

DEFECTIVE GOODS UNDER HIRE-PURCHASE : THE EFFECT OF THE NEW CREDIT LEGISLATION

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I. INTRODUCTION

The device of hire-purchase is a relatively recent invention¹ and a clear distinction between a conditional sale agreement and a hire-purchase agreement was only made subsequent to the passing of the Sale of Goods Act 1893 (U.K.). In *Helby v. Matthews*² the House of Lords emphasised that distinction and held that a hire-purchase agreement was not an agreement to buy under the provisions of that Act. A hire-purchase agreement is, at common law, a bailment of goods by the owner and an agreement by which the hirer has the option to return or purchase the goods at some time.³

The consequence of the credit legislation enacted recently in each of New South Wales, Victoria, Western Australia and the Australian Capital Territory, is that the hire-purchase agreement may, for essentially practical reasons, disappear. A more immediate consequence is that the rights of hirers of defective goods, under hire-purchase agreements which might be made, are diminished and uncertain.

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1 R.M.Goode, *Hire-Purchase Law and Practice* (2nd ed. 1970) 2, states that Mr H. Moore, a Bishopsgate piano maker who decided to increase his custom by making it easier for his customers to purchase goods on credit, claimed to have invented hire-purchase in 1846.

2 [1875] AC 471.

3 A.G. Guest, *The Law of Hire-Purchase* (1966) 21.

II. THE PROTECTION FOR HIRERS AT GENERAL LAW, UNDER HIRE-PURCHASE LEGISLATION AND THE TRADE PRACTICES ACT

The implied term forms the basis of contractual liability for defective products, however supplied, in the absence of express statements concerning those products. The nature of the hire-purchase agreement has, however, created difficulty at common law as to the conditions which ought to be implied in such contracts.⁴ It is clear that the common law implies a term of fitness for purpose in hire-purchase agreements but the precise formulation of that term cannot be stated.⁵ The nature of the term of merchantable quality to be implied at common law, if at all, into a hire-purchase agreement is uncertain.⁶ In contrast, there is little doubt that at common law the owner is under a duty to supply goods of the description which he has agreed to let out on hire⁷ and that there is also an implied condition in a contract of hire-purchase that the owner is capable of conferring a good title to goods at the time when the goods are delivered to the hirer.⁸

The legislative response to the implication of terms at common law into, inter alia, hire-purchase agreements was to give those terms, other than the term as to correspondence with description and subject to some amendments, statutory form. The enactment of hire-purchase legislation thus diminished the uncertainty surrounding the formulation of those terms but only for those agreements subject to that legislation. The legislation did not regulate all hire-purchase agreements nor did it exclude the common law.

Until the enactment of the new credit legislation the implication of terms into hire-purchase agreements was, in each of New South Wales, Victoria, Western Australia, and the Australian Capital Territory,

4 See S.W. Cavanagh and C.S. Phegan, *Product Liability in Australia* (1983) para. [104] for a detailed consideration of the common law position.

5 *Roach v. Roberts* (1924) 26 WALR 110; *Klose v. Duncan and Frazer Ltd* [1928] SASR 139; *Gemmell Power Farming Co. Ltd v. Nies* (1935) 55 SR (NSW) 469; *Woods Radio Exchange v. Marriott* [1938] VLR 309; *Beaton v. Moore Acceptance Corp. Pty Ltd* (1959) 104 CLR 107. In *Beaton* the High Court held expressly that a necessary prerequisite for the implication at common law of the term of fitness for a specified purpose was at least the requirement of reliance on the seller's skill and judgment. This requirement is rarely met in the case of a seller-finance company. See *ibid*.

6 *Beaton v. Moore Acceptance Corp. Pty Ltd*, *ibid*; *Traders Finance Corp. Ltd v. Rourke* (1966) 85 WN (Pt 1) (NSW) 739.

7 *Astley Industrial Trust v. Grimley* [1963] 1 WLR 584.

8 *Karflex Ltd v. Poole* [1933] 2 KB 251; *Warman v. Southern Countries Car Finance Corp. Ltd* [1949] 2 KB 576; *Mercantile Union Guarantee Corp. Ltd v. Wheatley* [1938] 1 KB 490; *Richards v. Alliance Acceptance Co. Ltd* [1976] 2 NSWLR 96.

regulated by hire-purchase legislation⁹ and the Trade Practices Act 1974 (Cth).¹⁰ In each of those jurisdictions the hire-purchase legislation did not apply to hire-purchase agreements where the hirer “. . . is a person who is engaged in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement”.¹¹ The terms to be implied into those hire-purchase agreements were the common law implied terms which were expressly preserved.¹² In New South Wales the ambit of the Hire-Purchase Act 1960 (N.S.W.) was further reduced by section 1(6) of that Act which excluded hire-purchase agreements

(i) under which the hirer is a company; or (ii) in respect of goods (other than industrial machinery, farm equipment or a motor vehicle) the cash price of which exceeds \$10,000 or, where a greater amount is prescribed, that greater amount

To the extent that the hire-purchase agreements which were excluded were not regulated by the Trade Practices Act 1974 (Cth) the common law operated exclusively.

