

# EVERY MAN'S CASTLE OR EVERY TRADER'S DUMPING GROUND

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## 1 INTRODUCTION

The sending of unsolicited goods (sometimes called inertia selling)<sup>1</sup> constitutes an important sphere in which common law principles have proved inadequate to meet the needs of today's consumer-oriented society. It is a practice which affords yet another illustration of the extent to which the existing structure of common law can be used unfairly by designing persons, particularly those in a position of financial advantage.

The law has moved slowly in this field; but largely through the pressure of the consumer protection activists it has in the United States and many other common law countries reoriented its attitude towards the traditional offer and acceptance rules in order to afford greater protection to the unwary. This reorientation has been achieved largely through legislative change, but reform is still long overdue in certain areas. There is, of course, ample juridical justification for attempts to realign traditional common law principles, legislatively if need be, to meet the greatly altered social needs of today.<sup>2</sup>

This article examines the problems connected with the sending of unsolicited goods, the rights and liabilities of the recipient of such goods, and the achievements and deficiencies of the present legislation. It goes on to suggest areas of possible improvement. In doing so it uses some of the insights available from other legal systems which have more experience in dealing with these problems.

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<sup>1</sup> "Inertia selling" occurs when people who have received goods through the post finally finish up paying for them through inertia although they have not ordered the goods and do not want them. Victoria, *Parliamentary Debates*, Legislative Council, 2 May 1972, 5571. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 1973, 5282; South Australia, *Parliamentary Debates*, House of Assembly, 8 March 1972, 3699; Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1970, p. 5; Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1971, p. 8 and for the year ended 30 June 1972, p. 18.

<sup>2</sup> W. Friedmann, *Law in a Changing Society* (2nd ed., England: Penguin Books and Stevens & Sons Ltd, 1972) pp. 132-35. See also G. Borrie and A. L. Diamond, *The Consumer, Society and the Law* (3rd ed., England: Penguin Books Ltd, 1973) p. 328.

## II THE SOCIOLOGICAL BACKGROUND

A man's home is his castle. But it is gradually becoming a place into which any outsider can introduce any article he pleases. The practice of sending unsolicited goods to advance sales first developed in the United States, but business communities in other countries were not slow to adopt the same technique. Through his mail-box,<sup>3</sup> a householder receives merchandise ranging from articles of domestic use to pornographic literature.<sup>4</sup> In Australia inertia selling has been mainly employed to push sales of pornographic materials and such items as books, magazines, Christmas cards, records and stamps.<sup>5</sup> However, complaints have also been made regarding unsolicited receipt of other commodities.<sup>6</sup> A South Australian received a twenty-eight pound bag of manure for which he had placed no orders.<sup>7</sup> Sometimes the articles come as unsolicited gifts with a view to generating custom. The recipient is told he is privileged to continue receiving similar products and will be duly invoiced, unless he says he does not want to be accorded the privilege: in other words, don't order the goods and you will continue to get them.<sup>8</sup> In most cases, however, the goods are sent to a person without any request by him, on a buy-or-return basis; and again the accompanying literature often says that the onus is on the recipient to advise the sender that he does not want them.<sup>9</sup>

Whether the goods are sent as gifts or on a sale-or-return basis, they

<sup>3</sup> In most cases the goods are sent through the mail, but they are also delivered in person and by common carrier.

<sup>4</sup> Cf. definition of "prescribed goods" in *Unsolicited Goods and Services Act, 1974*, (N.S.W.) s. 3(1).

<sup>5</sup> Victoria, *Parliamentary Debates*, Legislative Council, 2 May 1972, 5566, 5568; New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2804, 2812, 2814; Queensland, *Parliamentary Debates*, Legislative Assembly, 27 March 1973, 3329, 3330, 3332-34; South Australia, *Parliamentary Debates*, Legislative Council, 16 March 1972, 3951; Northern Territory, *Legislative Council Debates*, 2 August 1972, 839; Western Australia, *Parliamentary Debates*, Legislative Council, 11 December 1973, 6025-26. Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1968, p. 10, for the year ended 30 June 1969, p. 9, for the year ended 30 June 1970, p. 5; Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1971, p. 8; South Australia, *Report of the Commissioner for Prices and Consumer Affairs*, for the year ended 31 December 1972, pp. 10, 16; Queensland, *Report of the Chairman of the Consumer Affairs Council and the Commissioner for Consumer Affairs upon the Activities of the Consumer Affairs Council and the Consumer Affairs Bureau*, for the year ended 30 June 1972, p. 2; Australian Capital Territory, *Report of the Consumer Affairs Council, 1973-74*, p. 22; letter from Ministry of Consumer Affairs of Victoria the author dated 29 April 1975; information supplied by Ministry of Consumer Affairs of Victoria to the author on 29 April 1975.

<sup>6</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 27 March 1973, 3330; Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1968, p. 10.

<sup>7</sup> South Australia, *Parliamentary Debates*, Legislative Council, 16 March 1972, p. 3951.

<sup>8</sup> Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1967, p. 10.

<sup>9</sup> Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1967, p. 10; Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1972, p. 18.

can cause considerable inconvenience to the recipient who never wanted or expected them.<sup>10</sup> Many people have even suffered financial loss in sending them back.<sup>11</sup> Indeed, the practice of inertia selling constitutes a serious interference with the privacy of the individual. It could also, on occasions, be dangerous. Since the very nature of the business involves sending goods at random without much care or discrimination, it is quite likely that they might fall into the wrong hands. Incidents are not unknown of recently widowed women, aged clergymen and children of very tender age receiving literature which reveals new methods of sexual pleasure and techniques of complete sexual satisfaction.<sup>12</sup> A Victorian housewife who was attempting to shelter her daughters from certain types of information complained that she received a pamphlet describing some abnormal sexual behaviour.<sup>13</sup>

Various ingenious and deceptive tactics are used. A Michigan widow soon after her husband was killed in Vietnam received a news clipping of his obituary, laminated in plastics, together with a request to send two dollars or return the clipping.<sup>14</sup> One householder came home to find that his doorknob had been decorated during a good part of the day with a transparent bag holding a roll of toilet tissue—a goodwill gift of the makers.<sup>15</sup> Doctors and physicians find the practice so great a nuisance that they have urged immediate legislation to rescue them from “the avalanche of junk” that rains down on them.<sup>16</sup>

In some cases unsolicited goods pose a serious threat to children. Such cases highlight occurrences possible in any household. A sample of furniture polish has been mistaken by a child of five for lemon juice.<sup>17</sup> A packet of two edged blades has been opened by a child of three.<sup>18</sup> As

<sup>10</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 21 March 1972, 4291; New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2804, 2805, 2810, 2813, 2814; South Australia, *Parliamentary Debates*, Legislative Council, 16 March 1972, 3950. Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1968, p. 10, for the year ended 30 June 1969, p. 10, for the year ended 30 June 1970, p. 5; Queensland, *Report of the Chairman of the Consumer Affairs Council and Consumer Affairs Bureau upon the Activities of the Consumer Affairs Council*, for the six months ended 30 June 1971, p. 3; Australian Capital Territory, *Report of the Consumer Affairs Council*, 1973-74, p. 27; New South Wales, *Report of the Consumer Affairs Council*, for the year ended 30 June 1970, p. 11.

<sup>11</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 27 March 1973, 3331; Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1970, p. 5; Victoria, *Report of the Consumer Affairs Council*, for the period ended 30 June 1971, p. 8.

<sup>12</sup> 816 *Parl. Deb.*, H.C. (5th Series) 185 (1971). Cf., Western Australia, *Parliamentary Debates*, Legislative Council, 11 December 1973, 6026.

<sup>13</sup> Letter from Ministry of Consumer Affairs of Victoria, to the author dated 29 April 1975.

<sup>14</sup> *Consumer Reports*, July 1971, p. 404.

<sup>15</sup> *Ibid.*, May 1964, p. 212.

<sup>16</sup> *Ibid.*, September 1968, p. 501-5.

<sup>17</sup> *Ibid.*, June 1968, p. 286.

<sup>18</sup> *Ibid.*

observed in a consumer journal of America, mail-box business is thus even used to make "suckers of kids".<sup>19</sup>

The householder's problems do not end with receipt of the goods. This is only the beginning of his worries. If he is over-endowed with wealth, or wishes to buy the goods, then promptly mailing a cheque would be the simplest course. However, in the generality of cases, all the odds are against him.

