

COMPARATIVE FALSE ADVERTISING LEGISLATION: A BEGINNING

"Come, it's pleased so far," thought Alice, and she went on. "Would you tell me, please, which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

"I don't much care where—" said Alice.

"Then it doesn't matter which way you go," said the Cat.

"—so long as I get *somewhere*," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if you only walk long enough."

—Lewis Carroll: *Alice's Adventures in Wonderland*.

During the past few years, the consumer movement has grown with startling alacrity in North America. In that time, considerable attention has focused, in the area of social policy, on the problems of automobile safety, drug prices, adulterated foods and our increasingly polluted environment and, in the area of legal policy, on the issue of consumer credit. Proportionately, little time has been spent on the subject of advertising although North American billings exceed \$20 billion annually. Some of the rising concern is being directed at advertising aimed at children, but untrue, deceptive, and misleading advertising is only beginning to have its day. Admittedly, the American Federal Trade Commission Act¹ has existed since 1914, but only three of the thirty American states with civil false advertising statutes on their books enacted these prior to 1965. Furthermore, the English Trade Descriptions Act² and s.33D of the Canadian Combines Investigation Act³ date from 1968 and 1969 respectively.

It follows that much of the legislation in the United States, Great Britain and Canada still manifests growing pains and that a jurisdiction such as Australia will not have a *full* measure of experience on which to draw in the drafting of new legislation. There remains, nonetheless, a significant *corpus* of information which this article will attempt to convey before arriving at certain conclusions about the utility of the various approaches.

One point should, however, be noted in this brief introduction for it will weave its way through the tapestry which follows and is the thread upon

* Of the Faculty of Law of McGill University and of the Bar of the Province of Quebec.

1. 38 Stat. 717 (1914), 15 U.S.C. 41, 52 Stat. 111 (1938).

2. 1968, c.29.

3. R.S.C. 1952, c.314, as amended by 17-18 Eliz. 2, S.C. 1968-69, c.38, sec. 116.

which, in the opinion of the writer, much of the tale of consumer protection must be appliqué. False advertising is but one of a number of deceptive practices which have as their aim the separation of the consumer and his money. A broad definition of "advertising" or "false advertising" may undoubtedly cover many of these practices (if one is to employ such a definition at all) but some may escape the purview of even the widest stroke. It would seem, therefore, that the more useful legislative exercise would be that which is directed at the suppression of many, if not all, of these tactics and practices. Although the major thrust of this article will be in the area of false advertising, it should be remembered that the other practices are not far from the writer's mind⁴.

The article will review the legislation of the United States, Great Britain and Canada. The United States and Canada, like Australia, are federal jurisdictions and their approaches are interesting to the Australian reader for that reason alone but, curiously, the Americans have opted for the civil mechanism of attacking these practices while the Canadians have chosen a criminal approach. Although the American federal government has been active in the area for over half a century, the states have only the experience of a decade at most and in Canada the provinces have not acted at all although they clearly have some jurisdiction to do so. Great Britain, which does not have the federal problem, has decentralized the administration of its Trade Descriptions Act. They have also elected to regulate false advertising by the use of the criminal law.

I. The United States

(A) AMERICAN STATE LEGISLATION

Although the United States is a federally-structured country, its constitution differs from those of Australia and Canada and the right of the American states to regulate an activity like advertising relates not to the matter of such legislation but rather to the extent to which the effect of the activity is confined to the boundaries of the state in which the legislation is passed. Notwithstanding this constitutional difference, there is a great deal to be learned from an examination of the legislation of the various American states for they have had experience with both criminal and civil false advertising statutes and generally may be said to offer, through their great diversity, a considerable experience upon which to draw lessons for future legislation. In this connection, it has been observed that:

While federal regulation is marked by relatively few statutes and a considerable body of case material, the states have adopted a staggering number of statutes noteworthy for their *ad hoc* and piecemeal approach to the problems of advertising control and for the very slight degree to which they are enforced⁵.

4. See, e.g., R. Cohen, "Misleading Advertising and the Combines Investigation Act" (1969), 15 McGill L.J. 622, at 626-627; F. H. R. Rowell, "An Examination of Deceptive and Unethical Selling Practices in Canada", unpublished typescript, Canadian Consumer Council (Ottawa, 1970), 6-18; and R. Cohen, "The Regulation of Misleading Advertising in Canada: A Comparative Approach", unpublished typescript, Canadian Consumer Council (Ottawa, 1970), 10-17.

5. Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1057.

The most common regulatory provision is the *Printer's Ink* model statute which was drafted in 1911 for the well-known trade magazine and which has subsequently been adopted by all but two of the American states⁶.

Although the terms of the statute (as it was finally passed by each of the states) vary slightly, the following is the text of the model statute itself, without the amendments which were added in 1945 but which have not to any extent found their way into the already existing legislation:

Any person, firm, corporation or association who, with intent to sell, or in any wise dispose of, merchandise, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale, distribution, or with intent to increase the consumption of or to induce the public in any manner to enter into any obligation thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, or other publication, or in the form of a book, notice, circular, pamphlet, letter, handbill, poster, bill, or in any other way an advertisement, of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive, or misleading, shall be guilty of a misdemeanour⁷.

There is near unanimous agreement that the act has had little effect since "most local prosecutors . . . have never attempted to enforce these statutes"⁸. A series of interviews conducted in Pennsylvania, for example, revealed that "three assistant district attorneys interviewed in one Pennsylvania county asserted that they could recall only one instance when a fraud case had been prosecuted in their county"⁹. A broader survey of state attorneys general and county prosecuting attorneys across the United States "showed clearly that most jurisdictions have never used the statutes at all, and that only a few have initiated more than a handful of prosecutions"¹⁰.

Many reasons have been proffered for the lack of effectiveness of the statutes, some of which relate to problems inherent in any criminal law legislation¹¹.

6. Those states are Delaware and New Mexico. The most recent statute of this type was passed in Arkansas in 1967 (see Ark. Stat. Ann. sec. 41-1961 through 41-1964).

7. The text with the 1945 amendments included may be found in Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1058, n.245.

8. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1122. This view was substantiated for the writer by Assistant Attorney General John W. Keogh of Arizona, who stated in his letter of September 3, 1970: "I have been unable to find any record of an appeal of a case under it [the Arizona statute], which could mean that no case was ever brought, or that no prosecuting attorney ever won a case for a merchant to appeal. This 'non-record' of enforcement of criminal statutes on consumer frauds is typical of the situation throughout the United States . . ."

9. Note, "Translating Sympathy for Deceived Consumers into Effective Programs for Protection" (1966), 114 U. Pa. L. Rev. 395, at 429, n.260.

10. Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1063.

11. The reader should, however, note that, because of differences in procedure, some of the drawbacks indicated do not apply to the Canadian Combines Investigation Act or to the English Trade Descriptions Act.

Several factors account for the prevailing lack of enforcement. Few consumers are sufficiently outraged by false advertising to file a criminal complaint and testify at a trial, especially since the prosecution will not get their money back. A county prosecutor, perhaps influenced by the political drawbacks inherent in prosecuting local businessmen for what may seem no worse than an excess of competitive enthusiasm, usually concludes that his inadequately sized staff would be more profitably utilized in combating more serious crimes than false advertising. If he does prosecute, the offence must of course be proved beyond a reasonable doubt, and this task has been made more difficult in those states that have amended the original *Printer's Ink* statute to require proof of negligence or *scienter*. Finally, the model law's wording has unnecessarily limited its substantive coverage, and any criminal law will be subject to the principle that penal statutes should be strictly construed¹².

Senator Magnuson has observed that:

Many attorneys general and county prosecutors freely admitted that they had never tried to enforce it. One reason is that local prosecutors are burdened with trying to halt major felonies such as murder, rape and robbery, and are disinclined to waste their time on such a relatively small 'crime' as false advertising or selling. Another reason is that few prosecutors believe they will get a conviction. They have found that juries are hesitant to find a man guilty of a crime for what may merely be 'overzealous salesmanship'; consequently, few public officials prosecute¹³.

The major reason for the original proposal of the statute by *Printer's Ink* was the inadequacy of the common law remedies as a restraint of "the excesses of advertising in an age of mass consumption"¹⁴. Requirements of privity and reliance in the action for breach of warranty and of proof of *scienter* and reliance in the action of deceit made these remedies too unwieldy, but the major difficulty resulted from the necessity of individual prosecution where, as was previously pointed out, there was not even a chance to obtain the return of one's money. The inclusion of the state as an enforcing authority for the control of advertising, via the criminal law, appeared to supply the answer. Unfortunately, as the excellent Columbia Law Review Note¹⁵ points out, "some state legislatures lost sight of this underlying purpose"¹⁶. Thus, eleven states require that the advertiser know or be reasonably expected to know the falsity of his statements¹⁷. The necessity of proving *scienter*,

12. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1123.

13. Senator Warren G. Magnuson and Jean Carper, *The Dark Side of the Marketplace* (Prentice-Hall: Englewood Cliffs, 1968), 29-30.

14. Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1060. See also at 1019 and the works cited at n.3.

15. (1956), 56 Colum. L. Rev. 1018.

16. *Ibid.*, at 1060.

17. Those states are California, Florida, Maryland, Massachusetts, New Hampshire, Pennsylvania, South Dakota, Tennessee, Texas, Utah and Vermont. Four states, namely, Arizona, Maine, North Carolina and South Carolina, have further reduced the effectiveness of the statute by requiring an "intent to deceive".

which made the common law action of deceit so cumbersome, creates significant evidentiary problems for the prosecution and must be assumed to discourage authorities from pursuing offenders because of the difficulty of making out a case. It has the ancillary disadvantage of increasing the cost of making proof and obtaining a conviction which further reduces the probability of the statute being regularly used as an enforcement tool¹⁸.

The ineffectiveness of the criminal legislation and the existence of a plethora of unrelated statutes dealing with the regulation of advertising as it applies to specific products and services¹⁹ necessitated steps of a different kind. In 1956 it was suggested that:

much could be accomplished by substituting, for the criminal sanctions of the *Printer's Ink* and other applicable statutes, appropriate administrative machinery, on a state-wide level, which could order the cessation of objectionable practices along the lines set by the F.T.C. This would obviate the practical difficulties and moral questionability of demanding that law enforcement agencies brand as criminal persons who may have acted in good faith or simply have been carried away by their commercial enthusiasm. The public's need for protection from advertising abuses does not necessarily demand that the advertiser be equated with the thief or swindler²⁰.

It did not in fact turn out that the states established administrative machinery along the lines of the Federal Trade Commission, although, as we shall see below, a number of them did enact statutes quite similar in scope to the Federal Trade Commission Act²¹. Some of the states have established consumer protection bureaux but these are generally for the purpose of co-ordinating the receipt of complaints and the education of consumers. The administration of false advertising, deceptive practices and consumer protection statutes is almost invariably left to the office of the attorney general although most states have an assistant or deputy attorney general responsible for the enforcement of such legislation.

Of the thirty states which have passed laws regulating advertising on a civil as opposed to a criminal basis, only three²² did so prior to 1965. Much of this legislation has been drafted in concert with the Council of State Governments of the Committee on Suggested State Legislation and the Division of Legislation and Federal-State Co-operation of the Federal Trade Commission. Observations on these various statutes will be somewhat easier for that reason. In 1966, the Federal Trade Commission recommended to the Council of State Governments that all states pass a "little F.T.C. Act" modelled upon the 1961 law of the State of Washington²³ and the 1965 law

18. Note, though, that Michigan has stepped up its criminal prosecutions in the area of deceptive practices within the past two years. Letter from William L. Cahalan, prosecuting Attorney, Wayne County, Michigan, to Gale Gotschall, Counsel for Federal-State Co-operation, Federal Trade Commission, July 30, 1970.

19. See the list of these statutes (as they stood in 1956) which is compiled at (1956), 56 Colum. L. Rev. 1018, at 1099-1111.

20. *Ibid.*, at 1077.

21. 38 Stat. 717 (1914), 15 U.S.C. 41, 52 Stat. 111 (1938).

22. Namely, California, New Jersey and Washington.

23. The Unfair Business Practices and Consumer Protection Act, R.C.W. s.19.86.

of the State of Hawaii²⁴. The so-called "little F.T.C. Act" is now law in a total of nine states²⁵ and has been contemplated by the states of Virginia²⁶ and Tennessee²⁷. Generally, these acts are patterned upon section 5 of the Federal Trade Commission Act and include one of two alternative forms of wording:

Alternative Form No. 1:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 2:

False, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful²⁸.

These acts are not entirely uniform but may broadly be characterized by their reliance on one or other of the general forms of prohibition, coupled with a section providing for the importation of the accumulated case law which has resulted from 57 years of experience with s.5 of the Federal Trade Commission Act. The wording of this section varies slightly from state to state but the Unfair Trade Practices Act of Maine provides a typical example:

1. *Intent*. It is the intent of the Legislature that in construing this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to s.5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.
2. *Rules and regulations*. The Attorney General may make rules and regulations interpreting this section. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (the Federal Trade Commission Act) as from time to time amended²⁹.

