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THE CONSUMER PROTECTION ACT 1969 (N.S.W.) and COMPARABLE LEGISLATION IN OTHER STATES AND OVERSEAS

I

In the last decade increasing prominence has been given throughout the common law world to the necessity for protecting the ordinary consumer in his day to day dealings with the business community. The plight of the ordinary citizen in the era of the super-market, the chain-store, the mass-production of highly complicated goods, and the manipulation of consumer demand by intensive sales promotion campaigns and sophisticated advertising, has vied for attention in recent years with such emotive topics as the pollution of the environment, conservation, the prevention of crime, the rehabilitation of the criminal, and the reform of the law in general.

It has been recognised that the legislation governing the sale of goods, based as it is on the common law of a century or more ago, is completely out of touch with the business methods of the second half of the twentieth century, that it affords little protection for the buying public, who perforce must purchase their requirements on the terms dictated by the retailer or manufacturer, and in most cases without any accurate knowledge of the quality of the article they are buying. Most consumer goods today are sold either in sealed containers which defy inspection, or if available for examination, are so complex and of such intricate design, that an inspection would convey nothing about their quality to the average purchaser. It is almost impossible for him to make an informed selection, and he is therefore driven to rely on the advice of traders and the accuracy of advertisements extolling the product he seeks.

Along with this increased complexity of consumer goods, has come the proliferation of service organisations professing specialist ability in maintaining and repairing the technological marvels of the age, with consequent dilution of trade skills and unsatisfactory performance, leading inevitably to dishonesty and malpractice.

It is true that some attempt to protect the consumer has been made in Australia in the past, with the enactment in the various States of piecemeal legislation aimed at the safety of the buying public or at maintaining standards of quality¹. Again, in 1959 and 1960, the so-called uniform hire-purchase

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1. See e.g. Pure Food Act 1908-61 (N.S.W.); Electrical Articles and Materials Act Amendment Act 1967 (S.A.); Footwear Regulation Act 1958 (Vic.); Footwear Regulation Act 1969 (S.A.); Bread Industry Act 1959 (Vic.); Pesticides Act 1958 (Vic.); Seeds Act 1958 (Vic.); Health Act 1958 (Vic.) (Part XIV); Goods Act

legislation was enacted throughout the Commonwealth, in the hope of curbing the worst abuses that had been associated with this type of "purchase" on credit. The result of this legislation, with its emphasis on protecting the hirer under a hire-purchase agreement, has been that the hirer is in some respects today, better off than his counterpart who buys the goods outright, and whose rights are accordingly governed by the Sale of Goods Act 1893. But such piecemeal legislation has not gone far enough. It leaves a wide area in which the consumer is completely at the mercy of the trader, and it is this gap which States have in recent years sought to plug by enacting specific legislation dealing with consumer protection on a wide and general basis.

The first impetus in this direction was given by the appointment in the United Kingdom in 1959 of the Molony Committee to consider measures desirable for the protection of the consuming public, and its lengthy report issued in 1962 covered a multitude of topics of concern to the consumer, from advertising, to safety standards, and hire-purchase². As a result of suggestions made in the report, the United Kingdom Government appointed a Consumer Council in 1963^{2a} and enacted the Hire-Purchase Act 1964 in an attempt to provide greater consumer protection. More importantly from the point of view of the present inquiry, the Molony Committee's report inspired Victoria to enact the Consumers' Protection Act in 1964, setting up a Consumers' Protection Council with powers to investigate matters affecting the interests of consumers which were referred to it by the Minister, and to make recommendations on the protection of consumers generally. This Act was amended in 1968 and was eventually repealed and replaced by the Consumer Protection Act 1970, as the original legislation was found in practice to provide insufficient protection for the consumer.

The new Act has adopted a fresh approach to the problem of safe-guarding the interests of the consuming public, and indeed copies the legislation enacted in New South Wales a year earlier, in establishing the twin organisations of a Consumer Protection Council and a Consumer Protection Bureau as watchdogs of the interests of the consumer. It seems that the New South Wales statute (which was drafted after a world-wide investigation by the New South Wales Under-Secretary of Department of Labour and Industry) has been, and will continue to act, as the model for corresponding legislation in other States, but to say this, is not to detract from the notable achievement of Victoria in pioneering in this country, six or more years ago, statutory provisions aimed at the protection of the ordinary purchaser.

The New South Wales Consumer Protection Act 1969 has four main divisions. Firstly, it provides for the formation of two agencies, a Consumer Affairs Council and a Consumer Affairs Bureau, whose functions are to serve the interests of the consumer; secondly, it prescribes certain limitations

1958 (Vic) (Part V); Factories, Shops and Industries Act 1962-64 (N.S.W.) (Parts VIII and X now repealed); Goods (Trade Descriptions) Act 1935-69 (S.A.); Book Purchasers' Protection Act 1899-1963 (N.S.W.); Fruit Cases Act 1912-36 (N.S.W.); Electrical Development Act 1945-64 (Part V) (N.S.W.).

2. Cmnd. 1781 (1962).

2a. The Consumer Council was disbanded late in 1970, apparently as an economy measure. See U.K. Parl. Deb. (H.C.) 967 30th November, 1970, 954-55, 958, 967-69).

on trade descriptions and on false advertising with respect to sale of goods and services; thirdly, it sets out minimum standards of safety in the design and construction of certain goods; and finally it prohibits the practice of collusive tendering and bidding. The approach that will be adopted in this paper will be to examine the various aspects of the New South Wales Act in detail, and to contrast its provisions with the corresponding legislation in force in the other Australian States and elsewhere.

At the time of writing, legislation aimed at protecting the ordinary purchaser has been enacted in New South Wales, Victoria, Tasmania, South Australia, the Northern Territory and Queensland³, while somewhat similar legislation is in force in New Zealand⁴, the United Kingdom⁵ and in parts of North America⁶. To date, however, it appears that nothing has been done in the field of consumer protection in Western Australia or the A.C.T., but all States, including South Australia⁷, have enacted legislation to curb the activities of the high-pressure salesman who sells from door-to-door, and some reference to the various Door-to-Door Sales Acts in force must of necessity be made in the course of this survey, to give an accurate picture of consumer protection in Australia.

The first comment that must be made about the New South Wales Consumer Protection Act is the way in which the terms "goods" and "consumers" are defined, for these definitions determine, to a large degree, the ambit of the legislation. "Goods" are defined very widely to include "anything that is the subject of trade, manufacture or merchandise", while "consumers" on the other hand are restricted to persons who either (a) buy or hire goods otherwise than for re-sale or hiring or in the course of trade or business; or (b) for whom services are rendered for reward, otherwise than in the course of a business conducted by such persons. In other words, the consumer under the Act is the person who obtains goods or services for his own private use or consumption. This is in accordance with the view of the Molony Committee

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3. Consumer Protection Act 1969 (N.S.W.); Consumer Protection Act 1970 (Vic.); Consumers Protection Act 1970 (Tas.); Prices Act Amendment Act 1970 (S.A.); Consumer Protection Council Ord. 1969 (N.T.); Consumer Affairs Act 1970 (Qld.).
 4. Consumer Council Act 1966 (N.Z.). See too the Consumer Information Act 1969. (N.Z.).
 5. Trade Descriptions Act 1968 (U.K.).
 6. See the survey by Pasley "Protection of the Purchaser and Consumer Under Law of U.S.A." in (1969) 32 M.L.R. 241 and Comment "Consumer Protection in Michigan" in (1970) 68 Mich. L.R. 926. An attempt in the U.S.A. to set up an independent Federal agency for consumer protection failed recently in the U.S. Congress—See *The Australian*, 5th December, 1970, 12. Congress has, however, enacted legislation in the last eight years to cover the consumer's right to protection against the marketing of dangerous goods, and against fraudulent or misleading information, advertising, or labelling. See e.g. National Motor Vehicle and Traffic Act 1966, Toy Safety Act 1969, Cigarette Labelling Act, 1970, Fair Packaging Act 1966, Truth in Lending Act 1968, Consumer Credit Protection Act 1968.
 7. The Book Purchasers Protection Act 1963-64 (S.A.) applies to books, engravings, lithographs, pictures, etc., where the price payable exceeds \$20. Legislation to control a wider selection of goods is at present being drafted, while legislation rendering used-car dealers liable for defects (latent and otherwise) in vehicles sold by them has been promised. Other enactments envisaged include the control of unfair advertising and so-called "inertia selling". See *The Australian* 26th November, 1970, and 16th February, 1971.

on consumer protection⁸, but it does mean that emphasis is placed on the contractual aspect of the consumer's position, and that no one is to be regarded as a consumer unless he has obtained the goods or services under a contract. This emphasis on privity of contract excludes those members of the public who may be regarded as consumers in the broad sense of the word, but whose legitimate interests cannot be considered, as they cannot establish a contractual relationship with the trader against whom they have cause for complaint. Such persons are left to explore whatever remedies may be available to them under the general law of tort liability, and this may be of small comfort to them. Neither in Australia nor in England has the concept of privity of contract been relaxed in this area of the law as it has in the U.S.A.⁹, to include, not only the contracting party, but also members of his family, or guests in his home, who might be expected to use or consume the goods.

