REFORM OF THE LAW OF SALE IN AUSTRALIA

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[In this article, the author examines recent changes to the legislation governing contracts of sale in the United Kingdom and suggests that micro-reform will not satisfactorily overcome the fundamental problems with the Sale of Goods Act 1893 (UK). By comparing the structure of the law of sale in legislation based on the Sale of Goods Act with that of Roman law, the author identifies ways in which the Australian law of sale could be simplified and improved.]

I RECENT MICRO-REFORM OF THE LAW OF SALE IN THE UNITED KINGDOM

On 3 January 1995 in the United Kingdom, the Sale and Supply of Goods Act[1] came into effect. It reforms some aspects of the Sale of Goods Act[2] following recommendations made by the United Kingdom Law Commission and the Scottish Law Commission in a report to Parliament in 1987.[3] It is well known that the 1893 Act is the model for the legislation governing the law of sale in many countries. Historical events, in particular widespread colonial occupation by the British, spread the legacy of the English law to many now independent countries including Australia,[4] New Zealand,[5] Canada[6] and countries in Africa and Asia (for example Ghana and Malaysia).[7] In these various countries, the particular statutes which are modelled on the 1893 Act go by different names, but in view of their similarity to the original they can be referred to collectively as 'Sale of Goods Act legislation'.[8] The shared heritage means the reform of the law of sale in the United Kingdom is of interest to these countries; such reforms might constitute important changes to be followed. If such changes are not adopted, it must be recognised that increasing divergence between the various Acts modelled on the 1893 Act diminishes the advantage of sharing a common

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1 Sale and Supply of Goods Act 1994 (UK).

2 Sale of Goods Act 1979 (UK). This Act replaced the original Sale of Goods Act 1893 (UK) ('the 1893 Act'). It consolidated various amendments to the 1893 Act, but retained the basic structure of the Act.

3 United Kingdom Law Commission No 160, Scottish Law Commission No 104, *Sale and Supply of Goods* (1987) Cmd 137 ('Law Commissions').

4 Goods Act 1958 (Vic); Sale of Goods Act 1923 (NSW); Sale of Goods Act 1896 (Qld); Sale of Goods Act 1895 (SA); Sale of Goods Act 1895 (WA); Sale of Goods Act 1896 (Tas); Sale of Goods Act 1972 (NT); Sale of Goods Act 1975 (ACT).

5 Sale of Goods Act 1908 (NZ).

6 Michael Bridge, *Sale of Goods* (1988) 4. Quebec is an exception, having retained principles derived from the Napoleonic Code: *Quebec Civil Code*, Book III Title V.

7 H Hahlo and Ellison Kahn, *The South African Legal System and its Background* (1968) 520.

8 For the purpose of comparing the provisions of English, Australian and Canadian Acts, the section numbering of the Sale of Goods Act 1979 (UK), the Goods Act 1958 (Vic) and the Sale of Goods Act RSBC 1979 are used.

law of sale. But there is another possibility too, that the Sale of Goods Act legislation needs more fundamental reform than has been undertaken in the United Kingdom. If so, the changes enacted in the United Kingdom will not resolve these problems and it may be better to consider alternative approaches to reform. Why, then, was reform thought necessary in the United Kingdom and what was the nature and scope of the most recent changes?

In their report, the Law Commissions describe the suggested reforms as intended to be useful but not revolutionary.[9] The reason for this modest aim was the terms of reference given to the Commissions by the Lord Chancellor, which indicated fairly specific areas of inquiry and did not strictly permit a complete review of the law of sale of goods. The Commissions were to consider and make recommendations on whether the undertakings as to the quality and fitness of goods, implied under the law relating to the sale of goods and other contracts for the supply of goods, required amendment; the circumstances in which a person to whom goods are supplied is entitled, where there has been a breach by the supplier of a term implied by the statute, to reject the goods and treat the contract as repudiated, to claim a reduction or extinction of the price, or to claim damages; and the circumstances in which a buyer loses the right to reject the goods delivered by the seller.[10]

The Commissioners' report is not a comprehensive account of the law of the purchase and sale of goods, but it contains useful observations on the circumstances in which the 1893 Act was drafted, and an assessment of the present law in relation to the topics under consideration. It is pointed out that the purpose of Chalmers' codification was to provide, in the form of statute, a statement of the principles of law already laid down in judicial decisions, but not to alter the law, nor to fill in aspects of it that were yet to receive attention in the courts. The Commissioners' note that the provisions of the Act reflect the concepts, values and concerns of the 19th century, emphasising the viewpoint of merchant, rather than consumer, buyers and sellers. Great emphasis is given to the concept of the freedom of the parties to negotiate the terms of their agreement and to exclude, by agreement, the operation of almost all of the provisions of the Act. It is pointed out that, despite some important amendments to the Act, for example amendments which give consumers a degree of protection not originally available, the current legislation still 'consists of the 1893 Act with minor modifications'.[11] These observations are not controversial.

As regards the Law Commissions' assessment of the present law, it will suffice for present purposes to take note primarily of their findings in relation to the implied terms as to quality and fitness for purpose of goods bought and sold, the topic which is the cornerstone of much of what will be discussed in this paper. Before the 1995 amendment, section 14 of the Sale of Goods Act[12] laid down that in contracts of sale there was no implied condition or warranty about the

[9] Law Commissions, above n 3, 3.
[10] Ibid 1.
[11] Ibid 3.
[12] Sale of Goods Act 1979 (UK).

quality of goods, or their fitness for any purpose, except in terms of section 14(2) and section 15. In terms of section 15, conditions regarding the quality of goods are implied in the case of sales by sample, principally, the condition that the bulk of the goods delivered should correspond in quality with the sample, and be free from any defect not apparent in the sample which render them unmerchantable.[13] The provisions of section 14(2) required that goods bought 'by description' from a seller who sells goods in the course of a business be of 'merchantable quality', that is, free from defects not drawn to the buyer's attention or those defects which an examination ought to have revealed.[14] Originally the term 'merchantable quality' was not defined, but, in the United Kingdom, a definition was added to the section in 1973.[15] Section 14(6) laid down that goods of any kind are of merchantable quality within the meaning of section 14(2) if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances. It should be noted that the wording of the equivalent section in Australian jurisdictions still follows the formulation of the 1893 Act[16] and there is no statutory definition of 'merchantable quality' in the Australian Acts.

Before the introduction of a definition of 'merchantable quality' in the United Kingdom, and in countries where no definition has been enacted, the apparently simple provisions of section 14 have caused much difficulty over the years. In particular, a universally applicable concept of, and test for, 'merchantable quality' seem to have eluded the courts. The tests applied in some cases have been found inappropriate in others and so different formulations of the test can be found. They appear, broadly speaking, to be based on one of two approaches. The first approach is to ask whether goods which are found to be defective would nevertheless generally be acceptable to other buyers at the same price that the first buyer agreed to pay. A version of this 'acceptability' test was formulated by Dixon J in *Australian Knitting Mills Ltd v Grant:*

> [Goods] should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without an abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.[17]

The other approach is to focus on whether the defect deprives the goods in question of their usefulness, not to the particular buyer, but their general usefulness as goods of that type. This 'usefulness' approach was explained by Lord Reid in *Henry Kendall & Sons v William Lillico & Sons Ltd*:

[13] Ibid s 15(2)(a), (c).

[14] Ibid s 14(2).

[15] Supply of Goods (Implied Terms) Act 1973 (UK) s 7(2).

[16] Goods Act 1958 (Vic) s 19. Canadian provincial law also generally follows the original provisions of the 1893 Act, eg, Sale of Goods Act RSBC 1979, s 18. Cf the provisions of the *Quebec Civil Code*, arts 1522-31. See generally Bridge, above n 6, 451, 489.

[17] *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387, 418; reversed on the facts in [1936] AC 85 by the Privy Council.

> What sub-section (2) now means by 'merchantable quality' is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description.[18]

The disadvantage of this second approach is that goods may be held to be merchantable even if the aspect of quality complained of is one which the particular buyer considers material, whereas other buyers of the same type of goods *for different purposes* may not.[19] It is also interesting that the test, as formulated, does not appear necessarily to involve the notion of a 'defect' in the goods, but depends on a more generalised concept of the usefulness of particular goods for normal purposes. Nevertheless, when, in 1973, the definition of 'merchantable quality' was introduced in the United Kingdom into section 14(6) of the Sale of Goods Act, it followed the 'usefulness' approach, adding certain other specific factors to the test, such as the price paid. The approach is criticised by the Law Commissions in the 1987 report on three grounds: that the term 'merchantable' is outmoded, even obsolete, and therefore no longer appropriate; that the definition concentrates too greatly on the notion of the usefulness of the goods for their usual purpose, but neglects other aspects of quality that might be material, which has the effect of lowering the standard of performance required by sellers; and that the definition does not properly include the durability and safety of goods as aspects of quality.[20] The Commissions thus determined the need for further reform of the section, as occurred in 1995.

The latest amendment abandons the term 'merchantable quality' altogether and requires that, in the prescribed circumstances, the goods supplied under a contract of sale be of 'satisfactory quality'. The meaning of this phrase is defined in some detail. For the purposes of the Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances. The amendment further states that the 'quality' of goods includes their state and condition and, in appropriate cases, their fitness for all the purposes for which goods of the kind in question are commonly supplied, their appearance and finish, freedom from minor defects, their safety and their durability. In effect, the amendment opts to revert to emphasising the 'acceptability' concept under the guise of a new term, and the concept of usefulness for usual purpose is relegated to only one of a number of factors.

The Commissioners also made recommendations for other modifications to the Sale of Goods Act pursuant to the terms of reference set out above and suggested some specific changes of terminology appropriate to Scots law. These recommendations have been carried into law.[21] Included are changes to clarify what constitutes acceptance of goods by the buyer and what opportunity a buyer has to

[18] *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, 77, following Lord Wright in *Cammell Laird & Co Ltd v The Manganese Bronze and Brass Co Ltd* [1934] AC 402, 430.

[19] *B S Brown & Son Ltd v Craiks Ltd* [1970] 1 WLR 752; *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1.

[20] Law Commissions, above n 3, 8-11.

[21] Sale and Supply of Goods Act 1994 (UK) ss 2-4.

examine the goods and to partially reject them.[22] There are some modifications to the remedies for breach of condition in non-consumer cases, which limit a buyer's rights to reject goods for minor breaches of condition.[23] The details of these changes are not important for present purposes.

II THE LIMITATIONS OF MICRO-REFORM

The latest amendments continue what has been an ongoing process for over a century: trying to improve the Sale of Goods Act legislation where it appears most deficient, without radically altering the foundations of the original codification. In Australia, as in the United Kingdom, the Sale of Goods Act legislation that applies in the States and Territories has undergone only minor changes[24] and the basic structure of the Sale of Goods Act legislation and the concepts and mechanisms on which its provisions are based remain largely intact. Of course, hundreds of cases involving sale have been decided in the courts since 1893, but the case law concerns mainly matters of detail, decided within the structure of the legislation. For example, the courts have moved towards a wide rather than a narrow interpretation of the concept of sale by description so that even if a sale is of specific goods present at the time of the contract of sale and selected by the buyer, the sale is a sale by description 'whenever the description of the goods enters into the transaction, so that the buyer must be taken to rely upon it to a substantial degree as well as upon the identity of the goods'.[25] However, the concept of sale by description and the provisions of the legislation based on that concept remain as part of the law. Even the efforts to meet demands for effective consumer protection, which reached their peak in the 1970s and 1980s in Australia, have not involved major changes to the original provisions of the Australian Sale of Goods Act legislation. Instead, new enactments have been added to the existing structure, for example, at federal level by the Trade Practices Act[26] and at state level by various enactments, typical of which are the Goods (Sales and Leases) Act,[27] Fair Trading Act[28] and Credit Act[29] in Victoria.

It is rather doubtful that the latest reform of the Sale of Goods Act in the United Kingdom will render that legislation satisfactory. Some commentators take an optimistic if somewhat superficial view, for example, Patrick Milne who says 'the Act does bring about a number of important and welcome changes to

22 Kenneth Mullan, 'Satisfaction Guaranteed or No Money Back' (1988) 138 *New Law Journal* 280-2; Ian Brown, 'Acceptance in the Sale of Goods' (1988) *Journal of Business Law* 56.

23 Patrick Milne, 'Goodbye to Merchantable Quality' (1995) 145 *New Law Journal* 683, 684.

24 See, eg, s 9 of the Goods Act 1958 (Vic) which was repealed in recognition of the obligations under the Sale of Goods (Vienna Convention) Act 1987 (Vic); s 28 of the same Act, concerning markets overt, has also been repealed; s 42 has been amended to make clear that it is to be read subject to s 41.

25 *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387; *David Jones Ltd v Willis* (1934) 52 CLR 110; *Speedway Safety Products Pty Ltd v Hazell & Moore Industries Pty Ltd* [1982] 1 NSWLR 255.

26 Trade Practices Act 1974 (Cth).

27 Goods (Sales and Leases) Act 1981 (Vic).

28 Fair Trading Act 1985 (Vic).

29 Credit Act 1984 (Vic).

the law surrounding the sale and supply of goods.'[30] Atiyah is less sanguine. Writing after the publication of the Law Commissions' final report, but before the implementation of the proposals in legislation, Atiyah says it is unlikely the proposed changes will make much difference to the law.[31] The phrase he particularly criticised was, 'acceptable quality', originally proposed by the Law Commissions to replace 'merchantable quality'.[32] In the event, 'acceptable quality' has been changed to 'satisfactory quality' in the legislation, although the definition remains the same as originally suggested for 'acceptable quality'.[33] Whether the change of terminology is sufficient to overcome the problems of ambiguity and lack of genuine meaning raised by Atiyah[34] is, at best, arguable. Bridge points to more deeply rooted problems when he suggests that the concept of merchantable quality 'is just too complex and protean for a statutory definition to solve the problems of its implementation or even to define them with any precision.'[35] These misgivings suggest that if, in Australia, we were simply to follow the latest reforms in the United Kingdom and introduce equivalent provisions into our Sale of Goods Act legislation, we would be unlikely to achieve the objective of a satisfactory law of sale. It may be time to stop altering or adding to the details of the legislation, trying to shore up its existing structure.

