



THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIFTY-FOURTH REPORT

A.C.T. MANUFACTURERS WARRANTIES ORDINANCE 1975

MEMBERS OF THE COMMITTEE

Senator I. A. C. Wood (Chairman)
Senator W. W. C. Brown
Senator S. J. Collard
Senator D. M. Devitt
Senator P. D. Durack
Senator S. M. Ryan
Senator R. C. Wright

Function of the Committee Since 1932, when the Committee was first established, the principle has been followed that the function of the Committee is to scrutinise regulations and ordinances to ascertain -

- (a) that they are in accordance with the statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions; and
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIFTY-FOURTH REPORT

The Standing Committee on Regulations and Ordinances has the honour to present its Fifty-Fourth Report to the Senate.

A.C.T. MANUFACTURERS WARRANTIES ORDINANCE 1975

2 This Committee stands charged with the duty of scrutinizing all regulations and ordinances as subordinate legislation on certain specific grounds. Two of such grounds are relevant, namely

(a) that the ordinance should not give effect to substantive amendments of the law which if they are to be enacted at all should appropriately be enacted by Parliament as a Statute and not by the Executive as an ordinance ;

(b) that the ordinance should not unduly invade the individual rights of citizens.

3 The Manufacturers Warranties Ordinance of the A.C.T (No. 41 of 1975) is under scrutiny. It is hereinafter referred to as the Ordinance and is attached "A".

4 This committee has rigidly abstained from involving itself in any considerations of policy. Its criteria are strictly limited to the grounds above.

5 The ordinance was accompanied by the usual explanatory memorandum. It is attachment "B".

6 The explanatory memo clearly shows that the effect of the ordinance is to alter substantive law in a major respect. It is clear therefore that the ordinance if appropriate for enactment as law at all, should be enacted by Parliament and not by the Executive.

7 The ordinance imposes far reaching liabilities on a manufacturer - said by an explanatory memo to be "the same as those presently provided under the Trade Practices Act 1974 between a vendor and purchaser". If the vendor's liability under the Trade Practises Act should be extended to apply to manufacturers it would appear that such extension should be made by Parliament by an amendment of the Trade Practises Act and not by an A.C.T. ordinance made by the Executive.

8 But a very serious question arises as to whether indeed the Ordinance is not in conflict with the Trade Practices Act in important respects. The Act defines supply as a verb to include in relation to goods "supply (including resupply) by way of sale, exchange, lease, hire or hirepurchase", and in relation to services "provide, grant or confer". Division 2 of Part V sets out "conditions and warranties in consumer transaction" in contracts for the supply of goods.

 The Ordinance (Section 3 (2)) is expressed to apply to goods manufactured either within or outside the Territory. But by Section 3(2) (c) it is provided that "subject to section 6, (the Ordinance) does not apply to or in relation to manufactured goods sold directly by the manufacturer to the consumer".

Section 6 provides "the provisions of this Ordinance with respect to

- (a) express warranties; and
- (b) the warranty relating to the availability of spare parts,

apply to and in relation to manufactured goods that are sold directly by the manufacturer to the consumer".

There can be little doubt that the Trade Practices Act applies to these sales.

How the Territory Ordinance can lawfully add to, vary or contradict the Federal statute is not apparent.

But it adds another heap of confused legislation on to a basis already complex by State legislation and the Trade Practices Act.

Complicated legislation is costly, doubtful and inefficient.

- 9 The Ordinance declares that a manufacturer "where the goods are imported into Australia and the manufacturer does not have a place of business in Australia" (not the A.C.T.) is the importer of the goods.

- 10 The Ordinance gives expression to an entirely new warranty, (Section 4(1) (g)) where the goods are likely to require repair or maintenance - that spare parts will be available for a reasonable period after the date of manufacture (not sale).

Section 4(4) reads :

A manufacturer of goods is not liable upon his statutory warranty as to the availability of spare parts if the unavailability arose from circumstances that the manufacturer could not reasonably be expected to have foreseen.

Section 4(5) reads :

Without limiting the generality of sub-section (4), an industrial stoppage may, for the purposes of that sub-section, constitute a circumstance that a manufacturer could not reasonably be expected to have foreseen.

Section 7(2) provides:

Where a manufacturer takes reasonable steps to ensure that a consumer purchasing manufactured goods will effectively receive notice at the time the goods are purchased that the manufacturer does not undertake that spare parts will be available for the repair of the goods, no liability attaches to the manufacturer on the ground that the spare parts are not available.