Attention must also be drawn to the fact that the definition of "consumer" in the Act is so worded as to embrace, not only the purchaser or hirer of goods for private consumption, but also a person who enters into a contract for the supply of services, such as an agreement for the renovation or repair of a house or for other work. This is a recognition of the fact that today it is in the supply of services that the exploitation of the consumer is occurring with increasing frequency.

So far as the other jurisdictions are concerned, Queensland follows the New South Wales Act in its definitions of both "goods" and "consumer"¹⁰, while the other States either have no definition of either term as in Victoria, or else define one and not the other. Tasmania specifically defines "consumer" as including persons using or taking advantage of any service, while the definition in the South Australian legislation appears to be the widest of all, and includes not only the buyer or hirer of goods and the user of services for private consumption, but also one who leases goods or borrows money to enable him to purchase goods¹¹. With the exception of the Northern Territory, every jurisdiction includes within the functions of its consumer protection organisation the power to investigate the supply of services¹², the Tasmanian Act going so far as to define "services" so as to include a professional practice, and the provision of lodging or accommodation, as well as the more usual type of commercial business undertaking.

8. For the Molony Committee the word "consumer" meant "one who purchases (or hire-purchases) goods for private use or consumption". See report (Cmnd. 1781) 1962, para 2.

9. See s.2-318 Uniform Commercial Code and s.402A Restatement of Torts (Second) discussed in Sutton, "Reform of the Law of Sales" in (1969) 7 *Alta L.R.* 130, 146-7. The Consumer Protection Bill introduced into the United Kingdom Parliament in November 1970 apparently empowered proceedings to be brought directly against the manufacturer who was at fault instead of the retailer. See (1970) 120 *N.L.J.* 1038.

10. S.4(1).

11. S.3(1).

12. The Northern Territory Ordinance has no definition of "consumer" and a wide definition of "consumer goods"; the same is true of the Consumer Information Act 1969 (N.Z.) which, however, restricts it to articles intended for sale but includes services; while Tasmania and South Australia have no definition of "goods" but, as pointed out in the text, define "consumer" as including persons using any service.

As already stated, the New South Wales Act provides for the establishment of two agencies—a Consumer Affairs Council and a Consumer Affairs Bureau headed by a Commissioner for Consumer Affairs. This division has been adopted in some of the other States, while other jurisdictions have confined themselves to the setting up of a single body, the Consumer Protection Council. Queensland and Victoria adopt the New South Wales pattern, Tasmania and the Northern Territory are satisfied with the one entity, South Australia has entrusted the task of consumer protection to the Prices Commissioner, while New Zealand has a scheme of a Council plus an Institute which includes District Consumer Committees and members of the public, as well as the Council.

(I) *The Council:*

In most jurisdictions, membership of the Council, while varying in number, comprises representatives of consumers, (usually with a stipulation that at least two will be women), and persons experienced in or representative of interests in manufacturing, retailing and advertising and sales promotion¹³. The functions of the Council in each State are broadly similar, being, apart from minor variations, to make recommendations to the Minister with respect to any matter calculated to protect the interests of consumers, to investigate and advise the Minister on such matters affecting the interests of consumers as he refers to it, to consult with manufacturers, retailers and advertisers on any matter affecting the interests of consumers, and to disseminate information on such matters¹⁴.

The Queensland Act goes further in that it empowers the Council to recommend ways in which, as well as the interests of consumers, the interests of manufacturers, retailers, and persons engaged in commerce or the provision of services, might receive adequate consideration; while the New South Wales Act is more cautious in its approach. It does not spell out the functions of the Council in detailed terms, but merely gives it power to investigate and make recommendations in relation to any matter concerning the need for, or the desirability of, legislative or administrative action in the interests of consumers¹⁵. It will be noticed that in each case the Council has the power to initiate action, and is not limited in its functions to investigating matters referred to it by the Minister.

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13. In Queensland, provision is made for the appointment of a primary producer, a barrister or solicitor, a medical practitioner, an economist, and two trade unionists. See s.5(2). In the debate on the Bill in the Queensland Parliament it was pointed out that persons are appointed as individuals, and not as representatives of particular organisations whose interests they would obviously have to protect. See *Qld. Parl. Deb.* 16th October, 1970, 1153. So far as other States are concerned see s.7(2) (N.S.W.); s.4(1) (Vic.); s.3(3) (Tas.); s.4(2) (N.T.).
 14. S.6 (Qld.); s.5 (Vic.); s.6 (Tas.); s.5 (N.T.). Consultation with the providers of public services is included in the Northern Territory legislation.
 15. S.12. S.16 Consumer Council Act 1966 (N.Z.) is in even wider terms. Another point of difference is that only in Victoria and New Zealand is the Council specifically empowered to undertake educational work in the consumer field, although such power may be implicit in the authority given in other jurisdictions to disseminate information on matters affecting the interests of consumers. In N.S.W. it is the Bureau that is empowered to undertake educational work to the extent that the Minister approves. See s.5(d) (Vic.); s.17(2)(b) and (d) (N.Z.); s.16(b)(iii) (N.S.W.).

Several of the consumer protection statutes specifically elaborate on the meaning to be given to the phrase "matter affecting the interests of consumers". Thus, the Tasmanian Act states that, the prices charged for goods or services; practices used in connection with the advertising of goods and services or the marketing, packaging or labelling of goods; and matters relating to the fitness of goods for the purpose for which they are offered for sale; are to be regarded as coming within the ambit of the expression¹⁶, and the Northern Territory Ordinance has a similar clause, limited in operation however to goods as opposed to services¹⁷. The Victorian Act likewise confines itself to goods, and in addition makes no reference to pricing practices¹⁸. Both the New South Wales and the Queensland statutes are, however, silent on the point, and offer no guide on what is to be included in the ambit of the phrase.

(II) *The Bureau:*

The Consumer Affairs Bureau set up by the New South Wales legislation operates under the direction and control of a Commissioner for Consumer Affairs appointed under the provisions of the Public Service Act 1902¹⁹. The functions of the Bureau are firstly, to advise persons in relation to consumer protection legislation; secondly, to take and initiate action for remedying infringements of such provisions; and, thirdly, to such extent as the Minister may from time to time direct or approve, to give other advice to consumers on matters affecting their interests; to receive complaints as to fraudulent or unfair trade or commercial practices in relation to goods or services, and where appropriate, to refer such complaints to that authority best able to deal with it; and finally to conduct research, collect and disseminate information, and undertake educational work on matters affecting the interests of consumers²⁰.

The functions of the Consumer Protection Bureau set up under the Victorian Act are almost identical, the only significant difference being that that organisation's activities are not in any way subject to ministerial direction or approval²¹. It will be noted also, that there is no Commissioner for Consumer Affairs in Victoria, the control of the Bureau being in the hands of a chief executive officer who is expected to work in close co-operation with the Council²².

In Queensland, the functions of the Consumer Affairs Bureau are set out in considerable detail²³, but they do not appear to depart materially from those of the Bureau's counterparts in the Southern States. One interesting provision however empowers the Bureau to encourage the dissemination of information concerning consumer affairs to producers, manufacturers, and suppliers of goods or services.

16. S.6(3).

17. S.5(2).

18. S.3(2).

19. Ss.13, 15.

20. S.16.

21. S.7.

22. S.8.

23. S.19.

As in New South Wales the Queensland Bureau is under the direction and control of a Commissioner for Consumer Affairs appointed under the Public Service Act 1922-68²⁴. The Commissioner is given wide powers to obtain information, and a person who fails to furnish information or answer a question when required to do so or who gives information which is false, commits an offence under the Act²⁵. Presumably, the offence of giving false information is an absolute one—there is no qualification that it should be done wilfully or intentionally. One safeguard in the Act is the provision that any answer given, apart from matters of identity and ownership of the business, is inadmissible in evidence in civil or criminal proceedings other than proceedings for an offence under the Act²⁶.

Somewhat similar powers of investigation are conferred on authorised officers appointed under the Tasmanian statute, but the powers that can be used are limited to what has been authorized by the Minister, in the particular case. The powers specified include the right to require production of documents, to search premises, to inspect documents, and to impound or retain or copy any of them²⁷. Failure without reasonable excuse to supply information or to produce a document (even though incriminating) or the furnishing of false or misleading information, is an offence²⁸. The Tasmanian provision, unlike the corresponding Queensland section, does at least recognise the defence of "reasonable excuse", and it further departs from the latter with its stipulation that (apart from documents) a person is not required to give any information tending to "criminate" him²⁹.

Both statutes provide that the defendant must be informed of his legal obligation to supply information before he can be convicted of an offence under the Act, while the Tasmanian legislation contains detailed provisions aimed at preventing the disclosure of information of a confidential nature, such as trade secrets and the financial affairs of a particular person³⁰.