Another not uncommon approach to the definition of unlawful practices may be found in the Kansas Buyer Protection Act which, while remaining general in the sense that it does not delineate or enumerate deceptive practices, nonetheless is more detailed than the "little F.T.C. Act". That clause, which has been adopted by a total of eight states³⁰ reads as follows:

The act, use or employment by any person of any deception, fraud, false pretence, false promise, misrepresentation, or the concealment,

24. Hawaii R.S., c.480.

25. Those states are Hawaii, Maine, Massachusetts, New Mexico, North Carolina, Rhode Island, Texas, Vermont and Washington.

26. The "little F.T.C. Act" was introduced at the 1970 General Assembly but failed to come out of House Committee.

27. The passage of a "little F.T.C. Act" was unanimously recommended by the Governor's Advisory Commission on Consumer Protection in its report, *Consumer Protection in Tennessee 1970*, at 26.

28. Of the nine states which have "little F.T.C. Acts", only Texas has chosen alternative form number 2. All the others use alternative form number 1.

29. Maine R.S., Title 5, c.10, s.207.

30. Those states are Arizona, Delaware, Illinois, Iowa, Kansas, Maryland, Missouri and New Jersey.

suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice: *Provided, however*, That nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser: *Provided further*, That nothing herein contained shall apply to any advertisement which is subject to and complies with the rules and regulations of, and the statutes administered by the federal trade commission³¹.

It is worthy of note that no statute containing this type of clause has been passed by an American state since 1968, and it is doubtful, in the opinion of the writer, that such prohibitory provisions will proliferate in the future for, while the greater spelling out of unlawful practices may be less attractive to some, this type of clause has certain distinct disadvantages. In the first place, it has "starting up" difficulties since there is not an established case law which can be used for purposes of court interpretation. If such a clause contained an enumerated list of offences, the intent of the legislature might sufficiently substitute for the established jurisprudence but, in the absence of either, such a provision necessarily requires a developmental period which may be more or less extended according to the inclination of the courts called upon to adjudicate on matters arising under the statute. In the second place, the clause contains the words "*with intent* that others rely upon such concealment, suppression or omission"³² and proof must, in consequence, be adduced in this respect in addition to that which must be made in connection with the alleged offence itself.

The third type of declaratory provision is the most common and is that presently in force in fourteen of the states³³. It involves a listing of specific practices which are declared to be unlawful. It is accordingly somewhat narrower in scope than the two alternative forms used in the "little F.T.C. Act". In the draft which appears in *Suggested State Legislation for 1970*, there are twelve specific types of deceptive practices and one general catch-all section enumerated. The first twelve appear in the Uniform Deceptive Trade Practices Act which was promulgated by the National Conference of Commissioners on Uniform Laws in 1964 and the final one was first incorporated in *Suggested State Legislation for 1969*. The suggested text is as follows:

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

31. The example given is s.2 of the Kansas Buyer Protection Act.

32. Emphasis added.

33. Those states are Colorado, Connecticut, Delaware, Florida, Illinois, Nebraska, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Virginia and Wisconsin.

- (1) passing off goods or services as those of another;
- (2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causing likelihood of confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) using deceptive representations or designations of geographic origin in connection with goods or services;
- (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;
- (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) disparaging the goods, services, or business of another by false or misleading representation of fact;
- (9) advertising goods or services with intent not to sell them as advertised;
- (10) advertising goods or services with intent not to supply reasonably expectable public demand unless the advertisement discloses a limitation of quantity;
- (11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reduction;
- (12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or
- (13) engaging in any act or practice which is unfair or deceptive to the consumer.

Leaving aside the legislation of the states of Illinois, Oregon, Virginia and Wisconsin since these statutes are basically *sui generis*, let us briefly examine the statutes of those other ten states which are modelled on the Uniform Deceptive Trade Practices Act.

Only the New Mexico Unfair Practices Act is identical to the suggested legislation quoted at length above. Clause 13 is, for example, missing from the statutes of Colorado, Delaware, Florida, Nebraska, Rhode Island, Texas, Pennsylvania, Connecticut and New Hampshire. The Colorado, Florida, New Hampshire and Pennsylvania acts omit clause 12. The Connecticut act omits clauses 9 and 10 which basically apply to bait and switch tactics.

Equally of interest are the clauses which are inserted in the various acts and which have not been recommended by the Council of State Governments. As its equivalent of the thirteenth clause, for example, Rhode Island labels as a deceptive practice "using any other methods, acts or practices which mislead or deceive members of the public in a material respect". The Texas act,

in two unusual provisions, prohibits "advertising of a liquidation sale, auction sale or other sale fraudulently representing that the person is going out of business"³⁴ and establishes at some length the information which must be supplied and the rules which must be followed "in connection with the sale of, or offer to sell, goods, merchandise or anything of value, any contest, sweepstakes, puzzle or game of chance by which a person may, as determined by drawing, guessing, matching or chance, receive gifts, prizes, discounts, coupons, certificates or gratuities"³⁵. The Pennsylvania act prohibits referral sales tactics³⁶ as does the Colorado act³⁷. The latter act also declares unlawful "bait and switch" advertising, which in the words of the legislation, "consists of an attractive but insincere offer to sell a product or service which the seller in truth does not intend or desire to sell" and of which it gives a half a dozen examples³⁸. By way of a final additional comment on these state statutes, it should be noted that the effectiveness of the Colorado law has been greatly reduced by the presence throughout the enumeration of the deceptive practices of the requirement of knowledge on the part of the offender. The case of the Florida Unfair Trade Practices and Consumer Protection Act is similar for it eliminates the words "likelihood of" in clauses 2 and 3 of the uniform act and includes, by way of introduction to the definition of "deceptive trade practices", the following:

A person engages in a deceptive trade practice when in the course of his business, vocation or occupation he knows, or in the exercise of due care should know, that he has in the past, or is now engaging in any deceptive trade practice declared to be unlawful under this act³⁹.

It might be observed of the other four states to whose legislation reference was made above that their laws do not take any particular pre-designed form and appear rather to be attempting to regulate those practices which may be endemic to their own areas. Thus, for example, the Wisconsin law states that it is a deceptive practice to sell or furnish any property or services conditioned on the purchase of any other property or services without stating the price which must be paid for the property or services included in the sale together with any other requirements upon which the receipt of the property or services is conditioned⁴⁰. It also outlaws the "stuffed flat" tactic by prohibiting anyone in the business of buying or selling movable or personal property from indicating in any manner that he is a private party or householder not engaged in such business⁴¹. The portion of the Trade and Commerce Code of Virginia which deals with misrepresentation and other offences connected with sales contains provisions relating to bait and switch tactics, the failure to indicate that goods are "seconds", the advertising of a former or comparative price of merchandise, the use of the words "wholesale" or "wholesaler" and the advertis-

34. Art 10.01(b) (13) of the Consumer Credit Code.

35. *Ibid.*, art. 10.01(b) (14).

36. S.2(4) (xii).

37. S.2(1) (1).

38. S.2(1) (0).

39. S.817.77(4).

40. S.100.18(2).

41. S.100.18(3).

ing of new or used automobiles or trucks⁴². Finally, the Illinois Consumer Fraud Act, which had been described in 1968 as the most advanced legislation passed thereto⁴³, regulates chain referral sales, direct sales at the consumer's residence and various other consumer issues not very closely connected with advertising as such.

All discussion of the substantive provisions of the various state statutes would be entirely academic without a review of the remedies which are provided to the enforcement authorities to control abuses. Sections 5 and 6 of the model statute provide that the state attorney general may restrain by temporary or permanent injunction the use of any method, act or practice declared by the statute to be unlawful and also give to the court the right to "make such additional orders or judgments as may be necessary to restore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful". In addition to the injunction, the state of Arizona provides a \$10,000 fine and/or imprisonment of six months in the event of willful or intentional violation of the Act⁴⁴ while California provides a fine of \$2,500 per violation⁴⁵, Hawaii a penalty ranging from \$500 to \$2,500 per violation⁴⁶, New Hampshire a fine of up to \$1,000 per violation⁴⁷, New Mexico a fine of up to \$5,000 per violation⁴⁸, Washington a fine of up to \$2,000 per violation⁴⁹ and Maryland a fine of up to \$1,000 per violation and/or imprisonment for one year⁵⁰. The states of New Jersey and Vermont also envision the dissolution of the corporate charter of a company or the revocation of a licence to do business of a foreign company in the state⁵¹.

Most significant of all, though, is the addition of the treble damage section to the Hawaii and Washington statutes⁵² and that of the class action to the Massachusetts statute⁵³. In those respects, these three states are even in advance of the American federal government since bills providing such remedies have not yet been enacted by Washington⁵⁴. The treble damage

42. See s.59.1-42 *et seq.* Although the act is essentially criminal in nature, it does envision the possibility of injunctive relief in s.59.1-50(b).

43. William B. Saxbe, "The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General" (1968), 29 Ohio St. L.J. 897, at 912.

44. S.44-1531.

45. S.17536 Bus. and Prof. Code.

46. S.205A-1.3 of the 1955 Hawaii Revised Statutes. The writer does not have the reference to the corresponding section in c.480 of the new Revised Statutes.

47. S.358-A:6(I).

48. S.9.

49. S.19.86.140.

50. Art. 83, s.22(b).

51. S.8 of the New Jersey statute and s.2458 of the Vermont statute.

52. S.480-13 of the new Hawaii Revised Statutes and s.19.86.090 of the Washington statute.

53. S.9(2).

54. See for example, the following bills introduced in the first session of the 91st Congress. S.3092, a bill to amend the Federal Trade Commission Act to extend protection against fraudulent or deceptive practices, condemned by that act, to consumers through civil actions, and to provide for class actions for acts in defraud of consumers. The bill was introduced by Senator Tydings on October 29 1969, read

provision is extremely important, particularly where, as in the case of Hawaii, it is the treble damage or \$1,000, *whichever is the greater*, which is awarded. This means that a consumer may find it worthwhile to take an action where he might not otherwise have done so because of the miniscule value in dollars and cents of the damages which he may have suffered. The class action of course has the same effect in that a group of consumers may band together to take a single action in which they claim in one lump sum the damage which they all have suffered as a result of a particular representation.

Far more severe penalties are provided in the case of violation of a court order or injunction issued under one of the acts. These range from the \$100 minimum fine provided by the recent amendments to the Wisconsin act⁵⁵ to the \$25,000 provided by the Washington legislation⁵⁶, with the most common penalty being a fine of up to \$10,000 per violation⁵⁷. The New Hampshire, Pennsylvania and Rhode Island laws also provide for the loss of the corporate charter under certain circumstances⁵⁸.

A direct action is granted to the consumer by the statutes of Colorado, Connecticut, Hawaii, Massachusetts, Nebraska, New Hampshire, New Mexico, North Carolina, Vermont and Washington. The terms of these remedies and the type of relief available differ but it is generally provided that the consumer may be compensated for the damages which he may have suffered with or without injunctive relief, as the case may be.

Not unlike the Federal Trade Commission itself, most of the state consumer protection laws provide that the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be in violation of the law from any person who had engaged or was about to engage in any such method, act or practice. Such an assurance is generally required to be in writing and filed with the trial court of general jurisdiction of the county or judicial district in which the alleged offender resides. The assurance of voluntary compliance is not generally considered to

twice and referred to the Committee on Commerce. S.3201, a bill to amend the Federal Trade Commission Act to provide increased protection for consumers, and for other purposes. The bill was introduced by Senator Magnuson on December 3, 1969, read twice and referred to the Committee in Commerce, which reported it favourably with amendments, August 28, 1970. It has since been referred to the Judiciary Committee from which it was to have been reported by September 14, 1970. S.3338, a bill to amend s.5 of the Federal Trade Commission Act by providing for suits for damages by parties injured by reason of violation of s.5 and for class action for such damages, and for other purposes. The bill was introduced by Senator Hart on January 26, 1970, read twice and referred to the Committee on Commerce. Although there is no indication when, if ever, these bills will come out of Committee. *The Wall Street Journal*, July 1, 1970, p.16, col. 2-3, suggested that progress was being made in Committee.

New legislation has been introduced in the 92nd Congress, but none has yet been enacted. See the Consumer Legislative Monthly Report of March 3, 1971, issued by the Office of Consumer Affairs, Executive Office of the President.

55. S.100.26(6).

56. S.19.86.140.

57. The \$10,000 penalty exists in the statutes of Arizona, Colorado, Kansas, Maine, Massachusetts, New Hampshire, Rhode Island, Texas, Vermont and Wisconsin. Hawaii provides for a fine ranging from \$500 to \$2,500, Michigan a fine of \$1,000, Missouri a fine of \$5,000 and Pennsylvania a fine of \$5,000.

