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AUSTRALASIAN REGULATION OF DECEPTIVE SELLING PRACTICES¹

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1. Introduction

The previous issue of this Review contained a Consumer Protection Symposium in which some aspects of the regulation of deceptive selling practices were reviewed. The articles referred, for example, to the South Australian Unfair Advertising Act and the New South Wales Consumer Protection Act. Recent years have seen a considerable amount of legislation designed to protect the consumer and the purpose of this article is to try to draw together the legislation relating to deceptive selling practices. The drawing together avoids the somewhat misleading effect of discussing individual enactments: for example, the South Australian Unfair Advertising Act should be considered in conjunction with the Goods (Trade Descriptions) Act and the Misrepresentation Act. The drawing together also enables an overall assessment of the impact of recent legislation on consumer rights. The legislation relating to deceptive selling practices remains remarkably uniform throughout Australia and New Zealand so that the legislation for all the jurisdictions can be considered together and comparison is facilitated.

The pressure for legislative intervention to protect the consumer stems in part from a growing awareness of the inadequacies of the common law relating

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1. I am indebted to Miss R. I. Cabulis of the Adelaide Law School for her assistance in the research involved in the preparation of this article.

to contracts. In many ways the common law rules ensured that the contract in law need have little relation to the agreement in fact. The parol evidence rule, the binding effect of a signed document and the ability of the vendor to exclude all liability procured commercial certainty at the expense of consumer expectation. The consumer expected that he was entitled to goods which were (in Sale of Goods Act language) merchantable and the only special terms of any significance to him related to oral representations made by the vendor. Some legislation has attempted to change the terms of the contract. The Australian Hire Purchase Acts have insisted on the incorporation of an obligation to supply merchantable goods (second-hand goods excepted) and introduced liability for statements made in the course of negotiations. The English Misrepresentation Act of 1968, now followed in the South Australian Misrepresentation Act 1972, removed some of the impediments to a remedy for inaccurate statements.

Reform of contractual rights has not been a main feature of consumer protection legislation in Australia and New Zealand. Instead criminal penalties have been introduced for practices contrary to the consumer interest. In part this legislation reflects the difficulty faced by a consumer in enforcing his rights. In many consumer matters the amount involved is such that legal action is not worthwhile. Consequently the legislation has emphasised the creation of administrative agencies to supervise commercial activity.

The discussion of the substance of the legislation relating to deceptive selling practices is divided into three parts: promoting the product; catching the consumer off-guard; and enforcement. The first part discusses restrictions on promotional activities by the vendor. These restrictions aim to ensure that the consumer has not been misinformed when he makes a purchase and can effectively compare the values offered by vendors. The legislation has rarely required the disclosure of information but has quite sweepingly prohibited the use of inaccurate information and misleading promotional techniques. The second part concerns restrictions on efforts by traders to trap the consumer into a purchase. The legislation attempts to ensure that the consumer knows what he is doing and has had the opportunity to consider the consequence of his commitments. Attempts by the trader to induce ill-considered purchases are controlled. The third part of the article considers the methods for giving legal effect to consumer rights. It is concerned with additional powers given to both the government and the consumer to enforce the obligations imposed upon the trader.

2. Promoting the product

(A) WEIGHTS AND MEASURES

One of the oldest forms of fraud in the area of retail sales is the use of inaccurate weights and measures. Legislation to ensure such things as the accuracy of weighing machines was one of the first legislative actions for consumer protection. Despite modern retailing methods the control of this type of fraud remains significant. The control also establishes a uniform code of measurement which prevents the confusion to the consumer which would result from the use of different measurements. Furthermore the enforcement of the regulation of weights and measures requires an administrative structure which can be utilised for other consumer legislation.

All Australian States and New Zealand have reasonably similar legislation relating to weights and measures². This legislation requires a uniform system of weights and measures within each jurisdiction. Within Australia uniformity is achieved by reference to Commonwealth National Standards³. This machinery enables the change to metric standards.

The Acts create a chief administrative officer—a Chief Inspector of Weights and Measures, a Warden of Standards or the Chief Commissioner of Police—and a number of inspectors. Reliance is also placed on the work of local government officials. The inspectors are empowered to enter premises and test weights and measures. Weighing machines, weights and similar items may be verified and appropriately stamped.

All contracts and sales must be made by reference to the prescribed standard units⁴. Any contract not in these units is void. All sales must be by net weight or measure. It is an offence to make a false declaration or statement as to the number, quantity, measure, gauge or weight of an article; wilfully to mislead any person as to those matters; or to sell any article short of the weight, measure, or number purporting to be sold⁵.

It would now appear established that the offence of selling a short measure article is committed even though the consumer is not deceived. The actual amount supplied is apparent for example to a consumer who is supplied a ten ounce glass of beer whose top portion contains only froth. It is easier in New South Wales to interpret the legislation so as to require deception of the consumer in the case of short measure sales because the three offences mentioned in the previous paragraph are combined in one section and are introduced by the words "no person shall by means of words, description or other indication . . .". In *Joyce v. Paton*⁶ it was held that these words qualified the three offences and introduced an element of deception into each. In that case a customer asked for a pint of beer and was served a pint tankard which because of the froth did not contain a full pint. The licensee was acquitted on a charge of selling an article short of the quantity ordered because the customer was well aware of the short measure. However *Joyce v. Paton* was overruled a year later in *Joyce v. Stephens*⁷ and the licensee would now appear to have no defence. In New South Wales the offence is one of supplying an amount short of the quantity ordered whereas in some other States the offence is one of supplying an amount short of the quantity purporting to be sold. Where the short measure is apparent, it may be possible to contend that the supplier is not purporting to sell the full measure.

2. South Australia: Weights and Measures Act 1971; Western Australia: Weights and Measures Act 1915-69; Victoria: Weights and Measures Act 1958-70; New South Wales: Weights and Measures Act 1915-69; Queensland: Weights and Measures Act 1951-67; Tasmania: Weights and Measures Act 1934-68; New Zealand: Weights and Measures Act 1925-69.

3. Weights and Measures (National Standards) Act 1960-1966.

4. South Australia: s.31; Western Australia: s.17; Victoria: s.72; New South Wales: s.22; Queensland: s.32; Tasmania: s.19; New Zealand: s.14.

5. South Australia: ss. 33, 34; Western Australia: ss.21, 23; Victoria: s.77; New South Wales: s.28; Queensland: s.39; Tasmania: ss.29, 33; New Zealand: ss.19, 23.

6. (1941) 58 W.N. (N.S.W.) 88.

7. (1942) 59 W.N. (N.S.W.) 75.

There are a number of products for which no standard of measurement exists. An early New South Wales case rejected the contention that any standard of measurement could be required for a packet of toilet paper⁸. Even some cases in which there is an apparent standard have been held to be without standards. In *Ex Parte Brown; Re McGregor*⁹ a licensee was charged as the result of the sale of an ounce of whisky short of that measure. The Full Court of the New South Wales Supreme Court dismissed the charge on the basis that the offence only related to standard measures within the meaning of the Act and that these measures did not apply to the sale of whisky. "Those who framed the English Act of 1878 and its counterpart in this State lived in a day when the measuring out by a publican of spirituous liquor, such as whisky, by the fluid ounce was unthinkable, and when such niggling measures were regarded as being appropriate only to commodities dealt with by apothecaries"¹⁰. An example of the lack of information that may result from the lack of standards has occurred where customers have bought cigarettes apparently at a reduced price when in fact the cigarettes have contained larger filters and less tobacco. In laying down national standards the Commonwealth has power to extend the standards to cover as many cases as possible.

Whilst the consumer's task in comparing the values of products is simplified by the use of a standard set of weights and measures, products may still be sold in a wide range of quantities. Thus the consumer must decide whether he is paying more for 12 ounces of peanut paste at 41 cents or 14 ounces at 47 cents. The difficulty of this decision is compounded by comparison of the qualities of the products. It is possible to reduce the number of measurements in which a product is exposed for sale. Thus the Queensland Act¹¹ requires that bread be produced in one pound, two pound or four pound loaves.

In imposing criminal responsibility for what are termed social welfare offences the issue of the standard of conduct required has been much debated and the requirement of a guilty intent often weakened. The South Australian and Victorian provisions relating to weights and measures deal expressly with the issue of mistake¹². In these States the defendant will be acquitted if he can prove that the offence was due to a bona fide mistake or an accident or to any other cause beyond his control and in spite of all precautions being taken and due diligence exercised by him to prevent the occurrence of the offence, or was due to the action of a person over whom he had no control.

In a Victorian case, *Boyle v. Wright*¹³, the defendant sought to escape a charge of having sold underweight bread. He gave evidence of his production process and the Magistrate found that he had taken all due precautions and exercised all due diligence to prevent the commission of the offence. Nonetheless he was convicted because of a ruling that he had to particularise an accident or mistake which caused the underweight goods to be produced and escape detection.

8. *Cheadle v. Hugginson* (1919) 36 W.N. (N.S.W.) 58.

9. (1952) 52 S.R. (N.S.W.) 134.