In New South Wales the power to require information to be supplied or documents to be produced, is limited to matters that may constitute collusive tendering or bidding, and is vested in a Commissioner for Trade Practices³¹ (who is in fact at present also the Commissioner for Consumer Affairs) and a similar provision is to be found in the Victorian Collusive Practices Act 1965³².

At this point, it becomes clear what the division of function between the Council and the Bureau is, in those jurisdictions where such division exists. The function of the Council is to act as an organisation concerned with matters of policy, with viewing consumer protection from the overall point of view of prevention through education and the like, as well as through research,

24. Ss. 17-18.

25. S.20.

26. S.20(5).

27. S.8(1). See too ss.8-9 Prices Act 1948-70 (S.A.).

28. S.9(1).

29. S.8(5). Cf. s.20(4) (Qld.).

30. Ss6(5), 7(3)(4), 10.

31. S.47.

32. S.5.

and the raising of standards of manufacturing, retailing and advertising. Membership of the Council indicates that it is to be a body of informed opinion whose main function is to act in an advisory capacity in the policy-making field.

On the other hand, the rôle of the Bureau is a more specific one, being in effect a government department to investigate and act on complaints by consumers, to offer them guidance and advice, to protect their interests generally, and to assist the Council in carrying out its functions. To put the matter succinctly, the Council formulates principles of policy, and the Bureau implements the proposals thus enunciated, through inspectors and authorised officers. In those jurisdictions which have only the single entity of the Council, the function of that body appears to be both the enunciation of policy and the implementation of that policy, the danger being, of course, that the organisation will devote a disproportionate amount of its time to the day-to-day investigation of complaints and advising consumers generally, rather than concerning itself with consumer education, research, and the broader issues of consumer protection³³.

The one major departure from this general pattern is to be found in South Australia where, as already indicated, the task of consumer protection has been entrusted to the Prices Commissioner appointed under the provisions of the Prices Act 1948-70³⁴. The functions of this official correspond closely to the functions of the Consumer Affairs Bureau in Queensland and other States³⁵, but there is one notable addition which appears to go beyond anything to be found in consumer protection legislation elsewhere. Under s.18a(2) of the Prices Act the Commissioner, if satisfied that a cause of action exists and that it is in the public interest to do so, may institute civil proceedings or defend an action on a consumer's behalf, where the amount involved does not exceed \$2,500. The aim is to enforce or protect the consumer's rights where they have been infringed by another person or where the provisions of the Prices Act or other legislation relating to the interests of consumers have been broken. Certain safeguards are provided in the use of this power, e.g. the written consent of both the consumer and the Minister must first be obtained, and the Commissioner is subrogated to the rights of the consumer, but the novel principle remains that civil proceedings may be taken on the consumer's behalf on the basis that all costs shall be borne by or retained by the Commissioner and all moneys recovered shall belong and be paid to the consumer without deduction. On the other hand, any judgment against the consumer is recoverable from him³⁶.

II

Let me pass now to the second main division of the New South Wales Consumer Protection Act 1969. Part III of the Act has two main functions—to

33. In neither the Tasmanian nor the Northern Territory legislation however, is the Council specifically empowered to investigate complaints and take action on them, its functions being limited to the making of recommendations to the Minister and to consulting with manufacturers, retailers, and advertisers in relation to consumer matters.

34. This official is not normally subject to the Public Service Act 1967.

35. See s.18a added by s.6 Prices Act Amendment Act 1970.

36. S.18a(4)(c).

ensure that descriptions of goods, whether given on labels, documents or wrappers, are accurate; and to restrict the publication of false or misleading advertisements aimed at promoting the sale of goods. As will be seen, an amendment to the Act passed at the end of last year followed the Victorian, Queensland and United Kingdom legislation by extending this prohibition on the publication of false or misleading advertisements, in respect of goods, to the provision of services.

A. False Trade Descriptions

Part III, which is largely a re-enactment of Part VIII of the Factories Shops and Industries Act 1962, provides first of all for certain classes of goods³⁷ to have a prescribed trade description and makes it an offence to sell such goods, without having this description appended thereto in a conspicuous way. The Act goes on to constitute the offences of attaching a false or misleading trade description to *any* goods at all, i.e., not merely those goods which are required to have a trade description³⁸, and the sale of any goods to which a false description is affixed. There are comprehensive definitions of the terms "trade description", "false trade description" and "sell".

The phrase "trade description" covers any statement or indication as to the quantity, quality, characteristics, size, or weight of the goods, their place of origin, their mode of manufacture or selection or packing, their suitability for any purpose, the materials of which they are composed, whether they are patented or subject to copyright, and the manufacturer or producer of the goods. The absence of a general misdescriptions clause however, may mean that some misdescriptions will not come within any of the categories listed and will slip through the net. A trade description is false if it contains anything untrue or likely to mislead in a material respect³⁹.

The word "sell" includes exhibit, expose or have in possession for sale, or for any purpose of advertisement, manufacture or trade⁴⁰, and this definition, which has similarities to the corresponding definitions in the Queensland and United Kingdom legislation, is obviously aimed at avoiding the difficulties which might otherwise arise, if the rule of contract law were transplanted into the criminal law, that the display of goods is not an offer to sell but only an invitation to treat. The definition of "sell" in the Queensland Act is, however, wider than its New South Wales counterpart, in that it includes letting on hire-purchase or on hire, or having goods in possession for the purpose of such letting⁴¹.

The New South Wales Act does not make liability absolute for the offences of attaching a false trade description to goods or selling goods with a false

37. E.g. bedding, upholstered furniture, footwear, toys, leather and plastic goods. Cf. Schedule IV Factories, Shops and Industries Act 1962 (N.S.W.).

38. S.23. This is an extension of the previous law—see s.124 Factories, Shops and Industries Act 1962.

39. S.19 (N.S.W.). This is very close to the definition in s.121 Factories, Shops and Industries Act 1962.

40. S.5.

41. S.4(1). The definitions of "trade description" and "false trade description" are almost identical with those in the N.S.W. Act.

trade description. A defendant may be excused if he proves that he acted without intent to deceive and defraud, or in the case of sale that he took all reasonable precautions, acted bona fide, and on demand gave all information at his disposal with respect to his supplier of the goods. It will be noted however, that the onus of proof rests on him⁴². So far as an employee is concerned, he is specifically excused under the terms of s.31(c) if he acts bona fide in obedience to the instructions of his employer and co-operates in disclosing information concerning him⁴³.

With this must be contrasted the position under the Queensland and United Kingdom legislation where liability would appear to be more stringent. Thus, in Queensland the Consumer Affairs Act 1970 has similar provisions to its New South Wales counterpart relating to prescribed trade descriptions and the use of false trade descriptions, which are to a considerable extent a re-enactment of previous legislation⁴⁴. There are provisions prescribing trade descriptions (or words to be used therein) for stipulated classes of goods, and a prohibition against affixing a false trade description to any goods at all, or selling goods with such false trade description attached. But so far as the attachment of a false description is concerned, the offence is an absolute one, except in the case of a person engaged by way of business to do so, while in the case of a sale of goods with a false description affixed, the seller may set up as a defence that he took all reasonable precautions and used all due diligence, that he acquired the goods from another person and resold them in the same condition as received, and, most difficult of all for him to establish, that the contravention was due to something beyond his control. A cause is not to be taken to be beyond his control unless it is one that he could not reasonably have foreseen or provided for⁴⁵.

The United Kingdom Trade Descriptions Act 1968 was designed to replace and extend the existing legislation relating to false and misleading descriptions of goods and had its genesis in the recommendation of the Molony Committee on Consumer Protection to this end. It replaced the obsolete and obscurely-worded Merchandise Marks Act 1887-1952 on which at least some Australian States have modelled their trade description legislation. The 1968 Act was originally called the Consumer Protection Bill, but the word "consumer" was regarded with some distaste in certain quarters, as calling to mind a man in a café with a plate of fish and chips, and there was in addition the possibility of confusion with earlier legislation dealing with protection against dangerous goods, so the title was changed⁴⁶.

42. Ss.23-25.

43. See too s.45 Consumer Affairs Act 1970 (Qld.).

44. See ss.74-83 Factories and Shops Acts 1960-68. An amendment to this Act passed at the end of last year in effect restricts the application of Part X thereof to leather and textile goods, on the ground that the Consumer Affairs Act makes adequate provision for controlling false descriptions of goods generally. See *Qld. Parl. Deb.* 13th November, 1970, 1748. The provisions as to the marking of furniture contained in ss.65-73 Factories and Shops Acts 1960-68 are retained.

45. This defence is available generally in respect of any offence under the Act committed in respect of the sale of goods. Cf. s.27L(3) Weights and Measures Act 1915-69 (W.A.); s. 82N (3) Weights and Measures Act 1958-67 (Vic.); s.40A Weights and Measures Act 1934-70 (Tas.); s.44A Weights and Measures Act 1951-67 (Qld.); s.290(3) and (5) Weights and Measures Act 1915-68 (N.S.W.).