Senders will take up the position that the recipient can send the goods back. But that involves expense and time. Many people feel annoyed at receiving goods they have not ordered; and do not like to be put to the inconvenience of returning them or informing the supplier that they are not wanted.<sup>20</sup> Frequently, a cumbersome procedure for return is prescribed.<sup>21</sup> If the parcel is opened up, the recipient must repack and properly seal it. The other course is to write to the sender to collect his goods. If the recipient does this, he may be required to take reasonable care of the goods until—if ever—they are collected.<sup>22</sup> If he does not adopt any of the above courses, the consequences that may follow have been graphically described by a British M.P. thus

"A letter arrives asking for payment. That letter is frequently friendly. Then if payment is not made, another letter comes not quite so friendly. Finally, there follow letters which become ever more menacing in their tone, eventually threatening legal proceedings."<sup>23</sup>

It appears that inertia sellers in Australia operate in a similar fashion. A member of the Legislative Assembly of Queensland stated that there have been many cases where "after a series of letters—and some have been disgusting in their wording—legal action has been threatened."<sup>24</sup> Like cases have also been brought to the notice of the Western Australian Parliament.<sup>25</sup> The Consumer Affairs Councils of Victoria, South Australia and Queensland state that often a recipient who did not return the goods received threatening letters, sometimes even from debt collecting agencies.<sup>26</sup> To quote extracts from some of the letters sent by sellers

<sup>19</sup> *Consumer Reports*, November 1968, pp. 575-76.

<sup>20</sup> Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1968, p. 10; Queensland, *Report of the Chairman of the Consumer Affairs Council and the Commissioner for Consumer Affairs upon the Activities of the Consumer Affairs Council and the Consumer Affairs Bureau*, for the six months ended 30 June 1971, p. 3.

<sup>21</sup> *Which*, June 1969, p. 174.

<sup>22</sup> During the course of debate on the *Unsolicited Goods and Services Bill* of Western Australia, one M.P. stated that he was still in possession of an unsolicited publication which was sent to him about three years ago, and that he was waiting for this legislation to be passed. Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 December 1973, 5881.

<sup>23</sup> 807 *Parl. Deb., H.C.* (5th Series) 1644 (1970).

<sup>24</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 27 March 1973, 3330; see also 3332.

<sup>25</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 11 December 1973, 6026.

<sup>26</sup> Victoria, *Report of the Consumer Protection Council*, for the year ended 30 June 1969, p. 10; South Australia, *Report of the Commissioner for Prices and Con-*

- (1) "Please don't send back the gardening book, if you do, it will cause more trouble and expense than if you keep it."<sup>27</sup>
- (2) ". . . credit action which would seriously affect your national and local rating can only be stopped by a prompt payment."<sup>28</sup>
- (3) ". . . authorize the next of our Collection Department procedures which I know are not pleasant. They are, however, effective and in the end you will pay . . ."<sup>29</sup>
- (4) "We shall have no alternative but to arrange for a bailiff to serve a summons on you through the county courts."<sup>30</sup>

An average man who receives such threatening letters, couched as they very often are, in pseudo-legal phraseology, naturally falls under the stress of fear and anxiety. In a society dependent upon credit, threats to blacklist a person as a debtor or defaulter or to ruin his credit cannot be taken lightly.<sup>31</sup> Not infrequently, he resolves his dilemma by paying for the goods.<sup>32</sup> The law is defective if it throws a considerable section of the populace upon their own unaided resources to meet situations of such common occurrence and, as we shall see, the law as it stands at present is singularly unhelpful to the recipient.

Additional dangers and abuses are present in the attempt to enforce payment. Senders of goods often refer to fictitious collection agencies or credit rating bureaux. The American experience has perhaps not yet affected Australia seriously in this regard, but there is little doubt that, in the absence of strict checks, sellers will tend to resort to the American practice.

An element of deceit is also present in the implication often contained in threatening letters that the recipient is under a legal liability to pay. He is very often under no such legal duty, but can hardly afford the time and expense of consulting legal opinion to ascertain whether this in fact is so. The deception in regard to legal rights thus appears in the majority of cases to achieve its dishonest objective with a large measure of success.<sup>33</sup> Another aspect of deception often practised by inertia sellers is the reselling of their products as new after they have been returned by earlier recipients.

*sumer Affairs*, for the year ended 31 December 1972, pp. 10, 16; Queensland, *Report of the Chairman of the Consumer Affairs Council and the Commissioner for Consumer Affairs upon the Activities of the Consumer Affairs Council and Consumer Affairs Bureau*, for six months ended 30 June 1971, p. 3.

<sup>27</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2811.

<sup>28</sup> *Consumer Reports*, November 1968, pp. 575-76.

<sup>29</sup> *Which*, June 1969, p. 174.

<sup>30</sup> 807 *Parl. Deb.*, H.C. (5th Series) 1712 (1970). *Report of the Consumer Protection Council Upon the Activities of the Council*, for the year ended 30 June 1973, p. 30.

<sup>31</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 1973, 5282.

<sup>32</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 11 December 1973, 6026; Queensland, *Parliamentary Debates*, Legislative Assembly, 27 March 1973, 3330-31.

<sup>33</sup> Note 77 below and accompanying text. See also, South Australia, *Parliamentary Debates*, House of Assembly, 8 March 1972, 3699-70.

All too often these trade practices contain an element of coercion available to the large distributor with capital to spare, giving him an unfair advantage over the smaller competitor, who is unable to afford the very heavy outlay required to launch a large campaign of forced selling. From the point of view of public policy, the practice of inertia selling is undesirable for the reason that rival manufacturers may be denied the opportunity of placing before the public in fair competition information concerning their product which, if superior, could legitimately turn sales in their direction. Further, a country can hardly afford the wastage of time, energy and human resources used to produce the superfluous and shoddy articles in which, on the whole, the inertia sellers deal.

### III THE LEGAL BACKGROUND

#### A General

Unhappily, the common law rules relating to contract and torts do not afford much guidance as to the rights and obligations of the recipient of unordered goods. The law of contract seeks to deal with the unprecedented situation presented by inertia sales through the medium of rules that were evolved to meet simple offer and acceptance situations; and the old rules relating to involuntary bailees afford little guidance in the altogether novel situation created by attempts at forced sales.

The inadequacies of the legal rules, which will be examined in greater detail presently, have in recent years provoked legislative attempts to redress the injustices resulting from them. The legislative response in Australia has been substantial, but is by no means equal to the magnitude of the problems. There are still many respects in which the legislative response needs to be stepped up.

#### B The Position in Contract

The position in contract is that the recipient incurs no obligation to pay for unsolicited goods by their mere receipt. It is, of course, a basic principle that mere inactivity or silence on the part of the offeree, even though prescribed as a method of acceptance, does not cast any obligation on him. The offeror "cannot force the offeree to take his pen in hand, or to spend a two-cent stamp, or to open his mouth under penalty of being bound by a contract if he does not."<sup>34</sup> The senders of unsolicited goods

<sup>34</sup> A. L. Corbin on Contracts (St. Paul, Minn., West Publishing Co. (1963) I, p. 310 (hereinafter *Corbin*)). The purpose of the rule is to protect offerees. Thus although the offeror cannot impose obligations on the offeree by simply prescribing silence as the method of acceptance, there is generally no reason why the offeree, if he wishes, should not be able to hold the offeror to his offer. The offeror left in doubt as to whether the offeree wishes to contract with him cannot complain as he has himself waived the requirement of communication. See criticism of decision in *Felthouse v. Bindley* (1862) 142 E.R. 1037 by Treitel, *The Law of Contract* (4th ed., London: Stevens & Sons Ltd., 1975) pp. 24-25. Cf. *American Restatement on Contracts*, s. 72(1)(b).

have, however, proved cunning enough to work their way around this principle and take advantage of the doctrine of implied acceptance.<sup>35</sup> This doctrine may be exploited by sellers to their advantage by reason of the uncertainty of its meaning and application.

