

R3, Association of Business Recovery Professionals
Law Commission - Consumer sales contracts: transfer of ownership consultation
Consultation response, 30 October 2020

| Law Commission - Consumer sales contracts: transfer of ownership consultation | | | |
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| No. | QUESTION | DOC. PARA | COMMENTS |
| 1 | Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been “identified for fulfilment of the contract” are drafted sufficiently clearly? | | <p>No. The proposed new terminology is clumsy (e.g. “goods not identified and agreed on”) and could lead to misunderstanding. If an online consumer has chosen to purchase a specific item, they have already identified the item that they want to purchase.</p> <p>Some of the proposals are vague and open to ambiguity (e.g. how will you be able to establish that the trade intended labelling or setting aside of goods is to be permanent?)</p> |
| 2 | Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns. | | <p>Yes. We believe that there may be confusion as to when ownership is supposed to transfer as the proposals:</p> <ul style="list-style-type: none"> ● involve a subjective element (e.g. the trader intending something to be permanent- how will that be established?) ● contain vague terminology (e.g. when is something “delivered”) ● how will the consumer prove that he/she has been told of a unique identifier |
| 3 | Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer? | | <p>It would be helpful if matters could be clarified and simplified as to when ownership of prepaid goods passes (e.g. ownership passes on the total payment being received by the seller / trader).</p> |
| 4 | Is it common for goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context? If possible please provide: | | <p>(1) Unknown</p> <p>(2) Member experience - Several suppliers of the same titled CDs claimed RoT. However, none of the suppliers had unique identification to evidence</p> |

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| | (1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods); and (2) details of your own experiences. | | which CDs had been delivered (and was still owned) by which supplier. The suppliers were forced to accept that they were co-owners of the bulk of same titled CDs but this wasn't sufficient to validate the RoT rights |
| 5 | Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above? | | No. The suggested amendments seem rather impractical if not prejudicial to the retailer / seller. It would be unfair to allow a consumer who has only prepaid part of the sale price to be afforded ownership rights to a bulk of goods, thereby interfering with the retailer's ability to deal with that bulk. It also seems unlikely that retailers will identify / label a particular bulk or portion thereof in a sales contract. |
| 6 | Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns. | | Yes. It seems impractical to have a "two-stage" transfer of ownership process whereby the consumer will: <ul style="list-style-type: none"> • become an owner in common of a bulk; and then • become an owner of a specific quantity of the bulk when that quantity is identified Why not simplify the process and have ownership of the quantity transfer when that portion is identified? What is the benefit of the interim stage? |
| 7 | Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract? | | See comments to Question 3 above. |
| 8 | Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers? | | No. The proposals undermine freedom of contract principles. It makes commercial sense why a retailer would want the terms to delay transfer of ownership in goods until the retailer has received payment in full. To provide otherwise prejudices the retailer at the expense of the consumer. |

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| | | | It doesn't seem fair that the consumer can own goods which it has only partly paid for; leaving the retailer to expend time and resources receiving the balance of the payment. If the proposals deem it acceptable for a retailer to make the sale of age-restricted products conditional on the consumer proving their age, it should be permissible to make the sale of other goods conditional (e.g. on the price being paid in full). |
| 9 | Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements? | | Yes. |
| 10 | Do you have experience of contracts for the transfer of goods or are you aware of them having been used? If so: (1) what was the purpose of the contract? (2) what transfer of ownership provisions (if any) did the contract contain? | | No comment |
| 11 | Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods? | | No. |
| 12 | On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them? | | Yes. The consumer could have a claim for misrepresentation even where ownership has transferred to them. |
| 13 | If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that: (1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75? (2) these fees could not be claimed under chargeback rules? | | (1) Possibly if these costs are recoverable as part of a qualifying damages claim under s.75 CCA74 (2) Unsure - this will depend upon the terms of the chargeback |

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| 14 | Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill? | | <p>More often than not, RoT clauses give rise to disputes as to the validity or otherwise thereof. If the clause is invalid, then the purported onsale by the retailer to the consumer could be the subject of challenge by the supplier.</p> <p>If the on-sale to the consumer is deemed valid and ownership in the goods is transferred, this will have an adverse impact on a creditor's security.</p> |
| 15 | Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill? | | <p>No.</p> <p>The analysis that the consumer is bound by such a lien "in most cases" is premised on the lien being in existence before ownership is transferred. That presupposes that the warehouse or deliverer has not been paid prior to ownership transferring to the consumer - why?</p> |
| 16 | Do consultees agree that the draft Bill should come into force two months after it is passed into law? | | <p>No. A longer lead-in time would be preferable. The proposals represent a marked shift to the existing law which take time for stakeholders to familiarise themselves with and adapt their working practices.</p> |
| 17 | How common it is for retailers to use terms and conditions which delay the formation of the sales contract? In particular: (1) Are they more common among online retailers? (2) Are they used when goods are ordered in-store for later pick-up or delivery? (3) Are they more common among retailers who sell certain types of goods? | | <p>Unknown</p> |
| 18 | Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider? | | <p>In most circumstances, they refer to dispatch to the consumer.</p> |
| 19 | We welcome consultees' views on the reasons why retailers use terms and conditions which delay formation | | <ul style="list-style-type: none"> ● avoid a breach of contract ● sourcing of stock to satisfy orders |

