FIJI LAW SOCIETY, 1981 CONVENTION

HYATT REGENCY, FIJI

18-20 SEPTEMBER 1981

CONSUMER AND THE LAW

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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INTRODUCTION

When Aldous Huxley wrote Brave New World he predicted accurately many developments. Test-tube fertilization, the spread of narcotic drugs and the growing power of the bureauracy were all mentioned in his predictions of a society 600 years hence. Significantly enough, he predicted that the calendar would be changed and the Brave New World would date time by reference to Ford. Henry Ford's development of the mass produced motor car launched the consumer society of the United States, in earnest. The influence of mass production and consumerism continues to be felt in all parts of the world. Inevitably, the law, seeking to adjust the disputes and differences of society, responds to the world of the consumer.

The Australian Law Reform Commission is a permanent body established by the Australian Federal Parliament to assist the Government and the Parliament in the review, modernisation and simplification of Federal laws. There are State law reform agencies with similar responsibility in the area of State laws. In July 1981 a meeting of the Australian Law Reform Agencies was held in Hobart. Among the participants in this Conference were a number of overseas law reformers. The Fiji Law Reform Commissioner and the Fiji Crown Solicitor took an active part in the Conference. Proposals were made for closer co-operation between law reformers in Australia and in the Pacific region.

The Australian Law Reform Commission is a permanent body. It is established in Sydney with full-time and part-time commissioners. There are 11 commissioners in all comprising judges, barristers, solicitors and law teachers. Some of the best lawyers in Australia have been appointed as commissioners. The present Governor-General of Australia (Sir Zelman Cowen) and the most recent appointment to the High Court of Australia (Sir Gerard Brennan) were part-time commissioners. Sir Gerard Brennan was no stranger to Fiji, having been involved as counsel in important litigation here.

The Commission works on projects assigned to it by the Federal Attorney-General. To correct the bias of its composition of lawyers, a team of consultants is appointed in every project. The consultants come from many walks of life and from all parts of the country. They offer their service, free of charge, participating with the law commissioners to improve Federal laws. Proposals are then ventilated before the whole Australian community by the use of pamphlets, discussion papers, radio and television, talk-back programs, lectures, public hearings, seminars and public opinion polls. At the end of this process a report is prepared, with draft legislation attached. This report must be tabled in Parliament by the Federal Attorney-General and thus becomes a public document. A number of the reports of the Commission have been adopted at a Federal, Territorial and State level in Australia. The process is therefore not just an academic one. It is one designed to produce an actual improvement in the laws and practices of the country, so that these will be more in tune with our time of rapid change.

A number of the projects given to the Australian Law Reform Commission affect the consumer and the law. Notable amongst these are the projects concerned with consumer indebtedness, reform of insurance contracts involving consumer insurance, and the development of class actions for the protection of consumer interests in courts of law. I will deal with each of these projects in turn, although I acknowledge that some of them may be of limited relevance only to the needs of Fiji.

In Australia, because of the Federal nature of the Constitution, the majority of laws dealing with the protection of consumers' interests are State laws and thus do not fall within the province of the Australian Law Reform Commission. The Australian market economy is at a different stage of development and its needs may not reflect those of Fiji, where the needs of the consumer may well be quite different. It is necessary to begin this piece with a frank acknowledgement that laws developed in one country are not easily transplanted into another country, at least without significant adjustment. Not only is this true of the attempts to adapt laws and practices developed in the United

States to the rather different conditions of Australia. It is also true of would be reformers seeking to export Australian ideas to a country such as Fiji. I must leave it to Fijian colleagues, with their greater knowledge of the Fijian community and current laws to decide how many (if any) of the developments in Australia are apt for conditions in Fiji.

CONSUMER LAW: AN OVERVIEW

Before proceeding to sketch the relevant work of the Australian Law Reform Commission concerning consumers, it may be helpful to outline the phases through which Australian efforts to reform consumer protection law have passed during the last decade or so.

It has been suggested[1] that three distinct phases can be detected.

