THE LAW OF THE LABEL

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The baffling array of Federal and State laws relating to the labelling of products in Australia is a source of confusion for manufacturers and consumers alike. In this article Mr Shannon investigates the disparate legislation regulating labelling and highlights the difficulties involved for all concerned. The manufacturers, endeavouring to present their products attractively, are faced with the onerous task of ascertaining and satisfying the diverse regulations in each State. Consumers need to be as fully informed as possible as to the nature and contents of the goods they are purchasing. They also need to be protected from deceptive and undesirable selling practices. The author opines that the number of products on sale is simply too large, and the relevant consumer information too diverse, for detailed labelling requirements to be prescribed for all products. With the exception of certain products, general prohibitions on false, misleading and deceptive conduct would best serve the needs of both manufacturers and consumers.

The buyer may be informed and persuaded by any number of marketing tools—advertising in its various forms, product "positioning", and articles discussing the product in magazines and newspapers. And often the very last element of this sequence is an examination of the product itself—and its package. This final, immediate contact with a product may come at a critical moment in the purchasing decision. Negative information here can lose the sale. Positive reinforcement can clinch it.

The label is a particularly important marketing tool in relation to the sale of food. With increasing affluence the consumer has the choice of a wide variety of foods, many of them new products on the market. Revolutionary changes in packaging technology have meant that foods are available in various states of preserve, having undergone one of a number of possible processing methods. Differences in ingredients, processing and packaging often mean differences in food value, shelf-life and storage requirements. Yet, more and more food is put up for sale by self-service. No longer is the friendly knowledgeable grocer there to advise on the best brand of flour or the "freshest", "crispest" apples. The consumer must now rely on prior knowledge of the product, and on what can be seen at the point of sale. Most methods of packaging make inspection of the product impossible prior to purchase. The consumer is more and more dependent on adequate labelling to make a sound and well-informed choice.

This is not only true of foods, but of a wide variety of other merchandise as well. Farmers must rely on label information concerning new and

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complex agricultural chemicals. Purchasers with little or no knowledge of modern electronics are faced with the problem of how to make a rational choice amongst electronic calculators embodying space-program technology, or from a bewildering array of stereo equipment, each proclaiming itself to be the ultimate in quality.

This article examines two broad areas of Australian law relating to labelling. The first part of the article considers information which is made mandatory on labels by Weights and Measures, Pure Foods, Poisons and other legislation. The problems inherent in specifying what information must be stated on particular labels are illustrated by reference to food labelling laws, although these problems occur with non-food products as well. Labels may be used as vehicles for misleading, deceptive and undesirable information. They may also be used as elements in undesirable sales promotion practices—particularly lotteries and trading stamps. The second part of the article deals with misleading, deceptive and undesirable labelling and selling practices.

INFORMATION—FULL AND TRUE

1. *The Trade Practices Act 1974-1975 (Cth)*

Sections 62 and 63 of the Trade Practices Act provide for regulations to be made as to what *must* be stated on labels and packaging. By virtue of these sections, regulations may be made concerning goods that are intended to be used, or are of a kind likely to be used, by a consumer.[1] The regulations may, in respect of goods of a particular kind, prescribe (*inter alia*) a consumer product safety standard as to packaging, and the form and content of markings, warnings or instructions accompanying the goods,[2] and a consumer product information standard as to the disclosure of information relating to the performance, composition, contents, design, construction, finish or packaging of the goods, and the form and manner in which that information is to be disclosed on or with the goods. The prescribed information must be reasonably necessary to give persons using the goods accurate information as to the quantity, quality, nature or value of the goods.[3]

The provisions potentially extend to a wide range of goods. They may be used to prescribe a very wide and detailed range of information in respect of such goods, and the manner in which such information is to be communicated. The Trade Practices Commission could, for example, use the powers of sections 62 and 63 and its powers to issue guidelines pursuant to sections 28(1) and 52 to prescribe general and particular rules regulating all aspects of advertising and labelling. There is no apparent legal

[1] "Consumer" is defined, somewhat ambiguously, in s. 4(3) of the Trade Practices Act 1974 (Cth).
[2] S. 62(2).
[3] S. 63 (2).

reason why such rules, regulations and guidelines could not be as wide-reaching as those of the United States Federal Trade Commission and Food and Drug Administration.[4] But although the power is wide, its use to date has been very limited indeed. Since these sections came into force in August 1974, only one consumer product safety standard has been prescribed—the Buoyancy Aids Safety Standards.[5] The formulation of satisfactory standards often involves considerable research and testing. This is particularly the case where performance or construction standards are involved, although, as will be shown later in this article, the prescription of specific label information is often not a simple matter. It may be some time before an extensive range of standards is prescribed. The present Australian Government appears less anxious than its predecessor to set the pace in consumer protection, and uncertainty presently surrounds the future of sections 62 and 63.

From a consumer's point of view, the failure to make more extensive use of these provisions has meant that the impressive enforcement provisions of the Trade Practices Act have not been made available. A corporation supplying goods which fail to comply with a standard prescribed pursuant to sections 62 or 63 is liable to a maximum fine of $50,000 for each offence. Prosecution in respect of such an offence would be simple in terms of the evidence required to procure a conviction. All that need be proved is that the relevant standard has been prescribed, and goods which did not comply with that standard were supplied[6] by the defendant.

Perhaps even more important from a consumer's point of view is that the failure to make use of these provisions has meant that the "self-help" provisions of the Trade Practices Act remain largely inoperative in this area. Section 82(1) of the Act provides that a

> person who suffers loss or damage by an act of another person that was done in contravention of a provision of . . . Part V may recover the amount of the loss or damage by action against that other person.

Action pursuant to section 82 is facilitated by sections 62(3) and 63(3), which apply where a person suffers loss or damage by reason of his not having particular information in relation to the goods, and the person would not have suffered the loss or damage if the corporation had complied with that standard in relation to the goods. In such circumstances the person shall be deemed, for the purposes of the Act, to have suffered the loss or damage by the supplying of the goods. Actions for damages under section 82 are not restricted by any notions of privity, but may be maintained by

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[4] See generally the Federal Trade Commission Act (Ch. 311, 38 Stat. 717, as amended; 15 U.S. Code, ss 41-58) and the Fair Packaging and Labelling Act (Pub. L. 89-755, 80 Stat. 1296, as amended; 15 U.S. Code, ss 1451-1461).

[5] Trade Practices (Buoyancy Aids Safety Standards) Regulations 1974.

[6] Note that by virtue of s. 4(1) of the Act, "supply" includes sale, exchange, lease, hire or hire purchase.

any person suffering loss or damage, whether or not he is party to a contract in the supply chain. This notion is preserved by sections 62(3) and 63(3), with the result that the aggrieved person may elect to sue *any* person who supplied the goods not complying with the prescribed standards —the retailer, the distributor or the manufacturer. Moreover, the person seeking to recover loss or damage need not be a consumer.

A further "self-help" provision which would be more widely available if there were more standards prescribed under sections 62 and 63 is the possibility of "any other person" obtaining a restraining injunction under section 80 of the Act, and ancillary orders in the injunction proceedings pursuant to section 87.

It is these "self-help" provisions in the Trade Practices Act which make it a potentially more important consumer protection device than the numerous other State and Federal Acts which regulate the information that may or must be given on packages and labels.

2. *The Uniform Packaging Legislation*

The most important of the general State laws making particular label information mandatory are the Weights and Measures Acts and Ordinances of the various States and Territories, known collectively as the Uniform Packaging legislation.[7] This legislation is directed against an abuse of consumers' rights which is as old as trade itself—cheating with weights and measures. It is an abuse rendered much more critical by modern packaging, where what you see is no longer necessarily what you get.

