

## THE COOLING-OFF PERIOD IN VICTORIAN DOOR-TO-DOOR SALES LEGISLATION

### INTRODUCTION

Modern selling is no longer simply a process of supplying goods for 'a money consideration called the price', but involves the vital preliminary step of creating a demand to meet supply, of encouraging desires in purchasers for items with which they are initially unfamiliar, or for which they have no real need. Advertising fills this role in the ordinary market. High-pressure tactics provide an effective alternative in those distribution channels involving direct selling, where the functions of promotion and sale are inseparably linked. One door-to-door salesman has gone so far as to define 'selling' as:

making a person who is initially disinterested or gives the appearance of being disinterested, at least interested enough to listen.<sup>1</sup>

Coupled with the emphasis on the art of persuasion is the fact that in many cases the door-to-door selling concern is not dependent upon the maintenance of customer goodwill, but operates on the basis of a 'one-time killing'.<sup>2</sup> Moreover, the buyer's privilege of comparative shopping is effectively excluded where the sale is made in the home. The system thrives on the creation of temporary monopolies.<sup>3</sup>

These three factors: emphasis on the need to persuade, disregard for the interests of the buyer and the monopoly situation are the most undesirable features of door-to-door selling as a marketing method and underlie the prevalence of abusive selling tactics in this area.

The need has long been apparent for some form of legislative control over door-to-door sales which would negate the overwhelming effect of high-pressure selling methods and which would provide, at least in part, a rational basis for decisions to purchase made in response to such tactics.<sup>4</sup>

The essence of the scheme ultimately devised to meet this need was to forestall the effect of rights and obligations arising under a concluded

<sup>1</sup> Vanderveen, 'How Our Salesmen Sell Travel' in Gresham (ed.), *How Top Salesmen Sell in Australia* (1960) 131.

<sup>2</sup> Bottomley, *Why Protect Consumers?* (1970) 38-9.

<sup>3</sup> See "Electrolux" . . . face those doorbells with that up-and-at-'em spirit' in Bearden (ed.), *Personal Selling: Behavioral Science Cases and Readings* (1967) 38, 39.

<sup>4</sup> United Kingdom, *Report of the Committee on Consumer Protection* (1962) Cmnd 1781, paras 40, 511, 517, 742.

contract, in order to give the consumer a period of reflection during which he could reassess his purchase decision with some degree of objectivity. If, during this time, he changed his mind, he was to be entitled to return the goods and to demand repayment of any sums already paid.<sup>5</sup>

The 'cooling-off period', as it has become known, has found almost universal favour, and has been adopted in most common law jurisdictions. It is intended, in this comment, to briefly examine the structure of the recently amended Victorian door-to-door sales legislation and to discuss two aspects of the scheme which are vital to its success, but which appear hitherto to have been given short shrift by the Legislature, namely the problems associated with the scope of the scheme and the question of enforcement of its provisions.

#### THE VICTORIAN DOOR-TO-DOOR SALES PROVISIONS

##### (i) THE CENTRAL PROVISIONS

The Victorian door-to-door sales legislation is contained in Division 3 of Part II of the Consumer Protection Act 1972. The effect of the key provisions of the Part is to render agreements to which the legislation is applicable unenforceable by the vendor unless they are in writing and a copy of the agreement along with a statement of his rights under the Act is supplied to the purchaser.<sup>6</sup> It is, moreover, a criminal offence, subject to a penalty of up to \$200, for the vendor to disregard any of these requirements.<sup>7</sup> The purchaser is given a 10 day cooling-off period within which he can decide to terminate the agreement.<sup>8</sup> This is done by returning to the vendor a notice in or to the effect of the form prescribed in the first schedule, signifying to the vendor an intention to terminate on the part of the purchaser.<sup>9</sup> Once such a notice is sent, the agreement is deemed to have been rescinded by mutual consent, there is a notional total failure of consideration and provision is made for the refund of any monies paid and for the return of any goods delivered.<sup>10</sup>

