POST-SALE CONSUMER LEGISLATION FOR NEW ZEALAND — A DISCUSSION OF THE REPORT TO THE MINISTER OF JUSTICE BY PROFESSOR DAVID H. VERNON

DAVID J. HARLAND B.A., LL.B. (SYD.), B.C.L. (OXON)

Professor of Law, University of Sydney.

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1 *Introduction*

In the Closer Economic Relations Trade Agreement entered into by Australia and New Zealand in 1984 both countries agreed to develop closer economic relations by a mutually beneficial expansion of free trade between them and by eliminating barriers to trade between them. They also agreed to examine the scope for taking action to harmonize requirements relating to such matters as standards, domestic labelling and restrictive trade practices.[1] It should be mentioned, though the point cannot be developed here, that Australia and New Zealand are not unique in wishing to harmonize their consumer protection laws. One motivation for the steps taken in recent years by the European Economic Community to harmonize consumer protection laws of Member States is the perception that this is a necessary condition for the attainment of a truly common market in goods and services.[2] Moreover, a recognition that divergent laws and standards can often operate as barriers to international trade is one reason for many activities of a variety of more broadly based international bodies (such as the Organization for Economic Co-operation and Development and the United Nations) to promote co-operation in relation to consumer policy and the development of minimum internationally accepted principles for consumer protection.[3]

One step towards achieving the objectives of the CER Agreement in the area of consumer protection law was the passing by New Zealand of the Fair Trading Act 1986, which came into force on 1 March 1987. This Act adopts provisions which in general[4] closely parallel the provisions on misleading and unfair trade practices, and on product safety and product information, of the Australian Trade Practices Act 1974. The Australian Act also contains important provisions dealing with the legal rights of consumers as against

[1] See generally J. Farmer, "The Harmonisation of Australian and New Zealand trade practices law after CER" [1985] Recent Law 214, at 250.

[2] See generally Th Bourgoignie (ed.), *European consumer law — prospects for integration of consumer law and policy within the European Community*, 1982, Louvain-la-Neuve, Cabay; L. Krmer, *EEC Consumer Law*, 1986, Brussels, Story Scientia.

[3] See generally D. J. Harland, "The United Nations Guidelines for Consumer Protection" (1987) 10 Journal of Consumer Policy 245, (1988) 11 Journal of Consumer Policy 123; D.J. Harland, "Some international dimensions of consumer law and policy," forthcoming in Journal of the Indian Law Institute.

[4] Some important provisions introduced by the Trade Practices Revision Act 1986 are, apparently as a result of a deliberate policy decision, not reflected in the New Zealand Act. See in particular s.51A (representations with respect to future matters), s.52A (unconscionable conduct), s.65C(3)(export of goods whose supply in Australia is prohibited). For a discussion of these provisions see D. J. Harland, "Consumer law in Australia — some recent developments" [1988] Tijdschrift voor Consumentenrecht 13,100.

the suppliers of defective goods and services (including, in the case of goods, rights against the manufacturer or importer as well as the immediate supplier).

The question obviously arises as to whether, in light of the CER agreement, New Zealand should adopt legislation along the lines of these last mentioned provisions of the Australian Act. It is important to realize in this context that that agreement does not require identical legislation but rather has the aim that "the legislation should be compatible so that there is fair competition as between Australian and New Zealand traders, whether they be trading in Australia or in New Zealand."[5] Quite apart from the implications of the CER agreement there has been discussion of whether New Zealand's existing law for the post-sale protection of consumers is adequate in light of modern marketplace conditions.[6] Consequently, in 1986 the New Zealand government requested Professor David H. Vernon, of the University of Iowa, to make recommendations as to the appropriate policy for New Zealand to follow. His report was published in December 1987.[7] In a foreword to this Report the Minister of Justice and the Minister of Consumer Affairs noted that Professor Vernon's advice was that New Zealand should not follow Australia but that instead he had presented "an outline of an original and exciting form of consumer protection".[8] The Ministers indicated that the paper was intended to rekindle the debate on consumer sales and invited submissions from interested parties.

Professor Vernon's report recommends a regime of post-sale consumer protection as an amendment to the Fair Trading Act. He proposes that that regime should have as a major goal the intrusion on the functioning of the free market only to the extent necessary to provide needed protection and that in achieving that goal the basic principle should be that in buying goods or services for noncommercial use consumers are entitled to a legal system that encourages suppliers to provide goods or services that meet consumers' reasonable expectations and provides practical relief when the goods or services tendered fail to met those expectations.[9] As in Professor Vernon's view the Australian Act rarely provides an acceptable model for New Zealand to follow, it is appropriate first to outline briefly the relevant provisions of that Act.

2. *The Australian Legislation*

The provisions of the Trade Practices Act relevant for present purposes are Division 2 of Part V (conditions and warranties in consumer transactions)

[5] Farmer, supra n.1, p.256. See also F. Holmes, Closer Economic Relations with Australia — an Agenda for Progress, 1986, Institute of Policy Studies, Victoria University Press, pp.65-68, 81-82, 90-91.

[6] See Contracts and Commercial Law Reform Committee, Working Paper on Warranties in Sales of Consumer Goods, Wellington, July 1977 (summarized in J.H. Farrar et al, Butterworths Commercial Law in New Zealand, 1986, Wellington, Butterworths, pp.172-174); S.A. Garrett, "New Zealand: Last bastion of laissez-faire? Comparative perspectives on consumer protection" (1986) 5 Auckland Univ. L. Rev. 277; P. Benge, "Consumer Affairs" in Report of the Royal Commission on Social Policy, 1988, Wellington, Vol.IV, pp.807-829 at 822.

[7] David H. Vernon, An Outline for Post-Sale Consumer Legislation in New Zealand — A Report to the Minister of Justice, 1987, Wellington, Government Printer (hereinafter cited as Vernon Report).

[8] Vernon Report, p.4.

[9] Vernon Report, pp.8-10.

and Division 2A of Part V (actions against manufacturers and importers of goods).[10]

Division 2 implies certain terms in contracts for the supply of goods or services to consumers.[11] "Supply" is defined widely and includes, in addition to contracts of sale, contracts for exchange, lease, hire or hire-purchase of goods. In the case of goods the terms relate to such familiar matters as the supplier's right to pass title, correspondence with description, merchantable quality, fitness for purpose etc. Although based on the terms implied under the sale of goods legislation of the States, the scope of the implied terms has been expanded in favour of consumers along the lines of the provisions of the United Kingdom legislation adopted in 1973.[12] However, the most important provision is s.68 which makes void attempts to exclude or limit the obligations of suppliers arising under these implied terms. (In the case of those "consumer" transactions which involve goods or services which are not of a kind ordinarily acquired for personal, domestic or household use or consumption the supplier may, subject to a reasonableness test, limit or exclude liability for consequential losses; s.68A). The statutory invalidity, as between the contracting parties, is reinforced by s.53(g) (paralleled in s.13(i) of the New Zealand Act) prohibiting under criminal penalties any false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. It would appear that the effect of this provision is that the mere inclusion in a contract of an exclusion clause which is void under the Trade Practices Act (or under any applicable State law) is a criminal offence.[13] Where a supplier is in breach of a condition that is implied in the contract by Division 2, s.75A enables the consumer to rescind the contract in certain circumstances where the right of rescission would have been lost under the previous law. This provision attempts to deal, though arguably not sufficiently boldly, with certain circumstances in which the consumer's right of rescission was previously unreasonably restricted.

Division 2A, inserted in the Act in 1978, deals with the liability of manufacturers to consumers, thereby overcoming privity of contract problems.[14] The manufacturer is liable to compensate a consumer for a breach of an express warranty (defined widely so as to include, for example, claims made in advertising or promotional material), where the goods are not of merchantable quality or reasonably fit for their purpose, and also where spare parts and repair facilities are not reasonably available. Where one of the manufacturer's obligations has been breached the consumer has a statutory right to recover damages against the manufacturer. Certain persons who are

[10] See also Division 3, containing s.75 (saving of other laws and remedies) and s.75A (rescission of contracts).

[11] For a discussion of these provisions see G.Q. Taperell, R B Vermeesch & D.J. Harland, *Trade Practices and Consumer Protection*, 3rd ed., 1983, Sydney, Butterworths (hereinafter cited as Taperell, Vermeesch and Harland), Ch.17.

[12] Supply of Goods (Implied Terms) Act 1973. See now Unfair Contract Terms Act 1977; Sale of Goods Act 1979. See also Supply of Goods and Services Act 1982. The report of the Law Commissions on which the 1973 Act was based influenced the drafting of the provisions on implied terms contained in ss.11-14 of the New Zealand Hire Purchase Act 1971.

[13] For an analysis of s.53(g) see Taperell, Vermeesch & Harland, pp. 662-671.

[14] For discussions of these provisions see D.J. Harland, "The liability to consumers of manufacturers of defective goods — an Australian perspective" (1981) 5 Journal of Consumer Policy 212; Taperell, Vermeesch & Harland, Ch.18.

not the actual manufacturer are treated by s.74A as such for the purposes of the legislation. The most important example is certain persons who import goods into Australia. Subject to one exception discussed later, a term of a contract purporting to exclude or modify any liability of a manufacturer under these provisions is by virtue of s.74K void and use of a void exclusion clause attracts the criminal liability already referred to. Where a direct supplier is liable to the consumer under the Act, that supplier has a statutory indemnity against the manufacturer for the amount of that liability: ss.74H,74L.

The provisions of the Trade Practices Act described above speak in terms of supply of goods or services by a corporation. This is because the Act relies for its validity primarily on the power of the federal parliament under s.51(xx) of the Constitution to make laws with respect to corporations. However, although the provisions of the Act do speak in terms of conduct by corporations, it is also provided by ss.5 and 6 that these provisions are to be read as having an additional operation which relies on other heads of federal legislative power. Thus, for example, they apply to conduct by any person occurring in the course of trade or commerce within a Territory or among the States or between Australia and places outside Australia. In the result the scope of application of the Act is wider than might appear on an initial reading of its provisions.[15]

A further complication is that these provisions of the Trade Practices Act in general apply in addition to, rather than in substitution for, any provisions which may be applicable under the relevant State (or Territory) law.[16] The general law of contract is a matter for the relevant State (or Territory) law, and thus, for example, a consumer contract subject to the law of New South Wales will have implied into it those implied terms arising under the New South Wales Sale of Goods Act 1923 as well as, if applicable, the similar but no means identical terms implied by the Trade Practices Act. One of the complications of Australia's federal system is that neither the federal parliament (because of limitations on the scope of the substantive heads of its legislative power) nor the States/Territories (because of geographical limitations on the scope of their powers) can alone provide a completely national regime of effective consumer protection legislation. For this reason there has for some time been active discussion of proposals for the enactment by the States of legislation to mirror in each State the provisions of the Trade Practices Act. It has to be said that more progress has been made in respect of the provisions of that Act relating to misleading and unfair practices[17] (corresponding to Part I of the New Zealand Fair Trading Act) than in respect of those provisions under consideration here. Western Australia has copied Division 2, but not Division 2A. New South Wales, Victoria and South Australia have legislation which broadly speaking is similar to Division 2, though there are many differences in details (and the New South Wales legislation does not apply to contracts for the supply of services).[18] Both South Australia and the Australian Capital Territory have legislation giving consumers statutory rights against manufacturers of goods, and New South Wales gives limited

[15] See Taperell, Vermeesch & Harland, Ch. 2.

[16] See General Motors Acceptance Corp, Australia v Credit Tribunal (1977) 137 CLR 545.

[17] See N.S.W: Fair Trading Act 1987; S.A: Fair Trading Act 1987; W.A.: Fair Trading Act 1987; Vic: Fair Trading Act 1985.

