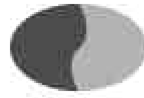

National Competition Policy Review

Fair Trading Act 1987 & Door to Door Sales Act 1967

Final Report

2002

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1 Executive Summary

The modern NSW consumer marketplace is a complex and sophisticated web of transactions between consumers and traders. For the most part, transactions occur without reference to the legislation or the remedies or redress it provides. That is, in the vast majority of circumstances, trade between the State's consumers and traders occurs in an honest and efficient manner, with both parties satisfied as to goods or services provided and consumed.

However, it is in relation to the tiny minority of transactions that legislation has been enacted and amended to ensure that the marketplace works effectively and efficiently. The *Fair Trading Act 1987* and the *Door to Door Sales Act 1967* provide a statutory framework for the operation of the NSW consumer marketplace. As noted in the introductory parts of this final report, the legislation exists in relation to a broad range of transactions, of varying value and complexity. These range from every-day consumer purchases – including such basic items as a newspaper or morning cup of coffee – to transactions as important as purchasing a home, car or expensive manufactured item. The legislation applies to more than $70 billion in annual consumer trade.

It is in this context that the review of legislation has occurred. While the Steering Committee was principally concerned to ensure that the State's fair trading legislation should not restrict competition unless it could be justified through a net public benefit analysis, it was also concerned about the potential impact of unfettered marketplaces. It might be emphasised that the National Competition Council – the body charged with responsibility for managing and assessing Australian governments' compliance with the National Competition Principles Agreement – has determined that where State Fair Trading legislation mirrors Part V of the *Trade Practices Act 1974* (Cth), it is not necessary to subject provisions to a net public benefit analysis; that the provisions are pro-competitive.

Nevertheless, the Steering Committee took the opportunity to review the legislation to ensure that its operation and effect resulted in an efficient and/or effective marketplace. The following report details the recommendations and findings of the Steering Committee in this regard.

The contributions made by the Steering Committee representatives, covering the public and private sector, are acknowledged with appreciation. The Committee was chaired and managed by the Department of Fair Trading, and included representatives from the Cabinet Office, Australian Competition and Consumer Commission, Fair Trading Compliance Division, Fair Trading Advisory Council, Australian Retailers' Association and, initially, the Public Interest Advocacy Centre.

1.1. Recommendations

Recommendation 1:	That a definition of represent be contained within the *Fair Trading Act*.
Recommendation 2:	That parity be maintained between sections 44 of the *Fair Trading Act* and section 53 of the *Trade Practices Act*.
Recommendation 3:	That section 60 of the *Fair Trading Act* not be amended.
Recommendation 4:	That section 44 be amended to mirror the *Trade Practices Act* provision.
Recommendation 5:	That Division 3A of the *Fair Trading Act* be amended to provide that a trader, unable to substantiate a claim made in the marketplace, shall be guilty of an offence.
Recommendation 6:	That section 38 of the *Fair Trading Act* not be amended in view of its satisfactory operation.
Recommendation 7:	That dual pricing continue to be proscribed by the *Fair Trading Act*.
Recommendation 8:	That lay by arrangements continue to be subject to regulation by the *Fair Trading Act*.
Recommendation 9:	That the mandatory code provisions of the *Fair Trading Act* should be repealed.
Recommendation 10:	That voluntary codes of conduct not be provided with statutory status within the *Fair Trading Act*.
Recommendation 11:	That door to door selling practices continue to be subject to regulation
Recommendation 12:	That the distinction between cash and credit sales be removed from the door to door selling legislation.
Recommendation 13:	That the provisions of the door to door selling legislation not apply to transactions of less than $100 in value, and that this figure be codified with a Regulation-making power to allow review.
Recommendation 14:	That the door to door selling transaction threshold should apply to the whole of the transaction's value.
Recommendation 15:	That the cooling off period contained within the door to door selling legislation should be reduced to five days in line with modern conditions.
Recommendation 16:	That the door to door selling legislation provide that a trader may not charge collect fees for services during the cooling off period but may, once the period has expired, retrospectively recoup such fees.

Recommendation 17: That the door to door selling legislation expressly prohibit the making of agreements to exclude its provisions.

Recommendation 18: That the door to door selling legislation not require, in any particular format or by any particular wording, that consumers be informed of their cooling off or rescission rights. Rather, direct sellers should be required to inform consumers by appropriate means.

Recommendation 19: That the direct selling legislation should continue to apply to unsolicited sales only.

Recommendation 20: That the door to door selling legislation be amended to provide that traders may not solicit trade before 9 a.m. or after 8 p.m. on any day of the week.

Recommendation 21: That the door to door selling legislation continue to apply to all traders.

Recommendation 22: That the *Door to Door Sales Act* be repealed and its provisions, as amended per the recommendations contained in this report, be inserted into the *Fair Trading Act* as a separate division entitled 'Direct Commerce'.

Recommendation 23: That unconscionable conduct continue to be subject to legislative prohibition in the *Fair Trading Act*.

Recommendation 24: That section 43 of the *Fair Trading Act* be amended to provide regulatory coverage in respect of a broader range of consumer transactions, including those between business.

Recommendation 25: That section 43 refer to consumer rather than customer.

Recommendation 26: That section 55 of the *Fair Trading Act* continue to reflect the equivalent provision in the *Trade Practices Act*.

Recommendation 27: That section 56 of the *Fair Trading Act* be amended to reflect the template legislation prepared under the national auspices of the Ministerial Council on Consumer Affairs.

Recommendation 28: That the *Fair Trading Act* be amended to insert a provision to allow the Director-General to issue an habitually dishonest trader with a notice to require the trader to show why he/she should continue to trade in New South Wales. Such an order should be made by the Supreme Court on application by the Director-General of the Department.

Recommendation 29: That the *Fair Trading Act* be amended to provide that a court may impose on a habitually dishonest trader a term of imprisonment.

Recommendation 30: That sections 68 and 72 of the *Fair Trading Act* be amended to provide the Local Court with jurisdiction.

Recommendation 31: That sections 68(2) and 72(6) of the *Fair Trading Act*, and section 7 of the *Consumer Claims Act*, be amended to extend the time limits of action to 6 years from the date of cause of action.

Recommendation 32: That the *Fair Trading Act* be amended to mirror the provisions of Part V, Divisions 2 and 2A of the *Trade Practices Act* in respect of warranty provisions.

Recommendation 33: That the *Fair Trading Act* not be amended to clarify that it covers conduct by NSW residents occurring outside NSW and conduct of non-residents of NSW that impacts on consumers in NSW.

Recommendation 34: That the *Fair Trading Act* not be amended to establish a Fair Trading Ombudsman.

Recommendation 35: That the *Fair Trading Act* be amended to provide that the Minister may, on the recommendation of the Director-General, impose a mandatory recall of products.

Recommendation 36: That the *Fair Trading Act* not be amended to provide the Products Safety Committee with jurisdiction to provide advice with respect to product safety policy.

Recommendation 37: That the *Fair Trading Act* be amended to allow safety standards to be prescribed for services.

Recommendation 38: That the *Fair Trading Act* not be amended to impose direct commerce safeguards in respect of conventional forms of direct marketing such as addressed mail, catalogues or e-mail.

Recommendation 39: That the *Fair Trading Act* be amended to include a provision imposing door to door selling-like regulation on telephone-based direct marketing activities.

Recommendation 40: That the *Fair Trading Act* should be amended to provide that once a consumer has informed a telephone direct marketer that he/she is not interested in purchasing goods or services, the telemarketer may not contact the consumer again for 30 days.

Recommendation 41: That the above provisions be contained within a 'Direct Commerce' Division of the *Fair Trading Act*.

2 Introduction

2.1 Background

Following approval by the Minister for Fair Trading, the Department of Fair Trading conducted a review of the *Fair Trading Act 1987* and the *Door to Door Sales Act 1967* in 2001. The review was undertaken as part of the NSW Government's commitment under the National Competition Principles Agreement to review all of its legislation that restricts competition before July 2002.

The principal aim of National Competition Policy (NCP) is to promote and maintain competition to increase economic efficiency and community welfare, while continuing to provide for consumer protection. The Government believes that, provided that the public interest is safeguarded, competition will benefit the people of New South Wales by creating a stronger and more vital economy.

The National Competition Principles Agreement establishes principles for pro-competitive reform of government business enterprises and removal of impediments to markets where they are not in the public interest. The Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition.

All NSW legislation has been examined to determine whether it establishes market entry barriers or requires conduct that has the potential to restrict competitive behaviour in the market. It is important to consider whether the costs of such legislation are outweighed by public benefit.

The *Fair Trading Act 1987* has been identified as potentially restricting competition and has been set down for review. The *Door to Door Sales Act 1967* has also been similarly identified and, in view of the similarities in focus of the two Acts and previous proposals to incorporate provisions relating to door-to-door sales into the *Fair Trading Act*, both statutes were reviewed in concert.

A relevant factor in the review was the relationship of the *Fair Trading Act* with the Commonwealth *Trade Practices Act 1974*. Part V of the *Fair Trading Act* mirrors the consumer protection provisions of the *Trade Practices Act*. When fair trading laws were introduced around Australia in the late 1980s it was intended that these provisions should be uniform in all States and Territories. This reflected the recognition by government that, wherever practicable, laws should apply equally to all consumers, irrespective of the jurisdiction in which they live or trade.

2.2 Measuring Costs & Benefits

The legislation review requirements under the Competition Principles Agreement state that, where the costs and benefits of a particular policy or course of action are to be measured, merits or appropriateness of a policy or course of action are to be determined, or an assessment is to be made of the most effective means of achieving a policy objective, the following matters, where relevant, must be taken into account:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

'Economic efficiency' has three principal objectives—first, the efficient organisation or production and distribution within firms (productive or technical efficiency), second, the efficient allocation of resources across industries (allocative efficiency), and third, the 'innovativeness' of firms and their capacity to respond to marketplace change (dynamic efficiency)[1]. Competition is crucial to the efficient and effective operation of the marketplace.

This is not to say that the operation of unfettered competition *always* achieves the best outcomes in terms of the efficient and effective operation of the marketplace. Unfettered competition may lead to undesirable social, environmental and economic consequences. In this respect, government enacts legislation to limit certain activities or practices which, should they occur, would lead to disadvantage amongst both traders (*vis-à-vis* other traders) and consumers[2].

2.3 The Review Process

It is the Government's policy to ensure that the review process takes into account the full range of public benefits of the legislation and that all views are thoroughly considered before any reforms are proposed. To achieve this, a Steering Committee was established to conduct the review. It comprised representatives from the following agencies/organisations:

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1 Industry Commission, *Pro-competitive Regulation: Discussion Paper* (November 1992) at 5.

2 *Ibid* at 7.

- Department of Fair Trading (Chair and project management);
- Cabinet Office;
- Australian Competition and Consumer Commission (ACCC);
- the Australian Retailers' Association;
- Public Interest Advocacy Centre[3]; and
- the NSW Fair Trading Advisory Council.

The Steering Committee has produced this Final Report in order to identify the issues relevant to competition policy, uniformity and the effectiveness of the legislation, and to identify potential areas of legislative reform. An issues paper was widely circulated to interested parties and advertisements, calling for submissions to the Review, were placed in the major metropolitan and regional newspapers. In addition, community consultation sessions were convened in the Sydney CBD, Newcastle, Wollongong and Orange to garner community input into the review process.

Although the emphasis of this review was on the anti-competitive aspects of the legislation, areas in which the laws could be made more efficient and effective were also considered during the review process. Having explained the principles of National Competition Policy and why the review was initiated, this Report—

- draws attention to the relevance of Fair Trading laws to the community (Chapter 3);
- provides background information on the introduction of the two Acts (Chapter 3);
- describes the objectives of the legislation and how the Acts meet them (Chapter 4). This chapter includes explanations of how the various provisions of the Acts function and discusses competition and other issues associated with the way the legislation operates;
- details the operation of the *Fair Trading Act*, *Door to Door Sales Act* and other equivalent State provisions (Chapter 4);
- discusses the regulatory objectives of government and puts forward a rationale for the intervention of Fair Trading legislation on the NSW marketplace (Chapter 4);
- assesses the legislation's impact on competition (Chapter 5);
- considers regulatory options (Chapter 5); and
- discusses other, relevant issues (Chapter 6).

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3 The Australian Consumers' Association was represented on the Steering Committee until May 1998 at which point its membership was relinquished in favour of the Public Interest Advocacy Centre. Owing to resource restrictions, PIAC discontinued its involvement in the review process in September 2000 following the release of the Issues Paper.

2.4 Terms of Reference for the Review

The following terms of reference were provided to the Steering Committee:

1. The review of the *Fair Trading Act* 1987 and *Door to Door Sales Act* 1967 shall be conducted in accordance with the principles for legislation reviews set out in the Competition Principles Agreement.

   The guiding principle of the review is that legislation should not restrict competition unless it can be demonstrated that:
   (a) the benefits of the restriction to the community as a whole outweigh the costs; and
   (b) the objectives of the legislation can only be achieved by restricting competition.

2. Without limiting the scope of the review, the review is to:
   (a) clarify the objectives of the legislation, and their continuing appropriateness;
   (b) identify the nature of the restrictive effects on competition;
   (c) analyse the likely effect of any identified restriction on competition on the economy generally;
   (d) assess and balance the costs and benefits of the restrictions identified; and
   (e) consider alternative means for achieving the same result, including non-legislative approaches.

3. When considering the matters in (2), the review should also:
   (a) identify any issues of market failure which need to be, or are being, addressed by the legislation; and
   (b) consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the *Trade Practices Act* 1974 (Cth) and the NSW Competition Code.

4. The review shall consider and take account of relevant regulatory schemes in other Australian jurisdictions, and any recent reform proposals, including those relating to competition policy in those jurisdictions.

5. The review shall consult with and take submissions from consumer groups, business organisations, government agencies and other interested parties.

6. The review will consider the general effectiveness of the legislation and examine issues of concern to consumers and industry.

3. The Consumer Marketplace

This section of the report outlines the context of the reviews of both the *Fair Trading Act* and the *Door to Door Sales Act*. The section also aims to briefly flag new developments in the marketplace.

The New South Wales consumer marketplace, over which the *Fair Trading Act* and the *Door to Door Sales Act* have jurisdiction, is a sophisticated and complex web of trade. It is the largest market in Australia and New Zealand. For the fiscal year 1999-2000, Gross State Product including public sector spending and private capital works was calculated at $213 billion. Of this, the *Fair Trading Act* and *Door to Door Sales Act* cover approximately $71.48 billion, or 57 per cent of total household consumption[4].

In order to determine factors affecting competitiveness within the marketplace, it is necessary to establish the boundaries of markets. Although such analysis is of greater relevance in relation to determining market power and anti-competitive conduct pursuant to the *Trade Practices Act 1974*, it is helpful to define the marketplaces subject to regulation by the Fair Trading legislation to assess competitiveness within them:

> "Defining markets is a process which focuses attention on the factors which influence the competitive environment. It provides the framework for analysing competition and is necessary for determining market shares, import penetration and the height of barriers to entry"[5].

In *Queensland Co-op Milling Assn and Defiance Holdings Ltd* (1976), the Trade Practices Tribunal provided a definition of market:

> "A market is the area of close competition between firms, or putting it a little differently, the field of rivalry between them … Within the bounds of the market, there is substitution between one product and another, in response to changing prices … Whether such substitution is feasible depends ultimately on customer attitudes, technology, distance and cost and price incentives …"[6].

In very general terms, the New South Wales consumer marketplace comprises two arms—the trade of goods and the provision of services[7]. At the outset, it should be

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4 Australian Bureau of Statistics, NSW Gross State Product, www.abs.gov.au.

5 Steinwall, R *et al*, *Australian Competition Law* (2000) at 115.

6 8 ALR 481 at 517, *ibid* at 118.

7 While conventional analyses of market definition refer to four dimensions, product, geographic, functional and temporal, it is sufficient to discuss the more limited consumer marketplace from the dichotomous perspective of goods and services.

clarified that this private marketplace does not include the delivery of government (State/local) services; neither statute has jurisdiction in respect of Government-based transactions[8].

3.1. Consumption of Goods and Services in NSW

Within the jurisdiction of the *Fair Trading and Door to Door Sales Acts*, the Australian Bureau of Statistics includes the following broad groups of goods as a basis for determining Gross State Product:

- Food;
- Alcoholic beverages and tobacco;
- Clothing and footwear;
- Furnishings and household equipment; and
- Miscellaneous goods.

The Australian Bureau of Statistics also includes the following broad groups of consumer services as a basis for determining Gross State Product:

- Recreation and culture;
- Hotels, cafes and restaurants; and
- Miscellaneous services.

In addition, the *Fair Trading Act* and the *Door to Door Sales Act* may have application to other segments of the State's economic output including private dwellings, buildings and machinery, livestock and intangible assets. The *Fair Trading Act* will also bind the Crown so far as it carries on a business.

Taken together, these transactions represent the majority of the State's household consumption expenditure, other spending being on utilities, transport and communication.

3.3. Profile of NSW Traders

The *Business Names Act 1962* requires that firms undertaking business within New South Wales or soliciting business from the New South Wales marketplace must register a business name if they are not trading in their own name. For example, Ms Sibylla Catt could trade as 'Sibylla Catt' and not register a business name, but if she traded under the name 'Sibylla Catt Merchants', she would be required to register a business name. As at 30 June 2000, there were 455,414 business names registered in New South Wales. While this number might under-represent the number of

8 The Department of Fair Trading's Customer Services Division frequently receives enquiries from consumers in relation to the supply of services by Government agencies. The Department does not have jurisdiction to action such complaints and advises consumers to approach the agency concerned or, should that be unsuccessful, refer the matter to the NSW Ombudsman.

firms actually undertaking commercial activity within the State[9], it does indicate the extent of trader activity.

Compared to previous years' registered businesses, there has been a steady increase in the registration of business names in NSW[10]. In turn, this suggests that (a) the number of firms is increasing and (b) the extent of commercial activity in the State's household sector is also increasing. These observations are consistent with the steady increase in Gross State Product over the same period in which it has increased from $189,494 million in June 1997, to $201,485 million in June 1998, and to $213,494 million in June 1999[11].

3.4. New Dynamics in Consumer Trade

This section of the Final Report briefly flags new developments within the marketplace which have altered traditional patterns in consumer trade. Where these developments have implications for the effectiveness of the legislation's regulation of the marketplace, they are discussed in the 'Other Issues' chapter.

3.4.1. Globalisation and the NSW Marketplace

'Globalisation' of the Australian marketplace has had profound implications for Australian economic and trade activity. These developments have had flow-on effects for consumer protection and general fair trading policy.

The increase in the number of producers – domestic and inter-State/international – supplying goods to NSW consumers would suggest that competitiveness within the marketplace would increase. As a result, the need for government intervention within the marketplace might be expected to decline.

Balancing this, increases in the range, complexity and diversity of consumer goods and services may imply that greater regulatory vigilance is required. Reasons for increased regulation could be to ensure that domestic safety and fitness for use standards are satisfied, especially in relation to goods supplied from jurisdictions where production standards are inferior to those from domestic sources.

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9 ie, firms might trade in a person's natural name or, unlawfully, fail to register a business name and therefore would not appear on the Register of Business Names.

10 It should, however, be emphasised that incorporated companies are not required to register a separate business name—in this respect, the number of traders in NSW is likely to exceed the number of registered business names.

11 As of 30 October 2001, these were the most recent figures available to the public from the Australian Bureau of Statistics on a non-subscription basis in relation to NSW Gross State Produce. Refer to www.abs.gov.au.

3.4.2. Electronic Commerce

The emergence of electronic commerce on the Internet has introduced a new dimension to the marketplace. It allows consumers and traders to undertake transactions by electronic means, crossing geographical borders into a global marketplace. While providing a spur to competition, such trans-border transactions also raise risks of fraud, influx of unsafe or defective products and services, and delivery problems.

The bypassing of jurisdictional boundaries raises questions about the extent to which existing consumer protection laws apply in the electronic trading environment—most Australian legal rights are difficult to enforce outside Australia. Complicating this further is the difficulty consumers may have establishing the geographical location of a trader at the time of a transaction. As the trader's location usually determines jurisdiction, there are implications for enforcement of the law and consumer access to dispute resolution and redress. Potential also exists for unscrupulous traders to take advantage of this uncertainty by misrepresenting their location. The issue of management of cross-jurisdictional disputes is discussed more fully in respect of the domestic market in the next section.

Another opportunity that arises for the unscrupulous trader in the electronic marketplace concerns the inability of the consumer to examine goods and services before purchase. Consumers are at risk of making poor choices in this shopping environment because they are unable to exercise the right to 'informed choice' through direct inspection, to establish true colour, quality, size and so on.

The electronic marketplace is a rapidly changing and complex environment. Consumer protection will require resolution of jurisdictional issues, accurate consumer information and the integrity of the electronic payment systems that support it. While such issues are beyond the scope of this review, it is sufficient to note that electronic commerce is likely to play an increasingly important role in the NSW marketplace.

3.4.3. National Consistency

Although each State and Territory has legislation in place that substantially mirrors the Commonwealth *Trade Practices Act* 1974, there are variations between the States and Territories.

A national Audit of Consumer Protection Laws undertaken by the Commonwealth in 1997 highlights, in its First Report, differences in the ways in which 'consumer' is defined by each State and Territory. The definition of consumer determines whether the provisions of the legislation will cover particular types of transactions. The lack of uniformity creates difficulties for businesses that may, as a result, have different obligations to different clients, depending on their geographic location. This results in increased costs to business and is therefore relevant to this Review.

The lack of consistency is also a potential problem for consumers who may be entitled to varying degrees of protection in different jurisdictions. For example, if a consumer in New South Wales purchases goods on the Internet, the marketer may be in Queensland and the supplier in South Australia. The applicable law will usually be the law of the State in which the trader is located. The rights of the consumer in that situation may therefore be determined by the definition of "consumer" in another state.

In addition, there are minor differences in other provisions of the *Fair Trading Act*s that the Commonwealth has suggested be reviewed with a view to achieving greater uniformity.

All jurisdictions are involved in discussions on the above issues so that this Competition Policy Review will have the benefit of those discussions in formulating proposals for any change. However, the Commonwealth has stressed that it is not promoting uniformity for its own sake, but that any change to enhance uniformity should result in net public benefit[12].

The Second Report of the national audit deals with inconsistencies between States and the Commonwealth in post sale consumer protection provisions. Unlike some of the other jurisdictions, this set of 'mirror' provisions is not contained in the *Fair Trading Act* but is reproduced in the *Sale of Goods Act* 1923, an Act administered by the Attorney-General's Department. Nevertheless, consumers are likely to approach the Department of Fair Trading for assistance in dealing with post-sale problems, so that the Department of Fair Trading has an interest in the outcome of the report. An additional inconsistency arises because the *Sale of Goods Act* does not apply to services, and so does not fully mirror the *Trade Practices Act* provisions.

3.4.4. Trans-Tasman Mutual Recognition Agreement

The Australian *Mutual Recognition Agreement* (1993) provides for the recognition within each State and Territory of regulatory standards adopted elsewhere in Australia regarding goods and occupations. The *Mutual Recognition Act* 1992 (Cth), which gives statutory force to the agreement, is based on the premise that the product and occupational entry requirements of one jurisdiction meet community expectations and should be acceptable in any other jurisdiction. The aim is to foster the development of a common national market for goods and services.

A new trade agreement between New Zealand and Australia, that extends internationally the existing Australian *Mutual Recognition Agreement*, has implications for the regulatory control of unsafe products in Australia. The *Trans-Tasman Mutual Recognition Arrangement* (the Arrangement) seeks to reduce legal barriers to the movement of goods and service providers between New Zealand and Australia.

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12 Department of Industry, Science and Tourism, *National Audit of Consumer Protection Laws*, First Report.

Under the Arrangement, mutual recognition principles affirm that goods that can be legally sold in New Zealand can be legally sold in Australian jurisdictions, and vice versa, without the need to meet certain requirements relating to the sale of imported goods. In respect of the sale of products, the Arrangement deals with standards covering characteristics like quality, size, strength, composition and technical performance as well as to assessment to ensure that products meet the standards. An example of this is bicycle safety helmets. Mutual recognition requires each jurisdiction to recognise the product safety standards of the other unless an exemption is justified.

Some areas of regulation such as quarantine and endangered species, firearms, fireworks and gaming machines are permanently excluded from the Arrangement. Other categories of goods that could endanger public health and safety or the environment, and which are subject to significant differences in regulation across the Tasman (therapeutic goods, hazardous substances, industrial chemicals and dangerous goods) are covered by the mutual recognition principle but are exempted either permanently or for a limited period of time. For these goods, governments will be required to align Trans-Tasman standards with international standards.

Australian safety standards were exempted from the application of the Arrangement for twelve months from its commencement (May 1998) while a review process was undertaken. NSW has reviewed the exemption for product safety standards for Child Safety Restraints and for Sunglasses and Fashion Spectacles. Exemptions for child restraints and sunglasses will continue to be in place pending further consideration.