Where the offer prescribes the performance of certain conditions, as distinct from mere inactivity, as an indication of acceptance, it is well settled that performance of those conditions amounts to acceptance.<sup>36</sup> Even here, however, the matter is not free from difficulty, for the performance of specified acts may not, in certain cases, amount to acceptance. Corbin illustrates this picturesquely in the following passage

"If A offers his land to B for a price, saying that B may signify his acceptance by eating his breakfast or by hanging out his flag on Washington's birthday . . . he does not thereby make such action by B operative as an acceptance against B's will. If B shows that he had no intent to accept, and that he ate his breakfast merely because he was hungry, or hung out his flag because it was his patriotic custom . . . no contract has been formed."<sup>37</sup>

However, in the case of most despatches of unsolicited goods, the method of acceptance is not prescribed and this leaves scope for argument as to whether in a given case the recipient's conduct amounts to acceptance. The use of the merchandise or a part of it would imply acceptance of the whole<sup>38</sup> or part.<sup>39</sup> Even this principle is not free of difficulty. For instance, reading a few pages of a book may leave the question wide open whether it has been used or not. If, however, the recipient plays a record or tries out an electric iron, the odds are against him.<sup>40</sup>

As far back as 1875, Coleridge C.J. warned the buyer that in the case of sale by sample, if the goods did not correspond with the sample and he sought to reject them, "he must do nothing". Else, implied the learned judge, he would have to pay for them.<sup>41</sup> Similar reasoning could operate greatly to the detriment of the unwary recipient of unsolicited goods. Indeed, before legislative reforms were recently introduced in Victoria, the Consumer Affairs Council advised recipients of unordered goods to be careful not to use them, for this would be taken as acceptance of the goods rendering the recipient liable for payment.<sup>42</sup>

<sup>35</sup> *S. Williston on Contracts* (3rd ed. by W. H. E. Jaeger, New York: Baker, Voorhis & Co., 1957) I, s. 91D, Legislative Note, "The Unsolicited Gifts Act", (1971) 10 *Tenn. L. Rev.* 201, 202.

<sup>36</sup> *Carlill v. Carbolic Smoke Ball* [1893] 1 Q.B. 256. See also *Contract Act* (No. IX of 1872) (India) s. 8.

<sup>37</sup> *Corbin*, p. 310.

<sup>38</sup> *Brogden v. Metropolitan Rly.* [1877] 2 App. Cas. 666.

<sup>39</sup> *Hart v. Mills* (1846) 15 L.J. Ex. 200.

<sup>40</sup> Cf. Legislative Note, "The Unsolicited Gifts Act" (1971) 10 *Tenn. L. Rev.* 201, 202.

<sup>41</sup> *Grimoldby v. Well* (1875) L.R. 10 C.P. 381, 393.

<sup>42</sup> Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1971, p. 9.

There may well be cases where the recipient is in the nature of things obliged to take some action concerning the goods. A perishable or dangerous article in one's mail-box or on one's doorstep necessitates some form of action for its disposal. Such action opens up the possibility of an argument that the recipient has used the goods.

We may turn for some guidance to the treatment of the recipient of *solicited* goods under the provisions of the *Sale of Goods Acts*. The Acts provide<sup>43</sup> that where the goods are delivered to the buyer on approval or on "sale-or-return" or other similar terms, the property therein passes to the buyer

- (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.
- (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

It has been held that where a person to whom goods have been delivered on "sale-or-return" pledges,<sup>44</sup> resells,<sup>45</sup> destroys or uses<sup>46</sup> or keeps them for an unreasonably long period, he thereby does an act adopting the transaction.<sup>47</sup> Even in the case of unsolicited goods most of the above-mentioned acts will be considered sufficient to fulfil the requirement of implied acceptance. *Weatherby v. Banham*<sup>48</sup> is a good illustration of the last category. The plaintiff had for years supplied racing calendars to one Westbrook. After his death, the defendant succeeded to his property. The plaintiff, not knowing this, continued to send the calendars and there was no evidence that the defendant ever offered to return them. On these facts the plaintiff succeeded. But the facts of the case do not disclose any evidence of the use of the calendars, and the decision perhaps turned on the fact that inordinate delay in returning the goods implied the defendant's acceptance. Lord Esher M.R. in *Kirkham v. Attenborough* summarized the position in terms that any act or conduct which is consistent only with the recipient's being the owner is sufficient to show that he has adopted the transaction.<sup>49</sup>

<sup>43</sup> E.g., *Sale of Goods Act 1893* (Eng.) s. 18, r. 4; *Goods Act 1958* (Vic.) s. 23, r. 4.

<sup>44</sup> *Kirkham v. Attenborough* [1879] 1 Q.B. 201.

<sup>45</sup> *Genn v. Winkel* (1911) 28 T.L.R. 483.

<sup>46</sup> *Elliott v. Thomas* (1838) 3 M. & W. 170; *Lucy v. Monflet* (1860) 5 H. & N. 229; *Okell v. Smith* (1815) 1 Starkie 107. These cases were decided before the *Sale of Goods Act 1893* (Eng.) was passed. Cf. *Poole v. Smith's Car Sales Ltd* [1962] 2 All E.R. 482.

<sup>47</sup> *Benjamin on Sales* (6th ed. by W. C. A. Key, London: Sweet and Maxwell, 1920) p. 370; *Poole v. Smith's Car Sales* [1962] 2 All E.R. 482.

<sup>48</sup> [1832] 5 C. & P. 288; 172 E.R. 950.

<sup>49</sup> [1897] 1 Q.B. 201. See also Rulon, "Contracts—Recipients Obligation for Unsolicited Goods", (1970) 10 *Washburn L.J.* 144; Legislative Note, "The Unsolicited Gifts Act", (1971) 39 *Tenn. L. Rev.* 201.



The test propounded by Lord Esher is, however, inappropriate to deal with many of the problems raised by unsolicited goods. What, for example, if the recipient destroys the goods? This would be consistent only with ownership under normal principles. Does it mean that the recipient has become liable for payment? What if he consigns the goods to his dustbin or conveys them to a rubbish dump because he has no storage space?<sup>50</sup> Likewise, some of the other tests propounded by the section quoted above, or decisions under it, are inadequate for the handling of an unsolicited goods situation. Undue delay in returning the goods, for example, may be a satisfactory yardstick in relation to solicited goods, but is inappropriate as a method of fixing liability where the goods are unsolicited. Again, resale may in fact be a wise precaution in the case of unsolicited goods which are perishable or proving to be a nuisance. One can conceive of many situations where resale of such goods ought not to raise an inference of appropriation. It may, indeed, be a measure that ensures to the benefit of the sender of the goods if the recipient resorts to this course without any intention to appropriate, but in order to reduce the sender's loss.

For all these reasons the traditional approaches to the solicited goods situation prove inadequate. Indeed, sellers of unordered goods have been able to drive a coach and four through the principle that a duty to speak should not be imposed on the recipient.

### C *The Position in Tort*

The recipient of unordered goods is an involuntary bailee.<sup>51</sup> The legal position of an involuntary bailee in relation to the goods in his possession is, however, full of difficulties. Some writers approximate his position to that of a finder,<sup>52</sup> whose duties are again far from clear. Winfield and Jolowicz state that an involuntary bailee will not be liable for mere negligence.<sup>53</sup> According to Salmond an involuntary bailee, in general, is liable only if the unauthorized act which has deprived the plaintiff of his property is also a negligent one.<sup>54</sup> There is some authority to suggest that

<sup>50</sup> Cf. *Sachs v. Miklos* [1948] 2 K.B. 23.

<sup>51</sup> Bailment is one of the modes of transferring possession. Pollock and Wright in *Possession in the Common Law* (Oxford, Clarendon Press, 1888) p. 163 state "Any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person."

An involuntary bailee is a person to whom goods have been delivered without his consent.

<sup>52</sup> For example, see J. Story, *Commentaries on the Bailment* (6th ed., Boston: Little, Brown & Co., 1856) p. 84 (hereinafter Story). See also (1921-22) 35 *Harv. L.R.* 873.

<sup>53</sup> P. H. Winfield and J. A. Jolowicz on *Tort* (9th ed. by J. A. Jolowicz, T. E. Lewis and D. H. M. Harris, London: Sweet & Maxwell, 1971) p. 422.

<sup>54</sup> *Salmond on the Law of Torts* (16th ed. by R. F. V. Heuston, London: Sweet & Maxwell, 1973) p. 107. See also Burnett, "Conversion by an Involuntary Bailee" (1960) 76 *L.Q.R.* 364, 368-69.

an involuntary bailee must not wilfully damage or destroy the chattel.<sup>55</sup> Paton, on the other hand, doubts the existence of such liability.<sup>56</sup>

Whatever the standard of duty, on one view, some degree of care is required of the recipient.<sup>57</sup> If so the sender of the goods is able to impose a totally unwanted duty upon another without any prior consultation or request. Indeed, not only is there the chance that the recipient may be fixed with a duty of care he never desired, he may also find that some act on his part in relation to the goods can be construed as conversion, thereby rendering him liable to the full extent of their value. The matter is complicated still further by confusion attendant on the acts necessary to constitute conversion.<sup>58</sup> Over a hundred years ago, Bramwell B. even admitted that "after all, no one could undertake to define what a conversion is",<sup>59</sup> and this position does not appear to have changed since.

