
Sale of Goods Act 1896
AND
Sale of Goods (Vienna Convention) Act 1986

NCP LEGISLATIVE REVIEW REPORT

1.0 LEGISLATION AND OBJECTIVES

The following legislation was considered:

- *Sale of Goods Act 1896* (“the SOG Act”); and
- *Sale of Goods (Vienna Convention) Act 1986* (“the SOG (VC) Act”).

1.1 Background:

1.1.1 The SOG Act

The SOG Act is “an Act codifying the law relating to sale of goods”. It is split into parts that provide for different aspects of contracts for the sale of goods, including:

- Part 2, Formation of the Contract;
- Part 3, Effects of the Contract;
- Part 4, Performance of the Contract;
- Part 5, Rights of Unpaid Seller against the goods; and
- Part 6, Actions for Breach of the Contract.

The SOG Act establishes standards for the sale of goods. It emanates from its parent Act, the English *Sale of Good Act 1893*. Similar uniform sale of goods legislation exists in other Australian jurisdictions comprising virtually identical provisions. As its name suggests, the SOG Act does not apply to transactions for services. Regulation of services is through the state-based *Fair Trading Act 1989* and the Commonwealth *Trade Practices Act 1974*.

1.1.2 The SOG (VC) Act

The SOG (VC) Act is “an Act to give effect within Queensland to the United Nations Convention on Contracts for the International Sale of Goods and for other purposes”. The SOG (VC) Act ratifies the Vienna Convention (“the Convention”), which takes into account the opinion, set out in the opening schedule to the SOG (VC) Act, that:

“the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade”.

Historically, work on a uniform international law for sale of goods began in 1930. It was not until after World War II, and an unsuccessful first attempt in 1964 that the United Nations, through its arm the United Nations Commission on International Trade Law (“UNCITRAL”), reached clarity on the sometimes complex issue of

uniform standards for international trade and contracts thereof. The Convention was adopted on 11 April 1980 with 11 original signatories. Australia adopted the Convention in 1986 binding all states and territories to the agreement.

1.1.3 Objectives of the SOG Act and the SOG (VC) Act

The objective of the SOG Act is to “codify” common law, expressing in statutory form the rules of common law. This codification brings clarity to some aspect of the sale of goods. It facilitates trade in goods, and is therefore pro-competitive, by clarifying particular aspects of the sale of goods in relation to contracts and the rights of sellers and buyers. The SOG Act implies terms into contracts with the objective of giving consumers their essential and principal source of consumer protection against defects in or non-conformity of goods and/or defects to title to them. (Goldring et al, 1998, p 33).

The objective of the SOG (VC) Act is to provide guidelines for contract standards. Such guidelines do not impose mandatory contract standards onto parties to the Convention. The articles of the Convention can be modified, and/or agreement can be reached between contracting parties that the Convention is not to apply at all. The objective of the SOG (VC) then is to establish a relatively uniform set of conditions for the sale of goods, particularly when that sale is done on an international trade basis. The articles of the SOG (VC) are pro-competitive, facilitating trade internationally and within internationally recognised standards of conduct.

1.2 Stakeholders

The stakeholders to these pieces of legislation are sellers of goods, consumers (purchasers of goods) and government.

2.0 IDENTIFICATION AND ASSESSMENT OF POTENTIAL RESTRICTIONS ON COMPETITION

2.1 The SOG Act

The following provisions of the SOG Act were identified in the initial stock take as potential restrictions on competition:

2.1.1 Capacity to buy and sell (s5(2)): When necessaries (goods suitable to the condition of life of the person and to their requirements at the time of delivery) are sold to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, a person must pay a reasonable price.

This provision was included in the initial stock take of potentially restrictive provisions on the basis that the requirement for the price to be “reasonable” could be construed as a price control. However, on closer examination, the intent of the provision is not to suggest or impose a price on the seller, but rather to facilitate fair and effective participation in the market by a particular class of consumer, who by virtue of their mental capacity may need special protection from exploitation. As “reasonable” is not defined in the Act, it would be a term to be determined by the Courts, which would look to the ordinary meaning of the phrase. This would usually involve looking at the prevailing market price to the general public of the goods in question in

addition to any other relevant factors. On this basis, this provision is not a restriction on competition.

