ELIGIBILITY FOR CONSUMER CONTRACT PROTECTION UNDER THE TRADE PRACTICES ACT

BY GARY A. RUMBLE*

In this article, Mr Rumble examines the 1977 amendments to the Trade Practices Act's definitions of the words "supply", "corporation" and "consumer" and their relationship to that part of the Act which gives contractual protection to consumers. The definition sections are tested against the policy goals identified by the Swanson Committee and against the general need for simplicity in consumer protection legislation. The verdict is unfavourable. It is demonstrated that the definition sections have some anomalous results. Mr Rumble argues, further, that the definition sections are a quag of ambiguity and specific areas of uncertainty are discussed to illustrate this argument.

Mr Rumble suggests that contract protection be taken out of the Trade Practices Act and incorporated in its own legislative framework.

It is well known that the Commonwealth legislation on the distinct topics of restrictive trade practices and consumer protection is contained in the one Act—the Trade Practices Act 1974.[1] It seems that at least some of the consumer protection provisions do not quite fit this legislative framework and have suffered accordingly.

Consumer protection which is dealt with by Part V has, in turn, two different aspects. Division 1 of Part V is concerned with "Unfair Practices" and Division 2 with "Conditions and Warranties in Consumer Transactions". In this article I merely wish to comment on the three most important things which must be present before Division 2 of Part V will operate to imply terms into a transaction. There must be a *supply* by a *corporation* to a *consumer*.

Before discussing the definitions of these words offered by the Act it is necessary to review the basic functions of Division 2. The Swanson Committee expressed the *policy* underlying the provisions thus—

> In our view one important function of the consumer protection provisions of the Act is to redress, between supplier and customer inequalities in the technical expertise required to recognise, and, the bargaining power to negotiate, a fair bargain. . . .[2]

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[1] As amended by Nos 63 and 56, 1975; Nos 88 and 157, 1976; Nos 81, 111 and 151, 1977. For the 1978 amendment see p. 481 *infra*.

[2] Trade Practices Act Review Committee Report to the Minister for Business and Consumer Affairs, August 1976 para. 9.40. The Review Committee consisted of Mr T. B. Swanson (Chairman)—formerly Deputy Chairman of I.C.I. and formerly Chairman, Commission on Advanced Education; Mr J. A. Davidson—Managing Director, C.I.G.; Mr A. G. Hartnell—Senior Assistant Secretary, Depart-

The *method* used in Division 2 to redress inequalities in bargaining positions is to provide, in section 68, that attempts to contract out of the terms implied by Division 2 shall be of no effect. In November 1977[3] section 68A was added to allow suppliers to certain consumers to limit the amount of damages recoverable for breach—

> (1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by section 69) to—
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> (a) in the case of goods, any one or more of the following:
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> (i) the replacement of the goods or the supply of equivalent goods;
>
> (ii) the repair of the goods;
>
> (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
>
> (iv) the payment of the cost of having the goods repaired; or
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> (b) in the case of services—
>
> (i) the supplying of the services again; or
>
> (ii) the payment of the cost of having the services supplied again.
>
> (2) Sub-section (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.
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> (3) In determining for the purposes of sub-section (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters:
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> (a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this sub-section referred to as 'the buyer') relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;

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ment of Business and Consumer Affairs; Professor A. Kerr—Professor of Economics, Murdoch University, Perth, formerly Chairman of the Consumer Affairs Council of Western Australia; Mr H. S. Schreiber—Solicitor, Sydney. Para. 1.3. It is to be noticed that small business was not directly represented *on* the Committee though representative bodies were of course consulted. Paras 1.6-1.11.

[3] Trade Practices Amendment Act (No. 2) 1977. The amendment came into operation on 10 November 1977. It does not seem to protect suppliers against the doctrine of the *Harbutt's Plasticine* case [1970] 1 Q.B. 447.

(b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and

(d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

Subject to that important qualification, the result in economic terms is that certain losses otherwise suffered by customers are transferred to suppliers.

The function of the definition sections in this context is to provide a "scale of relative bargaining power"[4] to prescribe which customers shall receive the benefit of section 68 and which suppliers suffer its detriment. The groups said by the Swanson Committee[5] and the Government[6] to be *deserving* of protection are "consumers" and "small businessmen".

It also seems necessary to state a typical characteristic of consumer transactions. If a consumer, disappointed with the outcome of a transaction, finds himself confronted with uncertainty as to his rights and the resolution of that uncertainty will be expensive in terms of legal costs and delay, he has a strong inducement to cut his losses by forfeiting his rights. This applies equally to small businessmen. As individuals they have no corporate interest in "buying" expensive precedents for the organisation of their businesses.

From the supplier's point of view uncertainty is hardly an asset. Sections 70-72 and 74, which imply terms as to correspondence with description, merchantable quality, fitness for purpose, correspondence with sample and standards of care and skill, only apply to contracts of supply "in the course of a business". Suppliers will find it difficult to organise their businesses if there is a state of confusion as to their liabilities. In short, clarity is desirable.

Judging the definition sections in the light of these considerations—the need for a scheme which redresses the disadvantaged bargaining position of consumers and small businessmen, and the need for clarity —the sections seem doomed to failure.

The difficult problem of constructing a scale of bargaining positions has been either forgotten or put aside as too difficult to solve in the

[4] Palmer and Rose, "Implied Terms in Consumer Transactions: The Australian Approach" (1977) 26 International and Comparative Law Quarterly 169, 180.

[5] *Op. cit.* paras 9.39, 9.40.

[6] H.R. Deb. 1976, Vol. 102, 3533.

short time available to the draughtsmen charged with implementing the generalities of the Swanson Committee Report. The definition sections, although reflecting some idea of "consumer", fail to reflect any idea of what a "small businessman" is.

A more insidious defect is the wordiness, complexity and ambiguity which permeates the legislation. It is not sufficient to give "consumers" and "small businessmen" rights. A practically unascertainable right is practically unenforceable and therefore is no right at all.

The uncertainty cannot be excused by saying Legal Aid is available to those who deserve help in ascertaining their rights. First, such aid is presently only available to a very narrow group and it will be a long time before the group eligible to receive it is coextensive with the group judged eligible for consumer protection. Secondly, from society's point of view it is quite irrational to have a system of loss allocation where the costs involved in the system are disproportionately large when compared to the typical amounts in dispute.