III THE NEED FOR MACRO-REFORM OF THE LAW OF SALE

The problems surrounding the concept of merchantable quality, and the more general question of what quality of goods must be delivered under the provisions of Sale of Goods Act legislation, appear to be symptomatic of more general problems with the underlying concepts, and structure of, the 1893 Act. There is indeed evidence of widespread suspicion that the Sale of Goods Act is fatally flawed and that to fix it, something more radical is needed than merely tinkering with the details. The Law Commissions make this very point in the introduction to their report, saying that it is difficult to put 'patches' into the Sale of Goods Act, partly because it uses concepts that are no longer fully accepted, partly because the concepts which Chalmers had in mind when drafting the 1893 Act are uncertain, and partly because the Act is not a complete code, and it is difficult to know what to add to it. The Commissions conclude:

> These difficulties have led us to the conclusion that it is doubtful how far a process of 'patching' the Sale of Goods Act can continue. If further alterations to our law of sale of goods are required, it might prove to be necessary to start

30 Milne, above n 23, 683.

31 P S Atiyah, *The Sale of Goods* (8th ed, 1990) 168.

32 Law Commissions, above n 3, 24-5, 70.

33 Sale and Supply of Goods Act 1994 (UK) s 1.

34 Atiyah, above n 31, 169. See generally John Livermore, 'Merchantable Quality - A View of the Law Commissions' Provisional Proposals' (1985) *Journal of Business Law* 217 (Pt I), 294 (Pt II); Ian Brown, 'The Meaning of Merchantable Quality in Sales of Goods: Quality or Fitness for Purpose' (1987) *Lloyds Maritime and Commercial Law Quarterly* 400.

35 Bridge, above n 6, 504; see also Kenneth Sutton, *Sales and Consumer Law* (1995) 284, 291.

> from the proposition that it would be better to have a new Act or Acts rather than the old Act with amendments.[36]

This passage echoes views expressed with considerable vigour by Samuel Stoljar more than forty years ago.[37] The basic question Stoljar raises is: what rights has a buyer when a seller delivers defective goods? Stoljar analyses in detail the history and development in English law of the conditions and warranties regarding the quality of goods sold. The overall, and perhaps startling, conclusions he reaches include the following:

> 1. The law of sale of goods is obviously in very great confusion and has no consistency whatever. In its present state, the law provides for one and the same fact-situation different legal principles giving rise to different legal consequences. By applying the appropriate conceptual permutations, we may arrive at any result we wish.
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> 2. As regards the nineteenth-century development, the core of the confusion can be traced back to the legacy of *Barr v Gibson* (1838) and to the doctrine in *Street v Blay* (1836). These decisions obscured the simple and straightforward paths along which the common law could and should have travelled. Nor did the Sale of Goods Act, 1893, do anything by way of real clarification. Indeed the draftsman merely perpetuated several unnecessary distinctions and, furthermore, added many difficulties of construction of his own.
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> ...
>
> 6. Needed above all: a thorough revision of the Sale of Goods Act with respect to the defective quality provisions.[38]

One might not agree with every detail of Stoljar's wide-ranging, 45 page analysis, but it is difficult, on reading his account, to avoid the realisation that what generally passes for the legal development of the principles of the law of sale by English courts was not so much a carefully guided and controlled process of refinement conducted in accordance with well established and widely recognised principles, but an often very haphazard series of choices and decisions that did not always follow a clear or consistent path, and which were frequently obscured by misconception, a failure to distinguish important differences and, in some cases, a simple misuse or confusion of terminology. In the light of this, Stoljar's conclusion that thorough revision is necessary appears reasonable and needs to be addressed.

Of course there has been some reform of the Sale of Goods Act legislation since the 1950s when Stoljar wrote, but it has been micro-reform and micro-reform has not addressed the most fundamental problems. Indeed it may well have had the effect of adding more. Atiyah draws particular attention to increasing difficulties of interpretation and application which successive reforms of the

[36] Law Commissions, above n 3, 4.

[37] Samuel Stoljar, 'Conditions, Warranties and Descriptions of Quality in Sale of Goods - I' (1952) 15 *Modern Law Review* 425; Samuel Stoljar, 'Conditions, Warranties and Descriptions of Quality in Sale of Goods - II' (1953) 16 *Modern Law Review* 174.

[38] Stoljar, 'Sale of Goods - II', above n 37, 196-7.

1893 Act have created.[39] He says that statutory amendment of the law of sale tends to create differences between the law of sale and that applicable to closely analogous contracts, unless parallel legislation is also passed. Ongoing reform of the law of sale sometimes makes it difficult to identify the precise effect of the legislation at any given moment and makes it necessary to draw arbitrary distinctions between cases depending on the precise contract involved. He says:

> As will appear during the course of this book, the Sale of Goods Act has not proved one of the more successful pieces of codification undertaken by Parliament towards the end of the nineteenth century. The principal reason for this may well be that there has been a change in the type of sale of goods cases coming before the courts, and the types of cases, more generally, coming to legal attention.[40]

Bridge also criticises the technicality and complexity of the legislation, which, he says, makes it difficult even for lawyers to understand. He cites as evidence a case in which, despite believing that there is a link, the court is unable to relate the section which deals with inspection and acceptance of the goods with the section dealing with the passing of property.[41] Bridge points out that the legislation, being based on the experience of 19th century commerce in England, does not adequately take account of international sales or consumer sale transactions.[42] Dissatisfaction with the unnecessary complexity and theoretical inelegancies of the Sale of Goods Act legislation was one of the reasons for the drafting and adoption of article 2 of the Uniform Commercial Code in the United States.[43] The Ontario Law Reform Commission has also analysed the Sale of Goods Act legislation and concluded that it has important defects, some of which have existed from its inception, and the reform of which would require very fundamental changes to the Act.[44] Most recently, the Law Reform Commission of Western Australia has undertaken a review of the Sale of Goods Act[45] and has published two discussion papers in which the provisions of the Act are analysed, many specific problems identified and a variety of detailed questions raised regarding possible solutions.[46]

There is thus a substantial body of opinion that the law of sale which is based on the 1893 Act is fundamentally unsatisfactory and requires substantial change. It also seems clear that reform of the Sale of Goods Act legislation will require more than going back to the early English cases to find, here or there, a wrong turn or bad decision which, once understood, would get things back on track. This is because, before Chalmers' codification, the common law had quite simply

39 Atiyah, above n 31, 3.
40 Ibid 3-4.
41 *Beaver Speciality Ltd v Donald H Bain Ltd* [1974] SCR 903.
42 Bridge, above n 6, 3, 14, 500-1.
43 Uniform Commercial Code 1990 text (USA).
44 Ontario Law Reform Commission, *Report on the Sale of Goods*, vol 1 (1979) 23-4, 26-7.
45 Sale of Goods Act 1895 (WA).
46 Law Reform Commission of Western Australia, *Discussion Paper on Implied Terms in the Sale of Goods Act 1895* (1995); Law Reform Commission of Western Australia, *Discussion Paper on Equitable Rules in Contracts for the Sale of Goods* (1995).

failed to work out full, clear and precise principles of law and a set of rules free of inconsistency and ambiguity. It is unfair to expect Chalmers to have made a silk purse from this sow's ear. Perhaps he set himself the wrong task, to codify English law as it then was, rather than seeking out a better conceived structure on which to base a formal statement of the law. In this regard, Chalmers can perhaps be criticised for not taking more account of the structure and mechanisms of Roman law, a legal system of which he professes to have had knowledge and to which, in his commentary on the sections of the Act, he makes quite detailed reference by way of comparison.[47] But the fundamental conceptions and structures of Chalmers' draft of the Sale of Goods Act indicate that it was not significantly shaped or influenced by this knowledge.

This continues a long and unfortunate tradition in England of abjuring any great, or at least overt, reliance on Roman civil law. In Europe, by contrast, the rediscovery of the *Digest*[48] in the early years of the 12th century brought about first a revival and then a widespread reception of Roman law. The greatest reception took place in Germany where, in the 15th and 16th centuries, Roman law was adopted as a whole by German courts as the proper law of Germany. In England, however, various factors conspired to limit the influence of Roman law.[49] Whereas the Germans theorised that the Roman empire had passed first into the hands of the Greeks, then the Franks and finally to themselves, providing a strong basis for their reception of Roman law, the kings of England did not consider themselves successors to Roman emperors. There were strong nationalistic and political sentiments in England which favoured indigenous law and custom over foreign legal influences.[50] Although Roman law was known and even taught in England in the 12th century and beyond, it was often looked on as an undesirable influence. Its introduction was resisted by kings and barons, and the inns of court favoured the teaching and practice of indigenous law rather than Roman law.[51] This lack of enthusiasm for Roman influence shows clearly in a statement by Holdsworth:

> We have received Roman law; but we have received it in small homeopathic doses, at different periods, and as and when required. It has acted as a tonic to our native legal system, and not as a drug or a poison.[52]

But, if the critics are right, a mere tonic has not been sufficient in the case of the law of sale, which, despite careful and patient nursing for many years, continues poorly.

[47] Mackenzie Chalmers, *The Sale of Goods Act, 1893* (3rd ed, 1896) v-ix. In later editions of this work, many of Chalmers' references to the civil law have been removed as superfluous.

[48] Justinian, *Digest* (533 AD).

[49] William Holdsworth, *A History of English Law* (1st published 1924, 1945 ed) vol IV, 252 ff; Hahlo and Kahn, above n 7, 505-6.

[50] John Merriman, 'Ownership and Estate (Variations on a Theme by Lawson)' (1974) 48 *Tulane Law Review* 916, 918-21.

[51] Francis de Zulueta and Peter Stein, *The Teaching of Roman Law in England Around 1200* (1990) xxii-xxvii; see generally Clive Schmitthoff, *The Sale of Goods* (2nd ed, 1966) 5-17.

[52] Holdsworth, above n 49, 293.

IV A POSSIBLE APPROACH TO MACRO-REFORM

If a fundamental revision of the Sale of Goods Act legislation is accepted as either necessary or desirable, what possible approaches are there? In Canada, the Ontario Law Reform Commission identified three possible ways of revising the Sale of Goods Act legislation. The first was to retain the essential structure and framework of the existing legislation, amending it where necessary. The second was to adopt article 2 of the Uniform Commercial Code in its current form, without change. The third was to draft an entirely new Act, but borrow heavily from article 2 in doing so.[53] The Commission recommended the third of its alternatives as the best option, arguing that to reform the Sale of Goods Act legislation properly would leave little of the 1893 Act, and that to adopt article 2 without change would introduce law that in some respects was either outdated, obsolete, too rigid, too radical, or simply inappropriate in Canada.[54] So it seems likely, although it has not happened yet, that the common law Canadian provinces will adopt new legislation as proposed by the Ontario Law Reform Commission. This borrows from, but is not identical to, the provisions of article 2 of the Uniform Commercial Code. This course of action is made particularly attractive by the fact that the United States is Canada's largest trading partner and closest neighbour.[55]

The Canadian approach may also seem attractive because article 2 of the Uniform Commercial Code traces its origins in many respects to the 1893 Act and so, despite important differences, seems broadly familiar to those who know that Act. In the 19th century, the law of sale in the American states, while not uniform, largely followed the principles of English law.[56] The Sale of Goods Act was the model for the American Uniform Sales Act, drafted by Samuel Williston in an effort to standardise the American law of sale.[57] This Act was adopted by 36 states before it was superseded by article 2 of the Uniform Commercial Code. Despite the many substantial reforms and the new structure of the Uniform Commercial Code, the provisions of article 2 still clearly reflect this history. Key concepts from the Sale of Goods Act remain in article 2, in particular, those of the implied warranties of merchantability and suitability for purpose.[58] However, the definition of 'merchantable quality' in the Uniform Commercial Code is different from the definition of 'satisfactory quality' now in force in the United Kingdom.[59] Once again, this raises the doubt that a universally acceptable

[53] Ontario Law Reform Commission, above n 44, 26. The Commission does not seem to have considered the alternative of borrowing from the principles of civil law that apply in Quebec, one of Canada's own provinces.

[54] Ibid 27-8.

[55] Ibid 27; Bridge, above n 6, 15-17, 502-3; Gerald Fridman, *Sale of Goods in Canada* (1995) 6-7.

[56] Ontario Law Reform Commission, above n 44, 12-13.

[57] Uniform Sales Act 1906 (USA).

[58] Uniform Commercial Code 1990 text (USA) §2-314-5.

[59] Ibid §2-314(2); cf Sale of Goods Act 1979 (UK) s 14(2). To be merchantable under the Uniform Commercial Code, goods must be at least such as to pass without objection in the trade under the contract description; be of fair average quality within the description in the case of fungibles; be fit for the ordinary purposes for which such goods are used; be of even kind, quality and

definition of the concept is possible, and suggests that it may be worthwhile to consider wholly different structures.

It is too early to predict with any certainty what final proposals or recommendations will emerge from the review being conducted by the Law Reform Commission of Western Australia. However, the discussion papers so far published appear to assume that there are discrete issues within the overall structure of the Sale of Goods Act legislation which can be addressed, if not individually, then at least in groups, and without fundamentally changing the foundations or concepts on which the Act is based.[60] The type of analysis being conducted, and the sort of questions being raised, suggests the strong possibility that the Commission will recommend changes that are highly legalistic and technical, and which will perhaps add substantial detail to the legislation.

If we are going to undertake reform of the law of sale, we must avoid replacing one set of problems with another. Improvement is required, not merely change. It is also extremely important to avoid ever longer, more complex and intricate Sale of Goods Act legislation, replete with details and dependent on definitions which defy common knowledge or understanding.[61] Lengthy statutes, in which every conceivable contingency is forecast and specifically provided for so that basic principles become obscured amid a mass of detail, are too often the consequence of law reform. For example, in the appendices to the report of the Ontario Law Reform Commission, the 57 sections of the current Ontario Sale of Goods Act is reproduced in 18 pages, while the draft bill proposed to replace it requires 46 pages to set out its 110 sections.[62] By contrast, the ideas put forward in this paper for a revision of Sale of Goods Act legislation would reduce, rather than increase, the amount and complexity of statutory law governing sale transactions. This is made possible by adopting a structure based on better conceived principles, the application of which is less complicated and uncertain. The ideas to be presented derive from comparing the overall structure of the Sale of Goods Act legislation with the general structure of the civil law of sale, as developed in Roman law. The purpose of the comparison is to seek well conceived and properly tested solutions to the current problems, solutions which may be better than trying to invent something new, or to re-configure something that is basically flawed.

Comparing the foundational concepts and structures of Sale of Goods Act legislation and those of Roman law as found in the *Corpus Iuris Civilis*[63] provides useful insights into the universal fundamentals of the law of sale. It leads to a realisation that a significant number of the concepts and distinctions presently contained in the Sale of Goods Act legislation are quite simply unnec-

quantity within each unit involved; be adequately packaged, contained and labelled as the agreement requires; and conform to promises or affirmations of fact made on any labels or container.