2.1.2 Stipulations as to time (s13(1)): Unless a different intention appears from the terms of the contract stipulations as to time of payment are not deemed to be of the essence of the contract of sale.

This provision was included in the initial stock take of potentially restrictive provisions on the basis that the provision might restrict business conduct by imposing standards on how contracts are to be interpreted in relation to time of payment.

The time frame for payment under a contract is one that may be determined by the parties prior to the contract being accepted. Whether that time frame is deemed to be of the essence of the contract depends upon whether both parties choose to include a provision in the contract that this is the intent. If one of the parties requires that payment being made within a particular timeframe is fundamental to the contract, then that party will specify that timeframe at the outset as a condition of the contract. It also follows that if this condition is not accepted by the other party, the other party will choose not to form the contract.

The identified provision is not a restriction on competition on the basis that it does not impose restrictions on parties to a contract in relation to the time of payment. All the identified provision does is to provide certainty in the event that, for whatever reason, the parties do not clearly specify the intended role of the time of payment in the contract.

2.1.3 Effect of sub-sale or pledge by a buyer (s48(1) and s48(2)):

- “s48(1): Subject to the provisions of [the SOG Act], the unpaid seller’s right of retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.”; and
- “s48(2): However, where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale the unpaid seller’s right of retention or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller’s right of retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.”

In simple terms, an unpaid seller has the right to retain ownership or stop goods in transit to a buyer even if the buyer has subsequently sold or otherwise disposed of the goods. However, if a document of title to the goods has lawfully transferred to the buyer, the unpaid seller’s right of retention or stoppage is lost if the buyer transfers the document to a third person by way of sale (providing it is taken by that person in good faith etc). If the transfer is by way of pledge (not sale), the unpaid seller’s right of retention or stoppage is subject to the rights of the third person.

This provision was included in the initial stocktake of potentially restrictive provisions on the basis that the provision might restrict business conduct by restricting the rights of unpaid sellers and/or second buyers. However, the provision is not designed to arbitrarily restrict buyers or sellers but to facilitate trade by codifying the rights of

sellers and subsequent buyers where the initial buyer disposes of goods and/or title to them without paying the seller.

The second buyer's rights are only disadvantaged if title to the goods has not been obtained. The seller still has avenues of recovery to pursue, and can still exercise their right of recovery if title has not already been transferred to the second buyer. This provision strikes a balance between the rights of a buyer to expect title and the needs of the seller to recover costs under certain circumstances. Competition is unaffected as all sellers are regulated equally by this provision, and the provision does not create inequities for sellers competing with each other. Therefore this provision does not constitute a restriction on competition.

2.2 The SOG (VC) Act

The following provisions of the SOG (VC) Act were identified in the initial stock take as potential restrictions on competition:

2.2.1 Article 2: the Convention does not apply to goods bought for personal, family or household use, goods bought at auction, sales on execution or otherwise by authority of law, stocks, shares or investment securities, ships, vessels, hovercraft, aircraft or electricity.

This provision was included in the initial stock take of potentially restrictive provisions on the basis that the provision might confer a benefit on some buyers and sellers and not others. In this instance, a benefit may be conferred onto sellers and consumers of goods that are excluded by Article 2. Sellers will not have to comply with any provisions of the SOG (VC) Act if their goods are excluded in Article 2.