3.4.5. New Economy Products—Trends in Consumer Regulation

A study on Canadian consumer protection policy undertaken by the University of Toronto noted that the pace of demand for, and supply of, products is increasingly driven by unprecedented innovation in information technology and 'content' segments of the marketplace[13].

Nowhere is this phenomenon more evident than in the so-called new economy marketplace. With the convergence of information technologies such as mobile telephony, Internet and e-mail, and broadcasting, consumers face a dazzling array of choices. Moreover, as these hitherto discreet services converge to give rise to common information platforms, the jurisdiction of State fair trading agencies may decline. In its place, the jurisdiction of the Commonwealth – in terms of telecommunications, broadcasting and Internet regulation – will increasingly apply.

However, whereas State-based consumer protection agencies have tended to investigate complaints made by consumers on an individual transaction basis, Federal regulation tends to apply to industry practices as a whole. Mechanisms have

[13] Hadfield, G *et al*, 'Rethinking Consumer Protection Policy', Faculty of Law, University of Toronto, August 1996.

often been established to address consumer complaints within these new marketplaces, by industry groups such as the Telecommunications Industry Ombudsman.

Taken together, these developments are likely to have far-reaching implications for the consumer marketplace and its regulation.

4. Regulation of the Marketplace

The preceding chapter described a changing consumer marketplace in New South Wales and demonstrates a trend towards national and global markets generated, in part, by the growth in electronic service provision.

The challenge to government is to facilitate an innovative and competitive trading environment while ensuring that consumers have adequate protection from unfair practices such as misleading and untruthful information, the sale of unsafe products or, indeed, fraud.

The principal legislation that provides such protection, the *Fair Trading Act*, has been amended over the years to deal with specific trading practices not in evidence when the Act was drafted and which have, over time, caused detriment to significant numbers of consumers. These practices were not caught by the more general provisions of the Act. The *Door to Door Sales Act,* however, has been retained in essentially the same form since its enactment in 1967.

This chapter will briefly describe the functions of those Acts in relation to the trading of goods and services in New South Wales.

4.1. Regulatory Objectives

This section aims to explain the purpose of the *Fair Trading Act* and the *Door to Door Sales Act*. In general terms, it provides a rationale for consumer protectionism and for the regulation of trade between traders and consumers in the NSW marketplace. It does so from market efficiency and social justice perspectives.

4.1.1. Regulatory objectives of government

This section examines the objectives of government in the regulation of the marketplace. It considers why government imposes regulation upon private markets to achieve policy objectives that could not be achieved in the absence of government regulatory intervention. In so doing, the section sketches the various policy issues affecting public regulatory objectives as they relate to economic development and social equity.

Competitive markets for goods and services efficiently allocate the economy's available resources. However, not all markets work competitively. It is when markets fail to produce a competitive (and therefore economically efficient) outcome that a case may be made out for government intervention. The term 'market failure' covers the following situations[14].

[14] Cabinet Office, Regulatory Review Unit, *From Red Tape to Results, Government Regulation: A Guide to Best Practice* (1995) at 27, 28.

The term 'monopoly power' is used in relation to situations where producers can restrict output and set prices at higher than competitive levels. As well as covering situations of true monopoly – a single producer – it can apply to situations where there is more than one producer if, as a group they can take effective collective action to benefit themselves at the expense of consumers.

Just as monopoly power can exist in markets with several producers, care must be exercised when assessing the need for intervention on the basis of monopoly power in markets with few participants. The apparent lack of competition in a market does not always mean there is a need for regulation or other forms of intervention to overcome monopoly power. Monopolistic or oligopolistic industry structures may, if the market is contestable, have similar prices to those that would exist in a more obviously competitive market. With contestable markets, the ease of entry and exit by other firms - or the threat of it - ensures that firms in the industry set competitive prices. If these conditions exist, the case for regulatory intervention on monopoly pricing grounds can be weak.

Market failure in the form of inadequate information includes situations where suppliers do not make available to consumers the information they need to make a decision about whether or not to purchase a good or service. Without knowing all the relevant facts, consumers may be misled by producers into buying a good or service which does not meet their needs. Reducing the costs of obtaining information and enhancing the flow of information to consumers reduces the ability of suppliers to mislead consumers while increasing the efficiency of the market. Adequate information can also reduce the occurrence of mistakes by consumers.

Regulation to improve the quality or amount of information available may be desirable where market forces would not ordinarily make such information available. There may, for example, be a case for requiring food manufacturers to disclose food additives which are potentially harmful to consumers if such information is unlikely to be volunteered. On the other hand, regulation to improve consumer access to information may not always be warranted. For example, information may already be freely available through the news media, consumer groups, public health agencies and similar services.

Central to these considerations is the definition of the term 'regulation'. The Organisation for Economic Co-operation and Development (OECD) defines regulation as:

> "the instruments by which governments place requirements on enterprises, citizens, and government itself, including laws, orders and other rules issued by all levels of government and by bodies to which governments have delegated regulatory powers"[15].

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[15] OECD, *Draft Report to Ministers on Regulatory Reform* (1997).

In its 1997 report on regulatory reform, the OECD explained the different categories of regulation:

- *Economic regulation* intervenes directly in market decisions such as pricing, competition, market entry or exit. Regulatory review aims increase economic efficiency by reducing barriers to competition and innovation, often through deregulation and use of efficiency-promoting regulation, and by improving regulatory frameworks for market functioning and prudential oversight;

- *Social regulation* protects public interests in such areas as health, safety, the environment and social justice. The economic effects of social regulations may be secondary concerns (or even unexpected), but can be substantial. Regulatory review aims to verify that regulation is needed, and to design regulatory and other instruments such as market incentives and outcome-based approaches, that are more flexible and effective, at lower cost; and

- *Administrative regulations* are formal administrative formalities – parochially described as 'red tape' – through which government collects information, registers and licences business activity, and intervenes in economic decisions in the marketplace. This form of regulation can have significant impacts on the operation of markets.

4.1.2. Objectives of the Legislation—A Rationale for Regulatory Intervention in the NSW Marketplace

Since the latter part of the 20th century, emphasis has shifted from the over-regulation of the marketplace to achieve government policy objectives. In the context of Australia, this has been an integral feature of the sustained goal of micro-economic policy. Since the mid 1980s, for example, Australia's financial system was opened to external financial traders, the Australian dollar was floated and significant changes have occurred in relation to the broadening of Australia's trade profile.

Governments around the world look to the marketplace to ensure that goods and services are produced which are appropriate to the demands of consumers. Markets can be an effective mechanism for resource and product allocation provided that (a) consumers are armed with full, or at least adequate, knowledge about the nature of goods and services and the terms of the transaction with the supplier, and that (b) traders compete fairly with each other. However, this may not occur because of assymetrical information and dissimilar bargaining positions. Rather, transaction costs are likely to be high in a marketplace where consumers cannot be confident about the nature of goods and services consumed, their reliability or safety.

The underlying principle is that well-informed consumers know best what goods and services will satisfy their needs and wants. In economic terms, society achieves its optimal 'welfare' outcome when individuals are free to pursue their own best consumption options. Producers who satisfy the needs and wants of consumers are

able to have a 'derived demand' for the resources used to produce these goods and services. In other words, the efficient allocation of productive resources in a market economy relies upon the informed choices made by consumers and the competitive behaviour of market participants. Legislation such as the *Fair Trading Act* and the *Trade Practices Act* play an important part in facilitating pro-competitive conduct and the efficient operation of the economy.

In this respect, throughout the 1970s and 80s Australian governments established Departments/Office of Fair Trading or Consumer Affairs to 'temper' the excessive characteristics of the private consumer marketplace. In New South Wales, the then Minister for Labour and Industry, the Hon Sid Einfeld, MLA, established the first Department of Consumer Affairs. In 1995, the Department of Fair Trading was established, comprising the former Department of Consumer Affairs, Office of Real Estate Services, Building Services Corporation and the Registry of Co-operatives. The Department's strategic intent is for NSW to be recognised for value and fairness in the marketplace. This intent is to be achieved through:

- delivering services that foster fairness and ethical trading in the marketplace;
- developing conditions which create equity and balance in the relationship between traders and consumers; and
- leading in the development and implementation of consumer protection policy throughout Australia which creates a vigorous and competitive marketplace.

4.2. The Fair Trading Act

The application of the Act is broad. It applies to all transactions between a supplier of goods and services and a consumer; that is to say where the consumer is not acting as a commercial personality. An exception to this is where the business is a farming undertaking. The Act also applies where a consumer acquires an interest in land. There is no monetary limit above which the Act ceases to apply. After the transaction is completed, the *Sale of Goods Act* also provides post sale consumer protection and issues related to the suitability of goods or services for the purpose for which they were bought.

The *Fair Trading Act*:

- requires traders to provide consumers with truthful information;
- prescribes information and practice requirements;
- prohibits unfair practices;
- provides for redress and enforcement; and
- provides protection against unsafe goods.

4.2.1 Truthful information

The requirements to provide truthful information are contained in Part 5 of the *Fair Trading Act* and these are mirror provisions of those in the *Trade Practices Act*. The Act regulates both the conduct and representations of traders. Essentially, conduct must not be misleading and deceptive, or likely to mislead and deceive

(section 42). These provisions are broadly drafted. They have been described, with reference to the equivalent provision in the *Trade Practices Act*, as the single most important development directed at ensuring that truth is conveyed as essential information in the Australian economic system[16].

As well as conduct, the Act prohibits false representations (section 44), but is specific in its coverage. For example, a person must not falsely represent that goods are new (44(c)), or make a false or misleading representation concerning the place of origin of goods. Recent amendments have extended this prohibition to false and misleading representations about a person's rights and obligations in relation to residential parks and retirement villages (44(l) and (m)).

The prohibition of misleading conduct and false or misleading representations extends to sales of land; the offering of employment; the availability and profitability of setting up businesses from home and to the cost of goods and services being promoted.

In essence, these provisions aim to ensure that consumers can make rational choices of products, confident that the information provided by the trader which has influenced their choice, is truthful.

4.2.2. Prescribed information and practices

While the "truthful information" provisions provide a minimum level of fairness in the behaviour of traders, some consumer transactions warrant more than just a requirement that information about a product or service must be correct. This is because the characteristics of the product or its care may not be apparent until after purchase, for example in relation to fabric. In such cases, the Act specifies either the type of information that must be given or the outcome that is to be achieved in respect of those transactions.

Section 38 of the Act provides for regulations to be made to prescribe product information standards for specified goods. These standards ensure that appropriate information is attached to products so that consumers have access to essential information which would not be apparent from examination of the article, or known to the retailer. An example of this is fibre content of textiles and care labelling. A minimum standard for labelling an article is therefore prescribed.

Information that must be given to a consumer is also set out in the Act in relation to lay-bys (Part 5B). The Act sets out the rights and obligations of the supplier and the consumer for this type of purchase, which involves progressive payment for an item over a short period of time and the goods not passing to the buyer until the last payment is made.

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16 Francey N, 'Section 52: Its Rationale, Justification and Deficiencies—and Some Suggestions for its Improvement', (Sept 1997) 5 *Trade Practices Law Journal* 162.

The rights of a consumer are also clearly stated with respect to dual pricing, a situation where there are two prices on an item for sale. In such cases the Act requires that the item be sold for the lower of the two prices.

Where there are industries with a history of consumer complaint, as opposed to individual traders, the *Fair Trading Act* provides a mechanism for dealing with the industry as a whole, rather than individual traders, by developing a code of practice. Codes can be created to guide professional development or for adoption by an industry on a voluntary, advisory or mandatory basis. However, the Act provides a power to prescribe mandatory codes of practice in industries where problems persist.

Mandatory codes prescribed under the *Fair Trading Act* outline industry specific minimum standards of legal behaviour in respect of practices of direct concern to consumers. They interpret, in detail, fair trading laws in a way that is relevant to industry and to the consumers of its product. The Act requires that a code should be drafted in consultation with interested parties. A mandatory code is a regulation made under the *Fair Trading Act* and therefore has the status of law. While a number of mandatory codes have been made under the Act, specifically with respect to education export, relocatable homes and retirement villages, those codes have now been incorporated into sector specific legislation.

4.2.3. Prohibited practices

Sections 4.1.1 and 4.1.2 above describe how the *Fair Trading Act* places conditions on the way transactions can be conducted. There are some practices, however, that are considered, by their nature, to be unfair and these practices are prohibited by the Act.

Some of these practices fall into the category of "scams" notably where the trader promises a reward for the consumer's participation in a scheme which is never realised. Schemes which fall into this category, and which are banned, are pyramid selling, referral selling and trading stamps.

Other practices such as offering gifts and prizes without intending to provide them in order to entice customers into a store, or bait advertising, which advertises a low priced article which is not available when the customer calls, are also banned. Similarly, the Act makes it an offence to assert a right of payment from consumers who have received goods and services that were not requested. Recipients are not liable to pay for the goods nor are they liable for any damage to the goods. The onus is on the supplier to collect the goods. A related issue is the supply of unsolicited credit and debit cards, which, while it does not purport to impose a charge on consumers, has the effect of encouraging indebtedness in the unwary and this practice is prohibited.

The Act also prohibits undue harassment and coercion in connection with the supply of, or payment for, goods and services. The effectiveness of this provision has been hampered by the term "undue" harassment. In relation to that part of the

provision which deals with payment, guidelines on appropriate practices have been developed by the Commonwealth in order to provide greater protection against the practices of the industry sector dealing in debt recovery.

Paragraph 4.1.1 outlined the provisions of section 42, misleading and deceptive conduct, and its importance in the marketplace. Another such provision, unconscionable conduct, is similarly broadly drafted, but, in contrast to section 42, the provisions which prohibit such conduct have tended to be interpreted or applied narrowly. The doctrine of unconscionability, under the law, refers to circumstances where the stronger party takes advantage of the weaker party in the formation of a contract which is unfair in the circumstances. The law has historically taken the view that the weaker party must show special disadvantage in order that a contract should be declared unconscionable, however, in order to assist in the determination of such matters in a fair trading environment, the Act lists matters to which the Court should have regard when making a determination. These include: the relative bargaining strengths of the parties; whether unnecessary conditions are imposed; whether the customer was able to understand the relevant documents, whether undue pressure was exerted on the customer, and so on. The list is not exhaustive.

In contrast to the rest of Part 5, the term "customer" is used in place of "consumer", and there is no definition of "customer" in the Act. A distinction is made in section 43, however, that the section only applies to goods or services of a kind ordinarily acquired for personal, domestic or household use, unlike the broad definition of consumer which has no such restriction. Section 43 is, therefore, inaccessible to businesses in their dealings with each other.

4.2.4 Redress and enforcement

Access to redress and enforcement under the Act ranges from the provision of information to consumers, to civil and criminal consequences pursued through the courts. The Department of Fair Trading can also refer complaints to other authorities or bodies.

Redress is accessible to consumers through either the Consumer, Trader and Tenancy Tribunal or the courts, depending on the type of breach. Claims may be made for compensation for loss or damage through the forum designated by the Act. In the case of unconscionable conduct, the application can only be made to the Supreme Court. A recent amendment allows consumers adversely affected by a contravention of a prescribed code to apply to the Consumer, Trader and Tenancy Tribunal both for compensation and for an order that conduct be discontinued and action taken to rectify the consequences of the contravention.

Consumer redress can also be achieved by the Department of Fair Trading investigating complaints and negotiating on the consumer's behalf without recourse, in the first instance, to a court or Tribunal.

As well as achieving redress for the individual, the Act empowers the Director-General of the Department to take enforcement action either as an administrative action, or through the courts. Administrative actions include the power to issue a penalty notice for a contravention of sections 32 or 40 of the Act, and to suspend a licence where there are reasonable grounds to believe the conduct of a licensee is such that the Act authorises suspension or cancellation. The Director-General may accept written undertakings in connection with a matter in relation to which the Director-General has a function under the Act. The Director-General may also require written undertakings with respect to compliance with any code of practice which is made under the *Fair Trading Act*. Where the trader refuses to give undertakings, the Director-General can apply to the Consumer, Trader and Tenancy Tribunal for appropriate orders.

For other contraventions of a serious nature the Director-General can apply to the Supreme Court to grant an injunction restraining a person from trading, or to put conditions on the person's ability to trade. If the contravention is in respect of advertising, the Court can require corrective advertising to correct offending material and to advise consumers of their rights. The Director-General can apply to the Court to freeze the bank accounts and other assets of people who breach the legislation to prevent the transfer of assets outside New South Wales and to appoint a receiver or Trustee.

The Director-General may, in addition, prosecute breaches of the legislation. The Supreme Court can impose a maximum penalty of $110,000 for corporations and $22,000 for a person other than a body corporate. Most actions, however, take place in the Local Court where there is a maximum penalty of $5500.

The Act gives shared power to the Minister for Fair Trading and the Director-General to name persons who supply unsatisfactory or dangerous goods or services, or who engage in unfair practices.

Power is granted to the Minister to issue a public notice in relation to potentially dangerous goods; to make an order prohibiting or restricting the supply of specified goods, and to order the recall of defective goods. The Act empowers the Minister to intervene in court proceedings under the *Fair Trading Act* or any other legislation administered by the Minister. The Minister thereby becomes a party to the proceedings.

4.2.5 Protection against unsafe goods

The *Fair Trading Act* deals with safety issues by setting safety standards for production of specified goods, restricting or prohibiting the supply of dangerous goods and providing for the recall of defective goods. These provisions are based on the product safety provisions of the *Trade Practices Act*.

The *Fair Trading Act* also establishes the Products Safety Committee (section 24). The role of the Committee is to conduct investigations into dangerous goods and provide advice to the Minister for Fair Trading on the need to ban or recall goods.

At the conclusion of an investigation, the Minister may act on the Committee's recommendation by making an order to ban and/or recall the goods, or by recommending the introduction of a product safety standard.

The *Fair Trading Act* provides the power to make regulations to prescribe standards for product design and manufacture to ensure that products are safe for ordinary use. The Act makes it an offence to supply goods which do not meet the standard. Standards are generally imposed where a risk of injury is associated with the use of the goods. The product safety provisions allow for the imposition of testing requirements on manufacturers to ensure that goods are safe before they enter the marketplace. A product standard may include requirements as to performance, contents, design, construction, packaging, testing of goods, durability and warnings and instructions to accompany the goods.

If there is a need to remove a dangerous product from the marketplace immediately, the Minister may make an interim order prohibiting or restricting the supply of a product for up to three months. The Act also empowers the Minister to permanently ban the supply of a product if the Products Safety Committee recommends such action, after consideration of a report of an authority of the State, or if such a ban is consistent with one imposed by the Commonwealth or another jurisdiction.

A permanent banning order and a recall may be issued simultaneously. This provision allows the Minister to serve an order on a supplier of dangerous goods requiring that the supplier recall the goods; advertise the defect to the public; and/or undertake to repair or replace the goods or refund the purchase price. The Act also allows for voluntary recall. Compulsory recall is the option of last resort where voluntary recalls have not been undertaken or have been inadequate.

4.3. The Door to Door Sales Act

The *Door to Door Sales Act* 1967 regulates unsolicited door to door credit sales of goods and services. The aim of the *Door to Door Sales Act* is to deal with problems which can occur when transactions are conducted in settings which are not normally places of business and where the seller is physically present with the consumer. Problems can arise in these situations because:

- consumers do not have adequate information about the goods or services being sold door to door, or access to information about the price and quality of similar products;
- some direct sellers take advantage of the unequal market power of the participants in a direct selling transaction by using high pressure, and possibly misleading, sales techniques to persuade consumers to make on the spot decisions;
- consumers are unable to "walk away" and may not feel comfortable asking the sales person to leave the premises; and
- salespeople are sometimes difficult to trace in the event of post-sale problems.

To overcome these problems the *Door to Door Sales Act* offers protection to the consumer who enters into a credit agreement to buy goods and services by providing for:

- a cooling off period of 10 days during which time the consumer can cancel the contract;
- the agreement to be in writing and signed by both parties; and
- the purchaser to be given a copy of the signed agreement, together with a notice of their rights and a cancellation document.

The legislation essentially allows consumers to reconsider a credit purchase that they may not otherwise have made if they were in a place of business.

4.4. State-Territory Regulation

While each State and Territory has legislation in place which substantially mirrors the Commonwealth *Trade Practices Act 1974*, there are many inconsistencies between jurisdictions.

The inconsistency in the application of the legislation is, perhaps, the most important. The definitions of “consumer” in Commonwealth, State and Territory fair trading legislation vary significantly. Some are based on the value or nature of the goods or services acquired, as in the *Trade Practices Act*, while others are based on the person acquiring the goods or services or the purpose for which the goods or services are acquired.

The *Trade Practices Act* definition is closely mirrored by Victoria and Tasmania. In the TPA, “consumer” is defined by reference to the value of the transaction (currently $40,000) or the nature of the transaction, that is, the use for which the goods and services are currently acquired. In the result, sec 4B of the *Trade Practices Act* provides that a “consumer” is a person who has acquired goods or services of less than $40,000 in value unless they were for domestic consumption purposes. The legislation will not apply to goods acquired for the purpose of resupply, using up, or transformation in trade or commerce or in a process of manufacture or production. In not expressly excluding business transactions, these provisions recognise that in many instances, business needs the same level of protection that is afforded to non-commercial consumers.

The South Australian provision is also based on this model, however, the re-supply qualification is intended to apply only to goods of a kind ordinarily acquired for personal, domestic or household use. There is a separate definition of consumer which applies to the Parts which do not mirror the *Trade Practices Act.*

The Queensland definition is based on the value of the transaction, but the nature of the transaction is replaced by a test based on the person acquiring the goods and services. In this case the person is a consumer if he or she is an individual and acquires the goods, services or interest other than for a business; or the price of the goods is not more than $40,000.

Western Australia has a more complicated definition of consumer that mirrors the *Trade Practices Act* definition, but qualifies it by stating that a person is not a consumer when they purchase goods in the course of, or for the purpose of, carrying on a business.

New South Wales, Northern Territory and ACT have the broadest definition of consumer as it encompasses any person who acquires goods or services from a supplier. The re-supply exclusion in relation to goods appears to be broader in New South Wales and the Northern Territory as the exclusion is stated to apply to re-supply "in the course of a business" while ACT has no such qualification.

The differences in the definition of "consumer" for the purposes of applying the Act are particularly relevant in electronic or other distance buying, where there may be differences in coverage of the Act in the two or more jurisdictions where the transaction takes place. Nevertheless, there appears to be no strong impetus for jurisdictions to harmonise their "consumer" definitions, despite a co-ordinated effort by the Commonwealth in conducting its audit of consumer legislation.

In its First Audit Report, the Commonwealth raised a number of issues for discussion as to the merits of harmonising the wording of the "mirror" provisions of the state *Fair Trading Act*s and the *Trade Practices Act*. Finally, it was decided that change for its own sake should not be pursued, but that if any provision were to be reviewed to improve its effectiveness, then it would be an opportunity to redraft on a uniform basis.

5. Impact on Competition

5.1. Truthful Information

The *Fair Trading Act* includes a range of provisions which prohibit practices in trade or commerce that seek to exploit or misinform the community, such as deceptive conduct, false representations and misleading advertising.

The general truthfulness provisions which are described in the next section of the paper protect business consumers as well as consumers of 'domestic' goods and services. The truthfulness provisions are stated in broad, general terms in the *Fair Trading Act*. This approach ensures that the law is flexible enough to deal with changing marketing techniques rather than needing to be amended regularly to deal with specific new practices. Broad provisions are also considered to be less restrictive of competition than those that require specific behaviour. However, this broad approach can also lead to uncertainty on the part of business, consumers, legal advisers and courts as to how a provision should be interpreted. This uncertainty could result in higher legal costs in the event of a dispute.

Having said this, the National Competition Council (the NCC), in its 'Third Tranche Report' dated February 2001, determined that where State and Territory legislation mirrors Part V of the *Trade Practices Act*, it is not necessary to review the State-equivalent provisions. That is, the Council determined that Part V, and its equivalents (in the case of the NSW *Fair Trading Act*, Division V), is pro-competitive. It is, therefore, not necessary to undertake a net public benefit assessment of these or other provisions mirrored in Part V.

However, the Steering Committee agreed that, notwithstanding the NCC's determination, where it determined as part of its review or through submissions that a provision required amendment, it would recommend so.

5.1.1. Misleading Conduct

Section 42(1) of the *Fair Trading Act* provides that a person shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive. Section 42 of the *Fair Trading Act* mirrors section 52 of the *Trade Practices Act 1974*, Division V. Generally, traders are required to tell the truth or refrain from giving an untruthful impression. Failure to disclose relevant information may, in some circumstances, also be a breach of the provision—for example, that a cooker requires a gas connection rather than power by electricity. Sub-section (2) specifically provides that the provision is to be read broadly.

Section 41 of the Act provides that where a person makes a representation with respect to any future event, and the person does not have reasonable grounds for

making the representation, the representation is taken to be misleading. In these circumstances, the onus is on the person making the representation to show that they had reasonable grounds on which to base the representation.