The case law on tortious liability of involuntary bailees is quite unhelpful. Cases have arisen in which an involuntary recipient of goods, in attempting to return them to the true owner, has made a mistaken but *bona fide* delivery to a fraudulent third person. Should he be liable to the owner? In *Elvin Powell v. Plummer*<sup>60</sup> it was held that the defendant in such a case was liable neither in negligence nor in conversion as he "had done everything reasonable". On the other hand, in *Hiort v. Bott*<sup>61</sup> the defendant was held liable in conversion. The cases may be distinguished by arguing that in the latter the defendant behaved unreasonably; but the issue of negligence was not put to the jury.<sup>62</sup> It would appear that *Hiort v. Bott* lays a heavy duty on an involuntary bailee.<sup>63</sup>

Cases have arisen where an involuntary bailee has mislaid the goods. In *Howard v. Harris*<sup>64</sup> it was held that the involuntary recipient of the manuscript of a play was not liable as "no duty of any kind or sort was cast upon the defendant with regard to what was so sent". On the other hand in *Summer v. Challenor*<sup>65</sup> it was held that the involuntary recipient of the manuscript of a play was liable as a duty devolved upon him to take care of the manuscript. These cases are difficult to reconcile. However, support

<sup>55</sup> E.g., *Hiort v. Bott* (1874) L.R. Ex. 86, 90.

<sup>56</sup> Paton, *Bailment in the Common Law* (1952) p. 115.

<sup>57</sup> Cf. Pooley, "Contracts" (1971) 17 *Wayne L. Rev.* 563, 580.

<sup>58</sup> For a description of what acts constitute conversion, see J. G. Fleming *The Law of Torts* (4th ed., Australia: Law Book Co. Ltd, 1971) pp. 53-61; Prosser, "The Nature of Conversion" (1957) 42 *Cornell L.Q.* 168, 174-84.

<sup>59</sup> *Burroughs v. Bayne* 157 E.R. 1196, 1200.

<sup>60</sup> (1934) 50 T.L.R. 158. Hawke J. remarked that "there was an obligation on the part of an involuntary bailee to do what was right and reasonable". See further *James v. Oxley* (1938-39) 61 C.L.R. 433, 447; *Heugh v. L. & N.W. Rly.* (1870), L.R. 5 Exch. 51.

<sup>61</sup> (1874) L.R. 9 Ex. 86.

<sup>62</sup> It may be argued, too, that in *Hiort v. Bott* the defendant was not technically a bailee; but this is hardly a satisfactory way to justify differing results. See Fleming, *op. cit.* 57; cf. Burnett, "Conversion by an Involuntary Bailee" (1960) 76 L.Q.R. 364.

<sup>63</sup> Paton, *op. cit.* p. 115.

<sup>64</sup> (1884) *Cab. & El.* 253.

<sup>65</sup> (1926) 70 *Sol. Jo.* 760.

for the view that a duty of care is cast on an involuntary bailee can be found in the established principle that where a person undertakes a task, whether gratuitously or not, he must display a reasonable standard of care in fulfilling the task.<sup>66</sup> In *Newman v. Bourke*,<sup>67</sup> where a diamond brooch had been accidentally left in the defendant's shop and was lost after it had been left in a desk by the defendant's employee, the defendant was held liable on the basis that the loss occurred through the negligence of his employees.

To make legal obligations depend on a test of control—i.e. the recipient has assumed control of the goods—is not always satisfactory. Its application in cases of recipients of unordered goods would tend to make their position most vulnerable. A learned author points out

“In theory it is open to the housewife to leave goods untouched and unopened on the doorstep or on the hall mat; in practice it is ludicrous to make her legal obligations depend on her farsighted or fortuitous decision to open or leave unopened a parcel left on her premises. The criterion of assumption of control is both imprecise and inappropriate.”<sup>68</sup>

Ordinarily, a housewife will not need to do anything in relation to the goods. But where a big parcel is left in the mail-box or pushed inside the house she will be required to remove it. In this situation, too, will she be considered to have taken the goods under her control?

These and other related questions of great practical importance have not yet received conclusive judicial attention. In *Hiort v. Bott*,<sup>69</sup> for example, Bramwell B. considered the hypothetical case of the man who delivered a parcel to you by mistake. The learned Baron asked what would happen if

“you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; . . . where a man delivers a parcel to you by mistake, it is contemplated that . . . you will do something about it. What are you to do with it? Warehouse it? No. Are you to turn it into the street. That would be an unreasonable thing to do.”<sup>70</sup>

In considering the case law, such as it is, one must bear in mind that the average recipient of unordered goods has no understanding whatever of the possible legal implications of any act he may perform in relation to the goods, and little inclination or opportunity to seek legal advice on a question which lawyers and judges would find difficult to answer.

<sup>66</sup> *Jones on Bailment* (4th ed., 1833) p. 49; Story, p. 85, *Chitty on Contracts* (22nd ed., London: Sweet & Maxwell, 1961) p. 79; Charles O. Gregory, “The Good Samaritan and the Bad: The Anglo-American Law” in James M. Ratcliffe (ed.) *The Good Samaritan and the Law* (1966) pp. 28-35; Linden, “Rescuers and Good Samaritans” (1971) 34 *Mod. L.R.* 241, 250-51.

<sup>67</sup> (1915) 31 T.L.R. 209.

<sup>68</sup> Strachan, “Inertia Selling” (1970) 114 *Sol. Jo.* 660.

<sup>69</sup> (1874) L.R. 9 Ex. 86, 90.

<sup>70</sup> *Ibid.*

## IV LEGISLATION IN AUSTRALIA

Over the past few years the practice of sending unsolicited goods has greatly increased in Australia. Consumer Affairs Councils throughout the country have received a large number of complaints.<sup>71</sup> Many sections of the community have suffered, as they do even now. From 1967 onwards the Victorian Consumer Affairs Council in all its reports has expressed strong disapproval of inertia selling methods. It even recommended that legislation on lines similar to that enacted in the State of New York be passed to completely prohibit such methods.<sup>72</sup> The New South Wales Consumer Affairs Council made a similar recommendation.<sup>73</sup> In 1971 the Queensland Consumer Affairs Council expressed the view that there was a need for legislation along the lines of the English *Unsolicited Goods and Services Bill* (now *Unsolicited Goods and Services Act 1971*).<sup>74</sup> In Western Australia the proposal to regulate inertia selling was overwhelmingly supported by a number of organizations.<sup>75</sup> In the Northern Territory considerable need was felt to control the practice in the cities.<sup>76</sup> South Australians were annoyed not so much by receipt of unordered goods as by another unsavoury practice of obtaining solicitation for the goods through the medium of confused order forms: the recipient signed an order or otherwise indicated the adoption of the order without realizing that he was committing himself to buy something.<sup>77</sup>

Nation wide concern about the activities of inertia sellers prompted discussions at the meetings of the Standing Committee of Attorneys-General. A draft uniform bill was prepared to control inertia sales.<sup>78</sup> Legislation based on this bill was first enacted in South Australia.<sup>79</sup> Victoria

<sup>71</sup> See, for examples, Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1972, p. 47, for the year ended 30 June 1973, p. 35 and for the year ended 30 June 1974, p. 46; Tasmania, *Reports of the Consumer Protection Council on the Activities of the Council*, for the year ended 30 June 1972, pp. 15, 17, 32, for the year ended 30 June 1973, pp. 34, 37, for the year ended 1974, pp. 44, 47. South Australia, *Report of the Commissioner for Prices and Consumer Affairs*, for the year ended 31 December 1972, pp. 10, 16. New South Wales, *Report of the Consumer Affairs Council*, for the year ended 30 June 1970, p. 11; Queensland, *Report of the Chairman of the Consumer Affairs Council and the Commissioner for Consumer Affairs Bureau upon the Activities of the Consumer Affairs Council and the Consumer Affairs Bureau*, for the year ended 30 June 1972, p. 2; Australian Capital Territory, *Report of the Consumer Affairs Council*, 1973-74, p. 27. New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2804.

<sup>72</sup> *Reports* for the year ended 30 June 1969, p. 10 and for the year ended 30 June 1973, p. 19.

<sup>73</sup> E.g., *Report* for the year ended 30 June, 1973, p. 19.

<sup>74</sup> Queensland, *Report of the Chairman of the Consumer Affairs Council and the Commissioner for Consumer Affairs upon the Activities of the Consumer Affairs Council and the Consumer Affairs Bureau*, for the year ended 30 June 1971, p. 3.