Nor can the uncertainty be excused by pointing to the alternative available of State consumer claims tribunals offering informal, pragmatic, untechnical arbitrations according to what seems fair and equitable.[7] First, the groups to whom such tribunals are available[8] and the money limits[9] on their jurisdictions are not coextensive with the scope of the Trade Practices Act. Secondly, any proceeding, no matter how informal, is going to mean increased delay. And delay inevitably deprives the customer of any right to reject the contract as his ability to give restitution fades away.

Let us look now to the definitions to illustrate these criticisms.

Supply

> Section 4(1) contains the following definition—
> In this Act, unless the contrary intention appears—"supply", when used as a verb, includes—
> (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
> (b) in relation to services—provide, grant or confer,
> and, when used as a noun, has a corresponding meaning, and "supplied" and "supplier" have corresponding meanings;

On 1 July 1977 the following additional provisions came into operation:[10]

> 4(1) In this Act, unless the contrary intention appears—"acquire" includes—

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[7] *E.g.* in New South Wales, Consumer Claims Tribunals Act 1974.

[8] Compare Consumer Claims Tribunals Act 1974 (N.S.W.), s. 4(1) with Trade Practices Act 1974, ss. 4, 4A, 4B, 6.

[9] *E.g.* Consumer Claims Tribunals Act 1974 (N.S.W.), s. 26.

[10] Trade Practices Amendment Act (No. 1) 1977.

(a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and

(b) in relation to services—accept;

Also added was a new section, section 4C:

In this Act, unless the contrary intention appears—

(a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;

(b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;

(c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both;

(d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both; and

(e) a reference to the re-supply of goods acquired from a person includes a reference to—

(i) a supply of the goods to another person in an altered form or condition; and

(ii) a supply to another person of goods in which the first-mentioned goods have been incorporated.

It seems that "acquire" and "supply/re-supply" are intended to be interdependent terms.[11] There are basic questions arising out of the definition. Is the definition intended to be exhaustive? The word "include" is not necessarily inconsistent with that intention.[12] If the listed transactions are not exhaustive is it implied at least that only a "supply" pursuant to a contract is within the definition? Remember that Division 2 only purports to imply terms into, not to create, contracts. But remember also that the word "supply" is also used in the trade practices part of the Act (*e.g.* section 47), and its scope may be affected by that consideration.

Unless it is implied that "supply" means "supply pursuant to a contract", then a householder buying food or clothes for the members of the household would be excluded from the definition of consumer as such an acquisition would be "for the purpose of re-supply". Even if "contract" is implied, this could leave a householder acquiring food for

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[11] For a discussion of the word "supply" in other statutory contexts see *Andaloro* v. *Wyong Co-operative Dairy Society Ltd* (1965) 66 S.R. (N.S.W.) 466, especially at 479, and at (1966) 119 C.L.R. 278 in the High Court. Also *Commonwealth* v. *Sterling Nicholas Duty Free Pty Ltd* (1972) 126 C.L.R. 297, especially at 309 *per* Menzies J. and 314 *per* Windeyer J.

[12] *Dilworth* v. *Commissioner of Stamps* [1899] A.C. 99, 106; *Lamont* v. *Commissioner for Railways* (1963) 80 W.N. (N.S.W.) 1242; *Y.Z. Finance Co. Pty Ltd* v. *Cummings* (1964) 109 C.L.R. 395.

a boarder ineligible, unless a further element can be implied that the supply be in a business context. Against such a further implication is the strong argument that those parts of Division 2 which should be restricted to a business context expressly make it a requirement that the supply be in the course of a business. Section 69, which relates to title, should *not* be limited to business dealings and should not have any such limitation introduced as part of the definition of supply.

Another basic question is complicated by federalism. What do the words "sale, exchange, lease, hire or hire-purchase" mean where used in section 4(1)? Do the words take their meanings from their "generally accepted meanings"[13] or do the meanings depend on any definitions in the proper law of the contract which might vary from State to State? This may also be a problem under section 73, which distinguishes leases, hires and hire-purchases from other acquisitions and section 4B(2)(d), which distinguishes purchases from other acquisitions.

Corporation

Division 2 only applies if the supplier is a corporation. Corporation is defined thus in section 4(1):

> "corporation" means a body corporate that—
> (a) is a foreign corporation;
> (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
> (c) is incorporated in a Territory; or
> (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c);

Section 4(1) defines the phrases "foreign corporation", "trading corporation", and "financial corporation" mainly by attributing to those phrases the meanings they have in section 51(xx) of the Constitution (corporations power). Also included, however, are corporations incorporated in external territories (a provision probably looking to section 51(xxix) (external affairs power) and/or section 122 (Territories power)) and certain banking corporations, in apparent reliance on section 51(xiii) (banking power).

"Territory" is defined by section 4(1) to mean internal territory. "Holding company" is defined by section 4A (inserted in July 1977),[14] a section a page and a half long. Obviously it will not always be easy to say whether a corporation comes within any of these definitions.[15] There will also be nice questions of agency involved in determining whether a particular contract of supply has been made with the

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[13] *Sterling Nicholas Duty Free Pty Ltd* v. *Commonwealth* [1971] 1 N.S.W.L.R. 353, 358 *per* Hope J. interpreting "sell" in the Airports (Business Concessions) Act 1959 (Cth). Does hire purchase have a generally accepted meaning?

[14] Trade Practices Amendment Act (No. 1) 1977.

[15] Evans, "The Constitutional Validity and Scope of the Trade Practices Act 1974" (1975) 49 A.L.J. 654.

corporation, albeit through its agents or with its "agent", as an independent contractor to the exclusion of the corporation.[16]

The situation is further complicated by section 6 which, over a page and a half, seeks both to give the Act an extended operation by reference to other Commonwealth heads of power, and to provide a list of powers so that the High Court can read the Act down if it decides that the corporations power has been exceeded. The extension most significant here is the combination of sections 6(2)(c) and 6(2)(h) which makes Division 2 applicable where the supplier is a person not being a corporation if the contract of supply is made in the course of, or in relation to trade or commerce between Australia and places outside Australia, among the States, within a Territory or between a State and Territory or between two Territories.[17]

This complexity is obviously attributable to federalism. And as far as the restrictive trade practices and unfair practices aspects of the Act are concerned the complexity is unavoidable. Those parts of the Act are concerned to prevent certain kinds of conduct. Because it is the conduct itself which is aimed at, and because the policy is so vulnerable to being frustrated by informal arrangements, the function of the definition sections in relation to the restrictive trade practices and unfair practices provisions is to bring as much of the conduct within the Act as is (constitutionally) possible regardless of the status of the parties.