Section 49 of the *Fair Trading Act* prohibits a person from engaging in conduct which is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods. In addition, section 50 of the Act prohibits a person from engaging in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services. Section 54 prohibits a person from making false or misleading representations about the profitability, risk or other important aspects of home-operated businesses, for example an activity that requires performance of work at or from home or a scheme that requires investment of money and associated work by the investor.

In view of the NCC's determination, the anti-competitive effect of the misleading conduct provisions are not assessed.

5.1.2. False Representations

Section 44 of the *Fair Trading Act* provides that false claims may not be made by a trader in relation to the:

- standard, quality, value, composition, style, model, history or particular use of goods;
- standard, quality, value or grade of services;
- whether goods are new;
- agreement of a particular person to acquire goods or services;
- sponsorship, approval, performance characteristics, accessories, uses or benefits of goods and services; and
- sponsorship, approval or affiliation of a person.

Section 44 also specifically prohibits false and misleading claims about:

- the price of goods or services;
- the availability of repair facilities or spare parts;
- the place of origin of goods;
- a buyer's need for goods or services; and
- the existence, exclusion or effect of any condition, warranty, guarantee right or remedy.

Section 44 of the *Fair Trading Act* mirrors section 53 of the *Trade Practices Act*. In keeping with secs 41 and 42 (noting the NCC's determination), section 44 and the other related provisions concerning misrepresentation are also considered to be pro-competitive. However, the Department has experienced difficulties with the interpretation of a number of provisions within the general area of misrepresentation.

In relation to section 44(e) of the Act, which provides that a person must not represent that goods or services have sponsorship or approval that they do not have, the question has been raised as to whether, where only a logo or symbol is displayed without any accompanying words, a representation is being made that the goods or services have the approval or endorsement of the organisation identified by the logo. While the owner of the logo may be able to take civil action for 'passing off', it is difficult to prosecute for an offence where only a *visual* logo or symbol is used. This inability to take action may impact on competition by allowing sales to be attracted away from genuine suppliers. More particularly, however, consumers may be misled into believing that the goods or services that they have purchased are warranted to carry some accreditation or possess some quality associated with the use of the logo in legitimate, truthful circumstances.

The Steering Committee considered that from both perspectives, this was an unsatisfactory situation. However, in her submission to the review, Dr Gail Pearson noted that if greater clarity were sought in relation to the operation of section 44(e), "represent" should be defined in section 4 to include pictorial representation. Presently, section 4 does not include a definition of "represent" or "representation". No other submissions identified this as a deficiency.

Nevertheless, the Steering Committee was persuaded by the argument advanced by Dr Pearson that a definition of "represent" ought to be included in the Act. This would have the advantage of ensuring consistency in applying the Act's provisions to those making representations in trade and commerce. In addition, the Steering Committee formed the view that the substantive position ought to be amended to ensure that representation as to approval or sponsorship may not include untruthful pictorial images.

Recommendation 1: That a definition of represent be contained within the *Fair Trading Act*.

More generally, although the truthfulness provisions of the Act, in particular section 44, provide a fairly comprehensive list of prohibited representations, the Department does at times encounter serious trader misconduct which is not specifically prohibited in any of these provisions. An example is a case where a trader advertised "40 watt" speakers at a specified price. Consumers arriving at the store found that what they would get for their money was actually two separate 20 watt speakers. The Department had to use a combination of a number of the Act's provisions to pursue the matter.

In this respect, the Australian Retailers' Association argued in its submission to the Review that:

> "It is impossible to specify each and every current or future prohibited behaviour. A broad general application of the Act should be pursued. Only where it is identified that specific behaviour of market practices are not being adequately dealt with under the broad provisions of the Act should specific provisions be identified in the Act."

Moreover, in her submission to the Review, Dr Pearson of the University of NSW Law School, cautioned against introducing an amendment to section 44 where it would necessarily lead to inconsistency with the mirror provision, section 53, of the *Trade Practices Act*. Dr Pearson stated that "[t]here is desirability is preserving the mirror relationship between the *Trade Practices Act* 1975 (Cth) s53 and the *Fair Trading Act* 1987 (NSW) s44 as lack of consistency hinders effective competition". The Steering Committee agreed with this position.

Recommendation 2: That parity be maintained between sections 44 of the *Fair Trading Act* and section 53 of the *Trade Practices Act*.

5.1.3. Publication of Material

Section 60 of the *Fair Trading Act* provides that sections 42, 44 (discussed below), 45 (false representations and misleading conduct in relation to land), 49, 50 and 54 do not apply to the publication of material by prescribed information providers. The function of this provision is to ensure that a publisher of a newspaper or the owner of a radio or television station is not liable for misleading or deceptive conduct or misleading representations in the course of reporting the news or otherwise providing information. The exemption does not apply to representations in an advertisement or which relate to the supply or promotion of goods or services or the sale of land by the media outlet.

In *Carlovers Carwash Ltd v Sahathevan* [2000] (13 October 2000 unr.), the Supreme Court considered an application brought by Carlovers Carwash Ltd to seek an order that a journalist, Mr Ganesh Sahathevan, cease making public comments averse to Carlovers Carwash's business practices. In respect of the case, the Hon Janelle Saffin, MLC made a submission to the Review. Ms Saffin suggested that while the matter was dismissed with costs on substantive hearing, the action amounted to a gag on the journalist's freedom of speech and that it was unfortunate that an interim injunctive order was granted pending substantive hearing by the Court.

Ms Saffin also stated in her submission to the Minister that it is inappropriate that section 42 of the *Fair Trading Act*, despite the protections afforded by section 60, could be used by traders to characterise negative publicity as misrepresentation. Ms Saffin has suggested that section 42 should be amended to clarify that it cannot be used as a basis for thwarting a journalist's freedom to make critical comments about a trader.

In relation to the specifics of the case, it might be noted that the injunction was granted with the defendant's consent. That is, the journalist consented to refrain from distributing further material critical of Carlovers Carwash. In this respect, any amendment to the Act could not fetter the inherent injunctive powers of the Supreme Court. Moreover, the Supreme Court held – in its substantive judgment – that section 42 could not be used to restrain the journalist's rights to express his views.

In light of Ms Saffin's comments, the Steering Committee considered recommending amendments to the Act to ensure that section 42 could not be used by traders to characterise comments critical of them as a form of misrepresentation. In this respect, the Steering Committee was of the view that rather than amend section 42 – and disturb its relationship with the *Trade Practices Act* – it may be appropriate to broaden the terms of section 60 to clarify that comments by journalists and others through media channels could not give rise to a basis for misrepresentation. However, Committee member, Dr Pearson, expressed particular concern about the amendment of sec 60 as any change could detrimentally affect the provision's relationship with the substantive honesty provisions in the Act.

Notwithstanding this, the Steering Committee noted that the Fair Trading Advisory Council was concurrently undertaking an inquiry into so-called 'infomercials', chaired by a former judge, Mr Kim Wilson. As the inquiry's recommendations were not available at the time of finalising this report, the Steering Committee considered that it would not be appropriate to recommend amendment of sec 60 as a part of the NCP Review process. Rather, the Committee agreed that it would be preferable for any amendments to sec 60 to be made as a result of the Advisory Council's recommendations.

Recommendation 3: That section 60 of the *Fair Trading Act* not be amended.

5.1.4. Country of Origin

The *Fair Trading Act*, in section 44(i), prohibits false or misleading representations concerning the place of origin of goods. The Department has sometimes had difficulty following up complaints about country of origin labelling because of legal uncertainties regarding the minimum requirements for country of origin claims. The Commonwealth has addressed this issue by amending the *Trade Practices Act* to clarify the circumstances under which phrases such as "Made in Australia" and "Product of Australia" may be used.

Since the *Fair Trading Act* does not contain similar clarification, courts considering matters under the Act will look to another relevant law, in this case the *Trade Practices Act*, to assist in their determination. Difficulties may still arise in taking action because the new test provided for in the *Trade Practices Act* is cast as a defence. The inconsistency between the *Fair Trading Act* and the *Trade Practices Act* could also result in a competitive disadvantage to incorporated traders and traders operating interstate.

In this respect, the Steering Committee was persuaded that section 44(i) should be amended to mirror the amended provision contained in the *Trade Practices Act*. The committee was especially mindful of the inter-jurisdictional nature of trade in the retail sector and the supply of goods from one jurisdiction in sale in others. Therefore, for the sake of consistency, the committee concluded that it would be

preferable to mirror the country of origin provision as prescribed in the *Trade Practices Act* in the *Fair Trading Act*.

Recommendation 4: That section 44 be amended to mirror the *Trade Practices Act* provision.

5.1.5. Substantiation

In April 2000, the *Fair Trading Act* was amended by the NSW Government to require traders to substantiate claims that they make in advertisements. Division 3A of the Act applies to traders who make false and misleading representations in their advertisements relating to such things as:

- 'get rich quick' schemes and computerised gambling systems promising windfall profits;
- miracle health solutions for weight loss and baldness;
- mail order promotions; and
- unrealistic prices for goods and services, and special deals.

Traders making claims of this nature may be unscrupulous or fraudulent operators with little intention to supply goods as advertised. In circumstances such as these, the amendment allows the Director-General of Fair Trading to issue a written notice requiring a person to substantiate their claims made in a published statement. The trader subject to the notice must comply with its terms within the time specified, by reply to the Director-General in writing, and provide details to substantiate the claims made. It is an offence to fail to comply with the notice or to knowingly provide information that is false or misleading.

Based on the trader's response to the notice, the Department of Fair Trading will be in a better position to assess what action should be taken pursuant to other provisions of the legislation. This might involve obtaining an undertaking from the trader or initiating prosecution action under the Act. In this respect, the substantiation provisions also play an important role in the prevention of potential disputes between traders and consumers by requiring traders to undertake to cease making certain statements in the future.

The Queensland and South Australian *Fair Trading Acts* include substantiation provisions, which can be used to require a supplier to substantiate any published claim or representation they have made. Here the distinction with the New South Wales legislation might be emphasised; while the Director-General of Fair Trading in NSW may require a trader, by written notice, to substantiate a representation made in the marketplace, it is not an offence to fail to substantiate the claim. Rather, the offence is made out when the trader refuses to comply with providing the Director-General with information or knowingly supplies erroneous information.

The submissions received by the Review criticised the operation of the provisions in this regard. For example, not only did the Legal Aid Commission support the strengthening of the provision to make it an offence to be unable to substantiate a

claim or representation made about a good or service, it argued that remedial orders should apply. That is, the Commission suggested that where consumers could demonstrate reliance upon a claim or representation, they ought to be able to seek a remedial order from the offending trader.

On the other hand, the Australian Retailers' Association urged caution. The Association noted that should the provisions be extended to create an offence where a trader was unable to substantiate claims made, there was a risk that consumers or competing traders could utilise the provisions for vexatious purposes. However, the committee was not satisfied that vexatious use could be made of an extended 'substantiation power', more so than any other provision within the Act prohibiting misleading conduct or misrepresentation.

Notwithstanding the somewhat opposing views of the principal submissions on this point, the Steering Committee preferred a balanced approach. That is, the Steering Committee supported the Legal Aid Commission's position that the provisions should be extended to create an offence where a trader was unable to substantiate a claim or representation made in the marketplace, in addition to the current 'mechanical' grounds of breach.

However, the Steering Committee did not support the Commission's recommendation that consumers should be able to seek remedial action in respect of a failure to substantiate claims. The committee considered that such a provision would essentially create a punitive offence in relation to mere conduct as opposed to the effect of the conduct—that consumers could possibly seek damages where no damage was suffered. The committee was satisfied that should a consumer suffer loss as a result of making a purchase based on misrepresentation or misleading conduct, the existing provisions within the Act – and those proposed – would be sufficient to ground an action by the consumer.

Recommendation 5: That Division 3A of the *Fair Trading Act* be amended to provide that a trader, unable to substantiate a claim made in the marketplace, shall be guilty of an offence.

5.2. Prescribed Practices

A number of provisions in the Acts prescribe compulsory information and business practice requirements which are considered desirable but which may not be delivered adequately by market forces alone.

Prescribed practices include requirements to provide certain information to consumers, for example, in the form of product labelling, written contracts and documents outlining consumer rights and obligations in relation to door to door sales and lay-by sales.

5.2.1. Product Information Standards

The *Fair Trading Act* requires compliance with product information standards which ensure that consumers are given information about the quality, nature or appropriate care of certain goods.

Section 38 of the *Fair Trading Act* allows for the making of regulations to prescribe product information standards for specified kinds of goods. The standards ensure that appropriate information is attached to products to enable consumers to make informed purchasing decisions, thus reducing the possibility of deception and enabling them to take health and safety issues into account.

The *Fair Trading (Product Information Standards) Regulation 1997* is prescribed under section 38 of the Act. The Regulation promotes consistency in the provision of product information by requiring conformance with specified Australian and New Zealand Standards. The prescribed standards provide a framework for essential product information to be made available to consumers while at the same time allowing market forces to determine which additional information will be attractive to consumers.

The Regulation requires that textile products, including clothing and household furnishings, are labelled to indicate their fibre content. The format of labels and their position on certain items is also covered. The Regulation also provides for the care labelling of specified goods, such as clothing, household textiles, furnishings and mattresses, depending on what they are made from. The requirement applies to products made from textile, plastic, plastic coated fabrics, suede, skins, hides, leather or fur. The effect of prescribing this information is that purchasers are given information about products which may need specialist care.

The Regulation was amended in 1999 following a review of the care labelling standard by the Commonwealth. The standard was amended to remove unnecessarily restrictive requirements relating to the wording used on care labels. The changes were incorporated into the NSW Regulation from 9 July 1999.

From 24 December 1999, the Regulation was amended to include a product information standard for petrol. The standard requires that service stations display the price per litre of regular unleaded petrol on one or more signs that are positioned and lit so that they will be readily seen by motorists. This standard was introduced to promote greater competition by providing greater petrol price transparency. Section 38 is prescriptive, in that it sets out detailed requirements which must be followed. The requirement to comply with a product information standard results in costs in producing and attaching labels to goods. Such costs are generally passed on to consumers by being factored into the purchase price of goods.

Another form of cost may be imposed on traders by the fact that product information requirements are not uniform between the various Australian States and Territories. As a result, traders operating in the national market may need to

comply with different requirements depending where the goods will be sold. However, traders also receive benefits from the product information provisions, through a reduction in disputes and claims for damages after the sale of a product. Removing some or all of the product labelling requirements could lead to lower costs for industry, however this possible benefit would need to be offset against the potential for damages and other legal actions.

Information labelling provides a range of public benefits, by allowing consumers access to information which may affect their personal health, comfort and safety. Consumers are benefited by being able to:

- avoid fibres for which they have an allergy or other negative reaction;
- exercise choice about types of fibres purchased, for example, on personal, religious or ethical grounds;
- make cost comparisons of products with different fibre content;
- ensure that products are not damaged by the use of incorrect cleaning processes.

One submission to the review suggested that it would be appropriate that national standards be prescribed, given that the market for goods is national. Such an option is not achievable within the context of this review, as it would need to be agreed on by all jurisdictions.

The Motor Traders' Association in its submission expressed support for regulations requiring the provision of beneficial consumer information. However, it described the current petrol information standard as ineffective regulation which does not deliver sufficient or meaningful information to consumers to result in a net benefit. The submission suggests that matters which are not associated with health and safety should be left to market forces to determine what information will be attractive to consumers.

The Issues Paper prepared for this review noted that the product information provisions are sometimes difficult to use when taking legal action for a breach, because of the three-step process which involves reference to the Act, the Regulation and the relevant Standard. One submission noted that this situation is not a problem as long as it is clearly indicated in the legislation. Copies of the Act and Regulation are freely available to consumers and traders via the Internet and libraries. Copies of standards must be purchased from Standards Australia. However, it is unlikely that many consumers or end-line traders would often need to consult the detail of the standard itself.

The Regulation is required to be reviewed every five years under the *Subordinate Legislation Act 1989*. This Act provides that Regulations are repealed after being in operation for five years. Where it is considered that a replacement Regulation needs to be made, the Act requires that a regulatory impact statement be prepared examining the costs and benefits of each provision of the proposed Regulation.

The current *Fair Trading (Product Information Standards) Regulation 1997* is due for repeal on 1 September 2002. It is anticipated that a replacement Regulation and

regulatory impact statement will be prepared for public consultation during early to mid 2002. This will provide an opportunity to consider the content of the standards currently prescribed in the Regulation in detail.

Queensland's *Fair Trading Act* contains similar provisions to the NSW Act for the prescribing of information standards. However, the Queensland legislation allows for information standards to be prescribed for services as well as for goods. To date, no information standards for services have been prescribed under that Act. In fact, it would appear that there are currently no Australian or New Zealand Standards in existence with respect to services. However, it may nevertheless be desirable in the future to amend the NSW Act to provide the flexibility to prescribe information standards for services. Having regard to the terms of review, the Steering Committee declined to make such a recommendation at this time.

The requirements for product labelling address potential information asymmetry between consumers and traders in the marketplace by ensuring that appropriate consumer information is attached to certain products.

Recommendation 6: That section 38 of the *Fair Trading Act* not be amended in view of its satisfactory operation.

5.2.2. Dual Pricing

This provision of the *Fair Trading Act* ensures that consumers cannot be misled into purchasing goods at a price higher than the lowest marked price. Dual-priced goods may not necessarily have more than one price marked directly on them. The provision covers a broad range of pricing methods, including labels, shelves, displays, catalogues and encoding, for example, in a barcode, computer or cash register.

Section 40 of the *Fair Trading Act* prohibits the sale of dual-priced goods at more than the lowest displayed or encoded price. Where the trader is not willing to sell the product at the lower price, they have the option of withdrawing the item from sale. This protects traders from loss due to error (where an incorrect price has inadvertently been displayed) or attempted fraud, for example where a price label from a cheaper product has been placed onto a higher value product by a consumer.

The provision is mainly used in relation to supermarket barcode scanning. The *Voluntary Code of Practice for Computerised Checkout Systems*, administered by the Australian Retailers Association, reinforces the dual pricing provision. It clearly spells out retailers' obligations in this area and applies to a significant range of supermarkets and food stores.

The dual pricing provision does not appear to have any impact on competition, since it applies to all NSW retailers. The provision does not appear to impose any unwarranted costs on traders, given that it is a matter of good business practice to ensure that products and coding systems are accurate. Incorrect pricing would

increase the level of customer complaints a trader receives, thereby increasing complaint handling costs.

The Issues Paper for this review noted that the dual pricing provisions appear to function effectively. The Department of Fair Trading receives few complaints on this subject. The submissions made to the review did not raise any concerns about the effectiveness of the provision.

An alternative option would be to remove the dual pricing provision from the Act. This could result in higher costs for consumers due to trader error, for example, where a product is 'on sale' but the computer encoded cash register still records the higher price, or due to deceptive practices by traders. Removal of the provision would not result in any significant cost saving for traders, given that the demands of the marketplace require that the price of goods be displayed or encoded and taking into consideration potential increased costs due to customer dissatisfaction.

Recommendation 7: That dual pricing continue to be proscribed by the *Fair Trading Act.*

5.2.3. Lay-bys

Lay-by is a form of interest free buying offered by retail stores where the purchase price can be paid in instalments over a fixed period of time. The store retains possession of the goods until the full price is paid.

The *Fair Trading Act* requires that the trader must give to the consumer a written statement containing the terms of the lay-by. The statement must contain details of the purchase price, deposit paid, balance payable, instalment and final payment dates and amounts and any cancellation charges payable by the consumer. The lay-by cannot be cancelled for overdue payment unless the consumer has been given written notice and at least seven days to make the overdue payment. The Act enables the consumer to cancel the lay-by, in which case all payments made must be refunded, after the deduction of a reasonable cancellation charge if this was set out in the lay-by statement.

The requirement to provide a written statement is a cost to businesses. This is not considered to have any particular impact on competition, given that traders are not required to provide the option of lay-by sales for their customers. A degree of flexibility is built into the provision, allowing traders to innovate in order to reduce their costs. Traders are able to decide the precise terms of the lay-by and how to provide the statement to consumers. For example, it may be printed or rubber-stamped on a sales docket, an envelope, invoice or in a booklet. Some larger retailers issue regular lay-by customers with a card encoded with the consumer's personal details, additionally providing them with a copy of the store's lay-by conditions which the consumer is advised will apply to any lay-by purchases made thereafter.

Flexibility is also provided with respect to the amount of cancellation fee which may be charged. The only requirement is that the amount (or a formula for its calculation, such as a per centage) is set out in the statement and that the amount does not exceed the sum of reasonable administrative and storage costs and an amount equivalent to any loss of value of the goods that has occurred since the lay-by was entered into.

The requirement to give consumers written notice and seven further days to make overdue payments results in both costs and benefits to business. The cost of issuing the notice may be balanced by increased likelihood that the consumer will finalise the purchase. The option of immediate cancellation would not significantly reduce the trader's costs, given the costs of refunding payments and returning goods to the shop floor as well as the loss of the sale.

Overall, the lay-by provisions could be considered to provide a benefit to traders by giving consumers confidence in their rights which in turn encourages them to make use of lay-by services on offer, increasing the trader's turnover. One submission to the review noted that, based on anecdotal evidence, the lay-by sales provision appears to work effectively. This is confirmed by the low level of complaints made to the Department about lay-by sales. The fact that traders continue to provide the option of lay-by sales could also be seen as an indicator of the success of the provisions. Moreover, at a time of rising consumer credit use and related indebtedness, the retention of lay-by provisions may serve an important function in assisting consumers to manage their consumption budgets and to plan for longer-term purchases.

An alternative option would be to remove the lay-by sales provisions, leaving consumers to rely on general fair trading rights. It is likely that reputable traders would continue to provide reasonable lay-by terms and to inform their customers of their rights and obligations. In other cases, the reduction in costs to traders might be offset by an increase in the costs of dispute handling.

Recommendation 8: That lay by arrangements continue to be subject to regulation by the *Fair Trading Act*.

5.2.4. Codes of Practice

A code of practice is an agreed set of rules for members of a particular industry to follow to ensure integrity and fair trading in that industry or sector. Codes of practice can be created for adoption on a voluntary or mandatory basis. The key features of any code are strong disclosure provisions and an effective dispute resolution mechanism.

The *Fair Trading Act* enables the prescription of mandatory codes of practice by regulation (Part 7). To create greater certainty within the consumer-trader relationship, these codes outline minimum standards of legal behaviour in respect of industry-specific practices of direct concern to consumers by clarifying rights,

obligations and expectations. In particular, such mandatory codes offer dispute resolution procedures as an alternative to redress through the courts and describe code administration arrangements. They are expressed in plain language. Development of codes under these provisions involves consultation with interested parties and requires an indication that associated traders will abide by the proposed code in their dealings with consumers. Once approved, the code becomes a regulation under law, so all members of the industry are required to comply with it.

The Issues Paper identified a variety of ways in which mandatory codes of practice might restrict competition through barriers to entry or inhibition of trader innovation. Submissions were divided on this issue. The Australian Retailers Association (ARA) suggested that:

> "mandatory codes act as a barrier to entry and therefore are likely to have an impact on competition. Mandatory codes are defacto regulation without the application of the rigours of Parliamentary scrutiny. Voluntary codes on the other hand are likely to be pro-competitive as they largely reflect appropriate behaviour and therefore the benchmark for industry practice."

The ARA also expressed the belief that mandatory codes restricted new entrants into markets which is "usually costly and suppresses innovation". By contrast, the Motor Traders' Association (MTA) suggested that:

> "Whether or not a code of practice constitutes a barrier to entry to the marketplace would depend on the elements and requirements of the code…[The] MTA does not consider that codes of practice inhibit trader/product innovation any more than current statutes."

The NRMA Insurance Group expressed a view similar to that of the MTA by suggesting that the issue of a code being a barrier to entry would have to be addressed on a case-by-case basis. The views expressed in submissions on whether codes had an impact on competition varied considerably dependent on how the term 'code' was being interpreted. It was clear that some organisations were describing the impact of voluntary codes instead of the mandatory codes that are provided for under the *Fair Trading Act*. Variance was also apparent where some organisations compared mandatory codes to voluntary codes, while others compared mandatory codes with specific purpose legislation. Submissions to the Review reveal a general confusion about the nature of the mandatory code of practice and reflect the uncertainties in respect of legal status and legal standing.

The Steering Committee considers that mandatory codes of practice *do* have an impact on competition. Their obligatory nature means that restrictions within codes on how a trader may operate can be compared to restrictions within specific purpose legislation. Accordingly, a mandatory code that prevents certain practices or establishes minimum standards of trading will impact on competition by potentially restricting entry to the marketplace to those who can comply with the standards and by limiting product innovation by the minimum standards imposed. Whether such an impact on competition can be justified is examined below.

A range of problems, both practical and perceptual, has dominated the Department of Fair Trading's experience of mandatory codes prescribed under Part 7 of the Act. Some of these issues are discussed below.