58. Ss. 358-A.9, 9 and 6-13.1-9, respectively.

be an admission of a violation for any purpose although there is often provision in the section dealing with the applicable fine in the case of violation of an injunction for a fine, often in an equal amount, for violation of an assurance of voluntary compliance. It is also often provided that matters closed following receipt of such an assurance may be at any time reopened by the attorney general for further proceedings when these are in the public interest.

Generally, there also exist provisions for civil investigative demands by the attorney general when it is thought that a person has engaged in, is engaging in or is about to engage in any act or practice declared to be unlawful by the act. The demand, which is made in writing and served upon any person alleged to have relevant information, documentary material or physical evidence, is essentially a subpoena and the refusal to obey it may result in significant fines and/or the vacation, annulment or suspension of the corporate charter of a company created by the laws of that state or the revocation or suspension of the licence to do business of a foreign corporation in the state.

(B) AMERICAN FEDERAL LEGISLATION

The mechanism for the control of false advertising at the federal level in the United States is interwoven through a number of governmental agencies, including the Federal Trade Commission, the Food and Drug Administration, the Securities and Exchange Commission, the Post Office Department, the Federal Communications Commission and the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Of all of these agencies, none is more important than the Federal Trade Commission, for none has authority beyond its own limited subject matter except the Federal Trade Commission, which has jurisdiction over false advertising in all its aspects⁵⁹.

The agency was, at its inception in 1914, designed primarily to deal with antitrust problems⁶⁰. The Federal Trade Commission Act⁶¹, together with the Clayton Act⁶², was the culmination of several years of public and Congressional debate and represented compromise positions among provisions in a series of proposed bills. "As a result, it is not possible to attribute to Congress a perfectly clear or fully consistent set of purposes which the agency was to implement"⁶³. Although it has always dealt with false advertising and "has, almost from the beginning, divided its functions into two principal areas: the regulation of restraints of trade, and the regulation of false

59. See George J. Alexander "Federal Regulation of False Advertising" (1969), 17 *Kans. L. Rev.* 573; Note, "The Regulation of Advertising" (1956), 56 *Colum. L. Rev.* 1018, at 1021; and Note, "Developments in the Law: Deceptive Advertising" (1967), 80 *Harv. L. Rev.* 1005, at 1019.

60. Edward F. Cox, Robert C. Fellmeth, and John E. Schultz, *The Nader Report on the Federal Trade Commission* (Richard W. Baron: New York, 1969), 215 (hereinafter referred to as the *Nader Report*). See also Commissioner Elman's remarks of December 17, 1969, before the Consumer Subcommittee of the Senate Commerce Committee, Hearings, U.S. G.P.O., Washington, 1970, 59.

61. 38 Stat. 717 (1914), 15 U.S.C. 41, 52 Stat. 111 (1938).

62. 38 Stat. 730 (1914), 15 U.S.C. 12, 49 Stat. 1526 (1936), 64 Stat. 1125 (1950).

63. *Report of the A.B.A. Commission to Study the Federal Trade Commission*, 1969, 5 (hereinafter referred to as the *A.B.A. Report*).

advertising"⁶⁴, it would appear that "its jurisdiction over advertising was not the product of an explicit grant of power"⁶⁵.

In addition to the acts already referred to, the Commission exercises enforcement or administrative responsibilities under the Export Trade Act⁶⁶, the Packers and Stock Yards Act, 1921⁶⁷, the Wool Products Labelling Act of 1939⁶⁸, the Trade-Mark Act of 1946⁶⁹, the Fur Products Labelling Act⁷⁰, the Flammable Fabrics Act⁷¹, the Textile Fiber Products Identification Act⁷², the Fair Packaging and Labeling Act⁷³, and other public laws. By far the most important of its responsibilities is that connected with the enforcement of s.5 of the Federal Trade Commission Act, which reads in pertinent part:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

Early complaints to the Commission emphasized not only falsity, but also the monopolistic tendencies of advertisements. The first case which rested solely on the issue of false advertising was decided in 1911⁷⁴. That decision of the Seventh Circuit affirmed the power of the Commission to control deceptive advertising and this jurisdiction was first upheld by the Supreme Court only three years later in the case of *F.T.C. v. Winsted Hosiery Co.*⁷⁵ All was not smooth going, though, for the Supreme Court significantly restrained the power of the F.T.C. over advertising in three other early cases. In *F.T.C. v. Gratz*⁷⁶ the Court upheld the right of the courts to review a decision of the Commission that a given practice amounted to an "unfair method of competition". In that same case, the Court limited the applicability of the Act to practices which had been illegal at common law prior to the passage of the Act in 1914⁷⁷. The court went further in 1929 by requiring that the harmful effects of the public interest caused by an unfair method of competition be "specific and substantial"⁷⁸. The most significant setback to the regulatory power of the Commission, though, occurred in the 1931 decision in *F.T.C. v. Radadam Co.*⁷⁹ when the Supreme Court required proof of injury to the competitor even in the face of a conceded deception of the public.

64. Alexander, *loc. cit.*, at 573.

65. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1019.

66. 40 Stat. 516 (1918), 15 U.S.C. 61.

67. 7 U.S.C. 181.

68. 54 Stat. 1128 (1940), 15 U.S.C. 68.

69. 60 Stat. 433 (1946), 15 U.S.C. 1051, 76 Stat. 771 (1962).

70. 65 Stat. 175 (1951), 15 U.S.C. 69.

71. 67 Stat. 111 (1953), 15 U.S.C. 1191, 68 Stat. 770 (1954).

72. 72 Stat. 1717 (1958), 15 U.S.C. 70, 79 Stat. 124 (1965).

73. 80 Stat. 1296 (1966), 15 U.S.C. 1451 (Supp. III, 1965-1967).

74. *Sears, Roebuck & Co. v. F.T.C.* (1919), 258 Fed. 307 (7th Circ.).

75. (1922), 258 U.S. 483.

76. (1920), 253 U.S. 421.

77. Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1021, and Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1020.

78. *F.T.C. v. Klesner* (1929), 280 U.S. 19.

79. (1931), 283 U.S. 643.

The obstacle resulting from the *Raladam* decision was finally removed by the Wheeler-Lea Act of 1938⁸⁰ which added to the Federal Trade Commission Act the words "unfair or deceptive acts or practices", thus placing "the consumer's interest in protection against deception on a par with the interest of competitors in fair trade practices and [making] possible more vigorous F.T.C. action against a wide range of deceptive practices"⁸¹. The same amending statute added to the jurisdiction of the F.T.C. the right to prohibit false advertising in connection with "the purchase of food, drugs, devices, or cosmetics"⁸².

The 1938 amendment provided, by adding to the Commission's ordinary cease-and-desist power⁸³, that, where "the use of the commodity advertised may be injurious to health . . ." or where the "violation is with intent to defraud or mislead . . .", criminal sanctions could be invoked against the offender⁸⁴.

Whichever statutory provision is relied upon, it remains necessary that the criteria of interstate commerce and public interest be found before the Commission may be said to have jurisdiction. That jurisdiction is ultimately based upon the constitutional right of Congress to regulate interstate commerce and is limited by s.5 to "unfair or deceptive acts or practices *in commerce*". The Supreme Court held in 1941 that these words are not as broad in effect as the term "affecting commerce" which is to be found in the Interstate Commerce Act. In that decision, *F.T.C. v. Bunte Brothers*⁸⁵, Mr Justice Douglas, in a persuasive dissent, thought the evidence of legislative purpose unclear and the need for a uniform regulatory policy sufficiently compelling to call for a liberal construction of the jurisdictional provision. Although the Commission has not directly challenged the continuing validity of the *Bunte* doctrine, it has asserted jurisdiction over intrastate acts that are part of a broader programme of interstate activity, and the courts have sustained this exercise of federal authority⁸⁶.

Since s.12 declares that "it shall be unlawful for any person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement . . . in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics . . ." jurisdiction may be obtained on the basis of interstate advertising alone without interstate sales. It is at best unclear whether interstate advertising alone in the case of goods other than food, drugs, devices or cosmetics may form the basis for jurisdiction, particularly where all other activities are wholly intrastate. In *S. Klein Dep't. Stores, Inc.*⁸⁷ the Commission took the view that interstate advertising alone was a sufficient ground in

80. 52 Stat. 111 (1938).

81. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1021.

82. 15 U.S.C. 52 (1964).

83. Federal Trade Commission Act, s.13.

84. *Ibid.*, s.14.

85. (1941), 312 U.S. 349.

86. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1022.

87. (1960), 57 F.T.C. 1543.

issuing an interlocutory order and the hearing examiner upheld the complaint against the jurisdictional challenge although he dismissed the complaint on other grounds⁸⁸. The Commission has not since asserted this position.

As far as the public interest requirement is concerned, s.5(b) of the Federal Trade Commission Act authorizes the Commission to proceed "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public"⁸⁹. The earliest cases "took the position that a public interest had to be convincingly demonstrated in each action"⁹⁰.

In *F.T.C. v. Klesner*⁹¹, Mr. Justice Brandeis dealt with this issue.

In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it⁹².

Gradually over time that approach has changed and the courts have tended not to disturb Commission findings of public interest⁹³. It has thus generally been found that the determination whether there is a public interest is within the special competence of the Commission.

Indeed, recent cases indicate that the courts have acquiesced in the Commission's determinations on these matters to the point that virtually all false and misleading representations are defined as contrary to the public interest. Thus, findings of sufficient public interest have been sustained where consumers were deceived by misrepresentations of the origin of goods, where practices prejudicing a single competitor might lead toward monopoly, and where unfair practices directed toward a competitor tended to confuse the public. It would seem in view of these cases that the requirement of public interest imposes no substantial limitation on the Commission's jurisdiction⁹⁴.

88. (1962), 60 F.T.C. 388, esp. at 393-394. See also the views expressed in Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1023 and Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1023.

89. 15 U.S.C. 45(b).

90. Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1024.

91. (1929), 280 U.S. 19.

92. *Ibid.*, at 28.

93. See, e.g., *Moretrench Corp. v. F.T.C.* (1942), 127 F. 2d. 792 (2d. Cir.).

94. Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1024-1025. See also Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1023-1025.

Once the jurisdictional issue has been solved, it remains to determine whether there has been an unfair or deceptive act or practice. Before applying the standards to the act or practice, it is essential to determine the level of consumer intelligence against which the promise or the claim of the advertisement will be measured.

It may be said that the F.T.C. has selected an extremely low intelligence level, and that the Courts have not significantly disturbed the Commission's determinations in this respect⁹⁵.

In the case of *F.T.C. v. Standard Education Society*⁹⁶, it was held that s.5 was "made to protect the trusting as well as the suspicious"⁹⁷. Thus, too, it was held in *Feil v. F.T.C.*⁹⁸ that

The Commission has a right to issue cease and desist orders if the representations . . . are likely to mislead an appreciable . . . segment of the public⁹⁹.

An appreciable segment of the public can clearly be a rather small segment¹⁰⁰. More recently, it has been held that a higher standard may be applied, but even that standard is still well below that of the ordinary reasonable man¹⁰¹. As a result of the *Kirchner* case, it is apparently unnecessary now for the advertiser to consider every possible meaning of an advertisement, although this particular issue will be discussed in more detail below. It has also been held by the American cases that, where advertisements are directed at a particularly susceptible group such as children, advertisements will be tested against their intelligence level.

Having determined the standard of intelligence against which the promise of the advertisement will be evaluated, it remains to determine what, in fact, is the promise which the advertisement conveys. This inquiry involves not only the explicit promise which is made by the advertisement, *but also the indirect or implied promise*. The meaning of the advertisement has often been held to be a question of fact for the Commission to decide, being a question which is within their field of expertise, and thus, this particular position has left the F.T.C. with wide discretion.

Generally speaking, the F.T.C. will not read a promise out of context, but will consider the advertisement in its entirety and draw the meaning from it on the basis of the total impression which is conveyed. Thus, it can be said that the "literal and technical truth will not save a claim that is misleading

95. Millstein, "The Federal Trade Commission and False Advertising" (1964), 64 Colum. L. Rev. 439, at 458. See also Note, "The Regulation of Advertising" (1956), 56 Colum. L. Rev. 1018, at 1029-1031, and Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1040-1043.

96. (1937), 302 U.S. 112. See also the leading case of *Charles of the Ritz Dist. Corp. v. F.T.C.*, (1944), 143 F.2d 676, esp. at 679.

97. *Ibid.*, at 116.

98. (1960), 285 F.2d 879.

99. *Ibid.*, 892, n.19.

100. See also *Chas. of the Ritz Dist. Corp. v. F.T.C.* (1944), 143 F. 2d. 676 (2d. Cir.), at 679-680, and *Gelb v. F.T.C.* (1944), 44 F. 2d. 580 (2d. Cir.).

101. *Heinz W. Kirchner* (1963), 63 F.T.C. 1282.

when read in the context of the entire advertisement"¹⁰². Accordingly, in the case of *P. Lorillard Co. v. F.T.C.*¹⁰³, where a *Reader's Digest* article which showed Kent to be lowest in tars and nicotine of the cigarettes compared in that article was used to demonstrate this fact about Kent, it was held that the advertisement was deceptive in the sense that, although Kent was, *in fact*, lowest, it was *insignificantly lowest*.