* Conciliation phase. In the first phase, conciliation machinery is established to settle many consumer disputes. This involves a transition from reliance on the informal pressure of a consumer protection bureau to binding decisions resulting from consumer claims tribunals. The conciliation phase is generally supplemented by penal legislation designed to outlaw the most unacceptable selling techniques, such as mock auctions, inertia selling, pyramid sales schemes and referral selling. The provision of consumer protection agencies and tribunals to supplement the ordinary courts is a recognition of the fact that many consumers feel unable to take their legitimate grievances to the courts either because of adversary procedures, the need for representation, the costs and delays involved or a general fear that exists in some quarters about the court system.
* Substantive law phase. The second phase is characterised by reform of the substantive law governing consumer transactions and their financing. The common law of contract is seen as unsuitable or inadequate to deal justly with the complaints of consumers. The need for new laws to govern growing consumer credit has promoted important suggestions for change. In recognition of the realities of the mass produced economy, law reform is proposed to provide as between the consumer and the manufacturer for manufacturers' warranties legislation, the provision of implied terms and relief against misrepresentation or unconscionability in dealings between consumers and suppliers, and comprehensive consumer credit laws to deal with the relationship between the consumer and the credit provider.
* Procedures phase. The third phase is reform of the law governing the procedures for effectively enforcing consumer claims. It is in this area that a proposal such as the reform of court procedures to permit class actions may be seen.

Different jurisdictions of Australia have reached different points in the development towards consumer protection law reform. Some of the nine jurisdictions, and on my understanding Fiji, are still effectively in the first phase. Others have entered the second phase. Two jurisdictions (the Commonwealth and South Australia) are on the brink of the third phase.

Obviously, the above sketch oversimplifies the complex developments made more complex by the Federal organisation of Australia, where law reform rarely develops on a broad front but often edges ahead, unevenly, from one jurisdiction to another. Equally obviously, what is 'reform' in the area of consumers' rights and consumer protections is distinctly a matter of opinion. Class actions, for example, have been seen by supporters as a 'panacea' that will redress the inequality of the consumer in litigation and the courts. Manufacturers described the procedure as 'business' final nightmare'. Nevertheless, it may be helpful to outline some of the recent developments in consumer protection law in Australia. As things change rapidly in this area, no more than a general sketch can be proffered. The chief developments I will refer to relate to those in the areas of

* Manufacturers' warranties
* Misrepresentation
* Unconscionable or unjust contracts

MANUFACTURERS' WARRANTIES

The common law rules of privity of contract, possibly apt for the time in which they were developed before the mass production of goods and services, frequently worked an unjustice by standing in the way of the recovery by the consumer from the dominant party with whom he may have had no direct contractual relationship but who is, in practical term, responsible for the wrong complaint.[2] The lead was given by South Australia[3] and the Australian Capital Territory[4], whose laws permitted a consumer to sue the maker of a defective product for breach of a term of an implied statutory 'contract'. In this way, responsibility for the defect was shifted from the retailer (who was often quite blameless) to the manufacturer. A different approach was taken in N.S.W. where legislation provided that where a consumer sued a supplier, either party could apply to the court for the manufacturer to be joined.[5] It was left for the court to decide whether to make an order (limited to the cost of remedying the defect in the goods) against the manufacturer.[6]

The pattern of the South Australian legislation was followed in the Australian Capital Territory. Protection by way of implied terms was conferred.[7] Equally significant, an action for damages could be founded on an 'express warranty.'[8] This was a further attempt to face up to the reality of the modern consumer society. An 'express warranty' was defined broadly as 'an undertaking, assertion or statement...the natural tendency of which is to induce a reasonable purchaser to purchase the goods'.[9] This provision was designed to address the reality of mass advertising as a means by which manufacturers promote the sale of their goods and services. Already, legislation has been enacted in Australia to provide for criminal and other sanctions in respect of misleading advertising.[10] The further step involves providing a private right of action where a claim, amounting to an express warranty, is deceptive.