The Uniform Packaging legislation prescribes maximum penalties that appear trivial in comparison with those of the Trade Practices Act. The maximum fine that may be imposed is $500,[8] and there is no private right to recover damages. Nevertheless, in practice, the legislation has been found to be highly effective, largely as a result of effective policing by the Weights and Measures authorities in the various States. It is an offence for a retailer to sell packaged goods unless correctly marked with the net weight or measure,[9] and any manufacturer persisting in such practice is likely to find that his major customers have been informed by the Superintendent of Weights and Measures that they may face prosecution if they sell such goods. This almost invariably secures full compliance.

The Uniform Packaging legislation regulates various important areas of label information, including the following:

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[7] The Weights and Measures Acts and Ordinances of the various States and Territories. See also the Packages Act 1967-1972 (S.A.). Although these Acts and the regulations made thereunder are not entirely uniform, they are sufficiently so to permit illustration of the points made in this article by reference only to the Weights and Measures Act 1915-1975 (N.S.W.). This uniform code is augmented at Federal level by the Commerce (Imports) Regulations, made under the Commerce (Trade Descriptions) Act 1905-1973 and the Customs Act 1901-1975.

[8] N.S.W. s. 44.

[9] N.S.W. s. 25(3). The manufacturer also commits an offence—s. 29D(3).

The identification of the packer or principal, either by full name and address or by means of an "approved brand".[10] This identification must be clear and legible on the package, and no additional particulars are permitted that may create any doubt as to the identity of the packer or the place of packaging. "An approved brand" is in fact a code number issued by the Department of Primary Industry or by the Weights and Measures Authority in the State of packing. It is designed more to facilitate policing by the relevant authorities than as a direct consumer protection measure. The code number is confidential, and will not be disclosed by the authorities. Manufacturers are, accordingly, able to use product differentiation by packaging to cover a wider area of the available market, and the curious consumer will be hard pressed to discover that the one manufacturer is selling under several different brand names. Many manufacturers do in fact state their full name and address on the label. The Pure Foods legislation[11] makes it mandatory that *somebody's* name be stated on labels for foodstuffs but, in cases where this is not done, consumers may be unable to find out to whom they may complain, if the quality or quantity of the goods purchased proves unsatisfactory. The Australian Consumers Association believes that the legislation should be amended to ensure that the name and address of both the packer and the manufacturer must be endorsed on packaged goods so that consumers are able to make complaints direct to them.[12]

A statement of quantity.[13] All pre-packed goods, unless specifically exempted, are to be marked with the net weight or measure of their contents ("measure" in the case of goods ordinarily packed or sold by number means their number). Detailed requirements are prescribed as to the position of the statement of quantity on the label or pack, minimum print-height, colour contrasts, proximity to the brand name and other copy, and permitted units of measure. Only metric units are now permitted. The *manner* of stating weight or measure is prescribed. The word "net" is mandatory on all weight statements, and it is an offence to show the gross weight. Expressions such as "net weight when packed" or "net weight at standard condition" are permitted in respect of some goods. Some goods are required to be sold by reference to weight, others by reference to volume, and some by either weight or volume. A few specified goods may be sold by reference to both weight *and* volume.

Unit price. Certain specified goods are required to be marked with a statement of the price per kilogram.[14] Special provisions are made for the

[10] N.S.W. s. 29B; see also s. 29P for "approved brands".
[11] See *e.g.*, Pure Food Act 1908 (N.S.W.) s. 14.
[12] *CHOICE*, Vol. 17, No. 1, Jan. 1976, at 462-463.
[13] N.S.W. s. 25; and see generally N.S.W. Weights and Measures Regulations Parts VII and VIII. Part VII deals generally with "Marketing of Pre-Packed Articles".
[14] See N.S.W. Regulations Part VII reg. 13. The goods specified are meat, natural cheese, dressed poultry, fish (including crustacea), unsliced bacon, ham and smallgoods.

weight marking of dressed poultry, goods packaged in both an inner and outer container, and multi-item packs.[15]

Prohibited and restricted expressions. Expressions which directly or indirectly relate to or qualify a unit of measurement of a physical quantity (for example, "Big Litre", "Full Kilogram") are "prohibited expressions".[16] Other adjectives, such as "King", "Giant", "Economy" and the like are "restricted expressions". They may be used provided that the statement of weight[17] or measure is so placed and marked that both may be seen clearly at the same time, and provided that specified height ratios and colour contrasts are complied with.

Exemptions. The scheme of the Uniform Packaging legislation is such that all packaged goods are subject to it unless specifically exempted.[18]

Prescribed quantities. Certain goods may be sold only in standard sizes.[19] This is an important consumer protection provision, facilitating easy price-comparison of such goods. Packaged goods not subject to such standardization may be sold in any quantity. In addition, and partly to accommodate the economies of the container manufacturers, goods not subject to standardization and which are permitted to be sold in terms of weight, may also be packed in standard-size rigid containers. The result is that goods put up for sale in the same-sized containers may, in fact, be of the same volume but of different weight. In such cases, information as to both volume and weight is required.[20]

An alternative way of facilitating price comparison is *unit pricing*—specifying the price per unit of weight or volume. This has been adopted on a varying scale in countries such as Canada, the United States of America, and the United Kingdom. In its 1974 report, the N.S.W. Consumer Affairs Council expressed the view that unit pricing would always be a second best alternative to packing in specified rounded quantities.[21]

The N.S.W. Consumer Affairs Council has also considered the issue of drained weight labelling of canned food.[22] There may be considerable

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[15] N.S.W. Regulations Part VII regs 9 and 15.
[16] N.S.W. s. 29J, and Regulations Part VII reg. 17.
[17] N.S.W. s. 29J, and Regulations Part VII reg. 17.
[18] N.S.W. s. 29R(1), and Regulations Part VII reg. 18.
[19] N.S.W. s. 29C, and Regulations Part VI "Packing of Certain Articles in Prescribed Quantities". A number of specific items are excluded—reg. 1(3).
[20] See Standing Committee on Packaging Statement of Principles, Issue 4, Nov. 1974.
[21] N.S.W. Consumer Affairs Council, *Fifth Annual Report* (1973-1974) 25. However, the point of specified rounded quantities is lost if too many different sizes are permitted, or if the difference between permitted standard sizes is too small. *E.g.*, under the Uniform Packaging legislation confectionery between 15g up to 100g may be packed in 5g increments. So a 30g candy bar selling for 20 cents today may become a 25g candy bar for 20 cents tomorrow. The packaging may remain identical except for the weight statement, and it may be hard to spot the difference. The case of the disappearing candy bar!
[22] N.S.W. Consumer Affairs Council, *Sixth Annual Report* (1974-1975) 11.

variation between the drained weight of solid food and the net weight as stated on the label. The liquid component may or may not be consumable. The Codex Alimentarius Committee[23] has adopted the principle that the minimum drained weight should be specified on the label where the liquid is discarded, but not where it is to be consumed.[24] The N.S.W. Consumer Affairs Council has departed slightly from this principle and has recommended that, irrespective of whether the liquid was consumable, the drained weight of solid food would be the information of most value to consumers, and so this information should be mandatory. The Council also recommended that the label for canned fruit in whole or in halves should specify the number of pieces in addition to the mean drained weight. Fortunately, fruit salad and passionfruit do not appear to fall within this recommendation.

3. *The Pure Food Legislation*

Another area in which the information on the label is extensively prescribed is that of the Pure Food legislation.[25] Again, this is broadly uniform in the various States and Territories. It is an area much too detailed to describe comprehensively here.[26] The following are the more general label details prescribed by the Pure Food regulations:

Common name. The compositional standard of many foods is prescribed. Other foods have a common name through usage. The common name must be used on the label.[27]

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[23] The Codex Alimentarius Commission is a joint working body of two United Nations inter-governmental organizations—the Food and Agriculture Organisation and the World Health Organisation. It administers a Food Standards Programme to develop international food standards aimed at protecting health, harmonizing national food legislation and ensuring fair practices in the food trade. The Australian States have been slow to follow Codex Alimentarius recommendations.