60 Law Reform Commission of Western Australia, above n 46.

61 Fridman, above n 55, 6 notes that the draft bill prepared by the Ontario Law Reform Commission and approved by the Uniform Law Conference of Canada, contains even more complex provisions than the Sale of Goods Act legislation, which has not yet been repealed in any province in Canada.

62 Ontario Law Reform Commission, above n 44, vol III, appendices 1-2.

63 Justinian, *Corpus Iuris Civilis* (533 AD).

essary or over-complicated. It follows that many of them could be done away with altogether and others could be replaced with more easily understood concepts to simplify what has become a very technical area of law. Simplification of the rules would help to restore the relevance of the law of sale to the many transactions that take place every day. In what follows, an analysis will be made to determine what particular changes, deletions, omissions and additions would produce a workable result. I believe that the suggestions to be made below combine to form a regime of rules that would be easily understood by lawyers and laypersons alike, and which is generally consistent with the basic principles of Australian law, as well as with some recent trends in consumer protection and the law of international sales.[64] These advantages make the approach worth consideration, even if, at first sight, it appears somewhat radical.

It should be made clear that no suggestion is being made that the reform of the Sale of Goods Act legislation should consist of the wholesale adoption of the rules of Roman civil law.[65] That would obviously be impractical and unrealistic. What *is* suggested is that, by comparing the structures of the Roman law of sale with the structures of the Sale of Goods Act legislation, important differences between them become clear. This allows a fresh evaluation of the purpose and function of the concepts and mechanisms that make up our current law of sale and enables us to consider what alternative structures are available. It will then have to be asked whether those alternatives are a practical means of reform, or whether considerations exist which render them unacceptable.

V VIEWPOINTS, VALUES AND ASSUMPTIONS

Before making specific proposals about how best to revise the Sale of Goods Act legislation, it is as well to be clear about some of my viewpoints, values and assumptions that have coloured or influenced what follows. If there is fundamental disagreement about these matters, it is unlikely that the specific ideas proposed below will be thought appropriate. Some of the points may appear obvious, but it is as well to state them at the outset.

Firstly, the contract of sale is an institution *ius gentium*, a concept described in the *Corpus Iuris Civilis*:

> *Ius gentium*, the law of nations, is that which all peoples generally observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals whereas *ius gentium* is common only to human beings among themselves.[66]

64 See, eg, Sale of Goods (Vienna Convention) Act 1987 (Vic).

65 Perhaps one should say adrogation rather than adoption, in view of the maturity of Roman law. See, eg, J Thomas, *Textbook of Roman Law* (1976) 437.

66 D.1.1.1.1. (Watson's translation). Also see Gaius, *Institutes* 1.1. The four numbers in references to the *Digest* of Justinian (D) indicate the divisions of the text into books, titles, extracts and paragraphs. It should be noted that the first paragraph of an extract is not numbered but is referred to as *principium*. The second paragraph is numbered 1. Thus, for example, the reference D.41.1.10.1 refers to book 41, title 1, extract 10, and the paragraph numbered 1. References to other primary Roman law texts are based on the same system but not all texts have the same number of sub-divisions. For example, Gaius' *Institutes* (G) is divided only into books and

It is likely that, as with some other institutions that became part of Roman civil law, the contract of sale originated in *ius gentium* and was developed by the *praetor peregrinus* before being assimilated into *ius civile*.[67] In my view, it is preferable that, as far as possible, municipal (national) law governing contracts of sale continues to be based on concepts and principles which are internationally recognised. National legal systems should only add to, alter or depart from broadly recognised concepts and principles where it is necessary to do so. Chalmers gives general support to this view, saying:

> [W]here any rule of municipal law is found to be generally adopted in other countries, there is a strong presumption that the rule is founded on broad grounds of expediency, and that its application should not be narrowed. The Roman lawyers were justified in attaching a particular value to those rules of law which were *juris gentium*.[68]

Further, it is thought that the rules which are devised to govern the contracts of sale should, as far as possible, be those rules which arise naturally from a consideration of the essential nature of the contract. The rules should be free of undue technicality or reliance on artificial distinctions.

Secondly, the law of sale is an integral part of contract law. Sale is a special contract only in the sense that some additional or exceptional rules are thought to be required when this type of contract comes into existence. This means that the substance of the law of sale should consist only of those special principles and rules which are necessarily exceptional. Where ordinary principles of contract law suffice, they should not be readily supplanted or displaced.

Thirdly, it appears to be generally true that, within certain limits, less law is better than more law. Good law uses a minimum of special concepts, terms and distinctions. The more detailed and complex the rules, the less likely they are to be well known and properly understood. Good law is based on soundly conceived broad principles, to which expression is given with the minimum number of special rules expressed in the most concise form that is consistent with clarity.

Fourthly, the basic concepts and structures of the law of sale should be such that they can be known and understood by a non-specialist. Law does not exist for lawyers and it should not be so technical, complicated or obscure that only lawyers can hope to understand it. Furthermore, the principles and rules of the law of sale should broadly accord with the perceptions, expectations and practices of the community, rather than being remote and irrelevant to most ordinary transactions. The remedies offered by the law to buyer and seller should be appropriate and readily accessible.

Fifthly, the law of purchase and sale originally developed primarily in response to commercial needs, as is apparent from the history of its development in both Roman and English law. In Roman law, the transaction whereby a thing was exchanged for money did not initially give rise to legally enforceable obligations.

paragraphs and the *Code* (C) and Justinian's *Institutes* are divided only into books, titles and paragraphs.

67 Cf Thomas, above n 65, 279.

68 Chalmers, above n 47, viii.

The exchange of a thing for money was only effective as the *causa* for transfer of property rights if payment and transfer (by *mancipatio* in the case of *res mancipi,* otherwise by *traditio*) were voluntarily performed, normally taking place simultaneously. It was only around 250 BC, after victory in the first Carthaginian war had led to increased commercial activity, that it became convenient to recognise *emptio venditio* (purchase and sale) as a contract, giving rise to rights and duties enforceable at law.[69] In England, the cases through which the courts developed the law of sale prior to its codification in 1893 almost always concerned disputes between merchants, the result being that the Sale of Goods Act is perceived as 'essentially a nineteenth century mercantile code, more related to internal than international trade.'[70] However, despite these facts, and the recent trend in Australia to legislate separately for the protection of consumers,[71] it should not be assumed that completely different principles and rules are needed to govern satisfactorily the interests of parties to 'consumer' as opposed to 'commercial' transactions.

VI SOME FOUNDATIONS

Is it possible to have a comprehensive but simpler law of sale than that set out in the Sale of Goods Act legislation? The Roman law of sale appears to have a more elegant structure, which suggests this possibility. Comparing the two systems will show if unnecessary complications have been built into the Sale of Goods Act legislation. To make a proper comparison, the salient features of the overall structure of both the Sale of Goods Act legislation and the Roman law of sale must be described. It will also be necessary to know, at least in outline, what specific topics are covered in the sources on Roman law of sale. The reason for this somewhat tedious exercise is to ensure that particular concepts and mechanisms which will be discussed are not dependent for their operation on some integral aspect of the law which has been left undisclosed or undiscovered. One must know the context of concepts and rules within which a particular aspect of the law operates. Finally, it will be necessary to show that the principles and rules of the Roman law of sale are complete, that is, that they are sufficiently fully conceived to provide for the proper resolution of the full range of the type of problems that arise in a modern society and which are currently dealt with under the Sale of Goods Act legislation. If the structures of the Roman law of sale prove on examination to be rudimentary, superficial, undeveloped or unsophisticated, it would be difficult to argue that they provide useful ideas for modern reform.

[69] Thomas, above n 65, 215.
[70] Law Commissions, above n 3, 2.
[71] See above nn 26-29.

VII AN OUTLINE OF THE STRUCTURE OF THE SALE OF GOODS ACT LEGISLATION[72]

The Sale of Goods Act legislation applies only to the purchase and sale of 'goods', which includes both corporeal and incorporeal things, but not immovable things.[73] The creation of the contract requires agreement between buyer and seller that the seller will transfer property in agreed goods to the buyer in exchange for an agreed or reasonable price in money.[74] The contract is conceived as bilateral. Whether it is properly described as consensual depends on whether or not, in a particular jurisdiction, those sections of the 1893 Act which originated in the provisions of the Statute of Frauds[75] requiring certain formalities to create an enforceable contract of sale, have been repealed. They have in the United Kingdom and New Zealand for example,[76] but not in all jurisdictions within Australia[77] or Canada.[78] Transfer of title in the thing sold depends ultimately on the intention of the parties to transfer and acquire property,[79] but the presumption is that the parties intend property to pass at the earliest opportunity, that is, as soon as the contract of sale comes into existence, provided no circumstances exist which necessarily delay the transfer of title.[80] A seller who is not able to make the buyer the owner of the thing sold, when property is to pass, is liable for breach of contract.[81] If property passes to the buyer when the contract is made, the contract of sale is called a 'sale', otherwise it is called an 'agreement to sell'.[82] Since property may pass at a very early stage, when there is no discernible event to signal the transfer to third parties, special provisions protect third parties who deal with a seller (or buyer) left in possession of goods, but not as owner,[83] and allow an unpaid seller to recover goods when, lacking real rights in the goods, it is not otherwise possible to do so.[84] After property has passed, but until delivery of the goods, the seller, as bailee, must take appropriate care to preserve them. However, the risk of accidental loss and advantage of profit in the goods passes to the buyer together with the property rights.[85] The delivery of the goods and payment of the price are reciprocal concurrent duties.[86]

72 See generally Sutton, above n 35.
73 Goods Act 1958 (Vic) s 3.
74 Ibid ss 6, 10, 13, 14.
75 An Act for the Prevention of Frauds and Perjuries 1677 (Eng).
76 Law Reform (Enforcement of Contracts) Act 1954 (UK) s 2; see Atiyah, above n 31, 46; Contracts Enforcement Act 1956 (NZ) s 4.
77 Tasmania, the Northern Territory and Western Australia retain the original provisions, but these have been repealed in the other Australian jurisdictions, eg, in Victoria by the Sale of Goods (Vienna Convention) Act 1987 (Vic) s 9.
78 Bridge, above n 6, 76.
79 Goods Act 1958 (Vic) s 22.
80 Ibid s 23.
81 Ibid s 17.
82 Ibid s 6.
83 Ibid ss 30-1.
84 Ibid s 46.
85 Ibid s 25.
86 Ibid s 35.

Apart from those terms which are essential for the creation of a contract of sale, the parties are free to agree to any other lawful terms, and may enforce all agreed terms by bringing an action on the contract. Terms of the contract are distinguished as being either conditions or warranties. Warranties are agreements which are collateral to the main purpose of the contract. In the event of a breach of warranty, the buyer is restricted to a claim for damages and is not entitled to reject the goods and treat the contract as repudiated.[87] In the event of a breach of condition, a buyer may reject the goods and treat the contract as repudiated unless the contract is for the sale of specific goods *and* property has passed, or if the buyer has already accepted the goods (or part of the goods in the case of non-severable contracts), in which case the buyer is restricted to a claim for damages.[88] Unless the liability is excluded by lawful agreement, a seller of goods is liable for breach of certain conditions which are implied into some, but not all, contracts of sale by the legislation and which govern the identity and quality of what is delivered to the buyer.[89] The remedies available for breach of these so called 'implied conditions' are the same as for any other breach of the contract.[90] Whilst some special provisions have been added to, or exist alongside, Sale of Goods Act legislation to protect the interests of consumer purchasers, these provisions differ in form and effect between jurisdictions.[91]

VIII AN OUTLINE OF THE STRUCTURE OF THE ROMAN LAW OF PURCHASE AND SALE[92]

In Roman law, the contract of purchase and sale is conceived as bilateral and consensual,[93] coming into existence without formalities[94] as long as there is *consensus* between buyer and seller on the essential elements of the contract. These are: what thing is sold (*certa res*),[95] the price to be paid (*certa pretium*)[96] and the type of transaction intended (*emptio venditio*).[97] No distinction is made between the sale of moveable, immovable, corporeal and incorporeal things.[98] The creation of the contract gives rise to *iura in personam* only,[99] and does not, *ipso facto*, affect the real (ie, property) rights in the thing sold. Although it is necessary for a seller to intend to transfer whatever real rights they have in the

87 Ibid ss 3, 16, 37-8, 41, 57, 59.
88 Ibid ss 16, 41-2.
89 Ibid ss 18-20.
90 Ibid ss 16, 59-60.
91 See, eg, Trade Practices Act 1974 (Cth); Goods Act 1958 (Vic) ss 86-90; Fair Trading Act 1985 (Vic).
92 See generally Thomas, above n 65, 279-92; William Buckland, *A Textbook of Roman Law from Augustus to Justinian* (1963) 481-98.
93 C.4.38.2. (Scott's translation).
94 D.18.1.2.1; 18.1.9.pr; C.4.48.4.
95 D.18.1.8.pr-1; 18.1.9-14.
96 D.18.1.2.1; 18.1.7.1-2; 18.1.36.
97 D.18.1.9.pr.
98 D.18.1.
99 D.19.1.1.pr; 19.1.40; C.4.49.1.

thing sold, it is not required that the seller warrant title.[100] Instead, only vacant possession must be guaranteed,[101] until any defect in the title transferred to the buyer is rectified by *usucapio*.[102] The seller's duty to deliver the thing sold and the buyer's duty to pay the agreed price are reciprocal[103] and, unless otherwise agreed, these duties are due to be performed simultaneously.[104] Property passes when the parties intend that it should, but the presumption is that it passes with delivery *and* payment.[105] Prior to delivery, the seller retains whatever real rights he or she has in the goods sold. The seller is under an obligation to preserve the thing sold until it is delivered and is liable for any damage due to his or her negligence.[106] As regards accidental loss or profits that accrue to the thing sold before delivery, the risk or advantage passes to the buyer as soon as the contract of sale is *perfecta* and thus, in many cases, before the transfer of real rights to the buyer.[107] Apart from the essential terms that must be agreed to create the contract of sale, the parties are free to agree to any other lawful terms[108] and may enforce all agreed terms by bringing an action of the contract (the *actio empti* or *venditi*).[109] Terms are not distinguished as either 'conditions' or 'warranties'. The contract of sale is predicated on the notion of good faith, so that it is possible for the parties to be bound by obligations arising from the concept of what good faith requires.[110] As regards hidden defects in the thing bought and sold, or a failure by a seller to make good on things said and promised but which were not terms of the contract, special remedies are available to the buyer, which are different from the remedies for breach of contract.[111]