An inquiry established by the Federal Government in Australia recommended the inclusion of manufacturers' warranties in the Federal Trade Practices Act. It supported the South Australian and A.C.T. developments in these terms:

> [I]t is the manufacturer placing goods on the market in the first place who is largely responsible for the quality of goods and the law should require manufacturers to be directly responsible for statutorily-imposed standards in respect of the quality of those goods. In consumer transactions covered by Division 2 of Part V of the Act, the law now imposes a standard of quality to be met by goods placed into trade or commerce. We do not accept that it is appropriate for liability for a breach of that statutory standard to rest upon persons other than the manufacturer simply because the consumer has no contractual nexus with the manufacturer. Of all the persons in the distributive chain, the manufacturer is the person best placed to effect appropriate insurance against such liability and obviously the only person who can adjust the manufacturing process to take account of any persistent defects.[11]

The committee added that the common law system operated unfairly against the intermediate supplier, especially in regard to latent defects in packaged goods. It noted his inability to obtain an indemnity where a manufacturer had protected itself with an appropriately widely worded exemption clause.[12] The committee recommended that the Act be amended to provide:

* That a manufacturer or importer of goods is liable to a consumer buyer, whether or not the consumer purchased the goods from the manufacturer, or to persons who derived title to the goods through the buyer, for breach of any express warranties given by the manufacturer, or of implied warranties essentially of the same kind as those presently implied by the Trade Practices Act into contracts between a seller and a consumer buyer, but the manufacturer should not be liable for any breach that has been caused by an act or omission after the goods have left the control of the manufacturer; and
* that this liability upon the manufacturer is to be concurrent with the liability presently placed upon the actual seller, but where an actual seller incurs liability to a consumer by reason of a breach of an implied warranty and the consumer could have recovered similar damages against the manufacturer, the actual seller can recover from the manufacturer an indemnity for his liability.[13]

Following considerable debate in consumer, industry and political circles the Australian Federal Parliament ultimately adopted provisions in the Trade Practices Act which substantially enact the proposals of the Committee.[14] Direct liability by a manufacturer to a consumer is a legal phenomenon whose time has come. The rules of privity which stood in the way of such liability are not appropriate for a time of mass production and distribution of goods and services supported by mass advertising by those who produce them.

MISREPRESENTATION

A second area where it was recognised that the principles of the common law were inadequate relates to misrepresentation inducing a contract. The inspiration for reform comes from the Misrepresentation Act 1967 (U.K.). That Act led to the South Australian Misrepresentation Act 1971 and the Law Reform (Misrepresentation) Ordinance 1977 of the A.C.T. The legislation gives any person the right to rescind the contract and obtain damages for non-fraudulent misrepresentation, regardless of whether the contract has been performed or the misrepresentation had become a term of the contract.

The A.C.T. Ordinance went further than the U.K. legislation in the range of persons whose misrepresentation might be relevant. In addition to the parties to the contract, those who 'receive any direct or indirect consideration or material advantage as a result of the formation of the contract' are bound.[15] Again, this reform is simply a recognition of modern marketing conditions. Many of the statements promoting the sale of goods are not made by the supplier but by the manufacturer. Because exemption

clauses can become a mechanism for allocating the insurance risk, these are controlled and permitted to operate only where it is 'fair and reasonable'.[16] One of the controversies which surrounded the passage of this legislation related to who should bear the onus of proving the intent to deceive. In the result, the ordinary rule of the onus of proof rests on the prosecution to prove all elements of the offence beyond a reasonable doubt was reversed. In the context of consumer transactions this would appear to be justifiable. If no intent exists, the maker of the statement is in a much better position to show that, than the prosecutor is to prove the opposite. A number of defences mollify the effect of this reverse onus including 'reasonable belief in truth', 'reasonable precautions' and 'reasonable lack of awareness of untruth'.[17]

UNFAIR CONTRACT

In October 1976, Professor John Peden of the Macquarie Law School in Sydney delivered a report to the Minister for Consumer Affairs and the Attorney-General for N.S.W. He recommended enactment of a law dealing with unconscionable contracts in New South Wales.[18] Subsequently the N.S.W. Government secured the passage of the Contracts Review Act 1980, assented to on 15 April 1980.[19] The Act's Long Title declares its purposes to be 'the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts'.