[24] Note 22 *supra.*

[25] This is broadly uniform in the various States and Territories. See particularly the Pure Food Act 1908 (N.S.W.); Health Act 1958 (Vic.); Health Acts 1937 to 1962 (Qld); Food and Drug Act 1908-1972 (S.A.); together with the regulations made thereunder. Subsequent references in this Article are to the N.S.W. Act and Regulations, unless otherwise specified.

[26] The Pure Food Regulations prescribe particular label details for literally hundreds of different products. The National Health and Medical Research Council has updated and codified food labelling requirements in its April 1975 publication *Approved Food Standards*, published by the Australian Department of Health.

[27] N.S.W. reg. 1. The standards are in many cases hopelessly vague and confusing. *E.g.*, N.S.W. reg. (3)(a) requires that where a cheese is sold under a descriptive name it shall correspond thereto in composition and character. By virtue of reg. 29(3)(b) and the Schedule, listed cheeses are required to correspond to the standards prescribed in terms of maximum percentage of water and minimum percentage of dry weight fat. These two factors do not define a cheese type, which depends on the ingredients and the method of manufacture. Accordingly the situation can arise where the manufacturer of a Mozzarella type cheese which falls marginally short of the minimum dry weight fat percentage is prohibited from calling it a Mozzarella although he would be apparently free to call it fetta or a number of other names that it is not. Cheeses sold without any name or classification are deemed to be Cheddar, and must comply with the standard prescribed for Cheddar.

The name of the vendor, maker, agent or owner.[28]

A statement of ingredients. The regulations prohibit exaggerated ingredient claims based on minor ingredients.[29]

The use of certain words is either prohibited or strictly prescribed—including "health", "imitation", "sugarless", "unsweetened", "energy", "protein", "vitamin", "mineral", "dietary", "low calorie", "starch reduced", and others.[30]

There has been considerable debate in recent times as to whether food labels should specify the nutritional value of the contents.[31] Research by the Australian Academy of Science indicates a causal connection between coronary heart disease and the intake of excessive calories and excessive amounts of cholesterol, total fat, refined carbohydrates and alcohol.[32] It has recommended, as a corollary to a nation-wide education program on nutrition, that food products in Australia should be accurately labelled to show their calorie content, amount and type of carbohydrates, fat and fatty acids, vitamins and minerals. The Academy believes that Australia is "notably deficient" in regulations as to the full and accurate labelling of the contents of foods. It calls for a new approach to allow the consumer to identify easily nutrient content (particularly the amount and type of fat and cholesterol) in all foods. And it seeks legislation "to permit and encourage the production, advertising and sale of products low in total and saturated fats and cholesterol (for example, processed meats) made with moderate amounts of unsaturated oils instead of large amounts of saturated fats".[33]

However, the Australian Consumers Association does not think that legislation in this form is desirable for Australia at the present time. In an editorial in *CHOICE* the Association stated:

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[28] N.S.W. s. 14 and reg. 1; see also ss 5 and 10. The label must show the name and address of the vendor of the packaged food or the maker thereof, or the owner of rights of manufacture. The address may be omitted if the name is registered under the N.S.W. Companies or Business Names Act. Accordingly it is possible for retailers such as Woolworths to market products under house brands, with no reference to the actual manufacturer except the "approved brand" code which is meaningless to consumers (see note 12 *supra*).

[29] Until recently this was mandatory for some foods only. The prescribed foods included infants food (reg. 16) invalids foods (reg. 17) and a few others. For all other foods, ingredient labelling was optional. Most manufacturers chose not to exercise the option. The N.S.W. Consumer Affairs Council in its *Fifth Annual Report* (1973-1974) (at 22) recommended that all packaged or prepared foods, unless otherwise exempted, shall include on the label a statement of the ingredients and the quantity or proportion in which they are present, in descending order of their relative proportion. This is consistent with the Codex Alimentarius recommendations. The recommendation is now embodied in N.S.W. reg. 69(3)(a), which requires that a complete list of ingredients be declared in the label of a food not elsewhere standardized in the regulations.

[30] N.S.W. Regulations 1(6), 1A, 3A and others.

[31] See *e.g.*, N.S.W. Consumer Affairs Council, *Fifth and Sixth Annual Reports*—1973-1974 at 25, and 1974-1975 at 9.

[32] Australian Academy of Science, *Report of a Working Group on "Diet and Coronary Heart Disease"* Report No. 18, March 1975.

[33] *Id.*, 70.

> As well as the practical problems involved in the administration of such a scheme, there are other reasons why legislative action may be premature.
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> A high proportion of consumers has little knowledge of the principles of nutrition and could not, at present, interpret nutritional data if they were stated on labels. In the United States, nutrient labelling has led to advertising abuses. Although manufacturers are not permitted to make unjustified claims about their products, many advertisements still manage to infer non-existent nutritional benefits. If an imitation fruit drink has been fortified with extra vitamin C, the unwary are likely to assume that it must be better than the natural fruit juice. This type of deception can be guarded against only by a nutrition education programme.
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> In view of the existing world food shortage and the probable increasing availability of food nutrient substitutes, the role to be played by education about nutrition is of increasing relevance.
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> Nutrient labelling can be effective only when consumers have been adequately educated in nutritional matters. ACA strongly believes that the governments should undertake widespread and continued community education in nutrition.
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> In the meantime, manufacturers should be obliged by law to supply nutritional data about any food product upon demand.[34]

As the law presently stands in Australia, nutrient labelling is illegal, except on breakfast cereals and a few other specified goods.[35]

The difficulty of introducing nutrient labelling, given the present level of consumer knowledge, can be seen in the various American experiments in this area.[36] In the United States, nutrient *labelling* is regulated on a Federal level by the Food and Drug Administration, while nutrient *advertising* is within the jurisdiction of the Federal Trade Commission. Where a nutrition panel is included on a food label, it *must* show the serving size, the amount of food energy (in calories), the amounts of protein, fat and carbohydrate (in grams) and the percentage of United States Recommended Daily Allowance ("U.S. RDA") for protein, vitamin A, vitamin C, the B vitamins (thiamin, riboflavin and niacin), calcium and iron furnished by

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[34] *Choice*, Vol. 16, No. 5, May 1975, at 146.

[35] See generally N.S.W. reg. 3A—"Vitamins and Minerals". Nutritional labelling is permitted on biscuits, bread, breakfast cereals, butter, margarine, flour, invalids foods, fruit juices, milk powder and vegetable substitutes for milk. The permitted label statement depends on the quantity of the food, expressed as a fraction of the recommended daily allowance. See also reg. 17—"Special Dietary Foods". Where vitamins and minerals are present in any food in its natural state in the concentrations specified, such food may be labelled as a source of vitamins or minerals. It is interesting to contrast the U.S. regulations for rice with those in Australia. The U.S. Federal Government and several States require that rice be vitamin enriched, a carry over from World War II when it was thought that rice would provide a cheap starch source which could be vitamin enriched to provide a better food balance. Most U.S. rice is now vitamin enriched. The same product cannot be legally sold in any Australian State if it contains added vitamins.

[36] See generally *Food Drug Cosmetic Law Journal*, Vol. 29, No. 8, 1974 reporting the U.S. Food Industry Briefing on Nutritional Labelling Education; see also Vol. 30, No. 3, March 1975, devoted to papers on the Trade Regulation Rule on Food Advertising.

a serving. It *may* show the percentage U.S. RDA of any of twelve additional vitamins and minerals, and other specified nutritional information is also permitted.[37]

The issues raised by the U.S. regulations and proposals range from questions as to the most appropriate method and form of disclosure to questions of what must or may be disclosed: Which nutrients?[38] Should comparison claims be permitted? What percentage of U.S. RDA should be present before a nutrient claim is permitted? How much is a "serving" of the food?