46. See Borrie, "The Trade Descriptions Bill" (1968) *Crim. L.R.* 258.

As in the local legislation, the Trade Descriptions Act provides for the two offences of applying a false or misleading trade description to any goods and the supply of or offering to supply any goods to which such a description is attached⁴⁷. The definition of an offer to supply likewise embraces the exposing of goods for supply and having goods in possession for supply⁴⁸, but the definition of "trade description" is more detailed than in the local statutes, and includes any indication of testing or approval by any person, or the history of the goods, including previous ownership or use⁴⁹. Under s.4(2) even an oral statement may amount to the use of a trade description, a provision which may be difficult to enforce and may mean a marked increase in the number of shop assistants who are deliberately vague or obtuse when asked about the goods they are selling. However, such an extension of the law can clearly be justified on the view that an oral false trade description can be just as harmful as a written one.

It seems clear that both in New South Wales and in Queensland, a trade description connotes something that is written, as the legislation refers to the appending of the description to goods, but it may well be that the same result as in England is achieved by the local provisions as to false or misleading statements concerning goods, which will be considered further below.

The United Kingdom Act sets out certain defences which it is open to the defendant to establish in answer to a charge that an offence had been committed. Thus, it is a complete defence to a person charged with supplying goods with a false trade description to prove that he did not know and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods⁵⁰. Again, it is a general defence to any proceedings at all under the Act to prove that the defendant took all reasonable precautions and exercised all due diligence to avoid an offence and that the offence was due to mistake, or accident, or to the default of another person or cause beyond his control, a provision which has already given rise to considerable litigation⁵¹. It is a notoriously convenient device for evading responsibility to shift the blame for an infringement of the Act from employer to employee and to invoke the defence of act of a third party when prosecuted, but this defence has succeeded more than once before the English Courts⁵². The reason may lie in the fact that the present current of opinion is against the establishment of vicarious liability in the field of consumer protection legislation⁵³.

In the light of the English experience, it is submitted that successful prosecutions could in future be brought in New South Wales and Queensland for such things as selling a "waterproof" watch which fills with water after an

47. S.1(a), (b).

48. S.6.

49. S.2(1). See too s.2(2) and s.3.

50. S.24(3).

51. S.24(1). Cf. s.113 Food & Drugs Act 1955 (U.K.) and ss.26-7 Weights and Measures Act 1963 (U.K.).

52. See e.g. *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606; *Tesco Supermarkets Ltd. v. Natrass* [1970] 3 W.L.R. 572 (leave to appeal granted); *Birkenhead & District Co-op Society Ltd. v. Roberts* [1970] 1 W.L.R. 1497.

53. See note by Howells in (1970) 33 M.L.R. 562, 564-65.

hour's immersion⁵⁴, for displaying for sale meat or poultry incorrectly labelled as to its place of origin⁵⁵, and for the sale of a motor-vehicle with the incorrect mileage shown on the odometer⁵⁶. In this last case, the defence to a prosecution brought in England in 1970 under the Trade Descriptions Act for supplying goods with a false trade description, hinged on the limitation in that Act that such supply must be in the course of a trade or business. No such limitation appears in the local legislation, and it follows that a person who sells goods privately may infringe the statute, unless he can bring himself within one or other of the exempting provisions already outlined.

So far as penalties are concerned, the New South Wales Consumer Protection Act re-enacts earlier legislation on the point⁵⁷. In addition to any other penalty, power is given to the Court either to order the refund of the price to the purchaser of goods bought with a false trade description, or, alternatively, to order that the purchaser be supplied with goods of the correct type; while in the case of a retailer who has been convicted of an offence under this part of the Act at least thrice within the space of five years, the Industrial Commission may prohibit him from carrying on business for such period as it decides.

The Queensland statute has similar powers to order a refund of the purchase price to the purchaser (including in accordance with the extended definition of the term "sell", any terms charges, etc., paid over under a credit-sale agreement or hire-purchase agreement), and alternatively it can order that goods be supplied in accordance with the trade description⁵⁸. However, there is no corresponding provision enabling the appropriate authority to put out of business a retailer who persistently offends against the Act. On the other hand, the Queensland statute does empower the court to order that the offender pay to the person aggrieved, such amount as it specifies as compensation for loss suffered, or expense or loss of time incurred by him, by reason of the offence—whether it be the sale of goods with a false trade description or a contravention of the section prohibiting the making of false statements as to services⁵⁹. This seems to be a most useful provision and one which could be copied with advantage in New South Wales. It will be noted however, that it does not extend to the payment of compensation in respect of the publication of false statements concerning goods which do not amount to a false trade description.

So far as the United Kingdom legislation is concerned, it imposes criminal sanctions only, and does not provide for payment of damages or compensation to any person who has suffered loss⁶⁰.

54. *Sherratt v. Gerald's The American Jewellers* (1970) 114 S.J. 147.

55. *Beckett v. Kingston Bros. (Butchers) Ltd.* (supra); *Birkenhead & District Co-op. Society Ltd. v. Roberts* (supra).

56. *London Borough of Havering v. Stevenson* [1970] 1 W.L.R. 1375. Success in this last case would depend in Australia on judicial interpretation of the definition of "trade description" in the local legislation. Under the English Act, the incorrect mileage was clearly a false trade description of the *history* of the car. Cf. Motor Car (Falsification of Mileage) Act 1970 (Vic.) discussed *infra*.

57. Ss.29-30. See ss.129(2) and 130 Factories, Shops and Industries Act 1962.

58. S.44(2).

59. S.44(3).

60. An amendment providing for payment by way of compensation was defeated in the

B. False or Misleading Advertisements

The second main function of Part III of the New South Wales Consumer Protection Act is to curb the publication of false or misleading advertisements aimed at promoting the sale, disposal, or letting on hire of any goods and, by virtue of the recent amendment to the Act, advertisements intended to induce a person to make use of any services for reward. Section 32 is in substantially similar terms as earlier legislation⁶¹, save that it brings the hiring of goods within the ambit of the section and embraces the supply of services—an extension made apparently on the recommendation of the Consumer Affairs Council, as it was found that a large proportion of complaints to the Consumer Affairs Bureau concerned the provision of unsatisfactory services⁶².

As has already been mentioned, this extension to include advertisements in respect of the supply of services had been anticipated in both the United Kingdom and Queensland, while Victoria as early as 1932 had realised the necessity for legislating to control this type of advertisement. In that year it enacted the Police Offences (False Advertisements) Act^{62a}, and this legislation, somewhat expanded, is now to be found in s.36 of the Summary Offences Act 1966. By virtue of that section, it is made an offence to publish any false statement aimed at the sale or disposal of any real or personal property or services, and the provisions of the section are very similar to those now found in s.32 of the New South Wales Consumer Protection Act.

Under the New South Wales Act, the three elements which comprise the offence are (a) publication of a statement (b) intended or apparently intended to induce the disposal of goods or the supply of services for reward, and which (c) is known to be false or misleading in a material particular⁶³. Publication is defined very broadly to include not only newspaper advertisements, but also statements made verbally or broadcast by radio and television, or exhibited publicly on land, water or in the air⁶⁴. It would seem that even the ephemeral sky-writer is within the ambit of this definition, provided his message can be seen from the street. There is a presumption that, once a statement is shown to be false or misleading, the defendant is deemed to have knowledge of its falsity or misleading character, a presumption which can be defeated by the defendant's establishing that he took all reasonable precautions against committing an offence and that he reasonably believed the statement was true⁶⁵. A further safeguard is provided for the printer, publisher or proprietor of a newspaper and the licensee of a commercial radio or television station or their agents, by requiring a warning, followed by publication in

United Kingdom Parliament on the ground that where goods are misdescribed, a whole line of goods are affected and many people have suffered loss. There was accordingly little justification in ordering payment of compensation merely to those persons who happened to be concerned in the prosecution. See *Borrie loc. cit.* 262-3.

61. S.133 Factories, Shops and Industries Act 1962 first enacted by s.4(2) Factories and Shops Amendment Act 1935.

62. *N.S.W. Parl. Deb.* 27th October, 1970, 6950.

62a. See too s.8 Trade Descriptions and False Advertisements Act 1936 (W.A.).

63. S.32(1). Cf. s.9 Consumer Information Act 1969 (N.Z.).

64. S.32(2).

65. S.32(3).

defiance of that warning, as a condition precedent to prosecution⁶⁶. The former requirement that the Minister's consent to prosecution must be obtained is dispensed with⁶⁷.

It will be noted that publication of a false or misleading advertisement constitutes an offence only, that there is no provision for a Court to order any refund of money paid, as is the case in respect of the sale of goods with a false trade description, but that, as might be expected, notwithstanding any conviction, the defendant remains liable to be proceeded against in a civil action⁶⁸.