Another aspect of the literal truth rule is directed at statements which, although truthful, do not support the product claim. In the *Hutchinson Chem. Corp.* case¹⁰⁴, the advertiser claimed that its car wax was resistant to heat and cold. To demonstrate the truth of its claim, the video portion of the advertisement showed gas being poured on the top of a car which had recently been waxed. This gas was ignited and the fire immediately extinguished with cold water. It was proved that where such a fire was put out within five minutes, it resulted in no appreciable heat being applied to the automobile. The claim was ultimately dismissed on other grounds, but the Commission pointedly declared that such a demonstration which is made to prove something which it does not, in fact, prove is deceptive under s.5. Moreover, it was held that the claim would be deceptive even if the experiment had been accurately and properly performed and even if the claim for the product was valid, for the deception would result from the implied representation that the demonstration supported the claim which was being made.

The *Hutchinson* case is an example of a situation in which a *physical* test did not support the product claim. More often, it is not a physical test but a verbal statement which does not fully disclose the facts; such a case has come to be known as a "half-truth". This gambit has not slipped by the watchful eye of the Federal Trade Commission, though.

Even the common law of deceit recognized that a half-truth can be as deceptive as a positive misrepresentation, and this principle has been applied under the F.T.C. Act. The Commission has long been able to require that fuller disclosure be made to correct a misrepresentation¹⁰⁵, and the Commission has said that it may be unlawful to make a statement which, although true, does not support the claim it purports to prove¹⁰⁶.

The Harvard Note goes on to point out that "the issue is potentially of tremendous commercial importance because so much modern advertising focuses on claiming and creating distinctions between products virtually indistinguishable functionally"¹⁰⁷.

The approach of requiring full disclosure has been carried further in the Fair Packing and Labeling Act of 1967¹⁰⁸. Although the Act deals only with

102. Millstein, *loc. cit.*, at 466.

103. (1950), 186 F. 2d 52.

104. (1959), 55 F.T.C. 1942.

105. *E.g., Haskelite Mfg. Corp. v. F.T.C.* (1942), 127 F. 2d 765 (7th Cir.).

106. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1047.

107. *Ibid.*

108. 80 Stat. 1296 (1966), 15 U.S.C. 1451 (Supp. III, 1965-1967).

the packaging or labeling of "consumer commodities"¹⁰⁹, the F.T.C. does have explicit authority to require affirmative aspects of advertising within the limited context of the legislation. Among the things which have to be affirmatively disclosed are the identity of the commodity, the name and place of business of the manufacturer, and the net quantity of contents¹¹⁰. If the Commission determines that regulations "are necessary to prevent the deception of consumers or to facilitate value comparisons as to any consumer commodity" it may establish and define standards for characterization of package sizes, regulate the placement of levels indicating lower prices, require that labels carry the common or usual name of the commodity and its ingredients, or prevent the "non-functional slack-fill of packages" containing consumer commodities¹¹¹. Violation of the statute is constituted "an unfair or deceptive act or practice in commerce", in violation of the provisions of s.5 of the Federal Trade Commission Act¹¹². The Act is significant in that it provides affirmative rule-making power for the Commission and establishes the principle of disclosure of material information. The declaration of policy at the start of the Act lays down the following principles:

Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods¹¹³.

A not-so-distant cousin of the half-truth is the ambiguous statement. Many advertisements are susceptible of two meanings, one of which is not the least bit misleading and the other of which is deceptive. There are no doubt those who would argue that the burden for resolving the ambiguity rests upon the shoulders of the reader of the advertisement; however, "to require the consumer to identify and unravel the advertiser's artful equivocations would be an excessive burden under a statute intended to protect consumers"¹¹⁴. It has therefore been stated on occasion that an advertising promise which is susceptible of two meanings, one of which is false, is misleading¹¹⁵. This will apparently be the case "even though other, non-misleading interpretations may also be possible or even likely"¹¹⁶.

It is quite clear that some vagueness and some ambiguity must be permitted, particularly where a term or phrase conveys a secondary meaning which is truthful although the primary or original meaning could not itself be truthful. The most common example of this situation is the use of the

109. As defined in s.10(a).

110. S.4(a).

111. S.5(c).

112. S.7(b).

113. S.2.

114. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1043-1044.

115. See, for example, *Rhodes Pharmacal Co. v. F.T.C.* (1954), 208 F. 2d. 382 (7th Cir.), at 387; rev'd on other grounds (1955), 348 U.S. 940.

116. Note, "Developments in the Law: Deceptive Advertising" (1967), 80 Harv. L. Rev. 1005, at 1044, and see especially n.29.

word "orange" when used to describe a beverage which is artificially flavoured to taste like oranges. The inability to use the word to describe the product would have the effect of making it virtually impossible for the advertiser to describe his product. Accordingly, the Commission requires a "high degree of proof" that there is a secondary meaning of the word which is commonly known to the public and then it will generally be required that the word be used in such a way, or be so carefully qualified, that consumers will not assume that the primary meaning of the word was intended¹¹⁷.

Puffing is normally acceptable, but where the superlative statement can be objectively disproved, the promise will be actionable. The line between subjective and objective appraisal of the promise is difficult to draw, but, generally, the judgment of the Commission will be upheld.

A review of the cases demonstrates that generally the Commission will find that an advertisement promises what the Commission itself believes it promises, notwithstanding dictionary definitions, the testimony of consumers and experts, or the results of surveys. The Commission always seems able to find one rule or another that can justify its determination of meaning. Furthermore, the Courts seem quite willing in most instances to uphold the Commission's view of the promise¹¹⁸.

Where formal proceedings are instituted by the Commission, these are initially adjudicated by a hearing examiner whose decision is subject to review by the full Commission. Where a violation occurs, the Commission may only issue a cease and desist order which becomes final if the respondent does not appeal or if the order is itself affirmed on appeal¹¹⁹. In case of violation of such order, the respondent becomes subject to civil penalties of up to \$5,000 per day, each day constituting a separate offence¹²⁰. Since the Commission has relied far less frequently in the past eight years on the formal proceedings as a method of enforcement, it would be particularly useful to review the "informal" or "voluntary" procedures which are available to the Commission and which it uses far more frequently.

Among the most informal procedures are the following. The matter can be referred to state authorities. This will certainly be the preferred course of action in any case where it is at all doubtful that the Commission has jurisdiction. The Office of Information may issue a press release dealing either with the individual offender, a particular type of problem or a problem of a particular industry. A third method of dealing with a problem is the publication of consumer education pamphlets on various subjects. These are produced from time to time and tend, of course, to deal with a particular type of problem rather than an individual offender.

Of the more structured options which are open to the Commission, the advisory opinion depends on the initiative, not of the Commission but of the party requesting the opinion. Individual firms often inquire about the legality of a proposed course of action, which may be an advertising campaign, a

117. *Ibid.*, at 1046.

118. Millstein, *loc. cit.*, at 470.

119. S.5(g).

120. S.5(1).

particular representation, a promotional gambit or the interpretation of an outstanding order to cease and desist¹²¹. It is, of course, advantageous to the businessman to receive such advice from the Commission since it affords him "a dependable assurance that the agency will not move against the business conduct in question"¹²².

Any advice given is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval¹²³.

Another option involves the Industry Guides which are essentially a form of advising the business community in general of the views of the Commission relating to certain practices in selected areas. These were never intended to have the force of law and the 1958 *Guides Against Deceptive Pricing* stated that they were adopted by the F.T.C. "for the use of its staff in the evaluation of pricing representations in advertising"¹²⁴. The Guides also stated in closing that "they do not constitute a finding in and will not affect the disposition of any formal or informal matter before the Commission".

Industry guides are administrative interpretations of law administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry¹²⁵.

Certain of these Industry Guides have in the past been promulgated as "trade practice rules". There are vast numbers of these¹²⁶ covering such disparate fields as beauty and barber equipment¹²⁷, fall-out shelters¹²⁸, the gladiolus bulb industry¹²⁹, the vertical turbine pump industry¹³⁰, the rabbit industry¹³¹, the

121. Such a request will be considered inappropriate "where the course of action is already being followed by the requesting party". (16 C.F.R., s.1.1).

122. *A.B.A. Report*, 9.

123. 16 C.F.R., s.1.3.

124. These *Guides* have since been amended and the latest compilation may be found at 16 C.F.R., pt. 233.

125. 16 C.F.R., s.1.5.

126. See sub-chap. B of 16 C.F.R., pts. 16 to 248.

127. 16 C.F.R., pt. 248.

128. 16 C.F.R., pt. 229.

129. 16 C.F.R., pt. 206.

130. 16 C.F.R., pt. 172.

131. 16 C.F.R., pt. 103.

ripe olive industry¹³², the wine industry¹³³ and the ice-cream industry in the District of Columbia¹³⁴. Some of the Guides now deal with problems that affect many industries, such as the *Guides against Deceptive Pricing*, the *Guides against Bait Advertising*¹³⁵ and the *Guides against Deceptive Advertising of Guarantees*¹³⁶.

The Trade Regulation Rules are rules and regulations which "express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers"¹³⁷. These are published after hearings of which notice is given and at which businessmen who are likely to be affected are permitted to present their viewpoints on the Rules proposed. They may cover all applications of a particular statutory provision and may be either nationwide or limited as to certain areas, industries, products or geographic markets. Once the Rules have been promulgated, the F.T.C. may rely upon them for the resolution of any issue provided that the respondent is given a fair hearing on the applicability of the Rule to the particular case.

Finally, there are informal enforcement procedures available to the Commission, including the assurance of voluntary compliance and informal corrective action. The A.V.C. is a written agreement to discontinue a practice which must be followed up within six months by a compliance report on the part of the firm which signed the A.V.C.¹³⁸ During the writer's interviews with various members of the Commission, there were conflicting views as to the utility of this proceeding and, in particular, as to the thoroughness with which the subsequent compliance reports are being filed and assessed. The informal corrective actions apparently take many forms, "including an oral assertion by a businessman that he will abide by F.T.C. rules"¹³⁹.

Although, in this age of increased consumer awareness, almost any enforcement agency in this area could expect criticism, the Federal Trade Commission has received more than its share. By and large, the criticisms are not new. A succession of studies from 1924¹⁴⁰ to 1969¹⁴¹ have criticized and suggested remedies. "It is worthy of note that each successive study made clear that the older criticism was still applicable and that previously proposed solutions generally have been ignored"¹⁴². The *Nader Report*, while not limiting its criticism, alleged that the F.T.C. has failed to do its job in four specific regards:

132. 16 C.F.R., pt. 148.

133. 16 C.F.R., pt. 139.

134. 16 C.F.R., pt. 89.

135. 16 C.F.R., pt. 238.

136. 16 C.F.R., pt. 239.

137. 16 C.F.R., s.1.12.

138. 16 C.F.R., s.2.21.

139. *A.B.A. Report*, 9.

140. G. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* (1924).

141. The *A.B.A. Report* is the latest in the succession.

142. *A.B.A. Report*, 9.

Unless it addresses itself to correcting these failures, the FTC will never work with any effectiveness:

1. The FTC has failed to detect violations systematically.
2. The FTC has failed to establish efficient priorities for its enforcement energy.
3. The FTC has failed to enforce the powers it has with energy and speed.
4. The FTC has failed to seek sufficient statutory authority to make its work effective¹⁴³.

To these criticisms, the *A.B.A. Report* added another which it appears to view, not so much as a criticism of the same class, but as a failure which may well be responsible for all the other criticisms.

The primary responsibility for these failures must rest with the leadership of the Commission. In recent years, bitter public displays of dissension among Commissioners have confused and demoralized the F.T.C. staff, and the failure to provide leadership has left enforcement activity largely aimless¹⁴⁴.

Part of the problem may be said to relate to the tools of enforcement of the Commission, which does not have the power to imprison, fine, assess or award damages. The most it can do is to issue a cease and desist order, which sometimes merely requires a change in the wording of an advertisement or that explanatory language be added in order to remove the deception. Even a cease and desist order can be appealed to the courts within 60 days after its issue¹⁴⁵. There are, however, stronger enforcement tools (which are not used) in the areas of food and drugs and flammable products. In addition to the civil penalties of up to \$5,000 a day, the Commission has the power to bring criminal action against offenders. In 1965, 1966 and 1967, only a single criminal action was brought¹⁴⁶. Although it has the power to seek preliminary injunctions under the textile and fur acts as well as the food and drug provisions of the F.T.C. Act, the F.T.C. almost never does so. Although it has an analogous power in sections 5(c) of the F.T.C. Act, the Commission has not apparently invoked the power to halt activities which have been challenged pending court review of a cease and desist order for a number of years¹⁴⁷.