Considerable data has been generated as to the effect of nutrient labelling in the U.S.A. One study has found perceptible shifts in consumer preferences towards brands with full disclosure labels—in some cases, over ten per cent.[39] Another study has shown that where there is a real nutritional advantage over competitive products, there is a major change in the more nutritional product's share of the market.[40] Yet another study of a two months nutrient labelling experiment showed that only 26.3 per cent of shoppers saw the nutrient list, only 16.2 per cent understood them and only 9.2 per cent used the information.[41]

In a pamphlet designed to assist consumer's use of nutrition-labelling information,[42] the U.S. Department of Agriculture takes seven pages to explain the prescribed information in what appear to be the simplest terms (covering only the eight nutrients that must be shown, and saying nothing of the twelve more that may be shown or the forty more that are also essential to life). This pamphlet then lists the percentage U.S. RDA of the eight nutrients for 889 foods which may be bought unpackaged, to enable the consumer to calculate all the nutrients in her diet. The steps involved in this calculation involve a week of measuring meals and averaging, and the calculation is only valid for the next week if the same foods are consumed again in the same quantities. The pamphlet admits that "selecting a good diet using nutrition information on labels and in this publication is not an easy task".

It is instructive to compare the labelling requirements for human foods with those for stock food. Five of the States have legislation governing the sale of food for stock.[43] In three States, "stock" as defined includes dogs

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[37] U.S. Department of Agriculture, *Nutrition Labelling—Tools for Its Use*—Agriculture Information Bulletin No. 382, issued April 1975.

[38] There are 40 to 50 nutrients essential to life.

[39] 1970 study by *Chain Store Age* Magazine, referred to in S. A. Weitzman, "Trade Regulation Rule on Food Advertising—An Analysis" (1975) 30 *Food Drug Cosmetic Law Journal* 181.

[40] *Ibid.*, referring to a 1971 study by the U.S. Consumer Research Institute.

[41] Abstract of the Institute of Food Science and Technology, Proceeding 6(2) 85.91 (1973), abstracted in (1975) 7 *Food Science and Technology Abstracts* 2F 100.

[42] U.S.D.A., *Nutrition Labelling—Tools for Its Use*, note 37 *supra*.

[43] The Stock Foods and Medicines Act 1940 (N.S.W.); The Agricultural Standards Acts 1952 to 1963 (Qld); Stock Foods Act 1958-1975 (Vic.); Stock Foods Act 1941-1956 (S.A.); Feeding Stuffs Act 1928-1951 (W.A.).

and certain captive birds. In Queensland, it includes dogs and cats and, accordingly, pet food sold nationally has to comply with this legislation. The N.S.W. Act stipulates that the label show the manufacturer's name and place of business, the product name, the net weight of the pack and the chemical analysis of the foods. In this latter respect, more consumer information must be available on a can of pet food than is required in respect of most human foods.[44] This is not to say that the information on pet food labels is necessarily *useful* to consumers. It is not possible to determine the extent to which a packaged pet food satisfies a pet's nutritional needs from the prescribed information on the label. The information that is required is more a monument to bureaucratic tunnel vision (dogs appear to have been grouped with pigs, cows and horses because there are working dogs on farms) than enlightened consumer legislation.

Another area of continuing debate in relation to food labelling is that of open-date stamping.[45] The problem facing the legislator in this area is that different dates are more particularly relevant to different foods, and even the same food may have different relevant dates depending on how it is packed, handled and stored. For example, the canning date may be thought more relevant to canned goods, but the date of removal of frozen foods from deep freeze to storage may be a more useful date for a consumer to know. "Sell by" and "eat by" and "open by" dates are obviously relevant and useful, but these dates are rendered uncertain by variations in handling and storage conditions. Consumers faced with a choice off the shelf will buy the freshest product, and may wrongly equate a "sell by" date with "eat by". Manufacturers and retailers also contend that open-date labelling will mean more wastage, and higher prices. Several States are presently considering mandatory open-date stamping for short-life perishable foods, and are expected to follow the recommendations (yet to be published) of the National Health and Medical Research Council. The New South Wales Consumer Affairs Council has noted that if date stamping is to be meaningful, there is also a need for the introduction of standards for the storage, transportation and handling of perishable and frozen foods.[46]

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[44] *E.g.*, the Queensland Agricultural Standards Act requires that manufactured stock food must be labelled with details of

minimum	%	crude protein
minimum	%	crude fat
maximum	%	crude fibre
maximum	%	crude salt
vitamin A		I.U. per lb.
vitamin D_3		I.U. per lb.
vitamin B_2		mg/lb.

This is similar to requirements in N.S.W., S.A. and W.A. However, in N.S.W., if a stock food contains meat offal and bone, the species of animal from which it was derived must be stated on the label.

[45] See generally U.K. Food Standards Committee, *Report on the Date Marking of Food* (London 1972); see also N.S.W. Consumer Affairs Council, *Fifth and Sixth Annual Reports*—1973-1974 at 25, and 1974-1975 at 20.

[46] *Sixth Annual Report* (1974-1975) 20.

4. *Other Legislation*

The labels for some prescribed goods must contain a prescribed trade description. This requirement is imposed by various State laws.[47] The term "trade description" is typically defined to mean much more than the nature of the goods and extends to such areas as quality, purity, quantity, price, origin, suitability for purpose, suitable methods of care, the mode of manufacture, material, ingredients and history. The goods for which a trade description is most commonly prescribed are leather goods, footwear, bedding, furniture and textiles. Special attention has been given to children's flammable nightwear. The use of terms such as "pure wool", "all leather sole" and "synthetic sole" is precisely regulated, and it seems that the demand for this regulation has come as much from industries seeking protection from cheaper synthetics as it has from consumers.[48] This is also apparent in the regulation of the use of the terms "margarine" and "butter".[49] At the same time, there is an element of consumer protection involved—particularly apparent in requirements such as that placed on furniture manufacturers to state their true name and address legibly and permanently on the product. This is a very small step towards facilitating consumer redress and ensuring that manufacturers must live with their reputations.

At the federal level, the Commerce (Trade Descriptions) Act 1905-1973, provides for regulations to be made prohibiting the import and export of goods which do not bear a prescribed trade description.[50] The Commerce (Imports) Regulations prescribe strangely diverse goods ranging from manures to powder puffs, including human foods, textiles, jewellery and (with specific exceptions) goods that are imported in the packages in which

[47] Consumer Protection Act 1969-1972 (N.S.W.) ss 20, 28, and Textile Products Labelling Act 1954-1970 (N.S.W.) ss 4, 10; Consumer Affairs Act 1972-1974 (Vic.) s. 34; Goods (Trade Descriptions) Act 1935-1969 (S.A.) s. 5; Consumer Affairs Act 1970-1974 (Qld) ss 25-29, and Factories and Shops Act 1960-1970 (Qld) ss 74-83; Trade Descriptions and False Advertisements Act 1936-1973 (W.A.) ss 5-7; Goods (Trade Descriptions) Act 1971 (Tas.) ss 7, 16; Children's Flammable Nightwear Ordinance 1975 (A.C.T.) ss 6, 7.

[48] See A. P. Moore, "Australasian Regulation of Deceptive Selling Practices" (1971) 4 Adel. L. Rev. 423, 429; see also K. C. T. Sutton, "The Consumer Protection Act 1969 (N.S.W.) and Comparable Legislation in Other States" (1971) 4 Adel. L. Rev. 43.