9 The terms implied by hire-purchase legislation in each of the jurisdictions under discussion are:-(i) terms as to title, quiet enjoyment and freedom from encumbrance: Hire-Purchase Act 1960 (N.S.W.) s.5(1); Hire-Purchase Act 1959 (Vic.) s.5(1); Hire-Purchase Act 1959 (W.A.) s.5(1); Hire-Purchase Ordinance 1961 (A.C.T.) s.10(1); (ii) a term as to fitness for purpose: N.S.W.: s.5(3); Vic.: s.5(3); W.A.: s.5(3); A.C.T.: s.10(3); and (iii) a term as to merchantable quality: N.S.W.: s.5(2); Vic.: s.5(2); W.A.: s.5(2); A.C.T.: s.10(2). The time at which the owner must have a right to sell is the time “when the property is to pass”. For the implication of the term as to fitness the particular purpose may be made known either to the owner or the dealer and there is no requirement of reliance on the owner’s skill and judgment. The duty to supply goods of merchantable quality is not strict; liability for defects of which the owner could not reasonably have been aware are excluded. It is not necessary for the implication of either term that the owner be a trader. Although there is no term implied as to compliance with description the hire-purchase legislation (N.S.W.: s.3; Vic.: s.3; W.A.: s.3; A.C.T.: s.7) requires every hire-purchase agreement to be in writing and to contain a description of the goods sufficient to identify them. For non-compliance the liability of the hirer is reduced by the amount included in the agreement for terms charges. None of the implied terms can be excluded, modified or restricted nor can the requirements as to writing and description (N.S.W.: s.36(1); Vic.: s.28(1); W.A.: s.28(1); A.C.T.: s.33(1); see also *Considine v. Citicorp Australia Ltd* [1981] 1 NSWLR 657). For an examination of the implied terms, see note 4 *supra*, paras [201]-[235].

10 S.69 (terms as to title, quiet enjoyment and freedom from encumbrance); s.70 (correspondence with description); s.71(2) (fitness for purpose); s.71(1) (merchantable quality); s.72 (correspondence with sample). The terms cannot be excluded: ss 68, 68A. The time at which the supplier must have a right to sell under s.69 is the time when property is to pass. The hire-purchase legislation is expressed similarly and each contrasts with the term implied at common law which looked to the time of delivery. For the implication of the term as to fitness the particular purpose may be made known either to the dealer or the owner and reliance on the skill or judgment of the dealer or owner is presumed. Unlike the hire-purchase legislation, the term as to merchantable quality extends to latent defects. There is no counterpart to ss 69 and 72 in the hire-purchase legislation. For an examination of the terms implied by the Trade Practices Act 1974 (Cth), see note 4 *supra*, paras [244]-[259].

11 See the definition of “hire-purchase agreement” in Hire-Purchase Act 1960 (N.S.W.) s.2(1); Hire-Purchase Act 1959 (Vic.) s.2(1); Hire-Purchase Act 1959 (W.A.) s.2(1); Hire-Purchase Ordinance 1961 (A.C.T.) s.6(1).

12 Hire-Purchase Act 1960 (N.S.W.) s.5(5); Hire-Purchase Act 1959 (Vic.) s.5(5); Hire-Purchase Act 1959 (W.A.) s.5(5); Hire-Purchase Ordinance 1961 (A.C.T.) s.10(5).

13 S.1(6) was introduced by s.3 of the Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.).

In the case of hire-purchase agreements which fall within the hire-purchase legislation it is provided expressly¹⁴ that the statutorily implied terms do not prejudice in any way any other enactment or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.¹⁵ This means that the statutorily implied terms are in addition to and not in substitution for the terms implied at common law and that a hirer is entitled to the benefit of a common law term if it affords better protection than one implied by the legislation save to the extent that it is effectively restricted or excluded by the terms of the agreement. The terms implied by the hire-purchase legislation cannot be excluded, modified or restricted.¹⁶

Broadly, the terms implied by the Trade Practices Act 1974 (Cth), which may not be excluded,¹⁷ arise only where there is a "supply" of "goods" or "services" by a "corporation" to a "consumer".¹⁸ Apart from the implied undertakings as to title, encumbrances and quiet possession, the supply by a corporation must be made "in the course of a business" and otherwise than by auction. Briefly, "supply" in relation to goods, includes supply by way of sale, exchange, lease, hire or hire-purchase.¹⁹ Accordingly, the scope of the Trade Practices Act 1974 (Cth) is wider than the hire-purchase legislation as to the types of contracts which are regulated but narrower in that the supplier of the goods must generally be a corporation²⁰ and the recipient, a consumer. A consumer is defined²¹ by reference to the nature and price of the goods supplied and not by reference to the nature of the person consuming them. If the price of the goods does not exceed \$15,000, or such greater amount as may be prescribed, and the goods are not acquired, inter alia, for re-supply then the acquirer of those goods is a consumer. Where the price of goods exceeds that amount, the person who acquires them is not a consumer unless the goods are of a kind ordinarily acquired for personal domestic or household use or consumption, and, in addition, are not acquired, inter alia, for re-supply.