10. At p. 136.

11. S.28; cf. *Hussie v. Williamson ex parte Hussie* [1955] Q.W.N. 48.

12. South Australia: s.41; Victoria: s.92.

13. [1969] V.R. 699.

On appeal Smith J. rejected this ruling and quashed the conviction. It was pointed out that in general the less specific the inferences that can be drawn from the evidence, the more the risk for the defendant that the tribunal will feel unable to be satisfied that the claim for protection has been made out. But that was a consideration going to the weight of the evidence. Smith J. added that "mistake" included an error in conduct consisting of an unintended failure to perform correctly and effectively a task intended to be duly performed and that "accident" included an unlooked for mishap or untoward event which was not expected or designed.

It may be doubted whether the attempts to provide elaborate formulae on the issue of mistake are worthwhile. They mean little more than that the defendant will be acquitted if he has taken reasonable precautions to prevent the commission of an offence. However to require reasonable precautions seems to indicate that it is not enough that an individual has done his best. In assessing an individual's conduct the courts are acting after the event and in relation to an isolated situation. There is much to be said for an administrative determination of reasonable standards for particular production processes.

(B) PACKAGING

The significance of weights and measures regulation has been reduced by the introduction of supermarkets and packaged goods. Following an English initiative, legislation relating to the packing of goods was introduced in all Australian States and New Zealand in the late nineteen-sixties¹⁴. The object of this legislation is to prohibit packages which are deceptive as to the amount of their contents and to control the statements appearing on the packages. This legislation is closely related to that regulating weights and measures and the administration of the two pieces of legislation is integrated.

Central to the legislative scheme is the responsibility of the packer. When an article is packed it must be marked with the name of the packer and a packaged article must not be sold if it does not contain the name of the packer¹⁵. The packer is defined as the person who packs an article in the reasonable expectation that the article will be sold or who authorises, directs, causes, suffers or permits the packing of an article in the reasonable expectation that the article will be sold. Where the packing is done on behalf of someone it is the person on whose behalf the packing is done whose name should appear on the package.

The problem of determining the packer of an article is illustrated by the case of *Vaux v. Baltic Merchandising Pty. Ltd.*¹⁶ In that case packets of cheese contained a statement: "Herb cheese 50 grams packed in Germany for Baltic Import Company Melbourne 1 $\frac{3}{4}$ oz." The section under which the defendant—the Import Company—was charged was interpreted to apply to

14. South Australia: Packages Act 1967-72; Western Australia: Weights and Measures Act 1915-69; Victoria: Weights and Measures Act 1958-69; New South Wales: Weights and Measures Act 1915-69; Queensland: Weights and Measures Act 1915-67; Tasmania: Weights and Measures Act 1954-68; New Zealand: Consumer Information Act 1969.

15. South Australia: ss.15, 27; Western Australia: s.27C; Victoria: s.82D; New South Wales: s.29B; Queensland: s.43B; Tasmania: s.25J; New Zealand: s.3.

16. [1962] V.R. 317.

persons who packed goods but not to persons who caused goods to be packed. Thus a person who arranged with an independent contractor to pack goods would be acquitted.

But O'Bryan J. went on to deal with the facts presented on the basis that a person who caused goods to be packed could be convicted. He pointed out that the words on the package were consistent with the goods having been packed by a supplier pursuant to a contract to deliver to a distributor Herb Cheese in $1\frac{3}{4}$ oz. packages, it being left under the contract of sale to the supplier to make his own arrangements as to how he would fulfil his contract. Under the packages legislation, on this hypothesis, it would appear that the distributor is not a packer and that the supplier's name should appear on the package. On this construction the packer will in many cases be outside the jurisdiction of the State in which the goods are sold. The duties imposed on a packer are more exacting than those imposed on a vendor yet a vendor may be the only person amenable to the jurisdiction of the State in which the goods are sold. Within Australia the impracticability of single State legislation should therefore be apparent.

The packages legislation imposes obligations on both the packer and the vendor. In South Australia the obligations of the packer and the vendor are divided into two parts—Part III: Packing of Articles, and Part IV: Sale of Articles. The other Acts combine the offences of packing and selling in one section. Nonetheless the legislation deals with two separate actions and already prosecutions have reflected some confusion on this point. As is customary in legislation of this type selling is defined to include offering or exposing for sale.

There are six main areas of conduct, some or all of which are controlled by the packages legislation in the various jurisdictions.

- (a) A package must be marked with a statement of the true weight or measure of the article which has been packed¹⁷.
- (b) The denomination in which an article may be packed may be prescribed in relation to any type of article¹⁸.
- (c) A package must not contain less than the weight or measure stated on the package. In general it is not permissible to state the weight or measurement as at the time of packing. An allowance is made for small deficiencies or for deficiencies caused by unforeseeable circumstances occurring after packing¹⁹.
- (d) Statements relating to the size of the pack, such as for example "Economy Size", may be prohibited or restricted. In the case of a restricted statement, the statement cannot be used without a clarifying explanation²⁰.

17. South Australia: ss.18, 30; Western Australia: s.27E; Victoria: s.82F; New South Wales: s.29D; Queensland: s.43D; Tasmania: s.25L; New Zealand: s.4.

18. South Australia: ss.16, 28; Western Australia: s.27D; Victoria: s.82E; New South Wales: s.29C; Queensland: s.43C; Tasmania: s.25K.

19. South Australia: ss.20, 32; Western Australia: s.27C; Victoria: s.82H; New South Wales: s.29G; Queensland: s.43F; Tasmania: s.25N; New Zealand: s.7.

20. South Australia: ss.24, 34; Western Australia: s.27J; Victoria: s.82J; New South Wales: s.29J; Queensland: s.43H; Tasmania: s.25R.

- (e) A package must not be marked with any words stating or implying that the article is for sale at a price less than its ordinary or customary sale price. The prohibition is intended to prevent such phrases as "3 cents off"²¹.
- (f) A package must not be deceptively larger than its contents. When an inner package is used the volume of the outer package must not exceed that of the contents by more than 35% of the volume of the outer pack, in other cases the excess must not be more than 25%²².

Overall the packages legislation does little more than put the consumer in the same position with respect to the weight and measure of packaged goods as he is with non-packaged goods. The weight or measure must be stated and must be accurate. The packages legislation itself does nothing to ensure the accuracy of statements on the package relating to the nature of the contents nor does it do anything to require that information be given about the contents or make such a requirement possible for defined classes of goods.

The primary responsibility for compliance with the demands of the legislation is placed on the packer. A careful vendor who sells a pack in the same state in which he received it will be excused. The vendor is excused if he can prove that the commission of the offence was due to a cause which he could not reasonably have foreseen or for which he could not reasonably have made allowance and that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence. In addition he must prove that he purchased the article from another person and sold or delivered it in the same state in which it was delivered to him.

The packer is given a defence in the case of articles short of the weight or measure stated on the pack. He will be excused if he can prove that the commission of the offence was due to a cause that he could not reasonably have foreseen and for which he could not reasonably have made allowance and that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

As in the case of weights and measures the defence of mistake has been spelt out by elaborate formulae. The stringency of the defences should be apparent from their recital. It would be a rare case where the defendant could prove all that he has to do to bring himself within their protection. Indeed it is difficult to see why a defendant has to satisfy all the factors listed if it is intended that a careful man should be acquitted. For example he must show both that the event was unforeseeable and that he took all reasonable precautions. If an event is foreseeable what more can be done than to take reasonable precautions? What are reasonable precautions against an unforeseeable event? It is possible that the courts will interpret the sections simply to require reasonable precautions. If this should occur the Acts will be seen to contain much unnecessary verbiage and again to have evaded the issue of specifying standards.

21. South Australia: ss.25, 36, 37; New Zealand: s.10.

22. South Australia: ss.26, 37; New Zealand: s.8.

(C) TRADE DESCRIPTIONS

In many jurisdictions criminal sanctions are imposed against persons who misdescribe goods in the course of business. In some cases the legislation dates from an early time²³. In the case of the early legislation the intention was to deal with fraudulent conduct in the course of trade. Later legislation has imposed a stricter responsibility, particularly on the manufacturer of goods.

There are two main offences: firstly, to apply a false trade description to goods; secondly, to sell goods to which a false trade description has been applied²⁴.

Extensive definitions are given of the type of matters which are regarded as a trade description of goods. Any indication of the nature, quality and characteristic of the goods, the manufacturer or the method of manufacture could be a trade description of the goods. Although the subject matter of the description is thus broadly extended, the mode of descriptions included is not as clear. The offence relates to the application of a false trade description. This wording seems to be concerned with matters such as labelling and not to cover mere oral descriptions. The inference does not seem to be removed by the fact that a description includes a statement, indication or suggestion²⁵. The express addition in Victoria and Tasmania of newspaper advertisements makes a broader concept even more difficult.