IX SOURCES OF THE SUBSTANTIVE ROMAN LAW OF SALE: THE *CORPUS IURIS CIVILIS*

With this outline of the general structure of the Roman law of sale in mind, a brief review of the relevant parts of the *Corpus Iuris Civilis* will provide a sufficient idea of what rules of law exist to give substance to the framework. *Corpus Iuris Civilis* means, literally, 'body of the civil law' and refers to the codification of Roman Law by the emperor Justinian in 533 AD.[112] The *Corpus Iuris* consists of several independent works: the *Digest*, the *Institutes*, the *Code* and the *Novels*. The *Digest* is a collection of the selected writings of the most

100 D.18.1.28.
101 D.19.1.3.pr-3; 19.1.11.18.
102 G.2.43.
103 D.19.1.11.2.
104 D.19.1.13.8.
105 D.19.1.40.
106 D.18.6.3.
107 D.18.1.35.5-7; D.18.6.
108 D.18.1.6.2; 18.1.40; C.4.54.1.
109 D.19.1.1.pr; 19.1.11.pr; 19.1.13.19-22; C.4.49.4.
110 D.19.1.11.1; 19.1.34.
111 D.21.1; C.4.58.
112 Henry Roby, *An Introduction to the Study of Justinian's Digest* (1886); see generally H Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd ed, 1967) ch XXVIII.

influential jurists of the classical period of Roman law (*circa* 100 - 250 AD). Consisting of about 150,000 lines of text, the *Digest* is divided into seven parts and further subdivided into 50 books, 432 titles and over 9000 extracts or fragments (fragments being the selected passages from the writings of the classical jurists).[113] The *Digest* is, essentially, a detailed practitioners' manual. The *Institutes* is a shorter account in four books of the basic principles of Roman law, intended by Justinian as an introductory text for first-year students of law (*novi Justiniani*), but it also has the force of law, being enacted as a statute. The *Code* is a collection of the decisions of the Roman Emperors (*constitutiones principum*) which, after the classical period, were the main source of further legal development. Justinian revised and updated the *constitutiones* as part of his overall codification. The *Novels* are a collection of the new *constitutiones* made after the compilation of the *Digest, Institutes* and *Code*.[114]

How may one best get a quick sense of the content in the *Corpus Iuris Civilis* on the Roman law of purchase and sale? This is not an easy matter, as a perusal of the *Digest* quickly shows. The 50 books have no individual titles, because the division of the work into books does not really reflect the more detailed structure of the subject matter. The chapters within each book have brief titles and for this reason are usually called titles rather than chapters. However, the arrangement of titles does not follow a flow of topics which might seem logical to someone who is used to a different arrangement of things and a modern lawyer may not find it easy to quickly discern the underlying structure and overall content of each branch of law.[115] The subdivisions of the titles, the paragraphs and fragments are arranged without headings. They flow reasonably smoothly from one to the next, but compilers have often abbreviated the extracts, sometimes making their meaning less accessible. The text generally contains statements of principle accompanied by fairly detailed examples of appropriate outcomes in given circumstances.

The main passages which deal with the law of sale are contained in books 18, 19 and 21 of the *Digest* and book 4 of the *Code*. There are other scattered passages in which reference to sale contracts are made, but these concern matters of detail only. The following topics are dealt with in book 18. Title 1 deals with the creation of contracts of purchase and sale, a discussion of special terms that may be arranged between buyer and seller and an account of things which cannot validly be bought and sold. Specific topics dealt with in the individual fragments include: a discussion of the distinction between the contract of purchase and sale and other contracts (barter, the hire of services, pledge and gift); sales made subject to a condition; the necessity of agreement between the parties as to the thing sold and the price; a discussion of things that cannot be validly bought and sold; sales of things in the alternative; sale by a non-owner of the thing sold; questions relating to accessories of things bought and sold; various types of special terms that might be agreed between the parties and what such terms

[113] Roby, above n 112, ch III.
[114] Ibid ch II.
[115] De Zulueta and Stein, above n 51, xiv.

entail; representations that are not terms of the contract; sales of new and second-hand goods; the sale of goods that have been damaged or destroyed; aspects of delivery, including symbolic delivery; and reservations by the seller of an interest in the thing sold.

Titles 2, 3 and 4 of book 18 deal in turn with sales made conditional on the seller not receiving a better offer, forfeiture clauses for non-payment, and the sale of an inheritance or a right of action (incorporeal things). Title 5 deals with the cancellation of a contract of sale and the circumstances in which a buyer and seller may resile from the contract. Included are: sales entered into by minors without the authority of a tutor; sales abandoned by agreement; and conditional sales. Title 6 concerns the incidence of risk and benefit in the thing sold. Specific topics are: when risk passes from seller to buyer in contracts of sale; factors which affect the passing of risk; the duties of the seller to preserve the thing sold before delivery; the seller's rights if the buyer is late in taking delivery; when a sale is considered 'perfected' for the purpose of the passing of risk; and the destruction of the goods sold by a third party. Title 7 concerns sales subject to a condition binding the purchaser as to the future use of the goods, particularly, slaves sold which are to be exported, or to be (or not be) freed.

Title 1 of book 19 deals with the actions on the contract which are available to the buyer and seller. The extracts deal with topics such as: various types of breach of agreement- failure to deliver; delivery of the wrong quantity of goods; failure of the seller to protect the buyer from eviction by a third party who claims the goods; failure to deliver goods of the specified quality;[116] failure to take delivery; the breach of duties arising out of the concept of good faith; the quantum of damages payable for breach of contract; the additional liability of a fraudulent seller for diseased or defective goods; the buyer's duty to tender the purchase price if suing for delivery; the right to fruits accruing to the *res vendita*; the right of the seller to sue for the price and interest thereon, and to recover expenses incurred; matters concerning accessories, for example, on farms sold; certain defences to an action brought on the sale; and the seller's duty to preserve the thing until delivery. The remaining chapters of book 19 do not concern the contract of sale, dealing instead with lease and hire, the action for brokerage, barter and two special actions. Book 20 deals with two forms of security, *pignus* (pledge) and *hypotheca* (charge). Book 21 reverts to the topic of sale, dealing with certain special provisions of the *aediles* edict, the eviction of the buyer by a third party with better title, the stipulation for double the price and a special defence available to a buyer in some circumstances, the *exceptio rei venditae et traditae*.

X THE SELLER'S LIABILITY IN ROMAN LAW FOR DEFECTIVE GOODS AND *DICTA PROMISSAVE*

Before describing in more detail the contents of book 21 of the *Digest* and book 4 of the *Code*, there are some things which, if explained, will allow readers

[116] D.19.1.6.4.

who are accustomed to the structure of Sale of Goods Act legislation a better understanding of the content and importance of these parts of the *Corpus Iuris*. It is striking that there is very little in what has so far been described which deals with the question of the quality of the goods delivered; provisions, that is, which appear to fulfil the same function as the implied warranties of the Sale of Goods Act legislation.[117] The few references in books 18 and 19 to the quality of goods are made almost in passing.[118] The emphasis in these books is rather on the rules of law governing the creation and enforcement of the contract and the terms of that contract. In Roman law, liability for deficiencies in quality in the goods sold was not dealt with under the concept of breach of contract unless the quality of the goods was something concerning which the parties had actually reached agreement as a term of the contract. There was, in other words, no term of the contract created (or implied) by operation of law which required the goods to be of a certain minimum quality, as the relevant sections of the Sale of Goods Act legislation do.

This is not to say that the mechanism of terms implied by operation of law into contracts of sale was unknown in the Roman law of sale. Indeed it was, as is illustrated by the so called 'warranty against eviction'.[119] By the first century AD, whether a seller of goods actually (expressly or impliedly) gave a warranty against the buyer's possession being disturbed (ie, undertook contractual liability for breach) was immaterial; sellers were considered liable to an action on the contract (for breach of contract) if a third party lawfully deprived a buyer of possession of the *res vendita* that had been delivered. This was the final stage of a long period of legal development. Originally, for a seller to be liable on the contract to a buyer who had been evicted by a third party with better title, it was necessary for the seller to have given a stipulation (a collateral contract) promising compensation, sometimes for double value, in the event of eviction.[120] By the first century AD it had come to be considered incompatible with the notion of good faith for a seller of goods to refuse to give the necessary stipulation, and a reluctant seller could be compelled at law to do so.[121] From this it was a short step to the same liability being created by law, rather than agreement, in every contract of sale.

In regard to the minimum qualities that a *res vendita* should possess, Roman law took an entirely different approach. The starting point is that the parties could, by agreement, bind themselves contractually regarding what qualities the thing sold was to have. Such terms were enforceable by an action on the contract (*actio empti*). Roman law took the view that, if a purchaser wished a thing bought to have particular qualities, he or she should make those attributes a term of the contract, failing which the seller would not be liable on the contract if the quality of the goods fell short of the buyer's expectations. A seller only had to deliver

[117] See, eg, Goods Act 1958 (Vic) ss 17-20.
[118] D.18.1.9; 18.1.10; 18.1.43-5; 19.1.1; 19.1.6.4; 19.1.11; 19.1.13; 19.1.27.
[119] Thomas, above n 65, 284-6.
[120] D.21.2.
[121] D.19.1.11.8

goods as identified and described in the terms of the contract. This approach left at least two problems which the rules, so far explained, do not resolve. One was where the thing delivered by a seller suffered from a defect. If the defect was patent, the principle *caveat emptor* applied, but if the defect was hidden or latent, that is, not apparent on an examination of the thing, *caveat emptor* was an inappropriate principle to apply. The other difficulty arose where a seller had made statements of fact bearing on the qualities of the goods, which had induced the buyer to enter the contract, but which statements could not be said to be terms of the contract involving contractual liability for breach. Such statements may be called non-contractual representations, or *dicta et promissa* (things said or promised). Responsibility for dealing with these problems fell to officials known as *aediles,* magistrates which were elected annually after 367 BC to take charge of the public markets in Rome.[122]

The *aediles* might have treated the existence of latent defects in a thing sold as a breach of an obligation created by law in all contracts of sale that goods be free of hidden defects, redressable as a breach of contract by the *actio empti.* The fact that they did not appears to have been due to a recognition that this mechanism, which was perfectly appropriate in the case of a buyer who suffered eviction at the hands of a third party, was inconsistent with the realities of the situation involving latent defects. It was also inappropriate for the second and equally important of the two problems mentioned, that is, the case of non-contractual representations. Whereas, in relation to questions of title to a thing sold, sellers would generally be sufficiently confident of title to give a stipulation against eviction, it is hardly likely that a seller would be inclined to undertake contractual liability for the existence of defects which are hidden just as much from the seller as from the buyer. Even less likely is any suggestion that sellers should undertake contractual liability for statements which, by definition, they have no intention of making into terms of the contract.

The *aediles* therefore devised a different approach to deal with these two situations. Although a buyer who had received goods which suffered from a latent defect, or who complained that a seller had not made good on *dicta et promissa,* was not considered to have an action for breach of contract, the *aediles* made special remedies available, enforceable by means of two special actions; the *actio quanti minoris* and *actio redhibitoria.* These remedies did not depend on the concept of breach of contract. Because of this, the circumstances in which they were available were strictly prescribed, and the remedies themselves were more limited in effect than those available through an *actio empti* for breach of contract.

The *aediles* had jurisdiction only over sales which took place in the public markets in Rome. They published an edict in which were set out their intentions and rules. The provisions of the original edict were probably revised from time to time after being first introduced in around 200 BC.[123] It can be seen from the

[122] Jolowicz, above n 112, 48.
[123] David Daube, *Studies in the Roman Law of Sale* (1959) 124.

parts of it that are preserved in the *Digest* that the provisions concerning latent defects and *dicta et promissa* were originally couched in very narrow terms.[124] Thus:

> Those who sell slaves are to apprise purchasers of any disease or defect in their wares and whether a slave is a runaway, a loiterer on errands, or still subject to noxal liability; all these matters they must proclaim in due manner when slaves are sold. If a slave be sold without compliance with this regulation or contrary to what has been said of or promised in respect of him at the time of his sale, it is for us to declare what is due in respect of him; we will grant to the purchaser and to all other interested parties an action for rescission in respect of the slave.[125]

The rules as stated by the *aediles* apply only to a small range of objects, in particular, slaves and beasts of burden (*iumenta*). The rules require the seller of such goods to declare the existence of certain defects if the slave or beast of burden suffered from them, and further, to declare that the thing sold was free from any other sickness or vice (*morbi et vitia*) not so disclosed. In short, sellers of the type of goods in question were obliged to reveal any hidden defects of which they were aware, and were made responsible for any defects which were not declared, but which subsequently manifested themselves, even if the seller had been unaware of them at the time of the sale. Because the manifestation of a latent defect was not, in these circumstances, a breach of contract, and because the seller might well have been unaware of it and unable to discover it, the seller was therefore not to be considered at fault and liability was limited in three ways.

Firstly, the defect complained of must have existed at the time of the sale, for if it had infected the thing sold *after* the sale, the loss arising would fall on either the buyer or seller according to the rules of risk.[126] Secondly, the buyer had to bring the action for relief within a shorter period of time than that allowed for the ordinary contractual action. This meant that the seller's special liability for latent defects did not last for an unreasonably long time. Thirdly, the relief available was different and less extensive than that available under an *actio empti*. The buyer had a choice between two kinds of relief, each of which was pursued under its own special action. The *actio redhibitoria* allowed the buyer to return the thing bought to the seller and recover the purchase price paid, interest thereon and any wasted expenses. In this way, the parties were restored to their former positions, so far as it could be brought about by a mutual return of the thing sold and the purchase price paid. The *actio quanti minoris* allowed the buyer to keep the thing bought, but to claim a reduction of the price paid and so recover a part of it, plus interest. In neither case was the seller liable for any further damages. Originally available for two and six months respectively after the sale, the periods during which these actions could be brought were later extended to six months and a year. The time was calculated as from the date of the sale.[127] The

[124] D.21.1.1; 21.1.38.
[125] D.21.1.1.1.
[126] D.18.6.
[127] D.21.1.19.6.

same remedies were available in the case of a seller failing to make good on *dicta et promissa*, in which case the time was calculated from the date the representation was made.