Section 75 of the Trade Practices Act 1974 (Cth) provides that Part V of the Act is not intended to exclude or limit the concurrent operation of any law of a State or Territory and that, other than expressly provided by Part V, no right or remedy existing before its enactment, is to be limited, restricted or otherwise affected. The terms implied by the

14 Note 12 *supra*.

15 This fact stresses the need for a resolution to the uncertainty of the extent of the common law implied terms.

16 Hire-Purchase Act 1960 (N.S.W.) s.36(1); Hire-Purchase Act 1959 (Vic.) s.28(1); Hire-Purchase Act 1959 (W.A.) s.28(1); Hire-Purchase Ordinance 1961 (A.C.T.) s.33(1).

17 Ss 68, 68A.

18 For an examination of these requirements, see note 4 *supra*, paras [244]-[253].

19 S.4(1).

20 This is subject to the operation of ss 6(2)(c) and (h) which extends the operation of the Act to persons. See note 4 *supra*, para [248].

21 Trade Practices Act 1974 (Cth) s.4B.

Trade Practices Act 1974 (Cth) are accordingly in addition to, and not in substitution for, the terms implied by State and Territory legislation and those implied at common law. It follows that a hirer can look to any of the terms implied at common law, or to those implied by State or Territory legislation if his agreement falls within that legislation, or to those implied by the Trade Practices Act 1974 (Cth) if his agreement is governed by that Act, and claim the benefit of the term or terms that give him the most favourable contract and remedies in the circumstances. For example, the terms as to merchantable quality implied by hire-purchase legislation do not protect the hirer against latent defects whereas section 71(2) of the Trade Practices Act 1974 (Cth) and the term implied at common law, at least on the authority of *Traders Finance Corp. Ltd v. Rourke*,²² do extend to latent defects. The hirer is entitled to the wider protection of the common law unless excluded by agreement or that of section 71(2) of the Trade Practices Act 1974 (Cth) if his agreement is governed by that Act. The proposition that the hirer is entitled to the most favourable remedy is subject to the proviso that the provisions of the Trade Practices Act 1974 (Cth) prevail over any State or Territory legislation in the event of any direct inconsistency.²³ Section 73 of the Trade Practices Act 1974 (Cth) may, in the circumstance where it operates,²⁴ produce a directly inconsistent result to the operation of the State and Territory legislation so attracting the self-executing operation of section 109 of the Constitution to limit the hirer's remedy in the terms provided for by

22 (1967) 85 WN (Pt 1) (NSW) 739.

23 It will only be in the event of direct inconsistency that the provisions of the Trade Practices Act 1974 (Cth) will, by virtue of s.109 of the Constitution, prevail. Section 74 eliminates the suggestion of inconsistency otherwise arising: *Re Credit Tribunal; ex parte General Motors Acceptance Corp., Australia* (1977) 14 ALR 257.

24 Section 73 is expressed as follows: "73. Where —

- (a) a corporation (in this section referred to as the "owner") enters into a contract for the supply by way of lease, hire or hire-purchase of goods to a consumer;
 - (b) antecedent negotiations in relation to the contract were conducted with the consumer by or on behalf of another corporation that is not related to the owner;
 - (c) the other corporation supplied the goods, or caused the goods to be supplied, to the owner;
 - (d) the owner did not take physical possession of the goods before they were delivered to the consumer; and
 - (e) the consumer suffers loss or damage as a result of a breach of a condition that is implied in the contract by virtue of section 70, 71 or 72
- the owner is not under any liability to the consumer by reason of the breach of that condition but the consumer may recover the amount of the loss or damage by action in a court of competent jurisdiction against the other corporation."

section 73.²⁵ Under the hire-purchase legislation the liability for breach of the terms implied by that legislation is on the owner, although, with respect to the condition as to fitness for purpose, the owner is entitled to be indemnified by the dealer.²⁶ In contrast section 73 of the Trade Practices Act 1974 (Cth), where it operates, displaces the owner's liability for damages and limits the hirer's rights to action for damages to a right of recovery against the dealer only. The release of the owner means that the hirer is without a remedy in damages should the dealer be insolvent. He may still, if the right has not been lost, elect, at general law, to terminate the hire-purchase agreement or, in the alternative, he may rescind the agreement pursuant to section 75A of the Trade Practices Act 1974 (Cth).²⁷

Apart from the need for a resolution to the uncertainty of the extent of the common law terms and the unfortunate effect of section 73 of the Trade Practices Act 1974 (Cth), the hirer of defective goods supplied by way of hire-purchase was well served by the protection of the terms implied at common law, by hire-purchase legislation and the Trade Practices Act 1974 (Cth).

III. THE EFFECT OF THE NEW CREDIT LEGISLATION

The hire-purchase legislation of New South Wales and the Australian Capital Territory has been repealed in conjunction with the commencement of the Credit Act 1984 (N.S.W.) and the Credit Ordinance 1985 (A.C.T.). In Victoria and Western Australia it has been amended by the Credit Act 1984 (Vic.) and the Credit Act 1984 (W.A.) to confine its operation to agreements outside the new credit legislation.