All this is quite new law - how effective it is and how reasonable is a matter for Parliament - not the Executive.

11 By section 9 certain presumptions are written into the ordinance.

12 The Minister in supporting the Ordinance by letter to the Committee has said "With the exception of the warranty of availability of spare parts, which is largely inappropriate to a retailer of goods, the statutory warranties imposed by this Ordinance are, in substantially similar forms, imposed by existing law upon sellers". If this existing law is to be extended from sellers to manufacturers it is a matter for Parliament and not the Executive. (Attachment "C")

13

We set out comments made by the Committee's Legal Adviser, Dr A. Endrey, Q.C.:

- (1) The Minister relies on the Final Report of the Committee on Consumer Protection of the United Kingdom presented to the British Parliament in 1962. According to my researches, this report still has not been acted on by the Parliament of the United Kingdom and there is no legislation in Britain even remotely resembling the present Ordinance. In 1971, the British Parliament enacted a further Consumer Protection Act which contains no provisions relating to manufacturers' warranties. Two years later, this was followed by the Supply of Goods (Implied Terms) Act 1973 which applies only to contractual relationships, such as sale of goods and hire-purchase agreements. The British Parliament therefore had two express opportunities since 1962 to regulate the field of manufacturers' warranties and on both occasions, it declined to take such opportunity.

- (2) The Minister further relies on the report of the Ontario Law Reform Commission. The Acts of the Province of Ontario are not available to me but it would seem from the Minister's letter that the recommendations of the Commission have not yet been adopted by the Parliament of Ontario.
- (3) The only precedent for the present Ordinance is therefore the South Australian legislation referred to by the Minister. I respectfully repeat my comments made in paragraphs (4) and (5) in respect of the A.C.T. Misrepresentation Ordinance.
- (4) I am not critical of the underlying principle of the present Ordinance that manufacturers should be made liable to the ultimate purchaser of their goods in certain circumstances. I respectfully maintain, however, the criticisms made in my earlier report.
- (5) The assertion made by the Minister that an importer can obtain redress against the manufacturer, is incorrect. The present Ordinance creates a new range of liabilities by its wide definition of "express warranty." The liabilities so created go far beyond the existing range of contractual and tortious liabilities at common law - which constitute the only causes of action by reason of which an importer can obtain indemnity against the manufacturer - and consequently, the importer would not have redress against the manufacturer in respect of his extended liability.

14 In the Australian Capital Territory, although there is now a fully elected Legislative Assembly, it is itself established by ordinance and not by Act of the Parliament. It has no statutory powers to enact legislation for the territory; such legislation in the form of ordinances is still formally made by the Governor-General with the advice of the Executive Council. Such ordinances are still subject to disallowance by either House of the Parliament. The practice of the government has been to refer draft ordinances to the Assembly for debate, but its opinions are advisory only.

 Therefore unless and until the Senate resolves otherwise, the Committee is of the opinion that A.C.T. ordinances stand referred to this Committee for consideration on the basis of subordinate legislation made by the Executive Government.

15 The Committee recommends that the Ordinance be disallowed.

16 Dissents by Senator Durack and Senator Ryan are attached.

IAN WOOD
CHAIRMAN

29 April 1976

DISSEYNT BY SENATOR DURACK

- 1 I agree that one of the criteria followed by the Committee in scrutinising Regulations and Ordinances is to ascertain that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment. However, in my opinion this principle should be applied with discretion and with regard to the particular circumstances of each piece of subordinate legislation.
- 2 In regard to Ordinances the Committee has already modified the application of these principles in regard to certain Territories and indeed has altogether withdrawn from the scrutiny of Ordinances of some Territories, e.g. the Northern Territory.
- 3 So far as the Australian Capital Territory is concerned, the vast majority of its substantive laws are made in the form of Ordinances and if the majority opinion of this Report prevailed all such laws would have to be made by Act of Parliament. This would add a considerable burden to the Parliament's legislative work.
- 4 The Territory now has a fully elected Legislative Assembly, and although its powers are advisory only it is nevertheless designed to provide a measure of self-government for the Territory.
- 5 It would seem to be a contradiction of this development that any Ordinance which changes the substantive law of the Territory has to be passed as an Act of Parliament. It may well be that some Ordinances could be of such paramount influence in the laws of the nation as a whole that they should be enacted only after full debate in the Parliament. The changes made in the law of contract by this Ordinance are not, in my opinion, of such a character.