One of the arguments advanced in support of the use of mandatory codes of practice instead of statute law is that a code is perceived as offering more flexibility and sensitivity to market circumstances. As a code is contained within regulation, it can be amended without the passage of legislation through Parliament. Submissions were again divided on whether mandatory codes were more responsive to industry needs than statute law. However, most organisations indicated that codes could be a more flexible instrument provided that they were maintained and updated by the administering agency in conjunction with stakeholders. The view was also expressed that legislation could be amended quickly if there was sufficient government support for changes.

Another argument put in favour of mandatory codes is that they make provision for quick and informal complaints handling and redress mechanisms. Submissions indicated clear support for industry-based dispute resolution suggesting that it was faster and cheaper for both traders and consumers. However, it is apparent that the quality of operation of alternative dispute resolution systems is directly related to how active an industry is prepared to be to administer a code. Goodwill and commitment is necessary to operate and maintain a complaints handling mechanism, and unless adequate resources are dedicated at industry level, such systems may not produce their potential advantages.

Three mandatory codes have been prescribed under the *Fair Trading Act*: the Caravan and Relocatable Homes Park Industry Code of Practice; the Retirement Villages Industry Code of Practice; and the Education Export Industry Code of Practice. While the former Department of Consumer Affairs had responsibility for the enforcement of the codes, they were administered by separate government agencies (within the housing and education portfolios). From the outset, the split of code ownership which separated the government agency administering the subject legislation from the compliance arm of the arrangement established a tenuous framework for the implementation of these codes.

This functional gap posed significant difficulties for the Department of Consumer Affairs whose expertise was not related to the codes for which it bore legislative responsibility. For this reason, responsibility for the Education Export Industry Code of Practice was transferred to the education portfolio. An unintentional resolution to the problem of split responsibility in respect of the remaining two codes occurred through the integration of the Department of Consumer Affairs, the Office of Real Estate Services and other agencies to form the Department of Fair Trading. However, in the latter case, the integration of affected agencies was coincidental and the potential for this difficulty to arise still exists.

The majority of submissions indicated that the appropriate government department should be given the enforcement role for a code within its portfolio area. One submission from a consumer indicated that:

> "The relevant governing body should take responsibility for subject matter administered by them otherwise it becomes very confusing not only for departmental staff but more so for the consumer and the trader."

By contrast, the Australian Retailers Association suggested that the Department of Fair Trading should have a broader "fair trading" responsibility beyond the subject matters administered by the Department. The Steering Committee believes that it is neither efficient nor appropriate for codes administered by another agency to be enforced by the Department of Fair Trading. Such an arrangement can restrict the smooth operation of a code and reduce its effectiveness.

Confusion about the legal status of mandatory codes has also manifested as a significant problem. This state of uncertainty is attributed to factors including the absence of penalties for code breach, the non-Parliamentary process by which the codes are amended and the plainer language in which they are expressed. These characteristics contribute to a perception that a mandatory code of practice is less of a regulatory instrument than other types of legislation. Submissions indicated a mixed view of the effectiveness and legal standing of mandatory codes of practice. The Legal Aid Commission of NSW indicated that it favoured regulation by legislation rather than by codes. It suggests that:

> "negotiations and consultations associated with drafting Codes of Practice have produced documents which, when it came to consumers attempting to take action for breaches of the Code, were not precise enough to establish personal, enforceable rights."

By contrast, the Australian Retailers Association supports the use of mandatory codes. It suggests that:

> "Mandatory codes should only be repealed and incorporated into principal legislation should there be a persistent market failure and dissatisfaction. The current approach of progressing measures from voluntary schemes, voluntary codes through to mandatory codes, regulation and legislation to deal with undesirable behaviour or practices should be adopted."

This perception that the codes, while mandatory, are less restrictive than statutes arose in various submissions to the Review. The legal standing of mandatory codes prescribed under the *Fair Trading Act* has also been questioned in a 1998 judgment by the NSW Court of Appeal in respect of the case of *Murphy v Overton Investments* concerning the Retirement Village Industry Code of Practice. The judgment raised doubts about the effectiveness of prescribed codes of practice as regulatory mechanisms, due mainly to difficulties in enforcement. It highlighted the conflict between the adoption of an instrument set in a broad framework, employing a flexible format to set guidelines for good practice (a code), and the setting of rules

that require mandatory compliance. In this matter, contrary to the residence contracts, village residents sought orders to prevent the village management from collecting payment from them for increases in the village's expenses, on the grounds that residents had not been properly consulted about changes to the village budget, as required by the Code. Significantly, the Court of Appeal decision confirmed the predominance of contractual rights over the Retirement Village Industry Code of Practice.

At present, there are no codes of practice prescribed under the *Fair Trading Act* in NSW. In recent years, National Competition Policy reviews have been conducted into the regulation of the NSW Retirement Village Industry and the Caravan and Residential Parks Industry. Both reviews identified substantial market failure and prevailing consumer dissatisfaction with the consensual processes provided by the mandatory Codes. As a result both codes have been repealed and their key provisions embodied in legislation. The Education Export Industry Code of Practice has been replaced with the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students which is prescribed under the *Education Services for Overseas Students Act* 2000, administered by the education portfolio. Accordingly, each of the mandatory codes once prescribed under the *Fair Trading Act* has been absorbed into specific purpose legislation.

The issues paper listed other options to the current system of mandatory code as:
1. Repeal of current mandatory codes and incorporation into legislation;
2. Extension of the application of the Act's enforcement provisions to codes;
3. Addition of provisions for enforcement of voluntary codes; and
4. Acceptance of voluntary codes as industry standards.

As there are common elements to the consideration of these options, they have been divided into mandatory codes and voluntary codes.

5.2.4.1. Mandatory Codes

As highlighted in discussions above, submissions to the Review reflected a misunderstanding about the status of mandatory codes. Many submissions suggested that they were somehow "less compulsory" than statutes. Being a mandatory instrument, this is not the intention when a code is adopted. The Court of Appeal decision has lent some credence to this perception of the operation of mandatory codes.

The option was raised in the issues paper of repealing current mandatory codes and incorporating them into principal legislation. This has already happened as a result of the review of other specific purpose legislation. It was found in relation to both the retirement village and caravan park industries that where it was considered that certain standards or practices should be mandatory, they should be part of principal legislation.

Another option considered during the Review was the proposal that the *Fair Trading Act*'s enforcement provisions be extended to apply to mandatory codes. A brief examination of the Commonwealth Government's approach to this issue follows. Part IVB of the *Trade Practices Act* 1974 provides for the prescription of industry codes. Codes must be declared, either as mandatory or voluntary, by regulation. Once declared, section 51AD prohibits contraventions by corporations of applicable industry codes of practice. An applicable code is one which is mandatory for the industry in question or a voluntary industry code that binds the corporation.

The *Trade Practices Act* provides a range of penalties and remedies if an applicable industry code is contravened. These are:

- Injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken;
- Damages;
- Ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including: specific performance; rescission and variation of contracts; damages; provision of repairs and spare parts; and probation orders, community service orders and corrective advertising orders.

To date, only one mandatory code (the Franchising Code of Conduct) has been prescribed by the Commonwealth. Submissions from both the Motor Traders' Association and the Australian Retailers Association indicate support for the Commonwealth model. However, advice received from the NSW Parliamentary Counsel suggests that:

> "it is preferable for criminal offences to be created by legislation or statutory instrument, rather than by reference to a code of practice. Criminal offences should be carefully drafted, and should tie in with the general criminal law. Keeping criminal offence provisions in legislation also enables them to be easily located and monitored, instead of placing them in documents that do not form part of the statute book".

Taken together, the Steering Committee was not persuaded that, as a matter of regulatory policy and practice, mandatory codes justified their anti-competitive effect. Committee member Dr Pearson noted that it may be somewhat premature to omit the compulsory code provisions given the current review by the Australian National University, on behalf of the Australian Competition and Consumer Commission, of code provisions within the *Trade Practices Act*. However, the ACCC, which was represented on the Committee, did not object to the removal of the NSW code provisions. This being the case, the Steering Committee considered that any marketplace failure was best addressed by relevant legislative prescription rather than the making of a potentially unenforceable code of conduct.

Recommendation 9: That the mandatory code provisions of the *Fair Trading Act* should be repealed.

5.2.4.3. Voluntary Codes

The issues paper raised two options in relation to voluntary codes.

There are no provisions in the *Fair Trading Act* that apply to voluntary codes. However, the *Consumer Claims Act* 1998 already provides that the Consumer, Trader and Tenancy Tribunal may take into account any code of practice whether or not prescribed under any other Act, when making orders.

The *Trade Practices Act* makes provision for the declaration of voluntary codes of conduct. For voluntary codes, the regulations may specify the method by which a corporation agrees to be bound and the method by which it ceases to be bound.

As discussed in the issues paper, it is understood that the provisions for prescribed voluntary codes under the *Trade Practices Act* were modelled on proposals being considered by the British Director-General of Fair Trading. The British Office of Fair Trading was considering the introduction of enforceable standards for those who agreed to comply. This proposal was rejected in favour of a 'seal of approval' scheme for identification of codes meeting certain principles and code enforcement through the removal of the seal.

Submissions to the Review did not support the introduction of a statutory-based model for voluntary codes. The Motor Traders Association suggested that:

> "[it] does not believe that industry wide voluntary codes are effective because they only bind those who are party to the code. In any case, without the threat of penalties and sanctions, "fringe traders" will not abide by any voluntary code – even if party to it".

Similarly, the Australian Retailers Association suggested that:

> "A statutory-based model for voluntary codes is likely to be inflexible and potentially costly and therefore potentially anti-competitive."

Hence, it was apparent that those making submissions to the Review believed that voluntary codes should remain outside of the statutes.

The Review considered whether it would be desirable for provisions to be made to recognise voluntary, industry developed codes by the Department of Fair Trading and by the courts as representing the acceptable standard of conduct in an industry. There would be no penalties for a breach of a voluntary code, but it would set an industry standard by which general industry conduct could be measured, including the conduct of industry members who do not subscribe to the code.

While submissions supported recognition of voluntary codes as a benchmark of good industry practice, it was generally considered that this already occurs through the provisions in the *Consumer Claims A*ct. The Review did not identify any benefit of making provisions under the *Fair Trading Act* in relation to voluntary codes.

Therefore, on the balance of evidence, it would not appear that any legislative changes are required in relation to voluntary codes of practice. The *Consumer Claims Act* already provides some recognition of voluntary codes as a benchmark of good industry practice. Further recognition within the *Fair Trading Act* is not considered appropriate or necessary.

Recommendation 10: That voluntary codes of conduct not be provided with statutory status within the *Fair Trading Act*.

5.2.5. Door-to-Door Sales

The *Door to Door Sales Act* regulates unsolicited door to door credit sales of goods or services.

Door to door selling is a form of direct selling. Both direct selling and direct marketing are variants of traditional retailing. A direct marketing sale contract is negotiated through a means of communication at a distance, such as a catalogue, by telephone or through the Internet. Problems in this industry have been partially addressed by a code of practice developed by the Australian Direct Marketing Association and which applies to its members. A direct selling contract is negotiated in the presence of both parties, but away from the seller's business premises.

In regulating direct selling practices, the aim of the *Door to Door Sales Act* is to deal with the problems which can occur when transactions are conducted in settings which are not normally places of business and where the seller is physically present with the consumer. Problems can arise in these situations because:

- consumers do not have adequate information about the goods or services being sold door to door, or access to information about the price and quality of similar products;
- some direct sellers take advantage of the unequal market power of the participants in a direct selling transaction by using high pressure, and possibly misleading, sales techniques to persuade consumers to make on the spot decisions;
- consumers are unable to 'walk away' and may not feel comfortable asking the sales person to leave the premises; and
- salespeople are sometimes difficult to trace in the event of post-sale problems.

To overcome these problems the *Door to Door Sales Act* includes provisions that offer protection to the consumer who enters a credit agreement in relation to a door to door sale. The Act provides for:

- a 'cooling off' period of 10 days after the purchase if the product was bought on credit as a result of an unsolicited visit to a home or place of work,
- the agreement to be in writing and signed by both parties and

- The purchaser to be given a copy of the signed agreement, together with a notice of their rights and a cancellation document.

Each of these requirements is considered in turn later in this section of the report.

The objective of the legislation is to foster a fair and efficient direct selling marketplace operation and appropriate consumer protection by reducing the incidence and effectiveness of high pressure selling in the home and at work. One of the principal assumptions of consumer theory is that consumers are rational, with stable, well defined preferences. Economists such as Rabin query this and argue that consumer decision-making is contextual[17]. Consumer purchasing decisions occur with reference to information available to the consumer, much of which is provided by the trader. Provided that this information is truthful and provided that consumers are in a position to properly evaluate it they are generally able to select products and services which meet their requirements.

In some situations, however, there is greater likelihood that the decision making process will be constrained and that this will result in systematically poor consumer choices. In the case of door to door sales, for example, the consumer is unlikely to have engaged in a product comparison prior to the unsolicited approach of the trader and so the decision making context available to the consumer is largely that which is represented to them by the trader. Information asymmetry and/or information deficiency compromises the ability of consumers to make the best consumption choices in view of their limited purchasing power.

As previously noted, producers respond to market signals in the form of consumer expenditures. When consumers make poor consumption choices or fail to receive the value that they expect for the money they expend, productive resources are diverted towards products and services which generate lower consumer satisfaction and are denied to products and services which would generate higher levels of consumer welfare. One of the objectives of fair trading law is to promote honest disclosure by traders to assist consumer decision making. The cooling off period involved with door-to-door sales and other direct marketing legislation provides consumers an opportunity to consider whether a decision made when the informational context limited truly reflects their consumer preference.

In assessing the role of the *Door to Door Sales Act* in the NSW marketplace, the Steering Committee considered its legislative history. The Act was enacted at a time of different social and economic circumstances. The disparity of these circumstances is reflected in the second reading speech proposing the *Door to Door Sales Bill.* As KPMG Legal, on behalf of the Cobra Group[18], argued in its submission—

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17 Rabin, M, *Psychology and Economics* (1996) at 1, 4.

18 The Cobra Group is a global selling organisation with operation sin 18 countries. Its clients include major corporations including AAPT, Video Ezy, McDonalds, American Express and Westfield. It also provides contract services for organisations such as the Heart Research Institute, Royal Flying Doctors Service and the Spastic Centre of NSW.

> "When the Door-to-Door Sales Bill was debated in the Legislative Council in 1967, a significant issue raised was the concern by husbands that they would be legally bound when their wives committed them to purchase goods and services classified as necessities. On this issue, Colonel the Honourable H J R Clayton argued: 'This bill is a protection to the working man and indeed any man whose wife is a lawful agent to enter into these contracts. He should be given an opportunity of ratifying the contract and discussing with his wife whether they can afford the purchase. There should be a proper place for repentance'.
>
> This is an antiquated notion and the law has changed so that a wife no longer acts as her husband's agent, so such protection is no longer needed for husbands".

Indeed, nearly 35 years after the introduction of the *Door to Door Sales Act* consumers are more sophisticated and more aware of, and less sensitive to, high pressure sales tactics, whether in the home or otherwise. However, the Steering Committee found that direct selling practices are also more sophisticated and widespread across a range of industries and products.

It is also a growth area, as indicated by the marketing practices of pay television and telephony companies. Cable and Wireless Optus noted the role of door to door sales for Pay TV and Internet service providers:

> "Door to door sales is a vital sales channel for selling our services and gaining customer acceptance of what we offer. The proportion of customers we have sold services to using door to door sales has been as high as 70% this year [2000]. It is one of the most effective sales channels because we can present the details or our offerings directly and to key decision-makers".

While firms such as Cable and Wireless Optus subscribe to a voluntary industry code of practice, some of the most vulnerable groups in our society continue to be subjected to highly undesirable direct selling practices from disreputable traders. These include the elderly (especially older women living alone), consumers with poor understanding of English and the disadvantaged. Many direct selling firms will target particular suburbs or areas, including those with a high percentage of public housing.

For example, the Steering Committee was particularly concerned about a number of complaints relating to a home security company's direct selling techniques. The Legal Aid Commission's submission also reported the problems with the company experienced by its clients. The pattern of selling was that a uniformed sales representative would make unsolicited contact with consumers on the basis of discussing the 'high rate of crime and violence in the local area'. The consumers were shown an emotive video quoting selected crime statistics and featuring shadowy figures. Consumers were then urged to purchase an expensive burglar

alarm, on credit, to 'protect themselves and their families against spiralling household crime and home invasions'. One consumer reported to the Department's review team that when her partner told the security company that he was not interested in purchasing such a system, the uniformed sales representative queried whether he was not concerned that "your wife will be attacked at home when you're not here"[19].

In another instance, the 'unconscionable conduct' provisions in the *Fair Trading Act* were used to thwart a credit contract entered into by the company and an intellectually disabled woman. The client, a woman suffering from Down's Syndrome, had apparently signed an agreement with a door-to-door home security company committing an ongoing part of her fixed disability pension to pay for the resultant credit commitments. A security sales representative complained to the Department's staff that the 'unconscionable conduct' provision had been used to rescind the credit sale and that its use was, therefore, "uncompetitive".

Notwithstanding the anachronistic rationale for the Act's introduction in 1967, examples such as this clearly demonstrate the ongoing necessity of legislation to protect vulnerable consumers who may be subject to high-pressure selling techniques into their homes or workplaces. The submission by the Legal Aid Commission to the Review highlighted this point:

> "Three decades on from the enactment of the DTDSA, door to door sales are still fertile grounds for unfair trading practices. Complaints of high-pressure sales techniques of dubious ethics remain common; vulnerable consumers are still often targeted … While there are some costs associated with imposing regulation on this industry that could have anti-competitive effects, the public benefit clearly outweighs any costs".

Recommendation 11: That door to door selling practices continue to be subject to regulation

5.2.5.1. Cash and Credit

Having regard to the above, the Steering Committee approached the review of the Act from the perspective that in view of the increased sophistication of the marketplace, the door to door sales provisions should aim to address clear instances of marketplace failure, rather than apply to <u>all</u> unsolicited transactions.

The Steering Committee noted that presently there was a range of consumers – equally vulnerable to high-pressure selling techniques – which is <u>not</u> protected by the *Door to Door Sales Act*. That is, to the extent that the Act excludes cash sales of unsolicited goods and services to consumers' homes and places of work, some consumers may lack adequate marketplace protection in materially the same

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19 It might be noted that the Department of Fair Trading successfully secured from this trader enforceable undertakings to cease conduct of this nature.

circumstances as those making purchases on credit. This disparity was noted by the Legal Aid Commission in its submission:

> "[I]t is difficult to see why the DTDSA should not apply to cash sales as the same concerns apply. The same refund provisions as currently apply in relation to credit sales could be extended to other sales".

For example, the Steering Committee considered a report of an elderly woman who, with the proceeds of the sale of her allocated shares following the demutualisation of the NRMA, had been convinced to purchase a household water filtration system for some $2,000. To convince her of the necessity to purchase the system, the elderly consumer was given a demonstration in her house whereby a sample was taken of her 'ordinary' tap water and it was shown to be cloudy and dirty (with the addition of a special substance). By contrast, the demonstration showed how clean and clear her water would be once it was filtered with the water filtration system. As the purchase was made by cash, the consumer was not protected by the *Door to Door Sales Act* and its contract cancellation rights once she realised the effect of the ruse. The Department was therefore forced to seek redress by means of the misrepresentation and unconscionable conduct provisions of the *Fair Trading Act*.

In relation to whether cash sales should be covered by the *Door to Door Sales Act*, the Cobra Group argued, however, that this was not necessary as:

(a) consumers were not committing themselves to future payments;
(b) cash sales are usually for low-price items
(c) consumers would be disadvantaged by not being able to finalise the transaction immediately; and
(d) The cost of consequential regulation would be prohibitive.

For the reasons outlined by Cobra, the Steering Committee concluded that the legislatively-mandated distinction between cash and credit unsolicited sales was appropriate in relation to low-price sales. However, in relation to high-price items, the Steering Committee found that there was little justification to provide inferior protection to consumers just because they used cash to purchase unsolicited goods and services.

Indeed, with the increasing closure of financial institutions in non-urban centres, and the resultant tendency for some consumers to store larger amounts of cash in the home, there may be pressing reasons to provide protection to consumers making directing selling purchases by cash. Such practices may be particularly prevalent amongst those with poor access to electronic funds transfer technologies and/or transport—such as the aged or disadvantaged.

In this respect, the Steering Committee noted that the Act's current emphasis on the *form of transaction* rather than its *value* has the effect of providing inadequate protection to those who equally warrant safeguards.

The Steering Committee was persuaded by the submission of the Direct Selling Association of Australia (DSAA), the peak industry body for door to door selling. In its submission, augmented by two meetings with the Department's review staff, the DSAA argued that the current distinction between cash and credit sales was meaningless and not in the best interests of either consumers or traders. Significantly, this was a view echoed by the Australian Retailers' Association which also supported the removal of the distinction between cash and credit sales for unsolicited contact.

Having regard to the submissions, and the Department's operational experience, the Steering Committee therefore concluded that the *Door to Door Sales Act* should not draw a distinction between credit and cash transactions. The Steering Committee characterised such a distinction as meaningless and potentially anti-competitive in the modern marketplace.

Recommendation 12: That the distinction between cash and credit sales be removed from the door to door selling legislation.

As a corollary, and in view of submissions received on the topic and comments made at the public consultation sessions, the Committee concluded that the Act should not, however, apply to transactions below a certain value. That is, to remove the distinction between cash and credit transactions but not impose a 'threshold' value would mean that the cash purchase of, for example, a single lipstick from the local cosmetics representative would invoke the *Door to Door Sales Act*.

The Steering Committee therefore considered what the preferable threshold value of a transaction should be to ground the *Door to Door Sales Act*. In its submission to the Review, the Cobra Group suggested that in relation to <u>credit sales</u>, the Act should not apply to purchases of less than $50. In its discussions with the Department's review staff, the DSAA suggested that the 'threshold' amount could be approximately $250–300[20]. On balance, the Steering Committee agreed that the Act should not apply to unsolicited contact purchases of less than $100. Rather than the appearance of being a 'mid-point', this figure was chosen having regard to the value – particularly for those on fixed social security income – of anything above this amount of money, yet would provide sufficient trading flexibility for purchases of goods below this amount.

The Committee also recommended that the figure of $100 should be codified in the legislation, and that a Regulation-making power be included to allow the Minister to review the monetary threshold as the value of money declined with inflation.

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20 The DSAA emphasised, however, that through its comprehensive code of conduct, its members provided the safeguards of the Door to Door Sales legislation on all purchases, irrespective of value or form of purchase.

Recommendation 13: That the provisions of the door to door selling legislation not apply to transactions of less than $100 in value, and that this figure be codified with a Regulation-making power to allow review.

Given the staged nature of payments, such as subscriptions, the Committee considered whether this amount should relate to the value of a particular transaction or the total consideration of the contract (which could be paid by a series of individual transactions).

For example, consumers may enter into a contract – as a result of an unsolicited approach – to connect to the Internet with a per month cost of $9.95 for a minimum of 12 months. While each payment of itself would fall below the $100 threshold, the total consideration of the agreement would be $119.40. Given the mandatory commitment for a minimum of 12 payments, the Steering Committee considered that the proposed $100 threshold should relate to the total consideration of the contract. In this respect, the Committee was affirmed in its view having regard to the provisions of the Victorian *Fair Trading Act 1999*. Section 60 of that legislation provides :

60. What is a contact sales agreement?

(1) An agreement is a contact sales agreement if—
  (a) it is an agreement for the supply in trade or commerce of goods or services of a kind ordinarily used for personal, household or domestic use; and
  (b) the agreement is made or entered into in the presence of the purchaser (or a person acting on behalf of the purchaser) and the supplier (or a person acting on behalf of the supplier) at—
    (i) a private residence other than a private residence which is the business premises of the supplier or the person acting on behalf of the supplier; or
    (ii) the workplace of the purchaser; and
  (c) the total consideration payable by the purchaser under the agreement—
    (i) is not ascertainable at the time of making the agreement; or
    (ii) is ascertainable at the time of making the agreement and exceeds $50.

(2) If—
  (a) 2 or more agreements relate substantially to the same transaction; and
  (b) the transaction could have been effected by a single agreement which would have constituted a contact sales agreement—
  then—

> (c) each of the agreements that would not, if it stood alone, constitute a contact sales agreement becomes a contact sales agreement; and
>
> (d) for the purposes of ascertaining the cooling-off period in relation to each of the agreements, each agreement is deemed to have been made when the last of the agreements was made.
>
> …

The Steering Committee considered that a provision along the lines of that enacted in Victoria would achieve its proposal that the $100 threshold amount relate to the total of the consideration rather than some segmented part-payment.

Recommendation 14: That the door-to-door selling transaction threshold should apply to the whole of the transaction's value.