The statutes vary from imposing liability only for fraudulent conduct to imposing strict liability. In South Australia and New South Wales the person applying the trade description commits an offence only if he acts fraudulently. The burden of proof is however on such a person to show an absence of an intent to deceive or defraud²⁶. In those States a person who sells goods to which a false trade description is applied must prove that he had taken all reasonable precautions against committing an offence and had provided information about his supplier²⁷. In Tasmania there is a general defence where the defendant can show that he had taken all reasonable precautions or that he had no reason to suspect that the trade description was false²⁸. In Victoria and Queensland a defence is available only for a person who sells goods having obtained them from someone else: he must prove that he had taken all reasonable precautions²⁹.

In all cases, even where a manufacturer is only penalised if he has acted fraudulently, a retailer must take reasonable precautions. The burden imposed

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23. Thus an 1892 prosecution concerned the Foster Brewing Company which had bottled its beer as Munich Beer: *Christie v. Foster Brewing Co. Ltd.* (1892) 18 V.L.R. 292. What would Barry McKenzie have thought?
 24. South Australia: Goods (Trade Descriptions) Act 1935-69 ss.7, 11; Victoria: Goods Act 1958-69 s.90; New South Wales: Consumer Protection Act 1969 s.23; Queensland: Consumer Affairs Act 1970 s.25; Tasmania: Goods (Trade Descriptions) Act 1971 s.14.
 25. Cf. G. Borrie and A. L. Diamond, *The Consumer, Society and the Law* (2nd edition), 131.
 26. South Australia: s.7; New South Wales: s.23(1).
 27. South Australia: s.11; New South Wales: s.23(2).
 28. Tasmania: s.14.
 29. Victoria: s.94; Queensland: s.47.

on a retailer is illustrated by *Sherratt v. Gerald The American Jewellers Ltd*³⁰ In that case the defendants had on sale a watch marked as waterproof. They had bought the watch from a reputable manufacturer. In fact the watch was not waterproof. It was held that the defendants had not taken all reasonable precautions as they could have immersed the watch in a container of water. The means of checking the description was simple in that case and a jeweller could be expected to exercise greater control over his wares than, say, a supermarket proprietor.

The courts have interpreted descriptions from the point of view of the average member of the public. In *Roche v. Tyler*³¹ the defendant exposed for sale an undershirt labelled "flannel undershirt". The garment contained three to five per cent. of wool and the remainder was cotton. Standard works of reference indicated that flannel was a material consisting substantially of wool. There was however evidence that in the trade the word had been applied to materials with an increasing percentage of cotton. The defendant was convicted. Cussen J. held that the statute was one designed to protect the public and consequently the court had to look to public interpretation.

The Victorian Supreme Court has required that there be something in the trade description which causes the false interpretation. In *R. v. Alexander Fergusson Pty. Ltd.*³² the defendant, a paint manufacturer, supplied tins of paint with a label on which there was a trade mark with the defendant's name and the picture of an elephant. Previously a Scottish firm had sold paint in Victoria and their trade mark had included an elephant. The Scottish firm had assigned their goodwill to the defendant. Persons in the trade testified that they had been induced by the label to believe that the paint was made in Scotland. The Full Court acquitted the defendant holding that an indication of the place of origin required "something in the label itself which being read according to the commonly received meaning of the words as used in that trade, would be in itself an indication that the goods were made in that place". There had to be "at least something more than the mere fact that it would convey to any person in the trade who read it the impression or belief that the goods were made in that place."³³ The distinction drawn in that case is a difficult one to apply and it is conceivable that it could lead to abuse. Protection for innocent misdescriptions can be obtained in most States by the defence for a person who has acted innocently.

There are further provisions dealing with the trade description of specified classes of goods. These will be considered later.

(D) FALSE ADVERTISING

Not only is the trade descriptions legislation restricted to statements which are applied to goods, but it does not affect statements relating to anything other than goods. Advertising through the mass media has long been a feature of Australian and New Zealand society. To require that this advertising be accurate does not seem to place an undue burden on the advertisers. Indeed,

30. (1970) 114 Sol. Jo. 147.

31. [1917] V.L.R. 665.

32. [1922] V.L.R. 801.

33. At p. 803.

it is surprising that in many jurisdictions such a requirement has not been imposed until the last decade. Today all Australian States (except Tasmania) and New Zealand control inaccurate advertising³⁴.

Whilst it is possible to classify all the legislation as relating to advertising, the terms used by the Acts to describe their subject-matter vary considerably. In Queensland the Act controls the publication of statements relating to goods³⁵, in New South Wales the publication of statements relating to goods or services³⁶. In Western Australia and Victoria the legislation deals with the publication of statements relating to real or personal property or services³⁷. In South Australia and New Zealand control is imposed on advertising³⁸. South Australia attempts a definition of advertisement but that definition is not enlightening; the basic idea seems to be the publication of a statement. In South Australia the advertisement must relate to goods or services or the extension of credit. In New Zealand only advertisements relating to goods are affected.

In Victoria and Western Australia false statements are prohibited; in other jurisdictions false or misleading statements are prohibited. In the parliamentary debates on the South Australian provision much was made of the greater scope given by the addition of "misleading". Reference was made to the cases of *Aaron's Reefs Ltd. v. Twiss*³⁹ and *R. v. Kylsant*⁴⁰. In fact these cases support the view that the courts will regard the concept of false statements as including misleading statements. The much cited passage is that of Lord Halsbury in *Aaron's Reefs v. Twiss*. "It is said that there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed—by what trick or ambiguous language: all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue"⁴¹.

There is one New Zealand case which suggests that the word "misleading" has some scope or at least might induce a court to be more ready to convict. In *Wark v. N.Z. Products Ltd.*⁴² a label on a can of baked beans contained the words "Baked beans in tomato sauce with bacon". Analysis established

34. South Australia: Unfair Advertising Act 1970-71; Western Australia: Trade Descriptions and False Advertisements Act 1939-69; Victoria: Summary Offences Act 1966, cf. Consumer Protection Bill 1972 s.13; New South Wales Consumer Protection Act 1969; Queensland: Consumer Affairs Act 1970; New Zealand: Consumer Information Act 1969.

35. S.32(1) & (2).

36. S.32(1) & (2).

37. Western Australia: s.8 (1) & (2); Victoria: s.6.

38. South Australia: s.3; New Zealand: s.9.

39. [1896] A.C. 273.

40. [1932] 1 K.B. 443.

41. [1896] A.C. 273 at 281.

42. (1952) 8 M.C.D. 23 referred to in (1971) 6 Recent Law 326.

that there was, in volume, a proportion of bacon in the product of about 8/1000 ths of bacon to the whole. The Magistrate found that there was no taste of bacon in the mixture as would be experienced by the ordinary person. He decided that even though the bacon was present in minute quantities, the label was misleading when the bacon could not be detected by sight or smell or taste.

In all jurisdictions the legislation essentially punishes a person who has been fraudulent or negligent. The defendant will escape if he can prove that he believed on reasonable grounds that the statement was true⁴³. In addition an exemption is provided for persons such as newspaper and television proprietors who act innocently⁴⁴. In New South Wales and Queensland there is a provision whereby inspectors may warn such persons about the nature of an advertisement and thereafter the protection is removed.

In addition to this general legislation there is some additional legislation dealing with specific advertising malpractices. In South Australia there is a prohibition of "bait and switch" or "ghost" advertising: it is an offence to advertise goods for sale where the advertiser does not have such goods for sale⁴⁵. In Queensland it is an offence to misrepresent the person who manufactured the goods or to make false claims as to the suitability of the goods⁴⁶. In New Zealand false endorsements are prohibited⁴⁷.

The trade descriptions of goods and unfair advertising legislation deals with certain classes of statements made by persons in the course of business. The legislation restricts only inaccurate statements. The attack on advertising by social critics extends beyond inaccuracy. A large amount of advertising involves not the conveyance of information about a product but the building up of psychological preference for a product. The issue worthy of debate is whether this style ought to be restricted. However this issue has been seldom mentioned in parliamentary debate.

(E) CRIMINAL MISREPRESENTATION

Only certain classes of statements are selected for control by the trade descriptions and unfair advertising legislation. In assessing this legislation the concepts of published statements and advertising can be accepted as equivalent. In Queensland the legislation concerns published statements relating to goods (advertising) and trade descriptions applied to goods (trade descriptions). In Western Australia the regulation covers all published statements (advertising) and in New Zealand all published statements relating to goods (advertising). In other jurisdictions all published statements (advertising) and trade descriptions applied to goods (trade descriptions) are controlled. No distinction between statements relating to goods and statements relating to other matters is apparent. Control of only published statements is arguably

43. South Australia: s.3(7); Western Australia: s.8(3); Victoria: s.36(4); New South Wales: s.32(3); Queensland: s.33; New Zealand: s.9(4).

44. South Australia: s.3(3); Western Australia: s.8(4); Victoria: s.36(3); New South Wales: s.32(4); Queensland: s.34; New Zealand: s.21.

45. Prices Act 1948-1970 s.33(b).

46. Consumer Affairs Act 1970 ss.34, 35.

47. Consumer Information Act 1969 s.9(5).

justified on the ground that these statements have wider impact and are more easily identified and proved.

In Queensland and South Australia the regulation of inaccurate statements extends beyond what has already been discussed. In Queensland the legislation discussed so far controls published statements about goods and trade descriptions of goods. In South Australia the legislation discussed so far controls published statements and trade descriptions of goods.