[18] N.S.W: Sale of Goods Act 1923, ss. 62-64; S.A: Consumer Transactions Act 1972; Vic: Goods (Sales and Leases) Act 1981.

rights to consumers against the manufacturer of goods which are not of merchantable quality.[19]

The above comments attempt to outline briefly what is a very complex situation. While the differences in the various provisions should not be exaggerated, as one who has attempted from time to time to deal with particular problems of consumer law in Australia from a perspective which is not limited to federal law or the law of a particular State, I can speak of this complexity with some feeling, and can sympathise with the frustrations which must be felt at times by New Zealand policy makers attempting to develop New Zealand approaches in harmony with the law in Australia.

3. *The Transactions to be Covered*

a) *The definition of "consumer"*

Professor Vernon makes a persuasive case for affording some measure of special post-sale protection for non-commercial buyers. However, if special protection is to be given to a class of buyers of goods and services, it is clearly essential to define as precisely as possible that class of buyers. Legislatures have frequently experienced considerable difficulty in devising an appropriate definition of the concept of a "consumer".

The Australian Act adopts a complex definition in s.4B, which may be summarized as follows. In the case of goods a person acquires goods as a consumer if either the price of the goods did not exceed $40,000 or, if the price did exceed that amount, the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or they were a commercial road vehicle, and provided in both cases that the person acquiring them did not acquire them, or hold himself out as acquiring them, for the purpose of re-supply or for certain other stated purposes, such as using them up in the course of a process of production or manufacture. (Professor Vernon misinterprets this provision when he states[20] that the Act protects all buyers, commercial as well as noncommercial, of goods for $40,000 or less; in fact commercial buyers are only protected when they buy for use in the business and not for the purposes of re-sale etc.). A person acquires services as a consumer if either the price did not exceed $40,000 or, if it did exceed that amount, the services were of a kind ordinarily acquired for personal, domestic or household use or consumption. The definition becomes particularly complex because of later provisions allowing a notional apportionment of the consideration (for the purpose of seeing if the $40,000 limit has been exceeded) in at least some cases where a number of goods or services, or both goods and services, are purchased under the one contract. I have previously criticized the Australian definition as being extremely complex and as resulting in part from a misguided attempt to treat some of the problems of small businessmen in the same manner as those of consumers.[21] I agree with Professor Vernon that attempts to deal with the problems of small commercial buyers should not be brought within the ambit of a consumer protection statute.[22] Solutions

[19] A.C.T.: Law Reform (Manufacturers Warranties) Ordinance 1977; N.S.W.; Sale of Goods Act 1923, s.64; S.A.: Manufacturers Warranties Act 1974.

[20] Vernon Report, p.12.

[21] Taperell, Vermeesch & Harland, pp. 576-592 (written before the 1986 amendments).

[22] Vernon Report, pp.13-14.

appropriate to consumers may well be inappropriate for small business. (However, I do believe that Professor Vernon overstates his case when he suggests that to protect small businessmen purchasing goods and services ordinarily acquired for private etc. use or consumption would be more cosmetic than real; there are many cases when such persons purchase for use in the business items such as motor cars, in respect of which purchases they might gain significant benefits if the protection given to private consumers were to be extended to them).

The concept of a consumer which appears to have most widespread support is what might be described as a subjective approach, that is an individual acquiring or using, for private, non-commercial purposes, goods or services supplied by a trader in the course of his business. This subjective approach is sometimes qualified by adding a further objective element, namely by limiting the concept to one who acquires goods or services of a kind which would normally be acquired for personal or domestic use.[23] Professor Vernon favours the latter approach and there are certainly strong arguments that can be made in favour of this. However, regard does need to be given to the argument made in the United Kingdom by the Law Commissions that the "ordinary purpose" approach is more appropriate to goods than to services and that "generally speaking it is not possible to identify a service as being of a kind normally provided for private (as distinct from business) use".[24] This point causes real difficulties in the application of the definition contained in the Australian Act.[25]

b) *Commercial Suppliers*

Professor Vernon argues that New Zealand's post-sale protective legislation should be limited to regulating the consumer's relationship with those whom the consumer buyer reasonably would expect to be responsible for resolving post-sale problems and that it is only when the seller can be described accurately as a professional rather than an amateur in relationship to the goods or services in question that the consumer would be reasonable in viewing post-sale service as a right. Citing a number of Canadian provincial statutes, he concludes that New Zealand would be following the pattern established in most other jurisdictions if it limited its statute to sales by persons regularly engaged in the business of supplying the goods or services in question.[26] It should be noted that the United Kingdom and Australia[27] both speak of a sale "in the course of a business". While the exact implications of the phrase are not yet clear,[28] it is quite possible that it would catch a wider range of suppliers

[23] See D.J. Harland, "The control of unfair or unconscionable practices, with special reference to consumer protection", General Report to the 12th Congress of the International Academy of Comparative Law, Sydney/Melbourne, August 1986, pp.2-3 and references there cited.

[24] Law Commission & Scottish Law Commission, Exemption Clauses: Second Report, 1975 (Law Com No 69, Scot Law Com No 39), p.59.

[25] Taperell, Vermeesch & Harland, pp.587-8.

[26] Vernon Report, p.14.

[27] Sale of Goods Act 1979, s.14 (U.K.); Supply of Goods and Services Act 1982, ss.4,9,13 (U.K.); Trade Practices Act, 1974, ss.70,71,72,74. (Aust.).

[28] Benjamin's Sale of Goods, 3rd ed., 1987, London, Sweet & Maxwell, pp. 451-453; Taperell, Vermeesch & Harland, pp.818-819.

than is envisaged by the recommendation.[29] A case can be made that whenever a business chooses to supply goods or services to a consumer it should bear the responsibilities placed on professional sellers, whether or not it regularly engages in such transactions (especially as the consumer will not necessarily be aware of the regular course of the supplier's business).

c) *Goods and Services*

Professor Vernon recommends that the legislation should cover both goods and at least some services. There certainly has been a tendency in the past for consumer protection legislation dealing with consumers' rights against suppliers to concentrate on the supply of goods and I agree with Professor Vernon that the reason is at least partly historical. The fact that services are usually less standardized than tangible goods has also perhaps resulted in it being more difficult to draft appropriate general provisions and to rely more on specific regulation on an industry or occupational basis. However, devising adequate protections for consumers of services is of considerable importance in light of the growth in the number and importance of services and of the increasing proportion in many countries of household expenditures devoted to services.[30]

Section 74 of the Australian Trade Practices Act provides for implied warranties as to care and skill and fitness for purpose in contracts for the supply of services (very widely defined) to consumers and applies also to materials supplied in connexion with those services. Professor Vernon recommends that this model should not be followed and that the proposed legislation should apply only to services which yield a tangible result. In his view the types of statutory warranties appropriate to goods can be readily adapted to such services, whereas services not rendering a tangible result (such as those supplied by lawyers, banks or insurance companies) are likely to raise substantially more complex problems that those for which the legislation be recommends is designed and tend to require legal counsel and either very specialized hearing procedures or full-scale judicial proceedings for their resolution. Accordingly he concludes that "while it seems clear that consumers need legislative protection in their dealing with suppliers of services that have no physical end product, the post-sale, consumer — protection statute seems the wrong place for it."[31]

Professor Vernon seems to believe that the appropriate approach for services that have no tangible or physical result is specialized legislation providing solutions specifically tailored to the particular type of service involved. Certainly one could cite examples from many jurisdictions of provisions of this type

[29] This was certainly the intention of the Law Commissions, on whose recommendation this phrase is based: Exemption clauses in contracts. First report: amendments to the Sale of Goods Act 1893, 1969 (Law Com. No.24, Scot. Law Com. No.12), London, HMSO, p.11.

[30] See eg Council of the European Communities, Second consumer protection and information program of the EEC, Brussels, Official Journal of the European Communities, Vol.24, No. C133/1-12, June 3, 1981, paras 34-37.

[31] Vernon Report, p.15. Sweden has drawn a distinction similar to that proposed by Professor Vernon in its Consumer Services Act 1985: see U. Bernitz & J. Draper, Consumer Protection in Sweden: legislation, institutions and practice, 2nd ed., 1986, Stockholm, Institute for Intellectual Property and Market Law, Stockholm, pp. 308-309. Compare Supply of Goods and Services Act 1982 (U.K.).

relating to eg credit, insurance, travel agents and tour operators, correspondence courses. However, any such approach will inevitably have gaps (whether due to oversight or the constant development of new types of services) and I believe that it is desirable to have some form of general provision laying down general standards. It may be that it would be more satisfactory to enact separate legislation dealing with this area. However, one virtue of including it in the proposed new Act would be that one would then have a statutory framework for the development of approved codes of conduct, which potentially have a very important role to play in respect of services. (It is worth noting that the majority of the codes of conduct negotiated in the United Kingdom by the Office of Fair Trading concern the service industries including, in addition to those involving the repair or treatment of goods, funerals, package holidays, postal and telecommunications services).[32] Moreover, it appears to me that many disputes over intangible services may conveniently be resolved by informal dispute resolution procedures and that if, as is recommended by Professor Vernon later in his report, provision is to be made for this in the post-sale statute there is virtue in bringing such services within the scope of such provisions.[33]

It should finally be noted that although in the early stages of the development of consumer protection policies attention in most countries was focused primarily on the provision of goods and to some extent services, it is increasingly recognized that transactions involving land (especially in relation to the rental or purchase of housing) must also be taken into account.[34] New Zealand has recognized this in s.14 of the Fair Trading Act. The post-sale consumer protection statute may well not be the appropriate vehicle for dealing with those problems, but I suggest that it is important that they not be overlooked.

4. *The Privity Problem*

As a result of modern methods of production and distribution of consumer goods, as well as of large scale advertising by manufacturers, consumers are encouraged to regard the manufacturer as being primarily responsible for the safety and quality of such goods, even though the consumer will normally have no direct contractual relationship with the manufacturer. Professor Vernon is in my view clearly correct in suggesting that at a minimum consumers would reasonably view the manufacturer and retailer as being jointly responsible for the quality of goods and that the common law privity of contract doctrine should no longer be a barrier to recovery by the consumer.[35]

Professor Vernon is, however, on more debatable ground when he says that "post-sale consumer protection legislation in other countries recognizes the unity of purpose within the distribution chain and treats everyone in the

[32] R. Lawson, *The Supply of Goods and Services Act 1982 - a practical guide*, 1982, London, Oyez Longman, pp. 129-130.

[33] For a recognition in New Zealand of a need to provide informal procedures in a specific context see Code of Practice to Cover the Issue and Use of Electronic Funds Transfer Cards within New Zealand, May, 1987.

[34] For an expression of significant concern over housing issues see Synopsis of Public Consultation on Consumer Affairs, 1985, Consumer Affairs Unit, Department of Trade and Industry, Wellington, p.24.

[35] Vernon Report, p.16. This aspect of the problem of the privity doctrine will probably only rarely be overcome by the Contracts (Privity) Act 1982; but see Garrett, supra n.6, pp.279-280.

chain as having a direct legal obligation to the ultimate consumer" and recommends that New Zealand adopt this approach.[36] This issue has been much discussed in the context of strict product liability for personal injury (and, in some cases, property damage) caused by defective products. American products liability law tends to adopt an "enterprise" theory (such as favoured by Professor Vernon) in imposing strict liability on a wide range of persons. On the other hand strong arguments have been made in favour of adopting a "channelling" approach by in general restricting liability to those able to control the production process. This is the approach which has been adopted in both the Council of Europe Convention on Products Liability in Regard to Personal Injury and Death and the European Economic Community Directive concerning liability for defective products, both of which documents influenced the drafting of aspects the Australian provisions.[37] It is not possible to discuss the respective merits of both approaches here.[38] My point is that the policy issue seems far less obvious to me than it does to Professor Vernon and that it needs careful thought before a final decision is made. If it is decided as a matter of policy to adopt a "channelling" approach, careful attention needs to be given to defining those who are to be liable. In the case of imported goods, for example, the impracticability of consumers asserting a claim against a distant manufacturer requires the importer to be treated as though he were the manufacturer in order to ensure that the consumer will have available a defendant within the jurisdiction.[39]

Although manufacturers of defective products should clearly be directly liable to consumers, the case for insisting that the retailer should also remain liable, despite the fact that he often will be personally blameless, seems to me to be overwhelming. I therefore agree with Professor Vernon that this position should not be changed[40] (and my point of difference with him lies therefore in doubting whether intermediate distributors should also be liable to consumers.) However, the issue arises as to whether the retailer should in the event that he is required to compensate the consumer have a right of indemnity against the manufacturer (or, if an enterprise theory is adopted, against others in the distribution chain). The Australian Act gives the retailer a statutory right of indemnity against the manufacturer in certain circumstances and it seems to me that there is a strong case for some such provision, though I am critical of one important aspect of the Australian provision.[41] Professor Vernon recommends that consumer - protective legislation is the wrong place to deal with such relationships and that if problems are found to exist separate legislation would be appropriate.[42] The question of where such a legislative provision is to be placed is of secondary importance, but there is virtue in dealing with the rights of all parties in the one statute.