6 I agree that the Committee should scrutinise ordinances with regard to its other principles and if a major offence is done to those principles, disallowance of the ordinances should be recommended to the Senate.

P. D. DURACK

DISSENT BY SENATOR RYAN

I dissent from the Report for the reasons given in Senator Durack's dissent.

S. M. RYAN

ATTACHMENT A
AUSTRALIAN CAPITAL TERRITORY

No. 41 of 1975

AN ORDINANCE

Relating to Manufacturers Warranties.

I, THE GOVERNOR-GENERAL of Australia, acting with the advice of the Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910-1973*.

Dated this thirtieth day of October, 1975.

JOHN R. KERR
Governor-General.

By His Excellency's Command,

GORDON M. BRYANT
Minister of State for the Capital Territory.

MANUFACTURERS WARRANTIES ORDINANCE 1975

1. This Ordinance may be cited as the *Manufacturers Warranties Ordinance 1975*.*

2. This Ordinance shall come into operation on such date as is fixed by the Minister by notice published in the *Gazette*. Commencement.

3. (1) In this Ordinance, unless the contrary intention appears— Interpretation.

“express warranty” means an undertaking, assertion or statement in relation to manufactured goods (including an undertaking, assertion or statement in an advertisement or in a brochure or other literature designed to promote sale or use of the goods) by the manufacturer or a person acting on his behalf, the natural tendency of which is to induce a reasonable purchaser to purchase the goods;

“goods” includes all chattels personal, other than things in action and money;

“manufactured goods” means goods manufactured for sale or disposal to consumers;

“manufacturer”, in relation to manufactured goods, means—

(a) a person by whom, or on whose behalf, the goods are manufactured or assembled;

(b) a person who holds himself out to the public as the manufacturer of the goods;

* Notified in the *Australian Government Gazette* on 31 October 1975.

- (c) a person who causes or permits his name, the name in which he carries on business, or his brand, to be attached to or endorsed on the goods or on any package or other material accompanying the goods in a manner or form that leads reasonably to the inference that he is the manufacturer of the goods; or
- (d) where the goods are imported into Australia and the manufacturer does not have a place of business in Australia—the importer of the goods;

“person” includes a body corporate;

“purchase” includes take on hire;

“sell” includes let out on hire;

“seller”, in relation to manufactured goods, means any person who sells the goods to a consumer;

“statutory warranty” means a warranty that arises by virtue of this Ordinance;

“Territory” includes the Jervis Bay Territory.

(2) This Ordinance—

- (a) applies to goods that are manufactured either within or outside the Territory;
- (b) does not apply to or in relation to goods that are manufactured before the date fixed under section 2; and
- (c) subject to section 6, does not apply to or in relation to manufactured goods that are sold directly by the manufacturer to the consumer.

(3) For the purposes of this Ordinance—

- (a) a person who acquires goods shall be taken to be a consumer of the goods if the goods are of a kind ordinarily acquired for private use or consumption and the person does not acquire the goods, or hold himself out as acquiring the goods, for the purposes of resale; and
- (b) a reference to a consumer, in relation to manufactured goods, includes a reference to any person who derives title to the goods through or under the consumer.

(4) A reference in the definition of “express warranty” to manufactured goods is a reference to manufactured goods that—

- (a) are sold in the Territory to a consumer; or
- (b) are delivered, after being sold to a consumer, to that consumer in the Territory.

4. (1) Subject to this section, where manufactured goods—

- (a) are sold in the Territory to a consumer; or
- (b) are delivered, after being sold to a consumer, to that consumer in the Territory,

the manufacturer warrants—

- (c) that the goods are of merchantable quality;