The definition sections have a different function in relation to Division 2 of Part V. Here the status of the parties is a central concern. To define "supplier" by reference to the constitutional corporations power is to provide a factor with some correlation to relative bargaining power. The additional heads of power relied on, however, have obviously been selected without regard to relative bargaining position. Take the example given above of "corporation" meaning "person" where the contract is made in a Territory. Obviously the fact that the contract occurs in a Territory provides no link with relative bargaining position. This criticism will not be so important if the definition of "consumer" adequately reflects relative bargaining position.

Consumer

There is a wide range of factors which could be used to determine the acquirer's eligibility for protection. Here are some examples.

1. Status of the acquirer
   — either absolutely or relative to the supplier's status
   — social background (education, age, class)

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[16] *Cf. International Harvester Company Australia Pty Ltd* v. *Corrigan's Hazeldene Pastoral Co.* (1958) 100 C.L.R. 644.

[17] Generally, Evans, *op. cit.*; Goldring, "Consumer Protection and the Trade Practices Act 1974-1975 (Cth)" (1975) 6 F.L. Rev. 287.

— natural person or corporate body
— occupation
— financial position.

2. Objective nature of the goods or services
— predominant, ordinary or common use
— consumer/industrial/commercial.

3. Acquirer's purpose
— actual, stated or apparent
— dominant, significant
— own use, re-supply.

4. Scale of the transaction
— amount payable under the contract
— previous/potential dealings between supplier/acquirer.

Some of these factors are conceptually imprecise. Some are more easily ascertained by the supplier than others. Some bear a stronger relationship to relative bargaining position than others. The drafting problem is to choose a factor or factors which either as alternatives or as cumulative requirements achieve a balance between the goals of redressing inequalities of bargaining position and of providing a certain and simple system which allows acquirers to ascertain their eligibility easily and allows suppliers to organise their businesses.

On 1 July 1977 the old definition of consumer was replaced by a new definition as a result of, and in accordance with, the Swanson Committee recommendations.[18] The new definition was amended in November 1977.[19] It should be borne in mind that under either the old or the new definitions it seems that a corporation could be a consumer given the oblique section 4(5):

> The express references in this Act to corporations and bodies corporate shall not be taken to imply that references to persons do not also include references to persons who are not natural persons

which, in 1976,[20] replaced the original

> 4.(1) In this Act, unless the contrary intention appears—"person" includes a body corporate, whether a corporation or not, as well as a natural person;

The only doubt is that both the old and new definitions of *consumer* are introduced by the words

> For the purposes of this Act, unless the contrary intention appears—

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[18] Trade Practices Amendment Act (No. 1) 1977.
[19] Trade Practices Amendment Act (No. 2) 1977.
[20] Trade Practices Amendment Act 1976.

It may be that some argument based on general ideas as to what "consumer" means, could be used to exclude a corporation otherwise qualifying for protection.

When discussing the old definition of "consumer" Stephen J. made these general observations:

> A consumer, in the traditional vocabulary of political economy, is the opposite of a producer—*Oxford English Dictionary*—and, although the description is commonly applied to one who uses up substances so as to result in their destruction, whether by eating them, burning them, wearing them away or the like, modern usage has extended its meaning to include those who make use of services—*Oxford English Dictionary Supplement* (1972). The Act has adopted this wider usage: . . . .[21]

Repealed Definition of Consumer of Services

The definition of consumer in relation to the acquisition of services used to be as follows:

> 4.(3) For the purposes of this Act, unless the contrary intention appears—
>
> (b) a person who acquires services shall be taken to be a consumer of the services if the services are of a kind ordinarily acquired for private use or consumption and the person does not acquire the services for the purposes of, or in the course of, a profession, business, trade or occupation or for a public purpose.

This definition was quite clear in structure. It chose two factors and made both of them necessary qualifications for Division 2 protection. The first factor was the objective nature of the services—were they consumer services? The second factor was the purpose of acquisition—was there a purpose of private use?[22]

Such a definition of course had the conceptual imprecision inherent in notions such as the objective nature of the services and purpose, but was otherwise simple. Its relationship to bargaining position was clear but restrictive. The double barrelled consumer test operated to exclude both some acquisitions for private use and all acquisitions for non-private use. Even this restrictive definition would allow some acquirers in a strong bargaining position to squeeze through as the section gave no consideration to the amount of money involved.

The definition was obviously favourable to suppliers. Not only was the group of protected acquirers narrow, but the outer limit of the group was set by the objective nature of the services. Thus suppliers

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[21] *Hornsby Building Information Centre Pty Ltd* v. *Sydney Building Information Centre Ltd* (1978) 18 A.L.R. 639, 643-644.

[22] On "private use" see Harland, "Consumer Protection, Implied Contractual Terms and Exclusion Clauses" (1976) 14 Law Society Journal 219.

could organise their businesses according to the objective nature of the services which it was their business to supply rather than according to less stable factors such as the purpose of the particular acquirer.

Repealed Definition of Consumer of Goods

The definition of a consumer of goods used to be as follows:

> 4.(3) For the purposes of this Act, unless the contrary intention appears—
>
> (a) a person who acquires goods shall be taken to be a consumer of the goods if the goods are of a kind ordinarily acquired for private use or consumption and the person does not acquire the goods or hold himself out as acquiring the goods for the purposes of re-supply;

As in section 4(3)(b) the objective nature was a factor—were the goods consumer goods? However, the second test, the acquirer's purpose, was not as restrictive as the purpose considered under section 4(3)(b). Section 4(3)(a) excluded not all acquisitions for non-private use, but only those acquisitions for re-supply.