##### (ii) PROVISIONS ADJUSTING RIGHTS ON TERMINATION

It is, in view of these requirements, advisable for the owner or dealer of goods which are the subject of a door-to-door sales transaction not to deliver such goods to the purchaser until after the expiry of the cooling-off period. But if the purchaser has come into possession of the goods, there are provisions in the legislation regulating his obligation to look after them. Section 17(7) imposes on him, in the event of his exercising the option to terminate, a duty to deliver up the goods on demand at his premises. There is no obligation on the purchaser personally to return the goods to the vendor. Section 17(9) provides that pending collection of the goods

<sup>5</sup> *Ibid.* paras 520 ff.

<sup>7</sup> S. 15(3).

<sup>9</sup> S. 16(2)(a).

<sup>6</sup> S. 15(1).

<sup>8</sup> S. 16.

<sup>10</sup> S. 17.

by the vendor, the purchaser is under a duty to take 'reasonable care' of them. Apart from this provision, it is likely that the purchaser would be burdened with the duties of a bailee with respect to the goods.<sup>11</sup> The effect of section 17(9) is, however, to make him liable only for loss of or damage to the goods caused by his own negligence or that of his servants.<sup>12</sup> The duty subsists for a period of 21 days after the giving of the termination notice. No provision is made with respect to the purchaser's obligations where repossession is not effected within that time. It is, however, generally considered that in such circumstances his duty is reduced to that of an involuntary bailee, which requires only that he not cause wilful damage to the goods.<sup>13</sup>

Section 17(3) entitles the vendor to make a 'reasonable charge' for any services rendered prior to the termination of the agreement or for any goods which the purchaser is unable to return.

### (iii) THE SCOPE OF THE LEGISLATION

The legislation does not apply to all door-to-door sales transactions. In the first place, it was considered necessary to exclude what have become known as 'milkman-type' transactions from the ambit of the legislation. It was thought that the burden of the cooling-off provisions should not fall on tradesmen who make home deliveries or whose occupation involves some continuing relationship with the householder both for reasons of commercial convenience and because in the case of most 'daily round' transactions the householder, having solicited the call, is not likely to be victimized by pressure tactics.<sup>14</sup>

The creation of this immunity involved the inclusion of two exceptions to the operation of the scheme. Firstly, the legislation only applies to credit purchase agreements,<sup>15</sup> which are defined so as to exclude (*inter alia*) agreements under which the whole of the purchase price is paid by the purchaser at or before the time at which the agreement is made, or within a month of the making of the agreement.<sup>16</sup> The effect of the exemption is to exclude from the ambit of the legislation all door-to-door sales transacted on a cash basis or pursuant to a monthly credit arrangement. Since these constitute the most common bases of payment under domestic transactions, most agreements of that type are effectively exempted from the cooling-off requirements.

<sup>11</sup> Diamond, *Introduction to Hire Purchase Law* (1967) 106.

<sup>12</sup> *Sanderson v. Collins* [1904] 1 K.B. 628.

<sup>13</sup> Thornely and Ziegel, 'Hire Purchase Law Reformed' [1965] *Cambridge Law Journal* 59, 68; Sher, 'The Cooling-off Period in Door-to-Door Sales' (1968) 15 *University of California, Los Angeles Law Review* 717, 770; Goode, *Hire Purchase Law and Practice, Supplement* (1964) 24.

<sup>14</sup> University of Adelaide Law School Committee, *Report to the Standing Committee of Commonwealth and State Attorneys-General on the law relating to Consumer Credit and Money-Lending* (1969) 60; Sher, *op. cit.* 744.

<sup>15</sup> Consumer Protection Act 1972, s. 14(3).

<sup>16</sup> S. 14(1).

In addition, the legislation does not apply to any door-to-door sales transaction where the purchaser made the original approach leading to the agreement or offer.<sup>17</sup> This provision is also designed to protect the 'milkman-type' trader, for in transactions of that kind, it is usually the case that the vendor calls at the purchaser's home only in response to an invitation, or to fill an order which has already been placed by the purchaser.