[36] Vernon Report, p.16.
[37] See D.J. Harland, supra n.14.
[38] See eg. D.J. Harland, "Products liability and international trade law" (1977) 8 Sydney Law Review 358 at 373-377 and references there cited. For an interesting development in France and Belgium adopting a type of enterprise approach see N Reich & H.W. Michlitz, *Consumer legislation in the EC Countries*, 1981, Wokingham, Van Nostrand Reinhold, pp. 98-100.
[39] See Taperell, Vermeesch & Harland, pp.878-880.
[40] Vernon Report, p.17.
[41] Taperell, Vermeesch & Harland, p.898.
[42] Vernon Report, p.17.

5. *Codes of Responsible Practices*

The essence of the scheme recommended by Professor Vernon is a two-tiered system of codes of responsible practices designed to give expression to the principle that the most effective protection for consumers is to deal with responsible suppliers.[43] A Statutory Code of Responsible Practices would codify such practices, but to enable it to contain sufficient flexibility to take into account the diverse needs and disparate problems faced by suppliers of different goods and services the statute would provide for supplier-drafted Special Codes of Responsible Practices which are compatible with the Statutory Code but which reflect the special needs of the supplier involved. The Special Codes would require certification by the Minister of Consumer Affairs as meeting the standards of providing consumers with protection that is compatible with the goals of, and at least equivalent to, the protection contemplated by the Statutory Code. The Statutory Code would make clear that the obligations it imposes will vary depending on a number of factors.

Professor Vernon refers to the approach adopted in a number of countries of creating a series of special warranties for consumer buyers and considers whether New Zealand should adopt this approach. ("Warranty" is here used in the sense of any contractual term rather than that used when such terms are classified as being conditions or warranties.). Professor Vernon argues that it is unnecessarily confusing to establish two tiers of warranties with different substantive and privity requirements and recommends that New Zealand avoid this confusion by establishing post-sale consumer rights simply as statutory rights.[44] (Professor Vernon notes that the Australian Act retains the warranty concept, though it should be noted that this is true only in respect of the obligations of the immediate supplier and not in respect of those of manufacturers.)[45] In my view the most effective right of a consumer in practical terms is often the right to reject non-conforming goods and/or to terminate ("rescind") a contract for breach and I believe that the scheme suggested does not sufficiently recognize this. I shall return to this point in my discussion of remedies.

Professor Vernon then considers whether the new statutory rights should be classified as sounding in contract or in tort.[46] He recommends the latter, though he does consider that the difference between a contract and a tort classification is likely to be relatively minor. This recommendation is influenced by the experience in the United States in the development of the modern law of strict product liability in tort and by a desire to establish a complete break with warranties and to avoid the instinctive seeking of precedents among the warranty cases.

Adopting a tort classification may have very important consequences when it comes to the question of the appropriate measure of damages. Although in many cases both the contract and tort approaches will produce the same result, in other cases the difference between them can be quite dramatic, as illustrated by a recent decision of the High Court of Australia on the Trade

[43] Vernon Report, pp.17-18.
[44] Vernon Report, p.18.
[45] See Taperell, Vermeesch & Harland, pp.880, 902-903.
[46] Vernon Report, p.19.

Practices Act.[47] It is clear from Professor Vernon's later discussion of remedies[48] that he contemplates the contract (*Hadley v. Baxendale*[49]) rule as the basic approach (though with some modification). The Australian Act does not address the issue of measure of damages. It is now settled that, in actions based on contraventions of s.52 (s.9 of the New Zealand Act), the measure of damages is essentially based on tort principles (especially those relating to the tort of deceit).[50] In the case of an action by a consumer for breach of a manufacturer's obligations under Division 2A of Part V of the Act the position is not altogether clear, though I have argued elsewhere[51] that a contract approach is appropriate here. Especially if the New Zealand Act is to adopt expressly a tort classification,[52] it may be that this point should be addressed by the legislation.

The adoption of a tort or contract classification may possibly have important consequences from the viewpoint of limitation of actions. It may be that it would be desirable to adopt a special provision on this, an approach which has been adopted in Australia, influenced by some important European developments, in the context of manufacturers' liability.[53] The relevance, if any, of contributory negligence by the consumer may also differ according to the classification adopted.[54]

6. *The Statutory Code of Responsible Practice*

The Report recommends that, whether a tort or contract classification is used, the Statutory Code of Responsible Practices should grant consumers the general right to receive goods and services that meet their reasonable expectations and should then proceed to specify those expectations.[55] The substantive consumer rights would deal at least with fitness for the purpose or purposes for which the goods or services are commonly supplied, their ordinary useful life, conformity with representations, samples or descriptions and performance of the functions for which such goods or services ordinarily are supplied, satisfaction of any special purpose made known by the consumer (unless the supplier informs the consumer that the goods or services are not suited to that purpose), freedom from claims that can be asserted successfully to deny the consumer's right to quiet possession, and supply of essential spare parts and reasonably available repair facilities. So far as services are concerned, the Report recommends that a single standard be applied to both goods and services when services have a tangible result, and that if it is decided to include other services a different standard be applied to them. The latter standard would be patterned after s.74 of the Australian Trade Practices Act and would

[47] Gates v. City Mutual Life Assurance Society Ltd (1986) 160 C.L.R. 1. For recent arguments by New Zealand commentators that in practice the distinction may often be less significant than is often assumed see J.F. Burrows, "The Contractual Remedies Act 1979 — Six Years On" (1986) Otago L. Rev. 220 at 229-230; L. Trotman, Misrepresentation and the Fair Trading Act, 1988, Palmerston North, Dunmore Press, pp.56-58.

[48] Vernon Report, pp.28,30.

[49] (1854) 9 Ex. 341, 156 E.R. 145.

[50] Gates v. City Mutual Life Assurance Society Ltd (1986) 160 C.L.R. 1.

[51] Taperell, Vermeesch & Harland, pp.902-3.

[52] See Sir Robin Cooke, "Tort and contract" in P.Finn (ed.), *Essays on Contract*, 1987, Sydney, Law Book Co., p.222 at 225-227.

[53] Trade Practices Act, s.74 J. See Taperell, Vermeesch & Harland, pp.898-902.

[54] Cooke, supra n.52 at 227.

[55] Vernon Report, pp.19-21.

specify a standard of due care and skill and of fitness for a special purpose made known to the supplier.

I agree generally that the approach adopted by Professor Vernon towards the basic substantive rights of consumers should be adopted. Time does not permit a discussion in detail of these rights, which would require a separate paper, but there are certain points to which I would draw attention.

As the Ministers indicate in their foreword to the Report,[56] the term "merchantable quality" is not appropriate in consumer transactions. An alternative phrase such as "acceptable quality"[57] would be more suitable. More important than the question of terminology is the substance of any statutory definition of the level of quality reasonably to be expected. The Report suggests a requirement that goods or services be as fit for the purpose or purposes for which they are commonly bought as it is reasonable to expect. This is based on the definition of merchantable quality contained in ss.66(2) and 74D(3) of the Australian Act (itself borrowed from s.14 (6) of the United Kingdom Sale of Goods Act 1979). While fitness for ordinary purpose is an essential element of any concept of acceptable quality, a definition expressed solely in terms of fitness for purpose may produce unexpected results and cause difficulties where goods will perform adequately but are otherwise in an unacceptable condition because of such matters as poor finishing and cosmetic defects e.g. a new car is delivered with dents in the bodywork or defective paintwork.[58] Fitness for purpose is in fact only one element of acceptable quality and a more comprehensive definition (including reference to such matters as appearance, safety and durability) is required.[59]

Although both manufacturer and retailer should in general be liable to the consumer, it will in some circumstances be unreasonable to make the manufacturer's liability identical with that of the retailer. For example, the retailer may expressly or implicitly lead the consumer to believe that the item sold is of a higher quality or capability than that contemplated and represented by the manufacturer. Likewise the consumer may buy for an unusual purpose which he communicates to the retailer but of which the manufacturer is totally unaware until a complaint is made subsequent to the purchase. While the Australian Act imposes similar obligations on both retailers and manufacturers in respect of quality, fitness for purpose etc the drafting of the obligations does recognize that in any given case the obligation of the manufacturer will not necessarily be co-extensive with that of the retailer.[60] To take just one example, whereas price and any description applied to the goods will often be a relevant factor in determining the quality called for in any particular case, in the case of the manufacturer's liability it is the price received by the manufacturer and any description applied by him which is relevant. Consequently the manufacturer's liability is an independent one and depending

[56] Vernon Report, p.3.

[57] Law Commissions, Sale and Supply of Goods, 1987, London, HMSO, Cm.137 (Law Com.No.160, Scot.Law Com. No.104), pp.23-27. See also Contracts and Commercial Law Reform Committee, supra n.6, pp.13-14.

[58] See idem, pp.29-30; Taperell, Vermeesch and Harland, p.826.

[59] For possible approaches see e.g Law Commissions, supra n.57, pp.27-34; Ontario Law Reform Commission, Report on Sale of Goods, 1979, Ontario, Ministry of the Attorney General, pp.206-220.

[60] See Taperell, Vermeesch and Harland, pp.884-888.

on the circumstances may in particular cases be either more or less extensive than that of the retailer.

It is suggested that the Statutory Code should make it clear that the abrogation of the privity doctrine renders the manufacturer liable not only for factual representations made by him about the quality of the goods, but also for any promises made by him (e.g. in advertisements or in the manufacturer's warranty often issued on the sale of consumer durables) as to action which he will take in relation to such matters as repair or servicing of the goods. The definition in the Australian Act of the "express warranty" for which a manufacturer will be liable was recently extended[61] to overcome difficulties which arose from the earlier adoption of an unduly restricted definition.[62]

Another aspect of the impact of the Australian Act on the privity doctrine should be noted. As well as attacking "vertical" privity by enabling the consumer purchaser to sue the manufacturer despite the absence of any contract between them, some inroad is also made on the problem of "horizontal" privity by granting the right to sue not only to the consumer who first purchases the goods but also to persons (other than those acquiring for the purpose of re-supply) who acquire the goods from, or derive title to them through or under, that consumer.[63] This extension of the right to sue will be significant in cases where the consumer buys goods as a gift or sells them second-hand within the time within which the manufacturer may still be liable, for example, because of the lack of durability of the goods or non-availability of spare parts. A case can be made for a similar extension of a consumer's rights as against the retailer, but this has not been done, no doubt at least partly because of the way in which, in contrast to the approach taken in respect of manufacturers' liability, the rights granted to the consumer against the retailer take the form of rights engrafted on to the general law of contract.

a) *Spare parts and repair facilities*

The post-sale rights of consumers specified in the statutory code would include the right to goods and services which are supported by a supply of essential spare parts sufficient to permit the goods or services to perform their functions over their normal useful life and which are also supported by reasonably available repair facilities sufficient to permit them to be repaired within a reasonable time over their normal useful life.