Although limited to the specific type of goods originally mentioned, the provisions of the *aediles'* edict were, in time, extended to sales of all types of thing and so became generally available remedies. Thus, in book 21 of the *Digest* Ulpian says: '[i]t must be realized that this edict applies to all sales, not only those of slaves but also those of anything else.'[128]

Some other aspects of the special *aedilitian* remedies may be mentioned which help to distinguish them from other available remedies. The availability of the relief does not depend on the agreement of the parties to abandon the sale, as in cases considered under D.18.1.5. *Aedilitian* relief is rather an action on the contract,[129] not an agreement to abandon or rescind it. The same aspect distinguishes the *actio redhibitoria* from *restitutio in integrum*; this last-mentioned relief was a special exercise of praetorian power to set aside an otherwise valid transaction as void, in special circumstances such as fraud, duress or error.[130]

The topics dealt with in book 21 of the *Digest* may now be briefly listed. Title 1 concerns the provisions of the *aediles'* edict, the *actio redhibitoria* and *actio quanti minoris*. There is an account of the original provisions of the edict and the circumstances in which the special remedies are available. Detailed (and robust) examples are given of defects in slaves, such as:

> Trebatius says that it is not a disease that one's breath smells like that of a goatherd or scabrous person, for this is an accident of exhalation. But if it be due to a bodily defect, such as a liver or lung-complaint or something similar, the slave is diseased.[131]

There follows a discussion of exclusion, by agreement, of liability for such defects; the distinction between mere puffery or opinion and misrepresentations (*dicta promissave*); the time periods during which the remedies are available; what the remedies involve and what requirements must be fulfilled for relief to be available; the nature and purpose of the remedies; what happens when a buyer is unable to restore the thing sold; the buyer's entitlement to claim interest on the purchase price and recover expenses; the availability of the remedies when only part of the thing sold is defective; and detailed examples of what constitute defects in beasts of burden. Title 2 deals with the remedies available in the event of eviction of the buyer by a third party, including what constitutes eviction, when it occurs, various complicating circumstances and a discussion of particular instances of eviction. The last title of book 21 deals with the defence available to

[128] D.21.1.63.

[129] By the time of the compilation of the *Digest*, aedilitian relief could be obtained by bringing the ordinary *actio empti* rather than the special aedilitian actions. See generally Thomas, above n 65, 288.

[130] D.4.1.4. See generally Michael Lambiris, *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989).

[131] D.21.1.12.4.

a purchaser from whom the seller seeks to recover the thing sold and delivered on the grounds that she or he, the seller, has remained owner.

An outline of what is found in the *Code* concerning sale completes the description of the content of the Roman law of sale. The provisions of the *Code* existed to clarify or settle questions of law that appeared uncertain. They are not lengthy; the translation of the relevant portion of book 4 of the *Code* runs to just over 20 pages.[132] Title 38 concerns various circumstances in which a purported sale is invalid. Title 39 concerns the sale of rights of action. Title 44 concerns the circumstances in which a contract of sale may be set aside as void, for example on grounds of fraud. Title 45 concerns occasions where it is permitted for the parties to abandon a contract of sale. Title 48 deals with aspects of the passing of risk of profit and loss. Title 49 concerns aspects of the actions available to the parties to enforce their rights under a contract of sale. Other titles (40-3, 46-7, 50-9) deal with certain specialised topics which are not of importance for present purposes.

XI Major Differences Between the Structure of Roman Law and Sale of Goods Act Legislation

Comparing the general structure of the Roman law of sale and the Sale of Goods Act legislation shows that there are many points of similarity between them. This is not surprising since both regimes of law exist to govern the same basic transaction. However, various important differences become apparent. In particular, there seem to be a number of concepts and rules in the Sale of Goods Act legislation which are either not found at all in Roman law, or which are not similarly significant in Roman law. These may be listed:

- The 1893 Act required formalities for the creation of a contract of sale. This distinction is no longer of importance in those jurisdictions where the formal requirements have been repealed.
- Special definitions of some key terms exist in the legislation. For example, the definition of 'future goods' in Sale of Goods Act legislation as 'goods to be manufactured or acquired by the seller after the making of the contract for sale'[133] is not known in Roman law, where the term has its more ordinary meaning, that is, goods not in existence at the time the contract is made.[134]
- The Sale of Goods Act legislation recognises the concept of the sale of generic goods. In Roman law the thing sold had to be either *certa* (specific) or from an identified source, failing which there could be no valid contract of sale.[135]
- The Sale of Goods Act legislation treats 'sale by description' as a distinct category of sale, to which special rules apply, particularly those rules regarding the quality of the goods.[136]

[132] C.4.38-9, 44-5, 48-9.
[133] Goods Act 1958 (Vic) s 3(1).
[134] D.18.1.8.pr.
[135] Thomas, above n 65, 281.
[136] Goods Act 1958 (Vic) ss 18-19.

- The Sale of Goods Act legislation lays down that a reasonable price is payable by the buyer if the price is not fixed in the contract, ascertainable in terms of the agreement or determined by a course of dealing.[137] This rule is not known in Roman law and, if it is interpreted too widely, the rule may be inconsistent with the essential elements of the contract of sale. It is thought that, at the very least, a contract of sale cannot come into existence unless the parties have agreed to exchange property in goods for money. If, thereafter, it is possible to establish what price is reasonable in the circumstances, the contract will be enforceable at that price.[138]
- The Sale of Goods Act legislation distinguishes terms of the contract as either 'warranties' or 'conditions' and attaches special rules to each category.[139]
- The legislation makes a seller of goods liable for breach of contract for failure to make the buyer the owner of the thing sold and delivered. In other words, there is a warranty of title, as distinct from the Roman law warranty against eviction.[140] However, the relevant section appears to import a warranty against eviction into the Sale of Goods Act legislation, in addition to the warranty of title.[141] This curious redundancy has caused much confusion.[142]
- In terms of the Sale of Goods Act legislation, it is presumed that the parties intend property rights in the thing sold to pass to the buyer as soon as the contract is made,[143] a variation of the ordinary rule that the intention to transfer real rights in moveable things is demonstrated by delivery of the thing.
- The Sale of Goods Act legislation takes into account whether or not property in the goods has passed to determine the type of relief available for breach of contract. There is a reluctance to allow a buyer to return goods delivered after property has passed, and instead to insist that once property has passed, the buyer is restricted to relief in the form of a claim for damages.[144]
- Sale of Goods Act legislation distinguishes between a contract of sale and two subspecies of that concept, the 'sale' and 'agreement to sell'.[145]
- Because property is presumed to pass from seller to buyer at an early stage, special provision is made in the legislation whereby, although a seller retains no real rights in the goods, a third party who acquires goods already sold, in good faith from a seller still in possession, acquires good title. A similar rule exists in relation to a buyer in possession who is not yet owner.[146]

137 Ibid s 13(2).

138 *May & Butcher Ltd v The King* [1934] 2 KB 17; *Hall v Busst* (1960) 104 CLR 206; *Wennig v Robinson* (1964) 64 SR (NSW) 157; *Re Nudgee Bakery Pty Ltd* [1971] Qd R 24; *Timmerman v Nervina* [1983] 32 SCR (NSW) 664; *ANZ Banking Group v Frost Holdings Pty Ltd* [1989] VR 695.

139 Goods Act 1958 (Vic) ss 3, 16-20.

140 Ibid s 17.

141 Ibid s 17(b).

142 See Atiyah, above n 31, 93-5; *Microbeads AC v Vinhurst Road Markings Ltd* [1975] 1 All ER 529.

143 Goods Act 1958 (Vic) ss 21-3.

144 Ibid s 16(3).

145 Ibid ss 6, 12, 14.

146 Ibid ss 30-1.

- Sale of Goods Act legislation creates contractual terms by operation of law, called implied terms, which require the goods to be merchantable, fit for the buyer's purpose, or equivalent to sample. These terms are created in some, but not all, contracts of sale. The seller who breaches these terms is liable for breach of contract.[147] It must be realised that the current statutory provisions strictly limit the creation of the implied conditions. Thus, in the Goods Act 1958 (Vic) for example, the condition implied by section 18 is limited to cases where the sale is a sale 'by description'; in terms of section 19(a) the seller is only liable to provide goods fit for the buyer's expressed purpose if the goods bought are of a kind that it is in the course of the seller's business to supply; and in terms of section 19(b) the goods are required to be merchantable only if the goods are bought 'by description' *and* the seller is a person who deals in goods of that description. Thus, if goods are bought from a person who does not deal in goods of that description, the goods delivered are not required to be of merchantable quality and the buyer may be stuck with defective goods without any remedy. The result is the same if the goods are bought from a dealer, but are not bought 'by description'. There are no equivalent implied terms in Roman law.
- In Sale of Goods Act legislation the policy *caveat emptor* appears to apply in respect of both patent and latent defects.[148] In Roman law, the policy *caveat emptor* only applies in respect of defects which are obvious or which are discoverable on an inspection of the goods, that is, in the case of patent defects. The Sale of Goods Act legislation therefore extends the policy significantly.

A list can also be made of the concepts and rules of Roman law which are not found in Sale of Goods Act legislation.

- In Roman law, the residual rule is that risk of profit and loss passes *before* transfer of title, that is, as soon as the contract is made, or as soon as the contract is *perfecta*,[149] whichever happens last. This varies the ordinary rule *res periit domino*, a maxim which indicates that when loss or damage is caused to a thing, that loss or damage falls on the owner of the thing, unless the owner is able to rely on some other more particular rule of law and shift the loss to another person.
- In Roman law, a seller is under a special liability, created by operation of law, but distinct from the concept of breach of contract, in terms of which a buyer has special remedies if the goods sold are later discovered to have suffered at the time of the sale from a latent or hidden defect.[150]
- The same special liability exists if the seller of goods fails to make good anything said or promised, representations which, although not intended to be

147 Ibid ss 18-20.
148 Ibid s 19(b).
149 D.18.6.8. A contract is considered *perfecta* in Roman law provided it is not subject to a suspensive condition (condition precedent); and provided that, in the case of fungibles, they have been weighed, measured or counted and thus appropriated to the contract.
150 See generally D.21.

terms of the contract, went beyond mere puffery and induced the buyer to enter the contract on the agreed terms.

- In Roman law, the contract of sale is categorised as *bona fidei* allowing both the buyer and seller to be liable on the contract for breach of duties which are seen in the circumstances of the case to arise out of the concept of good faith. So too, a buyer or seller may be barred from asserting rights when it would be inconsistent with good faith to do so.[151]

The failure of the Sale of Goods Act legislation to include the three last-mentioned elements within its structure constitutes, in my view, a major shortcoming. It demonstrates that, at the time of Chalmers' codification, English law had not fully developed a complete regime of rules for sale contracts. Thus there were important gaps in the structure of the Sale of Goods Act legislation which are only partially filled by the implied terms as to the quality of goods. They are gaps which, in the past, have seriously inhibited the ability of the courts to provide adequately for the protection of consumers in sale contracts. This, in turn, has made substantial amounts of additional legislation necessary, vastly complicating the law.

XII REFORMING THE SALE OF GOODS ACT LEGISLATION

Great risks attach to reforming the law by inventing entirely new rules from scratch rather than building on tested principles. Legislation which adopts substantially new approaches is very difficult to formulate and often requires much subsequent amendment and revision to take account of unforseen difficulties. Further, if each jurisdiction which currently employs Sale of Goods Act legislation reforms its law of sale according to its own ideas, there will likely be very little uniformity of approach, resulting in unnecessary and undesirable differences between the laws governing this contract.[152] Looking to existing systems of rules as a source of ideas for reform helps overcome these problems and the Roman law of sale is a worthwhile source because the principles and rules of Roman law are well refined and relatively complete. Recourse to these principles as a source of ideas for reform also increases, rather than diminishes, the similarity between the principles of our law and those of civil legal systems, promoting a harmony of approach.[153]

In my view, comparing the two systems of the law of sale shows that the Sale of Goods Act legislation is not the only, or necessarily the best, way of regulating purchase and sale agreements. By comparison with Roman law, the legislation appears to be unduly technical, overly complex and in some areas obscure or unsatisfactory. If this is indeed so, one way to begin the reform process would be

[151] Thomas, above n 65, 228, 284, 289.

[152] These points are illustrated by the various Credit Acts now in force in a number of Australian States. It is expected that these Acts will soon be replaced with revised and uniform credit legislation modelled on the Consumer Credit Code contained in the Consumer Credit (Queensland) Act 1994 (Qld). See generally Sutton, above n 35, 63 ff.

[153] See, eg, *Quebec Civil Code*, arts 1522-31. These provisions clearly derive directly from Roman law.

to strip the Sale of Goods Act legislation of everything that, on analysis, can be regarded as either dispensable or unsatisfactory. What is taken out because it is unsatisfactory should be replaced with the absolute minimum of alternative provisions. The result would be legislation that, like the 1893 Act, does not attempt to be a complete and detailed code of the law of sale, but only a statement of the major concepts, structures and mechanisms of the law of sale. Unlike Chalmers' original codification, however, the new Act would constitute a substantial reform of existing law and a departure from current historical sources. Changes along the proposed lines would necessarily restore to the courts, in increased measure, the task of working out the detailed application of the law. That we must be prepared to entrust the implementation of broad principles and the interpretation and extension of basic concepts to the courts is, to my mind, beyond question. There is no greater insult to the judiciary than legislation which attempts to deprive judges of the powers of interpretation and discretion by detailing in explicit terms every conceivable point that may arise for decision. If judges are thought to be not up to the job of understanding and applying broadly stated fundamental principles, the solution is to get better judges, not to write longer statutes.

Of the concepts and rules in the Sale of Goods Act legislation which are not found in Roman law, some are less important than others and may be regarded as superficial rather than foundational differences. Examples are: the requirements relating to formalities; the enforceability of a contract of sale at a reasonable price; or the presumption of when risk is to pass to the buyer. Other differences are more fundamental and it is necessary to inquire into the reason for their existence. Is there some jurisprudential justification for the existence of these particular aspects of the Sale of Goods Act legislation? If so, are those reasons still valid in Australia towards the close of the 20th century? In considering these questions, it seems that the eventual answers will depend on the context within which they are asked. If the importance of particular rules is considered *within* the structure of the Sale of Goods Act legislation, then most of them will be found to be useful and necessary. Whatever the imperfections of the legislation, MacKenzie Chalmers was no fool. The framework of rules he put together have an internal consistency, and the different provisions relate to, and are in many cases dependent on, each other. Thus, for example, the distinction between conditions and warranties is very significant within the structure of the legislation. So is the concept of 'sales by description' and the notion of terms of the contract regarding quality that are implied by law. All of these things are integrally related to each other; they do not stand apart as wholly independent concepts. If one were to ask, for example, if the distinction between warranties and conditions is a necessary component of the structure of the Sale of Goods Act legislation, the answer would likely be, yes, of course. But if, when considering the justification or necessity of particular concepts, one steps outside of the context of the Sale of Goods Act legislation and, viewing the contract of sale as *ius gentium*, seeks only the simplest and most elegant system of rules, then the answer will most likely be different and it will be seen that many of the concepts

and viewpoints that distinguish Sale of Goods Act legislation can be dispensed with or replaced. But what specific changes would be required?