5.2.5.2. Specific Safeguards

Presently, the cooling off period under the Act is 10 days. The Issues Paper considered whether this period was necessary. It is instructive to recount the parliamentary debates associated with the *Door to Door Sales Bill*. In its submission to the review, the Cobra Group quoted Mr Mannix, MLA, supporting the extension of the cooling off period from five days (per the model Australian legislation) to ten days:

> "Our reason for suggesting that a period of five days is too short is based on the premise that, especially in country areas, a housewife might say goodbye to her husband on a Sunday night upon his embarking on a journey of a couple of hundred miles to his place of employment, she knowing full well that he will be away from Monday to Friday and will arrive home on the Saturday or the Sunday".

However, in modern trading and social circumstances, the rationale for a prolonged cooling off period would no longer appear justified. As Cable and Wireless Optus noted in its submission to the review:

> "The door to door sales legislation currently includes provisions to which, for example, retail traders are not subject. Retail sellers are not subject to a 10-day cooling off period and detailed contractual arrangements. Treating door to door sales and retail trade differently in this way imposes additional costs on door to door sellers and [is] anti-competitive. These additional costs push up the price of products and services sold by these traders disadvantaging consumers".

While the Steering Committee did not accept the Cable and Wireless Optus submission in its entirety, it was persuasive in relation to cooling off periods and statutory notices (discussed below). The Committee found that having regard to improved technology and the ease of communication between consumers and traders to effect the cancellation of the contract, a cooling off period of 10 days for

NSW was no longer justified. However, submissions to the review – most notably those of the DSAA and Cobra – supported some form of cooling off period.

The Steering Committee therefore concluded that there no longer is reason to impose a longer cooling off period on direct selling transactions in NSW than those undertaken pursuant to the other States' legislation. Indeed, Dr Gail Pearson of the UNSW Law School, a specialist in consumer contract law and a member of the Minister's Fair Trading Advisory Council, commented in her submission to the Review that:

> "A reduction from ten to five days may provide a suitable balance between the need for certainty on the part of the supplier and the protection of the purchaser".

For the sake of consistency and having regard to the submissions received, the Committee therefore agreed that the cooling off period should be reduced to five days[21].

Recommendation 15: That the cooling off period contained within the door to door selling legislation should be reduced to five days in line with modern conditions.

One submission to the Review, that of Austar United Communications, specifically proposed that during the cooling off period, a trader should be able to collect payment for *services* provided during this period:

> "[W]here a cooling off period is in force, the Door to Door Sales Act needs to continue to allow the collection of money and the provisions of services during the cooling off period so that it remains a matter of commercial risk for the business, We note that this is not allowed in some states that have adopted the 'model' legislation".

In addition to Austar's reference to the provisions within the 'model legislation', the relatively recent amendments to the Victorian *Fair Trading Act 1999* provide that:

> **80. Payment for services during cooling-off period**
>
> A purchaser under a contact sales agreement or a non-contact sales agreement is not required to pay during the cooling-off period for any services provided under the agreement during that period.

On this, the Steering Committee agreed that the Victorian provisions would appear to be a reasonable compromise between the commercial concerns expressed by

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21 In the United States, the Federal Trade Commission has set the cooling off period for 'home shopping' at 3 days: www.ftc.gov/bcp/conline/pubs/buying.cooling.htm accessed on 6 July 2001.

Austar and its interpretation of the limitations of the 'model legislation'. That is, while sec 80 of the Victorian Act provides that traders, having made a contract by unsolicited means, may not collect payment during the cooling off period for services provided during that time, there appears nothing to prevent them from recouping fees for services consumed during the cooling off period once the period has expired.

Recommendation 16: That the door to door selling legislation provide that a trader may not charge collect fees for services during the cooling off period but may, once the period has expired, retrospectively recoup such fees.

One issue, however, that was neither identified in the Issues Paper nor raised in the majority of submissions was an agreed exemption from the cooling off provisions. Some submissions urged the Review to amend the legislation to allow consumers to consent to the cancellation of the cooling off period. Austar proposed the following arrangements:

> "The statutory 'cooling off period' raises some practical difficulties for Austar and we strongly advocate changes to the legislation allowing customers to waive their rights … Given this situation, Austar recommends that either:
>
> - The cooling off period be able to be waived by the customer in writing (such as by signing a form to that effect); or
> - The *Door to Door Sales Act* be amended to provide a mechanism for exemption of certain companies or products and services from the cooling off requirement".

However, Dr Gail Pearson of the UNSW Law School cautioned against this approach:

> "One issue which should be clarified is the provision in s71(1) of the Victorian Act which allows a purchaser to cancel the agreement under a non contact sales agreement if the agreement permits. It may be that if the agreement does not allow for cancellation then there are no rights of cancellation".

The Steering Committee was particularly concerned that objectives of the legislation could be so comprehensively thwarted by agreements of this nature. In particular, the Committee noted that it was likely that consumers with poor literacy skills from a non-English speaking background or the disadvantaged, were likely to be particularly susceptible to exemption clauses of this type. In this respect, the Steering Committee strongly recommended that the legislation be amended to proscribe exemption clauses of this nature to ensure that the cooling off and rescission processes of the legislation prevail over any private agreement.

Recommendation 17: That the door to door selling legislation expressly prohibit the making of agreements to exclude its provisions.

The Issues Paper also raised the issue of the information required by the Act to be furnished to consumers. Section 3 of the *Door to Door Sales Act* provides that where a credit purchase agreement is effected, or an offer for a credit agreement made by a trader, the trader must (a) make the offer in writing, (b) give the consumer a copy of the offer at that time and (c) provide a notice detailing rights of rescission and a notice of termination from the consumer to the trader.

A number of submissions – particularly those from direct selling organisations and supported by some discussion at the public consultation sessions – criticised the overly prescriptive form of notice required under sec 3(c). The Steering Committee noted consensus amongst the majority of submissions that the overly technical and complex working of the required notices was both confusing to consumers and therefore counter-productive in terms of ensuring their understanding of their rights of rescission under the legislation. Indeed, as the DSAA noted in its submission to the Review:

> "The problem arises when the regulators impose commercially unrealistic prescribed text, print size and impediments … the giving of two separate notices in relation to cancellation will result in 8 million extra pieces of paper being needed in Victoria each year – 99.9% of which will the throw away [sic]. These notices should be incorporated in current literature and sales agreements".

On the same point, Austar made the following comments in its submission to the Review:

> "Austar conducts door to door trading in several states and territories which have varying requirements for the documentation that must be given to customers in relation to their rights to rescind the contract ... This situation raises a number of issues:
>
> - From a compliance point of view, Austar is unable to develop a fail-safe sales procedure to ensure that all customers are given the required documentation;
> - It is difficult to prove that the customers were given the documents; and
> - Austar cannot use economies of scale or have standardised national procedures.

Specific to the terms of the *Door to Door Sales Act*, Cobra criticised the overly complicated requirements of the current provisions:

> "Presently, section 3(1)(c) of the Door-to-Door Sales Act prescribes that the statement in the form of Part 1 of the Schedule and the notice in the form of Part 2 of the Schedule must be contained in separate documents ... Consumers can be appropriately informed of their rights by informing them of the cooling off period in writing within the documentation provided to them.

> It can be confusing and confronting for consumers to be presented with a number of different documents for their consideration. The result is that the door-to-door purchasing appears to be unduly complicated for the consumer, reducing the competitiveness of door-to-door sellers. It is normal commercial practice to set out all of the provisions relating to an agreement in the one document."

Consistent with these sentiments, and in view of changed commercial circumstances since the Act commenced in 1967, the Steering Committee agreed that it was desirable to modify the legislation to simplify its requirements to inform consumers about their rights. In its submission to the Review, the Legal Aid Commission, while strongly supporting the retention of a prescribed written statement of rescission, supported its simplification:

> "This minimises confusion both for industry and consumers and ensures consistency in compliance with the legislation, However, some of out clients, such as those from Aboriginal and Torres Strait Islander communities or non-English speaking backgrounds have literacy problems. The protections under the DTDSA can fail such people, They have difficulty in understanding the content of the prescribed notices. Further, documents given at the point of sale become lost or obscured or confused with other documents provided at the same time …".

Specifically, the Committee considered that rather than specify the form in which notices of general rights and rescission should be provided to consumers, it was preferable to prescribe that traders must, in writing, inform consumers of their rights in respect of the cooling off period and how they can rescind the agreement. The Committee considered that to require, by legislative prescription, the exact wording of the conditions may be anti-competitive.

While the Legal Aid Commission submission suggested that traders should also be required to send consumers a post-sale notice "to remind them of their right to rescind the contract", the Steering Committee did not support this proposal. Rather, the Committee considered that amending the Act to clarify the rights of rescission and the manner in which it could be communicated was a preferable approach. The Committee agreed in principle that such a document could be a conspicuous appendum to the contract of sale, as suggested by the DSAA.

Recommendation 18: That the door to door selling legislation not require, in any particular format or by any particular wording, that consumers be informed of their cooling off or rescission rights. Rather, direct sellers should be required to inform consumers by appropriate means.

5.2.5.3. Unsolicited Sales

The Issues Paper considered whether the distinction between solicited and unsolicited sales should be removed from the *Door to Door Sales Act*. On this point, Austar suggested that removal of the distinction between solicited and unsolicited transactions would extend the Act's regulation to circumstances well beyond those requiring the extra protection of the Act:

> "[I]f all sales where the customer makes a request for the vendor to attend their premises are caught be regulation, there is some potential that the legislation could have much wider application to the borderline cases outlined in the Review. For example, customers who call Austar and request a Pay TV subscription sign an agreement containing terms and conditions when an installer visits their premises to set up their connection, This transaction clearly has no similarity to door to door sales; the customer has already decided to take up an Austar subscription and the installer is not a salesperson ... Given this, Austar has a strong objection to changes to the legislation that would have this effect."

The Legal Aid Commission, in its submission, also questioned whether it was desirable to remove the distinction between unsolicited and solicited transactions. The Commission noted that should the distinction be removed, "[t]he legislation would then apply to plumbers, electricians and other sales that are not usually associated with the high-pressure techniques of door to door sales". This was a view supported by the Australian Retailers' Association:

> "While the high pressure selling techniques of unsolicited sales are an issue which the Door to Door Sales Act wishes to address, sales which are initiated by the consumer … should continue to be covered under the general provisions of the *Fair Trading Act* and not covered by the Door to Door Sales Act … [F]or instance, it is unfair and inequitable to subject an invited sales representative of a carpet or blind supplier to provisions of the Door to Door Sales Act, especially the cooling off period requirement".

In this respect, the Steering Committee found that the <u>unsolicited</u> nature of the contact to a consumer's home or workplace was the principal justification for applying the provisions of the *Door to Door Sales Act*. That is, should the distinction between unsolicited and solicited contact be removed, the Steering Committee felt that there would be little justification for the additional safeguards of the *Door to Door Sales Act* beyond those already provided pursuant to the *Fair Trading Act*. The Steering Committee was particularly concerned that removal of this distinction may have especial anti-competitive implications for traders.

Recommendation 19: That the direct selling legislation should continue to apply to unsolicited sales only.

This prompted the question as to why a distinction should be drawn between direct <u>selling</u> (ie unsolicited door to door sales to a consumer's household or workplace) and direct <u>marketing</u> (ie unsolicited telephone or written contact to a consumer's household or workplace). While the Steering Committee was less convinced of the

merits of extending the jurisdiction of the Act to non-personal direct marketing (ie mail and pamphlet-based marketing), it supported the notion that the Act should apply to direct marketing where a consumer is personally contacted by unsolicited telephone means by a trader. This issue is discussed in Chapter 8 of this report.

5.2.5.4. Times of Calling

One issue considered during the public consultation sessions was the time limits applying to direct selling. Presently, the NSW *Door to Door Sales Act* does not proscribe the times beyond which uninvited traders may not call upon consumers. This is not the case in other Australian jurisdictions. For example, section 63 of the *Fair Trading Act 1989* (Qld) provides that a trader must not make an unsolicited call upon a consumer on (a) Sunday or a public holiday, (b) Saturday outside the hours of 9 a.m. to 5 p.m., or (c) any other day, outside the hours of 9 a.m. to 8 p.m.

The Steering Committee considered that it would be prudent to introduce a similar limitation in the NSW legislation.

Indeed, a number of consumers and traders involved in the public consultation sessions expressed concern at having been disturbed late of an evening with no expectation of the visit. Significantly, the DSAA supported limits on the hours of making unsolicited calls to consumers. The peak organisation for direct selling in Australia suggested that it was counter-productive for direct selling traders to call after approximately 8 p.m. as consumers would be annoyed at having been disturbed and, therefore, unlikely to make purchases.

However, in its submission to the Review, Foxtel emphasised the importance of allowing door to door traders have contact with consumers up until 9 p.m. six nights a week and on Sunday:

> "Direct contact with customers is essential in the process of explaining the benefits of technologies that that the customer may not have had exposure to before ... The experience of our sales representatives indicates that they are more likely to find all the decision makers of the household at home when they call later in the day. Consequently, Foxtel submits that door-to-door trading be allowed up to 9 pm Monday to Saturday and up to 8 pm on Sundays".

Notwithstanding Foxtel's sentiments, in an earlier version of the Queensland legislation, the *Fair Trading Act* provided that, "on other days", traders could not call on consumers after 6 p.m. As the DSAA pointed out, the effect of this provision was that direct selling traders were effectively being deprived of a significant period of their contact hours; during the day, it was less likely for consumers to be at home because of work or social commitments. Indeed, in relation to the former Queensland provisions, Cable and Wireless Optus noted the following:

> "We see the Queensland provision as a severe restriction to trade as our services are best suited to being presented to people in their homes. Cable & Wireless Optus, like many other door to door traders, prefer to present to the customer when all the decision-makers are present … Evenings are the best time for this to be possible … Given door to door selling generate up to 70% of our overall sales in NSW, any restriction on this form of marketing would severely hamper employment across the whole company and reduce employment in NSW".

Having regard to the comments made by the peak organisation for direct selling in Australia, the DSAA, the Steering Committee was of the view that a case for restricted hours had been made out and that their impact was unlikely to be significantly detrimental to legitimate traders. In any event, the Steering Committee noted that the harshest comments related to the earlier – now amended – 6 p.m. cut-off in Queensland.

On balance, the Steering Committee concluded that it would be appropriate to amend the NSW door to door legislation to introduce a requirement that traders not call on consumers after 8 p.m. and not before 9 a.m. While the Steering Committee was concerned to ensure consistency with the Queensland provisions – which impose more onerous time limitations on weekend days – it declined to recommend limitations different from those for the rest of the week.

The reasons for not imposing more stringent time limitations on the weekend days were threefold. First, the Act does not presently prohibit door-to-door trade on the weekend and this was not raised by any submissions to the review. Second, the Steering Committee noted that weekend retail trading – including a blanket prohibition on Sunday trading – had not been in place in New South Wales for many years. Third, changing patterns of work for many consumers mean that the opportunity to consider and purchase goods and services on the weekend is not regarded as the intrusion it once was. To prohibit or restrict traders' activity on weekends, while allowing trade for the rest of the week, fails to recognise these changed working patterns.

While the Steering Committee recommended that the more specific safeguards of the *Door to Door Sales Act* (for example, cooling off periods and information requirements) should not apply to cash/credit transactions of less than $100, it considered that there should be a general prohibition in relation to trading times. That is, the Committee agreed that irrespective of the value or form of the transaction, the legislation should provide that unsolicited contact may not be made with consumers outside the prescribed times.

Recommendation 20: That the door-to-door selling legislation be amended to provide that traders may not solicit trade before 9 a.m. or after 8 p.m. on any day of the week.

5.2.5.5. Regulatory Alternatives

As an alternative to statutory regulation, the DSAA put forward the suggestion that the legislation should not apply to its member organisations that abide by a voluntary code of conduct. At the time of making its submission to the Review, the DSAA was "in the process of finalising such an arrangement in Victoria". Succinctly, the DSAA was concerned that its members were being disadvantaged by having to abide by overly prescriptive measures in the *Door to Door Sales Act*. Rather, the DSAA argued that members' compliance with the organisation's voluntary code of conduct gave rise to improved protection outcomes for consumers but at reduced regulatory impost to traders. The DSAA suggested that rather than merely comply with the Act's requirements, its members – as a function of their compliance with the voluntary code of conduct – exceeded the legislative requirements.

These comments were echoed by Cable and Wireless Optus, Foxtel and Austar in their submissions to the Review. The comments of Cable and Wireless Optus reflected the general points made:

> "Cable and Wireless Optus [would] welcome arrangements that enable traders such as telecommunications providers being exempt [from] legislative requirements in door to door selling providing they have suitable arrangements in place that meet the key objectives of the any legislative restrictions. We would continue to comply with our Codes of Practice as we do currently, it would mean [we] wouldn't have to also meet additional regulatory arrangements under a different set of laws [sic]".

In addition, Austar emphasised the different forms of persuasive and mandatory regulation applying to the sale of telephony, Internet and broadcasting products. These include those imposed by the Australian Communications Industry Forum, Australian Communications Authority, Australian Broadcasting Authority and the Telecommunications Industry Ombudsman, and privacy legislation and industry codes of practice.

While the Steering Committee was attracted to these arguments in principle, it concluded that there could be little benefit in suspending the 'safety net' of the Act's provisions for traders if they were already exceeding its terms. Rather, the Committee concluded that with the benefit of the improved measures recommended above, the objectives of the proposals to suspend the *Door to Door Sales Act*'s provisions for 'approved traders' could be achieved—while ensuring that the legislative 'safety net' remained in place.

It is therefore significant to note that in relation to the voluntary code of conduct for members of the Australian Direct Marketing Authority (ADMA), one recalcitrant member merely cancelled its membership of ADMA once the peak authority proceeded to enforce the code's terms. Fortunately, for the affected consumers, their transactions remained subject to the *Fair Trading Act* and other redress mechanisms.

In this respect, in relation to the mere persuasive status of voluntary codes, the DSAA specifically commented – in another part of its submission – that it eschewed the compulsory requirements of mandatory codes:

> "The DSAA Code of Practice is a voluntary code, generated from within the membership, not imposed upon it as a mandatory code. It has the advantage of being driven by commitment and peer pressure. DSAA does not want to be involved with a Mandatory Code".

In these circumstances, and in view of the recommended improved legislative measures, the Steering Committee declined to support the DSAA's proposal at this time. The Committee considered that unless alternative safeguards – of at least the equivalent mandatory standing of the Act – could be developed, then the proposed industry-based regulation was an inadequate alternative.

Recommendation 21: That the door to door selling legislation continue to apply to all traders.

5.2.5.6. Statutory Structure

Finally, the Issues Paper and the public consultation sessions asked consumers and traders to consider whether the Act should continue as a stand-alone statute. For example, in Queensland, the Door to Door Sales provisions exist as a division of the *Fair Trading Act* (Division 4). There was a general consensus amongst those who participated in the public consultation sessions and the industry meetings conducted with the Department's review team, that the *Door to Door Sales Act* should be repealed.

In its place, there was general support for the proposition that the provisions should be transferred to a new division of the *Fair Trading Act*. Dr Gail Pearson, from the UNSW Law School, was quite adamant that the Door to Door Sales legislation should be contained in the *Fair Trading Act*:

> "A reworked regime for door to door sales … should definitely be included in the *Fair Trading Act* and not in separate legislation."

The Steering Committee was attracted to these views. The Committee felt that, as a general principle and as far as practicable, it was desirable to locate all regulation touching household goods and services trade between consumers and traders within the one statute. In discussions with the Department's review team, the Motor Traders' Association strongly supported the notion that it was desirable to locate all legislation affecting transactions with consumers in the one document for ease of reference and access by traders.

Therefore, the Steering Committee concluded that the *Door to Door Sales Act* should be repealed and its provisions transferred to the *Fair Trading Act* as a separate, stand-alone division.

Recommendation 22: That the *Door to Door Sales Act* be repealed and its provisions, as amended per the recommendations contained in this report, be inserted into the *Fair Trading Act* as a separate division entitled 'Direct Commerce'.

5.2.6. Net Public Benefit Evaluation

The *Door to Door Sales Act*, or whatever statutory form it may take in the future, is an additional regulatory impost on the marketplace. It imposes conditions on door-to-door trade which do not apply to the general consumer marketplace. In this respect, it can, on face value, be characterised as anti-competitive. The Steering Committee considered, however, that it is not so.

In the Committee's view, the additional regulatory requirements of the *Door to Door Sales Act* are justified because, unlike trade in the general consumer marketplace, consumers face particular risks and disadvantages. They are frequently faced with traders who are practised in the skill of high-pressure selling in circumstances where consumers may feel that they cannot simply walk away from the transaction as they may do if they are simply 'browsing' in a shop. Rather, traders attend consumers' homes and workplaces with the intention of selling goods and services absent costs and restrictions associated with traditional forms of commerce. Nevertheless, the Steering Committee considered that a different form of cost prevailed—those associated with consumers potentially suffering the detriment of pressure to enter into transactions with which they may not necessarily feel comfortable and not having the ability to 'shop-around'.

The *Door to Door Sales Act* was introduced in the context of Parliament's concerns about the potential of consumers, most notably, women being forced to enter into transactions without the authority of their husbands. The Hansard relating to the parliamentary debates for the *Door to Door Sales Bill* contains references, viewed from a contemporary perspective, which could be characterised as outdated. Nevertheless, the statements made in debate were made with the best on intentions—to protect vulnerable consumers.

In this respect, the New South Wales consumer marketplace has changed. No longer are women consumers necessarily vulnerable by virtue of their place in the home and in society. Instead, there is a different form of vulnerable consumers. The Committee found that, in particular, older consumers and those from a non-English speaking background are likely to be especially subject to the pressure exerted by sales people calling at their doors uninvited. This was demonstrated by the submissions to the Review and in the consultation undertaken by the Department amongst the community and with peak industry groups.

Nevertheless, the Steering Committee identified several mechanisms by which the operation of the *Door to Door Sales Act* could be improved. These are recommended in the text above and, for the sake of brevity, are not repeated here. They were recommended with the aim of ensuring that the consumer is protected in circumstances where special protection was warranted, but that such protection

was not unreasonably onerous for the trader and not give rise to anti-competitive effects. In this respect, it is significant to note that many of the measures recommended by the Steering Committee were those that were directly recommended by the peak industry group responsible for door to door selling in Australia, the Door to Door Selling Association.

5.3. Prohibited Practices

The *Fair Trading Act* establishes basic levels of honesty and fairness in advertising and marketing. The experience of consumers and the agencies which seek to protect them has shown that a number of particular trading practices have not been effectively eliminated by these general restrictions. For this reason it has been necessary to introduce specific provisions to outlaw certain practices altogether.

To achieve this objective the *Fair Trading Act* includes a range of specific prohibitions that are discussed in detail below.

5.3.1. Unconscionable conduct

Unconscionable conduct is conduct by which, in certain circumstances, one party acts to the detriment of another by unfairly taking advantage of a more powerful bargaining position. An unequal bargaining position may occur for many reasons. For example, a consumer may be unable to protect their interests because of the lack of a practicable alternative source of the goods or service, where the difficulty or cost of searching out an alternative is too great, or because of a language barrier. Unconscionable conduct occurs when the seller uses these or other factors to take unfair advantage of the buyer, for example, by imposing unreasonable conditions.

Section 43 of the *Fair Trading Act* lists several factors that may help in determining whether conduct is unconscionable. This list is not exhaustive, and a court may grant relief in any situation where unconscionable conduct is involved. The list is as follows:
- were the relative bargaining strengths of the supplier and customer unequal?;
- was the customer required to comply with conditions that were not reasonably necessary to protect the supplier's legitimate interests?;
- was the customer able to understand any documents used?;
- was undue pressure or influence put on the customer, or unfair tactics, such as high-pressure sales tactics, used?; and
- how much would the customer have had to pay, and under what circumstances, to buy equivalent goods or services from another supplier?.

Examples of unconscionable conduct could include the use unexplained complex documents that take advantage of people who, due to limited command of English or for some other reason, did not understand the terms involved.

Breaches of the unconscionable conduct provision do not attract criminal sanctions. Application can be made to the Supreme Court within two years of the

contravention for civil remedies, including injunctions to stop the illegal conduct, monetary compensation, rescission or variation of a contract, refund or specific performance of a contract.

Submissions to the review favoured the retention of the prohibition on unconscionable conduct, and its extension to investment purchases and business transactions.

The prohibition on unconscionable conduct is designed to address situations where a consumer is unable to protect their own interests and make an informed and rational choice regarding a transaction, as a result of factors such as their lack of bargaining power, their inability to properly understand the consequences of a transaction, or unfair pressure by a trader. The prohibition limits competition by placing restrictions on the behaviour of traders. Whether these restrictions are justified depends on the level of risk to which consumers would be exposed without them and whether, in the absence of government intervention, the market would be likely to address the risk itself.