The consumer who purchases an expensive appliance may later find it is worthless if a vital component fails and cannot be replaced. (The non-availability of spare parts has in some cases in Australia caused particular concern in relation to imported goods). Professor Vernon emphasises this problem for New Zealand consumers but comments on the complexity of the issue. If unduly onerous obligations were imposed on suppliers consumers might well end up being denied access to some goods and services and might be forced to pay unacceptably high prices for others. In an attempt to reconcile the needs of consumers with those of suppliers, Professor Vernon recommends that the supplier's obligation be limited to having available a reasonable supply

[61] Trade Practices Revision Act 1986, inserting a new definition in s.74A(1) of the Trade Practices Act 1974.

[62] See Taperell, Vermeesch and Harland, pp.892-894.

[63] Ss.74B, 74C, 74D, 74E, 74F, 74G (as amended by Trade Practices Revision Act 1976). See also s.74A(2)(aa). See Taperell, Vermeesch and Harland, pp.881-883.

of essential spare parts (i.e. parts imperative to the continued functioning of the item but excluding those that merely "dress it up"). Availability would not mean it was necessary for the supplier himself to keep a stock of parts so long as they could be acquired within a relatively short period of time. To assist buyers to make informed decisions suppliers would also be obliged to inform consumer buyers accurately in writing at the time of sale about the presence (or absence) of spare parts (both essential and other), the time it will take to obtain such parts not in inventory and possibly also the statistical likelihood that specific spare parts will be needed.[64]

The Australian Act deals with cases where goods require to be repaired but facilities for their repair are not reasonably available to the consumer, and where a replacement part is required for the goods but is not reasonably available.[65] If in such cases the manufacturer acted unreasonably in failing to ensure that repair facilities or parts were reasonably available, the manufacturer is liable to compensate the consumer for loss arising as a result of that failure. The manufacturer's obligation is far from absolute and does not apply where, at the time the need for repair or parts arises, circumstances beyond his control prevented him making the facilities or parts available. Although the other statutory obligations of a manufacturer cannot be excluded or limited, an exception is made in respect of the provision of repair facilities and spare parts. A manufacturer may exclude altogether his liability in this respect, or he may restrict the extent of his obligation. Such an exclusion or limitation is effective only if the manufacturer takes reasonable action to ensure that a consumer acquiring goods will, before or at the time when he commits himself, receive notice of the manufacturer's intentions.

The provisions of the Australian Act relating to repair facilities and spare parts apply only to manufacturers and there is no corresponding obligation on the retailer. Professor Vernon's proposals would apply to both. Certainly a case can be made that the availability of parts and repair facilities comes within an expanded concept of a modern warranty of merchantablity and that the retail seller should therefore be liable.[66] A contrary view is that such an obligation could in many cases impose undue hardship on the retailer, especially the small shopkeeper.[67] I have argued above that the retailer should in all cases be liable where the goods he sells are not of acceptable quality at the time of sale but it does not necessarily follow that he should be subject to a continuing obligation (in some cases potentially extending for many years) in respect of the provision of spare parts and repair facilities. Even granted that the small shopkeeper would not be required personally to provide repair facilities or to keep parts in stock, provided that they were reasonably available when needed, nonetheless it seems hard on him if he is liable in damages to his customer if some years after the sale the manufacturer ceases to make certain parts available or perhaps ceases business altogether.[68] It is in my

[64] Vernon Report, pp.21-22.

[65] Trade Practices Act, s.74F, discussed in Taperell, Vermeesch and Harland, pp.888-892.

[66] Contracts and Commercial Law Reform Committee, supra, n.6, pp.14-15. Ontario Law Reform Commission, supra n.59, pp.216-217.

[67] Law Commissions, supra n.57, p.34.

[68] The retailer may well be given a right of indemnity against the manufacturer (see e.g s.74H of the Australian Act); however, if this right is able to be excluded by contract the position of the small retailer may often be precarious.

view even more dubious in policy terms to hold the tradesman (such as the plumber or electrician using products in the course of domestic installations or repairs[69]) liable if a particular item subsequently becomes unavailable. Placing the obligations concerning spare parts and repair facilities on the manufacturer (or importer) and not the retailer seems to me to be a preferable approach.

Although I shall argue later that consumer policy requires that suppliers should not in general have as much freedom as is recommended by Professor Vernon to exclude or limit their liability to consumers, both the relative novelty of the obligations and the special practical problems which may arise suggest that greater freedom should be allowed in respect of spare parts and repair facilities. As has been indicated, such a distinction is drawn in the Australian Trade Practices Act. Thus a manufacturer who is unwilling to take the risk of unavailability of a specific part which he imports or purchases from a component manufacturer can protect himself in this regard. Similarly a small manufacturer of a product distributed over a wide geographical area may wish to limit the locations where he is bound to supply repair facilities.

Any exclusion or limitation should be effective only if prominent notice is given to consumers.[70] Competitive considerations may often make this an unattractive course of action, and this certainly seems to have been of significance in Australia. While clear notice of any such limitation or exclusion is essential, I doubt the wisdom of requiring the type of notice suggested by Professor Vernon. Requiring suppliers to give written notice as to the availability of parts and the time it will take to obtain parts not in stock could prove both expensive and of relatively small benefit to consumers. This is especially so as the information may well differ as to different spare parts for the one item and in any event even if information is accurate at the time of sale any delay in obtaining parts may fluctuate considerably over time. Considerable burdens could be placed by such a requirement on, for example, a suburban retailer who stocks a range of domestic appliances but does not himself keep spare parts in stock. As each supplier in the distribution chain is to be liable it would seem to follow logically that such information would be required from each supplier, though it may well be that it is intended that the obligation to provide information should attach only to the retail supplier. Finally it should be noted that in many cases consumers will attach considerable importance to parts not essential to the functioning of an item but affecting its appearance and, providing that exclusion of liability is permitted, it would seem to be preferable that the obligation in respect of parts should extend to all parts likely to be required by consumers.

b) *Ordinary useful life*

One of the obligations imposed on suppliers by the Statutory Code would be to supply goods or services which have a useful life at least as long as that which such goods or services ordinarily have. Professor Vernon proposes that, in addition to such obligations as may be voluntarily undertaken under any express warranty or guarantee given by a manufacturer or other supplier, the Statutory Code should render suppliers responsible for an appropriate

[69] Vernon Report, p.21.

[70] The steps which must be taken by a manufacturer to make such an exclusion or limitation under the Australian Act may give rise to considerable practical problems: see Taperell, Vermeesch and Harland, pp.889-892.

pro rata portion of extraordinary repair or replacement costs during the full ordinary useful life of the item involved.[71] Thus if a major component of an appliance having an ordinary useful life of 10 years were to fail after 6 years, the supplier would bear 40% of the replacement cost of that component. A possible compromise, designed to restrain price increases caused to consumers by this increased liability of suppliers while still providing consumers with substantially more protection than they now have, is to apply the pro-rata rule only during the first one-half of the ordinary useful life of the goods or services. Professor Vernon recommends that whichever version of the pro-rata rule is adopted, it would apply only to extraordinary costs and not those of repairs which a consumer should reasonably expect to incur during the life of a product or service. The Special Codes would state the ordinary useful life for the goods and services to be supplied and would also define ordinary and extraordinary repairs, and prior to any sale consumers should be informed of these matters.

Serious consideration should certainly be given to incorporating in the post-sale statute at least a general provision relating to durability. Doubt has been expressed as to whether the traditional sale of goods legislation adequately deals with cases where faults appear in goods some time after the sale. Both the Ontario Law Reform Commission[72] and the United Kingdom Law Commissions[73] have recommended that the legislation should incorporate a requirement that goods would be required to last for a reasonable time. In both cases the proposal was seen as clarifying rather than changing the law and, reflecting the view that durability is inherent in the concept of merchantable quality, would be listed as one of the factors to be taken into account in determining whether goods are of merchantable (or acceptable) quality rather than taking the form of a separate implied term.

Clearly a general requirement of durability would be difficult to apply in concrete cases and therefore the notion of giving the concept greater specificity in particular cases through the Special Codes is attractive. However, a number of difficulties are likely to arise. Professor Vernon contemplates defining the ordinary useful life of a product in terms of a time period. This would appear to be the only practical approach for most products, but the difficulty arises that with many products the period in which it may reasonably be expected to remain functional may vary considerably according to the extent of use made of it. Moreover, defining ordinary useful life will be a complex task in the case of products some of whose components may be expected to last for periods of time shorter than the expected life of the whole unit, thus causing considerable difficulties with the contemplated definitions of ordinary and extraordinary repairs. It may also be that suppliers will be reluctant to define in their Special Codes the ordinary useful life of their products or that alternatively they will, in light of the potential liability following from the definition, be tempted to state an unreasonably short period (and given the difficulty of defining the appropriate life of different products, complicated further where there are different grades of the same kind of item available on the market, the process of certification of codes by the Minister might not be able to deal effectively with the latter problem). Perhaps an acceptable

[71] Vernon Report, pp. 22 — 23.
[72] Supra n. 59, pp. 215 — 216.
[73] Supra n. 57, pp. 31 — 33.

approach would be to provide in Special Codes statements of minimum useful life (and perhaps major components), it being provided that these statements have only presumptive effect. It would thus be possible for relevant circumstances, such as the nature of the goods, any representations made, the extent of use of the goods and the way in which they were treated by the consumer, to be taken into account and for it to be held when appropriate that a longer or shorter period should apply. Such an approach would of course result in less certainty than that proposed by Professor Vernon but it may be that his goal is not attainable in practical terms. Alternatively, the judgment might well be made that the difficulties involved in any scheme of laying down specific rules for particular products and the unknown practical impact of a pro rata compensation system on suppliers' costs mean that a general standard contained in the Statutory Code is all that should be provided.

Whatever approach is adopted, it is suggested that consideration be given to adopting a concept of reasonable durability rather than ordinary useful life. The later concept would appear to be limited to the functioning of the item[74] but this is in my view unduly limited; for example, a car which still runs as a car, but whose paintwork deteriorates sooner than it should, is not sufficiently durable.[75]

c) *Responsible responses by suppliers*

The Statutory Code would require in general terms that all suppliers have in place a reasonable mechanism for dealing with consumer complaints. The supplier would be required to inform the consumer of the action he intends to take and the length of time such action will take. The Code would require this response to be given as soon as reasonably possible. Normally this would be on the day the complaint is received though it would be recognized that circumstances may exist that prevent so prompt a response. Response times appropriate to the nature of the product and the nature of the defect would be set out in the proposed Special Codes. The Statutory Code would provide that in the absence of a different and reasonable agreement the supplier will deal with problems arising during the period when the supplier is accountable for a defect in a way that does not inconvenience the consumer and the Special Codes would be required to specify the practice the supplier intends to follow in order to achieve the "reasonable response" goal. A suggested rule of thumb is that the supplier should not expect the consumer to return goods or services for repair when they were delivered by the supplier. In the event that a supplier failed to respond to consumer complaints in the manner required by the Statutory and Special Codes the consumer would be free to have the goods or services repaired or replaced (whichever is reasonable in the circumstances) by others. In addition to reasonable costs actually incurred, consumers would be able to recover from the supplier a 25% surcharge (limited, however, to a maximum of $100) to compensate them for time and trouble forced on them by the supplier's default.[76]

A common cause of consumer complaints is the difficulty often experienced in obtaining prompt and effective action from suppliers when justified complaints are made. More and more, suppliers are putting in place internal

[74] See Vernon Report, p. 22.
[75] Law Commission, supra n.57, p.32.
[76] Vernon Report, pp. 23 — 24.

complaints resolution procedures, specifying the company policy in respect of actions to be taken, establishing clear lines of responsibility and authority, and providing for the collection and monitoring of complaints statistics so that any recurring problem patterns can be promptly recognized.[77] Not only may such procedures help to ensure that companies meet their legal obligations to consumers, but it is widely recognized that they are sound business practice in fostering consumer goodwill. The suggestion by Professor Vernon that the post-sale statute emphasize the importance of complaint handling by suppliers and seek to encourage suppliers to institute procedures adopted to the circumstances of their own businesses is therefore one which should be followed, whether or not the particular guidelines suggested by him are adopted . . . The United Kingdom codes of practice referred to later[78] will be of interest when the details of the scheme are being prepared.

d) *Exclusion Clauses*

The generally inferior bargaining position of consumers vis-a vis suppliers and the widespread use by suppliers, especially in standard form contracts, of broadly expressed exclusion (disclaimer) clauses seeking to limit or exclude altogether responsibilities which the supplier would otherwise have mean that an effective statutory scheme of consumer protection should seek to control the use of exclusion clauses which unfairly disadvantage consumers. The difficulty is, of course, to devise a scheme which affords adequate protection to consumers but does not restrict freedom of contract in a way that may prove unnecessary and even harmful both to traders and consumers.