Perhaps the rationale for choosing a purpose of re-supply was that people in the business of re-supplying certain kinds of goods can be expected to have certain skills in assessing the quality of such goods. Any such consideration would, however, be given adequate weight in the substantive provisions of Division 2. Care must be taken not to confuse ability to assess quality with ability to negotiate equal bargains.

The strange thing about the operation of the repealed definition is that it apparently gave some protection to small businessmen who had not then been invented. Acquisitions of any of the following goods—fuel, light bulbs, production inputs (perhaps),[23] vehicles, tyres, tools, machinery, food and clothing for workers, paint, building materials *etc.* —if "of a kind ordinarily acquired for private use or consumption" were within the definition so long as the goods were not being acquired for the "purposes of re-supply". Any protection, however, was equally available to large businessmen. Largeness or smallness was not a factor to be considered.

The objective nature of goods test which operated to exclude some acquisitions for private use could be defended on the grounds of certainty. On the other hand the purpose of re-supply test which operated to exclude some acquisitions for non-private use and to admit others had no link with relative bargaining position and no justification in terms of certainty.

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[23] For example, a baker's acquisitions of flour and yeast were acquisitions of goods of a kind ordinarily acquired for private use. It might have been argued that the baker was a protected consumer as his purpose was not one of re-supply. His purpose was to sell bread, not flour and yeast.

Swanson Committee Recommendations[24]

The Swanson Committee made the following comment on the old definition:

> 9.42 The Committee believes that the present test of a "consumer" has been rightly criticised on three grounds:
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> — that it is insufficiently sensitive to the inequalities that occur in commercial transactions not involving "consumer goods" in a narrow sense . . .,
>
> — that it has inherent uncertainties, and
>
> — that it makes an illogical distinction between the test in relation to goods and that in relation to services.
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> The uncertainty mentioned above flows from the meaning of the word "private", used in the present Act, as to which the Committee has been given at least three possible alternative interpretations. The illogical distinction between "goods" and "services" is that the latter excludes acquisitions for the purposes of, or in the course of, a profession, business, trade or occupation, or for a public purpose, whilst acquisitions of the former do not have to meet that test.

The Committee considered that—

> 9.43 . . . the best approach to the definition of consumer should be primarily by reference to the price paid by the consumer for the goods or services. . . .

The Committee recommended, in the same paragraph, that a limit of $15,000 be set subject to being raised by regulation. The Committee went on—

> 9.44 But there are some transactions which will inevitably be above the monetary limit, which would be encompassed by the present definition and should continue to be encompassed—in the interests of the non-commercial consumer. A contract for the construction of a family home is one example. For this reason, the Committee considers that a further category should be added to the definition of "consumer", where the transaction relates to goods or services priced over $15,000. That category would include all acquisitions of goods or services of a kind ordinarily obtained for *person [sic], domestic or household uses*, a category which, the Committee considers, would have limited application above $15,000. We recognise that the boundaries of such a category are not wholly certain, but believe that in practice that uncertainty is likely to affect only a limited number of cases.

If the Committee had stopped at that point the factors chosen, which have some relationship to relative bargaining position, would have been combined in a relatively simple structure. The Committee, however, went on to add some further requirements in relation to acquisitions of goods:

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[24] *Supra* n. 2.

> 9.45 ... First, the Committee would continue the present exclusion of acquisitions of goods for the purpose of re-supply. Secondly, we consider that there should be a general exclusion for goods acquired for the purpose of being used up or transformed in a commercial process of production as an input into the repair, treatment or processing of goods, or of fixtures on land.

The Act was amended substantially in accordance with the Committee's recommendations.[25]

Current Definition of Consumer of Services

The definition of consumer of services now stands in this form:[26]

> 4B.(1) For the purposes of this Act, unless the contrary intention appears—
>
> (b) a person shall be taken to have acquired particular services as a consumer if, and only if—
>
> (i) the price of the services did not exceed the prescribed amount; or
>
> (ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Tested against the criterion of redressing bargaining inequalities, the legislature was perhaps too generous in protecting all acquirers up to the price limit. If a further alternative factor reflecting the smallness or largeness of the acquirer's business had been added, the definition would not have engendered the fear of liability[27] for disruption of large businesses which eventually resulted in section 68A.

Current Definition of Consumer of Goods

> 4B.(1) For the purposes of this Act, unless the contrary intention appears—
>
> (a) a person shall be taken to have acquired particular goods as a consumer if, and only if—
>
> (i) the price of the goods did not exceed the prescribed amount; or
>
> (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption,
>
> and the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade

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[25] Trade Practices Amendment Act (No. 1) 1977; Trade Practices Amendment Act (No. 2) 1977.

[26] This is the July 1977 version as amended slightly in November 1977 to take account of the substantial revision of the definition of "price" in s. 4B(2) discussed below.

[27] H.R. Deb. 1977, Vol. 107, 3038.

> or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land;

The comments offered above on "purpose of re-supply" in the old definition apply equally here. It seems quite anomalous to exclude all acquisitions for re-supply. The second exclusion of goods for those particular purposes listed seems to be an extension of the notion of re-supply and is equally hard to reconcile with the stated policy of redressing inequalities of bargaining power.

Above the price limit the group protected is clearly narrower than under the old definition. Not only are the old definition's requirements of objective nature of the goods and absence of purpose of re-supply retained, there is the further test of the absence of the further listed purposes.

Below the price limit what was gained on the swings was lost on the roundabout. Although the requirement that the goods be of a kind ordinarily acquired for private use is taken away, another requirement, the absence of those purposes listed above, is added to the absence of purpose of re-supply. Thus, for example, acquisitions of non-consumer machinery previously excluded are now included in the protection if below the price limit. On the other hand, some of those acquisitions of fuel previously protected as being acquisitions of goods of a kind ordinarily acquired for private use, are now excluded as being acquired for the purpose, for example, of being used up in a manufacturing process.[28]

The Swanson Committee thought it anomalous that under the old definition it was easier to qualify as a consumer of goods than as a consumer of services.[29] The situation is now reversed in that it is now harder to qualify as a consumer of goods than as a consumer of services. The consumer of services need not feel too joyful as section 74(3) contains a restrictive definition of services.