XIII AN OVERVIEW OF THE SUGGESTED MACRO-REFORM OF THE LAW OF SALE

It is not intended in this paper to put forward a detailed draft of a new Sale of Goods Act, but rather to provide broad suggestions of what is considered practical in regard to the reform of the current legislation. Some suggestions in relation to specific sections of the Act will also be made, but a preliminary outline of the proposals will help to communicate the thrust of the proposals. The starting point is that the implied terms regarding the quality of goods bought and sold should be done away with entirely.[154] The resulting gap in the law, concerning the minimum quality of the goods delivered, would be filled in two ways: firstly, by relying more on the ordinary concepts in Australian law of express or implied terms of the contract, and secondly, by introducing two replacement provisions to deal with the delivery of defective or unsatisfactory goods.

The first of these suggested mechanisms, relying on actual terms agreed, would be sufficient in many situations now covered by the statutorily implied terms because the requirements of the current Sale of Goods Act legislation regarding the quality of goods appear, in some instances, to require the same evidence that would establish an actual (express or implied) term of the contract regarding the quality of the goods. In such cases there is no need for a condition or warranty created by operation of law. For example, consider the circumstances in which section 19(a) of the Victorian Act operates. If it is proved in evidence that a buyer communicates to a seller the purpose for which particular goods are required, showing that he or she relies on the seller's skill or judgment to supply suitable goods and that it is the seller's business to supply such goods, it would be difficult to avoid the conclusion, applying ordinary contractual principles, that in these circumstances, there is an actual (implied) term of the contract that the goods delivered will be suitable for the buyer's purpose, even in the absence of any statutory provision to this effect. This term should be as enforceable as any other agreed term of a contract.[155] The same approach should apply in cases presently governed by section 20: where the parties use samples of goods in reaching agreement on what is bought and sold, the rights and duties of the parties should depend on the actual terms of their agreement, including any implied terms as to quality.[156]

The repeal of section 19(b) is more problematic. In cases where there is no evidence of special circumstances from which actual terms regarding the quality of goods might arise, and in cases where sellers are unlikely to want to undertake

[154] Goods Act 1958 (Vic) ss 18-20.

[155] South African cases illustrate this approach: *Kroomer v Hess & Co* 1919 AD 204 (South African Law Reports Appellate Division); *JK Jackson (Pvt) Ltd v Salisbury Family Health Studio (Pvt) Ltd* 1974 (2) South African Law Reports 619.

[156] *Wilmot v Sutherland* 1914 CPD 873; *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400.

contractual liability for aspects of quality beyond their control, there needs to be some residual requirement regarding the quality of the goods delivered. Section 19(b) should therefore be replaced with two provisions. The first would make a seller liable for latent defects in the goods sold. This liability should be restricted to something less than a liability for breach of contract.

Changing the basis of liability in this way requires justification. One reason is the difficulties that have arisen in connection with the concept of merchantable quality, difficulties which I believe arise not because of obscure terminology or inadequate definitions, but because the basic concept underlying the section is not sufficiently certain to be a practical measure of performance. Uncertainty exists because when one enquires whether a thing is either 'merchantable', or 'acceptable' or 'satisfactory', the question must be answered in two stages, firstly by ascertaining the qualities and characteristics of the thing itself, but then also looking to a whole variety of external factors, such as the purposes for which such goods are commonly used, or their saleability in the market. Which of these external factors are relevant and how they should each be weighed, tends to vary in different cases and at different times. The result is that the chances of predicting the outcome in a given case are not high. This infects the application of the concept with an unacceptable degree of uncertainty. On the other hand, whether a particular thing has a defect or not is a question which can be answered very largely by examining the thing itself (and, in some cases, comparing it with other things of the same kind or class) to determine whether or not it suffers from some undesirable quality, flaw, fault, blemish or damage which is not necessarily found in all items belonging to that class or kind of goods and which renders it imperfect. More shortly, a thing may be considered defective if it suffers from some abnormal quality or attribute which is reasonably regarded as undesirable.[157] This is, I suggest, a test which is easier to grasp and apply in most cases than the 'two-stage' concept of merchantability.

It will be seen from what has been said that the concepts of 'merchantable quality' and 'defective goods' may overlap. In many cases, goods which are defective may also be unmerchantable, depending on the circumstances. A more important point is that defective goods may nevertheless be merchantable, depending on factors such as the purpose for which such goods as described are normally bought, the price paid, and other relevant circumstances. This means the concepts of 'defects' and 'merchantability' are indeed distinguishable.

It may be asked what justification exists for making a seller liable to a buyer for defects in goods sold if no account is taken of whether or not the defects render the goods unmerchantable. It would indeed be difficult to justify imposing a liability for breach of contract in such circumstances, particularly as it is proposed that the implied warranty of merchantability be repealed. It must also be remembered that the defects under discussion are latent defects, hidden in many cases as much from the seller as from the buyer. On the other hand, a buyer who discovers latent defects will not wish to be held to the terms of a sale that,

[157] See D.21. Whether a defect is serious or trivial is a separate question.

had the facts been known, the buyer would not have entered, either at all, or on the particular agreed terms. In this situation fairness requires a compromise, something in between the seller being liable for breach of contract and not being liable at all. The compromise in Roman law is the creation of a special liability in terms of which the seller is required either to take back the defective goods, or to accept a reduction of the price paid. The seller is not considered to be in breach of contract in this situation and is therefore not liable for damages for breach. How these ideas would operate in particular cases will be demonstrated below.

A second replacement provision should also be introduced, to cover cases where the goods are not defective, but in which they do not have the qualities or attributes which the seller represented they had, although in circumstances where the representations do not amount either to terms of the contract, or to fraudulent misrepresentations — in other words, a liability similar to that in Roman law for *dicta et promissa*.[158] Sellers would thus be made liable for non-fraudulent misrepresentations made at the time of the sale, on which the buyer has relied in entering the contract. The liability would not be that which exists for breach of contract, because a representation is not a term of the contract. Nor would the liability be the same as exists for a fraudulent representation, because to impose exactly the same liability for both fraudulent and non-fraudulent conduct, as has happened in the England under the provisions of the Misrepresentation Act,[159] fails to take account of very significant differences in the degree of fault that exists in each case, and is therefore an approach which, in my view, is jurisprudentially unsound. It would be preferable, in cases where a seller makes non-fraudulent misrepresentations which the buyer has relied on, to impose a special liability on the seller, the same special liability that is proposed in the case of latent defects. This is appropriate because, as with latent defects, non-fraudulent misrepresentations envisage a situation in which the seller is not necessarily at fault. To the provision establishing this special liability could be coupled one that would not allow a seller of goods to contract out of liability for latent defects or representations in cases of sales to consumers. Such provisions would cover many of the situations for which special provision has had to be made for consumer protection in the Trade Practices Act[160] and the Goods Act[161] — a legislative structure which, to say the least, is complicated and inelegant.

So far, the suggestions for reform put forward have concerned only those sections of the Sale of Goods Act legislation directly concerned with the quality of goods delivered. These suggestions could possibly stand on their own, but there are a host of other ancillary changes that would further streamline the Sale of Goods Act legislation. They include doing away with both the distinction between conditions and warranties[162] and the limitations currently imposed on

[158] Such a provision would cater for many of the situations raised by the Law Reform Commission of Western Australia, *Discussion Paper on Equitable Rules in Contracts for the Sale of Goods*, above n 46, ch 2.

[159] Misrepresentation Act 1967 (Eng).

[160] Trade Practices Act 1974 (Cth).

[161] Goods Act 1958 (Vic) Part IV.

[162] Stoljar, 'Sale of Goods - I', above n 37, 429.

the remedies available for breach of a term of the contract after property has passed. Some other technical distinctions and complications currently contained in the Act could also be dispensed with; these will be detailed below.[163] It might also be desirable to further build into our law the principle that the contract of sale is one in which the parties are required by law to act in good faith, a notion which creates wide-ranging possibilities, especially in the field of consumer protection. But first it is necessary to further examine the practicability of the suggestions already made.

XIV THE USEFULNESS OF ROMAN LAW PRINCIPLES IN MODERN LEGAL SYSTEMS

Is there any evidence that the idea, developed in Roman law, of having a special liability and special remedies in respect of latent defects and misrepresentations can work successfully in a modern legal system, providing solutions to complex modern cases? The answer is, yes. Although countries in Europe which received Roman law in the 16th to 18th centuries later introduced national codes in the 19th century which displaced further direct reliance on Roman law, historical accident has allowed Roman law, somewhat modified by Dutch indigenous law (and therefore called Roman-Dutch law) to survive as the law of South Africa, Botswana, Zimbabwe and Sri Lanka.[164] The development of Roman-Dutch law in South Africa since 1652 has kept alive the tradition of a legal system that traces the roots of its legal principles back through Roman-Dutch law to Justinian's *Corpus Iuris Civilis*. It is not uncommon, therefore, to see reference in modern South African judgments to passages from the *Digest*, from which beginnings are traced the developments and changes in modern times. Although English law has had a substantial influence on South African law, South Africa has not received the Sale of Goods Act legislation. Indeed, the South African law of sale has not been reduced to statutory form except in the case of the sale of land and some special provisions with regard to credit sales.[165] The law of sale of goods in South Africa retains much of the simplicity of the original Roman law structure. It knows nothing, for example, of the special distinction between conditions and warranties, and does not presume that property passes as soon as the contract is made.[166] More important for present

[163] See below section XVI.

[164] Hahlo and Kahn, above n 7, 564-5.

[165] Alienation of Land Act 1981 (SAfr); Credit Agreements Act 1980 (SAfr).

[166] There is some evidence of the influence of English law on the South African law of sale. Particularly significant is the idea that, along with the civil law liability for latent defects and misrepresentations, South African law has a rule that goods bought and sold must be of at least merchantable quality. G Hackwill, *Mackeurtan's Sale of Goods in South Africa* (5th ed, 1984) 50-1, says that the requirement does not arise out of the *aediles* edict but 'is part of the description of the goods' and that a buyer can refuse to accept goods which he or she perceives are not 'merchantable'. The ultimate authority cited for this proposition is D.17.1.52, a passage concerned not with purchase and sale but with the action on mandate, and which makes no mention of merchantable quality or any such concept. Alastair Kerr, *The Law of Sale and Lease* (1984) 137-9 states that, as regards the warranty of merchantable quality, South African law is in accord with the principles of English law. Professor Kerr cites as his authorities Ulrich Huber, *Heedendaegse Rechtsgeleertheyt* (1686) 3.7.8, and a report by Cornelis van Bijnkershoek, *Observatio-*

purposes is that it retains the special liability and remedies for latent defects and misrepresentations.[167] That they remain an integral and important part of the modern law of sale in South Africa is illustrated in the decided cases. It will suffice, for present purposes, to describe the leading case of modern times.

In *Phame v Paizes*[168] a buyer purchased the seller's shareholding in, and some claims against, a company which owned immovable property. This property produced an income in the form of rental payments. While negotiating the terms of the sale, the seller's agent represented that one expense which the company had to meet in respect of municipal rates on the property amounted to R4,646 annually. On the basis of this and other information, the buyer agreed to pay R846,000 for both the shareholding and claims. The contract was thus for the purchase and sale of incorporeal property. In fact, the municipal rates payable by the company were R14,736. On discovering this, the buyer alleged that the agent's misrepresentation had caused him to agree to pay a higher price to the seller than he otherwise would have. Had he known the real amount of the rates payable, the buyer said, he would only have paid R815,000 for the shareholding and charges. This lower price was derived by using the same calculation on which the original price had been based, but substituting the correct figure for the

nes Tumultuariae (1472) vol 2, of a case decided by the *Hooge Raad van Holland en Zeeland* in 1718. On analysis, neither source is strong authority for importing a warranty of merchantable quality into South African law. The passage from Huber says: 'If the thing is entirely useless, so that it is of no value to the buyer, he [*sic*] may demand that the thing sold shall be declared to have been unmerchantable ... and the defendant consequently condemned to take it back, and to restore and return the money received by him [*sic*], with damages and interest, etc.' This may be plausible authority when taken out of context, but its significance seems doubtful when examined within the structure of Huber's treatment of the law of sale. In the first place, Huber says nothing of any warranty of merchantable quality in chapter 5 of book 3, in which he deals with the rights and duties of the parties to a contract of sale, including the case of latent defects, and the warranty of title. In chapter 7, where the passage cited occurs, Huber is concerned with the actions arising from the contract of sale. Huber first discusses the actions to enforce the contract, then turns to cases where one party wishes to 'annul' the sale. Huber treats the *actio redhibitoria* as an instance of annulling the sale, unlike the *actio quanti minoris* where only a reduction of the price is sought. He distinguishes the situation in which the two actions are available on the basis that the defect either renders the thing bought entirely useless or it does not. If a latent defect renders a thing completely useless, says Huber, it may be declared unmerchantable and the *actio redhibitoria* is available to the buyer. Huber's reference to the goods being unmerchantable in these circumstances seems to be included for nothing more than explanation and emphasis. Taken in context, it is hardly authority for concluding that a contractual term of merchantable quality is implied into contracts of sale by law. The passage has only been given this particular significance, I believe, because of the influence of English law and a knowledge by legal practitioners of the provisions of the Sale of Goods Act, a knowledge which perhaps predisposes one to believe that a warranty of merchantable quality *should* exist. But the concept of a warranty of merchantable quality is clearly unnecessary within the structure of the Roman law of sale. The case reported by van Bijnkershoek concerned tobacco in casks which was bought, but which, when delivered, was found by the buyer to suffer from obvious defects, having spoiled during transport. This patent defect constituted a breach of the seller's obligation to deliver goods which are free from such defects, and the action available would be an *actio empti*. Once again there is no need for a concept of 'merchantability' to account for this decision.

167 Hackwill, above n 166, 23 ff; Kerr, above n 166, 53 ff.

168 *Phame (Pty) Ltd v Paizes* 1973 (3) South African Law Reports 397 ('*Phame's* case'). Also see *Le Roux v Autovend (Pty) Ltd* 1981 (4) South African Law Reports 890 (N); *De Vries v Wholesale Cars en 'n Ander* 1986 (2) South African Law Reports 22 (O).

rates. The buyer therefore claimed R31,000 from the seller, either as a reduction of the purchase price or alternatively as damages.