Professor Vernon concludes that a blanket provision in consumer legislation denying suppliers the right to disclaim or limit their liability seems more restrictive than necessary. Accordingly he recommends that the Statutory Code should permit suppliers to limit liability or disclaim responsibility when it is reasonable to do so, while still providing appropriate protection to their customers.[79] Commenting that "although the Australian Act permits suppliers to limit their liability somewhat"[80], Professor Vernon notes that Act makes void terms by which suppliers seek to restrict or modify their obligations arising under the Act in respect of quality, fitness for purpose etc. of goods and services.[81] In his view suppliers should be prohibited from contracting out of their statutory obligations unless the goods or services are sold "as is". However, suppliers should be able to bind consumers to clear descriptions of the functioning of goods and services supplied, including a description of the normal life expectancy of the product, provided these descriptions are specifically made known to the consumer and are reasonable in scope. The statute would require that the Special Codes contain all exclusion clauses

[77] See eg Technical Assistance Research Programs Inc., Consumer Complaint Handling in America — Final Report, 1980, United States office of Consumer Affairs, Washington D.C.

[78] See text at notes 92-95.

[79] Vernon Report, pp. 24 — 26.

[80] It is not clear just what is being referred to here. It may be s 68A of the Trade Practices Act, which allows exclusion of liability for consequential losses in certain transactions (see supra text at note 14) which would not come within the scope of the "consumer" concept proposed by Professor Vernon.

[81] Trade Practices Act. s.68. s.74K, not cited by Professor Vernon, makes a similar provision in respect of the obligations of manufacturers.

the supplier will use, thus enabling any excesses to be controlled by the certification process. In Professor Vernon's view the provisions on exclusion clauses of the Australian Act are somewhat broader than seems reasonable in light of a policy of maintaining as free a market economy as possible while affording consumers necessary protection. He proposes that the sale of goods and services on an "as is " basis should be permitted subject to some fairly stringent conditions. Suppliers selling on an "as is" basis would be required to disclose all known defects and to provide a written statement expressing in very clear language the effect of such a sale. A model statement is provided and specificity and clarity equal to that of this model clause would be required for other lesser exclusion clauses.

It is not clear to me just what exclusion clauses would be permitted under Professor Vernon's scheme. Some clauses less extensive in scope than an "as is" clause are contemplated. Presumably therefore a supplier wishing to exclude his liability for certain known and disclosed defects could exclude his liability in respect only of those defects rather than being forced into the much more drastic position of excluding all responsibility under an "as is" clause. Presumably also some clauses which do not seek to exclude a substantive obligation but rather to limit the consumer's remedies on breach would also be permitted. Examples might be clauses obliging a consumer to notify the supplier within a certain (reasonable) time after the emergence of a defect and clauses placing some monetary limit on the supplier's liability (except if it is decided to include within the statutory scheme services not having a tangible result there may in any event be limited scope for the latter type of clause because of the remedial scheme proposed by Professor Vernon[82]).

The question of the approach which should be adopted to the control of unfair exclusion clauses in consumer transactions is a complex one, but it does seem to me that the case for an absolute ban on certain types of exclusion clauses is stronger than the Report suggests. Certainly a number of common law jurisdictions have made the policy judgment that the supplier's obligations in respect of quality, fitness for purposes etc are so basic that exclusion clauses relating to these obligations should be of no effect in consumer transactions. (However, as we shall see, this by no means prevents account being taken of special circumstances which should be taken into account in particular cases). This is the approach taken in the Australian Act so far as the supply of goods is concerned and the United Kingdom and a number of Canadian provinces take a similar approach.[83] Australia also renders void clauses seeking to limit or exclude the supplier's obligations under the implied terms in contracts for the supply of services. The United Kingdom has a different approach with regard to contracts for the supply of services, adopting a rather complex scheme the effect of which is that most exclusion clauses in contracts for the supply of services to a consumer will be subject to the reasonableness test i.e. the clause will be ineffective unless the party seeking to rely on it can establish that it was a fair and reasonable one to be included in the contract having regard to the circumstances which were, or ought reasonably to have been, known to the parties when the contract was made.[84] It is to

[82] See text at note 109.

[83] UK: Unfair Contract Terms Act 1977, ss. 6,7. As to Canada see G. Fridman, *Sale of Goods in Canada*, 3rd ed, 1986, Toronto, Carswell, pp.219 -222, 281 — 282. See also Contracts and Commercial Law Reform Committee, supra n.6, pp.18-19.

[84] Supply of Goods and Services Act 1982; Unfair Contract Terms Act 1977.

be noted that the provision in the Australian Act now under discussion only makes void clauses attempting to exclude or limit liability arising under the terms implied under that Act. However, a measure of general control is now provided by s52A of the Trade Practices Act which provides that a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.[85] This provision is likely to have a particular application to exclusion clauses though it is by no means so limited and applies to contractual provisions which may operate harshly on consumers but which do not take the form of an exclusion clause. In the United Kingdom residual protection is also given by the Unfair Contract Terms Act 1977 against many types of exclusion clause which may operate harshly on consumers.

I believe that an attempt to identify some minimum obligations of suppliers to consumers which cannot be excluded or limited is worthwhile. The great virtue of such an approach is that it provides a reasonably certain rule which greatly strengthens the position of consumers and consumer advisers (who will often not be lawyers) in negotiating satisfactory settlements with suppliers. Making the validity of such clauses dependent on some open-ended test (e.g. "reasonableness" or "unconscionability") may make some suppliers much less willing to negotiate a reasonable settlement and may mean that redress is not in fact obtained for many justified complaints. Admittedly the complexity and varied nature of services supplied to consumers makes this approach perhaps more controversial when it is extended from goods to services. One possible approach would be to provide for regulations to make a total or partial exemption from the prohibition on exclusion clauses if experience should show the general provision to be too restrictive in practice for particular types of services.[86]

In any event, the approach taken in the Australian Act is not nearly as rigid as might at first sight appear. An exclusion clause, which will often not be read by a consumer or which even if read will often not be fully comprehended, may not be used to exclude or limit liability arising under the Act, but the drafting of the provisions recognizes that special circumstances will often arise which should be taken into account in measuring the extent of the supplier's obligations under the implied terms. Thus, for example, ss.66(2) and 74D provide that what amounts to merchantable quality in any given case must be assessed by what it is reasonable to expect having regard to any description applied to the goods, the price (if relevant) and all other relevant circumstances. Thus it is made clear that where goods are sold as "second hand" or "factory seconds" that description, as well as the price if it is substantially less than that which would be expected for new or perfect goods, will result in goods being held to be of merchantable quality even though those same goods might well not be of merchantable quality were no such qualifying description employed. Likewise, under ss.71(1) and 74D(2) merchantable quality does not apply as regards defects "specifically drawn to the consumer's attention" before the contract is made. These are just some

[85] For a general description see Trade Practices Commission, Unconscionable Conduct, 1987. See also Contracts Review Act, 1980 (NSW). Note the limited unconscionability provision contained in New Zealand in the Small Claims Tribunals Act 1976, s.16(1)(e).

[86] See eg Supply of Goods and Services Act 1982 (UK), s.12(4). For an approach which includes only those types of services specifically mentioned, plus any which may be added by regulation, see Consumer Transactions Act 1972 (SA), s5.

examples[87] of how, although an exclusion clause cannot be used for this purpose, the supplier may considerably limit his liability provided he takes positive action to bring clearly to the consumer's attention the respects in which he is seeking to do so. The legislation does, however, reflect the view that in all cases certain minimum standards should apply and so, for example, although a used car dealer (not selling a car simply for scrap) may considerably narrow his liability by clearly specifying certain defects in a vehicle, he would presumably be liable if the vehicle cannot be operated safely (or cannot be put into a safe operating condition once the specified defects are repaired).

If Professor Vernon's approach to exclusion clauses is to be followed, Special Codes would be required to contain all exclusion clauses which the supplier will use. Presumably a clause contained in a certified code could not later be attacked on the ground that it was unreasonable in scope. Given the necessarily limited information as to the commercial context of a supplier's activities which will be available to the Minister when considering certification, and as a clause which may in the abstract seem reasonable may turn out to operate harshly in particular circumstances, it may be preferable to give the Minister's certification presumptive rather than conclusive effect so far as exclusion clauses are concerned.[88]

7. *Special (supplier-drawn) Codes of Responsible Practices.*

One of the central features of Professor Vernon's scheme is that the statute should provide for supplier - drafted Special Codes of Responsible Practices that are compatible with the statutory code but which take into account the diverse needs and disparate problems faced by suppliers of different goods and services. The codes would supply an element of flexibility and give general norms a specific meaning in relation to the product or service involved (eg in relation to its ordinary useful life).

Professor Vernon considers that "while the process recommended seems to have no counterpart in legislation elsewhere, it permits a flexibility that a country the size of New Zealand can sustain without great difficulty".[89] The Special Codes would be required to provide consumers with protection that is compatible with the goals of, and at least equivalent to, the protection provided by the Statutory Code and would be certified by the Minister of Consumer Affairs as doing so. Although industry-wide groups might prepare Special Codes for most suppliers, local associations and professional groups as well as individual retailers would be free to prepare their own codes so as not to defeat the purpose of enabling individual suppliers to have a voice in meeting the special problems they may face. The Minister would have power to impose a code on recalcitrant suppliers who fail to draft a satisfactory Code or to draft a Code at all.

I have pointed out elsewhere that, especially in an environment of calls for less government regulation of business activity and decreased budgets for regulatory agencies, much attention has been given to the role of non-binding

[87] See further Taperell, Vermeesch and Harland, pp. 843 — 846.

[88] For a comprehensive comparative review of approaches toward the control of unfair contract terms see E. Hondius "Unfair contract terms: new control systems" (1978) 26 Am. J. Comp. Law 525; E. Hondius, *Unfair Terms in Consumer Contracts*, 1987, Molengraaff Instituut voor Pr!vaatrecht, Utrecht.

[89] Vernon Report, p.26.

codes of conduct in raising standards of market behaviour, either as supplementary to (particularly in the sense of giving more concrete practical definition to) existing legal norms or as avoiding the need for further legislative intervention.[90] In Europe there has been widespread discussion of the role of non-legislative regulation of business conduct, especially in light of an increasing tendency for government agencies and others to be involved in the drawing up of codes and for public or consumer representatives to play a part in their implementation.[91] It may well be possible to make progress through such procedures in respect of some matters which are important in terms of consumer policy but which may not be effectively controlled by legislation.

In the United Kingdom considerable reliance has been placed on codes of conduct negotiated by the Office of Fair Trading pursuant to its statutory duty to encourage trade associations to prepare codes of practice for guidance in safeguarding and promoting the interests of consumers.[92] As well as dealing with such matters as complaints procedures and often also dispute resolution mechanisms, some codes have dealt with matters (eg delays in carrying out service work and the periods of time during which spare parts should be kept available) which it would be difficult to cover adequately in legislation.[93] It is recognized that difficulties arise with respect to enforcement of codes and their non-applicability to traders who are not members of the association adopting the code, and consequently there has for some time been discussion of the desirability of creating a statutory duty to trade fairly in consumer transactions, a duty which would be enforceable through detailed codes prepared after consultation with relevant trade associations.[94] A detailed discussion paper presenting this and other options was published in 1986.[95] In Sweden the Marketing Practices Act of 1975 contains broad general provisions dealing with deceptive and unfair marketing practices, the giving of information of particular significance to consumers and the sale of dangerous consumer products. Sweden relies heavily on guidelines issued by the Consumer Board to give specific content to the general prohibitions. The Guidelines are the result of negotiations between the Consumer Board and representatives of trade and industry, and often incorporate considerable elements of compromise. The guidelines are not binding as a matter of law but in practice have great persuasive effect and result in recourse to the Market Court being necessary only relatively rarely in cases where the guidelines have not been

[90] D.J. Harland, "The Legal concept of unfairness and the economic and social environment — fair trade, market law and the consumer interest", paper presented at the Fifth European Workshop on Consumer Law, Louvain-la-Neuve, September 1986, to appear in E. Balate (ed.), Unfair advertising and comparative advertising.