In his report, Professor Peden pointed out that it is 'just conceivable' that the common law court, urged on by Lord Denning[20] would develop a doctrine of 'unequal bargaining power' as a wider basis for voiding contracts.[21] However, the line of authority has been condemned as economically 'irrational'.[22] The possibility of Australian courts following it and developing a coherent scheme seems unlikely. For this reason, Professor Peden favoured a statutory innovation, with a check-list of factors designed to guide a court in deciding whether a contract was unconscionable. Professor Peden suggested his list.[23] A similar but less detailed list of factors had been proposed in an earlier Law Reform (Harsh and Unconscionable Contract) Bill 1976 prepared for the Australian Capital Territory by a working party on consumer protection laws.

The Contracts Review Act permits the appropriate court in New South Wales (the Supreme Court or District Court) where it:

> finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it consider it just to do so, and for the purpose of avoiding as far as possible an unjust consequence or result, do any one or more of the following:

(a) it may decide to refuse to enforce any or all of the provisions of the contract;

(b) it may make an order declaring the contract void, in whole or in part;

(c) it may make an order varying in whole or in part, any provision of the contract;

(d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that —

(i) varies, or has the effect of varying, the provisions of the land instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.[24]

Without limiting the duty of the court to have regard to the public interest and to all circumstances of the case, a number of criteria are specified in the Contracts Review Act to which the court is to have attention. These are:

(a) whether or not there was any material inequality in bargaining power between the parties to the contract;

(b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;

(c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract;

(d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract;

(e) whether or not —

(i) any party to the contract (other than a corporation) was not reasonably able to protect his interests;or

(ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he represented,

because of his age or the state of his physical or mental capacity;

(f) the relative economic circumstances, educational background and literacy of —

(i) the parties to the contract (other than a corporation); and

(ii) any person who represented any of the parties to the contract;

(g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed;

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act;

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect;

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act—

(i) by any other party to the contract;

(ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract; or

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract;

(k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party; and

(l) the commercial or other setting, purpose and effect of the contract.[25]

It is too early to predict the operation of the Contracts Review Act 1980. It is understood that the Act is before the Standing Committee of Commonwealth and State Attorneys-General in Australia for consideration for adoption in other jurisdictions.

CONSUMER INDEBTEDNESS AND CONSUMER INSURANCE

I now turn to the projects of the Australian Law Reform Commission which have special relevance to consumers and the law. By a painful process, which has taken many years, Australia seems to be moving slowly towards uniform credit laws. Proposals to this end have been developed and have been under consideration for many years by the Standing Committee of Attorneys-General. Two jurisdictions have introduced laws based on the proposals. Meanwhile, the Australian Law Reform Commission has been looking at the problems that attend the failure of consumer credit, namely those faced by consumers in debt. The Commission has delivered one report on this subject.[26] In further pursuit of the reference, it has also produced a discussion paper proposing important changes to the laws by which debts are recovered in Australia.[27]

The Commission's report proposed a simplified procedure by which debtors could pay their debts, aggregated, over a period of up to three years. The Commission drew on the experience of the United States of America, the world's largest credit economy, where schemes known as 'wage earner schemes' have operated successfully for over 40 years. These schemes permit people who get into debt but have a regular source of income, to secure a short moratorium, receive counselling, organise their total debt and then repay an appropriate sum to their creditors. The Australian Law Reform Commission's proposals suggested a similar legal arrangement. In doing so, it faced up to the reality of the modern expansion of credit and the reliance, nowadays, which creditors quite properly make on the credit reference system as the principal means to protect them against unreliable debtors. The report also addressed the need to take individual debt not necessarily as a sign of deliberate moral culpability, but frequently as an instance of the incompetence of a particular consumer debtor, to cope with the vastly expanded credit available in today's community.