The difficulty with treating the buyer's claim as a claim for damages was that the buyer did not aver that the representation made by the seller's agent about the rates was either an agreed term of the contract, or that it was made fraudulently.[169] The representation was, simply, a non-fraudulent misrepresentation, but one which the seller's agent knew was material to the buyer. Was this sufficient grounds for a buyer to bring an action on the sale for a reduction of the purchase price? That the action is brought on the contract of sale, as opposed to an action to set aside the contract, is clear in that the buyer intended to abide by the sale; he simply wanted to pay the price he would have calculated as appropriate had the real expenses been made known to him. Holmes JA begins his review of the relevant law with the provisions of the edict of the curule *aediles*, quoting passages preserved in the *Digest* before tracing the reception of these provisions into Roman-Dutch law in the writings of Voet,[170] Huber,[171] Matthaeus,[172] Noodt[173] and Grotius.[174] He considers the views of three French jurists who are authoritative on Roman law: Cujacius,[175] Donellus[176] and Domat.[177] He then analyses relevant South African cases and texts.[178] His conclusions are that, if a thing sold suffers at the time of the sale from a latent defect of which the buyer is unaware, then, on those facts alone, the buyer is entitled to special remedies, one of which is the reduction of the price paid. The right arises simply by operation of law and not by any reliance on what the parties intended, expressly or impliedly. It is, says Holmes JA, unnecessary for the buyer to try to fit his resultant right into the concept of a so-called warranty against latent defects and the buyer does not have to either aver or prove a breach of a term of the contract. The same rights arise, in the same way, if a seller, at the time of a sale, makes unfounded material statements or promises going beyond mere praise or commendation, and which bear on the quality of the thing sold, but which are not agreed on as terms of the contract. The remedies are available, where relevant, in respect of incorporeal property.[179]

Apart from illustrating the application of this ancient institution of the law of sale in a modern case, Holmes JA's judgment in *Phame's* case shows how, when the foundations of the law are clearly conceived and well worked out, no undue difficulty arises in understanding and applying them. It is suggested that it would

169 *Phame's* case 1973 (3) South African Law Reports 397, 409A.
170 Johannes Voet, *Commentary on the Pandects*, 21.1.3.
171 Ulrich Huber, *Praelectiones Juris Romani,* 21.1.2.
172 Matthaeus, *De Auctionibus*, 1.8.23.
173 Gerard Noodt, *Opera Omnia*, vol II, 456.
174 Hugo Grotius, *The Jurisprudence of Holland* (1926) 3.15.8.
175 Cujacius, *Opera Omnia*, vol IV, *ad* D.19.1.13.1, 805.
176 Donellus, *Ad titulum de Aelilicio Edicto* (1897 ed) vol X, 1336.
177 Domat, *Civil Law*, vol I, 85.
178 *Phame's* case 1973 (3) South African Law Reports 397, 414-17 (Holmes JA).
179 Ibid 416-18.

be less easy to achieve as appropriate a result on the given facts under the provisions of the Sale of Goods Act legislation.

XV APPLICATION OF THE SUGGESTED RULES IN ENGLISH AND AUSTRALIAN CASES

The effect of the rules suggested in this article as appropriate can be illustrated by applying them to the facts of cases previously decided under the provisions of the Sale of Goods Act legislation. The case of *David Jones Ltd v Willis*[180] clearly demonstrates the unnecessary complexities of the Sale of Goods Act legislation. The buyer purchased a pair of shoes from the seller. The shoes were defectively manufactured and the heel fell off one shoe soon after the sale, while the buyer was wearing it. The buyer suffered some injuries as a result. The buyer sued the seller for breach of warranty to recover damages. This would seem to be a very straightforward example of a case in which common sense dictates that the buyer is entitled to relief. Under the legislation, however, there are various complications. To rely on the implied warranty that the goods sold be of merchantable quality, it must be shown that the sale is a sale by description; otherwise the warranty is not implied at all. For this reason, the concept of sale by description is interpreted as broadly as possible, but some cases still fall outside it. The only alternative then is to show that the buyer communicated to the seller the special purpose for which the goods were required, so as to show that the buyer relied on the seller's skill or judgment, and that the goods are of the description which it is the seller's business to supply. Then, if the goods are not fit for the stated purpose, the seller is liable for breach of condition. However, because the case involves the sale of specific goods (the shoes) and property passed to the buyer as soon as the contract was entered into, the buyer is not entitled to return the shoes and simply claim back what he or she paid, but must keep the defective shoes and sue for damages. And the seller, if unaware of the defect, is liable for the consequential damages as well as for the immediate damages, despite never having intended to undertake that liability. In the present case, the High Court held, on appeal, that the sale was a sale by description, and that in any event, the buyer had communicated reliance on the seller to provide goods suitable for an expressed special purpose, that is, walking. The seller was therefore held liable for the buyer's injuries, the injuries being a consequence of the breach of warranty. However, would it not accord better with everybody's expectations and be much easier for everyone to understand, if the seller was simply liable in all cases of purchase and sale of goods to either reduce or refund the price (at the buyer's option) if the goods bought and sold are found to suffer from a material latent defect? With such a simple rule, one doubts whether a case like this would ever have come to court, let alone on appeal to the High Court. What would there have been to argue? The shoes clearly suffered from a hidden defect. The buyer would most likely have chosen to return them and reclaim the price, a practice which, in any event, many sellers of goods these days will allow to foster

[180] (1934) 52 CLR 110.

goodwill among customers, whatever the law might be. As for liability for injuries, the appropriate cause of action there is either negligence or special provisions for product-related injury such as are contained in the Trade Practices Act.[181]

Does it make any difference to the outcome which rules are applied? In *David Jones Ltd v Willis*[182] the buyer would obtain relief one way or the other. Would the outcome be substantially similar in all cases? The answer seems to be no, a point illustrated by the facts in *Henry Kendall & Sons v William Lillico & Sons Ltd.*[183] The buyer purchased an extract of groundnuts from a Brazilian supplier, to use in making compound animal food. After large numbers of young pheasants and turkeys which had been fed on the compound died, it was discovered that the groundnut extract supplied was contaminated in up to five parts to a million by aflatoxin, a poison. Aflatoxin does not always exist in groundnut extract, but sometimes does in varying amounts. Mildly contaminated extract can be fed to cattle, but not poultry. Badly contaminated extract cannot be used in animal food at all. The buyer of the extract in the present case, whose pheasants had died, brought an action for damages on the grounds that the extract supplied was not of merchantable quality. The court was unable to reach a unanimous decision on this issue. Lord Reid, with whom Lord Morris and Lord Guest agreed, held that despite the existence of the defect (the contamination) the goods were still merchantable, because they were saleable under the same description to buyers who would use them to feed cattle rather than poultry. Lord Pearce, with whom Lord Wilberforce agreed, came to a different conclusion on the basis that, even if the goods were saleable with the defect to other buyers, the goods would not have been saleable at the same price but at a lower price. It is suggested that if the Privy Council had been answering the question whether or not the goods supplied suffered from a latent defect, a question which is answered by considering the qualities of the goods themselves as compared with other goods of the same kind, the answer would have been straightforwardly in the affirmative. This is suggested by the fact that the term 'defect' is used in the various judgments to describe the contamination of the extract by the aflatoxin. The difficult question was whether this 'defect' rendered the goods 'unmerchantable', a matter on which there was no agreement. The reform of the law advocated in this article would make that second stage of the enquiry unnecessary and thus render the outcome much more predictable.[184]

Under the suggested rules, would the buyer of the defective extract be allowed to reclaim a refund of the purchase price (rather than a reduction of the price) if unable to return the goods originally bought? The complication is that, by the time the defect was discovered in the extract, the goods were inseparably mixed

[181] Trade Practices Act 1974 (Cth) Part VA.
[182] (1934) 52 CLR 110.
[183] [1969] 2 AC 31.
[184] Cf *Cammell Laird & Co Ltd v The Manganese Bronze and Brass Co Ltd* [1934] AC 402; *Grant v Australian Knitting Mills Ltd* [1936] AC 85; *Ashford Shire Council v Dependable Motors Pty Ltd* [1961] AC 336; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441.

into the food compound and some of it had been used up. The answer to this important question can be derived from the principle that the special remedy allowed to a buyer in these circumstances is neither a *restitutio in integrum,* nor a case of treating the contract as repudiated, but an action on the contract in terms of which the requirement is that neither party should retain any benefit received under the contract, rather than a requirement that each party be put back in his or her pre-contractual position. This means that, if the contaminated food has no value, either for feeding poultry or for any other purpose, the price can be claimed regardless of the inability of the buyer to restore the goods bought. If the food has some value for whatever purpose, that value must be offset against the claim for the price.

It has been suggested that commercial buyers of goods might exercise a right to reject materially defective goods for the wrong motive, for example, if the price of such goods were to fall.[185] This, it is said, is unacceptable and a reason not to allow such relief to buyers. However, there does not appear to be much merit in the argument. In the first place, under the suggested rules, the right to return the goods and reclaim the price would exist for a relatively short period of time — perhaps six months or a year from the date of the sale. Secondly, if material defects in goods sold do manifest themselves, it should not matter what the buyer's motive is in exercising his or her rights. And thirdly, if defects do exist, it seems fairer that the seller should take back what was sold than that the buyer be stuck with the goods as well as with the difficulty of bringing an action for damages to recover the loss.

Even if it is shown that the suggested rules would provide a more elegant and much simpler law of sale, it must also be asked whether alternative, less drastic approaches are available. For example, would adopting the latest English amendments, which redefine the concept of 'merchantable quality', provide an equal certainty and simplicity of approach? It does not seem likely. The new definition is complex and introduces a whole range of factors to be taken into account beyond considering the qualities of the goods themselves. It is not likely to be clear to the parties involved in a dispute how a court will weigh the various factors; this makes the outcome unpredictable and will lead to litigation. It also seems that there is an increasingly narrow distinction drawn between the concept of merchantability and the concept of goods fit for the buyer's special purpose and is thus bound to cause difficulty.

XVI DETAILED SUGGESTIONS FOR REFORM

To give effect to the suggestions outlined above, and to some related aspects of the law, the following changes to the Sale of Goods Act legislation should be made. The section numbers used are those of the Victorian Goods Act.[186] Some of the changes are more radical than others, but, taken together, the changes essentially simplify the law and place it on more orthodox legal foundations. I do

185 Law Commissions, above n 3, 37.
186 Goods Act 1958 (Vic).

not underestimate the significance of the proposals, which amount to scrapping what, for many lawyers, are the very rules that provide the essential character of the law of sale. It is hoped that this article will have helped place those rules in a better perspective, and shown that there are alternative and better ways of doing things. We do not have to remain blindly loyal to a flawed system of rules. The American experience with the Uniform Commercial Code demonstrates that the Sale of Goods Act legislation can indeed be simplified, rationalised and improved in many ways.[187] However, if all the proposed changes, taken together, are thought to be too far reaching, it would still be possible to achieve a measure of desirable reform by choosing to adopt only some of them. Care would then need to be taken to avoid preserving structures and mechanisms that are redundant or which conflict with newly adopted basic principle. Specific suggestions are as follows:

- Do away with the distinction between 'contracts of sale', 'sales' and 'agreements to sell', by repealing sub-sections (3) and (4) of section 6. The proposal is that no distinction between terms of a contract will be made in contracts of sale that are not made in contract law generally. The distinction is artificial and technical and, in the light of the overall structure now proposed, is not needed. It may be observed that those who drafted the new provisions to regulate the quality of goods bought and sold in the United Kingdom, substituted the word 'term' for 'condition' and 'warranty' throughout the Act.[188] But, because the amendments do not address the structural issues behind the use of the terms, the underlying distinction between terms that are conditions and those that are warranties remains. Thus, for example, in section 12 of the Sale and Supply of Goods Act, after changing 'condition' and 'warranty' to 'term' a new sub-section 5A states: 'As regards England and Wales and Northern Ireland, the term implied by sub-section (1) above is a condition and the terms implied by sub-sections (2), (4) and (5) above are warranties'.[189] Similar provisions apply to sections 11, 14 and 15. Whether this constitutes a real improvement is doubtful; rather, it suggests the apocryphal rearrangement of deckchairs on a doomed vessel.
- Strike out the distinction between warranties and conditions and leave only the concept of terms of the contract, as understood in ordinary contract law. Retain section 34, which states that it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale. The remedies available for breach of the terms of a contract of sale would be the same as the remedies for breach of the terms of a contract generally.
- Delete reference to 'sale by description' as a factor which limits the operation of certain provisions of the Act and refer instead to 'contracts of sale'. It does not matter *how* agreement on the thing sold is reached, as long as there is the

187 Uniform Commercial Code 1990 (text) (USA) art 2.
188 Sale and Supply of Goods Act 1994 (UK) s 1.
189 Ibid s 12(5A) appendix.

necessary *consensus*. In any event, the significance of the category has been minimised in Australia, where the tendency has been for judges to interpret the phrase as broadly as possible. The result is that almost all cases are considered sales by description, unless no words are used at all by the contracting parties, or the words used are as general as 'I want to buy this'.[190]

- Repeal section 10, which defines existing and future goods artificially, and instead define future goods in section 3 as goods not in existence at the time of the sale.
- Repeal section 12 which deals with the situation where the goods have perished after agreement to buy and sell. Since the section envisages that the thing sold existed at the time of the sale, but that risk has not passed from seller to buyer, the loss due to accidental destruction should fall on the seller. Rather than saying the sale is avoided, as the present section does, the situation would be that the seller is liable to the buyer for the value of the thing, so that, if the buyer has paid the price, he or she can either recover this value or, if payment has not been made, the buyer can set off payment against what the seller owes and claim any balance.
- Repeal section 16, which deals with the treatment of conditions as warranties, a distinction no longer to be maintained in the suggested framework.
- Retain the concept that the seller warrants title, but revise the wording of section 17(a) to make its meaning clear and repeal section 17(b) which is redundant.[191] The reason why, in Roman law, the seller of goods was not required to warrant title, but only vacant possession, no longer applies. Whereas, in Roman law, there existed various circumstances in which it was difficult for a seller to be certain of having title, so that it was inconvenient commercially to insist on a warranty of title, this is not the case in Australia, and a warranty of title is something most buyers understand and expect.
- Repeal sections 18 and 19 entirely. Without sections 18 and 19, section 34, which states that it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale, has full effect. In all cases, therefore, the seller will be obliged to deliver goods that correspond with any description used in reaching *consensus* as to either the identity or quality of the thing sold. Similarly, where it is a term of the contract that the goods purchased are to be fit for the buyer's purpose, the seller will be obliged to deliver goods in accordance with that obligation. Of course, there will be no limitation to the enforcement of such terms on the basis of whether the seller is a person who deals in goods of that type or not. The only enquiry will be whether or not the seller expressly or impliedly undertook contractual liability to deliver goods suitable for the buyer's purpose. Sales of things under patent or trade names would be similarly dealt with.
- To protect consumers, special provisions exist in some jurisdictions which ensure that the durability and safety of goods are considered as aspects of

[190] Stoljar, 'Sale of Goods - I', above n 37, 440; Stoljar, 'Sale of Goods - II', above n 37, 177.