<sup>75</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 8 December 1973, 5829.

<sup>76</sup> Northern Territory, *Legislative Council Debates*, 2 August 1972, 839.

<sup>77</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 March 1972, 3700.

<sup>78</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 27 March 1973, 3329.

<sup>79</sup> *Unordered Goods and Services Act, 1972* (South Australia).

followed suit by passing the *Consumer Affairs Act 1972*.<sup>80</sup> Other States passed similar legislation.<sup>81</sup> The Federal Parliament, however, felt that the effectiveness of State laws was necessarily limited and that there was a need for a national approach.<sup>82</sup> With this object in view, it legislated to protect the public against inertia sellers.

The Federal provisions are contained in the *Trade Practices Act 1974*<sup>83</sup> which came into operation on the first October of that year. Section 64 of the TPA provides that "a corporation shall not, in trade or commerce, assert a right to payment from a person for unsolicited goods unless the corporation has a reasonable cause to believe that there is a right to payment." Corporation has been defined to mean a body corporate that

- "(a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a territory;
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c)."<sup>84</sup>

However, the operation of s. 64 is not confined to corporations only. Section 6 provides that Division 1 of Part V in which s. 64 appears has the effect it would have if a reference in that Division to a corporation included a reference to a person not being a corporation.<sup>85</sup> The state laws have similar provisions. For example, the CAA provides that "a person shall not assert a right to payment from a recipient for unordered goods."<sup>86</sup>

Section 75 of the TPA indicates that the legislation in the states will continue to operate concurrently with the federal law.<sup>87</sup> If, however, the State laws are inconsistent with the provisions of the TPA, the latter prevail, and the former, to the extent of the inconsistency, are void.<sup>88</sup>

Although the provisions of the TPA are largely based on the state legislation, they have some distinctive features of their own. Thus, the TPA, although following the state and Northern Territory legislation in making assertion of right to payment for unordered goods an offence,<sup>89</sup> goes further in vesting the court with an injunctive power to prevent such conduct. Section 80 provides

- (1) The Court may, on application of—
  - (a) the Attorney-General;

<sup>80</sup> Hereinafter called CAA.

<sup>81</sup> *Unordered Goods and Services Ordinance 1972* (Northern Territory); *Unordered Goods and Services Act 1973* (Tasmania); *Unsolicited Goods and Services Act 1973* (Western Australia); *Unordered Goods and Services Act 1973* (Queensland); *Unsolicited Goods and Services Act 1974* (New South Wales).

<sup>82</sup> Australia, *Parliamentary Debates*, House of Representatives, 16 July 1974, 232.

<sup>83</sup> Hereinafter called TPA.

<sup>84</sup> TPA, s. 4.

<sup>85</sup> S. 6(3)(c).

<sup>86</sup> S. 23(1).

<sup>87</sup> S. 73(1).

<sup>88</sup> *Commonwealth of Australia Constitution Act*, s. 109.

<sup>89</sup> E.g., CAA, s. 23(1).

- (b) the Commission; or
  - (c) any other person,
- grant an injunction restraining a person from engaging in conduct which constitutes or would constitute—
- (d) a contravention of a provision of Part IV or V;<sup>90</sup>
  - (e) attempting to contravene such a provision;
  - (f) aiding, abetting, counselling or procuring a person to contravene such a provision;
  - (g) inducing, or attempting to induce, a person, whether by threats, promises or otherwise, to contravene such a provision;
  - (h) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision;
  - (i) conspiring with others to contravene such a provision.
- (2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under sub-section (1).
- (3) The Court may rescind or vary an injunction granted under sub-section (1) or (2).

It is significant that apparently any person can apply for an injunction under s. 80. The section, in providing such a remedy, appears to be derived from American legislation on inertia sales,<sup>91</sup> and is no doubt designed to prevent inertia sellers from taking advantage of the ignorance of the unwary recipient.

Jurisdiction to hear and determination actions, prosecutions and other proceedings under the TPA is conferred on the court and that jurisdiction is exclusive of the jurisdiction of any other court, other than the jurisdiction of the High Court under s. 75 of the Constitution.<sup>92</sup> The court is defined in s. 4 as the Superior Court in Australia, but until that Court is constituted by another Act the Australian Industrial Court is the court for the purpose of the TPA.<sup>93</sup>

The TPA<sup>94</sup> and some of the State Acts<sup>95</sup> detail similar circumstances in

<sup>90</sup> S. 64(1) appears in Part V of the Act.

<sup>91</sup> For example, see. *Cal. Civil Code* s. 1584.5 (West Supp. 1970); *N.Y. Gen. Bus. Law* s. 396 (McKinney Supp. 1969-70); *Conn. Gen. Stat. Ann.* s. 42-133a (Supp. 1970-71); *Hawaii Rev. Laws* s. 481 B. 1 (Supp. 1970). *Mich. Stat. Ann.* s.19416 (51) (Supp. 1970); *W. Va. Code Ann.* s. 47-11A-12 (Supp. 1970).

<sup>92</sup> S. 86.

<sup>93</sup> S. 169. Cf. the statement of the Attorney-General, Mr Enderby, that actions in contract for defective goods may be taken in any court and not just the Australian Industrial Court. *The National Times*, 12-17 May 1975, p. 12.

<sup>94</sup> S. 64(5) of TPA provides

"For the purposes of this section, a corporation shall be taken to assert a right to payment from a person for unsolicited goods or of a charge for the making of an entry in a directory if the corporation—

- (a) makes a demand for the payment or asserts a present or prospective right to the payment;
- (b) threatens to bring legal proceedings with a view to obtaining the payment;
- (c) places or causes to be placed the name of the person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment;

which a person will be deemed to have asserted a right to payment. Even the sending of an invoice or other document stating the amount of payment or setting out the price of the goods is, ordinarily, considered an assertion of a right to payment.<sup>96</sup>

Another respect in which the TPA goes further than the State legislation is that it provides for compensation to the recipient who has suffered loss due to the contravention of its provisions relating to unsolicited goods. Section 82 of the TPA reads

- “(1) A person who suffers loss or damage by an act of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person.
- (2) An action under sub-section (1) may be commenced at any time within three years after the date on which the cause of action accrued.”<sup>97</sup>

Section 82 confers a useful right. The importance of this section is that it grants a right of action for damages where no action in tort or contract may be available, and also in cases where such an action might perhaps be available in theory but would present serious problems of proof: for example, if fraud must be proved to establish the tort of deceit. Under s. 82, however, the action is available simply on proof of (1) an act in contravention of Part IV or V and (2) actual loss or damage caused by that act.<sup>98</sup>

The CAA also protects the public in some cases where complaints are made to the Consumer Protection Bureau under the Act.<sup>99</sup> However, the provisions of the CAA are limited in scope. They do not appear to confer

- (d) invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or
- (e) sends any invoice or other document stating the amount of the payment or setting out the price of the goods or the charge for the making of the entry and not stating as prominently (or more prominently) that no claim is made to the payment, or to payment of the price or charge, as the case may be.”

<sup>95</sup> E.g., *Unsolicited Goods and Services Act 1973* (W.A.), s. 11. Cf. CAA s. 23(2); *Unsolicited Goods and Services Act 1971* (Eng.) s. 2(2).

<sup>96</sup> In New Zealand as well, the law forbids invoicing a person in respect of goods that have not been ordered or requested by him. (See s. 9(6), *Consumer Information Act 1969*). Under French law, the sending of unsolicited goods coupled with a request to return them in cases of non-acceptance is punishable as a criminal offence. See Pierre Bonassies *et. al.*, in Schlesing (ed.) *Formation of Contract; A Study of Common Core of Legal Systems* (New York: London: Oceana Publications, 1968) I, *passim*.

<sup>97</sup> Ss. 64 and 65 appear in Part V.

<sup>98</sup> Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection—A Guide to Trade Practices Act 1974* (Sydney, Melbourne, Brisbane: Butterworths, 1974) 34. At p. 239 the authors suggest that s. 82 will frequently afford a right to damages for a contravention of s. 52 which provides that a corporation shall not engage in a conduct that is misleading or deceptive. Such conduct could include a non-fraudulent statement.