In the area of enforcement, one of the most serious complaints must be the extensive delays which tend to make violation of the law a worthwhile enterprise. Generally speaking, cases can take about a year to reach the Commission in the first place for the issuance of a complaint. At that time, the advertiser may often consent to a cease and desist order without admitting

143. *Nader Report*, 39.

144. *A.B.A. Report*, 1.

145. Note, "Translating Sympathy for Deceived Consumers Into Effective Programming for Protection" (1966), 114 U. Pa. L. Rev. 395, at 444.

146. *Nader Report*, 68.

147. *Ibid.*, 68-69.

any violation of the law. If the Commission does not obtain this consent, however, there is often a lengthy delay of between three and five years from the issuance of the complaint to the time when the order becomes final in the sense that the last delay to appeal has been exhausted. Although not within the area of misleading advertising, the case of the Crawford Corporation, which involved interlocking directorates in the prefabricated housing industry, is a case in point. It was dropped on April 4, 1969 when it was discovered that the respondent had withdrawn from that business over five years earlier¹⁴⁸. The best example of this problem can be found in the statistics which accompany the *A.B.A. Report*. In the area of deceptive practices, only 21% of the investigations pending in 1969 had been pending for one year or less; 27% were one to two years old and 52% were over two years old¹⁴⁹; 19% of the complaints pending litigation were two to four years old¹⁵⁰.

Remedies have been suggested by both the *A.B.A. Report*¹⁵¹ and the *Nader Report*¹⁵² but these are of little interest to the reader of this article to whom the potential problems inherent in such an agency are undoubtedly more meaningful. The significance of this review of the American legislation and the Federal Trade Commission is that Australia has a great deal to learn from the experience of the United States. Those ideas which are worthwhile may hopefully be an inspiration to new legislation and those which are inappropriate or have been found unworkable may be avoided with knowledge and a sense of purpose.

2. The English Legislation

The English approach to the control of false advertising is quite different from that of both the United States and Canada, from both a substantive and administrative point of view. It may, however, be more successful than either the American or Canadian attempts at regulation. During the first 13 months of operation of the new Trade Descriptions Act 1968¹⁵³, more than 40,000 complaints had been received and the Board of Trade had received more than 1,400 notifications of intent¹⁵⁴ from the local weights and measures authorities who institute proceedings under the Act¹⁵⁵.

The various laws which preceded the current act are generally described as parts of the merchandise marks legislation; the earliest of the statutes bearing that name dates from 1862¹⁵⁶. There had been many earlier acts dealing with merchandise marks and regulating the marking of specific classes

148. *Ibid.*, 72.

149. *A.B.A. Report*, Table X, 29.

150. *Ibid.*, Table XII, 31.

151. See especially 3.

152. See 163-173.

153. 1968, c.29.

154. S.30(2).

155. Bowes Egan, *Trade Descriptions: Prosecutions, Enforcement, and Complaints*, (L.R.S.: London, 1970), 1 (hereafter referred to as *Prosecutions*).

156. That act was entitled An Act to amend the Law relating to the Fraudulent markings of Merchandise, 25 and 26 Vict., 1862, c.88.

of goods, but these are largely irrelevant for our purposes¹⁵⁷. The 1862 act, which was the first prohibiting the application of false trade descriptions in general, was replaced by the Merchandise Marks Act 1887¹⁵⁸, which act itself was subsequently amended in 1891¹⁵⁹, 1894¹⁶⁰, 1911¹⁶¹, and 1953¹⁶². All of these acts have now been replaced by the Trade Descriptions Act 1968, but they will retain a certain decreasing significance until November 30, 1971 when their interest will become purely historical¹⁶³.

As Egan points out, though, these old acts are not without their practical significance for, in certain respects, the controls established by the older legislation exist in the 1968 act.

And much of the inspiration which led to the new law was derived from shortcomings in the old. So even these defects point to the abuse which the new law seeks to prevent.

The Merchandise Marks Acts, like laws dealing with the marking of gold, silver, linen, and cutlery, were passed by Parliament, not with any intention of aiding the ordinary buyer, but at the instance of trade lobbies, bodies representing well-established manufacturers and others, who wished to protect marks used by them, to protect their merchandise identification techniques from imitation by unscrupulous rivals who might seek to exploit a high reputation or an accessible market by using identical markings, or markings similar enough to cause confusion¹⁶⁴.

It was on the basis of a study prepared by the Committee on Consumer Protection, under the Chairmanship of J. T. Molony, that the new Trade Descriptions Act was drafted¹⁶⁵. Several points were stressed by the Molony Committee, including the necessity of consolidating the various existing statutes, as amended, in a single enactment. Other points of criticism included the poor draftsmanship of the various merchandise marks acts, the narrowness of the definition of false trade descriptions, the difficulty in proving "application" of the false description to goods, and the general failure to enforce the law¹⁶⁶.

The enforcement of the Act has now been placed in the hands of the local weights and measures authorities. Section 26(1) of the Act provides:

157. See W. Roger Breed, *The Trade Descriptions Act, 1968* (Charles Knight: London, 1969), xvii; John O'Keefe, *The Trade Descriptions Act, 1968* (Butterworths: London, 1968), 1-3; Bowes Egan, *Trade Descriptions: The New Law*, (L.R.S.: London, 1968), 2 (hereinafter referred to as *New Law*); and *Consumer Protection and Guidance in Britain* (British Information Services: London, 1967), 7-8.

158. 50 and 51 Vict., 1887, c.28.

159. The Merchandise Marks Act, 1891, 54 Vict., 1891, c.15.

160. The Merchandise Marks (Prosecutions) Act, 1894, 57 and 58 Vict., 1894, c.19.

161. The Merchandise Marks Act, 1911, 1 and 2 Geo. 5, 1911, c.31.

162. The Merchandise Marks Act, 1953, 1 and 2 Eliz. 2, 1953, c.48.

163. Egan, *New Law*, 2.

164. *Ibid.*

165. *Final Report of the Committee on Consumer Protection*, (H.M.S.O.: London, 1962) (hereinafter referred to as the *Molony Report*).

166. See Egan, *New Law*, 3.

It shall be the duty of every local weights and measures authority to enforce within their area the provisions of this Act and of any order made under this Act; and s.37 of the Weights and Measures Act 1963 (power of local authorities to combine) shall apply with respect to the functions of such authorities under this Act as it applies with respect to their functions under that Act.

This obligation is itself reinforced by the power given to the Board of Trade to order a report from the local weights and measures authority "on the exercise of their functions under this Act in such form and containing such particulars as the Board may direct"¹⁶⁷. The Board itself may be pressed by individuals who complain of the improper discharge of all or any of the functions conferred by the Act on a local weights and measures authority in any area and, under such circumstances, the Board may cause a local inquiry to be held, following which the publication of the report of the person holding the inquiry is mandatory, whether with or without additional comments of the Board itself¹⁶⁸.

This combination of a clear duty to enforce, coupled with a likelihood of investigation and publicity where a Chief Inspector of Weights and Measures shows himself tardy or uninterested, will do much to ensure that the new provisions are uniformly policed . . . [T]he enforcement provision means that local weights and measures authorities may be subject to pressures from militant consumer groups which may indict traders before the local Chief Inspector, then denounce him to the Board of Trade if he fails to act as they think he ought¹⁶⁹.

The operative section of the Act is section 1, which reads in pertinent part as follows:

Any person who, in the course of a trade or business—

- (a) applies a false trade description to any goods; or
- (b) supplies or offers to supply any goods to which a false trade description is applied;

shall, subject to the provisions of the Act, be guilty of an offence.

A person found guilty of an offence is subject either to summary conviction or to conviction on indictment and it is provided, in the first case, that a person may be liable to a fine up to £400 and, in the second case, to an unlimited fine or imprisonment for a term not exceeding two years or both¹⁷⁰. In the past, it appears that the procedure by indictment was never used and, although this does not necessarily limit the action of the authorities in the future, Egan suggests that "in practice a fine of £400 is likely to be the maximum penalty"¹⁷¹.

Under section 1 it is not necessary to prove an intent to deceive or defraud¹⁷², nor is it necessary to prove *mens rea*¹⁷³. On prosecution by indict-

167. S.26(2).

168. S.26(3) and (4).

169. Egan, *New Law*, i and ii, preface to the second edition.

170. S.18.

171. *New Law*, 3.

172. *Wood v. Burgess* (1889), 24 Q.B.D. 162.

173. *Mear v. Baker* (1954), 118 J.P. 483.

ment, proceedings must be commenced within three years from the commission of the offence or one year from its discovery by the prosecutor, whichever is earlier¹⁷⁴. In the case of procedure by summary conviction, the normal time limit of six months for the institution of a prosecution¹⁷⁵ has been extended to twelve months from the commission of the offence¹⁷⁶.

There are two principal offences envisioned by the British Act. The first occurs when any person applies a false trade description to any goods and the second when a person supplies or *offers to supply* any goods to which a false trade description is applied. It is provided that sections 2 to 6 of the Act "shall have effect for the purposes of this section and for the interpretation of expressions used in this section"¹⁷⁷.

Before analyzing these two offences, it is obviously essential to determine what a "false trade description" is. It is provided first of all that:

A trade description is an indication, direct or indirect and by whatever means given, of any of the following matters with respect to any goods or parts of goods, that is to say—

- (a) quantity, size or gauge;
- (b) method of manufacture, production, processing or reconditioning;
- (c) composition;
- (d) fitness for purpose, strength, performance, behaviour or accuracy;
- (e) any physical characteristics not included in the preceding paragraphs;
- (f) testing by any person and results thereof;
- (g) approval by any person or conformity with a type approved by any person;
- (h) place or date of manufacture, production, processing or reconditioning;
- (i) person by whom manufactured, produced, processed or reconditioned;
- (j) other history, including previous ownership or use¹⁷⁸.

It is intended by the use of the words "direct or indirect" to create offences where the violation consists in either a direct statement or an overall impression resulting from "the use of words, numbers or pictures from which the reasonable person could infer an indication"¹⁷⁹. The use of the words "by whatever means given" would appear to remove any doubt as to the necessity that the trade description be in print but it is also provided specifically that "an oral statement may amount to the use of a trade description"¹⁸⁰. It

174. S.19(1).

175. As provided by the Magistrate's Courts Act, 1952, 15 and 16 Geo. 6 and Eliz. 2, 1952, c.55, s.104.

176. S.19(2).

177. S.1(2).

178. S.2(1).

179. O'Keefe, *op. cit.*, 17.

180. S.4(2).

should be noted, though, that a trade description relates only to goods or parts of goods, and not to services. The Act elsewhere provides that it is an offence for anyone to make false or misleading statements as to services, accommodation or facilities¹⁸¹.

The various characteristics of goods referred to in paragraphs (a) through (j) need hardly be reviewed at length here for they have been explained in great detail with reference to the previous statute and case law in Egan¹⁸², Breed¹⁸³, and O'Keefe¹⁸⁴. Suffice it to say that there is considerable difference in approach from the statutes of the American federal government, the various states and the Canadian federal government. In all of these cases, the law-makers have evidently devoted their attention to the definition of the offences or deceptive practices rather than the matters with respect to which the offences or practices might occur. There will in many cases be parallels between the two; however, the seeming disparity in the point of attack is worthy of note.

The definition of a trade description is itself extended by the provisions of section 3 which provides that a *false* trade description is "a trade description which is false to a material degree". To cover the gaps created by such terminology, it is also provided that a trade description which is not false but is misleading and is "likely to be taken for such an indication of any of the matters specified in s.2 of this Act as would be false to a material degree" is deemed to be a false trade description as is anything which would be likely to be taken for an indication of any of those matters but is "not a trade description". In an entirely new category of trade description, one which would appear to be better placed within section 2 of the Act, it is provided that a false indication that any goods comply with a particular standard or are approved by a particular person is deemed to be a false trade description in the event that there exists no such standard or person¹⁸⁵.

The first offence under the Act contemplates the "application" of such trade descriptions to goods.

The word has a misleadingly immediate sense suggesting a purely physical application, labelling or marking with a die, and perhaps this common understanding of the word affected the courts enforcing the Merchandise Marks Acts. These inclined to give the word a restricted meaning, and some types of advertisements were not accepted as 'applying' descriptions to specific goods, even when these were purchased as a result of statements in the advertisements.

The Act of 1887 gave a list of activities which would constitute 'application', including the forging of any trademark and the use of any dies, blocks, and machines for the purpose of affixing false markings¹⁸⁶.

181. S.14. This is a totally new provision in English criminal law.

182. *New Law*, 5-7.

183. *Op. cit.*, 9-11.

184. *Op. cit.*, 16-18.

185. S.3(4).

186. Egan, *New Law*, 3.

The new act has wisely stayed away from the physical implications which plagued the older legislation. It provides that

A person applies a trade description to goods if he—

- (a) affixes or annexes it to or in any manner marks it on or incorporates it with—
 - (i) the goods themselves, or
 - (ii) anything in, on or with which the goods are supplied; or
- (b) places the goods in, on or with anything which the trade description has been affixed or annexed to, marked on or incorporated with, or places any such thing with the goods; or
- (c) uses the trade description in any manner likely to be taken as referring to the goods¹⁸⁷.