The Steering Committee considered that the risks to which consumers would be exposed in the absence of the prohibition on unconscionable conduct are considerable. Vulnerable consumers who are unable to protect their interests are at risk of gross exploitation. The costs of such exploitation can be enormous for the consumers involved. For the economy as a whole, exploitation of vulnerable consumers reduces competitiveness and efficiency because those consumers will fail to buy the goods and services that best meet their needs. While the market can be expected to react to unconscionable conduct by publicising known unscrupulous traders, vulnerable consumers who are unable to make use of information to help themselves are unlikely to benefit from this information. Industry codes of practice may also help to prevent unconscionable conduct, but codes of practice only cover certain industries and cannot offer the widespread protection provided by section 43.

Given these considerations, the Steering Committee considered that government intervention to prevent unconscionable conduct is justified. The costs of the prohibition to businesses include the costs of altering their sales practices to ensure that vulnerable consumers are not exploited. It is suggested that, while these costs are real, they are not substantial. They may require traders to put in place protocols for staff who deal directly with consumers.

Other costs to business include the uncertainty which is produced by the possibility that a contract may be avoided under section 43, and the costs of rescission of contracts, refunds or payment of compensation. Costs to government include the cost of providing court facilities for legal proceedings.

On the other hand, the benefits of a prohibition on unconscionable conduct are substantial, in preventing the exploitation of vulnerable consumers and maintaining a competitive market. The Steering Committee therefore considered that the benefits of section 43 clearly outweigh its costs.

Recommendation 23: That unconscionable conduct continue to be subject to legislative prohibition in the *Fair Trading Act*.

Section 43 is limited to conduct in connection with the supply, or possible supply, of goods or services normally purchased for personal, domestic or household use or consumption. Goods or services acquired for re-supply or for use in commerce are not covered, hence small businesses are unable to use this provision in relation to unconscionable conduct arising from their dealings with suppliers.

The exclusion also restricts the section's scope in relation to goods or services acquired for investment purposes. The Department of Fair Trading sometimes receives complaints about cases where non-urban land has been offered for sale as "future investment" for families, even where there is no prospect of the land ever being re-zoned for residential use. Such 'investment opportunities' may fall within the scope of the Act, since the Act's definition of a *consumer* includes a person who acquires an interest in land not for use for industrial or commercial purposes. However, section 43 uses the term *customer* rather than *consumer*. The Act does not contain a definition of *customer*.

Submissions favoured the prohibition on unconscionable conduct applying to goods and services acquired for personal investment purposes. Submissions suggested that the goods and services which should be considered to fall within the personal investment category should include stocks, bonds, shares, coins, precious metals, precious stones, land, housing, vehicles, life insurance, paintings, software, and jewellery. The submissions also supported the use of word consumer in section 43, rather than customer. The Parliamentary Counsel noted that the definition of consumer in the *Fair Trading Act* includes the purchase of goods or services for the purpose of re-supply in a farming undertaking. Most submissions also favoured the extension of the unconscionable conduct provisions to commercial as well as consumer transactions.

The Steering Committee considered that the restrictions contained in section 43 should be removed. Consumers who purchase goods and services for investment purposes face the same risks as consumers' making purchases for other purposes, and should therefore be covered by section 43. However, the Steering Committee did not support the listing in section 43 of specific goods and services which may be acquired for personal investment purposes, as this could be too restrictive. The Committee considered that a preferable approach would be to remove the limitations in section 43 so that the section applies to all transactions.

With respect to the application of section 43 to business transactions, it should be noted that section 53AA of the *Trade Practices Act*, which prohibits unconscionable conduct in business transactions, already applies to business transactions where at least one party is a corporation. In this respect, the Steering Committee considered that removing the restriction on section 43 applying to business transactions is desirable. The Committee considered that some small business operators are no better able to protect their interests than ordinary consumers and require

protection from unconscionable conduct. While larger businesses can be expected to have the resources to obtain legal and financial advice, limiting the prohibition on unconscionable conduct to small businesses would be difficult because of the problems inherent in choosing a point (presumably expressed in terms of annual turnover) at which a small business becomes a large business.

The Committee considered that extension of the provision, in the manner recommended above, would have a positive competition effect by making the marketplace more efficient and effective.

Recommendation 24: That section 43 of the *Fair Trading Act* be amended to provide regulatory coverage in respect of a broader range of consumer transactions, including those between business.

For the sake of consistency with the rest of the *Fair Trading Act*, the Steering Committee considered that the word consumer should be used in section 43 rather than customer.

Recommendation 25: That section 43 refer to consumer rather than customer.

5.3.2 Accepting payment without intending or being able to supply as ordered

Section 53 of the *Fair Trading Act* prohibits a person from accepting payment for goods or services where he/she does not intend to supply them, where he/she intended to supply goods or services materially different from those paid for or where he/she should reasonably have been aware that he/she would not be able to supply those goods within the time agreed or within a reasonable time. The NCC has determined that section 53 is a pro-competitive provision and, as such, does not require net public benefit analysis. Nevertheless, the Steering Committee agreed that it should be reviewed to ensure its ongoing effectiveness.

Taking action under section 53 has sometimes proved to be difficult in practice, due to the problem of proving in retrospect that a trader was aware that goods or services would not be supplied. For example, section 53 is often breached by mail order marketing firms which accept money from customers but don't actually have the goods in their possession to supply. Usually the marketing firm has a contract with a third party supplier who supplies the goods to the consumer. Delays occur when the third party supplier refuses to supply any more goods because the marketing company has not paid for previous orders, even though consumers' credit cards have been debited. Although the failure to supply is the fault of the mail order firm, it can be difficult to show that the firm was aware that it would be unable to pay its bills at the time that payment was accepted from the consumer.

Of course, in situations where consumers have lost money paid as deposits or payments in advance as a result of the trader becoming bankrupt or going into liquidation (prior to supply of the goods or services), even a successful action under

section 53 may not lead to a consumer obtaining a refund, and the consumer will simply join the list of creditors.

The incidence of consumer loss arising from breaches of section 53 may increase as electronic commerce, a form of distance selling, gains widespread consumer acceptance and the electronic marketplace becomes a focal site for direct marketing. This development will afford unscrupulous traders new and greater opportunities to mislead consumers by accepting payment without intending or being able to supply as ordered.

Previous reviews of this provision have suggested that the difficulty in proving an intention not to supply could be addressed by:

- shifting the onus of proof from the consumer to the trader, so that the trader is required to prove an intention to honour any representations made before the transaction about the future supply of goods or services;
- provide a time limit for delivery of goods or services, to replace the current vague requirement that the trader must have intended to supply within a "reasonable time". For example section 53 could provide that, unless a trader specifies another period before accepting payment, there is a presumption that the goods or services will be available within one month from the date of payment. This approach would leave it open to traders to arrange longer supply dates where necessary, for example where goods are being made to order or ordered in specially, but would otherwise mean that traders would need to resolve their supply contract difficulties before accepting payment from customers.

With regard to possible amendments to section 53, Dr Gail Pearson, of the University of New South Wales Faculty of Law, suggested that setting a statutory period for performance of a contract and creating a right to a refund if the contract is not performed within that period would increase the protection for consumers. However, Dr Pearson noted that, if a supplier goes bankrupt or into liquidation, the receipt of a refund will be subject to bankruptcy and insolvency law, although a personal action against a director could be possible if the right to a refund was incurred when there were grounds for suspecting that the supplier could become insolvent.

However, the Australian Retailers' Association is opposed to the amendment of section 53 to provide for maximum or presumed delivery periods, claiming that such an amendment would be anti-competitive and remove contractual flexibility. Similarly, the Motor Traders' Association considers that, in the case of MTA members, most of whom are dependent upon manufacturers or distributors further up the supply chain, it would be unreasonable to introduce maximum or presumed delivery periods and therefore penalise traders for circumstances beyond their control. The MTA new vehicle contract states that the dealer has 30 days from the estimated delivery date in which to supply the vehicle, and any breach of that provision may result in rescission of the contract and refund of any payment. The MTA considers that section 53(b) should not be amended and that it should be a

matter for the courts to determine what is a reasonable time and whether there is an entitlement to damages.

The difficulty of proving an intention not to supply means that the effectiveness of section 53 in preventing information asymmetry, both by providing a remedy for consumers and imposing a sanction on traders, is reduced. If a trader does not honour a contract with a consumer, the trader is already liable under contract law to compensate the consumer for loss caused. In contrast, the essence of section 53 is about the culpability of the supplier in terms of the trader's intentionally or negligently misleading misrepresentations. Reversal of the onus of proof would remove the element of culpability by assuming all traders who do not supply are culpable unless they are able to prove otherwise. The Committee did not consider that this would improve on the remedies already available to consumers under contract law.

The Steering Committee considered, however, that the requirement that goods/services be supplied within a "reasonable time" is too uncertain to assist consumers in taking effective action against traders. This uncertainty is also likely to encourage both consumers and traders to take legal action to resolve disputes over supply, rather than resolving these disputes themselves. The Committee therefore considered that section 53(b) should be amended to provide that goods/services should be supplied within one month, unless the trader specifies another time period prior to accepting payment.

The Committee also considered that altering the remedies available to consumers may be of assistance in dealing with situations of lack of supply. Providing that consumers are entitled to a refund if supply does not take place within one month or the agreed timeframe would provide more certainty for both consumers and traders than the existing right to damages. The uncertainty which inherently exists regarding appropriate levels of damages may encourage traders and consumers to take legal action, whereas if a consumer were willing to settle for a refund rather than seeking damages the dispute could be resolved without legal action. The Committee agreed, however, that a consumer's right to seek damages should not be abrogated by the statutory right to refund.

The right to a refund if supply does not take place within a specified time period could also reduce transaction costs for consumers because, rather than needing to enquire extensively into the trader's ability to supply, the consumer could be assured of a refund if the trader did not supply on time. The Committee considered that rather than detrimentally affecting competition, the proposed measures would have a pro-competitive effect.

5.3.3 Other unfair practices

Some traders attract customers into buying at their store by promising special offers, like free gifts. Section 48 of the *Fair Trading Act* makes it an offence to offer gifts, prizes or other free items when the promoter does not intend to supply them as offered.

Also known as bait and switch advertising, this practice involves advertising a product at an attractive price in an attempt to attract customers to the trader's store. Problems occur when the goods don't exist or have been sold by the time the customer arrives. In their place, different and usually more expensive goods are offered.

Section 51 of the *Fair Trading Act* provides that goods or services must not be advertised at a specific price if the seller knew, or reasonably should have known, it would be unable to supply them in reasonable quantities at that price for a reasonable period. What is 'reasonable' will depend on the particular circumstances, including the market in which the goods are sold and the nature of the advertisement.

Referral selling is a bait used by some traders to induce customers to buy their products or services by offering them a discount, commission or some other benefit in return for providing the names of other potential customers or assisting the trader to supply goods or services to other consumers.

Section 52 of the *Fair Trading Act* makes it an offence for a trader to make this kind of offer where the customer's receipt of the discount or benefit is dependent on an event occurring after the sale is made.

Section 55 of the *Fair Trading Act* prohibits the use of physical force, undue harassment or coercion in connection with the supply of goods or services to a consumer or in connection with payment by a consumer for goods or services.

Pyramid selling is a sales scheme which concentrates on recruiting new salespeople into the scheme rather than selling products. Pyramid sales usually have the following characteristics:

- people are required to pay a fee to participate in the scheme and
- people receive financial rewards or other benefits for recruiting other participants.

Section 56 of the *Fair Trading Act* prohibits the promotion of or participation in such schemes. The provisions apply to 'trading schemes' which involve the supply of goods and services as well as to schemes involving only the transfer of money.

Section 57 of the *Fair Trading Act* makes it illegal to send debit or credit cards unless the person receiving the card has requested it in writing. It is also an offence to convert an existing card without a written request from the recipient. It is not however an offence to enhance the existing service, for example by offering a greater number of outlets at which you can activate a card.

Assertion of right to payment for unsolicited goods and services is a sales practice which involves sending unordered goods to a consumer and then demanding payment. Section 58 of the *Fair Trading Act* protects consumers from having to pay for such goods by making it an offence to assert a right for payment from people

who have received goods or services which were not requested. The prohibition includes demanding payment for unsolicited advertising and unsolicited directory entries.

Asserting a right for payment includes:

- making a demand for payment or stating a right to payment;
- threatening to take legal action to obtain the payment;
- placing or threatening to place a person's name on a list of defaulters or debtors;
- invoking or threatening to invoke any other collection procedure;
- sending an invoice or document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of an entry, unless the document states prominently that no claim is made to payment of any charge.

Section 59 provides that a person who receives unsolicited goods is not liable to pay for them and is not liable for any loss or damage that occurs to the goods other than deliberate or unlawful damage that he or she causes. If the person decides not to buy the goods, they must not unreasonably prevent the supplier from collecting them. If the recipient gives written notice that the goods are unwanted and specifies where they are held, the supplier has one month to collect them. If no such notice is given, the supplier has three months from the date the goods were supplied in which to recover them before they become the property of the recipient.

A trading stamp scheme is an arrangement where a customer receives stamps in return for making a purchase, and the stamps can be traded for additional goods or services or for a discount of some sort. Part 5A of the *Fair Trading Act* deems schemes like this illegal if the supplier of the additional goods or services is not a person carrying on a genuine business of supplying the goods by retail, or is not supplying the services otherwise than under the scheme.

In addition, the *Fair Trading Act* enables regulations to be made to declare any scheme similar to a trading stamp scheme illegal. A trading stamp scheme could include the use of electronic means or any other technique in addition to or instead of the issue of stamps. Regulations may be made where:

- the scheme is considered prejudicial to fair trading or the public interest;
- the scheme promotes unfair competition between a retailer who is part of the scheme and one who is not; or
- the scheme has an inflationary effect on retail prices.

Trading stamp schemes were prohibited because of concerns that:

- when people sought to exchange the stamps or tokens for the "prize", the supplier frequently had run out or was no longer in business; and
- traders who sold the stamps often increased the price of the goods which were sold with them, so consumers were not actually receiving a benefit when they bought a product accompanied by stamps.

There does not appear to be any good reason for specifically prohibiting trading stamp schemes because the practices which led to their prohibition could be addressed by the prohibition on misleading and deceptive conduct and on accepting payment without an intention to supply. There are many incentive and reward schemes in existence and there does not appear to be any reason to single out trading stamp schemes if they are not misleading to consumers. No regulations declaring a scheme illegal are currently in effect in New South Wales.

All of the prohibited practices referred to above, with the exception of the prohibition on trading stamp schemes, mirror provisions in Part V of the *Trade Practices Act* and are therefore subject to the National Competition Council decision exempting State/Territory reviews from demonstrating that the provisions produce a net public benefit.

The national Audit of Consumer Protection Laws, undertaken by the Consumer Affairs Division of the Federal Department of the Treasury, identified a number of inconsistencies between the provisions which regulate unfair practices across Australia. Some of these inconsistencies have the potential to impose costs on business or create adverse consequences for consumers. A national committee has examined the provisions covering pyramid selling and undue harassment with a view to making these provisions more effective and thereby enhancing the regulatory environment for consumers, businesses and enforcement agencies.

The pyramid selling provisions in section 56 of the *Fair Trading Act* are generally seen by regulators to be overly complex and difficult to enforce. A national review of pyramid selling provisions is being undertaken, with a view to developing national template legislation.

Problems have also been noted with regard to the effectiveness of section 55 of the Act, which prohibits harassment and coercion of consumers. The wording of the section refers to "physical force or undue harassment or coercion". The use of the word *undue* has lead to interpretation difficulties: does it imply that some harassment or coercion is permissible but it is only *undue* harassment or coercion which is prohibited? The difficulty of determining, and proving in court, whether an instance of harassment was 'undue' or not, has meant that this provision is in practice rarely used. The Australian Competition and Consumer Commission has conducted an inquiry into this section and the equivalent provision in the *Trade Practices Act* and has issued guidelines for industry as to acceptable practices.

Submissions all supported the retention of these prohibitions on unfair practices, and were of the view that they produce a net public benefit.

In relation to possible changes to section 55 and 56 of the Act, the Australian Retailers' Association suggested that any changes to 55 and 56 should mirror the provisions of the *Trade Practices Act*, as this would enhance national consistency and therefore would be pro-competitive. In its review, the Department of Community Services stated that the word "undue" should be removed from section 55.

However, in the interests of consistency, the Steering Committee considered that section 55 of the *Fair Trading Act*, dealing with undue harassment and coercion, should continue to reflect the equivalent provision of the *Trade Practices Act,* section 60.

Recommendation 26: That section 55 of the *Fair Trading Act* continue to reflect the equivalent provision in the *Trade Practices Act*.

Given the current national review of pyramid selling provisions, and the fact that pyramid selling is frequently an inter-jurisdictional and Internet-based activity, the Steering Committee considered that New South Wales should, in the interests of national consistency, adopt the template legislation.

Recommendation 27: That section 56 of the *Fair Trading Act* be amended to reflect the template legislation prepared under the national auspices of the Ministerial Council on Consumer Affairs.

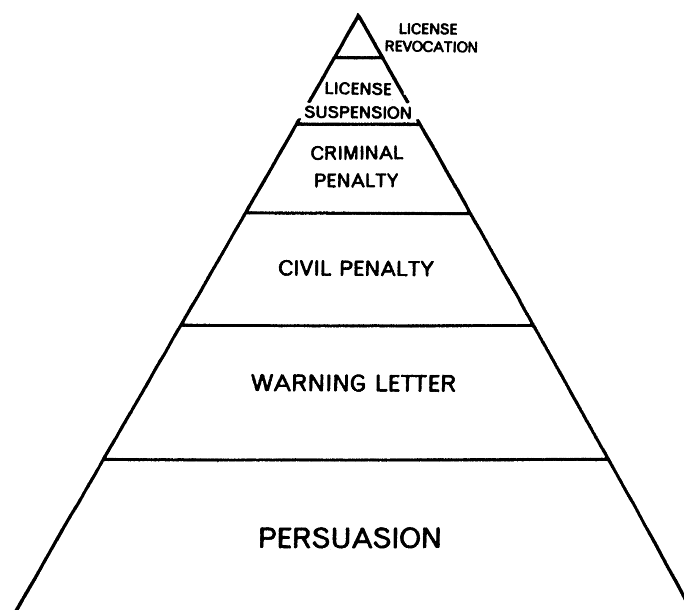
5.4. Redress and Enforcement

5.4.1. Compliance Regulation

The aim of this section is to outline the role that the Acts' redress and enforcement provisions play in providing the Minister, Department and consumers with powers and rights of redress.

Regulatory theorist John Braithwaite has proffered the regulatory model, the 'enforcement pyramid'[22]. The model indicates that public regulation occurs on an ascending basis, whereby government does not seek to address every instance of market failure.

[22] Ayres I and Braithwaite J, *Responsive Regulation: Transcending the deregulation debate* (1992) at 35.



In the context of consumer protection, disagreement between consumer and trader would be an example of low-level market friction. This is represented by Braithwaite's 'Persuasion' level of response. In less frequent circumstances of serious misconduct, however, compliance action initiated by the regulator is likely to be particularly forceful, giving rise to the withdrawal of trade rights. This is represented as 'Licence Revocation'.

As characterised by Braithwaite, a number of means are available to both consumers and the Minister/Department to obtain redress or enforce the State's fair trading laws.

5.4.2. Mechanisms Available to Consumers to Seek Redress

The *Fair Trading Act* and *Door to Door Sales Act* provide avenues for redress for consumers who suffer loss resulting from conduct which contravenes the Acts. The Acts offer a variety of mechanisms for law enforcement, including enforceable undertakings, injunctions, public warnings, prosecution, imposition of financial penalties, corrective advertising and freezing of accounts.

The Acts also provide for a number of mechanisms in relation to redress. These provide for self-help remedies by consumers, action against offenders by the Department and the Minister for Fair Trading and for court ordered compensation and penalties. The Department can also refer complaints to other authorities or bodies.

Section 68 gives consumers a right to compensation for loss or damage which occurs as a result of conduct that is in contravention of the Act, except in relation to the unconscionable conduct provisions in section 43. This right is available to private consumers and to business persons who have suffered loss as a result of a contravention of the Act by a competitor. The right to compensation is accessed

by action in the Supreme, District or Local Courts or the Consumer, Trader and Tenancy Tribunal. Orders in relation to section 43 can only be made by the Supreme Court.

Consumers who have been adversely affected by a contravention of a prescribed code of practice can apply, with the consent of the Director-General, to the Consumer, Trader and Tenancy Tribunal for an order under section 78A of the *Fair Trading Act*. The Tribunal may order that the conduct be discontinued and that action be taken to rectify the consequences of the contravention. Until recently, consumers who suffered loss and damage as a result of a breach of the *Fair Trading Act* did not have access to alternative dispute resolution. However, the newly-established Consumer, Trader and Tenancy Tribunal has jurisdiction to hear these compensation claims.

The *Door to Door Sales Act*, in section 3(1), provides that agreements entered into in breach of the Act are unenforceable by the seller of the goods or services. This means that, if the seller does not provide the documents required by the Act, the purchaser can cancel the agreement, return any goods supplied and receive a refund of any money paid. A consumer can also commit an offence under section 5(5) of the *Door to Door Sales Act* by failing to allow the seller to retrieve goods after the consumer has cancelled an agreement during a cooling off period. A consumer may also be liable for loss or damage to the goods, under section 5(6).

5.4.3. Mechanisms Available to the Crown to Seek Redress

In addition, section 9 of the *Fair Trading Act* provides the Director-General of the Department of Fair Trading with the following functions in relation to redress and enforcement:

- advising businesses and consumers about their rights and responsibilities under Acts administered by the Minister for Fair Trading;
- receiving and investigating complaints;
- referring complaints to other bodies, where appropriate;
- conducting research into the marketplace; and
- taking action to remedy contraventions of, or to secure compliance with, the provisions of the Acts.

Under section 64 of the *Fair Trading Act*, the Director-General and departmental investigators are able, where it appears that a person has contravened sections 32 (2) or 40 (1) of the Act, to issue a penalty notice for up to $500 or $200 respectively. The person who receives a penalty notice has the option of paying the specified amount or having the matter determined by a court.

The Act was recently amended to include section 73A, which allows the Director-General to accept written undertakings given by a person in connection with a matter in relation to which the Director-General has a function under the Act. The provision enables the Director-General to apply to the Supreme Court for orders where the person subsequently breaches any of the terms of the undertaking.

Where it appears that a person has contravened a prescribed code of practice, the Director-General may, under section 76 of the *Fair Trading Act*, require the person to give written undertakings that they will discontinue the conduct, comply with the code of practice in the future and take action to rectify the consequences of the contravention. Where a person refuses to give an undertaking or breaches an undertaking they have given, the Director-General may apply to the Consumer, Trader and Tenancy Tribunal for appropriate orders (section 78).

The Director-General can, in serious matters, apply to the Supreme Court to:

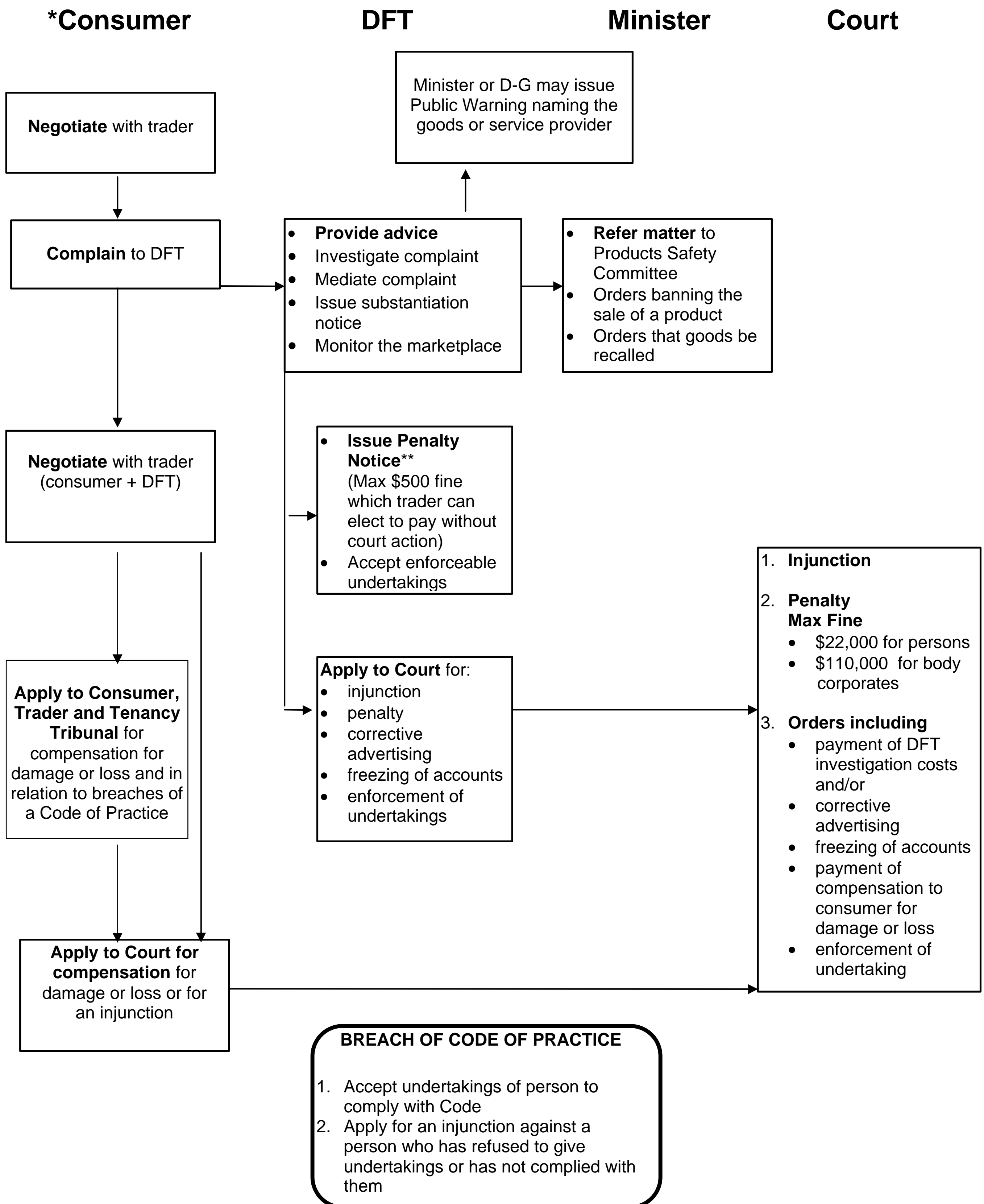
- grant an injunction restraining a person from carrying on a business of supplying goods or services, or to put conditions on the person's ability to trade (sections 65 and 66);
- require corrective advertising to correct offending material and advise consumers of their rights (section 67); and
- freeze the bank accounts and other assets of people who breach the legislation to prevent the transfer of assets outside NSW, and to appoint a receiver or Trustee of the property (section 73).