These exclusions are based upon the fact that they are all goods of a distinctive nature in trade and commerce, and/or are goods whose sale is regulated by other specific regulation. For example, the sale of household and personal goods would be regulated by parts of the *Fair Trading Act 1989* in Queensland and other similar fair trading regulation in other states. Because the infrastructure for and regulation of their supply is considerably different in each country, goods such as stocks, shares, investment securities, negotiable instruments, money and electricity are not included. And vessels, ships, hovercraft and aircraft are excluded because the regulations regarding building specifications and safety standards for such goods would differ from country to country. Ultimately, because Article 7(1) calls for uniform application and interpretation of the Convention, it is considered contrary to uniformity to include goods, such as the ones excluded by Article 2, within the provisions of the Convention.

Because all sellers and buyers of goods listed under Article 2 are treated equally, no group of sellers and buyers receives a benefit that is not available to all other sellers and buyers of the same category of goods. It is also considered that traders in goods exempted under Article 2 are not competing with traders in goods not exempted under Article 2. Therefore this Article does not constitute a restriction on competition.

2.2.2 Article 39(1) and (2):

- “39(1): The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity

within a reasonable time after he has discovered it or ought to have discovered it"; and

- 39(2): In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee."

This article outlines an obligation on the buyer to inform the seller of issues they have with the sale of goods within a certain timeframe. This article is closely linked to other articles of the Convention, namely articles 35, 38, 40 and 44, described as follows:

- Article 35 – requires seller to deliver to buyer goods as specified in the contract;
- Article 38 – requires buyer to inspect goods delivered to them within a short period;
- Article 40 – seller cannot rely upon Articles 38 or 39 if the seller was aware of non-conformity and did not disclose same to the buyer; and
- Article 44 – the buyer may reduce the price or claim damages if they have a reasonable excuse for not giving the required notice of lack of conformity.

Under Article 39, a buyer must give notice of the non-conformity and ensure the seller receives it, particularly if the notice is given to a third party or a person or agency associated with the seller.

This provision was included in the initial stock take of potentially restrictive provisions on the basis that the provision might restrict business conduct by restricting the rights of buyers in relation to remedies for non-conformity.

The imposition of time limits on the buyer's access to remedies is necessary to limit the liability of the seller. Otherwise, the seller's liability may continue unchecked and there is no standard by which the seller can consider the transaction fully completed. While these points indicate that this article is beneficial primarily to the seller there are also benefits to the buyer, as the article promotes a swift cure to apparent non-conformity. It is also reasonable to assume that the buyer will notice any lack of conformity in goods sooner rather than later, a scenario merely reinforced by the provisions of Article 38, as well as Article 39(1) and (2). The stipulated period of two years provides a reasonable balance between the interests of buyers and sellers. The limits and conduct requirements that Article 39 (1) and (2) indirectly impose are of benefit to all parties to the transaction and are therefore not considered onerous on either the buyer or seller. Consequently Article 39 (1) and (2) are not considered to be restrictions on competition.

2.3 Summary

The provisions and articles of the SOG Act and the SOG (VC) Act respectively have the effect of establishing ground rules for conduct in sales of goods. The SOG (VC) also has the objective of facilitating international trade by establishing uniform contract standards. Both Acts also contain essential consumer protection objectives.

On closer examination, it is considered that none of the identified provisions constitutes a restriction on competition. The provisions generally apply equally to all parties and therefore do not appear to confer benefits in a discriminatory fashion.

Any requirements for minimum standards or conduct are not considered restrictive as they generally are of benefit to all parties.

3.0 OTHER JURISDICTIONS

The only other state or territory to identify its corresponding SOG Act and/or the SOG (VC) Act as containing restrictions on competition is the ACT. It is understood that the ACT is in the process of finalising a draft report on its assessment of the ACT *Sale of Goods Act 1954* ("the ACT Act"). It appears that this draft report has concluded that the provisions of the ACT Act do not contain restrictions on competition.

4.0 CONCLUSIONS

Examination of the identified provisions in the SOG Act and the SOG (VC) Act indicate that they do not constitute restrictions on competition.

5.0 BIBLIOGRAHPY

Goldring, John, and Maher, Laurence and McKeough, Jill and Pearson, Gail *Consumer Protection Law 5th Edition* Federation Press Leichhardt 1998