In each case the question of the protection of the hirer of defective goods under hire-purchase agreements cannot have been considered. Presumably his interests were lost in the attempts to achieve the broader aims of the legislation.

In order to understand the effect of the new legislation on the hirer's rights, I have examined each jurisdiction separately.

25 It is suggested by G. Q. Taperell, R. B. Vermeesch, D. J. Harland, *Trade Practices and Consumer Protection* (2nd ed., 1978) para. 1768, that as s.73 only excludes liability for breach of the terms implied by the Trade Practices Act 1974 (Cth) there is no reason why the owner should not remain liable under the similar, but not identical, terms implied by the hire-purchase legislation. On the other hand, B. G. Donald, J. D. Heydon, *Trade Practices Law*, (1978) 743, conclude that virtually the same breach will result in a liability under the hire-purchase legislation but an express exclusion of liability under the Trade Practices Act 1974 (Cth), with the consequence, in their view, that s.73 must prevail. It is an issue yet to be tested but, as unfortunate as it may be for the consumer, it is considered that the view of Donald and Heydon will be preferred.

26 Hire-Purchase Act 1960 (N.S.W.) s.5(4); Hire-Purchase Act 1959 (Vic.) s.5(4); Hire-Purchase Act 1959 (W.A.) s.5(4); Hire-Purchase Ordinance 1961 (A.C.T.) s.10(4).

27 See note 4 *supra*, para [259]; see also *Australian Guarantee Corp. Ltd v. Jennings* [1981] 1 NSWLR 50.

(a) New South Wales

The Hire-Purchase Act 1960 (N.S.W.) was repealed on 28 February, 1985.²⁸ Despite its repeal provision is made for its continued application to and in respect of hire-purchase agreements which were entered into prior to that date²⁹ and, pursuant to section 13 of the Credit Act 1984 (N.S.W.), which commenced on the same date, certain hire-purchase agreements and lease agreements are deemed to be credit sale contracts.

Section 13(1) converts a contract for the hiring of goods under which the hirer has a right, obligation or option to purchase the goods into a credit sale contract. Section 13(2) similarly converts to credit sale contracts certain transactions which in form are contracts of simple hire, or lease, but which involve an understanding that the lessee will be able to purchase the goods at some future time.³⁰

28 Hire-Purchase (Repeal) Act 1981 (N.S.W.) s.2, (as amended by Miscellaneous Acts (Credit Repeal and Amendment Act 1984 (N.S.W.) s.5).

29 Hire-Purchase (Repeal) Act 1981 (N.S.W.) s.4.

30 There are three situations in which what is ostensibly a lease of goods will be converted into a credit sale contract. These are expressed in s.13(2) as where:-

- “(a) the contract provides, or it is reasonably likely having regard to the nature of the goods that the goods are, or are able to be, affixed to land or to other goods and the goods are not, or when so affixed would not be, reasonably capable of being re-delivered to the supplier;
- (b) before the contract is made, the supplier –
- (i) acts in such a manner that the person to whom the goods are hired ought reasonably to infer that the supplier is willing, whether during or within a reasonable time after the period during which the contract is in force, to negotiate the sale to him of the goods or of goods of a value and description similar to the value and description of the goods to which the contract relates (being a value and description as at the time the contract is made); and
 - (ii) expects, or in the circumstances ought reasonably to expect, that the person to whom the goods are hired will negotiate the purchase by him of the goods or of goods of such a similar value and description; or
- (c) before the contract is made, it is agreed that the person to whom the goods are hired may continue the contract for a nominal consideration for a period that exceeds, or for two or more periods that together exceed, the period of two years after the expiration of the original term of the contract for the hiring.”

Subsection (2) does not apply however to “a contract for the hiring of goods that are or might reasonably be expected to be used by the person to whom they are hired for the purpose of a business carried on by him or by him and another person or other persons, where the whole or the greater part of the amount payable under the contract is, or might reasonably be expected to be a loss or outgoing necessarily incurred in carrying on the business.” (s.13(4))

This limitation does not apply to s.13(1). Although this article is concerned with hire-purchase agreements it should be noted that the protection afforded to a lessee, under a lease agreement which is converted to a credit sale contract will depend upon whether in respect of the implication of terms, regard is to be had to the status of the agreement before or as converted.

In each case the cash price³¹ of the goods must not be more than \$20,000 unless the goods are or include a commercial vehicle³² or farm machinery.³³ In addition a contract for the hiring of goods to a body corporate³⁴ is excluded as is a contract for the hiring of goods to the extent that the financial accommodation provided in relation to the goods is not credit within the meaning of the Act.³⁵ Goods acquired by the hirer for re-supply are thus excluded.