The fundamental failing of section 4B(1)(a) is, however, that the structure exacerbates the uncertainty introduced by the Swanson Committee's combination of imprecise factors. Consider the last part of section 4B(1)(a), which applies to all acquisitions regardless of price, as if it were subdivided in this way:

> and the person (a) did not acquire the goods, (b) or hold himself out as acquiring the goods, (c) for the purpose of re-supply, (d) or for the purpose (e) of using them up (f) or transforming them, (g) in trade or commerce, (h) in the course of a process (j) of production or manufacture (k) or of repairing or treating (1) other goods (m) or fixtures (n) on land;

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[28] *Cf.* The baker example *supra* n. 23.
[29] *Supra* p. 467.

Even approaching this part of the definition with all good will, it is at best difficult to understand and at worst ambiguous. Does it mean that the acquirer is ineligible if one of the following combinations is present:

(a) or (b)
AND
EITHER (d)
plus (e) or (f)
plus (g)
plus (h)
plus (j) or (k)
plus (l) or (m)
plus (n)
OR (c)?

Or does this paragraph mean that the acquirer is ineligible if one of the following combinations is present:

(a) or (b)
AND
EITHER (d)
plus (e) or (f)
plus (g)
plus (h)
plus (j)
OR (d)
plus (k)
plus (l) or (m) (with (n) included in (m) as surplusage)
OR (c)?

The alternatives grammatically possible are endless. Does (k) "*of* repairing or treating" relate back to (d) "for the purpose" or to (h) "in the course of a process". If it is the former, then not only acquisitions of production equipment but even householders' acquisitions of hammers, paint brushes, drying cabinets, cooking utensils and washing machines are ineligible for protection because they are acquisitions (d) for the purpose (k) of repairing or treating (1) other goods (m) or fixtures (n) on land. In support of this construction it could be pointed out that "acquire" is not confined to "purchase" and that other types of acquirers—hirers, lessees, hire-purchasers[30]—would not be entitled to use up or transform the goods.

Against such a construction it might be argued that (d)'s purpose is only to supplement (c) "re-supply" and therefore what follows (c) is only concerned with acquisitions for the purpose of using up/transforming the goods in trade or commerce.

Does (c) for the purpose of re-supply stand alone or does it only disentitle an acquirer if combined with (g) trade or commerce or (h) in the course of a process?

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[30] Discussion of supply/acquire *supra* pp. 460-461.

What effect does the constitutional background have? In particular what effect should be given to the established doctrine that "production and manufacture" are not included within "trade and commerce" where the phrase appears in the Constitution?[31] This could be the basis for an application of *reddendo singula singulis* so that the acquirer would be excluded if

(a) or (b)

AND

EITHER (c)
plus (g)

OR (d)
plus (e) or (f)
plus (h)
plus (j) or (k)
plus (l) or (m).

It must be emphasised that this part of section 4B(1) applies to exclude from protection regardless of the price of the contract. Ambiguities in the *structure* of the factors disentitling acquirers could have been avoided but only at the cost of grotesque drafting. Such a solution would have highlighted the extraordinarily high number of factors thought relevant. As mentioned above, the factors themselves are inherently conceptually imprecise. A few examples are now discussed.

Re-supply/Using up/Transforming

Depending on what meaning is given to "supply" and depending on how the structure of section 4B(1) is understood, it may be necessary to ascertain whether a particular dealing with goods amounts to a re-supply on the one hand or a using up or transforming on the other.

Section 4C(e) provides that—

> a reference to the re-supply of goods acquired from a person includes a reference to—
>
> (i) a supply of the goods to another person in an altered form or condition; and
>
> (ii) a supply to another person of goods in which the first-mentioned goods have been incorporated.

Are all processes whereby the atoms, which made up "the goods", appear in other goods, to be classified as merely an "alteration of form or condition"? Or is some point reached when the chemical re-arrangement of the goods is of such a degree that the process is classified as a using up or transforming of the goods? How much of the goods have to be incorporated in other goods for section 4C(e)(ii) to apply?

A separate question is that surrounding section 4B(1)'s apparent attempted distinction between capital equipment and productive inputs,

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[31] *Grannall* v. *Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55.

the former being protected and the latter being excluded. If equipment is acquired for the purpose of being used to the point of exhaustion and then being scrapped, is that an acquisition for the purpose of using the goods up? Are goods such as rubber hoses, car tyres, light bulbs and washers which are known to have a limited life excluded when acquired for use on productive equipment because in their very nature they will be "used up" even though they will not be in any sense present in the finished goods? This is an area fraught with difficulty. Whichever way the fine points are resolved there will be anomalous results. Again it is emphasised that this test applies to all acquisitions regardless of price.

Time for Determining Status of Acquirer

Section 4B on its face is concerned with the acquirer's status at the time of performance. The section speaks of when "a person shall be taken *to have acquired*" as a consumer, but it would be contrary to usual principles of contract to imply a term into the contract *after* it was formed. What is the effect of the following subsection:

> 4C. In this Act, unless the contrary intention appears—
>
> (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;

Section 4C(b) apparently only enables a reference to supply/acquisition to be *expanded* by inclusion of a reference to agreeing to supply/acquire and does not enable a reference to supply/acquisition to be *read down* to agreeing to supply/acquire. It may be that the acquirer has to be a consumer both at the time of contract and at the time of performance.

Purpose

This is clearly related to the previous question. It is easy to imagine examples of acquirers changing their purpose between the time of contracting and performance. What of the person who merely wishes to make what seems to be a good bargain and has not given any consideration at the time of acquisition to the question of whether he will re-supply or retain the goods? Do we attribute to him the purpose of ultimately re-supplying?

Another problem is the acquisition for a range of purposes. Do we look to the dominant purpose? Or is it sufficient if such purpose is substantial or significant or merely present in some degree? Section 4F(b) looks to the question of when—

> a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason.[32]

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[32] 4F.(b): "a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if—

It is quite likely, however, that that section is not available to clarify section 4B, but is only directed to other aspects of the Act concerned with controlling conduct as against implying terms into contracts.