The scheme adopted by the Queensland Consumer Affairs Act is to have two separate sections dealing with the publication of false or misleading statements—one in relation to goods and one in relation to services—and as a consequence the draftsmen appear to have achieved results which they did not perhaps intend. Section 32 prohibiting the publication of false statements concerning goods is, to a considerable extent, a re-enactment of previous legislation⁶⁹ and is in almost the same terms as the corresponding New South Wales provision already discussed. The earlier legislation contained presumptions as to the knowledge of the falsity or misleading character of a statement and also limited prosecutions to cases where warnings had already been given⁷⁰, similar to that to be found in the New South Wales statute referred to above. These provisions have now, by virtue of sections 33 and 34 of the Consumer Affairs Act, been restricted to the situation where a false or misleading statement is "published" (sic) in respect of *services*, as opposed to goods, a limitation which departs from the previous law and appears to be insupportable in principle. One can only assume that the change in the law has been made inadvertently.

Section 30 of the Queensland Act prohibiting the making (as opposed to publication)⁷¹ of false statements as to services by a trader or businessman, goes much further than its New South Wales counterpart, and is a direct copy of s.14 of the Trade Descriptions Act 1968 (U.K.). The United Kingdom pioneered adequate legislative controls of descriptions of services, although it did not apply the same degree of stringency to the control of this area as it had done in the field of trade descriptions of goods. Thus the false statement must be made by a person in the course of business or trade, and it

66. S.32(4).

67. Cf. s.56. Consent is still required under the Victorian legislation. See s.36(8) Summary Offences Act 1966.

68. S.32(6). See too s.31(a) (N.S.W.) and s.41(1) (Qld.).

69. S.85 Factories & Shops Acts 1960-68, now repealed on the ground that it is redundant. See *Qld. Parl. Deb.* 13th November 1970, 1749. Other statutory provisions exist in Queensland dealing with false advertisements or representations, such as ss.10, 18 and 18E Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Acts 1922-61 aimed at preventing bogus advertisements, s.24a of the same Act, embracing false representations to a prospective purchaser concerning any real or personal property for sale, whether or not a contract results, and s.24aa covering representations by an auctioneer or real estate agent as to the availability of finance in respect of land.

70. Ss.85(4) and (5) Factories & Shops Acts 1960-68.

71. The wide definition of "publication" in the N.S.W. Act to include a statement made verbally, means that there is no substantial difference between the two statutes.

must be made knowingly or recklessly. The Queensland legislation retains these restrictions, but as has been seen, raises a presumption as to the knowledge of the falsity of the statement "when published" (a term appropriate to s.32 but not to s.30), which must be rebutted by the defendant.

Under the Queensland Act, an offence is committed when a statement known to be false to a material degree or made recklessly, i.e., regardless of whether it is true or false, is made in respect of certain specified matters, such as the provision in the course of trade or business of services, accommodation or facilities; or the nature of any such services, etc., so provided; or the time, manner, location and examination of any such services; or the effectiveness of any treatment, process or repair. The statement need not be precisely within the categories enumerated, so long as it is likely to be taken as within the specified list⁷². It will be noted that there is no reference to false statements as to the *price* of services, accommodation or facilities, an omission which appears to be rectified in New South Wales by incorporating the provision as to services in the same section as the prohibition against false statements intended to promote the sale of goods.

There follows the peculiar provision that "services does not include anything done by the person who makes the statement under a contract of service"⁷³. This provision is also to be found in the United Kingdom Act, and it is a little difficult to ascertain its meaning. It appears to stipulate that any statement as to the provision or nature of services does not include any statement by an employee as to the provision or nature of anything done or to be done by him. It seems clear that the intention of the legislature is to prevent an employer being held to be vicariously liable for a false statement made by an employee as to what has been or will be provided, or for recklessly exaggerated claims by him as to the efficacy of any treatment, process or repairs. If this is correct, it severely limits the operation of the section, but as indicated earlier, the climate of opinion today is against the imposition of vicarious liability in the field of consumer protection. So far as the employee himself is concerned, there is a blanket provision in the Act exempting from liability any employee who has acted bona fide in accordance with his employer's instructions and has co-operated with the authorities in locating him⁷⁴.

In future, it would seem that repairers, hotel-keepers, travel-agents and the like, who make false or reckless statements in relation to the services they provide, will run the risk of prosecution in New South Wales and Queensland. Henceforth, the wall-cladding expert who says that the surface will last 20 years, when in fact it starts to disintegrate within 12 months, or the proprietor of the 24-hour dry-cleaning service that takes a week, or the hotel-keeper who advertises a room with panoramic views of the harbour, when only a glimpse of blue water can be seen from a corner of the window, may find, not only that he has committed an offence under the Act, but, at least in Queensland, that he may be called upon to refund to the person aggrieved the amount paid on account of the services or accommodation offered, or alternatively, to supply services or accommodation that agree with what was

72. S.30.

73. S.30(3)(b).

74. S.45.

promised or to pay compensation for loss suffered or expense incurred by reason of the offence⁷⁵. As already pointed out, no such provision for reimbursement in respect of services appears in the New South Wales Act⁷⁶.

In England, proceedings have been brought under s.14 of the Trade Descriptions Act against a travel agent who stated in his holiday advertising brochure that the hotel accommodation at Majorca consisted of twin-bedded rooms with private bath, shower, toilet and terrace overlooking the harbour. A tourist who booked hotel accommodation with the travel agent on this basis, was given a room with no terrace at all, and, as a result, the agent was prosecuted for recklessly making a false statement as to the amenities of accommodation provided at the hotel. The prosecution failed, since it was shown that at the time the statement was made such accommodation did exist, and any negligence by the defendant in failing to ensure that such rooms were in fact allocated at a later date, had no bearing on the question whether it was false or recklessly made⁷⁷.

In another decision on the section, it was held that a statement as to the provision of services made by the builder of a house *after* the contract of sale had been made, might still constitute an offence under the section, even though it related to the sale of land and could not be said to have induced the entry into the contract⁷⁸. In the course of his judgment, the Lord Chief Justice, Lord Parker, indicated that a statement made after a contract was completed and payment had been made, stating for example the effect of repairs to the roof of a house or to a motor-car, would be an offence if made recklessly⁷⁹. It remains to be seen whether a Queensland court would go to this length in construing the corresponding provision in the Consumer Affairs Act, but there seems little reason to doubt that it would follow the principles of interpretation established in relation to the parent legislation.

It is a matter for regret, however, that neither the local legislation nor that of the United Kingdom, appears to be wide enough to curb the practice of issuing misleading so-called "guarantees" which, on examination, are found to restrict the supplier's or manufacturer's ordinary liability and to cut down the consumer's rights given to him by statute or at common law for his protection⁸⁰. Such guarantees are not false, and it is doubtful if they could be classed as misleading statements intended to promote the sale of goods or services.

C. Other Provisions

Apart from the legislative control of descriptions of services contained in s.14, the United Kingdom Trade Descriptions Act also contains certain provisions relating to statements in advertisements as to goods which, however,

75. S.44(2) and (3).

76. S.29(1) (N.S.W.) is limited to the offence of selling goods with a false trade description.

77. *Sunair Holidays Ltd. v. Dodd* [1970] 2 All E.R. 410; [1970] 1 W.L.R. 1037.

78. *Breed v. Cluett* [1970] 2 All E.R. 662.

79. *Ibid* at 663.

80. See for example the guarantee considered by the English Court of Appeal in *Adams v. Richardson & Starling Ltd.* [1969] 1 W.L.R. 1645.

do not go so far in some respects as the local legislation. These provisions may be summarized by saying that they extend the offences of applying a false trade description to goods and supplying goods with a false trade description, to statements contained in advertisements. A person who publishes an advertisement (defined somewhat inadequately to include a catalogue, circular or price list)⁸¹ containing a false trade description in relation to *any* class of goods, may be convicted of applying it to *all* goods of the class, i.e., the false trade description is to be taken as referring to all goods of the class to which the advertisement relates. In determining the class of goods to which the advertisement relates, regard must be paid to the form and content of the advertisement, the circumstances of publication, and all other matters which might influence a purchaser to decide the question⁸².

Not only are false statements in advertisements covered by the United Kingdom Act, but powers are given to the Board of Trade to require the inclusion of certain information in advertisements of goods, if it considers it in the interest of purchasers to do so. The Board may also assign definite meanings to terms used in relation to goods, such as the expressions "shrink-resistant" or "heat-proof", and can require goods to be accompanied by information or instructions. The criterion in each case is whether such a step is necessary or desirable in the interests of purchasers or consumers⁸³. As has been pointed out, under these sweeping provisions the Board of Trade could require that all cigarette packets should contain the words: "These will kill you"⁸⁴. Local legislation has not gone to these lengths, although the Queensland Act does empower the Government to prescribe words to be included in a trade description used in respect of a class of goods⁸⁵.