In Queensland s.30 of the Consumer Information Act deals with the most obvious category not within other provisions—statements relating to services. The section deals with all statements relating to services not just published statements and thus extends beyond what has been regarded in this article as advertising. The section follows very closely s.14 of the United Kingdom Trade Descriptions Act. It relates to statements made in the course of a trade or business relating to services, accommodation or facilities. Unlike the provisions relating to goods the person making the statement is only liable if his conduct has been fraudulent. He is liable if he makes a statement knowing that it is false or if he recklessly makes a statement that is false; a statement is made recklessly if it is made regardless of whether it is true or false. It is further provided that anything to be taken as a false statement as to any of the matters covered by the section is deemed to be a false statement as to those matters. This provision seems to eliminate the type of approach taken in *R. v. Alexander Fergusson Pty. Ltd*⁴⁸.

In South Australia Part II of the Misrepresentation Act 1972 has not been limited to a subject matter outside other provisions. It deals in general terms with false statements made in the course of a trade or business⁴⁹. However it is expressly stated that the legislation does not apply to advertisements subject to the provisions of the Unfair Advertising Act⁵⁰. The distinction between statements which amount to advertisements and those which do not therefore becomes crucial. I have already suggested a division between published statements and statements made simply between contracting parties. The overlap of advertisements and other false statements on the one hand and false trade descriptions applied to goods will be considerable. One wonders why the general provisions of the Misrepresentation Act could not supplant all other legislation.

Whereas the Queensland provision imposes liability only for fraudulent statements, the South Australian Act imposes a wider range of liability. The defendant who makes an inaccurate statement will be convicted unless he can prove that he believed on reasonable grounds that the statement was true⁵¹.

The topic of vicarious responsibility in relation to consumer offences was discussed in an article in the previous edition of this Review⁵². However the

48. [1922] V.L.R. 801.

49. Misrepresentation Act 1972 s.4.

50. S.4(7).

51. S.4(3)(a).

52. W. B. Fisse, "Consumer Protection and Corporate Criminal Responsibility" (1971) 4 Adel. L.R. 113.

leading case discussed in that article, *Tesco v. Natrass*⁵³, was given careful attention by the framers of the South Australian Act. Under the Act the person liable is the person on whose behalf the statement is made but he is given a defence where he has taken all reasonable precautions to prevent the commission of an offence by persons acting on his behalf or in his employment⁵⁴. In addition where a body corporate is guilty of an offence, each member of the governing body of the body corporate who knowingly authorises, suffers or permits the commission of the offence is himself guilty of an offence⁵⁵.

The impetus for the South Australian legislation came from comments of Zelling J.⁵⁶ in *Athens-MacDonald Travel Service Pty. Ltd. v. Kazis*⁵⁷. In that case the plaintiff, a Cypriot migrant, saved up sufficient money to take himself and his family back on a three months' trip to Cyprus. He arranged the trip through the defendant travel agency. The agency repeatedly assured the plaintiff that it would complete arrangements for his return journey. However the plaintiff and his family were sent on their way without any arrangement for their return and ultimately the only transport back involved cutting short the holiday. The plaintiff based his action on breach of contract and any claim of fraud was abandoned. The main issue in the case was the quantum of damages.

The Report of the Law Reform Committee which led to the Misrepresentation Act states that the Committee hoped to prevent fraudulent dealings by travel agents⁵⁸. In fact the Act is extending liability beyond fraud. The extension may be due to a desire to avoid the difficulties of proof of fraud (the *Athens-MacDonald Case* may be an example of this difficulty) or to a desire to place a businessman under a duty to take reasonable steps to ensure the accuracy of his statements. This extension is consistent with much of the recent legislation governing false statements. In terms of legal policies the comment can be made that although *Hedley Byrne v. Heller*⁵⁹ has had the most minimal effect on Australian case-law, its spirit has greatly influenced recent legislation. The other significant feature of much of the legislation is that in criminal offences the onus of proof has been thrust on the defendant whereas the civil-action plaintiff has to prove negligence.

The activities of travel agents are a central concern of the South Australian Act and would similarly be subject to the Queensland legislation. The English legislation has produced one significant case on this topic: *Sunair Holidays Ltd. v. Dodd*⁶⁰. In that case the travel agent's brochure described the facilities offered at the Hotel Costa Ayulas "All twin-bedded rooms with private bath, shower, W.C. and terrace". The holidaymakers found that rooms had no

53. [1971] 2 W.L.R. 1166.

54. Misrepresentation Act 1972 s.4(3)(b).

55. S.4(5).

56. Who is additionally Chairman of the Law Reform Committee.

57. (1970) 55 L.S.J.S. 426.

58. Of course the Bill applies to statements by anyone in the course of trade or business.

59. [1963] 3 W.L.R. 101.

60. [1970] 1 W.L.R. 1037.

terrace or balcony at all. At the time the statement was made the travel agent had a contract with the hotel whereby the rooms available for the agent's clients had the amenities described. The justices convicted the defendant on the basis that it was not established that steps had been taken after the statement but before the holidaymakers' arrival to ensure that the promised accommodation would be available. Lord Parker C.J. (with whom Bridge and Bean JJ. agreed) upheld an appeal on the basis that the statement was accurate when made and consequently no false statement had been made.

Part of the confusion surrounding the case results from the nature of the offence and that of the general defence under the Act. The offence is one of making statements fraudulently or recklessly; the defence is one of taking reasonable precautions to avoid an offence. In the type of case involved the general defence is merely confusing since a statement made after reasonable precautions cannot have been made fraudulently or recklessly. Lord Parker C.J. correctly points this out. However to concentrate on this issue misses what seems to me to be the main issue in the case: whether there is a duty to be responsible for the continuing accuracy of a statement made as to future events. Whether that duty is not to be reckless or is to take reasonable care is a separate issue.

The reasoning of the justices at first instance in *Sunair Holidays Ltd. v. Dodd*⁶⁰ concerned responsibility not merely for the accuracy of a statement at the time it was made or at the time the contract was formed but for its continuing accuracy up to the time at which performance becomes due. The usual contractual rule requires disclosure until a contract has been formed of information which falsifies a statement made during negotiations—*With v. O'Flanagan*⁶¹. In the Divisional Court in *Sunair Holidays Ltd. v. Dodd*⁶⁰ Lord Parker C.J., applying the English Trade Descriptions Act, inquired solely into the accuracy of the statement at the time it was made. He was interpreting the requirement (common to the English, Queensland and South Australian legislation) that the statement be false. He did not deal specifically with the contractual rule mentioned above (it does not appear from the report that up to the time of the contract the accused acquired or ought to have acquired any information indicating that his representation was false) but there is nothing in his judgment to deny its applicability to cases brought under the legislation here under review.

The contractual rule requires disclosure only up to the time of entry into the contract and does not extend to information received between the date of entry into the contract and the time of performance. Yet the party to whom performance is due may value this further information: he may incur expenditure of time, money and effort in reliance on the continuing accuracy of the statement, even after the other party has become or ought to have become aware that the statement is no longer true. Examples of such cases are *Athens-MacDonald Travel Service Pty. Ltd. v. Kazis*⁶² and the situation which might arise where a contract is entered into on the faith of a statement that a certain performer will appear at a festival. The approach of the justices at first instance in *Sunair Holidays Ltd. v. Dodd*⁶⁰ would impose a duty to pass

61. [1936] Ch. 575.

62. (1970) 55 L.S.J.S. 426.

on such information and avoid fruitless expenditure by the other party. It may or may not be that the information will affect performance of contractual obligations. Criminal responsibility may be imposed in addition to or in the absence of contractual obligation. *Athens-MacDonald Travel Service Pty. Ltd. v. Kazis*⁶² shows some of the limitations of contractual remedies and in the festival example there may be no contractual remedy at all.

In interpreting the existing legislation it must be conceded that in ordinary usage a false statement means a statement which is false at the time it is made. In legal usage the time at which the quality of an action is measured may be the time at which it becomes operative; hence the rule in *With v. O'Flanagan*⁶¹. The legislation under discussion regulates statements inducing the formation of a contract. Once the contract is formed the legal effect of the statement is determined. Hence the result in *Sunair Holidays Ltd. v. Dodd*⁶⁰ with a possible qualification along the lines of the rule established by *With v. O'Flanagan*⁶¹. On this analysis a distinction between the *Sunair Holidays Ltd. v. Dodd*⁶⁰ type of statement—that this pop group is booked to appear—and a continuing statement—that this pop group will appear—does not seem significant.

(F) MEDICINES, MOTOR CARS AND OTHER PRODUCTS

The legislation considered so far has dealt with misrepresentation in general terms. Some of the legislation has dealt with goods or services only but these are still broad classes. Additionally there is specific legislation. Some of this legislation deals with areas where fraud has been a special problem, such as the sale of medicines or second-hand motor cars. Other legislation has gone further than to prohibit false statements: it requires that the consumer be given specified information about the product.