[191] N Franzi, 'The Sale of Goods, Implied Undertakings as to Title, Etc.' (1980) 14 *University of Western Australia Law Review* 208.

merchantability.[192] While the concept of merchantability may be so narrow as to require such special provision, it is suggested that the concept of 'defects' is not only wide enough to include these dimensions of quality, but necessarily does so. If particular goods are of such quality as to be less durable than goods of that type normally are, that is a defect — an undesirable attribute, affecting the particular goods, not typical of all goods of that class. The same reasoning would apply to goods which are, for some reason, more hazardous than goods of that type normally are. Special provision is therefore not necessary.

- Introduce a new provision obliging a seller to deliver what was contracted for free of any material latent defects which existed in the goods at the time of the sale, and which defects were not disclosed by the seller to the buyer. It should also be provided that, in the event of any such latent defects in the goods manifesting themselves within a year of the sale (or whatever period is thought proper), the buyer has the option of either returning the goods to the seller and reclaiming the price paid, plus interest and wasted expenses, or of retaining the goods and recovering from the seller a portion of the purchase price, being the difference between what was paid and the market value of the defective goods at the time of the discovery of the defect.
- Amend section 61, which allows for the contractual exclusion of liability, so that a seller of goods is not permitted to contract out of liability for latent defects in cases where the seller was aware of their existence and did not disclose them, or where the seller was not aware of them if the buyer purchases the goods in question as a consumer. A definition of 'consumer' should be added to section 3.
- Those provisions of Part IV of the Goods Act (which deals specifically with consumer contracts of sale) which are made redundant by the proposed reforms should be repealed, for example, sections 87 to 90. The remaining sections will require amendment, for example, sections 86 and 100. The relevant sections of the Trade Practices Act[193] would also require amendment.
- Retain the basic principle set out in section 22(1) that property passes when the parties to the contract intend it to pass but change the presumption, contained in section 23, that unless a different intention appears, property passes as soon as the contract is made, or as soon as circumstances which prevent the passing of property no longer exist. Provide instead that the parties are presumed to intend that property in the goods is to pass at the time of delivery and reciprocal payment, a rule which accords better with the expectations of most buyers and sellers and which more closely follows the rules of property law. The presumption that property rights should pass with delivery and payment rather than when the contract comes into existence makes the rules regarding acceptance and rejection easier to comprehend, since, in many cases, property will not already have passed at the time the buyer elects to reject goods.

[192] See, eg, Sale and Supply of Goods Act 1994 (UK) s 14. Cf Trade Practices Act 1974 (Cth) s 71 and Part VA.

[193] Trade Practices Act 1974 (Cth) Part V.

- Sections 41 to 44 require revision to make it clear that the buyer's right to inspect and reject goods delivered by the seller exists to enable a buyer to avoid keeping goods which either patently do not conform to the agreed terms of the contract, or which suffer from material patent defects. Rejection should be possible even if property has already passed to the buyer, provided only that the buyer has not already accepted the goods as fulfilling the contract or done anything inconsistent with an intention to reject.
- Amend the rule contained in section 25, so that risk (rather than property) passes as soon as the contract is made. Rewrite the rules of section 23 so that they govern the passing of risk, rather than property, in the special circumstances dealt with in that section.
- Reverse the order of sections 57 and 58. Amend section 57 to make clear that an action for damages is available as an alternative to an action for delivery of specific or ascertained goods; or in place of delivery where the goods are unascertained; or for any other breach of contract.
- Simplify the provisions of section 55. A seller should be able to sue for the price in the same way that any term of a contract can be enforced.
- Add a provision which creates liability for a seller's failure to make good a non-fraudulent misrepresentation. The liability should be the same as that which exists when latent defects are found to exist in the goods.
- Add a provision that the parties to a contract of sale are bound by the dictates of good faith and liable for breach of contract for acting contrary to duties that good faith imposes on the contracting parties. If this and the previous suggestion is adopted, a revision of related consumer protection legislation would be necessary, as much of it would become redundant. The proposed provisions which provide protection to buyers might conveniently be extended to other contracts for the supply of goods and services, *mutatis mutandis*.

XVII Some Observations on Related Provisions

It is noteworthy that changes similar in some respects to those now suggested have begun to make their appearance in Australian law, although not as part of a reform of the basic approach of the Sale of Goods Act legislation. One important example is the provision of Part IV of the Goods Act which, in the case of consumer contracts of sale, allows for the 'rescission' of the contract of sale for innocent misrepresentation.[194] 'Rescission' is defined, for the purposes of the section, in terms that suggest a wholesale *restitutio in integrum*, that is, making the contract void from its beginning.[195] This provision thus goes somewhat further than the special remedies which, in this article, are suggested as an appropriate model for reform. It also sits badly within the general framework of the law of sale, since it equates the remedies for non-fraudulent misrepresentation with those for fraudulent misrepresentation, which seems to ignore important

[194] Goods Act 1958 (Vic) s 100. Also see Trade Practices Act 1974 (Cth) s 75A, which allows a remedy of 'rescission' for breach of a provision of Division 2. However, rescission under s 75A does not appear to have the effect of making the contract void *ab initio*. Cf s 87(2)(a).

[195] Goods Act 1958 (Vic) s 84.

differences between the two. It also means that the remedies for innocent misrepresentation are more radical in their effect on the contract than the present remedies available for breach of contract. Thus, where a buyer, who has purchased specific goods in which property has passed, proves a breach of contract, the buyer is obliged to keep the goods and claim damages. But if the buyer in the same circumstances proves a non-fraudulent misrepresentation, he or she is entitled to have the contract set aside, to return the goods, and to recover the purchase price. This is a remarkable result.[196] The provision appears to follow the same approach as that found in the Misrepresentation Act.[197] Before the introduction of this Act, the right of a buyer under the general law to rescind a contract of sale on grounds of non-fraudulent misrepresentation was, to say the least, somewhat uncertain.[198] This may well have been the result of the failure of English law to receive, via the law merchant, that part of Roman law that originated in the *aediles* edict regarding *dicta et promissa*. It may also be due to the limits imposed by interpretation of the Sale of Goods Act legislation on the application of equitable doctrines to contracts of sale.[199] It is thought however that the shortcomings of the general law regarding non-fraudulent misrepresentation in sale contracts would be put right in a most effective way if the suggestions put forward in this paper are followed, rather than by copying the example of what has been enacted in the United Kingdom, or by re-opening the law of sale to aspects of equitable doctrines that are of uncertain application.

The reforms suggested in this article would make the special remedies for latent defects and non-fraudulent misrepresentations available in *all* contracts for the sale of goods, thereby decreasing the distinction between consumer and non-consumer sales. There does not appear to be any good reason for restricting the availability of the special remedies for latent defects and non-fraudulent misrepresentations to consumer sale contracts. But because, in dealings between business persons, the parties are more likely to be negotiating their contracts with equal bargaining strength, it should be allowed in non-consumer sales for the parties to contract out of liability for latent defects and non-fraudulent misrepresentations.

XVIII THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The United Nations Convention on Contracts for the International Sale of Goods, the articles of which were finalised in Vienna in 1980, provides some

196 See Atiyah, above n 31, 524.

197 Misrepresentation Act 1967 (Eng).

198 See, eg, *Riddiford v Warren* (1901) 20 NZLR 572; *Watt v Westhoven* [1933] VLR 458; *Re Wait* [1927] Ch 606; *Leaf v International Galleries* [1950] 2 KB 86; *Long v Lloyd* [1958] 1 WLR 753.

199 Goods Act 1958 (Vic) s 4(2); *Re Wait* [1927] Ch 606; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] 2 WLR 902; Law Reform Commission of Western Australia, *Discussion Paper on Equitable Rules in Contracts for the Sale of Goods*, above n 46, 14 ff.

interesting perspectives.[200] The Convention was prepared in the belief that having a uniform set of rules to regulate contracts for the international sale of goods would assist in removing legal barriers to world trade and promote international trade. The provisions of the Convention were arrived at by a long process of discussion and consultation between legal experts from participating countries and the resulting set of rules is something of a hybrid of the national legal systems of the world, a compromise selection of principles and rules which seemed acceptable to a wide range of interested parties. The Convention does not follow the national law of any one country, and although various of its provisions have a familiar ring about them it is clear on analysis that there are some very substantial differences of approach between the Convention and the Sale of Goods Act legislation. For present purposes, it will suffice to take note of only some provisions of the Convention, in particular, those articles which have some similarities with the approach to reform that is suggested in this paper. This is not to say that the Convention exactly mirrors what is suggested here, but only that the suggested reforms would bring the Sale of Goods Act legislation closer to the Convention rather than further from it.

Of particular interest are the provisions in the Convention laying down a seller's obligations regarding the quality of goods to be delivered. The Convention avoids use of the concept of 'merchantable quality'. The Convention requires that goods delivered must be of the quantity, quality and description required by the contract.[201] Further, it is stated that, unless otherwise agreed, goods do not conform to the contract unless they are fit for the purposes for which such goods would ordinarily be used, or for the particular purpose made known to the seller on whom reliance was placed to provide appropriate goods, or unless they possess the qualities of goods held out as a sample or model. In addition they must be properly packaged.[202] Although the Convention does not use the term 'defect', preferring the phrase 'lack of conformity with the contract', it seems inescapable that the notion of defects underlies the idea of goods not being fit for their ordinary purposes, the broadest instance of lack of sufficient quality laid down in article 35. A seller is not liable for breach of the article if the buyer knew of, or must have known of, the lack of conformity complained of — a similar rule to that which applies in respect of patent defects.[203] The seller is liable for the lack of conformity even after delivery and the passing of risk, as is the case if defects are latent.[204]

As for remedies, a buyer who is faced with a breach of the provisions explained above may either insist on specific or substitute performance, or institute a claim

200 Convention on Contracts for the International Sale of Goods, opened for signature 11 April 1980, 19 ILM 671 (entered into force 1988). The convention is adopted in participating jurisdictions by re-enacting its provisions into local law. See, eg, Sale of Goods (Vienna Convention) Act 1987 (Vic).

201 Convention on Contracts for the International Sale of Goods, above n 200, art 35(1).

202 Ibid art 35(2).

203 Ibid art 35(3).

204 Ibid art 36.

for damages.[205] The Convention treats specific performance as a remedy available as of right, but makes this subject to any restrictions in the local jurisdiction, which, in Australia, makes the availability of the remedy subject to the discretion of the court. More significant for present purposes is the remedy described as avoiding the contract.[206] This is rather different from the right of a buyer under the Sale of Goods Act legislation to reject goods and treat the contract as repudiated, and in many ways is more similar to the special remedies allowed in Roman law by the *aediles,* except that the remedy of avoiding the contract is based on the concept of fundamental breach of contract, or non-performance. Even so, it is hard not to be reminded of the *actio quanti minoris* by the following:

> If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time.[207]

The effect of avoidance is said to be that it releases both parties from their obligations under the contract, subject to damages which are due.[208] However, avoidance does not invalidate any provisions of the contract inserted for the purposes of settling disputes, nor those which give the parties rights, nor any obligations consequent on avoidance. In other words, like the aedilitian remedies, the relief is not a *restitutio in integrum*, which makes the contract void *ab initio*, but an action on the contract. A party who has already performed contractual obligations prior to avoidance, whether wholly or in part, is entitled to have restored whatever was supplied or paid. Mutual restoration must be made concurrently. In some circumstances, complete restoration may be excused, for example, if a buyer seeking restoration of the purchase price cannot return the goods because they have perished or been spoilt as a result of the buyer examining them as required by article 38.[209]

XIX CONCLUSIONS

When considering the reform of the law of sale in Australia, we have various options. We could do nothing at all and continue with our law as it is, leaving it to the courts to interpret and develop the law as they have done for the last hundred years. This will not provide changes to the basic structure of the Sale of Goods Act legislation, but it has been an effective process in correcting some of the faults of the legislation and developing other aspects of the law of sale. Alternatively, we could continue with micro-reform, altering and refining those parts of the legislation that seem to require it from time to time, possibly taking the lead from the reforms implemented in the United Kingdom. We have argua-

[205] Ibid arts 74-9.
[206] Ibid art 49.
[207] Ibid art 50.
[208] Ibid art 81.
[209] Ibid art 82.

bly not yet reached the absolute limits of patching up the fabric of the Act. Lastly, there is the alternative of macro-reform. This may seem a daunting prospect, especially when it involves borrowing ideas from outside the traditional sources. The approach I have suggested in this article may not appeal to many. But if we concentrate on what is likely to provide the most elegant and efficient legal framework for this important commercial and consumer contract, the ideas put forward in this paper provide a solution which has some attractive advantages. We would still have sale of goods legislation containing a basic framework of the law of sale, but it would be stripped of much of its present complexity. It would be somewhat changed in its structure and effect, but not beyond recognition. The repeal of unnecessary technicalities and the existence of fewer special rules for contracts of sale would allow increased reliance in many cases on the ordinary principles of Australian contract law. The reformed legislation would also have some important new replacement provisions which, to lawyers trained in the present law, might initially seem unfamiliar, but which have an easily understood structure and purpose. The future development of the law would return in greater part to the courts, where it belongs and not be unduly constrained by over-detailed statutory provisions. In my view, the new regime of rules would be much more easily understood in their essentials by both lawyers and non-lawyers than is the present law. Litigation should be less complex and more predictable under these rules. The proposed approach to reform would result in less law, with an emphasis on improving its quality, rather than the seemingly endless increase in quantity. The differences between the Australian law of sale and the modern codes based on civil law principles would be substantially diminished.[210] These advantages, if they can be achieved, would make the necessary effort worthwhile.

[210] Ontario Law Reform Commission, above n 44, 12.