- (d) where the consumer expressly makes known to the manufacturer, directly or through the seller, the particular purpose for which the goods are being acquired—that the goods are reasonably fit for that purpose, whether or not that is a purpose for which the goods are commonly sold, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the manufacturer;
 - (e) where there is a term in the contract, expressed or implied, between the seller and the consumer to the effect that the goods are sold by reference to a sample—
 - (i) that the bulk will correspond with the sample in quality; and
 - (ii) that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample;
 - (f) where the goods are sold by description—that the goods will correspond with the description and, if the sale is by reference to a sample as well as by description, that the bulk of the goods will correspond with the sample and that the goods will correspond with the description; and
 - (g) where the goods are of a kind that is likely to require repair or maintenance—that spare parts will be available for a reasonable period after the date of manufacture.
- (2) Subject to sub-section (3), goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are ordinarily purchased as it is reasonable to expect, having regard to—
- (a) any description applied to the goods by the manufacturer;
 - (b) the price received by the manufacturer for the goods (if relevant); and
 - (c) all the other relevant circumstances.
- (3) A manufacturer of goods is not liable upon his statutory warranty as to the merchantable quality of the goods—
- (a) if the goods are not of merchantable quality by reason of—
 - (i) an act or default of the consumer or some other person (not being the manufacturer or his servant or agent); or
 - (ii) a cause independent of human control, occurring after the goods have left the control of the manufacturer;
 - (b) as regards defects specifically drawn to the consumer's attention before the contract for the sale of the goods is made; or
 - (c) where the consumer examines the goods before the contract for the sale of the goods is made—as regards defects which that examination ought to reveal,

(4) A manufacturer of goods is not liable upon his statutory warranty as to the availability of spare parts if the unavailability arose from circumstances that the manufacturer could not reasonably be expected to have foreseen.

(5) Without limiting the generality of sub-section (4), an industrial stoppage may, for the purposes of that sub-section, constitute a circumstance that a manufacturer could not reasonably be expected to have foreseen.

(6) A manufacturer of goods is not liable upon his statutory warranty relating to the sale of goods by description in respect of a description applied to the goods by a person other than the manufacturer.

(7) A manufacturer of goods is not liable upon his statutory warranty relating to the sale of goods by sample where—

(a) the sample was not supplied by the manufacturer;

(b) the sale by sample is made without the express or implied concurrence of the manufacturer; or

(c) the failure to comply with the warranty is due to circumstances that were beyond the control of the manufacturer and that he could not reasonably be expected to have foreseen.

Right of
consumer
to sue
manu-
facturer.

5. (1) Where an express warranty or a statutory warranty is not complied with in relation to manufactured goods, a consumer may, by action, recover against the manufacturer damages for breach of warranty in all respects as if the action were for breach of warranty under a contract between the manufacturer and the consumer.

(2) The right conferred by this section is in addition to, and not in derogation of, any other right of action that may be available to the consumer, whether against the manufacturer or otherwise.

Application
to sales by
manu-
facturer.

6. The provisions of this Ordinance with respect to—

(a) express warranties; and

(b) the warranty relating to the availability of spare parts, apply to and in relation to manufactured goods that are sold directly by the manufacturer to the consumer.

No
contracting
out.

7. (1) Subject to sub-section (2), it is not competent for a manufacturer to exclude or limit his liability, or to limit the consumer's right of action, or for a consumer to waive his rights, arising by virtue of an express or statutory warranty.

(2) Where a manufacturer takes reasonable steps to ensure that a consumer purchasing manufactured goods will effectively receive notice at the time the goods are purchased that the manufacturer does not undertake that spare parts will be available for the repair of the goods, no liability attaches to the manufacturer on the ground that the spare parts are not available.

(3) A manufacturer who purports to exclude or limit a liability, or a right, under an express or statutory warranty that he is not competent to exclude or limit by reason of this section is guilty of an offence against this Ordinance and punishable, on conviction, by a fine not exceeding \$1,000.

8. Where a seller of manufactured goods incurs liability to a consumer for breach of a condition or warranty implied by law, the seller may, by action against the manufacturer, recover an amount sufficient to indemnify him for that liability if the consumer could, by virtue of a statutory warranty, have recovered against the manufacturer damages in respect of that breach. Right of seller to recover against manufacturer.

9. (1) Where an advertisement or other publication is published containing an assertion that would, if made by a manufacturer or a person acting on his behalf, constitute an express warranty in respect of manufactured goods, it shall be presumed, in proceedings under this Ordinance, that the assertion was made by the manufacturer or a person acting on his behalf unless the manufacturer proves that he did not cause or permit the publication of the advertisement or other publication. Evidentiary provisions.

(2) Where, in proceedings under this Ordinance, a question arises whether goods were manufactured before or after the date fixed under section 2, it shall be presumed, unless the contrary is established, that the goods were manufactured after that date.