This article will examine restrictions relating to medicines, cigarettes and motor cars and labelling requirements for specific products. There is further legislation, for example that relating to advertisements by land agents⁶³. The labelling and advertising of food and drugs is also subject to control. Since the consumer's risk from defective products is in this case physical as well as financial the legislation goes beyond the control of false statements and specifies quality standards which must be complied with. The issue of food and drug regulation is one deserving of separate study.

- (i) The problem of false claims relating to medicines is one that became most pressing after the first world war. In all jurisdictions there is legislation to control false claims in relation to medicines⁶⁴. Strangely the Victorian and Western Australian sections do not apply to labels on bottles or other containers⁶⁵. In many cases this legislation preceded

63. South Australia: Land Agents Act; Victoria: Sale of Land Act 1962-71; Queensland: Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Act 1922-61; Land Acts 1962-68; Tasmania: Auctioneers Estate Agents Act 1959-68.

64. South Australia: Food and Drug Regulations 1964 reg. 7; Western Australia: Health Act 1911-1970 s.227; Victoria: Health Act 1958-71 s.249; New South Wales: Medical Practitioners Act 1938-67 s.47; Queensland: Health Act 1937-68 s.104A; Tasmania: Public Health Act 1962 s.91; New Zealand: Food and Drug Act 1969 s.10(1)(a).

65. *Mellis v. Williams* [1922] V.L.R. 571.

the more general legislation discussed previously. Its significance today is largely its specialised administration by public health officials.

New Zealand has however more extensive legislation relating to medicines⁶⁶ and it has been indicated that some of the New Zealand provisions will be followed in New South Wales. In New Zealand regulations may require certain information to be placed on any medical package or may forbid certain statements. In addition an advertisement must not claim that a medicine will cure any specified disease or disorder⁶⁷. Amongst the diseases specified are arthritis, heart disease and influenza.

- (ii) The health hazards of cigarette smoking have been a matter of public controversy for some time. In South Australia the Cigarettes (Labelling) Act 1971 requires the marking of a prescribed warning on a cigarette packet. Similar legislation will be enacted in other States. This legislation does not affect the content of cigarette advertisements but Commonwealth control of radio and television cigarette advertisements has been promised.
- (iii) The purchase of second-hand motor cars is one fraught with danger because of the uncertain quality of the product. In addition the selling of second-hand motor cars is a highly competitive business in which the claims by salesmen are noteworthy for their stridency and extravagance. Until recently the consumer has been left to his own devices save for the warning that his venture is one calling for the utmost caution. Today both South Australia and Victoria have legislation to control some abuses. In South Australia it is an offence for a second-hand motor dealer to change the odometer or falsely to state the year of manufacture, the year of the first registration or the year of the model of the car⁶⁸. In Victoria it is an offence for a dealer to change the odometer or falsely to state the mileage travelled by the car⁶⁹. In South Australia advertisements by second-hand motor dealers may be regulated⁷⁰ and a purchaser has certain contractual rights relating to the quality of the vehicle. In Victoria a contract for the sale of a second-hand motor vehicle must be in writing and contain a statement as to the mileage travelled by the vehicle⁷¹.
- (iv) Labelling requirements demand that some information be supplied to the consumer. Generally the requirements apply to leather goods; in Victoria and Western Australia bedding and furniture are also controlled; in Tasmania footwear and textiles are affected; in New South Wales and New Zealand the categories are left to be prescribed. Under the legislation there must be a statement attached to the goods indicating the type of material used⁷². One suspects that this legislation was

66. *Cf.* (1969) 4 Recent Law 270.

67. Food and Drug Act 1969 s.8.

68. Second-Hand Motor Vehicles Act 1971 s.35.

69. Motor Car (Falsification of Mileage) Act 1970 s.82B.

70. Second-Hand Motor Vehicles Act 1971 s.42(2).

71. Motor Car (Falsification of Mileage) Act 1970 s.82C.

72. South Australia: Goods (Trade Descriptions) Act 1935-69; Western Australia: Trade Descriptions and False Advertisements Act 1936-69; Victoria: Goods Act

introduced more to protect industries from competition from cheaper synthetic products than to protect consumers. However the consumer is benefitted even if indirectly and the operation of these requirements may be instructive for other similar measures.

(G) TRADING STAMPS

The legislation considered so far has sought to control the statements made by the trader about his goods or services. The general practice involved in the issue of trading stamps is the granting of a bonus dependent on the purchase of other goods. Only New South Wales has no control of this practice and even there some regulation has been fore-shadowed. The objections to the practice are: (1) the consumer is misled into thinking he is getting something for nothing whereas he is paying for the bonus in the price of his original purchase; (2) the consumer is unable to purchase the items he wants at a straight-out cash figure; (3) the bonus goods often represent poor value; (4) the consumer has difficulty in calculating the value of his bonus; (5) where the firm offering the bonus goods is independent from the trader the opportunity for fraud on its part and the chances of its insolvency are great.

Legislation in Australia relating to trading stamps has come in two main bursts. Early legislation prohibited in quite simple terms the issue of trading stamps. It was found that this legislation was easy to avoid. Thus a trading stamp was defined as any form of coupon entitling the holder to goods or some other reward. If the trader retained a discretion as to whether to hand over the goods or other reward, the coupon was not an entitlement and the scheme fell outside the legislation. Three States, South Australia, Western Australia and Queensland have amended their legislation to encompass any scheme of the trading stamp type. Tasmania and Victoria retain a simple form of legislation. Until quite recently Victoria only prohibited trading stamps which entitled the holder to a bonus from someone other than the trader who issued it. The New Zealand legislation is still in this form but additionally requires that permitted trading stamps be redeemed only in money.

The basic prohibition is that against issuing or delivering a trading stamp in connection with the sale, free distribution or advertising of any goods⁷³. Allied to this offence is a prohibition against giving or delivering money or goods in exchange for a trading stamp⁷⁴. Trading stamps are defined to include any form of coupon which entitles the holder to receive any money or goods or any goods at a reduced price⁷⁵.

1958-69, *cf.* Consumer Protection Bill 1972 Part III; New South Wales: Factories, Shops and Industries Act 1962-70; Queensland: Factories and Shops Act 1960-70; Tasmania: Goods (Trade Descriptions) Act 1971; New Zealand: Consumer Information Act 1969.

73. South Australia: Trading Stamps Act 1924-1935 s.5(1)(a); Western Australia: Trading Stamps Act 1948 s.4(1)(a); Victoria: Goods Act 1958-69 s.85(1), *cf.* Consumer Protection Bill 1972 ss.10-12; Queensland: Trade Coupons Act 1933-47 s.4(1)(a); Tasmania: Trading Stamps Abolition Act 1900-54 s.3(1); New Zealand: Trading Coupons Act 1931-69 (which prohibits only coupons redeemable by persons other than the trader who issued them).

74. South Australia: s.5(3); Western Australia: s.5(3); Victoria: s.85(2); Queensland: s.4(4); Tasmania: s.3(2).

75. South Australia: s.4; Western Australia: s.4; Victoria: s.84; Queensland: s.3; Tasmania: s.2; New Zealand: s.2.

In South Australia, Western Australia and Queensland there are four main other offences:

- (1) No person shall issue any writing promising an advantage dependent upon the purchase of any goods⁷⁶.
- (2) No person shall give any advantage or promise any advantage in exchange for any form of coupon⁷⁷.
- (3) No person shall encourage another person to dispatch any form of coupon in exchange for any advantage⁷⁸.
- (4) No person shall render any form of coupon in exchange for any advantage⁷⁹.

The scope of these provisions is illustrated by the case of *Goodwin v. Brebner*⁸⁰. A company dealing in washing machines and refrigerators inserted an advertisement in a daily newspaper stating that any person buying a washing machine would be able to buy any one of four other listed articles at a price which was much less than the value of those articles. The Full Court of the Supreme Court of South Australia held that the advertisement was a writing promising an advantage dependent upon the purchase of any goods. The Court rejected an argument that "writing" ought to be limited to a document whose production entitled the producer to an advantage. The Court reasoned that the advertisement was a means for holding out the promise to the prospective purchaser which avoided the necessity for the purchaser's producing any coupon or trading stamp. The advertisement was, in the Court's opinion, designed and intended to accomplish the same result as a trading stamp and was therefore well within the scope and mischief of the enactment. The result seems to be consistent with the aim of enabling a consumer to purchase any individual item at an actual cash price. However an oral advertisement in similar terms would not contravene the Act because there would be no "writing".

3. Catching the consumer off-guard

(A) HAWKERS

The consumer who goes to a place of business has taken the initiative in entering negotiations about the business transaction. The businessman who does not await this initiative may place the consumer at an unusual disadvantage. The consumer may not have had the opportunity to have considered the full consequences of his decision or a wife the opportunity to have discussed the matter with her husband. The licensing of hawkers dates back in many jurisdictions for over one hundred years. As in the case of trade descriptions applied to goods an established legal requirement has not been extended to meet changing business practices.