[49] Pure Food Act 1908 (N.S.W.) and Pure Food Regulations 1937 regs 23(3)-23(5), and Dairy Industry Act 1915 (N.S.W.) ss 21A, 21B, and reg. 103 of the regulations made pursuant to that Act; Margarine Act 1975 (Vic.) ss 9, 10 and Margarine Regulations 1976 S.R. 428/75; Margarine Act 1939-1974 (S.A.) ss 11-19, 22 and Margarine Regulations 1940, and Food and Drugs Act 1908-1976 (S.A.) s. 32, and Food and Drugs Regulations 1964 reg. 40; Margarine Act 1958-1975 (Qld) ss 12-14, and Margarine Regulations of 1958, and Health Act 1937-1974 (Qld) and reg. 28 of the Food and Drugs Regulations of 1964, made thereunder; Margarine Act 1940-1973 (W.A.) ss 26, 30, 31 and Margarine Act Regulations 1974, and Health Act 1911-1975 (W.A.) s. 212 and Food and Drug Regulation 1961 reg. G.05.003; Dairy Produce Act 1969 (Tas.) and Dairy Produce Margarine Regulations 1944, reprinted No. 19, 1970 regs 15-19, and Public Health Act 1962-1974 (Tas.) s. 69, and Public Health (Food and Drugs) Standards 1971 regs 52, 52A.

[50] See generally Commerce (Imports) Regulations 1940-1974 and Exports (General) Regulations 1954-1969 and the various separate sets of regulations dealing with particular product categories.

they are customarily exposed or offered for sale. These regulations require that prescribed goods be marked with the brand, the country of origin, a true description of the goods (for some goods only), the weight or quantity, and other information generally consistent with State Pure Foods, Trade Descriptions and Weights and Measures legislation. Various regulations have been made governing (*inter alia*) the labelling of meat, honey, fish, vegetables, fruit, dairy produce, flour and other goods prescribed pursuant to section 5 of the Act. As well as prescribing particular label requirements for particular goods, these regulations require generally that the goods be truly described on the label; that the label contain the word "Australia"; that it contain the name and registered brands of the manufacturer and exporter; that it specify weight or quantity; that it include a statement that the goods contain a deleterious substance; and that it have relation to the condition of the goods at the time of shipment.

Labelling standards may also be prescribed under the State and Federal Therapeutic Goods legislation.[51] A general standard has been prescribed under the N.S.W. Therapeutic Goods and Cosmetics Act 1972-1974 in respect of the labelling of therapeutic substances. This general standard requires information as to the name of the goods, the ingredients and composition of the goods, the batch number, the manufacturer, special storage requirements, and clear and adequate directions for use. The labelling of medicines is strictly regulated. Detailed regulation of cosmetic labelling has yet to arrive in Australia.[52]

Detailed label information is specified in respect of goods falling within the ambit of the various State Poisons Acts. Although not entirely uniform from State to State, this legislation requires language such as *POISON, NOT TO BE TAKEN*, and *NOT TO BE USED AS A FOOD CONTAINER* to appear prominently on a permanently-affixed label.[53] Ingredients and their strengths must be specified, and such information as restrictions on use and special warnings or first aid measures must be stated. These vary of course depending on the nature of the poison, and whether or not it is sold in bulk quantity, or in smaller packs for possible consumer use. The labelling requirements imposed by the Poisons Acts are very properly the most stringent of all Australian labelling laws, and extend to stipulating the colours of the label and the print, and the size, location and style of the print. Similar requirements apply in relation to the labelling of inflammable liquids,[54] although the information which must be

[51] Therapeutic Goods and Cosmetics Act 1972-1974 (N.S.W.) s. 22 and regs 23 and 23A; see also Therapeutic Goods Act 1966-1973 (Cth) s. 15.

[52] N.S.W. has taken the first small step with the Therapeutic Goods and Cosmetics Regulations. Regs 7 and 11 relate to cosmetics containing more than 0.1% hexachlorophane.

[53] See *e.g.*, Food and Drugs Act 1908-1976 (S.A.) and Food and Drugs Regulations 1964 regs 115-143 relating to poisons.

[54] *E.g.*, Inflammable Liquid Act 1915 (N.S.W.). There are also various State labelling regulations dealing with the labelling of flammable clothing—*e.g.*, Flammable Clothing Act 1973 (Tas.).

given on the label pursuant to the State Inflammable Liquid legislation is not so extensive.

Although there is a large degree of uniformity between the States and Territories with regard to laws prescribing label information, there are also a large number of minor variations from one State or Territory to the next. In most cases, it is possible for the one label to satisfy all requirements nationally, but the degree of variation which does exist is a constant and often necessary nuisance to traders wishing to market the one label on a national basis.[55] Of course, this is a problem in any federal system, and with only six States and two Territories which have to be consulted, it is easier in Australia than in the United States of America. Even so, the necessary process of liaison and consultation frequently delays the implementation of State consumer protection laws.

The preceding discussion has not dealt with *all* legislation at State and Federal level prescribing the information that must be provided on labels.[56] It has however been sufficient to illustrate an essential dilemma of labelling law. On the one hand, there is increasing product complexity coupled with packaging which does not readily facilitate examination prior to purchase. This calls for more label information. And on the other hand, there is a realization that too much information may in fact mislead and confuse the consumer. This was illustrated by the discussion on nutrient labelling and open-date stamping under the Pure Food legislation.[57] A similar point could be made with regard to all manner of other goods. Stereo equipment can be so complex, for example, that even fully-qualified electrical engineers may be hard-pressed to explain why one item is inherently better than another. The same may be said of various other electronic devices, to say nothing of automobiles, fly-spray, sun-tan lotion, and the effect of fluoride in toothpaste. New products and new technology appear in the market place every day. The task of specifying exactly what and how much information is enough to enable the consumer to make an informed, rational decision in respect of all such complex products is simply too great. Considering the incredible proliferation of new products in our affluent society, such a task is too expensive and time-consuming, particularly if interested industry and consumer groups are to be consulted in each case before a new regulation is promulgated. Rather than specify what must be said, it is necessary to rely on provisions which prohibit misleading, false, deceptive and undesirable marketing practices and, at the same time, to rely on the buyer's

[55] The manufacturers of margarine in particular have difficulty in simultaneously complying with the laws in all States. Inconsistencies also exist with respect to poisons, agricultural chemicals, and a number of other goods.

[56] For a practical check-list see the loose-leaf service *Marketing and the Law*, published by the Commercial Economic Advisory Service of Australia. See also *A Report on Australian Consumer Protection Laws* prepared by the Adelaide University Consumer Protection Group (Adel., Feb. 1975).

[57] For a somewhat committed point of view on excessive regulation of the food industry, see M. D. Sayer, "Food Regulation: Quo Vadis" (1976) 31 *Food Drug Cosmetic Law Journal* 188. Mr Sayer is Assistant General Counsel of the General Foods Corporation.

intelligence and awareness of potential shortcomings in the product. A programme of continuing education is necessary to increase the general level of such awareness.

THE DECEPTIVE AND UNDESIRABLE

1. *General State Law Prohibitions*

Misleading and deceptive labelling has long been a criminal offence under various State laws. For example, in New South Wales the Factories Shops and Industries Act 1962 prohibited false trade descriptions of prescribed goods such as clothing, millet brooms, bedding, upholstered furniture, shoes and leather goods.[58] The Weights and Measures legislation and the Pure Foods legislation in the various States has for some considerable time contained provisions prohibiting misleading and deceptive labelling.[59] In more recent times, similar provisions have been incorporated in State Consumer Protection legislation.[60] The maximum penalty for non-compliance is typically a fine of $200. Unlike the legislation considered in Part I of this article, these laws prohibiting misleading and deceptive advertising and false trade descriptions are drafted in general terms. Whereas the Weights and Measures and Pure Foods legislation is driven to great length and complexity to specify what must be stated on labels, these laws prescribe generally what *must not* appear on labels. However, in various laws of the States this simple generality is in fact more confined.[61] Typically, the State provisions only apply to statements and advertisements made in the conduct of or for the purposes of a trade or business.[62] The State provisions in many cases do not extend to "silent" deception arising from omission rather than from a statement or advertisement. In some instances,[63] they operate only where a falsehood concerns a "material

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[58] Factories, Shops and Industries Act 1962 (N.S.W.); see also Textile Products Labelling Act 1954-1970 (N.S.W.).

[59] See *e.g.*, Pure Food Act 1908 (N.S.W.) s. 10A.