Price and the Goods/Services

After the new definition commenced on 1 July 1977 it became apparent that the Act's definition of "price" in section 4B(2) was really only adapted to purchases. In November[33] a substantial revision was inserted and the provisions now stand as follows—

4B.(2) For the purposes of sub-section (1)—

(a) the prescribed amount is $15,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;

(b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;

(c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been—

(i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services —the value of the goods or services at that time;

(d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been—

(i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason."

[33] Trade Practices Amendment Act (No. 2) 1977.

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and

(e) without limiting by implication the meaning of the expression "services" in sub-section 4(1), the obtaining of credit by a person in connexion with the acquisition of goods or services by him shall be deemed to be the acquisition by him of a service and any amount by which the amount paid or payable by him for the goods or services is increased by reason of his so obtaining credit shall be deemed to be paid or payable by him for that service.

Section 4B(2) contains a strange use of the word "purchase". Where that word is used in the section 4(1) definition of "acquire", it seems to be the complement of the word "sale" in the definition of "supply". "Sale" usually means a transfer of property for an agreed price. It is strange, therefore, that section 4B(2) speaks of purchases of services.[34] We cannot say that "purchase" here merely means acquiring goods or services because section 4B(2)(d) speaks of "acquiring goods or services otherwise than by way of purchase". Perhaps the solution is to give "purchase" one meaning in relation to acquisitions of goods and another in relation to acquisitions of services. In relation to goods, the word could be given its usual meaning, the complement of "sale", and this would clearly exclude acquisitions by "exchange, lease, hire", but would leave us with the question of how to classify "hire-purchase" arrangements.[35] In relation to services, "purchase" may mean acquisitions for an agreed amount of money.

Section 4B(2)(b)

Section 4B(2)(b) still leaves a few questions. How is the paragraph to be applied to a situation where in one indivisible contract goods or services are to be supplied and paid for at a certain rate but the amount to be supplied is at the option of either receiver or supplier or is for

[34] *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, 234 *per* Latham C.J.; *Commonwealth* v. *Sterling Nicholas Duty Free Pty Ltd* (1972) 126 C.L.R. 297, 313-314 *per* Windeyer J.

[35] *Cf. Lee* v. *Butler* [1893] 2 Q.B. 318; *Helby* v. *Matthews* [1895] A.C. 471.

any other reason unknown at the outset? (For example, a contract to buy all the Y goods in a warehouse at $X each). This is entwined with the question of when the status of the acquirer is assessed.

Section 4B(2)(b) presumably applies where goods and services are purchased together with other property or services and a specified price *is* allocated to the goods or services but nothing expressly requires the price allocated to be a genuine estimate.

Section 4B(2)(c)

Section 4B(2)(c) makes an attempt to divide "the contract" which is very hard to relate to the substantive provisions. The substantive provisions seem to assume that a contract may be regarded as one for the supply of goods or as one for the supply of services with materials but cannot be regarded as having both characters. That is to say, it seems that the "materials" supplied in connection with services referred to by section 74 are not to be regarded as "goods" for the purposes of sections 69-72. One is led to this conclusion by the fact that section 71 and section 74 imply different standards of fitness for purpose. Thus the Trade Practices Act seems to have indirectly incorporated something analogous to the Sale of Goods Acts' distinction between the mutually exclusive contract for work and materials and contract for the sale of goods.[36] Section 4B(1) seems to reinforce this reasoning by having two definitions of consumer, one in relation to acquisitions of goods and one in relation to acquisitions of services.

Section 4B(2)(c) cuts across this reconciliation of section 71 and section 74 by proceeding on the assumption that *a* contract can be at one and the same time a contract for the "purchase" of goods and a contract for the purchase of services and then proceeds to lay down procedures for attributing values to these different components of the one contract. There is no direct mention of "materials" unless they are to be included in "other property".

Even without this question of section 4B(2)(c)'s relationship to the other parts of the Act, it is very difficult to attribute a meaning to the provisions. Does "other property" mean property other than "goods" (defined in section 4(1)) or, more probably, any kind of property including goods, other than "the goods"? And if the latter meaning, how are we to differentiate "the goods" from "the other" goods, "the services" from other services purchased under *the* contract?

If a person buys two cars and a truck do we find two prices—one for the two cars and one for the truck—or three prices—one for each vehicle—or an infinity of prices—one price for each chattel such as tyres, seat covers, seat belts, radio, pistons, nuts and bolts which make up each vehicle? Is a purchase of twenty dozen assorted bottles of wine

[36] Palmer and Rose, *op. cit.*

to be regarded as a situation where there is only one "price" or do we have to allocate a price to each bottle? Is a contract to strip and repaint a building a situation where we must allocate one price to stripping, another to repainting, another to the paint and yet another to the putty?

No guidance is given as to what the difference is between the situation dealt with in section 4B(2)(c)(i) where the goods or services "could have" been purchased from the supplier and that in section 4B(2)(c)(ii) where the goods/services were "not available for purchase". The most we can say is that they are mutually exclusive situations.

It really is just too absurd to get involved in this notional apportionment of price and requirement for inquiries into "value", and "availability". If we are concerned with relative bargaining positions then the total amount payable under the contract is surely more readily available as an indicator (remembering the section speaks of *the* contract). Admittedly this would narrow the range of acquirers entitled to the protection of the legislation.

Section 4B(2)(d)

This paragraph shares section 4B(2)(c)'s vague factors—"*could have* purchased", "*not available* for purchase", "*value*" and is subject to the same comments. Another problem central to section 4B(2)(d) is that already mentioned—the meaning of "purchase".

The fundamental flaw of section 4B(2)(d) is, however, its conflict with the principle of redressing bargaining inequalities. Although the inquiry may be relevant in exchange situations, what possible relevance to bargaining position does the purchase price or value of the goods have in a lease or hire situation? If the hire charge is only, say, $200 why should the acquirer be excluded by a factor not directly involved in the bargain such as the value of the goods?

