 1977* (ACT) (see para 6.16 above); *Goods (Sales and Leases) Act 1981* (Vic): see discussion paper para 2.40.

<sup>34</sup> Para 2.48.

<sup>35</sup> Report on *Innocent Misrepresentation* (project No 22, 1973).

<sup>36</sup> See particularly New South Wales Law Reform Commission, *Sale of Goods: Second Report* (LRC 51, 1987), para 2.16; see also Victorian Law Reform Commissioner, *Innocent Misrepresentation* (Report No 7, 1978).

<sup>37</sup> Of the commentators, Professors Carter and Simmonds agreed that legislation should be introduced based on that in New South Wales. Professor Bridge did not express a concluded view. Professor Duggan did not deal with the issue.

## **Chapter 7**

### **SUMMARY OF RECOMMENDATIONS**

#### **Formal requirements for contracts of sale**

The Commission recommends that section 4 of the *Sale of Goods Act 1895* be repealed.

*Paragraph 2.8*

#### **Sales in market overt**

The Commission recommends that section 22 of the *Sale of Goods Act 1985* be repealed.

*Paragraph 3.5*

#### **Passing of property in specific goods**

The Commission recommends that the words "or where the contract is for specific goods, the property in which has passed to the buyer" should be deleted from section 11(3).

*Paragraph 4.9*

#### **Acceptance and examination of goods**

The Commission recommends that section 35 of the *Sale of Goods Act 1895* be amended by insertion of the words "(except where section 34 of this Act otherwise provides)" before the words "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".

*Paragraph 5.7*

#### **Rescission for innocent misrepresentation**

The Commission recommends that the *Sale of Goods Act 1895* be amended by the insertion of the following provisions:

- (1) After section 59(2), the following subsection:

"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."

(2) In section 35, the following new subsection:

"The buyer's acceptance of the goods does not preclude rescission of the contract for an innocent misrepresentation, unless the acts constituting acceptance amount to affirmation of the contract."

*Paragraph 6.21*