[60] Consumer Protection Act 1969-1972 (N.S.W.); Consumer Affairs Act 1972-1974 (Vic.); Misrepresentation Act 1971-1972 (S.A.), and Unfair Advertising Act 1970-1972 (S.A.); Consumer Affairs Act 1970-1974 (Qld); Trade Descriptions and False Advertisements Act 1936-1973 (W.A.), and Motor Vehicle Dealers Act 1973 (W.A.). See also Consumer Affairs Ordinance 1973 (A.C.T.), and False Advertising Ordinance 1970 (N.T.).

[61] See generally K. C. T. Sutton, note 48 *supra* and in *Sale of Goods* (1974, 2nd ed.) Ch. XXIV; see also J. C. Phillips, "False and Misleading Advertising Under the Trade Practices Act 1974 and Existing Queensland Legislation" (1974) 2 *Queensland Lawyer* 73.

[62] Consumer Protection Act 1969-1972 (N.S.W.) ss 24, 25; Misrepresentation Act 1971-1972 (S.A.) s. 4, and Unfair Advertising Act 1970-1972 (S.A.) s. 3a. *Cf.* Unfair Advertising Act 1970-1972 (S.A.) s. 3, and Goods (Trade Descriptions) Act 1971 (Tas.) ss 9, 14.

[63] Consumer Protection Act 1969-1972 (N.S.W.) ss 23-25, 32; Consumer Affairs Act 1972-1974 (Vic.) s. 13; Misrepresentation Act 1971-1972 (S.A.) s. 4, and Unfair Advertising Act 1970-1972 (S.A.) s. 3; Consumer Affairs Act 1970-1974 (Qld) ss 31, 32; Trade Descriptions and False Advertisements Act 1936-1973 (W.A.) s. 8; Goods (Trade Descriptions) Act 1971 (Tas.) ss 9, 10. *Cf.* Motor Vehicle Dealers Act 1973 (W.A.) s. 35 by which a dealer may affix or attach a notice to a second-hand car indicating with "reasonable particularity", any defects, together with his estimates for "fair cost" of remedying any such defect.

particular" or is likely to deceive in a material way.[64] And, in some States, it is necessary to prove as an ingredient of the offence that the offender had *knowledge* of the falsity.[65]

Queensland and South Australia have specific labelling prohibitions which can in certain circumstances be a binding constraint on national sales promotions. In these States it is an offence to pack or sell any article with a label which contains any matter stating or representing by implication that the article is for sale at a price lower than that of the ordinary and customary sale price.[66] It is not an offence to *advertise* a price reduction —only to say it on the label.

Various of the States have recently sought to regulate deceptive packaging. The enabling legislation[67] provides that regulations may be made as to the proportion that free space in a package bears to the total capacity of the package. The model regulations provide that the free space be limited to forty per cent of a chocolate box, thirty-five per cent of a container with an inner sachet, and twenty-five per cent of other articles.

2. *Trade Practices Act Prohibitions*

With one broad, simple stroke of the legislative brush, the Trade Practices Act has, in section 52, made all misleading or deceptive labelling illegal. Section 52(1) provides that "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive". Section 4 of the Act provides that " 'conduct', when used as a noun, includes doing, refusing to do, or refraining from doing, any act. . ." And by virtue of section 6(2)(h) of the Act, reference to a corporation in section 52 has the effect it would have if it included a reference to a person not being a corporation. So this perfectly wide section clearly extends to all deceptive labelling and selling of deceptively-labelled products in Australia. In addition, section 53 prohibits various false representations and statements in connection with the supply or promotion of goods or services.

In the first part of this article, it was noted that the task of prescribing

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[64] Consumer Protection Act 1969-1972 (N.S.W.) s. 32; Consumer Affairs Act 1972-1974 (Vic.) s. 13; Misrepresentation Act 1971-1972 (S.A.) s. 4; Unfair Advertising Act 1970-1972 (S.A.) s. 3b; Consumer Affairs Act 1970-1974 (Qld) ss 31, 32; Trade Descriptions and False Advertisements Act 1936-1973 (W.A.) s. 8.

[65] Consumer Protection Act 1969-1972 (N.S.W.) ss 25, 32: the Act also requires an intention to deceive and to defraud (ss 23, 24, 32); Consumer Affairs Act 1972-1974 (Vic.) s. 13; Misrepresentation Act 1971-1972 (S.A.) s. 4, and Unfair Advertising Act 1970-1972 (S.A.) s. 3; Consumer Affairs Act 1970-1974 (Qld) ss 31, 32, 33; Trade Descriptions and False Advertisements Act 1936-1973 (W.A.) s. 8. In all of the above it is a defence to establish that all reasonable precautions were taken to ensure that the advertisement complained of did not contain an unfair statement, and that the offender reasonably believed this to be so.

[66] Weights and Measures Regulations of 1953 (Qld) reg. 198; Packages Act 1967-1972 (S.A.) s. 25. A permit may be obtained authorizing reduced price marking (s. 35). See also s. 36 relating to the sale or marking of an article with a misleading price.

[67] See *e.g.*, Weights and Measures (Amendment) Act 1975 (N.S.W.). Model regulations were published by the N.S.W. Weights and Measures Office in June 1974, based on existing measures in Queensland and South Australia. However, these regulations have not yet been gazetted, and are not expected to come into force until early 1977. Western Australia and the other States are in the process of following suit.

the specific label information necessary to be able to make a properly-informed buying decision for all goods sold appears to be beyond the capacity of any legislative or administrative authority. There is simply too much relevant information in respect of too many different products. And in many cases the information, although important, may be counter-productive and confuse the consumer. Yet there could be little argument about the following principle being the desired standard:

> Generally speaking, an advertisement should set forth whatever the purchaser would normally want to know about the nature and use of the product. If certain information could affect the tendency to buy or not to buy, then it is a safe bet that such information should be disclosed in advertising.[68]

This standard must be equally applicable to labelling.[69] The advertisement may be seen and its detail largely forgotten. The label stays with the product, and its detail remains as a constant reference to the ingredients, composition, purpose, directions for use, limitations and special dangers of the product. It may be argued that failure to disclose information on the label falling within the principle enunciated above amounts to deceptive nondisclosure, and is rendered illegal by section 52 of the Trade Practices Act, aided by the section 4 definition of "conduct".

The difficulty with this is that it glosses over the problem of determining with certainty what it is that the purchasers would normally want to know, or what could effect the tendency to buy or not to buy. This would vary from one consumer to the next, and from one situation to the next. The difficulty may be illustrated by applying the standard to the question of nutrient labelling. Some consumers can and would use the nutrient information to advantage. The same information would be irrelevant to or misunderstood by other consumers. Nevertheless, there will be occasions when section 52 can be used to combat misleading nondisclosure. For example, it could be used to procure a court order that a label for sunscreen preparation claiming to be one hundred per cent effective carry a prominent statement that this applies only if the product is used as directed. This may mean it must be re-applied after swimming or after a certain period of exposure. Similarly, failure to disclose that a book is abridged or that the great majority of persons experiencing symptoms of tiredness will derive no benefit from a vitamin preparation may contravene section 52.

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[68] E. W. Kintner, *A Primer on the Law of Deceptive Practices* (1971) 105.

[69] Consider for example the humble light bulb. Identical light bulbs manufactured in the same factory are sold in Australia under different labels at dramatically different prices implying differences in quality. But there may in fact be a distinction. Light bulbs of the same wattage may be made to last for different average lives, and to give varying amounts of lumen output. Unless lumen and life rating are disclosed on the label, consumers are unable to make a rational choice. Accordingly, the U.S. Federal Trade Commission has promulgated a trade regulation rule that such information be disclosed—see the Incandescent Lamp (Light Bulb) Industry final trade regulation rule, *CCH Trade Regulation Reporter* Vol. 4, 38,024.