[91] See generally European Consumer Law Group, "Non-legislative means of consumer protection" (1983) 6 Journal of Consumer Policy 209; N. Reich & L. Smith (eds), "Special issue: Implementing the consumer-supplier dialogue through soft law?" (1984) 7 Journal of Consumer Policy 111-321.

[92] Fair Trading Act 1973, s.124.

[93] G. Borrie, *The development of consumer law and policy — bold spirits and timorous souls*, 1984, Stevens & Sons, pp.75-76; R. Cranston, *Consumers and the Law*, 2nd ed., 1984, London, Weidenfeld & Nicolson, pp.31-42.

[94] See eg Borrie, supra n.93, pp. 75-77, 115-6.

[95] Office of Fair Trading, A General Duty to Trade Fairly — a Discussion Paper, 1986.

followed or in cases on matters where agreement has not been possible.[96] More recently in Australia New South Wales[97] has made provision for the approval by the Minister of codes of practice which when approved may be prescribed by regulation and enforced by certain orders made following an application by the Commissioner for Consumer Affairs to the Commercial Tribunal.[98]

There is, therefore, potential for a scheme such as that proposed by Professor Vernon being very useful in providing a mechanism for practical and concrete expression in the context of particular types of goods or service industries to the implications of the necessarily widely expressed statutory norms applicable to goods and services generally.[99] I now outline a number of considerations which I suggest warrant careful consideration when the details of the scheme are being worked out.

It is not clear to me whether certification by the Minister of a Special Code would have the effect of exempting the supplier from the provisions of the Statutory Code or whether it would rather amount to a declaration, necessary for it to become binding on suppliers under the legislation and having considerable presumptive force, that it is compatible with the Statutory Code and gives consumers rights which are at least not less extensive than those contained in that Code. It seems to me that in principle the latter rather than the former approach is desirable, that is that the Special Codes should supplement rather than replace the provisions of the Statutory Code. A similar way of achieving this goal might be to provide that certified Special Codes are not legally binding as such, but that they are evidence of what constitutes acceptable practice satisfying the general obligations imposed by the Statutory Code.[100] No doubt the provisions of the Special Codes would in nearly all cases prove in practice to be virtually mandatory but an approach which regards the Special Codes as supplementing the Statutory Code would give some flexibility if a court or other tribunal were to consider that through inadvertence a code had been certified which contained some provision not compatible with the Statutory Code.

If the Special Codes are to enjoy general public acceptance and credibility, it appears to be highly desirable that there be a requirement, prior to the Minister's certification of a code, of consultation with relevant consumer and community organizations and with any industries or suppliers which might be affected by the operation of the code. Ideally such consultation would take place from the commencement of the process of development of the code rather than at the final stages when attitudes may have hardened and

[96] See U. Bernitz, "Guidelines issued by the Consumer Board: the Swedish experience" (1984) 7 Journal of Consumer Policy 161; Bernitz & Draper, supra n.31, pp.74-78, 303-305. Cf. S. Wikstrom, "Bringing consumer information down to earth. Experiences from a Swedish experiment." (1984) 7 Journal of Consumer Policy 13.

[97] Fair Trading Act 1987, ss. 74-79. Similar provisions are also made in Western Australia: Fair Trading Act 1987, ss. 42-47.

[98] The Tribunal is established under the Commercial Tribunal Act 1984. For discussions of the aims of these provisions see Department of Consumer Affairs (N.S.W.), Annual report for the year ended 30 June 1986, pp.31-32; Annual report for the year ended 30 June 1987, p.38.

[99] For a discussion of other mechanisms for giving more specific guidance as to the types of conduct governed by general clauses see Harland, supra n.90.

[100] For a discussion of parallels to this approach see Office of Fair Trading, supra n.95, Ch.4.

desirable compromise may be more difficult to achieve. Such involvement is equally important in the subsequent continuing process of actual implementation of the code. Concern over such issues is a feature of the European discussions referred to previously.[101] It has also been expressed recently in Australia, admittedly in the context of self-regulatory schemes not having direct statutory backing, in terms of external participation and a need for self-regulation schemes designed as alternatives to legislation requiring a window for public input.[102]

The scheme envisaged would give a special legal position to suppliers' codes, and it is therefore important that there be regular monitoring of their implementation to ensure that the benefits envisioned for consumers are in fact realized. One difficulty involved in arriving at informed judgments about conflicting claims made in public debate about the effectiveness or otherwise of voluntary codes is the frequent lack of objective information about their operation. The United Kingdom experience in monitoring the codes approved by the Office of Fair Trading should be of value here.[103]

The process of development and final approval of appropriate codes is likely, at least initially, to be time consuming for both suppliers and government.[104] Only time will tell whether suppliers or their organizations will see sufficient incentive to be vigorous in developing codes, and government would presumably wish to impose codes only as a last resort. This by no means questions the importance of seeking to achieve the application of Special Codes across a broad spectrum, but it does suggest that the Statutory Code should be drafted on the assumption that at least for a very substantial period of time it will remain the principal source of consumers' rights in respect of many transactions.

Professor Vernon suggests that, as part of an overall campaign to educate consumers about their rights and remedies, prior to completing a consumer transaction involving a price of $100 or more each supplier dealing directly with the consumer provide the buyer with a copy of the Special Code governing its obligations.[105] Especially if the obligations under their Special Codes of different suppliers of similar goods and services are to vary (as might well happen if codes come to be seen by some suppliers as a significant marketing tool) it is desirable to attempt to devise methods of enabling consumers who wish to do so to become aware of these prior to the final consummation of a deal. The experience of the United States Federal Trade Commission in administering the provisions of the Magnuson-Moss Act relating to suppliers' express warranties should be considered in this context. The rules prescribed by the Commission are designed to ensure that sellers take action so that the text of product warranties (whether given by the seller or not) are available to consumers before they come to a decision to buy.[106] A requirement for

[101] Supra n.91.

[102] See W. Coad, "Industry self-regulation — when does it work and why?", paper presented at the Australian Federation of Consumer Organizations Symposium on Business Regulation, Canberra, March 1988. The paper discusses a forthcoming major study by the Trade Practices Commission on self-regulation in Australia. See also Re Media Council of Australia (No.2) (1987) A.T.P.R. 40-774.

[103] See eg G Woodroffe,"Government monitored codes of practice in the United Kingdom" (1984) 7 Journal of Consumer Policy 171.

[104] Bernitz, supra n.96, p.163. See also office of Fair Trading, supra 95, pp.35-36.

[105] Vernon Report, p.27.

[106] See C. Reitz, *Consumer Product Warranties under Federal and State Laws*, 2nd ed., 1987, Philadelphia, ALI/ABA, Ch.4.

a copy of the supplier's code to be handed to each purchaser may become unnecessarily burdensome. Moreover, in respect of any particular transaction there may well be relevant codes of suppliers other than those dealing directly with the consumer (eg the manufacturer). Consequently consideration should be given as to whether steps need to be taken (and, if so, what steps are practical without causing consumer confusion and an excessive mountain of paper) to make the terms of these codes available to consumers who wish to take them into account when making purchasing decisions or when making a post-purchase complaint. (These thoughts emphasize a possible danger, though one which experience may prove to be unfounded, in permitting a proliferation of codes adopted by different suppliers).

8. *Codes of Responsible Practices — Remedies*

It is a truism that reform of the law relating to consumers' substantive rights will often have little impact if steps are not also taken to enable those rights to be put to practical effect. This is not to deny the educative effect that a clear statement of these rights can have on responsible traders, but the well known barriers to access to justice by consumers[107] and the deterrent effect on recalcitrant traders of effective enforcement mechanisms mean that a comprehensive regime of post-sale consumer protection must also address consumer redress mechanisms. Consequently Professor Vernon finally turns to the question of how to provide a decision — making process which is relatively inexpensive and informal, provides rapid relief and can be used effectively by consumers acting without legal counsel.[108]

a) *The nature and scope of consumer relief*

The traditional approach to the measure of damages in contract would seek, subject to the rules as to remoteness and mitigation, to place aggrieved consumers in the position they would have been in had the goods or services not been defective. Professor Vernon considers that these rules have, in the consumer protection area, the disadvantage of being rather complex. Accordingly he recommends[109] that, except for consumer services having no physical result, serious consideration be given to limiting remedies under the statute to repair, replacement, refund of the purchase price and reasonable out-of-pocket costs resulting from the supplier's default. To the extent that services not having a tangible result are included within the statute, the normal contract rules as to damages would apply as the repair — replacement — refund remedy would be obviously inappropriate for such services. The Report also recommends that, rather than orders for the supplier to pay the consumer an amount of money, specific performance should be the basic remedy under the statute. Thus the supplier of defective goods or services would be ordered to repair them (or to arrange for their repair) or in appropriate cases to replace them. If the goods or services have design flaws or other defects making the product or service perform below the consumer's reasonable expectation, a refund of the purchase price would be ordered (though it is assumed that

[107] See generally M Cappelletti & B Garth, "Access to justice: the worldwide movement to make rights effective" in M Cappelletti and B Garth (eds.), Access to Justice, Vol 1 (1978), Sijthoff & Nordhoff, Part 1.

[108] Vernon Report, pp.27-28.

[109] Vernon Report, pp.28-29, 30.

replacement would be the normal order and it is perhaps contemplated that refund would be ordered only when the replacement item would be likely to suffer from the same defects). In cases where the consumer has already had repairs effected by someone else the supplier would be ordered to pay the reasonable costs of the work done (plus the surcharge previously discussed).[110]

Professor Vernon argues that the fact that only non-commercial buyers are protected by the statute "virtually obviates the need for awarding consequential economic losses other than out-of-pocket costs" [111]and that the addition of consequential damages for inconvenience or other non-economic harm will complicate the process so much that consumers will need to employ lawyers. He considers that in the vast majority of cases damages limited as he suggests will come close to achieving the goal of the traditional rules and that making these additional losses recoverable would so complicate the simple and speedy remedial process recommended as to outweigh any possible benefits in equity terms of allowing recovery of consequential losses. He points out that "personal injuries resulting from defective products give rise to the major consequential recoveries in other countries" and that New Zealand's accident compensation scheme and its abolition of tort claims for personal injuries resulting from accidents removes the need to consider such claims in the present context.[112]

It is not clear just what "out-of-pocket" costs would include. It clearly includes repair costs where the consumer has repairs effected by someone other than the supplier, as well as costs incidental to obtaining redress eg travelling costs involved in negotiating with the supplier and perhaps reasonable costs of necessary technical advice (such as a mechanical report from a motorists' organization). It would presumably also cover such consequential losses as the cost of hiring a substitute item while that purchased is out of service. Where a refund of the purchase price is ordered, it may possibly include any additional cost to the consumer of purchasing a substitute item (eg where prices of the type of item in question have risen).

However, it is not at all clear whether the concept would cover one very important type of claim, namely where a defective product or service causes damage to other property of the consumer. Such claims, while comparatively rare, can be catastrophic to the individual consumer and can involve an amount many times the cost of the defective product or service e.g. where defective appliances or domestic installation work cause a fire damaging the consumer's home. It is suggested that this aspect of product liability is one which remains important for New Zealand in terms of consumer policy.[113] It is true that

[110] Supra, text at note 76.

[111] P.28.