(3) Where the name, business name or brand or a person is attached to or endorsed on goods, or a package or other material in or with which the goods are sold, and the name or brand appears in a manner or form that leads reasonably to the inference that that person is the manufacturer of the goods, it shall be presumed, unless the contrary is established, that the person has caused or permitted the name, business name or brand to be attached to or endorsed on the goods, package or material in that manner or form.

10. The Minister may make regulations, not inconsistent with this Ordinance, prescribing all matters that are required or permitted by this Ordinance to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance. Regulations.

ATTACHMENT B

AUSTRALIAN CAPITAL TERRITORY MANUFACTURERS WARRANTIES ORDINANCE 1975

EXPLANATORY MEMORANDUM

This Ordinance rectifies deficiencies in the present law by providing a clearly stated statutory rule holding a manufacturer liable for breach of any express representations regarding his products. It also deems him to have given an implied warranty as to the quality of his goods and, where appropriate, implied warranties as to fitness for purpose, availability of spare parts and certain implied warranties where the sale is by sample or description. The content of these warranties is the same as those presently provided under the Trade Practices Act 1974 between a vendor and purchaser.

The Ordinance gives effect to recommendations in the Report on Consumer Warranties and Guarantees in the Sale of Goods by the Ontario Law Reform Commission. In doing so, it follows in many respects the Manufacturers Warranties Act 1974 of South Australia.

ATTACHMENT C



PARLIAMENT OF AUSTRALIA

MINISTER FOR THE CAPITAL TERRITORY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

19 MAR 1976

My dear Senator,

I refer to your letter of 4 March 1976 concerning the Manufacturers Warranties Ordinance 1975.

I cannot agree with the criticisms of your adviser that the legislation was either hastily conceived or stimulated by consideration other than fairness and justice to manufacturers and consumers. The legislation has, in fact, a long history of consideration by lawyers experienced in this field.

In July 1962 the Committee on Consumer Protection (U.K.) presented its Final Report to Parliament. In that report the Committee recommended that a number of conditions be irrevocably implied by statute, including conditions of merchantable quality, reasonable fitness for purpose, title, quiet possession, freedom from encumbrance, correspondence with sample and correspondence with description. The Committee was highly critical of the position then existing with relation to the lack of legal responsibility of manufacturers but recommended only that the implied conditions apply to retailers (Chapter 12).

The position was taken further by the Ontario Law Reform Commission, the members of which are legally qualified, and of whom all but one are Queen's Counsel. In 1972 the Commission reported on Consumer Warranties and Guarantees in the Sale of Goods. That report recommended that statutory rules be provided to hold a manufacturer civilly liable for breach of any express warranties and also deeming him to have given a consumer buyer implied warranties of the same type as run from the retail seller to the consumer buyer.

The recommendations of the Ontario Law Reform Commission were considered in South Australia and many were incorporated in the Manufacturers Warranties Act 1974 (S.A.).

The Manufacturers Warranties Ordinance 1975 was prepared following consideration of the above authorities and of Part V of the Trade Practices Act 1974-1975 by a working party on Consumer Protection Laws of the Australian Capital Territory. The working party was established in June 1975 by the then Attorney-General and the then Minister for the Capital Territory and comprises:

Mr A.G. Hartnell, Senior Assistant Secretary, Business Affairs Division, Attorney-General's Department (Chairman)

Mr A.R. Hedley, Government Division, Department of the Capital Territory

Mr M. Vernon, Chairman, Consumer Affairs Council of the A.C.T.

Mr J.W. Browne, Consumer Affairs Bureau of the A.C.T. and

Mr S. Gates, Lecturer-in-Law, Canberra College of Advanced Education

Secretary - Mr G. Holmes, Attorney-General's Department

The Ordinance was considered in draft form by Mr Justice Blackburn of the Supreme Court of the Australian Capital Territory and by the Law Society of the Australian Capital Territory. Mr Justice Blackburn commented that:

"Both the principle and, in general, the text of the draft Ordinance have my support. The draft Ordinance appears to me to open up a new field of much-needed law."

An amendment was made to the draft Ordinance to remedy the one defect to which his Honour drew attention. The Law Society established a sub-committee to consider the Ordinance and the comments of that sub-committee were adopted by the Council of the Law Society and forwarded to the working party. The Law Society expressed no concern over the matters raised by your advisor.

In view of the lengthy consideration to which the legislation has been subjected I can see no advantage in further examination of it by yet another committee of lawyers.