<sup>99</sup> S. 9B.

any right on an individual to sue for damages<sup>100</sup> but only empower the Director of Consumer Affairs to institute or defend proceedings on behalf of the consumer if the Director is satisfied

- “(i) that the consumer has a cause of action or a good defence to an action relating to a matter to which the complaint refers; and
- (ii) that it is in the public interest to institute or defend proceedings on behalf of the consumer with a view to enforcing or protecting the rights of the consumer in relation to an infringement or suspected infringement by another person of those rights or of this Act or any other law relating to the interests of consumers.”<sup>101</sup>

The rights of the Director are also limited. He cannot institute or defend proceedings on behalf of a consumer unless

- “(i) the amount claimed or involved in the proceedings does not exceed \$2,500;
- (ii) the Minister has given his consent in writing subject to such conditions (if any) as he determines; and
- (iii) the consumer has given his consent in writing and has not revoked that consent.”<sup>102</sup>

Section 87 of the TPA further protects a person who has suffered due to a contravention of Part IV or V of the Act. It provides that

“where in a proceeding instituted under or for an offence against this Part the Court finds there has been a contravention of a provision of Part IV or V, the Court may, in addition to imposing a penalty under section 77 or 79, granting an injunction under section 80 or making an order under section 82 in an action for the recovery of the amount of any loss or damage, make such other orders as it thinks fit to redress injury to persons caused by any conduct to which the proceeding relates or any like conduct engaged in by the defendant.”<sup>103</sup>

The powers of the Court under s. 87 are much wider than are granted under s. 82. It is interesting that under s. 87 the Court is empowered to make ancillary orders in favour of a person even though he was not a party to the proceeding.<sup>104</sup> Orders can be made to redress injury caused not only by conduct to which the proceeding relates but also by like conduct engaged in by the defendant. It has been suggested that “if the power is exercised widely, s. 87 will produce a result similar to that sought in the ‘class actions’ which have become a feature of consumer protection litigation in the United States.” However, experience in United States has shown that “severe practical difficulties arise where very large numbers of consumers have been affected by a particular course of conduct.”<sup>105</sup> The

<sup>100</sup> Whether a private cause of action arises by virtue of breach of statutory provisions is a difficult question of construction. See *O'Connor v. S.P. Bray* (1936-37) 56 C.L.R. 464, 477-78.

<sup>101</sup> S. 9B(1)(b).

<sup>102</sup> S. 9B(2).

<sup>103</sup> S. 87(1).

<sup>104</sup> Taperell, Vermeesch and Harland *op. cit.* pp. 35, 242.

<sup>105</sup> *Ibid.*, p. 242.



orders that may be made under s. 87 include, but are not limited to

- (a) an order declaring the whole or any part of a contract or of a collateral arrangement relating to a contract to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
- (b) an order varying a contract or such an arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;
- (c) an order directing the refund of money or the return of the property; and
- (d) an order directing the payment of a person who has suffered loss or damage of the amount of the loss or damage.<sup>106</sup>

It appears, however, that the ancillary powers of the Court under s. 87 only arise if relief is first granted in the principal proceedings under ss. 77, 79, 80 or 82.

Again, the punishment prescribed by the TPA is much more severe<sup>107</sup> than the \$500 penalty provided under State legislation.<sup>108</sup>

Under all the legislation, "unordered goods" means goods sent to a person without any request by him or on his behalf. However, the State legislation also defines goods delivered on order as unsolicited in certain situations.<sup>109</sup> One objectionable method the inertia sellers adopt to create the impression that the goods were delivered on order is to send members of the public forms ingeniously designed to obscure the fact that they are order forms. The recipient unwittingly fills in this form not realizing that it can be construed as an order but believing it to be only an application or request for information. This objectionable practice has been covered by the definition of unordered goods in the State legislation.<sup>110</sup>

Two significant rights have been conferred on the recipient by all the statutes. First, where a recipient receives unordered goods the goods shall, upon the expiration of the "relevant period" become the property of the recipient. "Relevant period" means, where the recipient of unordered goods gives notice with respect to the goods to the sender, the period of one month next following the day on which the notice is given or the period of three months next following the day on which the recipient

<sup>106</sup> S. 87(2). See also s. 87(3), (4) and (5).

<sup>107</sup> TPA s. 79 provides

"A person who contravenes a provision of Part V other than section 52 is guilty of an offence punishable on conviction—

(a) in the case of a person not being a body corporate by a fine not exceeding \$10,000 or by imprisonment for a period not exceeding 6 months; or  
 (b) in the case of a person being a body corporate—by a fine not exceeding \$50,000."

<sup>108</sup> E.g., CAA, s. 23(1).

<sup>109</sup> TPA, s. 4. For state legislation, see, e.g., CAA, s. 21(3).

<sup>110</sup> See above, note 77 and accompanying text.

received the goods, whichever first expires.<sup>111</sup> The provisions appear to have been based on the English *Unsolicited Goods and Services Act 1971*, but this statute provides a much longer period for passing of property where notice has not been given by the recipient to the sender.<sup>112</sup>

Second, the recipient is not liable to make any payment for the goods and is not liable for the loss of or damage to the goods other than loss or damage resulting from the doing by him of a wilful and unlawful act in relation to the goods during the "relevant period".<sup>113</sup>

## V LOOPHOLES IN THE AUSTRALIAN LEGISLATION

The main object of the Australian legislation is, of course, to protect unwary people against ingenious and designing traders, and to reduce the nuisance resulting from their activities.

Underlining the purpose of the Trade Practices Bill, Mr Murphy (the then Attorney-General) remarked that it was intended to afford protection to the untrained consumer who was no match for the trained businessman.<sup>114</sup> In the Victorian legislature, Mr Rafferty (Minister for Labour and Industry) stated that one of the important objects of the Consumer Protection Bill<sup>115</sup> was to drive out of existence certain objectionable sales practices.<sup>116</sup> In the Queensland legislature, it was also observed that the purpose of the Unordered Goods and Services Bill was "to protect the community from rogues and swindlers who send unsolicited goods".<sup>117</sup>

While going some distance towards redressing injustices permitted by common law, the Australian legislation would still appear to have many defects.

*First*, the legislation does not prohibit the sending of unsolicited goods. An offence is committed only if a right to payment is asserted. The legislation protects the recipients against inertia sales, but it does not go all the way; if this practice is to be prohibited, "it is useless trying to stamp them out with velvet slippers, or by deliberately missing when you have put down your foot".<sup>118</sup> No man has the right to send another person unwanted goods.

*Second*, the assertion of a right to payment is not an offence in all situations. The TPA states that a corporation does not commit an offence

<sup>111</sup> TPA, s. 65(4). For state legislation, see, e.g., CAA s. 22(1) and (3).

<sup>112</sup> S. (1), (a) and (b).

<sup>113</sup> TPA, s. 65. All the state Acts provide that the recipient is not liable unless loss or injury has arisen from his wilful and unlawful disposal, destruction or damaging of the goods. See, e.g. CAA, s. 24.

<sup>114</sup> Australian *Parliamentary Debates*, Senate, 30 July 1974, 540-41.

<sup>115</sup> The *Consumer Protection Bill* was passed in 1972 but the name of the *Consumer Protection Act 1972* was amended to the *Consumer Affairs Act 1972* by the *Consumer Affairs Act 1974*.

<sup>116</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 21 March 1972, 4291. See also, Victoria, *Parliamentary Debates*, Legislative Council, 27 April 1972, 5428.

<sup>117</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 27 March 1973, 3333.

<sup>118</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2817; see also pp. 2812, 2813.

if it has reasonable cause to believe that there is a right to payment.<sup>119</sup> Likewise, under State legislation, the sender is not considered to have asserted a right to payment if he believed on reasonable grounds that a request for the goods had been made.<sup>120</sup>

*Third*, the goods do not become the property of the recipient on their immediate receipt. The property in goods passes to the recipient after a certain period. That intervening period is one of much inconvenience and uncertainty. Many people are unable to send the goods back, because they are ill or cannot address envelopes satisfactorily or do not want to go to the trouble. They become greatly upset and inconvenienced by the presence of such goods.<sup>121</sup> Thus, a person who receives a large parcel of records or books would have to keep them properly for the period of at least one month.

*Fourth*, the sender can take possession of the goods within that period, and there is no statutory obligation enjoining the sender to compensate the recipient for his inconvenience.<sup>122</sup> If the recipient has incurred expenses in storing or removing the goods it will not be very easy for him to recover his expenses.