31 "Cash price" is defined in s.13(5)(b) of the Credit Act 1984 (N.S.W.) as meaning, "in relation to a contract for the hiring of goods –

- (i) where at the time the contract is made the goods are available for purchase for cash from the person from whom the goods are hired – means the lowest price at which the person to whom the goods are hired might have bought the goods from the first-mentioned person for cash;
- (ii) where at the time the contract is made the goods are reasonably available for purchase for cash but are not reasonably available for purchase for cash from the person from whom the goods are hired – means the price at which, at that time, the person to whom the goods are hired might reasonably have bought goods of that kind for cash; or
- (iii) where at the time the contract is made the goods are not reasonably available for purchase for cash – means the amount that is the reasonable value of the goods at that time."

32 "Commercial vehicle" is defined in s.5(1) as meaning –

- "(a) a motor vehicle within the meaning of the Motor Traffic Act 1909, constructed or adapted principally for the carriage of goods but does not include a motor vehicle of the kind known as a utility, a station wagon or a panel van; or
- (b) a vehicle without motive power of its own and constructed or adapted principally for the carriage of goods and for being drawn by a motor vehicle within the meaning of that Act;"

33 "Farm machinery" is defined in s.5(1) as meaning –

- "(a) a harvester, binder tractor, plough or other agricultural implement; or
- (b) any other goods of a class commonly used for the purposes of a farming undertaking that are prescribed as being farm machinery for the purposes of this Act where the goods are acquired for the purposes of a farming undertaking;"

34 The term "body corporate" does not include a body corporate under the Strata Titles Act 1973 (N.S.W.) or a company, the shares in which confer rights to occupy parts of a building owned by it (s.5(1)).

35 S.13(5)(a). The term "credit" is defined in s.5(1) as "any form of financial accommodation other than –

- (a) credit provided to a debtor, for the purposes of a business carried on by him, by –
 - (i) a documentary letter of credit;
 - (ii) discounting, or becoming a party to or the holder of, a bill of exchange or other negotiable instrument, or
 - (iii) becoming surety for a debtor;
- (b) credit provided for the purchase of goods for re-supply.
- (c) credit provided for the purchase of goods that –
 - (i) are raw materials; or
 - (ii) are ordinarily acquired for the purpose of treating or repairing other goods or fixtures on land or of being incorporated in other goods, for the purposes of transforming them, or incorporating them in other goods –
 - (iii) in trade or commerce;
 - (iv) in the course of a process of production or manufacture; or
 - (v) in the course of repairing or treating other goods or fixtures on land;
- (d) credit provided for the purchase of services, where the buyer has contracted to provide those services, or goods and services that include those services, to a third person; or
- (e) any transaction prescribed as being a transaction that is not credit within the meaning of this Act;"

Where a hire-purchase agreement or lease agreement is so deemed to be a credit sale contract the property of the supplier in the goods passes under the contract to the person to whom the goods are hired upon delivery of the goods or the making of the contract whichever last occurs³⁶ and a mortgage containing prescribed terms and conditions is deemed to have been entered into in writing between the hirer and the supplier as security for payment to the supplier of the amount payable by the hirer.³⁷

Accordingly, the current position in New South Wales for the regulation of a hire-purchase agreement is that if the agreement was entered into prior to 28 February 1985, it continues to be regulated by the Hire-Purchase Act 1960, provided that the hirer is not a company³⁸ or a person who is engaged in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement³⁹ and provided that, unless the goods are industrial equipment, farm equipment or a motor vehicle, their cash price does not exceed \$10,000.⁴⁰

If the agreement is entered into after 28 February 1985, it is regulated as a credit sale contract by the Credit Act 1984 (N.S.W.) provided that the hirer is not a body corporate⁴¹ or a person who acquires the goods for re-supply⁴² and provided that, unless the goods are or include a commercial vehicle or farm machinery, their cash price does not exceed \$20,000.⁴³

Insofar as the implication of terms in a hire-purchase agreement is concerned the current position is as follows:

(i) A hire-purchase agreement which falls outside the scope of each of the Hire-Purchase Act 1960 (N.S.W.) and the Credit Act 1984 (N.S.W.) may be subject to the terms implied by the Trade Practices Act 1974 (Cth) and/or the terms implied at common law. The hirer will be entitled to claim the benefit of the term or terms which give him the most favourable contract and remedies in the circumstances subject to the proviso that the Trade Practices Act provisions will prevail in the event of any direct inconsistency. At common law the implied condition as to title requires the owner to have a right to sell the goods at the time of their delivery to the hirer whereas under section 69(1)(a) of the Trade Practices Act 1974 (Cth) the owner is not required to have that right until the time when property in the goods is due to pass to the hirer. The hirer is entitled to the benefit of the wider common law provision

36 S.13(3)(e).

37 S.13(3)(f). The prescribed terms and conditions are those contained in Form 1 of Schedule 1 to the Credit Regulations 1984 (reg. 9).

38 Hire-Purchase Act 1960 (N.S.W.) s.1(6)(i).

39 *Id.*, s.2(1), "hire-purchase agreement".

40 *Id.*, s.1(6)(ii).

41 Credit Act 1984 (N.S.W.) s.13(5)(a)(i).

42 *Id.*, s.13(5)(a)(ii).