Likewise, the Commission's project on insurance seeks to adjust the Australian law governing insurance contracts, to an age of mass produced consumer insurance. The law governing the relations between an insurer and the insured was basically developed in the 18th century, long before mass produced insurance policies were sold by radio and television to people of varying understanding and generally little inclination to read the policy terms. The imposition upon consumer insurance of this kind of the obligations worked out in an earlier time, for quite different transactions, is scarcely just or appropriate. Yet unless there is reform of the law in this area, the law of insurance will continue to operate in this way.

The Australian Law Reform Commission has delivered one report on the subject of insurance contracts.[28] This report dealt with the relationship between the consumer of insurance and the insurance intermediary (agent or broker). It made proposals concerning the legal responsibility for and occupational regulation of insurance intermediaries. The Commission acknowledged three principles, each of them relevant to the consumer and the law.

* Protecting innocent purchasers. Where losses occur as a result of the methods used to market goods and services, the law should generally endeavour to spread the risk of consequent losses among the whole body of purchasers rather than allow them to fall randomly on those who have acted in good faith and are directly and immediately affected by those losses.

* Promoting informed choice. As far as possible, the insured should be put in a position to make an informed judgment when purchasing insurance through an intermediary. Where informed judgment may be inhibited by a lack of knowledge, legal intervention may be required to ensure that the relevant information is made available.
* Encouraging competition. Forms of regulation which might have an anti-competitive effect on the insurance industry or on any section of it should be avoided.[29]

The Law Reform Commission proposed a regime by which insurers would themselves be responsible for the conduct of agents dealing with an insured, but a broker, independent of the insurer, would not be entitled to look to the insurer for indemnity. To protect the innocent insured, the Commission proposed a scheme of occupational regulation for brokers, trust account requirements and a system of compulsory professional insurance for brokers. The Australian Government has announced that it will not be legislating along the lines proposed by the Commission.[30] However, a number of State governments, of differing political persuasion, have indicated their intention to do so, for the better protection of the innocent insured. Furthermore, the Western Australian Parliament, has already adopted legislation for the licensing of insurance brokers.[31]

The report on insurance intermediaries is only the first phase of the Australian Law Reform Commission's recommendations on the reform of insurance contract law. A second report, following a discussion paper on the subject[32] will deal with such matters as:

* the provision of comprehensible information on insurance to insurance purchasers
* the review of the law of insurable interest and the principle of uberrima fides
* the commencement, renewal and cancellation of insurance
* under-insurance, average, over-insurance, double insurance and subrogation
* exclusion from cover of insurance
* sexual and other forms of discrimination in insurance cover and premiums.

It is expected that the Commission's second report on insurance will be delivered early in 1982. It will not propose a different regime for consumer and non-consumer insurance. However, it is necessary in reform of the law of insurance to have regard to the profound implications of the spread of consumer insurance and the involvement, as insureds, of very many ordinary citizens without any sophisticated knowledge of insurance law. Recognition of this reality has implications for the content of a just law of insurance.

CLASS ACTIONS

I now, briefly, turn to the subject of class actions, a project referred to the Australian Law Reform Commission by the Federal Attorney-General in Australia. The Commission has delivered a discussion paper on the subject, which has been widely debated in all parts of Australia.[33] It plans to produce a report with recommendations in 1982.