*Fifth*, the recipient may be liable for damages if he wilfully and unlawfully destroys, damages or sells the goods.<sup>123</sup> Why should the recipient have any liability or anxiety in regard to goods he never solicited? The provisions regarding liability for wilful and unlawful damage can cause great hardship to the recipient. On occasions it may be difficult for him to establish that he did not wilfully damage the goods. Many articles sent by mail are not packed properly and are damaged in the course of transit. Goods may be left at a house in the absence of the householder and their condition may deteriorate even before the householder has a chance to inspect them. There have been cases where persons returning after a period of absence have found goods at their doorstep in a shocking state.<sup>124</sup> Further, the recipient of even the most offensive literature cannot tear it up or throw it away for a certain period. What if "the Archbishop of Sydney or the Cardinal Archbishop of Sydney (receives) publications such as Ribald, Screw, Gay, Searchlight or Cocksure?"<sup>125</sup> What again if a right wing liberal receives a communist manifesto? It would be quite fair to permit recipients of such goods to do anything they pleased in relation to the goods. They should be entitled to consign them to their rubbish bin, throw them into the gutter or put them on the mantelpiece.

<sup>119</sup> S. 64(1). See also CAA, s. 23(1).

<sup>120</sup> E.g., CAA, s. 22(3)(a).

<sup>121</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2810.

<sup>122</sup> E.g., CAA, s. 22(2)(b).

<sup>123</sup> TPA, s. 65(1), (2) and (3). For state legislation, see, e.g., CAA ss. 22(1) and 24.

<sup>124</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2814.

<sup>125</sup> New South Wales, *Parliamentary Debates*, 14 November 1974, 2821.

*Sixth*, if the recipient places an order for certain goods and the sender supplies different, but similar goods, the sender is not for that reason alone considered to have sent unsolicited goods within the meaning of the State legislation.<sup>126</sup>

*Seventh*, the State legislation does not seem to have any effective teeth. The five hundred dollar penalty provided for the assertion of a right to payment is too low having regard to the ample means of many of the senders resorting to this practice and the very high penalty provided by the Federal legislation.

*Eighth*, the Federal provisions do not apply if the recipient uses like goods in the course of his profession, business, trade or occupation.<sup>127</sup>

It would appear then that there are numerous loopholes in the Australian legislation which give ample lee-way to inertia sellers. Business enterprises now, as before, are free to continue their practice, for it is no offence to send unsolicited goods. Since sending of goods is no offence and they can be repossessed by the sender within a certain period, he may not hesitate to take a chance. If the recipient is persuaded to buy the goods so much the better. If he refuses to buy the goods or does not indicate his mind the sender can always collect them. A recent American case illustrates that around eighty per cent of recipients of unordered goods soon after receiving them either returned or paid for them, and an additional ten per cent did so after receiving one or two notices from the sender.<sup>128</sup>

Further, it may be possible for the ingenious trader to take unfair advantage of the federal legislative provisions that a corporation will not be liable for asserting a right to payment if it is proved that such a corporation had reasonable cause to believe that there was a right to payment.<sup>129</sup> On the other hand, in *Readers Digest v. Pirie*<sup>130</sup> the appellants established that they had reasonable cause to demand payment. The case against them was instituted for a contravention of the English *Unsolicited Goods and Services Act 1971*. The appellants had asserted a right to payment in respect of copies of the Readers Digest sent to the respondent after the latter had cancelled the subscription. The appellants were acquitted because the information of the cancellation, due to the mistake of their junior staff, was not fed into the computer which had instructed the sending of the demand.

There is nothing in the State legislation to enable the recipient who has paid for the goods before the expiry of the "relevant period" to subsequently recover that payment. Indeed, in the generality of cases, the payment would appear to indicate that the recipient has accepted the

<sup>126</sup> E.g., CAA, s. 21(2).

<sup>127</sup> S. 64(1) and (2). See also *Unsolicited Goods and Services Act*, (Eng.) s. 1(2).

<sup>128</sup> *Portwood v. F.T.C.* 418 F. 2d. 419 (10th Circuit, 1969).

<sup>129</sup> TPA, s. 64(1); cf. CAA, ss. 23(1) and 28.

<sup>130</sup> [1973] S.L.T. 170.

sender's offer, and that he made the payment to fulfil his existing contractual obligation. Under s. 82 of the TPA<sup>131</sup> an action for damages can be brought by a person who suffers loss as a result of the contravention of provisions of the Act regarding unsolicited goods; but success under this section may depend on establishing that the payment was made by way of mistake. The authors of a recent guide to the TPA have appreciated this limitation on s. 82 and conclude that where the recipient "paid not because he wished to buy the goods but because he has been misled into thinking he was obliged to do so, it would appear that his payment could be said to have been induced by an assertion by the corporation, in breach of s. 64, of a right to payment. On that basis he could recover damages under the general provision contained in s.82, . . ." <sup>132</sup> It appears that it would not be an easy task for the recipient to establish that he was so misled. However, if a breach of s. 64 is established the court may make an ancillary order under s. 87 directing the refund of money.<sup>133</sup>

On the other hand, if the recipient pays for the goods after the "relevant period" (i.e. one month or three months) then presumably he would be able to recover his money, for at the time of payment he himself was the owner of the goods.<sup>134</sup>

Furthermore, the Australian legislation does not grant full immunity to the recipient from civil liability in respect of unsolicited goods. For example, the CAA provides

Notwithstanding any Act or law to the contrary, the recipient of unordered goods is not liable to make any payment for the goods and is not liable for any loss of or injury to the goods other than loss or injury arising from his wilful and unlawful disposal, wilful and unlawful destruction or wilful and unlawful damaging of the goods during the relevant period within the meaning of section 22.<sup>135</sup>

The provisions gives rise to problems of interpretation. Before the passing of the current legislation an involuntary bailee could be held liable for loss or damage to the goods resulting from an unauthorized and positive act on his part. Under the legislation this is still stated to be the case if the act occurs during the relevant period. Nevertheless, by sending the goods the sender makes an offer which apparently may still be effectively accepted by the recipient despite the legislative provisions. He may communicate his intention to accept to the sender. He may also accept the

<sup>131</sup> See text accompanying note 97.

<sup>132</sup> Taperell, Vermeesch and Harland *op. cit.* 227.

<sup>133</sup> See note 106 and accompanying text.

<sup>134</sup> The recipient may be able to recover his money in quasi contract on the basis that he paid it under a mistake, or possibly on the basis that it was made under a void contract. Cf. R. Goff and G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966) pp. 61-63. S. J. Stoljar, *The Law of Quasi Contract* (Australia: Law Book Co., 1964) pp. 19-22, 29; *American Restatement on Restitution*, Ch. 2, ss. 15 and 18; *Contract Act* (India) (No. IX of 1872) s. 65.

<sup>135</sup> S. 24.

offer by conduct. Thus, even though he does not communicate his intention to accept, his damaging, destroying or disposing of the goods may indicate that he has accepted the offer. In such a case a contract comes into existence and the property in the goods passes to the recipient.<sup>136</sup> Even though the property has passed to him he cannot be sued in contract for the price of the goods; for the legislation states that the recipient of unordered goods is not liable to make any payment for them. But any action grounded in conversion or detinue might also fail; for after the acts of the recipient implying acceptance of the offer he becomes the owner of the goods, and he cannot do any unlawful act in relation to property which he now owns and possesses.

Accordingly, if the above theory is correct, the recipient of unordered goods may accept the sender's offer but at the same time refuse to pay for the goods. This conclusion does not appear to accord with the intention of the CAA and other Australian legislation, and a different interpretation of the provisions is possible. It may be argued that property in unordered goods can only pass to the recipient after the relevant period. Any purported acceptance of the seller's offer during the relevant period will be ineffective. This interpretation is implicitly supported by the provisions stating that property vests in the recipient after the relevant period, that the seller can repossess the goods during that period, and that the recipient of the goods is not liable to pay the price of the goods. Moreover, such an interpretation renders meaningful the provision that the recipient is liable for unlawful and wilful acts of destruction, disposal and damaging during the relevant period.

## VI FOREIGN LEGISLATIVE RESPONSE

The American<sup>137</sup> and the Canadian<sup>138</sup> legislation seem to deal more efficiently with the problem of inertia sales. The United States Congress and the legislatures of forty-five States have legislated for the protection of recipients of unordered goods. The laws vary from State to State, but most of them authorize the recipients to treat the goods as gifts.

The main Federal provisions are contained in the *Federal Trade Commission Act* and the *Postal Reorganization Act*. The scope of the Federal Acts is limited. Under the *Trade Commission Act*, the Federal Trade Commission is entitled to deal with inertia sales if they constitute "unfair

<sup>136</sup> The Australian state legislation on sale of goods provides

Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

E.g., *Goods Act 1958*, (Vic.) s. 23.