[112] P.28. While it is generally true that s.27 of the Accident Compensation Act 1982 bars such claims, it is arguable that in certain cases a claim at common law would still lie, e.g. certain claims against drug manufacturers may be regarded as not involving "personal injury by accident" within the meaning of the Act and as therefore not being caught by s.27.

[113] The EEC Directive on product liability covers certain cases of damage caused to any item of property other than the defective product itself: Article 9. The Australian provisions on manufacturers' liability provide a measure of strict liability for damage caused by defective products (see Harland, supra n.14), but this is limited to the consumer who acquired the product and successors to title to that consumer. This causes anomalies by excluding from the statutory right of action such persons as users and bystanders. The Australian Law Reform Commission is currently preparing a report on products liability.

the consumer in such a case would remain free to sue under the general law, but it would seem that the expanded substantive rights available under the statutory and special codes would not be available for this purpose.[114] If this were so, in such an action brought against the retailer of a defective appliance the consumer would have to rely on the express terms of the contract and on those terms presently implied under the Sale of Goods Act 1908, the supplier's liability under which might be limited or even excluded altogether by an exclusion clause. (It would appear that the controls on exclusion clauses in the Statutory Code would apply only in so far as they purport to affect rights arising under that Code, though the requirement of Ministerial approval of exclusion clauses contained in Special Codes may effect a more general control). Further, if the consumer chose to sue the manufacturer of the appliance (perhaps because the retailer's solvency was doubtful), the action might normally have to be brought in tort in negligence as the inroads made on the privity doctrine would apparently not be available in an action outside of the statutory scheme.

Recent commentators have remarked that the traditional hesitation of the common law to award non-pecuniary damages for breach of contract may be attributed to a failure to distinguish between commercial and consumer contracts and to recognize that almost by definition the latter are concerned with the transfer to the promisee of a benefit to be enjoyed rather than a marketable good.[115] Admittedly, the law is presently in an uncertain and evolving state with regard to those circumstances in which damages in contract for injured feelings and disappointment will be awarded, and enabling consumer claims tribunals or similar bodies to award such damages might be thought to risk unnecessary complication and lengthening of proceedings. If it is decided that such claims must be excluded such a decision will have been made perhaps reluctantly but at least with an appreciation of the fact that in the case of many consumer contracts (including those for the purchase of many consumer durables and services relating to home improvements and the like) the real loss suffered on breach relates to disappointment, frustration and waste of time rather than substantial economic loss.[116]

The suggestion that the basic remedy available be one of specific performance is based on the idea that the inconvenience of replacing the goods or having them repaired outweights the flexibility that money damages would give the consumer. The suggestion has the advantage of emphasizing to suppliers that their essential responsibility is to perform their obligations rather than to pay money damages, though in practice no doubt a supplier who is unwilling or unable to comply with an order to repair or to replace would in the alternative be ordered to pay a sum of money to the consumer.[117] However, it is not

[114] Moreover, Professor Vernon's preferred approach to the remedial process seems to assume that these rights could not be asserted in the ordinary courts: see below text at notes 126-133.

[115] See Harris, Ogus & Phillips, "Contract remedies and the consumer surplus" (1979) 95 L.Q.R. 581.

[116] See generally D.J. Harland, "Future trends for judicial and statutory reform in contract law" in J. Carter (ed.), Rights and Remedies for Breach of Contract, 1986, Committee for Postgraduate Studies in the Department of Law, Faculty of Law, University of Sydney, pp.227-230.

[117] See eg Small Claims Tribunals Act 1976 (N.Z.), s.16(2); Consumer Claims Tribunals Act 1987 (N.S.W.), ss 30,36 (this Act replaces the Consumer Claims Tribunals Act 1974).

obvious that it will be sound policy to allow such orders to be made when a consumer objects to this course. Where a supplier has failed to repair (either through refusing to do so or through unsuccessfully attempting to do so) the consumer may well prefer to receive a sum of money and to make alternative arrangements. Likewise a consumer who has sued a manufacturer of a defective appliance which requires replacement may well prefer a refund of money to enable him to purchase another brand (or may prefer to keep the money and to do without that type of appliance altogether) rather than to be forced to accept a replacement from that manufacturer. Subject perhaps to a power in the decision-maker to order otherwise if the consumer is acting unreasonably in the circumstances, it seems to me that the choice of remedy should lie with the consumer. There are no doubt cases where consumer claims are in fact based "not so much on the defect as on the consumer having changed his or her mind about wanting the item,"[118] but to use this as a justification for protecting suppliers from such claims by requiring repair or replacement is in my view an over-reaction.

Mention should here be made of one particularly important aspect of a consumer's contractual rights against the immediate supplier of goods or services. In practical terms very often a consumer's most effective right is that of rejecting non-conforming goods and/or of terminating ("rescinding") a contract for breach by the supplier of his obligations. The right of termination is in a sense a self-help remedy and can place the consumer in a strong bargaining position, particularly if the full purchase price has not been paid.

While the remedy of damages has obvious shortcomings for the consumer, the remedy of rejection has equally obvious attractions for him. It is easy for the non-lawyer to understand; it entitles him to return the goods to his seller and demand the return of the purchase price in full. The buyer can then decide whether or not to buy identical goods from the same or a different supplier. The remedy is attractive to the consumer not just because it is simple but also because it puts him in a strong bargaining position. It is, moreover, of particular importance to him both where the defects are not easily remedied and where the nature and circumstances of the breach have been such as to make him lose all confidence in the seller or in the product sold to him.[119]

It is not clear how the consumer's right of termination under the existing law would be affected by the statutory scheme. Where a consumer has taken delivery of goods but almost immediately discovers a defect it would appear, as already indicated, that under the statutory scheme the form of relief available would normally be in the discretion of the decision-maker (though the consumer would in certain cases be entitled to replace the item and recover the cost of so doing plus the 25% surcharge from the supplier).[120] Presumably the consumer in such a case could elect to rely on his or her right of termination under the general law (but, as was discussed previously in the context of property damage claims, apparently without the benefit of the modernized substantive obligations imposed on suppliers by the statutory scheme and possibly without the benefit of that scheme's control over exclusion clauses).

There are admittedly many difficulties which arise relating to termination

[118] Vernon Report, p.29. Compare Law Commissions, supra n.57, p.39.

[119] Law Commissions, Sale and Supply of Goods, 1983, London, HMSO (Law Com. Working Paper No.85, Scot. Law Com. Consultative Memorandum No. 58), p.72.

[120] See supra text at note 76.

for breach, though in New Zealand, at least in the case of contracts not governed by the Sale of Goods Act, the result of the Contractual Remedies Act 1979[121] is that these difficulties are less acute than in many other jurisdictions. It might in many circumstances be thought unreasonable if a consumer could reject an item because of some relatively minor defect which can be repaired by the supplier, and there is therefore a case to be made for restricting the consumer's right to reject until the supplier has had a reasonable opportunity to cure the defect. It is, however, of interest in this context to note that in the United Kingdom the Law Commissions recently, after having provisionally recommended such a scheme, finally rejected it. The Commissions saw the primary task of the law (hardly ever directly invoked) in this situation as being to provide a regime against which potential disputes can be most satisfactorily resolved, and emphasized the importance of keeping the law on this matter simple and the danger of undermining the bargaining position of the ordinary consumer.[122]

On the other hand, the sale of goods legislation in many cases restricts the buyer's right to terminate at an earlier time than would be the case under the general law of contract. Despite the amendment made in New Zealand to s.37 of the Sale of Goods Act 1908[123] problems arise where a defect in an item may not appear until it has been operated for some time and yet the right to terminate may be held to have been lost very shortly after delivery. This is not the place to pursue this issue, which has been the subject of interesting debate recently in the United Kingdom, in part prompted by concern of consumer organizations about the implications of a case in which it was held that where the engine of a new car seized up less than one month after purchase and after having been driven about 140 miles it was too late for the buyer to reject the car.[124]

My essential point is that it is unsatisfactory to create new obligations for suppliers of defective goods and services while not at the same time considering the rights of consumers to reject defective goods or to terminate a contract for breach. If it is thought desirable that the new statutory scheme is to stand independently of the law of contract (and one reason for the form recommended by Professor Vernon is a desire to break away from what he fears may be a constricting influence of contract concepts), there is at least a need to consider the inter-relationship between the rights granted by the new scheme and those arising under the law of contract.

b) *The Need for a Deterrent*

As a means of encouraging suppliers to comply voluntarily with their obligations Professor Vernon recommends that a fine of $100 be imposed

[121] Ss.7-9. As to the position with contracts for the sale of goods see *Finch Motors Ltd v. Quin (No.2)* [1980] 2 N.Z.L.R. 519; F. Dawson and D. McLauchlan, *The Contractual Remedies Act 1979*, 1981, Auckland, Sweet and Maxwell, Ch.9.

[122] Law Commissions, supra n.119, pp.72-79; Law Commissions, supra n.57, pp.38-40; compare Contracts and Commercial Law Reform Committee, supra n.6, pp.15-18; Ontario Law Reform Commission, supra n.59, pp.444 ff.123 See Contractual Remedies Act 1979, s.14, discussed in Dawson & McLauchlan, supra n.121, pp.171-173.

[124] *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All E.R. 220. See Law Commissions, supra n.57, Part 5; National Consumer Council, Sale of Goods Act: Law Commissions' Recommendations, PD42/87, October 1987.

on suppliers who are ordered to repair, replace, refund the purchase price or pay out-of-pocket costs.[125] Relief from the fine would be granted if the supplier proved that it acted reasonably, though erroneously, in failing to volunteer the appropriate remedy. To encourage the supplier to act expeditiously in complying with the order made the relief would be granted only after such compliance. Fines paid under this system would be used to finance the various consumer programmes administered by the Minister of Consumer Affairs.

Although the fine admittedly would only be paid by those suppliers who could not convince the decision-maker that they acted reasonably in resisting a demand for redress, suppliers may well resent such an approach and see the fine as one-sided given that there would be no sanction on consumers making unreasonable demands. Moreover, the costs of administering such a scheme would need to be investigated before deciding whether its introduction would be desirable.

c) *The Remedial Process*

Professor Vernon argues that an ideal system for adjudicating consumer complaints would be inexpensive, informal, rapid and capable of being understood and used by consumers without legal representation; it is also essential that the initial decision be final and the relief granted be performed by the supplier expeditiously. The system must also be fair both to consumers and suppliers. While the existing small claims tribunals system in New Zealand seems to meet many of the criteria, Professor Vernon considers that it is far from the ideal. In the first place, in many cases familiarity with a specific industry, product or service is likely to be an important element in achieving a fair result, and he believes that a mechanism designed to deal with the problems of a specific industry or profession is likely to be more effective than the more generalized mechanism represented by the small claims tribunals. Accordingly the creation of specialized mechanisms is suggested. Second, in both small claims tribunals and specialized mechanisms an imbalance of expertness is likely to exist between the uninitiated amateur (consumer) and initiated specialist (the supplier or its agent) and consequently he recommends that consideration be given to the appointment by the Minister of a group of knowledgeable lay consumer advocates who could appear either on request by the consumer or when the decision-maker concludes that such representation is essential to fairness. Professor Vernon suggests that serious consideration be given to supplementing the small claims tribunal system by encouraging suppliers to include a dispute resolving mechanism in their Special Codes. The independence of the decision maker would be controlled by the Commerce Commission, which would appoint decision makers from lists of names submitted by the supplier and the Minister. Where professions, industries or suppliers fail to submit a reasonable mechanism the Minister would be able to establish one.[126]

Certainly many consumer disputes raise not so much technical legal issues but complex factual issues about the quality of particular goods and services, and a number of precedents exist overseas for developing processes which

[125] Vernon Report, pp,29-30.
[126] Vernon Report, pp.30-31.