In Tasmania and New Zealand the licensing of hawkers is left to local government⁸¹. In other jurisdictions regulation is to some extent left to local

76. South Australia: s.5(1)(b); Western Australia: s.5(1)(b); Queensland: s.4(1)(b).

77. South Australia: s.5a(1); Western Australia: s.6(1); Queensland: s.4A(1).

78. South Australia: s.5a(2); Western Australia: s.6(2); Queensland: s.4A(2).

79. South Australia: s.5a(3); Western Australia: s.6(3); Queensland: s.4A(3).

80. [1962] S.A.S.R. 78.

government but there is at least central legislation requiring a licence⁸². In Western Australia however hawkers and pedlers are in general prohibited⁸³. The business of a hawker and pedler is defined as the selling or offering for sale by retail of goods carried about by land or water (and in some jurisdictions by air)⁸⁴. Persons selling newspapers or food or similar items or selling at showgrounds and similar places are exempt from this definition. No specialist licensing authorities have been established and licences must be obtained from the Commissioner of Police or Justices of the Peace⁸⁵.

One area of uncertainty has been whether the employer or the employee should have a licence. In South Australia the definition of hawker makes it clear that it is the employer who must have the licence⁸⁶. In the other three States where there is a central licensing requirement the Acts are unclear as to whether the employer or employee should have a licence. The matter has been judicially considered by Sholl J. in *Burns v. Sutherland*⁸⁷. In that case it was held that a person carrying on the business of a hawker and pedler as an agent for someone else had to have a licence. The purpose of the Act was said to be to control the type of person who might carry around goods for sale in an ambulatory way, with the opportunities for fraudulent practices, and for entry onto private premises, which that trade entailed. The court pointed out that if an alternative construction was adopted there could be a hawker selling on commission goods for any number of principals or a hawker could form a company and sell on its behalf without a licence.

The argument that the persons who enter onto private premises should be regulated seems compelling. At the same time the licensing requirement should extend to the person on whose behalf the hawking is carried on and who is in a position to control undesirable practices.

(B) DOOR TO DOOR SALES

The concept of a hawker at first appears to encompass a door-to-door salesman. However a hawker is only a person who carries goods with him and who sells those goods. A person who goes around door-to-door and makes contracts or obtains offers is not a hawker. The factors which lead to the licensing of hawkers seem to apply to such door-to-door salesmen, in fact the arguments for licensing would appear to be stronger because in the case of an executory contract the consumer may not appreciate the extent of his obligations as clearly as in the case of a cash purchase. However licensing requirements have not been extended to door-to-door salesmen. Instead in all

81. Tasmania: Local Government Act 1906 s.205(12); New Zealand: Municipal Corporations Act 1954 s.386(28).

82. South Australia: Hawkers Act 1934-60 s.4; Victoria: Hawkers and Pedlers Act 1958-63 s.4; New South Wales: Hawkers and Pedlers Act 1901 s.6; Queensland: Hawkers and Pedlers Act 1849-1905 s.2.

83. Hawkers and Pedlers Act 1892-1966 s.5.

84. South Australia: s.3; Western Australia: s.1; Victoria: s.3; New South Wales: s.5; Queensland: s.23.

85. South Australia: s.6; Victoria: s.6; New South Wales: s.8; Queensland: s.4.

86. Hawkers Act 1934-60 s.3.

87. [1969] V.R. 211.

jurisdictions legislation has been passed to allow the consumer in certain circumstances to withdraw from his contract⁸⁸.

In all jurisdictions except South Australia the Door to Door Sales Acts apply only to credit transactions. In Tasmania the transaction must additionally be for \$40 or more; in New Zealand if the transaction is a credit sale it must involve \$40 or more, if it is a bailment \$20 or more. In South Australia the only requirement is that the transaction involve \$20 or more. In Victoria and New Zealand only transactions relating to goods are covered, in South Australia and New South Wales transactions relating to goods and services are covered, in Queensland an extensive list of goods and services and in Western Australian and Tasmania only books and other prescribed goods⁸⁹.

The attempts to state the types of agreements subject to the legislation give rise to cases relating to the scope of the definitions. Applying the definitions can be difficult because it is far from clear why some agreements are included and others excluded. One of the most common consumer complaints in recent years has related to the installation of home insulation or wall cladding. Under the Door to Door Sales Acts it can be argued that such a contract is not one relating to goods or (in some jurisdictions) is one relating to services.

The issue of definition was raised in *Collins Trading Co. Pty. Ltd. v. Maher*⁹⁰. In that case the plaintiffs agreed to supply and install a "Wonder-Heat" oil heater. Payment was to be made over a period of three years. The defendants failed to make any payments and when the plaintiffs sued for the purchase price the defendants argued that because there was no agreement or other memorandum in writing and no copy of any agreement or offer and no statement had been given to them, the agreement was unenforceable under the Victorian Door to Door Sales Act. The plaintiffs contended that the agreement was not one relating to goods. Goods were defined to include all chattels personal other than money or livestock and any fixtures severable from the realty. Lush J. held that the contract was for the supply of an appliance available on the general market. In legal terms, the vendor undertook to do two things: to supply the appliance and to install it. The property in the heater passed when it was delivered and before it was installed. There was therefore a contract for the sale of goods. Consequently it was unnecessary to decide what was meant by the words "any fixtures severable from the realty". However Lush J. pointed out that in one sense any fixture at all is severable from the realty. It seemed to him that the words referred to at least three considerations one or all or a combination of which might be relevant in different circumstances. The considerations are the questions (a) whether severance can be effected with ease or with difficulty; (b) what degree of damage would severance occasion to the fixture and to the realty; (c) would the fixture when severed have any real identity as a chattel as distinct from mere component parts.

88. South Australia: Door to Door Sales Act 1971; Western Australia: Door to Door Sales Act 1964; Victoria: Door to Door Sales Act 1963-70, *cf.* Consumer Protection Bill 1972 ss.14-20; New South Wales: Door to Door Sales Act 1967-69; Queensland: Door to Door Sales Act 1966; New Zealand: Door to Door Sales Act 1967.

89. South Australia: s.5(1); Western Australia: s.2; Victoria: s.2; New South Wales: s.2; Queensland s.2; Tasmania: s.2; New Zealand: s.2.

90. [1969] V.R. 20.

Once the definitional problems have been resolved, the Door to Door Sales Acts all allow a period in which the consumer may cancel the agreement: the period is seven days after the agreement in Western Australia and Queensland, eight days in New Zealand, ten days in Tasmania; ten days after the agreement or delivery of the goods (whichever is the later) in Victoria; and five days in New South Wales and eight days in South Australia after the service on the purchaser of the statement required by the Act⁹¹. To ensure that the purchaser is aware of these rights a statement in a form set out in a Schedule to the Acts must be served on him. To ensure that he is aware of his obligations under the agreement a copy of that must be served. The purchaser's right of cancellation cannot be excluded by the agreement.

The Acts only apply to sales at the consumer's place of residence or places of employment. Because of possibilities of evasion, apart from Western Australia and New South Wales, the limitation is framed in terms of contracts not completed at the vendor's trade premises. Another limitation is that the Acts do not apply to cases when the consumer has requested the trader to call at his premises. This limitation led to the practice of advance salesmen soliciting invitations. Various attempts to overcome this practice are made: the Queensland Act makes it an offence to solicit invitations; the South Australian exemption is limited to requests made at the vendor's place of business.

Additional protection is given to the consumer in some States. In Queensland no delivery may be made until the period during which cancellation may take place has expired; in South Australia payment is forbidden until that period has expired. In Western Australia, Victoria and Queensland the contractual rights of the consumer are expanded. There the Acts render void any provision of the agreement which relieves the vendor from liability for any act or default of the vendor or any other person acting in connection with or in the course of any negotiation leading to the making of the agreement; and render void any provision that waives, excludes or limits any warranty, privilege, right or protection to whose benefit the purchaser or bailee might otherwise be entitled by the virtue of the provisions, effect or operation of any law or rule of law. These provisions seem to ensure the availability of a remedy for any misrepresentation in the course of negotiations and the applicability of s.14 (I) and (II) of the Sale of Goods Act or any similar common law implied terms. They continue the pattern of protection given to the credit purchaser by the Hire-Purchase Acts and accentuate the differences between the protection for such a purchaser and that for a cash purchaser⁹².

Book purchasers are given special protection in some jurisdictions. In New South Wales and New Zealand any agreement for the sale of books where all the books are not handed over at the time of agreement is void unless the purchaser has signed a copy of the agreement on which there appears in red capital letters a statement of the total liability of the purchaser⁹³. In South

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91. South Australia: s.8(1); Western Australia: s.4; Victoria: s.4; New South Wales: s.4; Queensland: s.4(1); Tasmania: s.6(1); New Zealand: s.7.
 92. Cf. The Moloney Report which recommended the non-excludability of s.14(i) and (ii) in any consumer purchase.
 93. New South Wales: Book Purchasers Protection Act 1899-1963 s.5; New Zealand: Merchantile Law Act 1908 s.44.

Australia door-to-door sales of books for more than twenty dollars are unenforceable unless confirmed by the purchaser not less than five days nor more than fourteen days after the agreement⁹⁴.