The policy consideration which led to the formulation of the third exception was the need to protect vendors in situations where the agreement was substantially negotiated at the seller's premises but was, for some reason, concluded at the buyer's home. Such a situation is likely to arise in connection with the test driving of motor vehicles or with home trials of domestic appliances.<sup>18</sup> To this end, the legislation is expressed not to apply where the original approach leading to the agreement was made at appropriate trade premises,<sup>19</sup> which are defined as the place where the vendor normally carries on business or at which such goods are normally offered or exposed for sale.<sup>20</sup>

#### SHORTCOMINGS OF THE LEGISLATION

##### (i) THE PROBLEM OF SCOPE

The difficulty with the exceptions enumerated above is that, although the grounds on which they were formulated are quite valid, the formulations themselves are ill-conceived. The provisions succeed in conferring the required immunities, but they also have the effect of excluding a large number of transactions which should fall within the scope of the scheme if it is to be at all effective.

The most glaring shortcoming of the legislation in this regard is that it does not apply to cash transactions. Apart from the reasons discussed above, several other considerations have been proposed in support of the retention of this limitation. None are compelling. Firstly, it has been suggested that consumers who can afford to make a lump sum payment have less need for protection against high-pressure selling than do impecunious purchasers.<sup>21</sup> A more expansive version of what is basically the same argument is that the person who buys on instalment credit is peculiarly vulnerable to unscrupulous selling techniques, since the attractive facility of paying by instalments tends to dispel the caution that is customarily exercised by one who pays cash.<sup>22</sup>

Both of these arguments are weak. They ignore the fact that financial over-commitment is only one of the adverse effects of the abusive sales

<sup>17</sup> S. 14(3)(a)(ii).

<sup>18</sup> Victoria, *Parliamentary Debates*, Legislative Council, 10 November 1971 per Hon. A. J. Hunt.

<sup>19</sup> S. 14(3)(a).

<sup>21</sup> Sher, *loc. cit.*

<sup>20</sup> S. 14(1).

<sup>22</sup> Goode and Ziegel, *Hire-Purchase and Conditional Sales—A Comparative Survey of Commonwealth and American Law* (1965) 50.

tactics which the legislation is designed to control. Consumers also have a right to protection from being burdened with unwanted goods bought in response to an artificially created need, or purchased simply in order to get rid of a persistent salesman. These considerations apply irrespective of how payment is made.

A further argument in favour of the limitation is that if a purchaser pays cash, the cooling-off provisions are useless, since it will often be impossible to trace the vendor for the purposes of exercising rights of cancellation; where, on the other hand, the purchaser is under a continuing obligation to pay, the vendor will obviously stay around to collect his instalments.<sup>23</sup> The fallacy in this argument is, of course, that the considerations it raises are relevant to the effectiveness of the methods employed to enforce the scheme, not to the issue of the scope of the legislation.

Finally, it has been frequently asserted that most door-to-door sales transactions are effected on a credit basis and that there is little need to extend the legislative provisions to cash sales.<sup>24</sup> There have, unfortunately, been few attempts to produce a rational breakdown of direct sales into cash and credit transactions, but the information that is available suggests that there is a sufficient demand to warrant legislative action.<sup>25</sup>

Despite all statements to the contrary, there are compelling reasons why the legislation should extend to cash transactions. In the first place, there are several methods of providing purchase finance which *in fact* amount to instalment sale agreements, yet in *legal substance* involve a cash sale financed by either a secured or unsecured credit advance. Those transactions of which the essence is a loan by the financier to the purchaser, who then pays cash to the vendor for the goods, thus leaving himself obligated to repay the financier in instalments, are not credit purchase agreements within the meaning of the Act because the whole of the purchase price is paid by the purchaser at the time at which the agreement is made. Under the present legislation, a vendor, in order to escape the cooling-off provisions, need only make the appropriate adjustments to his credit provision system.<sup>26</sup>

<sup>23</sup> N.S.W. *Parliamentary Debates*, Legislative Assembly, 23 August 1967, 724 *per* Mr Maddison.