Of course, any attempt to define "price" of a leasing or hiring contract by reference to the rent payable would run into the difficulty that the rent is a function of the length of the hire or lease and this cannot necessarily be determined at the outset. If the lease/hire is for a definite period an alternative would be to look to the amount payable. If the lease/hire is for an indefinite period and the acquirer's obligation is to pay at a certain rate according to the length of the lease/hire then the test could be the greatest amount payable for any one month's lease/hire. Such a test would not only reflect bargaining position, it would also allow eligibility to be determined easily by reference to the contract instead of by reference to the current nebulous "reasonable price", "value" *etc.*

Section 4B(2)(e)

It should be emphasised that although section 4B(2)(e) talks about

the provision of credit as a service, section 74 in Division 2 of Part V does not imply terms into such contracts.[37]

In fairness to the draughtsmen it should be pointed out that the November amendment was hurried through by Parliament at the end of the session.

Summary

The above lengthy discussion may not be thought very constructive. I have not followed the ambiguities through to a resolution nor suggested any clear principles by which the ambiguities can be resolved. Any half-baked lawyer can raise questions. It takes skill to answer questions.

That of course is the whole point. It would be a brave legal adviser who advised a client apparently protected by Division 2 of Part V of the Trade Practices Act to go to court. My advice at the present would be to keep well away from that part of the Trade Practices Act unless the client was prepared to run the risk of lengthy litigation to resolve fine points. If on the other hand my client were already in a strong bargaining position, then this ability to threaten his supplier with protracted court proceedings would strengthen his position further.

A lot of work has to be done. It is incredible to look at the Act and find that before we can even get to the content of the protection in Division 2 of Part V we must read through two pages defining "consumer", three and a half pages defining "corporation" and one page defining "supply". Even if this wordiness had the effect of removing all uncertainty it would be open to criticism for its length alone in consumer contract legislation.

The length, however, is not a function of watertight drafting. At various stages in the above discussion, different problems raised have been referred to—the extent of Commonwealth constitutional power, choice of law in Federal jurisdiction, conceptual uncertainty inherent in the factors used and ambiguity in the structure of the definitions. Again it must be emphasised these are all problems which have arisen at the first step of determining eligibility for the protection of Division 2 of Part V.

Recommendations

Any revamp will have to be co-ordinated with any manufacturers'

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[37] 74.(3): "In this section, 'services' means services by way of—
(a) the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or of fixtures on land;
(b) the alteration of the physical state of land; or
(c) the transportation of goods otherwise than for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported."
"Similarly, when a banker 'deals in credit' he makes loan contracts and does not sell anything." *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, 234 *per* Latham C.J.

warranty legislation which materialises.[38] It would be advantageous to take consumer contracts out of the Trade Practices Act and to combine manufacturers' warranty and consumer contract legislation, both being concerned with contractual remedies, in the one framework.

Division 2 of Part V does not use the enforcement provisions shared by the restrictive trade practices and unfair practices components of the Act. It is undoubtedly true that all the social problems aimed at by the Trade Practices Act share a common cause in the "bigness" of some business organisations. This of itself does not justify the attempt to squeeze their remedies into the one framework. The legislation does not treat "bigness" as itself a problem to be remedied. Restrictive trade practices, unfair practices and unequal bargaining positions are separate social problems. Under the current arrangement the last topic seems to be the poor relation.

Supply

The basic complicating fact that the Commonwealth is trying to imply terms into contracts which are creatures of State law is unavoidable. Some care could be taken, however, to clarify what sort of contracts are included in, and in section 73 excluded from, the Act. Consideration could also be given to the possibility of extending contractual protection to acquirers where the contract to supply to the acquirer is between the supplier and a person other than the person suffering the loss.[39]

Supplier

Federalism is another unavoidable fact and the doubts surrounding Commonwealth powers are also unavoidable. One way to minimise their importance would be to minimise the number of powers referred to.

Of course, if the definition of acquirer is sufficient in itself to reflect bargaining position then it would be a shame to let any transaction through where the acquirer is within the definitions just because the supplier is not. On this basis we could make the protection available, regardless of the status of the supplier, to any acquirer within the definition where any constitutional link can be made.

In one sense this would reduce uncertainty in that if we blast away with the full range of Commonwealth powers—trade and commerce

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[38] See the undertaking by the Minister at H.R. Deb. 1977, Vol. 107, 2906 to introduce manufacturers' warranty legislation, and the Trade Practices Amendment Bill 1978 discussed *infra* p. 481.

[39] *Quaere* the effect of s. 4C(a) set out *supra* p. 461. The Trade Practices Amendment Bill 1978, discussed *infra* p. 481, modifies the situation to the extent of allowing the consumer to bypass the intermediate suppliers and sue the manufacturer directly. There are strong arguments, however, for saying that either because of the nature of the rights of action given by Division 2A (traditional contractual remedies), or because of the way Division 2 interacts with the definition sections, that only consumers who acquire defective goods by a contract are within Division 2A.

with other countries, and among the States (section 51(i)), defence (section 51(vi)), lighthouses (section 51(vii)), naturalisation and aliens (section 51(xix)), Commonwealth public servants (section 52(ii)) *etc.*—then we are sure to hit all transactions with at least one power.

There is of course the middle ground chosen by the present framework which basically relies on the corporations power, but then goes on to extend Division 2's protection to all acquirers where there is an intra-Territorial, international, inter-State, inter-Territory, or State-Territory link. There does not seem to be any real reason for stopping at these acquisitions other than perhaps coyness at using the full range of Commonwealth powers.

There is quite a strong argument for limiting the group of suppliers subject to Division 2 to those suppliers who are corporations within section 51(xx). The structure would be simple. This factor has a link with relative bargaining position and also with ability to absorb loss without hardship. It is definitely an unsatisfactory situation at the moment that a large business as a "consumer" is "protected" in some transactions against a natural person's supposed bargaining strength as a "supplier".

Acquirer

At the moment the definitions of consumer of goods and services involve the use of the following factors

— price

— objective nature

and in relation to goods, the further factor

— purpose.

Under the current system any protection available to small businessmen is also available to large businesses. Small businessmen are indirectly favoured by the price limit in that they are more likely to get under this limit than large business acquirers.

It may be time to try something different.

A viable alternative would be to extend protection to all acquirers *except* large businesses. Large business could be defined by corporate status and some mathematically certain factor such as highest number of employees and/or officers at a particular point of time. There may well be some record required to be kept by companies or taxation legislation which would provide an unambiguous up-to-date indicator of size.