<sup>137</sup> All the relevant statutes are listed in *American Bar Association Journal* (February, 1975) 196.

<sup>138</sup> E.g., *Revised Statutes of Ontario*, 1970 c. 82, s. 46(1)(b) and (3).

methods of competition in commerce, and unfair deceptive acts or practice in commerce".<sup>139</sup> The *Postal Reorganization Act* applies only to cases where unsolicited goods have been sent by mail.<sup>140</sup>

It is interesting to note that legislative attempts to deal with the problems of inertia sales, at the State level, began around the middle of the last century. A Florida statute of 1851 provided that "no person shall be liable to pay for any newspaper, periodical or other like matter, unless he shall subscribe for, or order the same in writing".<sup>141</sup> Many later statutes also attempted to protect the public against the sale of unsolicited periodicals and newspapers.<sup>142</sup> It was, however, the State of Virginia that for the first time made a general rule to cover all unordered merchandise. The Virginian law exempted the recipient from liability to pay for the goods unless he appropriated them to his own use.<sup>143</sup>

In 1967 a Californian statute prohibited invoicing for unsolicited goods unless the demand clearly stated that the recipient was only obliged to pay if he accepted the offer.<sup>144</sup> This was an illustration of the stiffening of the law relating to such forced sales. The more recent approach as noted above has been to permit recipients to treat unsolicited goods as unsolicited gifts, and allow them to reject, retain, use or dispose of the goods in any manner without any obligation whatever to the sender.<sup>145</sup>

A similar trend has been noticeable in Canada. For example, the *Consumer Protection Act* of Ontario provides that "no action shall be brought by which to charge any person for payment in respect of unsolicited goods notwithstanding their use, misuse, loss, damage or theft".<sup>146</sup> The Act also expressly absolves the recipient from any legal obligation in respect of the disposal of such goods.

Even the American gift statutes appear to be insufficient to deal effectively with the evil of inertia sales. They do not touch the common law position that if recipients pay for the goods, they would, on one view, be deemed to have accepted the sender's offer. Of course, such a recipient could challenge the contract on the ground of fraud by showing that he was induced into paying for the goods by a fraudulent misrepresentation. This would, however, burden the consumer with a court action. The tendency, therefore, in many American states, including New York,<sup>147</sup> Hawaii,<sup>148</sup> Michigan<sup>149</sup> and California,<sup>150</sup> is to prohibit even the sending of unsolicited

<sup>139</sup> 15 U.S.C. s. 45 (1964).

<sup>140</sup> 39 U.S.C. s. 3009 (1970).

<sup>141</sup> *Fla. Stat. Ann.* s. 725.03 (1944).

<sup>142</sup> E.g., *Ore. Rev. Stat.* s. 98.450 (1969); *Wash. Rev. Code* s. 19.56.020 (1967).

<sup>143</sup> *Va. Code Ann.* ss. 11-12 (1964 Repl. Vol.).

<sup>144</sup> *Cal. Civil Code* s. 1716 (West Supp. 1970).

<sup>145</sup> E.g., *Ark. Stat. Ann.* s. 85-2-606.1 (Supp. 1973); *Ill. Rev. Stat. Ch.* 121, s. 351; *Wash. Rev. Code Ann.* s. 1956.020 (Supp. 1974).

<sup>146</sup> *S. 46(3) Revised Statutes of Ontario*, 1970.

<sup>147</sup> *N.Y. Gen. Bus. Law* s. 396 (McKinney Supp. 1969-70).

<sup>148</sup> *Hawaii Rev. Laws* s. 418B-1 (Supp. 1972).

<sup>149</sup> *Mich. Stat. Ann.* s. 19.416(51) (Supp. 1970).

<sup>150</sup> *Cal. Civil Code* s. 1584.5 (West Supp. 1974).

goods. These statutes have had immediate success. One writer states that "unsolicited goods complaints concerning domestic concerns have almost disappeared in New York since the statute's enactment".<sup>151</sup>

## VII CONCLUSIONS AND SUGGESTIONS

The success of the sales techniques we are considering, is largely attributable to the inadequacies of the common law. In Australia, the problems created by such techniques have been dealt with more satisfactorily by Federal law than State law. The Federal provisions regarding injunctions, damages and ancillary orders are, indeed, unique in Australia. On the other hand, the provisions dealing specifically with unsolicited goods apply only to cases where the goods have been sent by a corporation. Further, the Federal law shares some of the defects of State law. For example, it is doubtful if a recipient who has paid for unwanted goods can subsequently in all cases recover his payment.

The unsolicited merchandise business thrives on the unwariness and lack of knowledge of the average man. As long as most of the recipients are misled into paying, or otherwise pay for the merchandise, this business will continue to flourish. Like many other laws, inertia sales legislation protects only the informed person. Even he still suffers the inconvenience of receiving unwanted goods, subsequent demands for payment and, if he wants to claim storage and other expenses, the annoyance and trouble of suing. Moreover, even if there are a few court actions, they would in no way jeopardise or hamper inertia selling.

Despite legislative attempts to deal with the problem of inertia selling the number of complaints made to Consumer Councils regarding receipts of unsolicited goods has not abated.<sup>152</sup>

A much more severe law is required to deal with the problem of inertia sales and the following suggestions are offered:

- (1) Apart from prohibiting assertion of right to payment for unsolicited goods, the despatch of goods should also be made an offence, as is the case in some American states.<sup>153</sup> Those who send out something that has not been ordered should be penalized.
- (2) The recipient should be entitled to treat unsolicited goods as unsolicited gifts immediately on their receipt. Indeed, both the Victorian and New South Wales Consumer Affairs Councils made such a recommendation, but it was turned down.<sup>154</sup> It was observed by a New

<sup>151</sup> "Unsolicited Merchandise: State and federal remedies for a consumer problem", (1970) *Duke Law Journal* 991, 1002.

<sup>152</sup> E.g., Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1973, p. 35; for the year ended 30 June 1974, p. 46.

<sup>153</sup> Cf. Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1973, p. 19.

<sup>154</sup> For Victoria, see note 72 above and accompanying text, cf. Victoria, *Report of the Consumer Affairs Council*, for the year ended 30 June 1974, p. 19. For New



South Wales M.P. that "we ought to try to establish the principle that when a person engages in what we believe to be the iniquitous practice of sending out unsolicited goods in the hope that the recipient of these will pay for them by virtue of his thinking he has ordered them or his believing that having received them there is some compulsion upon him to pay, the sender should suffer".<sup>155</sup> The same M.P. also moved an amendment to cl. 4(2)<sup>156</sup> of the New South Wales *Unsolicited Goods and Services Bill* to provide "that there be no period of liability; that the recipient of unsolicited goods be not liable for the loss or damage of those goods and that the goods become the property of the recipient unless he has sent them back or they have been received by a person who knows that they were not meant for him".<sup>157</sup> This amendment was, however, rejected.

- (3) If the recipient has paid for the goods he should be entitled to claim his money back from the sender in all cases.
- (4) The State legislation, like the TPA should also be suitably amended and some provisions of the Federal Act, for example, those dealing with injunctions, damages and higher penalties, incorporated. It is important that State legislation be amended to increase the amount of penalty for even a corporation punishable under the Federal law can escape that punishment if it is first convicted under State legislation. This is quite clear from s. 75 of the *Trade Practices Act* which provides:

Where an act or omission of a person is both an offence against section 79 and an offence under the law of a State or Territory and that person is convicted of either of those offences, he is not liable to be convicted of the other of those offences.<sup>158</sup>

- (5) In the light of recommendation (2) above, the clauses of the Federal and State Acts providing that the recipient shall not be liable for any loss or injury to the goods during the relevant period, unless such loss or injury has arisen from his wilful and unlawful act, would not serve any useful purpose and should be repealed.
- (6) An express provision may be made in both the Federal and State

South Wales, see *Report of the Consumer Affairs Council*, for the year ended 30 June 1970, p. 11. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2808.

<sup>155</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2808.

<sup>156</sup> The clause reads

"A recipient of unsolicited goods is not liable for the loss of, or damage to, the goods other than loss or damage resulting from the doing by him of a wilful and unlawful act in relation to the goods during the relevant period."

<sup>157</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1974, 2808.

<sup>158</sup> S. 75(2).

legislation to entitle the recipient to claim for the storage expenses of the goods.

- (7) The unsolicited sending of dangerous articles which pose a serious hazard for children should be made more severely punishable.

It is submitted that both consumer protection and commercial integrity demand that early attention be given to this problem at the Federal as well as the State level.