(C) REPAIR TO HOUSEHOLD ITEMS

An extremely common source of consumer complaint has been the charge for and the quality of repair work to household items such as television sets, washing machines and refrigerators. The standard practice of less reputable repair firms is to insist on removing the appliance from the home. The consumer is asked to sign an agreement giving the repairer wide powers in carrying out the repairs. The item is retained for a long period. If the owner insists on its return he is faced with a demand for a sum for a quotation or for repairs⁹⁵. The practices of one Victorian firm were such that its manager and an employee were convicted on charges of conspiracy to defraud.

The consumer still finds himself relatively unprotected against excessive charges and poor workmanship by repairers. Proof of conspiracy to defraud is difficult and the offence would not encompass mere overcharging or poor workmanship. The transaction will normally result from an inquiry by the consumer and so will fall outside the Door to Door Sales Acts. The repairer will be careful not to make any statements which bind him in the future performance of his undertakings. As with travel agents the promises relate to future events and it is difficult to prove that they were false when made. Perhaps most importantly the repairer has a lien over the goods which entitles him to retain them until his charges are met.

The consumer's main aims are to have some assurance with respect to the amount he will be charged and to have some way of checking whether the work for which he is charged has been done satisfactorily. Consideration should be given to a requirement that the consumer be given a copy of the agreement, including a warning as to the repairer's lien, before any household item is taken away. The statement should include an estimate of the charge to be made and the repairer should be prevented from increasing the charge by more than, say, ten per cent. without the consumer's written consent to another specific charge. The consumer should be entitled to a statement of the work done before having to pay. The potential for fraud is at least an argument for the licensing of all repairers.

(D) UNSOLICITED GOODS

Another means whereby the consumer is induced into purchases he does not desire is the sending to him of goods he has not requested followed by an account for the goods. The consumer is in fact entitled to refuse to pay for the goods and is under no obligation to return them to the sender. However the goods remain the sender's property and the consumer must retain them and have them available for the sender to take back.

Whilst he retains the goods it appears that the consumer must exercise some care for them. Two cases are cited⁹⁶ for the proposition that a recipient of

94. Book Purchasers Protection Act 1963-64 s.4.

95. *Cf.* Report of the Chairman of the Consumer Affairs Council for the Year ended 30th June, 1970 (N.S.W.), 26.

96. See for example D.M.A. Strachan, "Inertia Selling" (1970) 114 Sol. Jo. 660.

unsolicited goods owes a duty of care for the goods to the sender. In *Newman v. Bourne and Hollingsworth*⁹⁷ the plaintiff accidentally left her diamond brooch in the defendant's shop. An employee of the defendants placed the brooch in a drawer rather than at the lost property office. The brooch was lost. The defendants were held liable for the loss on the basis of a failure to take proper care. In *Elvin & Powell Ltd. v. Plummer Roddis Ltd.*⁹⁸, a person who appears to have been the rogue of the story, requested the plaintiff to send a number of coats to the defendant. The person then sent the defendant a note in the plaintiff's name stating "Goods despatched in error; sending van to collect" and collected the coats himself. It was held that the defendant was under a duty of care but had not breached that duty. The courts place the standard of duty on a recipient at a low level: he is only liable for gross negligence. However, it is difficult to see why a sender in such a situation should be owed any higher duty than one not to destroy the goods wilfully. His position seems comparable with that of a wilful adult trespasser—in fact his position is worse in that he is claiming protection for a financial interest as opposed to protection from physical injury.

Regulation of the practice of sending unsolicited goods has been discussed quite generally in recent times. As a preliminary measure New Zealand has prohibited the sending of an invoice or a document that has the appearance of an invoice in respect of goods that have not been ordered or requested unless the words "no payment due unless you buy or order" appear in easily legible lettering⁹⁹.

Following the English Unsolicited Goods and Services Act of 1971 uniform legislation has been promised in all Australian States. In South Australia the Unordered Goods and Services Act 1972 has been passed¹⁰⁰.

Under the South Australian Act where unordered goods are sent by a trader they become the property of the recipient without any liability in respect thereof either one month after he has served the statutory notice on the sender or three months after he has received the goods. In the period until they become his goods the recipient is only liable for wilful and unlawful disposal, destruction or damaging of the goods. No charge can be made for an entry in a directory or for prescribed services unless the person to be charged has signed a note setting out the details of the transaction. It is not yet clear what services are to be prescribed. It is an offence for a person who has sent unsolicited goods or made an unauthorised directory entry or provided unauthorised services to make a demand for payment, threaten any legal proceedings, place the recipient on a list of defaulters, or invoke any other collection procedure.

Although the South Australian Act is extensive and imposes criminal liability for demanding payment it does not entitle the consumer to a statement of his rights to return the goods or dispose of them after the prescribed period. Consumer ignorance is an unscrupulous trader's weapon and information

97. (1915) 31 T.L.R. 209.

98. (1933) 50 T.L.R. 158.

99. Consumer Information Act 1969 s.9(6).

100. Cf. Victorian Consumer Protection Bill 1972 ss.21-32.

requirements are included in the Door to Door Sales Acts. Under the present legislation relating to unsolicited goods and services consumer ignorance will only be counteracted by information dissemination by administrative authorities.

4. Enforcement

(A) ADMINISTRATIVE AGENCIES

To complement recent consumer legislation all jurisdictions have established administrative agencies to deal with consumer matters. In Western Australia, Victoria, New South Wales and Queensland the agencies have been established on similar lines. Two bodies have been established in these States: a Consumer Affairs Council and a Consumer Protection Bureau. The Council's rôle is to undertake research, the Bureau's role is to handle consumer complaints. The Council is to investigate matters affecting the interests of consumers, to disseminate information and to make recommendations to the Minister; the Bureau is to advise consumers as to their rights and other matters affecting their interests and to receive complaints about commercial malpractices¹⁰¹. In Western Australia alone the powers of the Consumer Protection Bureau have been extended to parallel those of the Prices Commissioner in South Australia. In South Australia instead of the creation of a new administrative agency to deal with consumer affairs, the powers of the Prices Commissioner were extended. The Commissioner has practically all the powers of the Consumer Affairs Councils and Consumer Protection Bureaux of the eastern States but in addition he, and the Western Australian Consumer Protection Bureau, are empowered to institute or defend legal proceedings on behalf of the consumer¹⁰². In Tasmania and New Zealand a single agency has been established. The functions of the Tasmanian Consumer Protection Council are to carry out investigations into any matter affecting the interests of consumers and any matter raised in a consumer complaint, to make recommendations to the Minister, and to give advice to consumers¹⁰³. The New Zealand Consumer Council has been set up to protect and promote the interests of consumers; its principal functions seem to be to undertake research and disseminate information¹⁰⁴.

The range of activities that could be entrusted to a governmental consumer agency can be placed in three broad categories: (a) the undertaking of research and the publication of reports; (b) the investigation and prosecution of criminal offences and participation in any licensing procedures; (c) the assistance of consumers with respect to their private rights.

In all jurisdictions emphasis has been placed on research by administrative agencies into matters concerning the consumer interest. It is at this stage too early to comment on the effectiveness of this research. In most jurisdictions

101. Western Australia: Consumer Protection Act 1971; Victoria: Consumer Protection Act 1970, *cf.* Consumer Protection Bill 1972 Part I; New South Wales: Consumer Protection Act 1969; Queensland: Consumer Affairs Act 1970.

102. South Australia: Prices Act 1948-70 s.18a; Western Australia: Consumer Protection Act 1971 s.18.

103. Consumers Protection Act 1970-71.

104. Consumer Council Act 1966-69.

the agencies have wide powers to investigate complaints and collect information relating to any criminal offence; the Tasmanian Consumers Protection Council is given wide powers to demand evidence. However the agencies' powers are dependent upon a complaint and there do not appear to be any powers to take the initiative to investigate possible offences. In some cases prosecutions for consumer offences can only be brought with the consent of the Attorney-General. Licensing requirements are not common in the consumer area and the consumer agencies have not been involved in the existing procedures. The agencies have wide powers to advise consumers as to their rights, however most of the Acts are unclear as to the powers of the agencies to negotiate a settlement of a consumer complaint and only in South Australian and Western Australia has the agency the power to initiate or defend civil proceedings on behalf of the consumer.

The establishment of two consumer agencies stems from a desire to separate the functions of research and investigation of complaints. Victoria switched from a single agency to the two agencies. The former single agency found an advantage in investigating the law in areas of consumer complaint but the issue of reports to Parliament on particular transactions produced opposition. The effectiveness of a research agency will depend on its remaining informed of the areas of consumer complaint.

(B) PRIVATE REMEDIES

The concentration of the consumer protection legislation has been very heavily on criminal remedies. Obviously the Door to Door Sales Acts substantially affect the time at which a contract becomes binding on a consumer. Apart from this reform the extension of private rights has been very limited. In three States the Door to Door Sales Acts prevent the exclusion of a wide range of implied terms. In New South Wales a person convicted of selling goods under a false trade description may be ordered to refund the price to the purchaser or to supply goods in accordance with the description¹⁰⁵. In Queensland a similar power exists and in addition the court may order a person who has been convicted of selling goods with a false trade description or making a false statement as to services to pay compensation to the person aggrieved¹⁰⁶. In South Australia a motor dealer convicted of an offence relating to the description of a second-hand motor vehicle may be ordered to pay to the purchaser three times the difference between the sale price of the vehicle and its fair value¹⁰⁷.