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| | of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative). | | <ul style="list-style-type: none"> ● cater for pricing errors |
| 20 | We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts? | | It's possible that conditional contracts could address certain elements of risk for retailers but we would question the suitability of conditional contracts in most retail transactions, especially on-line purchases. |
| 21 | Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract? | | Unknown |
| 22 | Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract? | | No comment |
| 23 | Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015? | | No comment |
| 24 | Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future? | | No. Member experience - card issuers have been quite accommodating in accepting customer claims. |
| 25 | Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract? | | No comment |
| 26 | Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible. | | <p>No. See comments to Question 16 above.</p> <p>Creating and delivering training to deal with the proposed legislative changes is going to involve considerable time and resources. This is not a "relatively small change to the existing law". Furthermore, insolvency</p> |

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| | | | practitioners (IPs) often retain retail staff to assist with appointments and so retail staff would also need to be trained on the changes. In addition to the costs of training, IPs and their staff are likely to need to spend time adapting their work practices and processes to accommodate the change in approach to dealing with consumers and assessing the nature of their claim in an insolvency situation. |
| 27 | Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible | | Unknown. We disagree that the proposed rules in the draft Bill are not extensive. They involve a marked shift from existing law and would presumably impact a retailers business regardless of insolvency. Retailers will probably require ongoing legal advice, not only to gain an understanding of the changes and what this means for their business, but also for a review of their business documentation and also assistance in the event of any future disputes as to ownership under the revised law. |
| 28 | In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible. | | <p>Our primary concern is the overall cost impact that the proposals will have on:</p> <ul style="list-style-type: none"> ● insolvency appointments - allowing consumers to acquire ownership of assets will diminish those available for realisations for the benefit of the general body of creditors. This will be exacerbated where the goods have only been partly prepaid. Debt collection is particularly challenging in an insolvency situation. ● on the finance sector - diminishing the pool of assets will adversely affect lenders security, which is already being further eroded by both the increase to the prescribed part and the imminent introduction of the secondary preferential status of HMRC. These latter two changes have already dealt a substantial blow to the finance sector and the proposed changes to the benefit of consumers is not going to sit well with lenders |

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| | | | <ul style="list-style-type: none"> ● creditors (other than consumers) - a reduced pool of realisations which will be further eroded by HMRC's secondary preferential status, will result in a further dilution of the dividend paid to creditors. This will be particularly detrimental to trade creditors, most of whom have already suffered significantly as a result of the Coronavirus pandemic. |
| 29 | We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree? Please provide qualitative and quantitative evidence where possible. | | No comment |
| 30 | What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently? Please provide qualitative and quantitative evidence where possible. | | <p>See comments to Question 28 above.</p> <p>Most likely negative but will presumably depend upon the circumstances of each retailer.</p> |
| 31 | What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors? Please provide qualitative and quantitative evidence where possible. | | See comments to Question 28 above. |
| 32 | We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree? Please provide qualitative and quantitative evidence where possible. | | <p>No. See the comments to Question 26 above. Any ownership dispute (e.g. RoT) warrants investigation which can be time-consuming. There will be paperwork to consider, which of itself is seldom substantive proof of the allegations made. Determining rights of ownership is already complicated and the proposals compound matters further by introducing several new criteria and /or options that will need to be considered. Furthermore, some of the proposed changes (e.g. goods being labelled / set aside / altered / identified by the retailer) is likely to necessitate more site visits which in themselves are time-consuming and costly, not to mention challenging during COVID-19.</p> |

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| 33 | In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible. | <p>Transferring ownership to the consumer will leave IPs with an unenviable choice of either:</p> <ul style="list-style-type: none"> ● incurring costs to deliver the goods to the consumer; or ● failing to deliver the goods and presumably a claim for breach of contract and/or other damages claim both of which options will have an adverse impact on the insolvent estate and ultimately the return to the remaining creditors |
| 34 | Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill? Please provide qualitative and quantitative evidence where possible | <p>No. You have identified the following benefits for consumers:</p> <ul style="list-style-type: none"> ● they would spend less time investigating ownership and ● a greater chance of recovering items resulting in less frustration and personal time spent <p>It's likely that very few (if any) consumers read a retailer's terms and conditions (so as to understand their position and possible risks involved in the sale transaction). Similarly, it's rather unlikely any of the same consumers will be reading the CRA15; so modernising and/or attempting to clarify the existing language is unlikely to be of much benefit to them. In our experience, it's the IP (and their staff) who would investigate any claims of ownership of assets and not the consumer. So the proposed changes are not going to change the status quo to the benefit of the consumer.</p> <p>Presumably the ease of recovering goods will ease their frustration, but most creditors experience frustration in dealing with an insolvent debtor. The proposed changes simply mean that a "small consumer group" will benefit from a fundamental change to the pari passu principle that underpins insolvency law, to the detriment of the remaining body of creditors.</p> |

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| 35 | Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales? Please provide qualitative and quantitative evidence where possible. | | The consultation has identified that the changes are “targeted at a small consumer group” and “would not protect all prepaying consumers on retailer insolvency”. Hence we would question the true impact of the proposals in the greater scheme of online sales. There could be a myriad of reasons for the increase in online retail sales that have nothing to do with consumer confidence (e.g. convenience, change in consumer habits, competitive pricing and more recently the Coronavirus pandemic). |
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