The statutory warranties provided in section 4 of the Ordinance are, in substance, those warranties imposed by the Trade Practices Act 1974-1975 upon the supplier of goods to a consumer. The Ontario Law Reform Commission recommended that similar warranties be imposed on manufacturers, and a number of the warranties were imposed in South Australia. Warranties of merchantable quality and the fitness for purpose are imposed by section 71 of the Trade Practices Act and warranties upon sale by sample and sale by description are imposed by sections 72 and 70 respectively of that Act. The warranty of availability of spare parts has no similar provision in the Trade Practices Act but was recommended by the Ontario Law Reform Commission and enacted in section 4 of the Manufacturers Warranties Act 1974 (S.A.). With the exception of the warranty of availability of spare parts, which is largely inappropriate to a retailer of goods, the statutory warranties imposed by this Ordinance are, in substantially similar forms, imposed by existing law upon sellers. The width of the terms of the warranties is deliberate for it would be impracticable and undesirable to make separate provision for every conceivable industry.

It has been necessary to provide a wide definition of express warranty for two reasons. At common law a mere affirmation of fact is not sufficient unless it is also intended to be promissory in character (Heilbut, Symons & Co. v Buckleton (1913) A.C. 30) thereby invoking the elusive test of contractual intention. Secondly, with rare exceptions, agreements for sale contain a clause excluding all representations and warranties other than those expressly stated in the written document. Manufacturers' written "warranties" frequently carry a similar disclaimer. Both the American Uniform Sales Act, Section 12, and its replacement the Uniform Commercial Code, section 2-313, contain definitions of express warranty to a similar effect as provided in the Ordinance. The adoption of such a definition was recommended by the Ontario Law Reform Commission and enacted in the Manufacturers Warranties Act 1974 (S.A.).

There are a number of reasons for extending the liability already imposed upon the retailers of goods to manufacturers. In modern marketing it is the manufacturer who plays the dominant role. He is responsible for putting the goods into the stream of commerce and, in most cases, for creating the consumer demand for them by continuous advertising. The retailer is little more than a way station. It is the manufacturer who endows the goods with their characteristics and it is

he who determines the type of materials and components that shall be used and establishes quality control mechanisms. It is also he who determines what express guarantee shall be given to the consumer and who is responsible for the availability of spare parts and the adequacy of servicing facilities. Almost all the consumer's knowledge about the goods is derived from the labels or markings attached to the goods on the sales literature that accompanies them and these too originate from the manufacturer.

The present law of contract allows the consumer no direct redress against the manufacturer unless a promise or statement is made by or on behalf of a manufacturer which can be regarded as an offer of an independent collateral contract between the manufacturer and eventual buyer (*Shanklin Pier Ltd. v Detel Products Ltd.* (1951) 2 K.B. 854). Otherwise the law requires circuity of actions and an unnecessary multiplication of cost and proceedings. Typically the buyer sues the retailer who then joins the wholesale distributor or importer, and they in turn will bring in the manufacturer. If the retailer is insolvent or has otherwise closed his business, the consumer may not even be able to initiate an action. If the consumer has moved a substantial distance from the original place of purchase or to another State, he will be faced with further procedural difficulties. If the cause of the breakdown of the goods is disputed, the buyer will not have the right to obtain discovery of documents from the manufacturers, or to examine his officers, although the manufacturer rather than the retailer is likely to be in possession of all the pertinent facts.

Although the use of manufacturers' "guarantees" is widespread the practice provides the consumer with little protection. Such guarantees can take effect only as contracts and are only effective if an offer, acceptance of the offer and consideration can be found in accordance with normal principles to establish a contractual relationship between the consumer and the manufacturer. Indeed, the major aim of manufacturers' warranties is usually to exempt the manufacturer from liability.

The definition of "manufacturer" has been extended to catch importers because they represent the foreign manufacturer or are the only persons accessible to the consumer. This is true of many industries. The importer could then join the manufacturer in any action against him if jurisdiction could be found, or proceed against him in another jurisdiction upon the original contract. The importer is in a better position to ascertain the qualities of the goods, to obtain warranties in respect of those goods and to obtain redress overseas.

It is my opinion, and that of the lawyers who have considered the legislation and the proposals upon which it is based, that it is necessary that the legislation be drafted in wide terms. To do otherwise would be an exercise in futility.

I trust that these observations will be satisfactory to your Committee.

Yours sincerely,



(A.A. STALEY)

Senator I.A.C. Wood,
Chairman,
Senate Standing Committee on
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