<sup>24</sup> *E.g.*, South Australia, *Parliamentary Debates*, Legislative Assembly, 30 October 1963, 1359 *per* Mr Dunstan.

<sup>25</sup> Martin and Smith, *The Consumer Interest* (1968) 99.

<sup>26</sup> It should be noted that the concept of 'credit purchase agreement' is expressly, albeit tortuously, extended to hire purchase agreements under the Victorian legislation: Consumer Protection Act 1972, s. 14(1). Those forms of credit provision which are structurally similar to hire purchase are caught by the general terms of the definition of 'credit purchase agreement'. However, evasion is made easy by virtue of the negative form in which that definition is cast: a general statement followed by a series of exceptions can rarely pretend to be exhaustive.

A further argument in favour of extending the cooling-off provisions to cover cash sales is that the legislation invites evasion wherever the salesman is able to pressurize his prospect into paying cash. In many cases, the unwary purchaser may be attracted by inducements in the form of discounts or 'free' gifts to make immediate payment, and thus unwittingly lose the legislative protection to which he would otherwise be entitled.

It is, finally, by no means impossible to reconcile the conflict between the need to extend the legislation to cover cash transactions and the desirability of excluding 'milkman-type' transactions from the operation of the provisions. The South Australian Door to Door Sales Act 1971 contains a formula which may well prove workable. That legislation does apply to cash sales, but provision is therein made for the exemption of the 'milkman-type' transaction by the enactment of a minimum price of \$20; where the contract price falls below that figure, the cooling-off provisions are inapplicable.<sup>27</sup> Since most daily round transactions involve sums well below that amount, the vendor in such circumstances will not be burdened with the requirements of the Act.

Other limitations which have been imposed on the applicability of the cooling-off provisions are also objectionable. The exception operable in situations where the purchaser makes the original approach is particularly open to abuse. The vagueness of this formula serves only to encourage vendors to exercise their ingenuity. It is, for example, possible that a vendor who can induce a purchaser by 'bait' advertising or by offering such perquisites as attractive discounts, to phone in order to arrange 'a free home demonstration' or 'a visit from our representative', will successfully avoid the operation of the cooling-off requirements.

The creation of exceptions to legislation of this kind is always a dangerous exercise, for exceptions give rise to loop-holes and invite evasion. The facility with which the provisions of the present Victorian legislation can be avoided is testimony both to inadequate drafting and to an over-willingness on the part of the legislature to sanction exceptions without proper consideration of the possible consequences.

#### (ii) THE PROBLEM OF ENFORCEMENT

The Consumer Protection Act 1972 relies heavily, if not excessively, on criminal penalties to secure compliance with its provisions. For example,

<sup>27</sup> Door to Door Sales Act 1971 (S.A.), s. 6(1).

One possible defect in this approach is that it encourages the use of the 'split document' technique; where goods are valued at over \$20, it is possible for the vendor to evade the Act by making out two or more separate contracts, each for sums not exceeding \$20.

This problem could, however, be overcome by providing that where two or more agreements are entered into by the same or associated parties at or about the same time, they should be treated as a single transaction and the aggregate of the advances as a single advance for the purposes of determining whether the \$20 limit has been exceeded: see United Kingdom, *Report of the Committee on Consumer Credit* (1971) Cmnd 4596, para. 6.7.2.

failure by the seller to provide the relevant documents renders him liable to a fine not exceeding \$200.<sup>28</sup> A similar penalty is imposed on a vendor who wrongfully retains a purchaser's money after cancellation,<sup>29</sup> and a \$400 penalty is attracted by the inclusion in contracts of clauses purporting to exclude the statutory provisions.<sup>30</sup>