The United Kingdom Act goes on to deal with the problem of the "bogus" price reduction, by making it an offence to offer to supply goods at a price which is falsely shown, in any way whatever, to be less than the figure recommended by the manufacturer or producer, or below the price at which the person making the statement had himself offered the same or similar goods for a continuous period of not less than 28 days within the previous six months⁸⁶. It is also an offence to indicate that the goods are being offered at a price less than that at which they are in fact being offered⁸⁷. Thus, it would seem that a retailer in England can now hold "clearance" or "closing-down" sales, or dispose of "fire" or "flood-damaged" or "bankrupt" stock, only if such sales are genuine. There are, of course, many loop-holes in the section—a manufacturer can for instance recommend an unrealistically high price so that any retailer could quite truthfully claim that he is selling below the "list price" for such goods. However, it is a praiseworthy attempt to curb a practice

81. S.39(1).

82. S.5. A publisher who bona fide received an advertisement for publication in the ordinary course of business is protected by s.25.

83. Ss.7, 8, 9.

84. Borrie "The Trade Descriptions Bill" in (1968) Crim L.R. 258, 261.

85. S.26(1) (Qld.).

86. S.11(1) and (3).

87. S.11(2). Cf. s.10 Consumer Information Act 1969 (N.Z.). The subsection was invoked in *Tesco Supermarkets Ltd. v. Natrass* [1970] 3 W.L.R. 572 (leave to appeal granted.).

both pernicious and widespread which, if the reports of the local consumer affairs bureau are any guide, is not confined to the United Kingdom.

It is suggested that the local legislation dealing with false or misleading advertisements in respect of goods may be widely enough drawn to cover this practice, especially in view of the extended definition of "publication" contained therein. A price tag with a false "mark-down" displayed on goods in a shop, or an announcement over the store's public address system of a price reduction, would both appear to be caught by the relevant section in both the New South Wales and the Queensland Acts. Further, such local legislation as the Packages Acts or the Weights and Measures Acts in force in various States, while primarily designed to control the marketing of pre-packed goods, and to curb such practices as inadequate marking of weight and the use of "over-sized" containers not filled to full capacity, in some instances, prohibit the display of misleading statements on the package, such as "giant" or "economy size" or "cents-off" to indicate that it is sold at a reduced price⁸⁸.

It may be appropriate to give one or two illustrations of how the United Kingdom provision has operated in practice. In *North-Western Gas Board v. Aspden*⁸⁹ a notice was displayed on fixed hearth gas fires in the Board's showroom offering £3 allowance on any two gas fires bought at the same time. The notice was intended to apply only to fixed gas fires and not to other types on sale in the same showroom, but the Board was convicted of giving a misleading indication as to the price of goods contrary to s.11 of the Act. On the other hand, in *John v. Matthews*⁹⁰ a member of a club bought a packet of cigarettes from the club and was charged the normal price, although the packet bore the notice "3d. off"⁹¹. A complaint was made under the Act, but the club secretary refused to allow an investigating inspector on the premises and was charged with wilful obstruction. The prosecution failed, on the ground that the object of the Act was the protection of the public, and it did not apply to domestic bodies such as private members' clubs. This restriction of the Act to transactions of a purely commercial nature, does open up a fairly wide gap in the field of consumer protection, particularly in view of the current popularity of the social club as an institution.

Apart from the local legislation controlling the marketing of pre-packed goods to which reference has already been made, there are statutes in force in the various States which have as their aim either the prevention of the use of false trade descriptions and false advertisements in respect of goods, or the protection of the consumer in other ways. Examples of such enactments

88. See e.g. s.25 Packages Act 1967 (S.A.); ss.27G(6), 27J. Weights and Measures Act 1915-69 (W.A.); s.82J. Weights and Measures Act 1958-67 (Vic.); ss.25N (7), 25R Weights and Measures Act 1934-70 (Tas.); s.43H Weights and Measures Act 1951-67 (Qld.); ss.15, 16 Weights and Measures (Packaged Goods) Ordinance 1970 (N.T.); ss.14, 15 Weights and Measures (Packaged Goods) Ordinance 1970 (A.C.T.); ss.29, 29A, 29G(5) and 29J. Weights and Measures Act 1915-68 (N.S.W.). See too the Consumer Information Act 1969 (N.Z.) especially ss.7-10 and 21.

89. *The Times* 20th February 1970.

90. [1970] 2 W.L.R. 1246; [1970] 2 Q.B. 443.

91. The evidence showed that club officials were unaware of the notice which had been put on the packet by the manufacturer.

are the Goods (Trade Descriptions) Acts 1935-69 (S.A.); the Trade Descriptions and False Advertisements Acts 1936-69 (W.A.); Goods Act (Part V) (1958) (Vic.) and Goods (Trade Descriptions) Act 1969 (Vic.); Commerce (Trade Descriptions) Act 1905-50 (Cwlth.); Textile Products Labelling Act 1954-70 (N.S.W.); Prices Act 1948-70 (S.A.) (especially ss.21, 24, 33a, 33b, 33c, and 33e); and the Consumer Information Act 1969 (N.Z.). This list is illustrative only, and many more examples could be given.

One notable omission from the list is the legislation passed recently in the various States to control door-to-door sales, but before examining this in some detail, attention should be drawn to two sections of the Queensland Consumer Affairs Act set out under the rubric of "misrepresentation". Section 35 is concerned with "passing-off" and prohibits the publication (as defined in s.32(2)) of any statement or the doing of anything which may indicate that goods or services are produced or supplied by a person other than the true supplier; while s.36 relates to misleading representations as to the suitability of goods. The publication of any statement or the doing of any act, in the conduct of a trade or business, in relation to goods manufactured or sold, is forbidden if it is likely to mislead another as to the purpose for which the goods are suitable.

III

As has already been mentioned, legislation has been passed in the last few years to control door-to-door sales in every jurisdiction in Australia, and some attention must be paid to this legislation, which has been enacted to protect the consumer against a particularly obnoxious form of high-pressure salesmanship. The various Door-to-Door Sales Acts⁹² all have a common basis, although each statute has individual variations. The basic concept behind these enactments is that where a purchaser has agreed (elsewhere than at the supplier's trade premises) to buy goods or to make use of services on credit, the agreement is unenforceable by the vendor unless it is in writing and a copy of the agreement together with a statement of his rights under the Act is supplied to the purchaser; and further, the purchaser is given a period of reflection, varying from five to fourteen days according to the particular statute concerned⁹³, within which he can decide to terminate the agreement. If he decides to cancel the contract, the agreement is deemed to have been rescinded by mutual consent, there is a notional total failure of consideration, and provision is made for the refund of any money paid and the return of any goods handed over.

The Act applies even though negotiations only were conducted elsewhere than at trade premises, provided that a concluded agreement was eventually made, but it has no application where it is the purchaser who has made an

92. Door-to-Door Sales Act 1967-69 (N.S.W.); Door-to-Door Sales Act 1963-70 (Vic.); Door-to-Door Sales Act 1966 (Qld.); Door-to-Door Sales Act 1967 (Tas.); Door-to-Door Sales Act 1964 (W.A.); Door-to-Door Sales Ordinance 1969 (A.C.T.); Door-to-Door Sales Ordinance 1967 (N.T.); Book Purchasers Protection Act 1963-64 (S.A.). As in the case of the Consumer Protection Act, the pioneer in this field was Victoria. A Door-to-Door Sales Act was enacted in New Zealand in 1967.

93. 5 days (N.S.W. s.4(2), N.T. s.5(2)); 7 days (Qld. s.4(2), A.C.T. s.8, W.A. s.4(2), N.Z. s.7(1)); 10 days (Vic. s.4(2) Tas s.6(2)); 14 days (S.A. s.4(c)).

unsolicited request for the vendor to attend at the purchaser's place of residence or employment, etc. This exception has provided a loop-hole for unscrupulous salesmen of which they have not been slow to take advantage, and dubious means have been employed in an endeavour to obtain an invitation from a prospective purchaser to call and discuss business.

Individual variations on this basic pattern include the limitation of the application of the Act to goods as opposed to services⁹⁴, or even to certain prescribed goods such as books, kitchenware, jewellery, watches and household appliances⁹⁵. In some instances, hire-purchase agreements are excluded and in others included; agreements negotiated entirely by mail, or relating to land are specifically excluded in one or two cases, and the exclusion of agreements where the purchaser is a company or dealer or where the parties have a history of previous credit arrangements is common. In Tasmania and in New Zealand, the Act does not apply to a credit-sale where the total purchase price does not exceed \$40, while in South Australia, the legislation applies only to books, engravings and pictures priced at more than \$20, and the prohibition in the Act is against entering into an agreement or conducting negotiations at the place of residence or employment of the purchaser, rather than anywhere apart from the vendor's business premises—a variation to be found in other Acts as well. The Queensland Act makes it an offence for the vendor to deliver any goods to the purchaser until after the "cooling-off" period has elapsed, and reinforces the prohibition by declaring that the buyer will not be liable for any loss or damage to goods delivered in contravention of this provision⁹⁶. The South Australian enactment forbids the payment of any deposit or the delivery of any goods until written confirmation of the contract by the purchaser within fourteen days of his signing the agreement, and further provides that the contract must contain a conspicuous notice that it is unenforceable unless and until such written confirmation is received⁹⁷.