The use of treble damages follows an American example whose aim is to reward complainants and punish fraudulent traders. However a consumer's main concern is to obtain just compensation for his loss in all cases¹⁰⁸. He does not want to be dependent on a criminal conviction which usually comes only after the decision of an appropriate authority to commence criminal proceedings. The consumer legislation has created criminal offences in many

105. Consumer Protection Act 1969 ss.29-30.

106. Consumer Affairs Act 1970 s.44(2) and (3).

107. Second-Hand Motor Vehicles Act s.35(3) and (4).

108. Cf. Report of the Chairman of the Consumer Affairs Council for the Year ended 30th June, 1970 (N.S.W.), 22.

instances where the consumer would face great difficulty in establishing a civil right, particularly until the law relating to misrepresentation is liberalised. In these cases the consumer may seek to invoke a civil remedy for breach of statutory duty. He can argue very convincingly that the legislation was enacted to protect the class of consumers of which he is a member. Unfortunately this remedy has been rarely granted outside cases of physical injury.

As well as doing little to extend the range of civil rights, the consumer legislation has done little to improve the remedies by which those rights may be enforced. One advance has been the establishment of administrative agencies to handle complaints and, in South Australia and Western Australia, to participate in legal proceedings. The importance of this advance should not be underestimated. It is already fair to observe that whereas the wide range of remedies under the Hire Purchase Act has had very little recorded impact, consumers have flooded the administrative agencies with their complaints. Further reform would give more meaning to the consumer's rights. The availability of group remedies, whereby a number of similarly placed consumers could share the costs, could be simplified, perhaps by an expansion of the representative action discussed by Bray C.J. in *Gaetjens v. Arndale (Kilkenny) Pty. Ltd.*¹⁰⁹ The cost of bringing an action must be reduced to a reasonable proportion to the amount involved. In South Australia the Second Hand Motor Vehicles Act s.26 has provided for the reference of some disputes for settlement by the Prices Commissioner. Whilst one wonders whether the Prices Commissioner can fulfil all the rôles with which he is entrusted, the concept of informal settlement of disputes is significant. The traditional common law tribunal may have to be abandoned in favour of an investigatory arbitrator¹¹⁰.

5. Conclusion

This article has examined legislation regulating deceptive selling practices in all Australian States and New Zealand. The similarities contained in the legislation of the various jurisdictions far exceed the differences. The area of greatest divergence is the regulation of representations made in the course of trade.

The kind of task attempted in this article has been attempted by the Victorian government in the Consumer Protection Bill of 1972. This Bill contains no startling innovations and does little more than to restate in one statute the existing consumer protection legislation discussed in this article. The Bill contains an overlap between its false advertising and false trade descriptions provisions. The Bill's greatest significance may be that it unifies the administration of various pieces of consumer protection legislation.

At times in this article the practical difficulties of single State action have been mentioned. These difficulties exist wherever one State attempts to control part of what is essentially an interstate transaction. The task of regulation in Australia is complicated and, on balance, impeded by the working of the

109. [1969] S.A.S.R. 470. Statutory changes are probably necessary, cf. *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.* [1910] 2 K.B. 1021; J. F. Keeler, "Contractual Actions for Damages Against Unincorporated Bodies" [1971] 34 Modern L.R. 615.

110. Cf. M. J. Trebilcock, "Private Law Remedies for Misleading Advertising" (1972) 22 Toronto L.J. 1.

federal system. Packaging legislation, for example, has to deal with goods produced in one State and sold in another. Similar problems do occur in relation to international dealings and, for example, Australian meat production has felt the impact of United States health regulations. But in a practical as well as a legal sense trade within Australia is intended to be free. Different regulations by different States add to the cost of commerce.

The legal freedom of interstate trade guaranteed by s.92 of the Constitution does impinge on State (and, of course, Commonwealth) regulation of deceptive selling practices. Twice, in 1939 and 1969, South Australia's legislation outlawing trading stamps has been challenged in the High Court—*Home Benefits Pty. Ltd. v. Crafter*¹¹¹ and *Re Readers Digest Association Pty. Ltd.*¹¹² On both occasions the legislation was held to be valid. Packaging legislation receives support from the recent validation of margarine colouring requirements in *S.O.S. (Mowbray) Pty. Ltd. v. Mead*¹¹³. The issue of the constitutional freedom of interstate trade is only raised here and an examination of it is beyond the scope of this article, but the issue demonstrates, in perhaps the most acute form, the constitutional difficulties which can arise in this area.

Some of the difficulties of State control of national commerce, though not s.92, can be overcome by Commonwealth action. Whatever the implications of *Strickland v. Rocla Concrete Pipes Ltd.*¹¹⁴, there are a number of areas of potential Commonwealth action which have not as yet been explored fully. The Commonwealth has imposed national standards of weights and measures under its power granted by s.51 (XV) of the Constitution to make laws with respect to weights and measures. Dr. Wynes¹¹⁵, citing dicta in a Canadian case—*Re Bread Sales Act*¹¹⁶, suggests that s.51 (XV) enables legislation fixing standards of weights and measures but would not support an enactment restricting the manufacture and sale of articles unless of a certain weight or measure. Why the weights and measures power is to be narrowly construed is not apparent. The packaging of imported goods and of goods involved in interstate commerce could be controlled by the Commonwealth under s.51(I). Radio and television advertising could be controlled under the accepted interpretation that s.51 (V) gives the Commonwealth power over broadcasting. Indeed it has been suggested that State legislation cannot affect radio and television advertising¹¹⁷. However at present the Commonwealth only regulates the amount of radio and television advertising so it is difficult to argue that there is any inconsistent Commonwealth legislation. The Commonwealth powers in relation to the postal service (s.51 (V)) and interstate commerce (s.51(I)) would allow some legislation about the sending of unsolicited goods and about trading stamps.

In the absence of Commonwealth action the States are acting together. The States reached agreement on legislation to control packaging and legislation

111. (1938-39) 61 C.L.R. 701.

112. (1969) 43 A.L.J.R. 116.

113. (1972) 46 A.L.J.R. 192.

114. (1971) 45 A.L.J.R. 485.

115. W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd edition), 245.

116. (1911) 23 O.L.R. at 245.

117. Mr. Millhouse, *South Australian Parliamentary Debates, 1970-71, Volume 4*, p. 3763.

restricting the sending of unsolicited goods. Unfortunately uniformity can be destroyed by minor amendments made during the passage of legislation through the Parliaments.

Whilst within Australia Commonwealth legislation would simplify the regulation of deceptive selling practices, Commonwealth control raises other problems. The subject-matter of consumer protection is a large number of what are by themselves insignificant events. One of the features of the English Trade Descriptions Act of 1968 is that it imposes duties on local authorities to implement the legislation and gives private individuals means of seeing that these duties are performed. The rôle of local government officials in the control of weights and measures and of hawkers has been briefly mentioned in this article. Recent consumer protection legislation has tended to ignore the administrative facilities of local government and attention has been focused on the new consumer protection authorities established in all jurisdictions in Australia and New Zealand. However these authorities are dependent on consumer complaints and do not have any general investigatory powers. False advertising is one field where constant investigation would protect the consumer interest. The enactment of Commonwealth laws would only add to the enforcement problem. Whereas the "autochthonous expedient" of Chapter III of the Constitution allows the Commonwealth to use the facilities of State courts and, in particular in this context, of State local courts to handle minor matters, no similar provision exists in relation to executive government. There are some instances where there is an obvious means of Commonwealth enforcement: the Broadcasting Control Board could deal with radio and television advertising; Customs officers may be able to deal with the packaging of imported products.

The problem of enforcement is exacerbated by the reliance of recent legislation on administrative action. Little has been done to amplify private remedies¹¹⁸ or to give consumer groups any role in the enforcement of new laws. Although in the past the consumer has done little to make use of his rights, if there was a genuine attempt to make him aware of his rights and to provide a realistic means of enforcing them, he might yet exercise self-help. The social pressure that has contributed to the passing of much of the legislation discussed in this article could be harnessed to its operation.

Gaps in the legislation discussed have been referred to. Practices concerning the repair of household items are largely unregulated and aspects of each piece of legislation could be improved. Furthermore this article has dealt with the existing control of deceptive selling practices. There are practices not referred to which are reasonably regarded as unfair to the consumer but which have fallen outside any regulation—pyramid selling and store auction sales have recently made newspaper headlines. The legislation has not extensively regulated commerce—"thou shalt not lie" is hardly new—and perhaps emphasizes that freedom of trade in the first half of this century was one-sided. In the final analysis, whatever reservations are held concerning the substance of the existing legislation, there is no doubt that at present the implementation of these enactments presents problems which call for closer consideration than they have received in the past.

118. In South Australia, Part III of the Misrepresentation Act 1972 (referred to in the Introduction) is a notable exception to this proposition.