43 *Id.*, s.13(1).

unless excluded by agreement. The requirement of reliance on the owner's skill and judgment which, on the authority of *Beaton v. Moore Acceptance Corp. Pty Ltd*,⁴⁴ is a prerequisite to the implication of the term as to fitness for purpose at common law, is not a prerequisite under section 71(2) of the Trade Practices Act 1974 (Cth). The hirer is again entitled to the benefit of the wider term.

If the hire-purchase agreement is not one entered into between a "corporation" and a "consumer" within the meaning of those terms under the Trade Practices Act 1974 (Cth) the hirer's remedies would depend exclusively on the common law.

(ii) A hire-purchase agreement which remains subject to the Hire-Purchase Act 1960 (N.S.W.) may be subject to the terms implied at common law or those implied by the Hire-Purchase Act 1960 (N.S.W.) or the Trade Practices Act 1974 (Cth). As discussed above the hirer can look to any of those terms and claim the benefit of the term or terms that give him the most favourable contract and remedies in the circumstances.

(iii) The position for a hire-purchase agreement which is subject to the Credit Act 1984 (N.S.W.) is complex. That Act does not provide for the protection of a hirer by the implication of terms. However, a hire-purchase agreement which is deemed to be a credit sale contract may thereby be considered to be subject to the terms implied by the Sale of Goods Act 1923 (N.S.W.) and the Trade Practices Act 1974 (Cth).⁴⁵ Some weight for that view is perhaps found in section 13(3)(e) which provides for the passing of property in the event of the deemed credit sale. In the result the protection afforded to the hirer under a hire-purchase agreement may be diminished in contrast to the position under the Hire-Purchase Act 1960 (N.S.W.). Unless the agreement is within the scope of the Trade Practices Act 1974 (Cth) the hirer will not be able to rely on the implied term as to fitness for purpose. Section 19(1) of the Sale of Goods Act 1923 (N.S.W.), unlike section 5(3) of the Hire Purchase Act 1960 (N.S.W.) and section 71(2) of the Trade Practices Act 1974 (Cth), does not take account of the fact that the particular purpose may be made known to persons other than the contractual supplier of the goods to the hirer. In addition the requirement of that section that the goods supplied be of a description which it is in the course of the seller's business to supply may not be satisfied where the goods are supplied by a credit provider. The similar requirement in section 19(2) may prevent the implication of the term as

44 (1959) 104 CLR 107.

45 The terms implied at common law into contracts for the sale of goods no longer apply to contracts within the Sale of Goods Act 1923 (N.S.W.). This follows from the nature of the Act as a code and from the express terms of s.19 Sale of Goods Act 1923 (N.S.W.). To the extent that the common law implied terms are so excluded by the Sale of Goods Act 1923 (N.S.W.) that exclusion has been preserved by s.75 Trade Practices Act 1974 (Cth.). See note 4 *supra*, paras [110]-[114].

to merchantable quality. Further, the prohibition on the exclusion of terms implied by that Act is limited to a "consumer sale" as defined in section 62 of the Sale of Goods Act 1923 (N.S.W.).⁴⁶ The hirer might thus find that he is unprotected should the hired goods not be of a kind commonly bought for private use or consumption. There would equally be no protection under section 68 of the Trade Practices Act 1974 (Cth) from an exclusion clause in the case of such goods where their price was greater than \$15,000.⁴⁷

If a deemed credit sale is not so subject to the provisions of the Sale of Goods Act 1923 (N.S.W.) on the basis that the conversion in status is limited to the purposes of the Act,⁴⁸ it may still incorporate the terms implied by the Trade Practices Act 1974 (Cth) and/or the terms implied at general law appropriate to its form prior to the conversion to its new status. Unfortunately, it is a matter upon which the Act is silent.

The question of the application of section 73 of the Trade Practices Act 1974 (Cth) is another problem. The effect of that section, where it operates, is to absolve finance companies from liability for loss or damage suffered by the consumer as a result of a breach of a condition implied by section 70, 71 or 72 of the Trade Practices Act 1974 (Cth). For the section to operate the supplier corporation must, *inter alia*, have entered into "a contract for the supply by way of lease, hire or hire-purchase ...". Accordingly the right of the hirer to sue his supplier, where the hire-purchase agreement is deemed by section 13(1) of the Credit Act 1984 (N.S.W.) to be a credit sale contract depends upon whether consideration may be given to the form of the agreement or whether its status as a hire-purchase agreement has been lost for all purposes. Nevertheless, as previously mentioned, whether or not section 73 precludes the recovery of damages from the supplier, the hirer may still, if the right has not been lost, elect, at general law, to terminate the contract or, in the alternative, rescind the contract pursuant to section 75A of the Trade Practices Act 1974 (Cth). In either event that might involve the return to the consumer of moneys paid by him under the contract. Section 75A(3)(b) provides expressly for the return of moneys paid whereas in the event of termination at general law the right to their return would depend on there being a total failure of consideration.⁴⁹

46 Sale of Goods Act 1923 (N.S.W.) s.64.

47 The goods would also be less than \$20,000 for the Credit Act 1964 (N.S.W.) to have application.

48 S.14(1) Consumer Credit Act 1981 (N.S.W.) which was an earlier version of s.13(1) Credit Act 1984 (N.S.W.) deemed the conversion to be "for all purposes". That expression was in contrast with the expression "for the purposes of this Act" as found in s.15(1) Consumer Credit Act 1981 (N.S.W.) (now s.14(1) Credit Act 1984 (N.S.W.)). The phrase "for all purposes" has disappeared. It never appeared in the Victorian credit legislation.