In an effort to give the Act more "teeth" and to close loop-holes discovered in the original legislation, recent amendments in New South Wales and Victoria have made it an offence for the vendor to fail to furnish a copy of the agreement and the statement outlining the purchaser's right under the Act to terminate the agreement. A similar provision is to be found in the Tasmanian and A.C.T. legislation. In addition, more elaborate provisions designed to ensure that the vendor will refund any money paid, and that both parties will return any goods handed over under the agreement now rescinded, are contained in the 1970 Victorian amendment, and there is also a detailed list of clauses which will be void if contained in an agreement caught by the Act. Thus, a clause attempting to modify or exclude any warranty, right or protection given to the purchaser by law, e.g., under the Sale of Goods Act, would be completely ineffectual, as would a provision making an offer irrevocable, or one stipulating that the agreement is to be governed by a particular system

94. "Goods only" include Victoria (the reference in s.4(2) to "services" appears to be a misnomer), Tasmania, Western Australia and New Zealand.

95. See s.2(1) (Qld.), (which also contains a detailed definition of "services"), s.2(1) (Tas.) s.2 (S.A.) (books, engravings and pictures), and s.2(1) (W.A.). See too Door-to-Door Sales Amendment Regulations 1969 (Tas.).

96. Ss.4(4) and (5).

97. Ss.4(c) and 5.

of law⁹⁸. A similarly detailed prohibition against "contracting-out" of the statute is to be found in Queensland and Western Australia, but elsewhere the "contracting-out" provisions are much less elaborate, being limited in New South Wales for instance, to any attempt to exclude the right to terminate the agreement.

Like the Weights and Measures Acts and similar legislation, the Door-to-Door Sales Acts are aimed at consumer protection in the strict sense of the term, i.e., prevention rather than cure. The consumer is prevented from suffering harm, as opposed to his being compensated or given redress when matters have gone wrong. The legislation is aimed at curbing abuses in a particular area, where sharp practice and deception have necessitated the introduction of corrective measures.

Other areas in which remedial legislation has been mooted as essential to curb mal-practices, include the sale of second-hand motor vehicles, the practice of so-called "inertia selling" and the lending of money. Thus, in South Australia, it is proposed to implement some of the recommendations contained in the Rogerson report on consumer credit and money-lending, and to force a used car dealer to disclose all defects in a motor-vehicle known to him and to rectify any defects latent or otherwise, that appear within three months of a sale⁹⁹. In Queensland the Attorney-General has forecast legislation whereby any motor dealer who sells a used car, would be compelled to warrant that the mechanical and structural condition of the vehicle was sound and was roughly commensurate with that expected in a car with the mileage reading shown on the odometer¹ and that the vehicle was in all respects road-worthy. It will be interesting to see the precise form which this legislation will take, and whether the draftsmen will be able to plug effectively all the loop-holes which a smart businessman or his legal adviser can usually find in this sort of statute.

In Victoria the Motor Car (Falsification of Mileage) Act 1970 makes it an offence to make a false statement as to the mileage travelled by a motor car or to tamper with an odometer with intent to deceive. The Act further provides that a contract for the sale of a second-hand motor car must be in writing signed by both parties and must state the recorded mileage of the vehicle and whether or not the vendor believes this mileage to be true. If the vendor makes a false statement in this respect or if there is no written contract complying with the Act, the purchaser can either rescind or affirm the contract and recover damages for loss suffered. Corresponding rights are given to a hirer under a hire-purchase agreement, with the additional provision that any attempt to "contract-out" of the section by an owner or dealer is of no effect.

The standing committee of Commonwealth and State Attorneys-General has agreed on the necessity for early legislation to control the increasingly prevalent practice of so-called "inertia selling", i.e., the technique of sending

98. S.7 inserted by 1970 amendment.

99. *The Australian*, 9th December, 1970, 17.

1. *The Telegraph* (Brisbane) 17th December, 1970, *The Australian* 18th December, 1970. Cf. Motor-car (Falsification of Mileage) Act 1970 (Vic.) discussed *infra*.

unsolicited goods through the post on a buy-or-return basis². If the goods are not returned, the recipient is invoiced for the price.

New South Wales, Victoria and South Australia have indicated that they will collaborate in the preparation of uniform legislation to deal with the situation which, it must be admitted, does raise complex legal problems. It is reasonably clear that the mere foisting of goods on to an unsuspecting and unwilling recipient will not in itself create a contract—mere silence or inactivity on the part of the offeree will not amount to acceptance—but there is always the danger that some act on the part of the recipient will be held to constitute acceptance. Apart from that, there is the unresolved problem of what duty of care (if any) in respect of the goods is owed by the recipient, cast in the mould of an involuntary bailee of the goods pending their recovery by the seller. It is clear that he must not wilfully damage or destroy the article concerned, but beyond that, his legal obligations cannot be spelt out with certainty. It may well be that the law imposes on the unwilling recipient a duty to exercise reasonable care in the custody of the goods until they are picked up by the seller—presumably, with no corresponding right to claim storage or other expenses.

In England, an Inertia Selling Bill was introduced into Parliament in January 1970, but failed to pass through the House of Lords before Parliament was dissolved³. It gave the recipient of unsolicited goods the right to dispose of them "as if they were an unsolicited gift" on giving the sender 30 days notice, or, in any event, in the absence of such notice, four months from the date of receipt of the goods. A further provision invoked the criminal law to curb the practice of sellers of threatening legal proceedings in the event of failure by the recipient to pay the purchase price. Under the terms of the Bill such a threat was an offence punishable by a heavy fine.

It may reasonably be expected that any local legislation will follow closely along the lines of the proposed English experiment, but it is hoped that the local draftsmen will deal with the problem of the standard of care owed by the recipient of the unsolicited goods, a matter on which the English Bill was silent.

So far as the borrowing of money for credit purposes is concerned, legislation has been passed overseas, such as the so-called Truth-in-Lending Act of 1968 in the U.S.A., to compel disclosure of effective interest rates and other charges to prospective borrowers, and it has been suggested that there is need for similar legislation in Australia, especially in view of the estimated figure of \$4,000 million owed in this country to finance companies at the end of November 1970⁴. Such legislation might also curb the current practice of some suppliers, of applying a minimum "handling" charge in respect of all orders, however small. Under this practice, an item priced at 75 cents could have a surcharge of \$5 placed on it⁵. In the light of selling and lending

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2. *The Australian* 3rd February, 1971; *Sydney Morning Herald* 6th February, 1971. The practice is widespread in New South Wales. See Report of N.S.W. Consumer Affairs Council (1969-70) 11-12, 30. The Council recommended legislation to control the practice.
 3. See Strachan "Inertia Selling" in (1970) 114 Sol.J. 660.
 4. *Sydney Morning Herald* 24th December, 1970.
 5. *Courier-Mail* 7th December, 1970.

techniques currently in vogue in Australia, it would appear that there is a need today for both truth-in-selling and truth-in-lending laws, applicable, if not generally, at least in selected areas of commerce.

IV

It seems appropriate to conclude this survey by examining briefly the way in which the consumer protection legislation in New South Wales, Victoria, and England has operated in the short time that it has been in force. As indicated earlier, the legislation is essentially penal in nature, imposing criminal sanctions rather than extending existing civil remedies. The local legislation however, unlike the United Kingdom Act, does have provision for the payment of compensation to a consumer who has suffered loss through the statute being infringed, and it is regrettable that the amendment to like effect was defeated at Westminster. If a choice has to be made between imposing penal sanctions or providing civil remedies, it must be admitted that, in the field of consumer protection, the former must prevail, for the fact is that if the enforcement of the law is left to the individual, most of the evils which the legislation is aimed at would go unchecked. The ordinary citizen has not the time, the energy, the funds or the incentive, to enter into litigation over shoddy or defective consumer goods, or malpractices in relation to customary household services. Prosecution at public expense after appropriate investigation by authorised inspectors⁶ is the only effective means of ensuring that the consumer protection legislation will be observed. The effectiveness of the United Kingdom Act can be gauged from the fact that in the first seven months of its operation, the number of prosecutions launched in that country for alleged infringements of the statute amounted to 435⁷; and it is generally conceded that since the passing of the Act there has been a remarkable rise in the quality of the merchandise offered for sale.

It is true that the United Kingdom Consumer Council in a report published in July 1970 entitled "Justice out of Reach—A case for Small Claims Courts" advocated the setting-up of a tribunal to deal with civil claims up to £100, on the basis that the hearings would be informal and legal representation of either party would be barred. The proposal was based on the conclusions drawn by the Council from a survey conducted by it, which indicated that clients with consumer problems or claims were either not welcomed by solicitors or, if welcomed, were discouraged from pursuing their claims in the ordinary courts on the ground that it was uneconomic to do so. Little help could be gained from the legal aid scheme in such a case as the contribution, if granted at all, was too small to be of any significance⁸.