Criminal penalties in such legislation are of little value unless there is some authority specifically entrusted with the duty of enforcement and provided with the resources necessary for that purpose. 'What is important is not so much the severity of the penalty, but the degree of certainty that an offence will be followed up with detection and conviction.'<sup>31</sup>

That degree of certainty is not provided by the Victorian system. Under the superseded Door to Door (Sales) Acts 1963-68, the responsibility for enforcement was cast upon the police. The number of successful prosecutions was not high,<sup>32</sup> and this is not surprising, for the police force is hardly the appropriate body to be enforcing legislation of this kind. The police are ill-equipped to handle the increasingly complex network of criminal offences associated with deceptive selling practices for they lack the time, the resources, and a sufficient knowledge of consumer affairs.<sup>33</sup> The Victorian Consumer Protection Council reported that in several instances, complaints made to police were ignored on the basis that they were matters for civil action and not for criminal prosecution.<sup>34</sup> Further, the evidentiary problems associated with bringing a prosecution under this legislation are acute. It was often impossible for the police to obtain those details of a transaction, effected in the privacy of a consumer's home, which were necessary to secure a conviction.<sup>35</sup>

The Consumer Protection Act 1972 purports to bolster the effectiveness of the penal provisions by transferring the enforcement function from the police to a body of inspectors, which is to be constituted pursuant to the Public Service Act 1958 and attached to the Department of Labour and Industry.<sup>36</sup> At first glance, this approach seems commendable, for it places responsibility for enforcement of the legislation on a body which is capable of being moulded into a specialized agency for the implementation of

<sup>28</sup> S. 15(3).

<sup>29</sup> S. 19(1).

<sup>30</sup> S. 20(3).

<sup>31</sup> Committee of the Law Council of Australia, *Report on Fair Consumer Credit Laws to the Attorney-General for the State of Victoria* (1971-72) para. 10.2.1.

<sup>32</sup> According to a letter received from the Victorian Law Department in December 1971, there had, to that date, been no prosecutions for breach of the provisions of the Door to Door (Sales) Act 1963-67. The first prosecution under the Act was instituted in June 1972. The judgment was set aside on appeal to the County Court: *McAllan v. Camberwell Amusements Pty Ltd* (County Court, Melbourne, 20 July 1972).

<sup>33</sup> Committee of the Law Council of Australia, *op. cit.* para. 3.1.2.

<sup>34</sup> Victorian Consumers Protection Council, *Report for the year ended 30th June 1966*, 7.

<sup>35</sup> Bottomley, *op. cit.* 30-1.

<sup>36</sup> Consumer Protection Act 1972, ss. 62-7.

consumer laws. The eventual achievement of this result will, however, depend upon the size and form which the investigatory department assumes and the number and diversity of the functions which it will be required to perform. At the time of writing there are no more than six persons who have been authorized to act as inspectors under the Act.<sup>37</sup>

A further unfortunate feature of the legislation in its treatment of the function of enforcement is that it does not adequately define the role which the Consumer Protection Bureau is to play in that function. The stated aim of the Consumer Protection Act 1972 is to bring consumer laws 'within the administration of the Bureau'<sup>38</sup> which is, under the Act, empowered to 'initiate action for remedying infringements of [the provisions of the Act] whether on complaint or otherwise'.<sup>39</sup>

This provision is strange. It appears to authorize the Bureau to institute proceedings against defaulting vendors, but section 66 provides:

[p]roceedings for any offence against this Act may be taken by any inspector or by any other person thereunto authorized in writing by the Minister whether generally or in any particular case or by any person whose rights are impaired or who is specially aggrieved by the commission of such offence or by the duly appointed attorney of such last mentioned person.