As indicated above, an oral statement may amount to the use of a trade description. There is also a special provision extending the new law to all advertisements and it only remains then to determine whether the trade description used in the advertisement would be “likely or unlikely” to lead the ordinary reasonable buyer to believe that the statements referred to the specific goods with which the purchaser is supplied¹⁸⁸. It had been hoped by the Molony Committee that the new law would provide “a truly comprehensive definition” of the word “advertisement”¹⁸⁹, but no definition of that nature was in fact provided, although it is stated that “advertisement” “includes a catalogue, a circular and a price list”¹⁹⁰.

The second offence, which is far less serious, is apparently aimed at the shop-keeper who does not actually apply the false trade description but who supplies or offers to supply goods to which the description has already been applied. To avoid the possibility that a retailer might avoid prosecution by arguing that the presence of goods in his windows or on display within his store was only intended to encourage shoppers to make offers which he could then reject, the Act provides that “a person exposing goods for supply or having goods in his possession for supply shall be deemed to offer to supply them”¹⁹¹.

Among the most difficult problems to cope with in any legislation relating to advertising or labelling are the definitions of trade terms and the compulsory contents of an advertisement or label. In this regard, the Molony Committee made some rather far-reaching recommendations which were ultimately adopted. With respect to the definition of trade terms, they stated

We are dissatisfied with the looseness with which descriptive words are used in trade and find in this lack of precision fruitful opportunity for misunderstanding, profitless argument, uncertainty and deceptive practices. At present, unless words have a clear-cut significance, Merchandise Marks law cannot be invoked to restrain their use. The

187. S.4(1).

188. S.5.

189. *Molony Report*, para. 663, 219.

190. S.39(1).

191. S.6.

only way to remedy this state of affairs is to attach by law an exact meaning to terms used in commerce so that the same words mean the same thing at all times and to all persons. This idea is not new. The Anglo-Portuguese Commercial Treaty Acts, 1914 and 1916, in effect enact that the terms "port" and "madeira" shall mean and mean only wine produced in Portugal and Madeira respectively. Under the Fertilisers and Feeding Stuffs Act, 1926, s.2(2) and Fourth Schedule, where fertilisers and animal feeding stuffs are sold under specified names there is an implied warranty that the article accords with a statutory definition; which definition may be varied by Ministerial action (s.23). In 1934 the Merchandise Marks (Trade Descriptions) Bill was promoted. It proposed to set up machinery by which a statutory definition could be given to trade descriptions. This became a Government Bill but it was withdrawn in face of considerable criticism and opposition. It was essentially a trade protective measure.

We recommend that the proposal of 1934 should now be adopted as an aid to the consumer. The power to issue and, where necessary, to amend, definitions should be given to . . . the President of the Board of Trade¹⁹².

Following this recommendation, Parliament gave the Board very broad powers to assign such meanings to expressions for the benefit of consumers and exporters¹⁹³. It is essential to bear in mind that orders made under this section merely establish the definitions of certain words or expressions. Clearly, no manufacturer or seller of goods need employ a defined term but, when he does so, he must do so in conformity with the definition, failing which he will subject himself to the criminal penalties provided in the statute.

It is, of course, different in the case of compulsory labelling, which by its nature requires the inclusion of the prescribed information. In this connection, the Molony Committee recommended

that power be taken to prohibit consumer trade in designated goods unless they bear a label or are accompanied on delivery with a written statement conveying prescribed information . . . or with instructions or warnings concerning use, care or maintenance . . . There should be supplemental power to lay down the nature and size of the label and printing; the point and method of annexure; and the mode and sequence in which the prescribed matter is to be stated. It should be made an offence to sell, or offer or expose for sale the designated goods without a label purporting to provide the prescribed matter, or to deliver such goods unless accompanied by the appropriate written statement¹⁹⁴.

The House of Commons acted upon this recommendation and provided that the Board of Trade might make orders imposing, in the interest of consumers, requirements for securing that "the goods should be marked with or

192. *Molony Report*, para. 640 and 641, 212-213.

193. S.7.

194. *Molony Report*, para. 655, 217.

accompanied by any information (whether or not amounting to or including a trade description) or instruction relating to the goods" where this appears necessary. The Board also has the power to regulate or prohibit the supply of goods with respect to which the requirements have not been followed "and the requirements may extend to the form and manner in which the information or instruction is to be given"¹⁹⁵. Similarly, where the Board finds it necessary or expedient in the interest of the consumer that an advertisement should contain or refer to any information, it may by order "impose requirements as to the inclusion of that information, or of an indication of the means by which it may be obtained"¹⁹⁶.

These powers to make orders are not to be exercised in a vacuum. There are accompanying procedural safeguards for persons who might be affected by such orders. The Board must consult with organizations which appear to be representative of interests which will be substantially affected. Secondly, the Board must publish notice of its intention to make the order. Thirdly, the order shall not be made until 28 days have passed from the date of publication of the notice and may then be made with such modifications as the Board may determine are appropriate, having regard to the representations received by them. Finally, either the House of Commons or the House of Lords has the power, by simple resolution, to annul any such order.

The similarity between this power to make orders and the practice of the Federal Trade Commission with respect to trade regulation rules and industry guides is apparent. Happily, the English have unequivocally legislated the right of the Board to make such orders and it is unlikely, in consequence, that there will be any dispute in connection with the Board's jurisdiction to make such orders¹⁹⁷.

The Act also envisions mis-statements other than false trade descriptions. These include false representations as to royal approval or award¹⁹⁸, false representations as to supply of goods or services¹⁹⁹, false or misleading statements as to services, accommodations or facilities²⁰⁰ and false or misleading indications as to the price of goods²⁰¹. Of all of these, the most interesting, from the Canadian point of view, relates to false pricing, which is found in s.33C of the Combines Investigation Act²⁰². In that connection, three offences have been created in s.11 of the English statute.

A seller may be prosecuted if he:

- (a) falsely indicates that he sold goods at a specified higher price,
- (b) inaccurately claims that goods are offered at less than a recommended price,

195. S.8(1).

196. S.9(1).

197. From time to time, noises are made in the United States about the constitutionality of the Federal Trade Commission's activities in this regard.

198. S.12.

199. S.13.

200. S.14.

201. S.11.

202. R.S.C. 1952, c.314, as amended by 8-9 Eliz. 2, S.C. 1960, c.45.

- (c) misleads customers about the price they will eventually be obliged to pay²⁰³.

Two rather interesting innovations have been included in the English Act in the form of presumptions²⁰⁴. An indication that goods were previously offered at a higher price or at a particular price is to be treated as an indication that they were so offered *by the person* giving the indication unless it is expressly stated that they were so offered *by others* and the representation does not imply that they were so offered by the person making the representation. Such an indication is also to be treated as an indication that the goods were so offered within the preceding six months for a continuous period of not less than 28 days, unless the contrary is expressed.

While these two presumptions would otherwise undoubtedly prove particularly useful, the section itself may be largely useless for two reasons. In the first place, the reference is to "the price at which the goods or goods of the same description were previously offered by him". This means, for example, that the section will not catch an advertiser who states that the goods are being sold at a preferable price at the moment, in relation to the higher price which will be introduced at some time in the future, where that higher price never does, in fact, take effect. More importantly, the section uses the word "offered" rather than the word "sold" with the apparent consequence that commodities on which discounts are normally given will not fall within the purview of these provisions. For example, where a television set is always *offered* at \$500, but is always *sold* at a lower price, representing a "cash", "trade-in" or other discount, there would appear to be a sufficient defence available to the retailer since he had in fact *offered* the television set for sale at the higher price although he had never *sold* any²⁰⁵.

The second offence, which is quite straightforward, has as its apparent effect the justification of the use of manufacturers' suggested list prices which conflicts directly with the attitude of the Federal Trade Commission in its *Guides Against Deceptive Pricing* and with this writer's view of the intention of s.33C of the Combines Investigation Act²⁰⁶.

The last of the offences may be particularly significant and is presumably aimed at the magazine subscription or encyclopaedia salesman who pretends to be giving away "free" samples of either and manages, in the name of postage and handling costs or an up-to-date subscription service, insisting always on payments for such matters well in advance, to hike the price to dizzying heights.

Two brief final observations might be made about the terms of the statute. Where a corporation has committed an offence which is "proved to have been committed with the consent and connivance of, or to be attributable to any

203. Egan, *New Law*, 14.

204. No such presumptions are to be found in s.33C of the Canadian Act. See text *infra*.

205. The section is new and experimental. It has weaknesses which are universally recognized. See, e.g., Egan, *New Law*, 14-15; Egan, *Prosecutions*, 17-24; and Forman, *The Trade Descriptions Act, 1968: A Lawyer's Progress Report*, (The Consumer Council: London, 1970), 40-45. especially at 43-44, where the Canadian approach to misleading price regulation is praised.

206. See 16 C.F.R. s. 233.3 and *infra*, especially n.276.

neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly"²⁰⁷. Whether this section is legally essential or not is a moot point, particularly in view of s.23 which provides that proceedings may be instituted against any person to whose act or default the offence may be attributed, even where the person, presumably an employer, has already been convicted, but it may have some deterrent value²⁰⁸. The Act also provides defences where the commission of the offence is due to a mistake or to reliance on another person, an accident or some other cause beyond his control, and where the accused took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control²⁰⁹; and also in the case of innocent publication of an advertisement by a person whose business it is to publish or arrange for the publication of advertisements where the advertisement is received for publication in the ordinary course of his business and he has no knowledge or reason to suspect that the publication would amount to an offence under the Act²¹⁰.

As indicated at the beginning of this section, on the basis of the number of prosecutions, there can be no doubt that the Trade Descriptions Act has been successful. From the limited information which is available to the writer, it apparently has been a success on a qualitative basis as well. In his work on the law in action, Bowes Egan has stated:

The Trade Descriptions Act, 1968, is a good law. Enforcement has eliminated or curtailed many abuses, and its provisions are generally easy to understand . . .

Repeated customer complaints about selling practices of nationalised industries have led to sharp changes in description of prices and performance though . . . actual prosecution of these elevated bodies has resulted on only a few occasions. Many of the largest department stores have been subjected to the attentions of local weights and measures inspectors, and supermarkets with names of household familiarity have been heavily fined either as a result of unwise initiatives by local managers, or because of failure to co-ordinate the practice of all branches when a national promotional campaign was mounted. Long-accepted claims made by leading advertisers have been abandoned; packing which presented a misleading visual impression of quantity contained has been redesigned . . . In all, it is clear that many selling practices long accepted as justified by the commercial community have been less favourably regarded by courts empowered to enforce a comprehensive criminal code regulating descriptions used in course of trade²¹¹.

207. S.20(1).

208. The use of the term "body corporate" may itself be useful, for the Act is thereby made to apply to other types of corporate organizations than limited liability companies, including, for example, bodies incorporated by acts of Parliament or royal charter (Egan, *New Law*, 24).

209. S.24(1).

210. S.25.

211. Egan, *Prosecutions*, 1.

Patrick Forman has been somewhat more modest in his praise. "While the Trade Descriptions Act has been a success, most of us concerned with it from day-to-day know that it needs improvement"²¹².

3. Canada

(A) CANADIAN PROVINCIAL LEGISLATION

Unlike the American states²¹³ the Canadian provinces have drafted little significant legislation dealing with consumers and less still which speaks of false advertising. Quebec does not have a consumer protection act on its books at all²¹⁴, while Alberta's only legislation of this type is The Consumer Affairs Act, 1969²¹⁵ which merely establishes a Consumer Affairs Branch without giving it an act of its own to administer. It is empowered to

- (a) maintain liaison with consumer and business groups throughout Alberta,
- (b) disseminate information for the purposes of advising consumers respecting any Acts which provide protection for consumers,
- (c) receive and investigate complaints of practices that are in contravention of Acts for the protection of consumers or appear to be detrimental either to business or to a consumer, and
- (d) co-operate with other governments, agencies of any government and any bodies or organizations in programmes designed to promote the interests of consumers in Alberta²¹⁶.

The provinces of New Brunswick, Nova Scotia and Ontario each have analogous legislation. The Consumer Bureau Act²¹⁷ of New Brunswick establishes a Consumer Bureau which

- (a) shall maintain liaison with consumer groups throughout the province;
- (b) shall collect and distribute information for the purpose of educating and advising consumers respecting consumer protection, including but not limiting the foregoing, lending and borrowing practices, retail sales practices and marketing practices;
- (c) shall promote and assist counselling services in respect of consumer protection;
- (d) shall receive and investigate complaints of conduct in contravention of any Act which provides for protection of consumers;
- (e) shall perform any duty imposed by any Act; and

212. *Op. cit.*, 1.

213. See the discussion of the American legislation in the section entitled "American State Legislation" *supra*.

214. The Quebec government has however, recently appointed a "consumer ombudsman" and its Consumer Protection Act has had a first reading.