49 See note 4 *supra*, paras [259], [307], [311]-[312].

(b) Victoria

In Victoria the Hire-Purchase Act 1959 (Vic.) has not been repealed in conjunction with the commencement of the Credit Act 1984 (Vic.).⁵⁰ Instead section 169(1) of the Credit Act 1984 (Vic.) amends the Hire-Purchase Act 1959 (Vic.) to exclude from its operation contracts regulated by the Credit Act 1984 (Vic.). Notwithstanding that amendment, the Hire-Purchase Act 1959 (Vic.) continues its operation in respect of hire-purchase agreements made before the commencement of the Credit Act 1984 (Vic.).⁵¹

The effect of section 169(1) is to exclude from the Hire-Purchase Act 1959 (Vic.) those hire-purchase agreements which are deemed to be credit sale contracts by section 13 of the Credit Act 1984 (Vic.). That section is identical to section 13 of the Credit Act 1984 (N.S.W.). In the result the Hire-Purchase Act 1959 (Vic.) continues to operate in respect of hire-purchase agreements made before 28 February 1985 and hire-purchase where the cost price of the goods, not being a commercial vehicle or farm machinery, is greater than \$20,000, or where the hirer is a corporation.

The current position in Victoria in respect of the implication of terms in a hire-purchase agreement is as follows:

- (i) A hire-purchase agreement which falls outside the scope of each of the Hire-Purchase Act 1959 (Vic.) and the Credit Act 1984 (Vic.) is subject to the terms implied at common law. It will only be where the hirer is engaged in the trade or business of selling goods of the same nature or description as those comprised in the agreement that neither enactment applies.⁵² In such circumstances the terms implied by the Trade Practices Act 1974 (Cth) are not attracted.⁵³
- (ii) A hire-purchase agreement which is subject to the Hire-Purchase Act 1959 (Vic.) may be subject to the terms implied at common law or those implied by the Hire-Purchase Act 1959 (Vic.) or the Trade Practices Act 1974 (Cth). (See (a)(ii)).
- (iii) The position for a hire-purchase agreement which is subject to the Credit Act 1984 (Vic.) depends, in part, as in New South Wales, upon whether the conversion to a credit sale contract effected by section 13 is for all purposes or only for the purposes of the Act. The Victorian position is further complicated, however, by the Goods (Sales and Leases) Act 1981 (Vic.).

⁵⁰ 28 February 1985.

⁵¹ Credit Act 1984 (Vic.) s.169(2).

⁵² See the definition of "hire-purchase agreement" in s.2(1) Hire-Purchase Act 1959 (Vic.) and s.13(5) Credit Act 1984 (Vic.).

⁵³ See the definition of "consumer" in s.4B Trade Practices Act 1974 (Cth).

If the cash price of the goods does not exceed \$20,000 the terms to be implied in the deemed credit sale contract may be those appropriate to a sale under Part IV of the Goods Act 1958 (Vic.)⁵⁴ on the basis that the transaction is to be regarded as a sale for all purposes, or those appropriate to a hire-purchase agreement at general law on the basis that it is the form of the transaction which attracts the terms. In each case the terms implied by the Trade Practices Act 1974 (Cth) may also apply should the transaction fall within the ambit of its operation.⁵⁵ If the cash price of the goods under the hire-purchase agreement exceeds \$20,000 and it is an agreement in respect of a commercial vehicle or farm machinery, the terms to be implied into the deemed credit sale may, on the same bases, be those implied by Part I of the Goods Act 1958 (Vic.) or those implied at general law in the case of hire-purchase agreements.⁵⁶ In such circumstances the Trade Practices Act 1974 (Cth) has no application.

Part IV of the Goods Act 1958 (Vic.) provides greater protection than Part I. The terms as to fitness for purpose⁵⁷ and merchantable quality⁵⁸ which are implied by Part IV are not limited to circumstances where the supplier is a dealer in goods of the same kind as supplied but extend, like sections 71(1) and 71(2) of the Trade Practices Act 1974 (Cth), to a supply "in the course of a business". It is easier to view the deemed sale by a credit provider as part of its business activities than to view the credit provider as a dealer in the goods supplied. Further, section 90 of the Goods Act 1958 (Vic.), like section 71(2) of the Trade Practices Act 1974 (Cth) takes account of the fact that the particular purpose for which goods are required may be made known to persons other than the contractual supplier of the goods. Finally, the exclusion of the terms implied under Part I is expressly authorised⁵⁹ whereas those implied under Part IV cannot be excluded, restricted or modified.⁶⁰