Staff of the Trade Practices Commission Consumer Protection Division are located in its Canberra Office and its Regional Offices in each State capital city. In the first nine months of operation of the Act, the Commission investigated a total of 1,661 matters, and resolved 1,340 of them, instituting proceedings in sixteen and directing proceedings to be instituted in a further thirteen. These related to advertising generally rather than to labelling. Although this investigation and enforcement activity does not represent a great increase over the activities of the various State agencies, the Trade Practices Commission has one outstanding advantage. Whilst a lack of cooperation and response from traders investigated has been reported from time to time by the State Consumer Protection agencies, the Trade Practices Commission is armed with the threat of being able to secure very substantial penalties through the courts. The Commission is not lightly ignored.

3. *Warranties, Guarantees and Exclusion Clauses on Labels*

Labels are frequently the vehicles for warranty or guarantee statements, or for clauses purporting to exclude or limit warranties implied by law.

Section 53(g) of the Trade Practices Act makes it an offence for a corporation to make false or misleading statements concerning the existence or effect of any warranty or guarantee in connection with the supply or promotion of any goods or services. The Trade Practices Commission's guideline[70] interprets this provision as requiring that the nature and extent of the guarantee be clearly and conspicuously disclosed. It is an area of particular difficulty. Sometimes manufacturers, in all innocence, intend to communicate a different message from the one perceived by a customer reading the label. A camera firm may warrant free repair, or replacement at its option. It means that it has the option if repair is impractical to replace the camera with one of equivalent or better condition in perfect working order. The customer, on the other hand, may expect a new camera replacement. But irrespective of whether the deception is deliberate or not, the label will infringe section 53(g) if the statement of warranty or guarantee is false or misleading. And once again, section 82 permits *any* person who suffers loss or damage by an act in contravention of section 53(g) to recover the amount of the loss or damage against the person who gave the warranty or guarantee. There is no requirement as to privity of contract.

By virtue of Division 2 of Part V of the Trade Practices Act, various warranties and conditions are to be implied in certain contracts for the supply of goods by a corporation to a consumer. These include an implied

[70] Trade Practices Commission Information Circular No. 10, (Advertising Guidelines) para. 11; see also Information Circulars Nos 5 and 6. Contrast the more detailed minimum disclosure standards for written consumer product warranties required by the U.S. Magnuson-Moss Warranty, Federal Trade Commission Improvement Act (Pub. L. 93-637, 88 Stat. 2183; 15 U.S. Code s. 2301 note).

condition that the seller has the right to sell, and warranties as to quiet possession, correspondence with description or sample, merchantable quality and fitness for express or implied purpose. Although similar to the conditions and warranties implied by the Sale of Goods legislation in the various States, those implied by virtue of the Trade Practices Act re-codify and extend the previous law in several important ways. A detailed discussion of the comparison and contrast with previous law is beyond the scope of this article. It should be noted in passing that the terms implied by the Trade Practices Act extend to a wider range of contracts by virtue of the definition of "supply" as including sale, exchange, lease, hire or hire purchase. These terms are also in one important respect more limited than those of the various State laws. They apply only to contracts for the supply of goods *to a consumer*. The word "consumer" is very inadequately defined in section 4(3) of the Act. And while it is clear that the bulk of what are normally regarded as consumer transactions fall within it, its perimeters are not clear.

There are many hazards which militate against the effectiveness of an exclusion clause on a label. In the first place, it must be established that the clause, often inconspicuously written on the label, actually forms part of the contract between buyer and seller. The wider the exclusion of liability is drawn, the more courts will tend to hold that the exclusion clause does not apply.[71] Even if the exclusion clause is held to be a term of the contract, it will not necessarily be applied literally by the courts, and may be held in law to mean something different from that which as a matter of plain language it says.[72] If the clause is able in the particular circumstances to negotiate these hazards, it may still be wholly or partly inoperative. Section 68 of the Trade Practices Act prohibits any term of a contract which purports to exclude, restrict or modify the application of the conditions and warranties implied by that Act, and renders any such term void. Various State Acts contain similar provisions.[73]

These difficulties impinging on the effectiveness of exclusion clauses give rise to further difficulties in terms of the various prohibitions on misleading and deceptive conduct. In particular, in so far as a void exclusion clause may wrongly lead purchasers to believe that their rights have been effectively excluded, it may constitute misleading or deceptive conduct in

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[71] "[T]he more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient", *per* Denning L.J. in *J. Spurling Ltd* v. *Bradshaw* [1956] 2 All E.R. 121, 125; see also *Fillmore's Valley Nurseries Ltd* v. *North American Cyanamid Ltd* (1959) 14 D.L.R. (2d) 297, where weed killer ruined the plaintiffs pansy crop, and the exclusion clause was held to be insufficiently prominent to be contractually effective.

[72] See generally F. Dawson "Fundamental Breach of Contract" (1975) 91 L.Q.R. 380.

[73] *E.g.*, Sale of Goods Act 1923 (N.S.W.).

contravention of section 52 of the Act.[74] It has also been argued that such exclusion clauses may, in themselves, also constitute a false or misleading statement concerning the existence of, or effect of, a warranty or guarantee, in contravention of section 53(g). Although ignorance of the law is no defence to a criminal prosecution, this principle does not necessarily extend to a presumption that people know of the implications of section 68 of the Trade Practices Act and other provisions to the same effect.

4. *Lotteries and Trading Stamps as Deceptive and Undesirable Selling Practices*

Two marketing practices sometimes considered undesirable which are apparently outside the wide Trade Practices Act provisions concern the promotion of trade by using lotteries and trading stamps. These activities are regarded as deceptive and undesirable in most States, although just how undesirable they are thought to be varies enormously from State to State. The State lotteries[75] and trading stamp[76] legislation may apply to labels when manufacturers seek to make proof-of-purchase a condition of entry in sales promotions. Such proof-of-purchase is usually required in the form of a label or part of the packaging of the goods.

In the United States, the use of lottery schemes or devices in merchandising products has long been held to contravene both the common law (where proof-of-purchase is a condition of entry) and section 5(a)(i) of the Federal Trade Commission Act.[77] This section prohibits "unfair methods of competition in commerce", and "unfair or deceptive acts or practices in commerce". The courts and the F.T.C. have found trade promotional lotteries to be "unfair" on grounds of public policy—that this competitive method exploits children; and it is generally contrary to good morals. Assertions that the moral climate of the community has changed have been rejected in the American courts.

What then must we say of the moral climate of the various Australian States? Only in New South Wales is it possible to run a trade promotion amounting to a lottery which requires proof-of-purchase entry. Such a

[74] *E.g.*, in Information Circular No. 6 issued by the Trade Practices Commission. See also the views of staff of the Bureau of Consumer Protection, U.S. Federal Trade Commission on Consumer Product Warranties published in *CCH Trade Regulation Reports* No. 186, 22 July 1975.

[75] Lotteries Ordinance 1964 (A.C.T.); Lotteries and Art Unions Act 1901-1966 (N.S.W.); Art Unions and Amusements Act 1976 (Qld); Lottery and Gaming Act 1936-1974 (S.A.); Racing and Gaming Act 1952 (Tas.); Lotteries, Gaming and Betting Act 1966 (Vic.); Lotteries (Control) Act Amendment Act 1972 (W.A.). Several of the States also prohibit label lottery schemes by general criminal legislation, such as the Criminal Code 1913 (W.A.) s. 212, and Vagrants Gaming and other Offences Acts 1931 to 1971 (Qld) s. 19.

[76] Trading Stamps Ordinance 1972 (A.C.T.); Trading Stamps Act 1972 (N.S.W.); The Trade Coupons Acts 1933 to 1947 (Qld); Trading Stamp Act 1924-1935 (S.A.); Trading Stamps Abolition Act 1900 (Tas.); Consumer Affairs Act 1972-1974 (Vic.); Trading Stamp Act 1948 (W.A.).