215. S.A. 1969, c.20.

216. S.4.

217. S.N.B. 1967, c.5.

- (f) shall perform such other duties as are prescribed by this Act or the Minister²¹⁸.

In Ontario, the Consumer Protection Bureau Act, 1966²¹⁹ provides in addition that its Consumer Protection Bureau shall "receive and investigate complaints of conduct in contravention of legislation for the protection of consumers" and "enforce legislation for the protection of consumers"²²⁰. The Nova Scotia Consumer Services Act²²¹ would appear to establish a Bureau with a more creative and assertive rôle than those of the other provinces. It is the function of the Bureau and it has the power to

- (a) initiate, recommend or undertake programmes designed to promote the interests of consumers in the Province;
- (b) co-ordinate programmes of the Government of the Province that are designed to promote the interests of consumers;
- (c) promote and encourage the institution of practices and conduct tending to the better protection of consumers and co-operate with other governments or agencies of governments or any bodies, organization or persons in programmes having similar objects;
- (d) undertake, recommend or assist in programmes to assist consumers to be more fully informed about goods and services offered to them;
- (e) undertake research into matters that are within the scope of the functions of the Bureau and co-operate with other governments or agencies of government and other bodies, organizations or persons in carrying out such research;
- (f) receive and act upon complaints of violations of Acts designed to protect consumers the administration of which has been assigned to the Bureau and endeavour to obtain voluntary compliance with them or any of them;
- (g) counsel persons and groups on their rights and duties under Acts referred to in clause (f);
- (h) establish programmes for the education of consumers with respect to credit practices and problems;
- (i) foster and encourage the establishment and operation of non-profit consumer credit counselling agencies;
- (j) perform such other functions and duties relating to the protection or benefit of consumers as are from time to time assigned to the Bureau by the Governor in Council or the Minister²²².

It is worthy of note that none of these bureaux is specifically empowered to suggest or draft legislation for the protection of consumers. Whether because of this or for other reasons, it might be observed that the various provincial

218. S.5.

219. S.O. 1966, c.24.

220. S.1(2).

221. S.N.S. 1968, c.5.

222. S.3.

consumer protection acts are designed to deal *only* with the issue of consumer credit. Two of the acts, those of New Brunswick and Saskatchewan, may be so identified by their names alone; the first is entitled The Cost of Credit Disclosure Act²²³ and the second The Cost of Credit Disclosure Act, 1967²²⁴. The only provisions relating to advertising in those acts are concerned with the narrow issue of false statements which pertain to credit. As an example, the New Brunswick act provides:

Where any registered lender makes false, misleading or deceptive statements relating to the extension of credit in any advertisement, circular, pamphlet or similar material, the Minister may order the immediate cessation of the use of such material²²⁵.

The acts of Prince Edward Island²²⁶, Newfoundland²²⁷ and Nova Scotia²²⁸ also contain provisions relating to false or misleading advertising, but these, too, are limited to advertising relating to the extension of credit²²⁹.

The Newfoundland and Nova Scotia acts also contain provisions which state that certain disclosures must be made in advertising the terms of credit and the cost of borrowing²³⁰, but the net effect of these sections obviously does not extend beyond the advertising of credit. Such a provision also exists in the British Columbia Consumer Protection Act²³¹, the Manitoba Consumer Protection Act²³² and the Ontario Consumer Protection Act, 1966²³³.

From the general point of view of consumer protection, the British Columbia legislation goes farther than that of any of the other provinces. It deals with the issue of referral sales²³⁴, the rescission of door-to-door transactions²³⁵ and unsolicited credit cards or goods²³⁶.

Each of the provincial statutes provides for penalties in the event of violation of one of the provisions of the act. Penalties of \$2,000 per offence by an individual and/or imprisonment of six months or a year and penalties of \$2,500 in the case of corporations are provided in the acts of New Brunswick²³⁷, Prince Edward Island²³⁸, Newfoundland²³⁹, Nova Scotia²⁴⁰, Ontario²⁴¹ and British Columbia²⁴². In the Saskatchewan act, the penalty is

223. S.N.B. 1967, c.6.

224. S.S. 1967, c.85.

225. S.13. See also s.12 in the Saskatchewan Act.

226. Consumer Protection Act, 1967, S.P.E.I., c.16.

227. The Newfoundland Consumer Protection Act, 1969, S.N. 1969, Bill 23.

228. Consumer Protection Act, R.S.N.S. 1967, c.53.

229. Ss.14, 16 and 14 respectively.

230. Ss.20 and 18 respectively.

231. S.B.C. 1967, c.14, s.14.

232. R.S.M. 1970, c.200, s.26(1).

233. S.O. 1966, c.23, s.26.

234. S.5A, added by S.B.C. 1969, c.5, s.3.

235. S.7, added by S.B.C. 1969, c.5, s.5.

236. S.15, added by S.B.C. 1970, Bill 16, s.1.

237. S.23.

238. S.22.

239. S.24.

240. S.21.

241. S.32.

242. S.23.

\$1,000 or six months' imprisonment and \$5,000 in the case of a corporation²⁴³, while Manitoba provides penalties of \$1,000 for a first offence and \$2,000 or three months' imprisonment in the case of a second offence for individuals as well as \$2,000 for a first offence and \$5,000 for a second or subsequent offence in the case of corporations²⁴⁴.

Of all the provincial acts, only that of Ontario contains a general prohibition against misleading advertising without reference to credit. The relevant section reads, in pertinent part:

Where in the opinion of the Registrar, any seller or lender is making false, misleading or deceptive statements in any advertisement, circular, pamphlet or similar material, the Registrar may order the cessation of the use of such material, and any such order is subject to review and appeal in the same manner as an order respecting registration made under Part I²⁴⁵.

In this connection, it should be noted that the extent of the protection afforded by the section is somewhat limited by the interpretation provisions of the Act. A seller is defined as "a person who is in the business of selling good or services to buyers, and includes his agent"²⁴⁶. The definition of a buyer is as follows:

"Buyer" means a person who purchases goods for consumption or services under an executory contract and includes his agent, but does not include a person who buys in the course of carrying on business or an association of individuals, a partnership or a corporation²⁴⁷.

It is immediately apparent, therefore, that the only persons protected by section 31 are consumers and the Act does not, therefore, extend its coverage to advertising which is directed by manufacturers to wholesalers or retailers or even, strangely enough, to a person buying goods, as a result of such misrepresentations, to be used in the carrying on of his business, whether he does business as a corporation, as a partnership or even as a sole proprietor.

The procedure by which complaints relating to advertising are dealt with is as follows. Because it is the attitude of the Bureau that the purpose of the Act is primarily the registration of itinerant sellers and credit disclosure, advertising is relegated to a rather insignificant place in the overall picture. The Bureau has neither the funds nor the personnel to deal with such matters and they are, therefore, handling them on a rather informal basis. The staff, who are hired to serve as recipients of complaints also, therefore, undertake the investigations required to prepare the evidence necessary to a section 31 order. Where the complaint appears to be well-founded, it passes through the hands of the Deputy-Registrar who, in his discretion, may recommend that the Registrar form an opinion. After reviewing the matter, the Registrar will either send back the complaint or make his order.

243. S.18.

244. S.94.

245. S.31.

246. S.1(m).

247. S.1(b).

His decision may then be appealed to the Commercial Registration Appeal Tribunal²⁴⁸ which has the power to administer oaths, to summon witnesses and to require them to give evidence under oath. It may also issue subpoenas both simple and *duces tecum* and employ stenographic assistance during the course of the hearing. It may then either confirm or revoke the decision of the Registrar or make any other decision which it deems proper. The decision of the Tribunal may itself be appealed directly to the Court of Appeal²⁴⁹.

Two other Ontario Acts should be referred to before leaving the matter of provincial legislation, namely, The Real Estate and Business Brokers Act²⁵⁰ and The Used Car Dealers Act, 1964²⁵¹. The first has very limited application to this area, providing merely that a broker, when advertising, shall indicate his own name as the party advertising²⁵². The latter act is broader and is worded much as s.31 of the Consumer Protection Act except that it applies only to used car dealers registered under the Act²⁵³. The Act also provides an interesting section authorizing the passing of regulations "prescribing the information that used car dealers and salesmen shall disclose respecting the history of any class or classes of used cars"²⁵⁴.

(B) CANADIAN FEDERAL LEGISLATION

There is a not inconsiderable number of Canadian federal laws which deal with false advertising in one form or another and these include the Bank Act²⁵⁵, the Hazardous Products Act²⁵⁶, the National Trademark and True Labelling Act²⁵⁷, the Precious Metals Marking Act²⁵⁸, the Textile Labelling Act²⁵⁹, the Food and Drugs Act²⁶⁰, the Trade Marks Act²⁶¹, the Broadcasting Act²⁶², the Consumer Packaging and Labelling Act²⁶³ and the Combines Investigation Act²⁶⁴. There are few reported cases in Canada emanating from the false advertising provisions of any of these statutes other than the Combines Investigation Act which is, without doubt, the most important of the federal laws in this area. Furthermore, the Combines Investigation Act is the most sweeping of all the acts, encompassing the advertising of all goods in all media and by almost all means.

248. S.7.

249. S.14(e).

250. R.S.O. 1960, c.344.

251. 12-13 Eliz. 2, S.O. 1964, c.121.

252. S.46.

253. S.18a, added by 13-14 Eliz. 2, S.O. 1965, c.139.

264. R.S.C. 1952, c.314, as from time to time amended.

255. 14-15-16 Eliz. 2, S.C. 1966-67, c.87.

256. 17-18 Eliz. 2, S.C. 1968-69, c.42.

257. R.S.C. 1952, c.191.

258. 17-18 Eliz. 2, S.C. 1968-69, c.17.

259. 18-19 Eliz. 2, S.C. 1969-70, c.34.

260. 1-2 Eliz. 2, S.C. 1952-53, c.38.

261. 1-2 Eliz. 2, S.C. 1952-53, c.49.

262. 16-17 Eliz. 2, S.C. 1967-68, c.25.

263. Bill C-180, 28th Parl., 3rd Sess., 19-20 Eliz. 2, 1970-71.

264. R.S.C. 1952, c.314. as from time to time amended.

Since the writer has already reviewed the provisions of the Act and the decided cases elsewhere²⁶⁵, this review will be more cursory than it might otherwise have been.

From a substantive point of view, the operative sections of the Act, insofar as false advertising is concerned, are ss.33C and 33D. The first of these creates a summary conviction offence in the case of any materially misleading representation to the public concerning the price at which any article has been, is, or will be ordinarily sold. The second establishes an indictable offence whenever an advertisement is published which contains a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading; 33D also creates a summary conviction offence in the case of inadequate or improper testing of anything about which a statement or guarantee of the performance, efficacy or length of life is made in an advertisement. Both 33C and 33D contain exculpatory provisions for persons publishing advertisements which they accept in good faith for publication in the ordinary course of their business. The texts of these sections is as follows:

33C. (1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

33D. (1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published

- (a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or
- (b) to promote a business or commercial interest.

(2) Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction.

265. See Cohen, "Misleading Advertising and the Combines Act" (1970), 15 McGill L. J. 622 and 64 C.P.R. 193. This article takes the cases through July 1970. An updated version of the article with some changes in approach and evaluation of the existing jurisprudence was given as one of the Meredith Memorial Lectures of 1971 and it will be published in the 1971 volume of those Lectures within the next few months. It will, incidentally, review the case law through March 1971.

(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

(4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the President of the National Research Council or by the deputy head of the public department, as the case may be.

(5) Nothing in subsection (4) shall be deemed to exclude, for the purpose of this section, any other adequate or proper test.

The presence of these sections in Canada's antitrust act suggests, quite correctly, that the twin themes of fair competition and consumer protection run in the background. Nor should this be surprising since unfair or deceptive acts and practices are fundamentally anti-competitive. There is no need, however, in the prosecution of false advertising cases to either allege or prove harm to a competitor as there was originally under the American Federal Trade Commission Act. The standard to be met under s.33C is a purely objective one, having nothing to do even with the character or intelligence of the person exposed to the advertisement or representation. To give rise to an offence, the Crown must show that there was a representation made:

- (a) to the public;
- (b) for the purpose of promoting the sale or use of an article;
- (c) concerning the price at which such or like articles have been, are or will be ordinarily sold; and
- (d) that representation must be materially misleading.

The first two requirements are rather easily dealt with. Any representation made in an establishment which "is open to the general public"²⁶⁶ will suffice even where the communication is verbal²⁶⁷. The fact that the representation is made to an officer attached to the federal Department of Justice has not been a bar to successful prosecution²⁶⁸ nor has the fact that the representation was made to an investigator who was not fooled or deceived thereby²⁶⁹. On the second point, it has been held from the very first cases under the section that any representation of this nature was made for the purpose of promoting the sale or use of an article²⁷⁰. There almost exists a presumption to this effect and well might this be, for, if the purpose of advertising is to sell, what further proof of this intention could be sought than the publication of the advertisement?