The Director-General can, in addition, apply to a Court for a conviction for an offence against the Act or Regulations (section 63).

The Minister or the Director-General of the Department may, in accordance with section 86A of the *Fair Trading Act*, issue a public statement naming persons who supply unsatisfactory or dangerous goods or services, or who engage in unfair business practices. The Minister may issue a public notice in relation to potentially dangerous goods, may make an order prohibiting or restricting the supply of specified goods (sections 30 and 31) and may order the recall of defective goods (section 34). Section 86 enables the Minister to intervene in court proceedings under the *Fair Trading Act* or any other legislation administered by the Minister. The Minister thereby becomes a party to the proceedings.

The Supreme Court can impose a maximum penalty of $110,000 for corporations or $22,000 for non-corporations (section 62) or grant an injunction against a person in relation to conduct which contravenes the *Fair Trading Act* (section 65). Most actions, except injunctions, take place in the Local Court where there is a maximum penalty of $5,000. The *Door to Door Sales Act* provides for penalties of up to $220 for failure to provide the documents required by the Act (section 3). A court, on convicting a person of an offence under this Act, may also order that any amounts paid by the purchaser be refunded (section 3).

This is diagramatically represented in the following chart:



* Enforcement provisions can also be used between unincorporated businesses except for breach of section 43

** Penalty Notices only available for:

- selling goods in contravention of an interim or permanent under sections 30, 31 of the FTA
- selling goods at a price greater than the lowest marked price under section 40(1) of the FTA

The preceding diagram shows the flow of compliance, enforcement and redress action which occurs on breach – or alleged breach – of the *Fair Trading Act* or *Door to Door Sales Act*. The first column, 'Consumer' shows the mechanisms available to consumers, the second and third columns show the mechanisms available to the Crown (ie Department and Minister) and the fourth column, 'Court', shows the powers provided to the courts to make orders and impose penalties.

Taken together, these represent the means by which the Minister and Department may seek enforcement of the State's fair trading legislation or ensure, in specified circumstances, that breaches do not occur.

5.4.4. Options for Compliance Reform

The Issues Paper canvassed a number of matters that the Department of Fair Trading and Steering Committee considered necessary to examine. In particular, these included the 'show cause', penalties, compensation, time limits for action, warranties and complaints and cross-jurisdictional issues. Since preparing and publishing the Issues Paper, the Australian Law Reform Commission published a background paper in relation to civil penalties, *Review of Civil and Administrative Penalties in Federal Jurisdiction* (2001). This report considers, where appropriate, the Commission's commentary.

5.4.3.1. Show Cause

The Department commonly finds that disreputable traders who have taken orders and deposits for goods and services which have not been supplied become insolvent and leave many consumers out of pocket. These traders may have a history of failed companies, often in the same type of business, and after each insolvency they start up again under another name and repeat their dishonest practices. Moreover, consumers will have no recourse to compensation if traders arrange their personal affairs to minimise redress to creditors in the event that their business fails.

In such cases, the only avenues open to the Department to prevent major consumer detriment are through public naming under section 86A of the *Fair Trading Act,* and/or Supreme Court injunction restraining them from operating a business (assuming sufficient evidence of current conduct was available). For example, in August 2000, the NSW Supreme Court granted an injunction to prevent Michael Helsby Knight from engaging in any physical or electronic trade within or to New South Wales[23]. The injunction by consent was made pursuant to sec 65 of the *Fair Trading Act*. In announcing the order's granting, the Minister for Fair Trading, Mr Watkins, stated that "NSW is well rid of this shameless rogue … He is an habitual unfair trader – the worst that Fair Trading has come across".

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23 *Director-General of the Department of Fair Trading v Michael Helsby Knight (alias Michael Kain)*, NSWSC (7 August 2000, unr).

The Issues Paper considered whether an effective solution to the sorts of issues raised by Mr Knight's conduct might be to confer a statutory power on the Director-General to require a person to show cause why s/he should be allowed to continue to trade. If used in conjunction with substantiation requirements as discussed above in paragraph, the Department would be able to act before consumer detriment occurs, especially in relation to known disreputable individuals. In its submission to the Review, the Australian Retailers' Association supported the 'show cause' proposal:

> "The Director-General should be provided with the power to require a trader to show cause why they should be allowed to continue to trade based on circumstances such as a large number of complaints or where the proprietor appears to be operating dishonestly or has a history of breaches".

Notwithstanding that the Motor Traders' Association did not support the proposal in relation to industries subject to licensing suspension arrangements, it supported the proposal in broader terms:

> "In industries where licensing is not required, legislation should be punitive enough to either prevent the trader trading until the complaint is resolved or require a "show cause" as to why he should be allowed to continue trading".

Against this, the Steering Committee was most mindful of the importance of ensuring that such a power would not effectively deny a person his or her livelihood. The Steering Committee agreed that any 'show cause' power would necessarily be subject to some degree of oversight by a court and could be contested by the respondent trader.

In this respect, the Committee considered that once the Director-General had issued an order requiring a trader to show cause as to why he/she should be allowed to continue to trade within New South Wales, the Director-General should be required to make an application to the Supreme Court for the making of an order. Such proceedings would, therefore, take the form of a permanent injunction of sorts pursuant to sec 65(2) of the *Fair Trading Act*. The Committee considered that this degree of independent adjudication was required in the interests of natural justice given the potential gravity of such an order.

While such a 'show cause' provision could be characterised as anti-competitive in the sense that it is interfering with the 'natural' operation of the marketplace, the Steering Committee considered that the public interest benefits associated with such impact would be outweighed. Moreover, the Committee was mindful that the NCC had determined that provisions within the *Trade Practices Act*, with the effect of curbing marketplace misconduct in order to improve economic efficiency, were actually pro-competitive.

The Steering Committee therefore agreed that the *Fair Trading Act* should be amended to introduce a provision allowing the Director-General to issue an individual with a 'show cause' notice. Once the Department had received a reply from the trader, or the trader did not reply, the Steering Committee agreed that an application should be made by the Director-General to the Supreme Court for an order to prevent the trader from trading in or from New South Wales. Given the potentially detrimental impact of the provision, the Committee suggested that the Department closely consult with affected industry parties during the Bill drafting stage.

Recommendation 28: That the *Fair Trading Act* be amended to insert a provision to allow the Director-General to issue an habitually deceptive trader with a notice to require the trader to show why he/she should continue to trade in New South Wales. Such an order should be made by the Supreme Court on application by the Director-General of the Department.

5.3.3.2. Criminal Penalties

The *Fair Trading Act* presently only provides for monetary penalties of $22,000 in the case of an individual and $110,000 for a body corporate. As described above, there are some traders who have a history of dishonest and disreputable behaviour and who are able to avoid any monetary penalties by structuring their affairs to minimise any redress.

It may be that, in the event of what appears to be an habitually dishonest trader who deliberately avoids the possibility of redress for consumers, that the Court should have the option of sentencing that person to a term in prison. In this respect, the Review was unable to draw a meaningful distinction between offences involving obtaining benefit by deception, as set out in the *Crimes Act*, and the circumstances of offences in the *Fair Trading Act* whereby dishonest traders may deliberately (and sometimes systematically) deceive consumers with a view to obtaining financial benefit.

In a speech delivered to the Fourth Annual Conference of the Association for Compliance Professionals, Justice A H Goldberg of the Federal Court of Australia made the following observations in relation to the regulatory context of trade practices legislation in Australia:

> "A structure of compliance is not enough—there has to be a culture of compliance, a willingness to accept the proposition that certain conduct is, to put it colloquially, 'just not on'. I would expect that we would not look kindly on persons who had committed a theft … Should there not be similar responses to price-fixing, market division, tax evasion, improper use of inside information, and so on?"[24].

[24] Quoted in 'At the cutting edge of compliance', *ACCC Journal* No 31 at 6.

The Issues Paper sought comment from consumers and peak industry groups in relation to the potential imposition of criminal sanctions for traders who flagrantly and repeatedly breach the *Fair Trading Act*. In relation to offences under the sec 42 'umbrella' of the Act, the Parliamentary Counsel suggested that it might be preferable – from a burden of proof perspective – to expand the range of civil penalties rather than creating a criminal penalty. However, in its thorough submission to the Review, the Motor Traders Association succinctly summarised the sentiment of a number of submissions:

> "Habitually dishonest traders are an anathema to any industry and bring all traders into disrepute. The courts should have a range of powers available, including prison sentences, to punish such offenders".

Indeed of the submissions received that addressed this issue, none – including submissions from industry – opposed the proposal to create a criminal offence, punishable by a term of imprisonment, for traders in severe breach of the *Fair Trading Act*. The Steering Committee therefore agreed to recommend that the Act be amended to create a criminal offence, in addition to an expanded range of civil penalties, in these circumstances.

The Steering Committee did not consider that the Act's amendment to allow the imposition of a criminal penalty was anti-competitive.

Recommendation 29: That the *Fair Trading Act* be amended to provide that a court may impose on a habitually dishonest trader a term of imprisonment.

5.4.3.3. Compensation

The Issues Paper noted that, in some circumstances, the *Fair Trading Act* does not provide easy access to remedies on an individual basis. Consumers taking action for damages under section 68 of the *Fair Trading Act* will incur costs, including legal costs and the cost of their time, which could potentially be more than the value of the original transaction. However, the jurisdiction of the Consumer, Trader and Tenancy Tribunal improves consumer access to compensation in relation to section 68. There is provision in section 72 for the Department of Fair Trading to include a claim for damages to one or more consumers in its legal action against a trader. In addition, this provision allows the Supreme Court, in conjunction with proceedings for an offence under the Act, to make a range of reparation orders to the person who suffered loss or damage as a result of the offence.

However, notwithstanding this procedural improvement, one problem is that these orders cannot be made by the Local Court, which is where most of the Department's cases are heard. This is in contrast to the position under, for example, the *Door to Door Sales Act* and the *Motor Dealers Act* 1974, both of which allow for compensation orders by the Local Court. It was suggested in the Issues Paper that section 72 should be extended to the Local Court so that compensation

orders can be sought wherever the Department takes proceedings under the *Fair Trading Act*.

A number of submissions to the Review favourably commented upon the improved access to compensation procedures by consumers. Indeed, the Steering Committee noted that a number of consumer representatives supported the proposed measures. Against this, the Australian Retailers' Association opposed the proposal: "No – this matter should be left to the Fair Trading Tribunal". While the Association did not expand upon their reasoning, the views of the Motor Traders' Association might be instructive in this regard. In expressing opposition to jurisdiction being extended from the Supreme Court and Consumer, Trader and Tenancy Tribunal, respectively, to the Local Court to improve consumer access, the MTA raised the possibility of vexatious claims:

> "MTA considers that the *Fair Trading Act* already provides adequate and inexpensive (in the case of the Fair Trading Tribunal) access to justice for consumers, including consequential costs. The issue of compensation for legal costs and for the cost of an applicant's time, and the extension of section 72 of the Act to the Local Courts, are matters on which MTA is ambivalent – providing compensation is available to traders as well as consumers".

While the *Fair Trading Act* does provide improved access to consumer redress in an effective manner, a large number of actions, initiated by either the Department or consumers, occur in the Local Court jurisdiction. In this respect, the Steering Committee agreed that it would be appropriate to extend to the Local Court jurisdiction in relation to sec 72.

In so far as the MTA's rider about the availability of remedy being made to both consumers and traders, the Steering Committee did not agree that it was appropriate to extend the provision to traders. That is, the provision is plainly predicated upon the basis of addressing imbalance between the respective 'power' positions of consumer and trader, the former being disadvantaged by virtue of imperfect information and potentially dishonest conduct. Sections 68 and 72 are designed to correct dishonest conduct by traders—and, in this respect, it would be counter-productive to allow traders to access the provisions in relation to consumers. If consumer conduct is inappropriate in the sense of refusal to pay or other deception, there are existing remedies available – at both common law and in the criminal statutes – which allow traders to take action.

As these matters are essentially mechanical in relation to judicial jurisdiction, the Steering Committee did not consider that they impacted on competition. In any event, providing jurisdiction to the lower-cost Local Court may have a beneficial effect in relation to the operation of the marketplace by reducing relevant transaction costs.

Recommendation 30: That sections 68 and 72 of the *Fair Trading Act* be amended to provide the Local Court with jurisdiction.

5.4.3.4. Time Limits

This is a matter that prompted opposing submissions to the Review. Section 68 of the *Fair Trading Act* provides that an application for compensation for loss or damage must be commenced within 3 years after the date that the "cause of action accrued", that is, when the problem arose. In turn, sec 72(6) of the Act provides that, in relation to a contravention of sec 43 (unconscionable conduct), a person may apply for compensation within two years or, in any other case, three, after the cause of action accrued.

The Commonwealth has extended the time limit for legal action under the *Trade Practices Act* to six years. Sections 82 and 81(1CA) now provide that actions taken pursuant to Part V of the Act must be commenced within 6 years after the date on which the cause of action accrued. That limitation period is consistent with other areas of the law and provides favourable guidance for an extended limitation period under the *Fair Trading Act*, if only for the sake of consistency between the two principal consumer protection statutes in Australia. However, the Steering Committee was also persuaded by a range of operational and compliance-based arguments.

In its submission to the Review, several consumer representatives highlighted the anomalous effect of the inconsistency between the time limits in the *Fair Trading Act* and the *Consumer Claims Act,* and the *Trade Practices Act*. Indeed, the Legal Aid Commission, drawing on its representation of consumers from lower socio-economic backgrounds, proposed that in addition to achieving consistency within the NSW consumer protection legislation and with the Commonwealth provision, the time limits ought to be extended to the life of the contract:

> "The Commission supports extending and standardising these time limits as discussed in the Issues Paper. However, in many cases the person who needs protection under the FTA does not discover the problem until many years after a contract or transaction was entered into … Accordingly, the time limits in the FTA and the CCA should include a second limb that links the time limits to the life of a contract, rather than to the date of the contract or breach".

Against this, the Australian Retailers' Association and Motor Traders Association expressed opposition to any extension of action time limitations to ensure consistency with the *Trade Practices Act*, let alone extending them to the life of a potentially long contract. Indeed the ARA stated that "any extension" of the time limit in respect of most goods and services would be "harsh and unfair on traders" and would potentially give rise to marketplace entry barriers. Similarly, in relation to the supply of motor vehicles, the Motor Traders' Association opposed the proposal noting that the current three years is adequate, especially in relation to the finite life of motor vehicles.

In addition, there is an inconsistency between this time limit and the time limit provided for consumer claims in the Consumer, Trader and Tenancy Tribunal. The *Consumer Claims Act 1998* (section 7) provides that claims in respect of goods or services must be "lodged" in the Tribunal less than three years after the *purchase* or supply date. In these statutory circumstances, there have been instances where a person has been unable to apply for an order because he/she did not become aware of the problem within three years. For example, in relation to misleading or deceptive conduct with regard to property (ie land) and major consumer durables, the loss arising from the conduct may not be apparent for a considerable period.

Having regard to industry concerns, the Steering Committee declined to accept the Legal Aid recommendation that the limitation period be significantly extended, including to the life of a contract. On the other hand, the Committee also did not accept the industry associations' submissions that the time limit should not be extended at all. Rather, the Committee concluded that it was preferable to amend secs 68(2) and 72(6) and, consequentially, the Consumer Claims legislation to ensure consistency of time limitations within the statutes and with the *Trade Practices Act*.

That is, the Committee recommended that it would be desirable to amend the statutes to provide that an action for compensation must be made within 6 years of the date of the cause of action, not from the date of purchase. This would ensure that for consumer durable goods, sufficient time would elapse before a fault could be identified rather than a consumer's legitimate claim being defeated because of a technical (and unintended) clash of statutory provisions, and consistency with the Commonwealth legislation.

The Steering Committee considered whether amendment to these provisions would have an anti-competitive effect. While extension of the window within which consumers would be required to make a claim against a trader could be characterised as potentially increasing transaction costs and, therefore, giving rise to an anti-competitive effect, the Steering Committee considered that restoring parity with the *Trade Practices Act* was desirable. Such consistency would, in the view of the Committee, abrogate any potential anti-competitive effect by not requiring traders to be subject to different (and inconsistent) State and Commonwealth provisions. Moreover, by ensuring consistency between the *Fair Trading Act* and the *Consumer Claims Act*, potential confusion, thereby increasing transaction costs, could be avoided.

Recommendation 31: That sections 68(2) and 72(6) of the *Fair Trading Act*, and section 7 of the *Consumer Claims Act*, be amended to extend the time limits of action to 6 years from the date of cause of action.

5.4.3.5. Warranties in Other Legislation

The Issues Paper raised the potential problem of provisions relating to the warranties being included in legislation administered by the Attorney General, the

Sales of Goods Act 1923, despite it being important to DFT's consumer redress and information providing functions. The *Trade Practices Act* contains provisions relating to warranties and guarantees for the supply of both goods and services in Part V, Division 2A. Similar provisions were not included in the *Fair Trading Act* as there was already legislative coverage for goods under the *Sale of Goods Act* (Parts 2 and 8). Consumers in NSW seeking redress for defective goods or services might, potentially, therefore need to take action through the courts or under common law using a variety of consumer law statutes within the administration of the Department of Fair Trading and the Attorney General's Department.

The result is a complex system for consumers to understand. In turn, this confusion may give rise to anti-competitive market circumstances. Moreover, as these provisions are important to consumer redress, Department of Fair Trading officers are often required to provide information to consumers on their rights for redress under the *Sale of Goods Act*. While the Issues Paper noted that the liability of departmental staff providing information on legislation administered by the Attorney General was not clear, the Steering Committee was less concerned about this matter. From the perspective of the individual officers, 'shield of the Crown' arrangements and, at an institutional level, requirement for bad faith to be shown should provide adequate safeguard to those merely providing information.

In her submission to the Review, UNSW Senior Law Lecturer, Dr Gail Pearson, stated that it would be inappropriate to include the *Sales of Goods Act* in its entirety in the *Fair Trading Act* because of the commercial focus of the former. Rather, Dr Pearson suggested that, similar to the position in Western Australia, a separate *Sale of Goods Act* should be maintained and that warranty provisions within the *Trade Practices Act* (Part V, Division 2) should be mirrored in the *Fair Trading Act*. This suggestion is consistent with concerns expressed during the review process about the overly complex language of the *Sale of Goods Act*.

Given this, the Steering Committee agreed that it would be preferable to mirror in the *Fair Trading Act* the provisions of Part V, Divisions 2 and 2A, *Trade Practices Act*, but not include the *Sale of Goods Act* warranty provisions. This would have the competitive advantage of ensuring consistency with the Commonwealth legislation while also improving the operation of the State legislation.

Recommendation 32: That the *Fair Trading Act* be amended to mirror the provisions of Part V, Divisions 2 and 2A of the *Trade Practices Act* in respect of warranty provisions.

5.4.3.6. Inter-jurisdictional Complaints

Transactions relating to the sale of many consumer products and services are now national or international. This may create some difficulties in relation to complaints arising across State borders or, worse still, between countries. While the fair trading legislation in each State is consistent with the *Fair Trading Act*, provisions are not uniform and there are cross-jurisdictional variations in some aspects of the legislation.

Management of cross-jurisdictional complaints is co-ordinated between the States to determine which agency should deal with a complaint. Depending upon the wording of the relevant State Acts, the trader could be in breach of the laws of the State in which the trader is based and/or in which the complainant is based.

The Issues Paper noted that it would be possible for the *Fair Trading Act* to clarify that it covers conduct by NSW residents occurring outside NSW and conduct of non-residents of NSW that impacts on consumers in NSW. Such a provision would bring with it a number of practical and legal difficulties relating to its enforcement. For example, a court may refuse to grant an order under the *Fair Trading Act* that operates beyond the boundaries of NSW. Even if such an order were granted, it could be difficult for the NSW Department of Fair Trading to monitor compliance. The Department does not have the power to obtain information, documents and evidence from a trader based in another State, nor to enter premises outside NSW.

There may also be co-ordination problems when affected customers are located in different States. This issue, from an operational perspective, has been considered by a number of national committees, including the Ministerial Council on Consumer Affairs. A national approach is clearly desirable and this would preferably follow internationally-agreed principles. This is especially relevant with respect to electronic transactions, for example, where a consumer in one State may purchase goods or services over the Internet from a trader in another State.

In this respect, it is salient to note that the ACCC has entered into a formal relationship with other international fair trading regulators to develop a common platform for investigation and enforcement activities relating to e-commerce transactions across national boundaries. The International Marketing Supervision Network (IMSN), being an informal forum for marketing regulators from 29 countries, has concluded that there are several areas where the ability of IMSN members collectively to protect consumers and foster consumer confidence requires particular attention. These include information sharing, inconsistent jurisdictional requirements and unco-ordinated enforcement measures. In February 2001, the ACCC participated in a 'Sweep Day' with other world consumer protection agencies. While the results of the Sweep are not relevant for the purposes of this section of the Report, it is sufficient to note that compliance with common consumer protection principles across international boundaries is an important goal for fair trading agencies. Indeed, NSW – as one of a number of Australian consumer protection agencies – participates in the Sweep.

In this respect, the Review declined to recommend the development of provisions with the designed effect of clarifying the inter-State application of the legislation. That is, in the context of potential constitutional limitations based on inter-State commerce considerations and anti-competitive effects, it was considered prudent to not prescribe inter-jurisdictional application at this time. Rather, ongoing operational activities between Fair Trading agencies within Australia and internationally appeared to be a preferable option in the face of shifting

jurisdictional issues arising from e-commerce initiatives and related common law developments. Nevertheless, the Steering Committee recommended that the Department of Fair Trading carefully monitor the inter-State consumer trade marketplace to ensure that issues were addressed on a needs basis.

Recommendation 33: That the *Fair Trading Act* not be amended to clarify that it covers conduct by NSW residents occurring outside NSW and conduct of non-residents of NSW that impacts on consumers in NSW.

5.4.3.7. Alternative Dispute Resolution

There is a move in Australia and overseas towards the use of a range of mechanisms for resolving disputes which offer alternatives to adjudication through the courts. These are known collectively as 'alternative dispute resolution' or, more commonly, ADR.

ADR has emerged in response to a perceived failure of formal arbitration systems. In the alternative, it is preferred as a faster and less costly option than litigation before common law courts subject to formal rules of evidence. ADR is commonly distinguished by the following features:

- resolution is usually speedier than through the court system;
- the process is less expensive than legal action;
- entry to dispute resolution is often voluntary;
- hearings are most often conducted with a minimum of formality and technicality;
- disputants are encouraged to represent themselves, rather than handing over control of the process to lawyers;
- decisions are not tied to rules of law;
- the underlying causes of the dispute may be addressed;
- remedies are wider in scope than those under an adversarial system; and
- where possible the outcome is not based on one side winning over another, but on consensual solutions.

The Consumer, Trader and Tenancy Tribunal has in place a number of ADR procedures to assist parties to settle disputes quickly without the need for a formal Tribunal hearing. Part 5, entitled 'Alternative dispute resolution' of the *Consumer, Trader and Tenancy Tribunal Act 2001* prescribes the "duty" to promote conciliation. Section 54(1) provides that prior to determining a matter, the Tribunal must use its "best endeavours" to bring parties to the proceedings to a settlement. Sub-section (2) provides that if settlement is reached, the Tribunal must make orders to give it effect. A variety of other provisions within the Part empower the Tribunal to refer parties to mediation by neutral evaluators appointed by the Tribunal.