Let me start by explaining what a class action is. First, it is a legal procedure. Strictly speaking, it creates no new legal rights, beyond those which exist at present. It provides a means for the delivery of existing legal rights to many persons with identical or like causes of action. It is a procedure by which one person or a group of determined individuals can aggregate legal causes of action and, in the name of many persons bring those causes of action to legal determination. Whilst in most countries of the common law, including Australia and Fiji, the law has insisted that actions for damages should be brought individually and not in the form of a representative or aggregate action, in the United States a different course was followed. The class action was developed, precisely to permit the bringing of large scale litigation. Frequently, the amount at stake, individually, would not have justified the bringing of a legal case. Everyone recognises that at the current costs of lawyers, there are many people who simply cannot afford to bring their grievances to justice. Our system for delivery of justice is an expensive one. The class action is said, by its supporters, to be a means by which a determined litigant can organise 'a class' and bring before the court not only his own claim but the aggregate claim of all persons similarly affected. Individually, such cases would often not come to the courts. Collectively and in aggregate, the amount at stake can sometimes be very significant.

The arguments for and against class actions are recounted in the Australian Law Reform Commission's discussion paper. I will not repeat them. There is no doubt that the class action brings in its train problems which must be addressed in any attempt to graft this American procedure on to a legal system such as that of Australia or Fiji. There is the problem of the blackmail suit, the claim without moral merit, the potential for windfall benefits to unexpected plaintiffs and the growth of a litigious industry to the benefit of lawyers rather than their clients. There is also the suggestion that we should enhance other procedures for protecting consumers and potential class plaintiffs, such as consumer protection authorities, consumer claims tribunals, voluntary recalls and so on.

Nevertheless, the South Australian Law Reform Committee has recommended the introduction of class actions in that State.[34] Although the proposal has not yet been acted upon by the South Australian Government, there is no suggestion that class actions in the United States will be repealed. The procedure has its problems. But a system of justice which contents itself with paper rights that we all know will frequently not be delivered because it is too expensive, dilatory or frightening to get to the umpire, is not one deserving of respect. Much of the emphasis in future law reform will undoubtedly be in the area of reform of legal procedures and the delivery of justice. Where a mass produced refrigerator contains a defect, the law ought to be able to find a way to 'mass produce' the delivery of justice. Where a common legal problem exists, involving a claim for damages, we ought to be able to find a way of promoting aggregate justice. It will not be satisfactory, in the mass produced, consumer society today, for the law alone to linger lovingly with the craftman's remedies. Class actions may not be a pressing issue in Fiji. But the improvement of the delivery of justice and in the means of getting people to independent determination of disputes, is a world wide issue and one which is, I would warrant, as relevant to Fiji as it is to Australia.

CONCLUSION

A Peking municipality announcement recently declared that:

> Consumer information has replaced women on colourful store signs and bill boards in an effort to develop a scientific attitude to purchasing.

Although I do not envisage quite so radical a development in Fiji or Australia, it is surely a sign of the times that consumerism has reached the Peoples Republic. In the United States, Australia and other countries, the-tide of consumer protection legislation is undoubtedly ebbing. At least for the time being, the high point has been reached and passed. The watch-word for this decade would appear to be modesty in public sector spending, personnel and interference in market forces. But even the chief advocate of 'small government', Professor Milton Friedman, acknowledges the need, occasionally, to have government intervention in order to protect the aggregate social good from the harm that can be done by an entirely unregulated economy. In his book, Free to Choose Milton Friedman teaches:

> Freedom cannot be absolute. We live in an interdependent society. Some restrictions on our freedom are necessary to avoid other, still worse, restrictions...We should develop the practice of examining both the benefits and costs of proposed government interventions and require a very clear balance of benefits over costs before adopting them.[35]

All law reform, including law reform designed to protect the consumer, will in future have to do its sums rather more carefully than in the past. Well meaning legislation for consumer protection may not always be effective and it may sometimes be expensive to implement, to police and to enforce in the courts. In this paper, I have sought to outline, in inevitably general language, the stages through which moves towards better consumer protection in Australia have passed. I have outlined some of the tasks before the Australian Law Reform Commission relevant to the consumer and the law. I must leave it to those who know much more about the economy and society of Fiji to determine how many of the Australian developments are relevant for your situation. Countries which share the tradition of the common law of England can learn from each other. That is the merit of the link of history. But each society must develop its laws to be in tune with the economic and cultural values that are unique to each jurisdiction. In part, that is the challenge for law reform today.