The Act does not indicate how the Bureau and the inspectors are to co-operate. It appears to contemplate that the investigatory department will enjoy a large degree of autonomy, and that it is to be only indirectly responsible to the Bureau. Indeed, the terms of sections 6, 8 and 66 when read together would suggest that a separation of powers is intended between, respectively, the policy-making organ (the Council), the administrative and advisory body (the Bureau) and the enforcement agency (the inspectors). If this is in fact the case, the power to initiate action, conferred on the Bureau by section 8(a), would amount to little more than a duty to exercise a supervisory function over action which may be taken by others pursuant to the Act. This appears to be the one concession made to recent demands that the Bureau—or its reconstituted equivalent—be invested with powers of investigation and prosecution.<sup>40</sup>

<sup>37</sup> These six men with, apparently the occasional assistance of the Inspectors of Factories and Shops, a body attached to the Department of Labour and Industry, are charged with enforcing, throughout Victoria, a vast array of consumer regulations: Trading Stamps and Coupons (Consumer Protection Act 1972, Pt II, Div. 1); False and Misleading Advertising (Pt II, Div. 2); Door-to-Door Sales (Part II, Div. 3); Unordered Goods and Services (Part II, Div. 4); Merchandise Marks (Part III, Div. 1); Footwear Regulation (Part III, Div. 2); and Safe Design and Construction of Goods (Part IV).

<sup>38</sup> Victoria, *Parliamentary Debates*, Legislative Council, 27 April 1972, 5425 per Hon. V. O. Dickie.

<sup>39</sup> Consumer Protection Act 1972, s. 8(a).

<sup>40</sup> Committee of the Law Council of Australia, *op. cit.* para. 3.2.3; University of Adelaide Law School Committee, *op. cit.* 70.



The structure of the re-established consumer protection machinery seems exceedingly complex and smacks of unnecessary bureaucracy. The creation of three distinct bodies to perform closely interrelated functions with minimal provision made for co-operation is inexplicable. This lack of cohesion (together with the scarcity of authorized inspectors) is likely to have particularly serious consequences in the sphere of enforcement, for it will probably result in enforcement activity being sporadic and aimless. Yet these were the very characteristics of the old legislation which the implementation of the new scheme was designed to overcome.

To be really effective, consumer protection legislation must be based on some form of constant supervision and control. Sporadic enforcement of its provisions will not deter unscrupulous salesmen, for the profits to be gained from exploitation will always outweigh the losses involved in the threat of an occasional fine. What the present scheme requires is a clearly defined programme of enforcement. The Bureau, being in constant touch with consumer problems, is in an ideal position to furnish such a programme. However, it can hardly do so while it is set at a distance from the body exercising the powers of investigation and prosecution and while, moreover, that body is impossibly small to cope with the functions allotted to it. The allocation of supervisory powers in the Bureau is insufficient. The number of inspectors should be substantially increased, they should be attached to, and under the direction of the Bureau, and they should be empowered to bring actions in the name of the Bureau. In this way, the possibilities of properly co-ordinated activity would be increased, and an adequate response would at last be made to the frequent requests that the Bureau be given 'teeth'.

It should perhaps be mentioned that the Act retains the civil sanction as a weapon against the defaulting vendor: section 15(3) provides that non-compliance with the cooling-off provisions will render contracts unenforceable. Such measures are, unfortunately, based on an unrealistic estimate of consumer awareness. The civil sanction is, in fact, likely to prove little more effective than the criminal penalty in securing compliance with the door-to-door sales legislation, for in many cases, unless he is sued, a consumer will not know that a statutory provision has been breached, nor will he be aware of the rights conferred upon him as a result of that breach. Unless a purchaser is actually aware of a legal defect in an agreement, he will not be any the less susceptible to stand-over tactics by salesmen.

#### CONCLUSION

There are, apart from the problems discussed, several other defects in the new Victorian door-to-door sales legislation. The problems of scope and enforcement were chosen for examination because they seem to be

the areas most urgently in need of review. The scheme would be greatly improved if, firstly, it was extended to cover cash transactions and secondly, the machinery responsible for enforcement was strengthened, in terms of both organization and numbers of qualified personnel. It is inevitable that until these basic improvements are made, door-to-door salesmen will remain free to ignore the Act with impunity.

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