Some industries, for example, banking, telecommunications, water and energy, have developed their own ADR mechanisms under ombudsman schemes. These are industry-based dispute resolution schemes which operate at arms-length as self-

funded, independent dispute resolution mechanisms which have been established in response to government's calls for industry to take responsibility for management of consumer complaints. Anecdotally, consumers have reported to the Department satisfaction with many of these industry-based schemes, particularly that operating within the telecommunications sector. This approach has benefits for industry in terms of feedback, and it engenders consumer confidence in that industry. It has been suggested that this may be an appropriate structure for resolution of consumer disputes.

The Issues Paper considered whether the introduction of an ombudsman scheme would be desirable, in addition to the operation of the Consumer, Trader and Tenancy Tribunal. Presumably, such an ombudsman would adopt a 'pro-active' role in the investigation and settlement of disputes between consumers and traders. Indeed, such a scheme may have its attractions given comments made to the Department from time to time that "it lacks teeth" in *requiring* traders to comply with the terms of agreements with consumers.

However, such criticisms do not recognise the role played by consumer protection agencies in modern marketplaces. In any one year, across its multiple operational branches, the Department of Fair Trading may receive in excess of 2 million enquiries and complaints from consumers and traders concerning the administration of approximately 50 statutes. The Steering Committee agreed that it would simply not be possible to formally investigate and to require settlement of every complaint involving, potentially, consumer trade of lesser monetary consideration than the high cost of formal investigation and interventionist mediation. Rather, the Department provides the mechanism for consumers and traders to focus their settlement efforts and, failing that, a party to a contract may make an application for formal determination (or mediation) by the Consumer, Trader and Tenancy Tribunal.

In its submission to the Review, the Australian Retailers' Association highlighted the shortcomings of a Fair Trading Ombudsman scheme:

> "… ombudsman schemes should be limited to identified problem areas as ombudsman schemes are very expensive to operate and therefore would act as a barrier to entry and [are] therefore anti-competitive. Independent Alternative Dispute Resolution processes and links to the Fair Trading Tribunal are cost effective and pro-competitive".

This view was echoed by the Motor Traders Association and, for different reasons, by the NRMA and consumer representative on the Motor Traders Advisory Council, Ms Dulcie Taylor.

Having regard to these views and the context in which consumer protection regulation occurs in New South Wales, the Steering Committee recommended against the introduction of a Fair Trading Ombudsman Scheme. Put simply, the Committee considered that (a) it would be too expensive, (b) too unwieldy and (c) may divert necessary resources from providing information to the marketplace to

enable consumers and traders to resolve their disputes without the intervention of the state. In this respect, the Committee noted that neutral mediators/evaluators already play a like role under the *Consumer, Trader and Tenancy Tribunal Act* provisions, if its jurisdiction is formally invoked.

Recommendation 34: That the *Fair Trading Act* not be amended to establish a Fair Trading Ombudsman.

5.5. Product Safety and Information

The *Fair Trading Act* deals with safety issues by setting safety standards for production of specified goods, restricting or prohibiting the supply of dangerous goods and providing for the recall of defective goods. These provisions are based on the product safety provisions of the *Trade Practices Act*.

5.5.1 How the provisions restrict competition

The provisions potentially restrict competition by establishing a process which would allow certain things to be done in relation to prescribed products. These include setting safety standards for the production of specified goods, restricting or prohibiting the supply of dangerous goods and providing for the recall of defective goods.

However, specific products are not listed in the Act. Rather, there is a further, separate assessment of the costs and benefits of prescribing specific items under the Regulations and thereby placing restrictions on their supply. Accordingly, while the provisions in the legislation can affect competition, they are generally activated only where a clear net public benefit for their use is demonstrated since the costs and benefits of prescribing particular items under the legislation must be fully assessed.

An exception to this would be the provision for a temporary ban on the supply of a product for 3 months while the Products Safety Committee (PSC) investigates the need for a ban or restriction on supply. Nevertheless, there is still some assessment of the need to impose a temporary ban prior to doing so.

The provisions of the *Subordinate Legislation Act* require that all regulations be reviewed and remade every 5 years. This helps ensure that all standards prescribed remain relevant.

5.5.2 Is there a case for intervention in the market?

Consumers are unable to make efficient purchasing choices if they do not have adequate information on which to base their decisions. Consumers may easily assume in the absence of evidence to the contrary that products that they buy will meet their needs and be safe to use. Products often have safety implications that

are not immediately apparent to the consumer – eg. child restraints for cars without a top tether are far less safe than those with a top tether.

While consumers could perhaps conduct research of their own, assessment of the safety of products can also be fairly technical and beyond the capacity of most consumers. Where products have significant safety implications that go undetected by the consumer, the products may cause injury or death.

Reducing the costs to consumers of obtaining safety information and improving the flow of information to consumers reduces the ability of suppliers to mislead consumers and for products to cause injury or death while increasing the efficiency of the market. The provision of information before a consumer purchases a product is crucial if consumers are to make the best choices and if injury or death is to be prevented.

There are also situations where product safety can only be ensured by establishing performance standards, contents, design, construction, packaging, testing of goods, durability and warnings and instructions to accompany the goods.

Regulation of these matters may be desirable depending on whether market forces adequately deal with these matters. Generally, specific products would not be made subject to the product safety legislation unless there was an indication of a safety problem which could only be addressed through legislation.

Government intervention may be of particular benefit to the public in regulating the product safety standards since these standards are independent of industry. The process of establishing product safety standards as set out in the *Fair Trading Act* is also transparent and promotes consultation with a broad range of interests (eg. through the composition of the Products Safety Committee, which includes representatives of the Australian Consumers Association, Standards Australia, Australian Retailers Association, Westmead Children's Hospital, and the Minister for Health, as well as through the procedure which must be followed by the Committee when investigating the need for a product ban). Government intervention also promotes a uniform approach to addressing product safety issues within a jurisdiction rather than leaving various product suppliers to address these matters as they see necessary.

The objectives for legislative intervention in the area of product safety are therefore to prevent injury or death by requiring the communication of information or establishing other restrictions of the sale of products.

5.5.3 Other possible options for achieving safety objectives

5.5.3.1 Product liability law

Product liability law compensates consumers who suffer loss or damage caused by a faulty product. The potential cost of compensation acts to some degree to deter traders from supplying unsafe products.

Compensation can be sought through an action in negligence, an action under contract, or an action under the manufacturer's liability or product liability provisions of the *Trade Practices Act*.

5.5.3.2. Rely on voluntary standards

The Standards Association of Australia publishes voluntary standards for consumer products. The Department of Fair Trading represented on a number of the consumer product technical committees which develop these standards. The purpose of the committees is to have representation from a wide range of disciplines to ensure that all stakeholders are represented. These committees aims by consensus to establish standards which, whenever possible, focus on the performance of products rather than design requirements. Wherever possible, joint Australian/ New Zealand standards are prepared.

5.5.3.3. General requirement to supply safe products

In Europe there has been a shift away from specific product safety standards toward general safety provisions and liability strategies. A general safety provision places responsibility on producers and others in the supply chain to introduce only safe products into the market. It also establishes a legal right for consumers to buy safe goods and complements safety regulations by catching hazards not specifically covered. Where safety problems are identified the supplier would need to be able to show what steps had been taken to confirm the safety of goods before marketing them to the public rather than the Department undertaking tests to prove the product dangerous.

This option reverses the onus of establishing product safety on product suppliers.

5.5.4 Other Options

5.5.4.1 Product safety legislation

As pointed out earlier, the provisions of the Act do not directly impose costs since any product that becomes subject to these provisions must be prescribed in the regulations and there is a further assessment of the costs and benefits of imposing a product safety standard.

Having said this, the costs to business which may result from the product safety provisions can be considerable. Compliance with proactive product safety standards may result in increased design, manufacturing and testing costs, and thus, higher prices for consumers.

The cost to business is higher when a standard is initially introduced, as it may be necessary to buy new equipment, establish new procedures, train staff etc. Some extra costs may also be ongoing, for example, the cost of printing and attaching

warning labels. Manufacturers may need to use higher quality, more expensive materials and more complex designs than they otherwise would.

These costs would usually be passed on to retailers and consumers. One result may be that consumers are forced to pay for higher quality items than they would choose to buy if standards were not imposed. Another cost to consumers is the restriction of choice: imposition of a product safety standard restricts the range of products that can be made available for sale.

There are costs to Government in administering and enforcing the legislation, as well as educating the communicating about its provisions.

On the other hand, compliance with safety and information standards can save businesses legal and compensation costs for damage or injury caused by unsafe goods or by goods being used in an unsafe manner. Consumers likewise, save potential medical and legal costs which may outweigh the increased cost of the goods. Consumers also save on the costs of getting information about a product. A factor to be considered is that no amount of money can compensate for the serious injury or death of a person.

5.5.4.2 Product Liability Law

Unlike the proactive approach taken under product safety legislation, relying on product liability law requires consumers to seek redress through litigation following death or injury. If the litigation is successful, there will be monetary compensation for the litigants. The outcome of the litigation can lead to product suppliers modifying their products, which in turn may add to production and testing costs. However, there is no independent assessment of the extent to which the product modifications will thoroughly assess safety issues. Commercial considerations in avoiding further litigation may not be a sufficient substitute for a thorough safety review.

Accordingly, under this option, consumers face the costs of litigation. Modifications to products may increase the costs of a product. The litigation costs of businesses may also be passed on to consumers. Consumers will still face the costs of getting safety information about the product. Should product modifications not be extensive as required on safety grounds, there may be further death and injury and further litigation.

5.5.4.3 Voluntary standards

Voluntary standards have a number of benefits. They act as an indicator of best business practice, they do not require Government resources for enforcement, businesses may comply with the standards as part of a marketing strategy and certification to a voluntary standard by an accredited body will ensure that the standards of companies are assessed and accredited by an independent body.

However, voluntary standards may be perceived by a consumer as relating to performance standards when compliance may only mean that the product complies with design standards. Furthermore, expressions like "this product complies with Australian standards" can be confusing to the consumer – the standards merely represent industry best practice. The standards may or may not address safety issues.

Voluntary standards are unenforceable and may not be sufficient to prevent death or injury. Their adoption may depend on each business assessing what is necessary for marketing purposes and to avoid possible litigation. This assessment may not be accurate and litigation may result following death or injury. The litigation costs of businesses may also be passed on to consumers. Consumers will still face the costs of getting safety information about the product.

5.5.4.4. General requirement to supply safe products

Reversing the onus of establishing product safety on all product suppliers imposes substantial testing and design costs. There is no assessment of the need for this level of regulation on all products. Some suppliers would be tempted to avoid testing in the hope that their products would never be the subject of investigation.

The costs of testing and design are likely to be passed on to consumers. The likely high costs of compliance for industry may lead to non-compliance and therefore the possibility of an adverse impact on public safety. There would be costs to Government from the administration and enforcement of these provisions.

From the above assessment, it would appear that the product safety provisions have a clear net public benefit. The continuation of the provisions, including the power to restrict the supply of products on safety grounds, were generally supported by all who commented on the issues paper.

5.5.5 Additional Issues

5.5.5.1 Compulsory product recall provisions

Some concern has been expressed by respondents to the Issues Paper that the provisions of the *Fair Trading Act* in relation to compulsory product recall are insufficiently flexible to allow products to be quickly withdrawn from sale where they pose an obvious danger to the public.

At present, the Products Safety Committee is responsible for recommending to the Minister for Fair Trading that there should be a compulsory product recall. However, before this can occur, the Department of Fair Trading's Product Safety and Standards Branch must undertake an informal inquiry into a potentially dangerous product before compiling substantiating material with which to seek a referral from the Minister to the Products Safety Committee. It can be difficult to quickly organise a meeting of the PSC given the diversity of representation on the PSC.

Under the Victorian *Fair Trading Act* 1999, the banning and recall of products is undertaken by the Minister upon the advice of the Director General of the Office of Fair Trading. A person whose interests are affected by the banning and recall of products may appeal the order within 28 days in the Victorian Civil and Administrative Tribunal.

It is recommended that the compulsory recall of products in NSW should be undertaken by the Minister upon the advice of the Director General of the Department of Fair Trading. Affected parties should be able to seek a review of the recall order in the Administrative Decisions Tribunal. This would allow the Minister to act promptly to recall a product while permitting a review of the decision.

The Products Safety Committee would still be responsible for the relatively less urgent task of conducting investigations into whether products should be banned or their sale otherwise restricted.

Recommendation 35: That the *Fair Trading Act* be amended to provide that the Minister may, on the recommendation of the Director-General, impose a mandatory recall of products.

5.5.5.2 Role of the Products Safety Committee

One of the matters raised in the Issues Paper was whether the role of the PSC should be expanded to include the power to recommend appropriate product standards or policy in relation to safety. There are already a number of non-Departmental sources of advice on product standards and policy. These include groups such as Standards Australia, and the Australian Consumers Association as well as the Consumer Affairs division of the Commonwealth Treasury and the ACCC. A number of these groups are also represented on the PSC.

However, there would be considerable duplication and resources needed if the PSC, as a collective body, was required to arrive at advice on product standards and policy. All interested parties are already consulted by the Department of Fair Trading when investigating product safety standards and preparing advice. The expertise of groups such as Standards Australia would therefore already be fed into the policy-making process.

Recommendation 36: That the *Fair Trading Act* not be amended to provide the Products Safety Committee with jurisdiction to provide advice with respect to product safety policy.

5.5.5.3 Coverage of Services

With the rapid market development of service industries in NSW, there is a widening area where consumers may not be effectively protected due to lack of

coverage by the *Fair Trading Act*. New Zealand, South Australia and Queensland include services in their information and product safety standards.

As with products, services regulated by the provisions would need to be prescribed in the regulations, thereby requiring an assessment of the costs and benefits of regulation. This assessment would eliminate duplication where a service was already regulated by other legislation (eg. medical profession) and ensure that only appropriate services are regulated under the safety provisions of the *Fair Trading Act*.

Recommendation 37: That the *Fair Trading Act* be amended to allow safety standards to be prescribed for services.

6. Other Issues

6.1. Direct Commerce

Presently, the trade of goods, sold by unsolicited contact and purchased on credit, is regulated by the *Door to Door Sales Act*. Section 6.2.5. of this Report recommended significant changes to improve the operation of door to door selling, referred generically as direct selling, in New South Wales.

In considering these operational issues, the Door to Door Sales section of the Report concluded that while the *Door to Door Sales Act* should no longer draw a distinction between unsolicited transactions paid for by cash or on credit, it was necessary to maintain the limitation that the Act only apply to unsolicited trade. To extend the Act to solicited trade would mean that the transactions were so similar to those undertaken in the 'conventional goods and services marketplace' as to not justify the additional safeguards of the *Door to Door Sales Act*.

Having said this, section 6.2.5. of the Report queried why the *Door to Door Sales Act* (or what might become the door to door sales division of the *Fair Trading Act*) should draw a distinction between unsolicited direct selling and other forms of unsolicited contact trade into a consumer's home or workplace. Generally, this latter category might be referred to as 'direct marketing'. Such trade includes unsolicited telephone calls to consumers' homes or workplaces, unsolicited mail to consumers' homes or workplaces and, increasingly, unsolicited mail to consumers' home and work e-mail accounts.

While the Steering Committee was satisfied that, in principle, it was not necessary to extend the coverage of the *Door to Door Sales Act* (or its future statutory equivalent) to unsolicited mail, it was concerned that inadequate protection was being provided to consumers in relation to their telephones. This would appear to be a particularly salient concern given the sale by commercial bodies of telephone subscribers' telephone account and home address details, on CD-Rom, for commercial use by traders.

In this respect, the Steering Committee considered that the Review provided the opportunity to address the issue of 'direct commerce'. This is timely given the increased use of electronic data to establish consumers' preferences, and the use of 'data mining' and manipulation to make targeted commercial use of it. By way of comparative background, the Steering Committee noted developments in overseas jurisdictions, particularly the United States and the United Kingdom at an international level, and in Victoria and Queensland.

The *Consumer Protection (Distance Selling) Regulation 2000* (UK) commenced in October 2000. Unlike the Door to Door Sales legislation in the Australian

jurisdictions, the UK equivalent relates to trade conducted over the Internet, order by catalogue, mail order, digital TV and telephone. In this respect, the legislation regulates both direct selling and direct marketing. Under the UK Distance Selling Regulations, consumers are entitled to:

- clear information before placing orders;
- written information (by letter, fax or e-mail) about purchases, warranties and cancellation rights;
- a cooling off period;
- a full refund if goods and/or services are not provided by an agreed date or (if no date was agreed) within 30 days or placing an order; and
- improved protection measures in relation to credit card fraud.

Shortly after the Regulation's commencement, the UK Office of Fair Trading conducted a 'sting operation' in which a number of UK consumer regulatory bodes participated in a co-ordinated sweep of UK Internet sites offering goods and services for sale. While most of the 637 UK sites provided basic business contact details (ie postal and e-mail addresses and a telephone contact number), 52 per cent failed to provide easily accessible information in relation to refund rights and treatment of consumers' personal information.

According to advice received from the UK Office of Fair Trading, consumers and traders have now adapted well to the new regulatory regime and compliance has improved. With this, consumers' interests have been safeguarded in circumstances where they have traditionally been somewhat vulnerable.

Turning to the United States, the Minister for Fair Trading referred to the Department's review team representations that he had received from the Hon J R Face, MP on behalf of a constituent, Mr Steve Owens of Charlestown, concerning the introduction of a Bill in the US State of New Jersey General Assembly. The Bill, simply referred to as No. 3028, provided that consumers wishing to not be contacted by telemarketers could include their name and contact details on a database retained by the Division of Consumer Affairs in the Department of Law and Public Safety. The Bill provides that after 30 days of the details being voluntarily added by the consumer, it is an offence for the telemarketer to contact that person. Convicted telemarketers would be liable civil administrative penalties of up to $2,000 for each violation.

In 1999, the Victorian Government amended its *Fair Trading Act* to regulate the sale of goods and services at a consumer's home or work premises where the total consideration of the purchase is $50 or more (or not ascertainable). Part 4 of the Act, entitled 'Off-Business-Premises Sales', distinguishes between contact and non-contact sales agreements.

Section 60 of the Act provides that a contact sales agreement is one involving goods or services of a kind "ordinarily used for personal, household or domestic use" entered into in the presence of the purchaser or person acting on his/her behalf at private premises (but not the trader's) or the purchaser's workplace. By

contrast, sec 68 of the Act defines a non-contact sale as a traditional consumer sale at a shop or other business premises. Section 61 of the Act sets out the requirements for contact sale agreements including full terms (s-sec 1(a)), notice of cancellation rights (s-sec 1(b)), full details of the trader (s-sec 1(c) and (d)), and prescriptions about the size of the agreement's print (s-sec 2).

Relevantly for this section of the Review report, sec 78 provides that a trader who has contacted a consumer by telephone for the purposes of a non-contact sales agreement "must—

(a) cease those negotiations immediately on the request of the prospective purchaser; and

(b) refrain from contacting the prospective purchaser for 30 days afterwards".

The Queensland *Fair Trading Act* specifically contemplates the inclusion of telephone-based telemarketing in definition of door to door sales. Section 57 defines door-to-door trading as the trading practice under which "a person … makes telephone calls seeking out persons who may be prepared to enter, as consumers, into contracts for the supply of goods or services". However, informal advice from the Queensland Department of Fair Trading indicates that while telephone contact is included in the definition of door-to-door trading, the Department has received a legal opinion to suggest that telemarketing is not covered by the Act's door-to-door trade prescriptions.

In discussions with the Department's review staff, the Australian Direct Marketing Association (ADMA) urged caution in relation to the adoption of other jurisdictions' regulatory regimes. In specific terms, ADMA suggested that it may not be appropriate to apply to the NSW marketplace a regulatory structure developed to address marketplace failure in the European Union or the United States.

Nevertheless, the Steering Committee was persuaded by the material from the international jurisdictions and, indeed, the context created by the Victorian and Queensland legislation. Moreover, consultation during the Final Report's preparation identified, what one person described as, the meaningless distinction between contact forms of direct marketing and door to door sales. Having said this, the Steering Committee was mindful of ADMA's suggestion that overseas regulatory approaches should not be adopted without adequate regard to the particular detriment occurring in the local marketplace.

The Steering Committee has opted for a new, targeted form of direct commerce regulation in New South Wales in order to take new technologies into account. While the Steering Committee recognised the rationale for the UK and EU provisions which impose strict conduct requirements on traders who seek to engage consumers in trade by sending them specifically-addressed mail, catalogues or e-mail, it considered that available marketplace data did not warrant such far-reaching regulatory intervention.

Recommendation 38: That the *Fair Trading Act* not be amended to impose direct commerce safeguards in respect of conventional forms of direct marketing such as addressed mail, catalogues or e-mail.

On the other hand, the Review considered consumer representations made to the Minister and Department in recent years that demonstrated particular and identifiable marketplace detriment – similar to unsolicited attendance at a person's home or workplace – in relation to unsolicited telephone contact with consumers. The Steering Committee considered that inter-personal pressure exerted by sales people at a person's front door and on the phone was highly similar in nature.

While it is undoubtedly true that consumers may simply 'hang up' on a persistent trader, it is equally true that a consumer may simply close the door. The Review found that the type of inter-personal pressure exerted on the telephone was likely to be the same as though a trader had called on a consumer at his or her home or workplace. Indeed, if the trader contacted a consumer by telephone on the basis of a database list, it was the Department's experience that the consumer would be referred to by name, thereby making the inter-personal connection potentially more threatening than cold attendance at the home or workplace.

Moreover, the Steering Committee was particularly concerned about the potential use of telephone-based pressure in relation to older and non-English speaking background consumers. Such considerations are consistent with the NSW Government's requirement in its Charter for a Culturally Diverse Society that its agencies deliver their services and develop programs sensitive to the particular impact they may have on communities whose first language is not English. As trade engaged over the telephone may have particular detriment for people whose non-face-to-face communication skills are not strong, the Steering Committee considered it important to ensure that it did not disadvantage certain classes of consumer, such as the elderly and those from non-English speaking backgrounds, more so than others.

Such a regulatory model would also have the advantage of addressing an anomaly, identified during the Review, whereby some traders appear to have successfully side-stepped the intent of the *Door to Door Sales Act* by cold-telephoning consumers to make an 'appointment' with them to call at their homes. While the consequential conduct and circumstances are the same as though the trader had physically called on the consumer cold, such practices have raised doubts as to whether the contact was unsolicited or not, thereby evading the safeguards of the *Door to Door Sales Act*. In this regard, such a regulatory approach would seem particularly desirable given converging marketing practices caused by new technologies, particularly in the information and communication sectors.

Taken together, the Steering Committee agreed that modern telemarketing practices gave rise to sufficiently significant and wide-spread incidents of marketplace detriment and anti-competitive conduct to warrant regulation. While

the imposition of additional regulation with respect to telephone direct marketers may, of itself, be characterised as limiting competition, the Steering Committee formed the view that the modern marketplace was so different from that subject to the *Door to Door Sales Act* in 1967 that the transaction costs to the marketplace would be negligible.

Therefore, the Committee recommended that the terms of the *Fair Trading Act* in relation to door-to-door trade also apply to traders who contact consumers unsolicited by telephone at home or in their workplaces for the purposes of initiating sales.

Recommendation 39: That the *Fair Trading Act* be amended to include a provision imposing door to door selling-like regulation on telephone-based direct marketing activities.

In addition, the Review considered that it was desirable, for consistency and public interest purposes, to mirror the provision in the Victorian legislation in relation to the duty to cease telephone marketing pursuant to sec 78 (as discussed above). This is also consistent with the New Jersey Bill, as brought to the Review's attention by the Member for Charlestown on behalf of a constituent trader.

Whereas the direct selling provisions would apply without variation to telemarketing, the Committee agreed that it was appropriate that a provision to require that traders not contact consumers for 30 days after being requested to not do so should apply only to telemarketing. Such a distinction reflects the office-based context of telemarketing practices compared to those randomly knocking on doors as they walk down a street to solicit business. The Steering Committee was concerned that to impose the 30 day 'no contact' period on direct sellers would be and unreasonable and unjustifiable impact on competition.

Recommendation 40: That the *Fair Trading Act* should be amended to provide that once a consumer has informed a telephone direct marketer that he/she is not interested in purchasing goods or services, the telemarketer may not contact the consumer again for 30 days.

The Committee considered that these contact sales provisions should be included in a 'Direct Commerce' Division of the Act, reflecting their coverage of direct selling (ie door-to-door sales) and aspects of direct marketing (ie telemarketing). Such a reference also is more representative of the data-basis of marketing in modern times compared to the traditional door-to-door knocking form of solicitation of the 1960s when the *Door to Door Sales Act* commenced.

Recommendation 41: That the above provisions be contained within a 'Direct Commerce' Division of the *Fair Trading Act*.