54 Pt IV was introduced by the Goods (Sales and Lease) Act 1981 (Vic.) and commenced on 1 June 1982. It applies, inter alia, to contracts for the sale of goods where the cash price does not exceed \$20,000 or, if above that limit, the goods are of a kind ordinarily acquired for personal domestic or household use or consumption (s.85(1)). Pt IV does not apply, however, to a sale of goods where the buyer purchases or holds himself out as purchasing the goods for the purpose of re-supply or (where the goods are raw materials or goods that are ordinarily acquired to repair or treat other goods or fixtures on land, or to be incorporated in other goods) for the purpose of transforming them or incorporating them in other goods, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land (s.85(1)(a)).

55 See (a)(iii) and see in particular the discussion of the uncertainty surrounding the operation of s.73 Trade Practices Act 1974 (Cth).

56 See the discussion at (a)(iii) for the effect on the hirer's rights.

57 S.90 Goods Act 1958 (Vic.).

58 *Id.*, s.89.

59 *Id.*, s.61.

60 *Id.*, ss 95-97.

(c) Western Australia

The position in Western Australia is similar to that in Victoria. The Hire-Purchase Act 1959 (W.A.) has been amended⁶¹ to exclude from its operation any agreement that is deemed to be a credit sale contract by the Credit Act 1984 (W.A.). Notwithstanding that amendment the Hire-Purchase Act 1959 (W.A.) continues its operation in respect of hire-purchase agreements made before the commencement of the Credit Act 1984 (W.A.).⁶²

The effect of the amendments is that the Hire-Purchase Act 1959 (W.A.) continues to operate in respect of hire-purchase agreements made before 31 March 1985, and hire-purchase agreements where the cash price of the goods, not being a commercial vehicle or farm machinery, is greater than \$20,000, or where the hirer is a corporation.

The position in respect of the implication of terms where a hire-purchase agreement falls outside each of the Hire-Purchase Act 1959 (W.A.) and the Credit Act 1984 (W.A.) or where it is subject to the Hire-Purchase Act 1959 (W.A.) is the same as in Victoria (see (b)(i) and (b)(ii) respectively). The position for a hire-purchase agreement which is subject to the Credit Act 1984 (W.A.) is similar to that in New South Wales (see (a)(iii)) except that where the Sale of Goods Act 1895 (W.A.) has application the exclusion of the terms implied by that Act is permissible.⁶³

(d) The Australian Capital Territory

In the Australian Capital Territory, as in New South Wales, the Hire-Purchase Ordinance 1961 (A.C.T.) has been repealed in conjunction with the commencement of the Credit Ordinance 1985 (A.C.T.).⁶⁴ Although there appears to be no provision for the continued operation of the Hire-Purchase Ordinance 1961 (A.C.T.) in respect of hire-purchase agreements made before the commencement of the Credit Ordinance 1985 (A.C.T.) those agreements would be subject at least to the terms implied by the Hire-Purchase Ordinance 1961 (A.C.T.).⁶⁵

The position in respect of the implication of terms is the same as for New South Wales (see (a)) except that where the Sale of Goods Ordinance 1954 (A.C.T.) has application the exclusion of the terms implied by that Ordinance is permissible.⁶⁶

61 S.8 Acts Amendment and Repeal (Credit) Act 1984 (W.A.).

62 *Id.*, s.20. The Credit Act 1984 (W.A.) commenced on 31 March 1985.

63 S.54 Sale of Goods Act 1895 (W.A.).

64 S.265 Credit Ordinance 1985 (A.C.T.). The Ordinance commenced on 28 February 1985.

65 S.3(2) Credit Ordinance 1985 (A.C.T.) provides that it has no application to such a contract made before its commencement.

66 S.58 Sale of Goods Ordinance 1954 (A.C.T.).

IV. CONCLUSION

One aim of the new credit legislation was to provide uniformity as between the States and Territories adopting it. It is evident that that aim has not been achieved with respect to the protection afforded to hirers of defective goods. In fact any uniformity which had existed by reason of the hire-purchase legislation, has been removed.

Another aim was undoubtedly to provide greater consumer protection for those within its scope than for those excluded. However, it will only be hirers of goods under hire-purchase agreements which remain subject to hire-purchase legislation or those which may be made subject to the Trade Practices Act 1974 (Cth) or Goods Act 1958 (Vic.), who, for example, will benefit from a non-excludable term as to fitness for purpose. The fact that section 73 of the Trade Practices Act 1974 (Cth) may not apply to a hire-purchase agreement regulated by the credit legislation thus providing greater protection for a hirer is a result achieved more by chance than design.

Apart from its effect in reducing uniformity and diminishing rights in this area the new legislation has created uncertainty, particularly to the extent of the conversion effected by section 13, and added complexity to an area concerned principally with consumer protection which should be free of such technicalities. It must be concluded that in framing the new credit legislation no consideration was given to the plight of the hirer of defective goods under a hire-purchase agreement.