can utilize familiarity with problems of particular sectors of industry.[127] While there are clearly significant potential advantages in such a system of specialized tribunals, there are also potential problems which need to be borne in mind. Care needs to be taken that a proliferation of dispute resolution mechanisms does not result in consumer confusion as to where to turn for help.[128] At the very least, consumers need to be advised to resort to a small claims tribunal when a specialized mechanism may not be able to deal fully with a dispute where suppliers from different industries are involved (eg where problems with a poorly functioning appliance may be due to either a defect in the appliance or to defective work by the tradesman who installed it, or to both). Moreover, there may be difficulty in obtaining sufficient numbers of part-time decision makers who are both expert in their knowledge of particular industries and at the same time perceived by consumers as being truly independent and not unduly sympathetic to industry attitudes. A final point is that particular suppliers (or industry associations) may well see insufficient incentive to go to the trouble and expense of setting up and maintaining government supervised specialized dispute resolution mechanisms. If this were to happen, government would presumably be reluctant to impose such mechanisms on a wide-spread basis. In the United States the Magnuson — Moss Warranty Act 1975 encourages those giving express warranties on durable consumer goods to establish informal mechanisms for resolving warranty disputes and gives warrantors some incentive to do so. Minimum requirements for such mechanisms are set out in a rule prescribed by the Federal Trade Commission, and if it is decided to establish procedures of the type recommended by Professor Vernon the United States experience should be considered. Mechanisms established under the Magnuson-Moss Act admittedly differ in some important respects from those recommended by Professor Vernon. Nonetheless, it is noteworthy that despite growing interest in alternative dispute resolution and the establishment by American industry of many informal mechanisms on a voluntary basis, mechanisms under the Magnuson-Moss Act have not been widely adopted (except by new car manufacturers and some members of the housing industry).[129]

The difficulty of dealing with disputes involving complex factual matters concerning technical goods or services is a very real one, and even if specialized mechanisms are created consideration needs to be given to methods of assisting small claims tribunals when dealing with such cases. One approach is to make available to a tribunal on request an expert in the field, either an inspector from a relevant government department or where necessary one commissioned by the Department of Consumer Affairs for the particular case.[130] Another

[127] See eg Sweden (see Bernitz & Draper, supra n.31 at 97-101); UK (see Cranston, supra n.93 at 40-41); U.S.A. (see eg L. Ray (ed.), Consumer Dispute Resolution; Exploring the Alternatives, 1983, Washington D.C., American Bar Association at 63-77, 405-412, 643-652).

[128] See Note, "Proliferation and fragmentation in the Australian court system" (1978) 52 A.L.J. 594; A Duggan, "Consumer redress and the legal system" in A. Duggan & L. Darvall (eds.), *Consumer Protection — Law and Theory*, 1980, Sydney, Law Book Co., p.200 at 224.

[129] See C. Reitz, supra n.106, ch.11.

[130] Provision already exists in the Small Claims Tribunals Act 1976, ss 26,27, for a tribunal to seek evidence on its own initiative and for the appointment of a person to enquire into and report upon a relevant matter of fact, but it may be that this power is insufficiently exercised — see Small Claims Tribunal Evaluation, Study Series No. 17, Wellington, Policy and Research Division, Department of Justice, May 1986, Vol.1: Discussion Paper, pp.52-53,105.

approach might be to constitute tribunals of three persons, the referee as chairman and two others chosen respectively from panels of representatives of industry and consumers. Although this approach has proved useful in the context of some forms of specialized tribunals,[131] it may well be too expensive and cumbersome for small claims tribunals as a general rule.

Given the wide scope of the rights of consumers to be established under the Statutory and Special Codes, it is inevitable that a significant number of consumer complaints will not come within the jurisdictional limits of the small claims tribunals. Recognizing this, Professor Vernon comments that either the jurisdictional limits of the tribunals will have to be increased significantly or a dual system will have to be established.[132] It would seem that in referring to a dual system he is referring to the specialized mechanisms he recommends. It also appears, though this is by no means clear, that Professor Vernon assumes that all claims under the Statutory and Special Codes would be dealt with under this dual system, the ordinary courts having no jurisdiction in respect of such claims.

Even if services not yielding a tangible result and consequential property damage claims are not included within the scope of the statutory scheme, it is inevitable that some claims will be far in excess of current monetary limit ($1000)[133] for small claims tribunals (eg claims for refund of the price of a defective new motor car or some claims for defective house building work). Any (necessarily arbitrary) monetary limit on the jurisdiction of small claims tribunals will always leave some cases outside of their jurisdiction. In any event, it appears to me very likely that raising the jurisdictional limit too drastically would eventually lead to a community judgment that the departures from normal procedural safeguards (right to legal representation, applicability of the rules of evidence, right of appeal etc.) involved in setting up special tribunals for small claims[134] could no longer be justified and indeed might place the whole concept of informal justice in jeopardy. This danger will be increased if it is decided to continue the practice of appointing non-lawyers as referees and to retain the present provision in s.15(4) of the Small Claims Tribunals Act 1976 that in determining disputes tribunals shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations.[135] The provision of informal tribunals specially designed to deal with small claims is in my view an important feature of consumer policy and it would be unfortunate if the benefits they afford to consumers were to be placed at risk by attempts to employ them in a manner for which they were not designed. Contrary to what Professor Vernon appears to assume,

[131] Examples include the Swedish Market Courts and the N.S.W. Commercial Tribunal.

[132] Vernon Report, p.31.

[133] The Disputes Tribunal Bill 1987 proposes to raise this to $3000 (or $5000 if the parties agree).

[134] "The issue then is one of social policy and of weighing two competing considerations; first that all citizens should have access to at least some kind of forum to redress their grievances, and secondly, that the laws should be strictly, scrupulously and equally applied to all. The establishment of Small Claims Tribunals indicates that some erosion of the latter principle has been accepted as the price to be paid for at least the attempt to achieve the former". (C. Hawes, "Some aspects of Small Claims Tribunals in New Zealand," paper presented to Australasian Universities Law Schools Association Conference, August 27-30, 1986, Goroka, Papua New Guinea). See also Small Claims Tribunal Evaluation, supra, n.130, pp.29-36,89-90.

[135] See A. Frame, "Small Claims Tribunals" [1982] N.Z.L.J. 250.

I believe that virtually unlimited (in a monetary sense) jurisdiction is even less likely to be acceptable to the community in the case of the specialized mechanisms. Consequently it appears to me to be inevitable that the ordinary courts be given jurisdiction in respect of at least some claims arising under the statutory scheme. Indeed I believe that in principle consumers who wish to do so should be free to bring any such claim before the ordinary courts (though with minor claims there might well be costs penalties even for a successful plaintiff).

As the rights of consumers under the statutory scheme would, at least in the main, be decided by small claims tribunals or the specialized mechanisms, the problem arises that no body of precedent would become available to enable judgments to be made as to whether similar standards are being applied in similar cases and whether the objectives of the legislation are being met. There is indeed a real danger under the existing law that problems of individual consumers will relatively rarely find their way into the law reports, with a consequent danger of distortion of the general law as it applies to consumers.[136] As a partial solution to this problem Professor Vernon suggests that seminars for decision-makers be organized with the aim of ensuring that they understand the substance of the statute and their role under it, as well as of providing an opportunity for exchange of information among them.[137] Especially if reports of such seminars were published from time to time, this suggestion is attractive. An additional step might be to require periodical public reports from the tribunals and specialized mechanisms, giving statistics of cases decided and their outcome, together with a summary of the types of claim brought and any general principals emerging from the decisions made.

d) *Finality*

Allowing appeals on the merits of a decision would often defeat the purpose of a system of special tribunals for hearing consumer claims, as successful consumers will often be unable or unwilling to undertake the risk of costs involved in defending an appeal by the supplier. Consequently legislation establishing such tribunals frequently provides that such appeals shall generally be final.[138] Professor Vernon therefore recommends that decisions on claims under the statute made by small claims tribunals or specialized mechanisms should not be subject to appeal, though the supplier would be permitted to challenge the jurisdiction of the decision — maker. In such a case the supplier would be required to conform with the order, but if the appeal were successful the government would reimburse the supplier for its costs of compliance with the order and for its costs incident to the appeal. (The Minister of Consumer Affairs would resist the appeal where he or she deemed it appropriate). Professor Vernon also recommends that consumers be entitled to appeal on the ground that the decision amounted to a gross miscarriage of justice, the Minister of Justice prosecuting the appeal in appropriate cases.[139]

Professor Vernon's recommendation in general strikes a reasonable balance

[136] See A Duggan, supra n.128, at 224.

[137] Vernon Report, p.31. For a description of some such steps already taken see Small Claims Tribunal Evaluation, supra, n.130, pp.22-34.

[138] See eg Small Claims Tribunals Act 1976 (N.Z.), ss 17,34; Consumer Claims Tribunals Act 1987 (N.S.W) ss.12, 34.

[139] Vernon Report, pp.31-32.

between the need for finality and the need to ensure that just procedures have been followed. However, suppliers as well as consumers should have the right to challenge a decision on the basis that it involved a gross miscarriage of justice. (In New South Wales the legislation establishing consumer claims tribunals allows decisions to be challenged only on the grounds of lack of jurisdiction or failure to observe natural justice, and a number of the reported decisions relate to challenges by suppliers on the latter ground.)[140]

9. *Conclusion*

Professor Vernon's report outlines a comprehensive scheme for post-sale protection of New Zealand consumers. It provides a valuable service in addressing the major issues which need to be addressed by such a scheme -the definition of "consumer," problems caused by the privity doctrine, the substantive obligations of suppliers appropriate to the modern marketplace, and mechanisms for the redress of consumer complaints. It also importantly draws attention to the potential role of supplier-specific codes of conduct in giving concrete definition in the context of particular industries or trades to the general provisions of the statutory scheme.

While I agree with the general thrust of many of the recommendations made by Professor Vernon, I have criticized details of his suggestions and have raised additional matters which I suggest should be considered when a statutory scheme is being drafted. There are two matters in particular where I have differed from Professor Vernon.

While I would certainly not suggest that the post-sale provisions of the Australian Trade Practices Act should be taken as a perfect model for New Zealand (and I have myself criticized some aspects of those provisions), I have argued that that legislation does offer more by way of guidance than Professor Vernon's report would suggest and I have pointed out some aspects of it which do not appear to have been fully appreciated by him.

I also believe that Professor Vernon's recommended statutory scheme of consumer protection fails to take account of the relationship between that scheme and the general law and that it is essential that any such scheme should be integrated with the general law. This arises most acutely in the context of consumers' claims against their immediate suppliers. If the statutory scheme is to stand completely independently of the law of contract, at least the impact of the statutory scheme on the consumer's contractual rights needs to be addressed. My own preference would be for the consumer's rights against the immediate supplier to be integrated with the law of contract. One approach to this would be to incorporate provisions concerning consumers in the Sale of Goods Act. Such an approach would, if it were to be comprehensive, necessitate also amendments to the Hire Purchase Act and new legislation dealing with other contracts for the supply of goods (eg hire and exchange), contracts for the supply of services and consumers' claims against manufacturers. Another solution would be the enactment of a comprehensive code of commercial law, which would encompass all of these matters, prescribing where appropriate different rules for consumers than for commercial acquirers of goods and services. A third approach would be the enactment of a

[140] See eg Jet 60 Minute Cleaners Pty Ltd v Brownette (1982) A.S.C. 55-203; McLelland v Amcil Industries Pty Ltd [1983] 1 N.S.W.L.R. 615.

comprehensive consumer transactions statute, leaving commercial transactions (at least for the time being) to be governed by existing statutes and the common law. The latter approach might be attractive if the judgment were made that the drafting of a comprehensive commercial code was desirable in principle but would be such a mammoth undertaking as to result in unacceptable delay in the achievement of needed reform in consumer law.[141] The basic goals advanced by Professor Vernon could be achieved in either of these ways. Decisions as to the most appropriate statutory pattern for New Zealand must be made on the basis of judgments as to how best to integrate reforms in the overall structure of New Zealand law and as to New Zealand's priorities for law reform.

[141] As to some of the problems involved, and the importance of setting priorities, see D. McLauchlan, "Contract and commercial law reform in New Zealand" (1984) 11 N.Z.U.L.R. 36.

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