The presumption currently contained in section 4B(3) that an acquirer is eligible for protection could be modified to this extent. Once the acquirer is shown to be a corporation the presumption should be reversed to require the corporation to prove that the mathematical

limit (whatever it is) has not been reached at the relevant time (whenever that is).

Such a proposal would obviously be unattractive to suppliers. Whether or not an acquirer is a large business is not readily ascertainable by suppliers. However, any further requirements for eligibility such as declarations by acquirers of "smallness", or supplier's awareness of acquirer's size would be too unwieldy and commercially impractical.

Suppliers would also be opposed to the widening of the group eligible for the protection of section 68. Leaving aside that suppliers are also acquirers at some stage, they could perhaps be persuaded by the following points.

Section 68 does not operate to transfer all losses suffered by an acquirer back to the supplier. Section 68A currently operates to allow limitation (but not total exclusion) of liability in supplies of non-consumer goods or services. It is to be noticed that the basis upon which section 68A allows limitation of liability *i.e.* that the goods/services be non-consumer goods/services—still leaves the possibility of liability for disruption of large businesses through the supply of defective consumer goods/services. If the suggested new basis for eligibility is introduced and section 68A is repealed then suppliers need not fear large liability for disruption of large business because, *ex hypothesi*, large business will no longer be within the Act's protection.

Other leakages from the loss transferred occur in the following ways. On ordinary principles governing recovery of contract damages, only such damage as was within the reasonable contemplation of the parties at the time of contracting is recoverable. Section 69 (title) expressly allows a supplier to limit his liability in the sense that he can contract to transfer only such title as he has. Merchantable quality implied by section 71 is not implied:

(a) as regards defects specifically drawn to the consumer's attention before the contract is made; or

(b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

The merchantable quality implied is only such as it is *reasonable* to expect. The fitness for purpose implied by section 71(2), section 74(1) and section 74(2) is only *reasonable* fitness and will not be implied in section 71(2) and section 74(2) unless the acquirer's particular purpose is made known and the acquirer relies reasonably on the supplier's skill and judgment. The skill and care implied by section 74(1) is only due care and skill.

Some may think that even large businesses deserve bargaining protection in their acquisitions of consumer goods, such as food for the office Christmas party and typewriters for an insurance company's

office.[40] It would be *possible* to give *large* businesses protection according to some arrangement of the factors currently used

— objective nature of goods/services

— price.

Against this it must be said again that there should be no confusion of ability to assess quality with ability to negotiate equal bargains. Nor should we forget the large businesses' capacity to absorb and spread loss. It is much more desirable to keep the structure simple and leave large businesses to fend for themselves when negotiating as acquirers.

Conclusion

The most efficient way of advising acquirers and the most effective way of protecting acquirers is to educate them, to publicise what rights they have. At the moment it would be extraordinarily difficult to prepare a summary of the eligibility for the protection in Division 2 of Part V of the Trade Practices Act to appear in the places where such summaries could and should appear—in buses, trains, billboards, newspapers and trade journals.

It is clearly not going to be easy to make this part of the law understandable. But it must be done. If the lawyers are going to be able to explain to members of the public what their rights in consumer contracts are, the lawyers must be able to understand the law. At the moment I suspect a great many lawyers are having as much trouble as I am in understanding these definition sections.

Postscript

Since this article was written a Bill has gone before Parliament for an Act, the Trade Practices Amendment Act 1978, to amend the Trade Practices Act 1974 further. The Bill will probably be passed in the 1978 Budget Session.

Amongst other things the Bill, as foreshadowed by the Minister,[41] proposes to insert into Part V a new division, Division 2A—Actions against Manufacturers and Importers of Goods. The proposed Division 2A gives consumers statutory rights of action against corporations manufacturing or importing goods where there is another person who has been supplied the goods by the corporation for re-supply and the consumer eventually acquires them. The statutory rights of action relate

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[40] *Cf.* Swanson Committee, *op. cit.* para. 9.40: ". . . These inequalities are not necessarily limited either to 'traditional' consumers or to transactions involving what might be termed 'consumer' goods, in a narrow sense. For example, an insurance company purchasing a lounge chair for its reception area could not be expected to have any more expertise, or bargaining power, than a householder. Nor would a small pie manufacturer necessarily have any expertise or bargaining power in relation to the purchase of an office typewriter. . . ."

[41] *Supra* n. 38.

to fitness for purpose (clause 74B), correspondence with description (clause 74C), merchantable quality (clause 74D), correspondence with sample (clause 74E), provision of parts and repair facilities (clause 74F) and express warranties (clause 74G). It is also proposed to give the intermediate supplier liable under the Act a right of indemnity against the manufacturing or importing corporation (clauses 74M, 74H). There are also provisions dealing with contracting out of clause 74H (clauses 74K, 74L).

The statutory right of indemnity given to the intermediate supplier seems to create this anomaly. The intermediate supplier cannot rely on Division 2 to reject defective goods or claim damages against the manufacturer/importer because he (the intermediate supplier) has acquired for the purposes of re-supply.[42] However, he can get a right under Division 2A to claim damages against the manufacturer/importer by supplying the defective goods to a consumer and thus making himself liable under the Act.

It has not been possible to consider in detail the relationship of Division 2A of Part V to Division 2 or to the definition sections. This much, however, can be said. As Division 2A uses the same concepts—supply, corporation, consumer—and thus the definitions which have been discussed in this article—the problems adverted to in this article are just as significant for the application of Division 2A of Part V as for Division 2. It is interesting to note that amongst the other elements which must be present before the consumer's statutory right of action comes into existence is the requirement that the goods be

> . . . of a kind ordinarily acquired for personal, domestic or household use or consumption.[43]

Another late development has been the announcement of the setting up of a "consultative committee to continuously monitor the operation of the Trade Practices Act and its administration".[44] It is unlikely that the Scott Committee[45] will "monitor" anything but those parts of the Act which are concerned with Trade Practices *stricto sensu.*

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[42] *Supra* n. 27.
[43] Cl. 74A(2)(a).
[44] Financial Review 29.6.78.
[45] The Chairman is Mr Russell Scott who has acted previously as "a consultant for a major firm of Sydney solicitors which did a considerable amount of trade practices work", Financial Review 30.6.78.