[77] See generally Kintner, note 68 *supra* at 201-225. See also *CCH Trade Regulation Reporter* Vol. 2, 7939.

promotion requires a permit from the Chief Secretary, but in most cases this is readily obtained. If the lottery promotion is permitted in New South Wales, it may be run in the Australian Capital Territory as well. Provided proof-of-purchase is not a condition of entry, permits may be obtained in the Northern Territory as well, while Tasmania, Victoria, Queensland[78] and South Australia do not prohibit lotteries where entry is gratuitous. Traders appear to partially avoid this prohibition on proof-of-purchase entry by permitting entries to be written on a plain sheet of paper and to be accompanied either by a label or by a drawing of a label.[79] Most entrants find it easier to send the label than a drawing. Alternatively, it is possible to make the label-game a game of skill. It must involve no element of chance at all to escape the lottery provisions but, provided this pre-condition is met, proof-of-purchase may be required as a condition of entry in all states except Victoria, South Australia, Western Australia and Queensland. In the latter three States, any offer made conditional upon proof-of-purchase is prohibited by the Trading Stamps legislation. In Victoria any game either of skill or of chance requiring proof-of-purchase entry is prohibited by the Lotteries, Gaming and Betting Act 1966.

By American standards, the public morality of some of the Australian States may be suspect in terms of lotteries. When it comes to prohibiting trading stamps, however, Queensland, South Australia and Western Australia, in particular, are virtuous indeed.

Label offers "that the purchaser or any other person shall be entitled to or will receive any refund, gift, allowance, reward, valuable consideration, benefit or advantage of any kind whatsoever dependent on the purchase of goods" are prohibited in these States.[80] This prohibition is so ridiculously wide that if construed literally it would prohibit a promise on a label that free maintenance or advice concerning the use of the product would be made available to purchasers. Labels which may be exchanged for money or goods fall within the definition of "trading stamps", and it is an offence to issue or deliver a trading stamp with or about goods in connection with the sale, free distribution or advertising of any goods.[81] It is an offence for a trader to sell or distribute goods associated with a trading stamp, or to redeem or offer to redeem a trading stamp. It is an offence directly or indirectly to encourage certain of these prohibited acts. It is also an offence to advertise a trading stamp offer.[82] So widely drafted is this legislation in

[78] The Queensland Act permits Art Unions for the promotion of trade, provided no entry fee is charged in respect of participation. This is similar to the position in New South Wales (except that a permit is required in N.S.W.). However, proof-of-purchase entry is prohibited in Queensland not by the Art Unions and Amusements Act 1976, but by the Trade Coupons Acts 1933 to 1947 (Qld) s. 4.

[79] But see *Wyatt* v. *Tarax Drinks Holdings Ltd* [1969] V.R. 626.

[80] Trading Stamp Act 1924-1935 (S.A.) s. 5(1); Trade Coupons Acts 1933 to 1947 (Qld) s. 4(1); Trading Stamp Act 1948 (W.A.) s. 5(1)(b).

[81] *Ibid.*

[82] Trading Stamp Act 1924-1935 (S.A.) s. 5a; Trade Coupons Acts 1933 to 1947 (Qld) s. 4A; Trading Stamp Act 1948 (W.A.) s. 6.

South Australia, Western Australia and Queensland that one of its prohibitions may be stated as follows:

> No person shall give any goods in exchange for any document issued concerning goods which have been or are intended to be sold.[83]

The legislation would prevent a person from obtaining a replacement for defective goods upon tendering a label or warranty card as proof-of-purchase. The delivery of a packet of a household commodity is forbidden under criminal penalty if, on the packet, there is an offer to the purchaser of a free cookery book. Such offers are common in Australia; for example, a free dog bowl to anybody who sends in three Rinso labels. These offers may be deceitful, fraudulent, restrictive or monopolistic, although in the majority of cases they are not so. To single out and prohibit such sales-promotion techniques *per se* seems misguided. Consumers in other States, where the net of the trading stamp prohibition is not so widely cast, do not appear to suffer to any greater extent from unfair and deceptive practices.[84]

The other Australian States prohibit third party trading stamps of the notorious Green Shield and Tiki Green type, but do not extend to trading stamps issued in connection with the sale of goods and redeemable from the seller of the goods or from any person from whom the seller (whether directly or indirectly) acquired those goods. The Victorian prohibition purports to extend beyond third party trading stamps to trading stamps *per se*, although it is commonly accepted in practice that it only prohibits third party schemes.[85]

This situation is to be contrasted with that in the United States where the Federal Trade Commission does not consider trading stamp plans in themselves to be an unfair method of competition under the laws it administers. At the same time, the Commission has emphasized "that changing circumstances or methods may reveal that some plans may be operated in violation of specific provisions of law".[86] Some of the States of the U.S.A. have laws regulating trading stamps.[87]

The trading stamp legislation of the Australian States interferes with or prohibits proof-of-purchase and gift-with-purchase trade promotions. It may be argued that the legislation is misdirected in this prohibition—that if there is any real evil in such promotions it lies in their possible deceptiveness. People might believe they are getting something for nothing, whereas in fact they are required to buy a product, and the donor expects

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[83] *Samuels* v. *Readers Digest Services Pty Ltd* (1972) 4 S.A.S.R. 213, 242 *per* Bright J.

[84] See *per* Barwick C.J. in *Samuels* v. *Readers Digest Association Pty Ltd* (1969) 120 C.L.R. 1, 19-20.

[85] See the Second Reading Speech on the Victorian Consumer Protection Bill, by Mr Rafferty, the Minister of Labour and Industry; Vic. Parl. Deb. (Leg. Ass.) 21 March 1972, 4289.

[86] F.T.C. ruling 3 October 1957, cited in Kintner, note 68 *supra* at 197; *CCH Trade Regulation Reporter* Vol. 2, 7960 .

[87] *Dandy Products Inc.* v. *F.T.C.* [1964] *Trade Cases* 71,139; 332 F. 2d 985.

to recover the cost of the gift in increased returns from sales. This evil is effectively corrected by a general prohibition on misleading and deceptive conduct, requiring that the full conditions of the offer be clearly stated. Section 52 of the Trade Practices Act is adequate for this purpose. It also extends to prohibiting the practice of inflating the normal price of the goods to cover the cost of the offer. Although it may be conceded that there are good policy grounds for prohibiting third party trading stamps, the prohibition of coupon and label offers as sales promotion devices in some States seems unnecessary.

CONCLUSIONS

This examination of some of the laws relating to labelling in Australia has illustrated the dilemmas which face the legislators. Some consumers want as much information about the product as they can get, and can cope with it. Others may be confused and misled by technical information, unless it is imparted in the context of an education programme to explain its significance.[88] The humble label is a poor educator—it is hard pressed even to convey general descriptive information concerning the product. Balanced against the consumer's need to be educated and informed are the manufacturer's and importer's needs to be able to sell their products without unnecessary restrictions. In the Australian federal system, label information standards are difficult to formulate so as to be uniform throughout the country. Already a manufacturer is faced with a bewildering array of laws. It is difficult to see why consumers in one State require different label information to consumers in another State, or why selling practices which have caused no measurable harm to consumers in some States should be illegal elsewhere.

Although there is a case for prescribing detailed label information in respect of foods, medicines, poisons, inflammable goods and the like which, if misused, could cause serious harm to people, there is nothing to show that the general prohibitions on false, misleading and deceptive conduct are not adequate to keep labels honest, if properly administered and enforced. Although such general prohibitions are frequently criticized for uncertainty, it is submitted that this is a small price to pay for the individual's freedom to be able to say all that needs to be said and to say it in his own way.

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[88] In his *Fifth Annual Report* (1975) the Queensland Commissioner for Consumer Affairs noted the importance of a continuing program of consumer education. He reported that "it is becoming increasingly evident that some consumers are inclined to assume that the very existence of laws for their protection relieves them of the responsibility for taking simple common sense precautions before entering into commitments involving substantial sums of money".