FOOTNOTES

1. K.P. O'Connor, 'Consumer Law: Recent Reform Measures and Current Proposals for Further Reform', unpublished paper delivered to a Canberra Law Workshop, October 1977. The first part of the present paper draws extensively on Mr. O'Connor's essay.

2. Handler, 'False and Misleading Advertising', 39 Yale L.J. 22, p.26 (1929).

3. Manufacturers Warranties Act 1974 (S.A.), No. 47 of 1975.

4. Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.).

5. Commercial Transactions (Miscellaneous Provisions) Act 1974 (N.S.W.), inserting new Part VIII (ss. 62-64) into Sale of Goods Act 1923 (N.S.W.).

6. Sale of Goods Act 1923 (N.S.W.), s.62(5).

7. Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.), s.4(1)(c), (d), (e) and (f). Senate Committee on Constitutional and Legal Affairs, Hansard for 3 November 1976 contains comprehensive submission by the Department of the Capital Territory on the Ordinance, Document 8, pp. 429-580.

8. Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.), s.5(1).

9. id. s.3(1).

10. Eg. Trade Practices Act 1974 (Aust.), ss.52 and 53. On State law prior to 1973, see O'Connor, 'Deceptive Advertising' (LL.M. thesis, University of Melbourne, 1973); on Trade Practices Act provisions, see Tapperell, Vermeesch & Harland, Trade Practices and Consumer Protection (1974) and Maher, 'Section 52 ...', (1975) 49 L.Inst.J. 80; 'Section 53 ...', (1975) 49 L.Inst.J. 358.

11. Trade Practices Act Review Committee, Report to the Minister for Consumer and Business Affairs, August 1976 (the Swanson Report), p.76.

12. ibid.

13. id., p.77.

14. Trade Practices Act 1974 (Aust.), Part V (Consumer Protection), Division 2A Actions against Manufacturers and Importers of Goods (inserted by Act No. 206 of 1978).

15. Law Reform (Misrepresentation) Ordinance 1977 (A.C.T.), s.4(1)(c).

16. id., s.6.

17. id., ss.7(2) and 8(2).

18. J.Peden, Report on Harsh and Unconscionable Contracts, October 1977 (the Peden Report).

19. Act No. 16, 1980 (N.S.W.).

20. Lloyds Bank Ltd. v. Bundy [1975] 1 Q.B. 316 (C.A. 1974); A. Schroeder Music Publishing Co. v. Macaulay [1974] 1 W.L.R. 1308 (H.L.); Clifford Davis Management v. W.E.A. Records [1975] 1 W.L.R. 61 (C.A.).

21. Peden Report, p.9 (1976).

22. Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords', (1976) 26 University of Toronto L.J. 359.

23. Peden Report, Appendix A (draft Bill), p.v-vi (1976).

24. Contracts Review Act 1980 (N.S.W.), s.7(1).

25. id., s.9(2).

26. Australian Law Reform Commission, Insolvency: The Regular Payment of Debts (ALRC 6), 1976.

27. Australian Law Reform Commission, Discussion Paper No. 6, Debt Recovery and Insolvency, 1978 (ALRC DP 6).

28. Australian Law Reform Commission, Insurance Agents and Brokers (ALRC 16), 1980.

29. id., p.xiii-xiv.

30. Statement by the Australian Treasurer, Mr. J. W. Howard, Commonwealth Parliamentary Debates (House of Representatives), 10 June 1981, p.3414.

31. General Insurance Brokers and Agents Act 1981 (W.A.).

32. Australian Law Reform Commission, Discussion Paper No. 7, Insurance Contracts, 1978.

33. Australian Law Reform Commission, Discussion Paper No. 11, Access to the Courts - II Class Actions, 1979.

34. Thirty-Sixth Report of the Law Reform Committee of South Australia Relating to Class Actions (1977).

35. M. & R. Friedman, Free to Choose, 1980, pp.94, 53.