266. *R. v. Carmen Jewelry Mfg. Co.*, May 16, 1967, Court of Sessions, Quebec City, unreported and *R. v. McGrath and Smith* (1967), 56 C.P.R. 160.

267. *R. v. Ameublement Dumouchel Furniture Ltd.* (1970), 15 McGill L.J. 671.

268. *R. v. Carmen Jewelry Mfg. Co.* (1967). unreported.

269. *R. v. Mountain Furniture Co.* (1966), 15 McGill L.J. 662.

270. *R. v. Eddie Black's Limited* (1962), 38 C.P.R. 140.

The third requirement is somewhat more difficult for the onus on the Crown is to establish that the ordinary or "regular" price, against which the special price is apposed, is not as represented. The Crown need not prove the exact price to which all firms in the area conformed, but it does have the obligation of showing that the ordinary selling price is lower than that which the offending representation indicates it to be. To make its proof, the Crown calls as witnesses representatives of other firms in the area to interrogate them as to their price for the articles in question during the time period relevant to the publication of the advertisement. It is clearly critical to determine the size of the area in which the Crown must adduce evidence as to the ordinary price for, the larger it gets, the more awesome the burden becomes.

Must it, for example, be the entire viewing area of a television channel or, worse still, the entire listening area of a radio station or the circulation area of a newspaper? One or two decisions have so held²⁷¹, but the trend appears to be in the other direction. One recent appeal concluded "that the trading area to which the representation was made, was that in reasonably close proximity to the City of Windsor, although the circulation of the Windsor *Star* extended throughout the County of Essex and beyond"²⁷². The rule has been more generally stated as follows:

The extent of the 'public' in each case must be limited to each area where the goods are sold and the area would be extended to include an area in which price competition would exist as between the business establishments of a particular area²⁷³.

The problem can clearly be avoided if a definition of "area" or "regular price" is provided in the statute; otherwise, the matter is left, necessarily, to the discretion of the courts with the possible consequence, as in Canada, of a decade of unsureness.

Where the accused itself sells more of the article than any other dealer in the area, its own records indicating the price at which it has regularly sold the item should be of greatest relevance in determining the ordinary price. There has been some indecisiveness on this point in the Canadian courts but the judicial trend appears to be moving towards support of this view²⁷⁴. On this point, the presumptions of the English law are most useful for they have the beneficial effect of easing the burden of the Crown²⁷⁵.

The final issue concerning ordinary price relates to the terms used in the representation. As anyone knows from reading his local newspaper or visiting stores, the vocabulary used to indicate a price bargain is extensive. One sees "regular price", "value", "comparable value", "compare to", "save", "retail",

271. *R. v. F. W. Woolworth Co.* (1969), 58 C.P.R. 223. See Cohen, *loc. cit.*, 637, n.58 McGill L.J. and 223, n.58 C.P.R.; *R. v. McKay's Television and Appliances Ltd.* (1970) 62 C.P.R. 236, rev'd Dec. 17, 1970, unreported and *R. v. Simpsons-Sears Ltd.* (1969), 58 C.P.R. 56, rev'd Jan. 26, 1971 unreported.

272. *R. v. McKay's Television and Appliances Ltd.*, judgment of Macdonald, J., in appeal, unreported.

273. *R. v. Simpson-Sears Ltd.*, judgment of Doyle, J., in appeal, unreported.

274. See, e.g., *R. v. Amalgamated Carpets & Furnishing Ltd.* (1970), 15 McGill L.J. 670 and *R. v. McKay's Television and Appliances Ltd.*, unreported.

275. See *supra*.

"manufacturer's regular", "list price", "suggested retail price", a higher price crossed out and so on. In Canada these expressions are almost always held to be synonymous with "ordinarily sold" as the term is employed in s.33C. There has been some difficulty with the terms "list price" and "suggested retail price" and their variants but a recent decision appears to have resolved these by holding them to be equivalent to "ordinary price" when they are unrealistic and unsupported by sales records in the area²⁷⁶.

As the Act itself indicates, it is not enough that there be a misrepresentation; that misrepresentation must be material. Since there is no definition of the term in the statute, it has been held that the words must be given their normally accepted meaning²⁷⁷ and variations as low as 5-10% in the ordinary price have been held to be material although the courts have not established criteria in percentage terms²⁷⁸.

Finally, there are some general observations which might be made regarding s.33C. The most important is that, for Canada's peculiar constitutional reasons, the statute is criminal in nature. Certain consequences flow from this fact. First, the Crown must prove its case (and this, of course, means every element of the offence) beyond a reasonable doubt. Second, some judges have ruled that the section is to be strictly construed although there appears to be less discussion of this point in the more recent cases, perhaps in view of the fact that it is ultimately the consuming public who benefit from successful prosecutions. Fourth, because of the particular wording of the section, it has been held that *mens rea* is not a necessary ingredient of the offence²⁷⁹. Finally, as a practical matter, it might be noted that the average fine *per case*²⁸⁰ has been under \$275, which is appalling when one considers that fines of up to \$1,500 *per count* are available for the punishment of corporations. The Crown does also have available to it the prohibition order of s.31 of the Combines Investigation Act and these have been obtained in 43% of the convictions to date. These are particularly effective where there is a strong compliance programme for *R. v. Allied Towers Merchants Limited (IV)*²⁸¹ has shown the danger to an accused of breaching a s.31 order²⁸².

There is little that can be said now of s.33D²⁸³ since there is little case law, but a few words may be in order. The essence of the offence is the publica-

276. *R. v. R. A. Beamish Stores Limited*, June 30, 1970, unreported, rev'g (1970), 62 C.P.R. 97. See also the discussion on this point in Cohen, *loc. cit.*, at 644-647 McGill L.J. and 213-216 C.P.R.

277. *R. v. Miller's T.V. Ltd.* (1968), 56 C.P.R. 237, at 241 and *R. v. Patton's Place Limited* (1968), 57 C.P.R. 12, at 16.

278. Specific examples of price discrepancies may be found in the Meredith Memorial Lectures to which reference has been made above in n.265.

279. Largely because of the exculpatory provision in 33C(2) for the publisher which would hardly be necessary if knowledge were a required ingredient of the offence. *R. v. Allied Towers Merchants Limited (II)* [1965] 2 O.R. 628, [1966] 1 C.C.C. 220 and 46 C.P.R. 239.

280. In the 110 cases decided through February 25, 1971.

281. (1969), 60 C.P.R. 140.

282. The fine was \$1500 and the judge clearly indicated that he would have been more severe had there not been extremely convincing evidence of an attempt on the part of the accused to avoid the commission of the offence.

283. See the text *supra*.

tion of an advertisement—note that section 33C refers to a representation and is therefore broader in scope—which contains a statement that purports to be a statement of fact but that is untrue, deceptive or misleading. In other words, the statement may be factually unassailable, but may contain implications which are deceptive or misleading. Such an advertisement—which is commonly referred to in North America as a “half-truth”—will be actionable. Conviction will also be in order where the advertisement is *intentionally* so worded or arranged that it is deceptive or misleading. The insertion of the word “intentionally” will probably render this part of the section useless unless the courts are prepared to read presumptions into the law.

In the recent *Imperial Tobacco* case²⁸⁴, Canada has one of the most important judgments rendered to date in this area. Following the American cases, Mr. Justice Sinclair of the Alberta Supreme Court has held that “the protection of the section is for ‘the public—that vast multitude which includes the ignorant, the unthinking and the credulous’ ”²⁸⁵. The standard is not, therefore, that of the ordinary reasonable man, a factor which will undoubtedly prove to be of great importance in the prosecution of future s.33D cases.

Although there can be little doubt that the use of the term “advertisement” rather than “representation” will result in some restrictions in the usefulness of s.33D in the future, it has not proved a hindrance to date. There have been convictions for labels, brochures, flyers, signs on premises as well as TV and newspaper advertisements. As in the case of s.33C, *mens rea* is not a necessary ingredient of the offence and fines under 33D have generally been higher than those under 33C, averaging close to \$650 per case and ranging as high as \$3,000. Although this may result from the fact that the offence created by s.33D(1) is indictable, the greatest handicap of the section may well be the fact that the offence is *inflexibly* indictable. Courts may be less willing to convict because of the gravity of the offence and it would clearly be more sensible to provide the Crown with the option to proceed by way of summary conviction. The indictable route could then be reserved for “hard-core” deceptive practices.

4. Conclusion

One might best conclude by commenting on the recently enacted South Australian Unfair Advertising Act, 1970-1971 in the light of the American, English and Canadian legislative experiences. Like the English and Canadian statutes, the South Australian Act is limited to unfair advertising practices and this is, as stated in the introduction to this article, a significant deficiency, particularly where the definition of advertisement is not apparently broad enough to include the other practices:

“advertisement” includes every form of advertising (whether or not accompanied by or in association with spoken or written words or other writing or sounds and whether or not contained or issued in a publication) by the display of notices or by means of catalogues, price lists, labels, cards or other documents or material or by exhibition of

284. (1970), 64 C.P.R. 3.

285. *Ibid.*, at 4.

cinematograph films or of pictures or photographs, or by means of radio or television, or in any other way²⁸⁶.

This definition would not necessarily cover purely verbal representations made door-to-door, for example, although this would clearly depend upon the attitude of the courts in defining "or in any other way". A strong argument could certainly be raised against the verbal representations falling within the definition, though, in virtue of the maxim *inclusio unius est exclusio alterius*, for verbal representations are already mentioned within the parentheses.

The Act is otherwise general in scope and the benefit or deficit to be derived from this fact also depends, of course, on the courts. The sole offence created relates to the publication of an advertisement containing "an unfair statement"²⁸⁷. This term is defined as follows:

"unfair statement" in relation to an advertisement means a statement or representation contained in the advertisement that is—

(a) inaccurate or untrue in a material particular;

or

(b) likely to deceive or mislead in a material way a person to whom or a person of a class to which it is directed²⁸⁸.

It is the second part of this definition which is likely to create problems for the Act also provides that

It shall be a defence to a prosecution for an offence that is a contravention of subsection (1) of this section for the defendant to prove that the unfair statement was of such a nature that no reasonable person would rely on it²⁸⁹.

There exists an apparent contradiction between these two excerpts which is only resolved by assuming that the reasonable person of the second is intended to mean "reasonable person or reasonable person of a class to which it is directed". There is obviously a distinction to be drawn between a reasonable adult and a reasonable child, for example, and the definition of "unfair statement" would lose its effectiveness if the defendant were able to show that no reasonable adult would have been fooled by an ad patently directed at a child. Even if the interpretation offered by the writer is the correct one, the result would seem to be that the Unfair Advertising Act will not be as consumer protective as either the American or Canadian legislation which, it may be remembered, protects the gullible, the unthinking and the credulous. It is true that the burden of making out the defence provided by s.3(4) lies on the defendant but the harshness from the point of view of the consumer is that the defence should have been provided at all.

The most inexplicable provision of the Act, from the point of view of this writer, at least, is s.3(2) which reads:

286. S.2.

287. S.3.

288. S.2.

289. S.3(4).

It shall be a defence to proceedings for an offence that is a contravention of subsection (1) of this section for the defendant to prove that at the time of the publication he believed on reasonable grounds that the statement or representation complained of was not an unfair statement.

Although the Crown does not have the onus of establishing *mens rea*, the fact that proof of the absence of *mens rea* by the defendant will secure an acquittal is most obnoxious and may well prove to be an insurmountable obstacle to the efficient utilization of the Act.

Just as the writer levelled a criticism against s.33D of the Canadian Act for its inflexibly indictable approach, so must he now criticize the South Australian Act for its inflexibly summary approach. The Attorney-General should have the right to wield a bigger stick when the occasion calls for it, as it so often does. Finally, in this connection it might be observed that the fine of one thousand dollars is rather limitative. This is an unhappy feature of s.33C and parts of s.33D of the Canadian Act as well although the English Act avoids the problem by providing the summary and indictable options.

The writer has long held the opinion that fines ought to be levied in accordance with the profits obtained from the illegal acts or practices. Where the profit on an item is, for the sake of argument, five dollars and one thousand items are sold as the result of an unfair statement in an advertisement, it is grossly inequitable that the offender should suffer a fine or penalty which, at maximum, represents but a portion of his profits. *A fortiori* is this so when there is no provision for injunctive relief or higher penalties in the case of second and subsequent offences²⁹⁰.

In sum, while the Act may represent a step forward in Australia, it may be observed that it is likely to have both starting-up and operational difficulties due to the general and limited thrust of its provisions and the wide-open defences available to the advertiser. One can only hope that the South Australian courts will be more generous than those in Canada in interpreting the Unfair Advertising Act²⁹¹.

290. A strong case might be made for giving to the South Australian Prices Commissioner the power either to grant or to seek elsewhere a cease-and-desist order.

291. Extended criticisms of the Canadian Act and recommendations for its amendment may be found in Cohen, *op. cit.*, 126-132.