This proposal for the establishment of a "people's court" is reminiscent of the Small Debts Court established in New South Wales under the Small Debts Recovery Act 1912-68, whereby jurisdiction is limited to \$300 and no professional costs are awarded, but the procedure is formal. It must be pointed out, however, that the existence of this jurisdiction in New South Wales has

6. The inspectors are under the control of local authorities in England and are officers of the appropriate Government Dept.—usually Dept. of Labour—in Australia. They have wide powers of entry, etc.

7. See (1970) 112 Sol. J. 510.

8. See (1970) 114 Sol. J. 625; (1970) 120 N.L.J. 765, 822, 824, 827, 842.

not prevented consumer exploitation, as the necessity to establish consumer protection bodies has shown.

The local consumer protection legislation has been criticised for creating a "toothless body", a "paper tiger" lacking any real powers of enforcement, but this criticism scarcely does justice to the New South Wales and Queensland statutes which compare favourably with their United Kingdom counterpart so far as penalties for false trade descriptions or advertisements are concerned. There is, however, some merit in the criticism so far as it concerns the lack of specific sanctions available to the consumer protection bodies in carrying out their functions of investigating complaints, and promoting the interests of consumers generally. In New South Wales for example, the Bureau can, as already pointed out, take proceedings to remedy statutory infringements, but these proceedings may only be taken by a person acting with the authority of the Minister⁹. In Queensland the Bureau can investigate complaints and take appropriate action, but any proceedings for contravening any provision of the Act must have the prior consent of the Minister (if brought by an inspector) or the Commissioner (if brought by the complainant)¹⁰. But beyond that, where it is merely a case of sharp practice, or an infringement of the Act cannot be clearly proved, it would seem that the main weapons of these bodies are publicity by naming recalcitrant suppliers in annual reports to Parliament, and the threat of recommending corrective action to the Minister unless the trader concerned mends his ways. If the supplier adopts a defiant attitude and dares the Bureau to do its worst, it would seem that it is powerless to take any really effective action.

The great value of the legislation is of course that it provides a means, which was previously lacking, whereby the consumer can direct his problems and complaints to the one source, in the knowledge that he will receive a sympathetic hearing. In the past, the consumer has, more often than not, been faced with the position that, even if he had any desire to do so, his complaint did not justify the taking of civil proceedings, and his only recourse was to approach the supplier for redress. While the vast majority of traders are prepared to deal reasonably with legitimate complaints, there is always a small segment of business which seeks to take advantage of the consumer by every means possible. Quite apart from this "fringe element", however, there is always room for misunderstandings between the honest supplier and his customer—a lazy or disinterested employee for instance, may fail to pass on a legitimate complaint to the manufacturers, and will then seek to fob off the customer with the excuse that the manufacturer will not co-operate. Or the consumer may have a myopic view of his rights, and make quite unacceptable demands on a supplier, a not uncommon occurrence as any reading of the "Crisis Line" or "Hot Line" column of the metropolitan dailies will testify.

What is needed is an indifferent person or agency to whom complaints can be channelled for investigation and assessment, and who can then act as mediator or arbitrator in the dispute. Tact, persuasion and negotiation are

9. S.56(1). Very few such prosecutions have been authorised. One was authorised recently against a car sales firm for an alleged breach of the Act relating to false and misleading advertising in connection with a "trade-in" offer. See *Sydney Morning Herald* 3rd February, 1971, 3.

10. S.48.

the watch-words of the Consumer Affairs Bureau, and this approach has been remarkably successful. In the first year of its operation the New South Wales Bureau handled over 2,800 complaints and in the vast majority of cases achieved satisfactory results, with the traders concerned either providing whole or partial redress, or else justifying the stand taken by them. Indeed, its experience has been that it received much more co-operation from the business community than it received from consumers in its inquiries. The experience in Victoria is similar, with only slightly fewer complaints being dealt with in the last twelve months¹¹.

A feature of the complaints has been their diversity, with no one particular commodity or service calling for special attention or remedial action on the part of the New South Wales Bureau. Of the eleven different categories into which the complaints were placed¹², the most important concerned building work (including renovations and wall cladding, and associated with the latter, the insidious practice of referral selling); domestic appliances (which involved, amongst other things, the so-called "free gift" selling, based on greatly inflated list-prices, whereby the cost of the "free" gift is included in the price paid by the consumer, unbeknown to him); motor vehicles, (especially the sale of second-hand cars, in which the main problems involved the use of misleading warranties, the deliberate concealment of faults, and misrepresentation of the age and mileage of vehicles, coupled with an all-embracing exclusion clause); the supply of services (particularly excessive charges for television and washing machine repairs); misleading advertising (especially concerning domestic appliances and motor vehicles, and the so-called "bait-and-switch" technique of selling); and finally, faulty clothing, furniture and floor-coverings (particularly carpets)¹³.

These six categories comprised nearly 70% of the total number of complaints received by the Bureau in New South Wales and it is clear that the Bureau, by its practice of inquiry, negotiation, the issue of warnings, and, as a last resort, the naming of recalcitrant traders in its annual report, has made notable progress in obtaining redress for legitimate complaints and in discouraging the continuance of objectionable business practices. At the same time, it is equally clear that ignorance, cupidity, and unwarranted optimism on the part of the consumer, have been contributing factors to the plight in which many complainants have found themselves. It is a sad fact of contemporary life that "you cannot legislate for fools" or for the avaricious, while the unscrupulous have only themselves to blame. The Bureau has done its best to protect the greedy and the unwary, but in the last resort it is a matter for education of the consumer. He must make a rational choice based on knowledge. He must be educated in how to make the best selection, how to avoid the numerous pitfalls in the market-place, and how best to finance his dealings. The various Consumers' Associations in Australia and elsewhere have for some time been concerned with educating their members in the task of selection of consumer goods, and this function has now been extended to the public in general with the recognition by the Consumer Affairs Bureau

11. In the first four weeks of its operation, the Queensland Consumer Affairs Bureau received 462 complaints. See *Sunday Mail* 7th February, 1971 5.

12. N.S.W. Consumer Affairs Council Report 1969-70 pp.22-23.

13. *Ibid.* 23-28.

of New South Wales and Victoria of the necessity for educating the ordinary consumer in all aspects of marketing. The issue of monthly information bulletins is now a well-established practice of the Consumers' Protection Council of Victoria, while the New South Wales Bureau has published a number of pamphlets on specific topics of immediate concern, such as "Buying a Used Car" and "Maintenance Contracts and Servicing". In addition, addresses have been given to organisations and schools, and material supplied for use by educational authorities in secondary schools and elsewhere¹⁴. This is a clear recognition that the only really effective method of protection for the consumer lies in research for, and the implementation of, a comprehensive programme of education for the public. This will take time, but its justification lies in the adage that prevention is better than cure.

V

One final word of explanation is due. In this survey, little more than half the provisions of the New South Wales Consumer Protection Act 1969 has been covered. No attempt has been made to deal with either Parts IV or V, which deal with safety in design and construction of goods, and the prohibition of collusive tendering and bidding respectively. The reason for omitting them is that they deal with the protection of the consumer in a more extended sense than envisaged in this paper. Put briefly, Part IV substantially re-enacts previous legislation prescribing certain standards of safety, but adds freezers to the list of items whose doors must be capable of easy opening from inside; while Part V follows the lead set by Victoria with its Collusive Practices Act 1965, and prohibits collusive tendering and collusive bidding¹⁵. A Commissioner for Trade Practices (who as already mentioned, is at present also the Commissioner for Consumer Affairs) administers the provisions of Part V.

Amendments to the Act at the end of last year made considerable changes to Part V. These amendments included the restriction of the definition of "tender" to a written offer made in response to an invitation published in a newspaper or similar document, and the addition of a stipulation that any person accused of a collusive practice, should have an opportunity to justify or explain his position before proceedings were taken¹⁶. A further stipulation followed Commonwealth legislation in providing that considerations of public interest must be taken into account. The term "public interest" was given statutory definition, the basis of which was the preservation and encouragement of competition, weighed against certain other factors including, (and this is not the first Parliamentary recognition of a very useful word), the need to achieve full use of industrial "know-how"¹⁷.

14. *Ibid.* 31-32.

15. Prior to 1965 Western Australia had enacted legislation dealing explicitly with collusive tendering—see Trade Associations Registration Act 1959—while New South Wales, Victoria and Tasmania had statutes controlling collusive bidding at auctions of cattle, farm produce and land. See s.45 Auctioneers, etc. Act 1941-65 (N.S.W.); s.34 Auction Sales Act 1958 (Vic.); ss.96-8 Land Act 1958 (Vic.); ss.34-5 Crown Land Act 1935-59 (Tas). The Victorian Collusive Practices Act 1965 was modelled on Part IX of the Commonwealth Trade Practices Act 1965-67, then in Bill form. For differences between the two Acts, see Baxt "The Victorian Collusive Practices Act" in (1965) 6 *Austr. Lawyer* 142.

16. A similar procedure of consultation has been adopted in relation to packaging and labelling of goods and advertising by s.19 Consumer Information Act 1969 (N.Z.).

17. *Cf.* s.50 Trade Practices Act 1965-67 (Cwlth.).