

VICTORIA

Report

of the

CONSUMER AFFAIRS COUNCIL

for the

Year ended 30 June 1983

*Presented to both Houses of Parliament pursuant to the Provisions of
Section 7 (2) of the Consumer Affairs Act 1972*

Ordered by the Legislative Assembly to be printed

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CONSUMER AFFAIRS COUNCIL

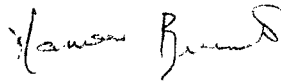
30th June, 1983

The Honourable Peter Spyker, M.P.,
Minister of Consumer Affairs,
Victoria.

Dear Sir,


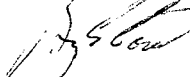
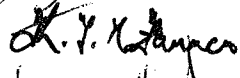

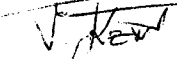
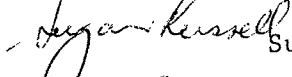
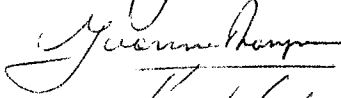
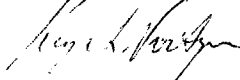
In accordance with the Consumer Affairs Act, 1972, Section 7, the Consumer Affairs Council of Victoria has much pleasure in presenting to you this Report concerning the activities of the Council for the year ended 30th June, 1983 for tabling before both Houses of Parliament.

Yours faithfully,



Maureen Brunt, Chairman

Council Members:

	Roderic N. Armitage
	Barry E. Coad, E.D.
	K.T.H. Farrer, O.B.E.
	Marilyn B. Head
	Vera Kent
	Suzanne M. Russell
	Yvonne Thompson
	K.L. Vertigan

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1. FUNCTIONS AND MEMBERSHIP OF THE COUNCIL

1.1 Functions of the Council

Section 6 of the Consumer Affairs Act 1972 states:

6. The functions of the Council shall be -
- (a) to investigate any matter affecting the interests of consumers referred to it by the Minister;
 - (b) to make any recommendations with respect to any matter calculated to protect the interests of consumers;
 - (c) to consult with manufacturers, retailers and advertisers in relation to any matter affecting the interests of consumers; and
 - (d) in respect of matters affecting the interests of consumers, to disseminate information and to encourage and undertake educational work.

1.2 Membership of the Council

Section 5 (1) of the Act states:

5. (1) There shall be a council appointed by the Minister to be called the Consumer Affairs Council consisting of a person appointed as Chairman of the Council and at least seven and not more than nine members of whom -
- (a) at least one shall be a person experienced in the manufacture of consumer goods;
 - (b) at least one shall be a person experienced in retail trading in consumer goods;
 - (c) at least one shall be a person experienced in advertising or sales promotion activities in connexion with consumer goods; and

- (d) at least four (including at least two women) shall be persons representing the interests of consumers.

The composition of the Council as at 30 June 1983 was as follows:

Chairman, Maureen Brunt Other part-time appointments as Professor of Economics, Monash University; and member, Trade Practices Tribunal.

"A person experienced in the manufacture of consumer goods"

Dr. K.T.H. Farrer, O.B.E. Consultant; formerly Chief Scientist, Kraft Foods Limited; member, Food Science and Technology (Reference) Subcommittee, NHMRC; member, Antarctic Research Policy Advisory Committee.

"A person experienced in retail trading in consumer goods"

(Vacant)

"A person experienced in advertising or sales promotion activities in connexion with consumer goods"

Barry E. Coad, E.D. Marketing Services Associate Director, Target Australia Pty. Ltd.; Deputy Chairman of Victorian Executive, Australian Association of National Advertisers; member, Federal Executive, Australian Association of National Advertisers; Major, Army Reserve.

"Persons representing the interests of consumers"

Roderic N. Armitage	Federal Secretary - States' Operations, Australian Finance Conference; wide knowledge of consumer credit law practices.
Suzanne Russell	Chairman, Consumers' Association of Victoria; Council member, Australian Consumers' Association; Senior Lecturer in Home Economics, R.M.I.T.
Marilyn B. Head	Solicitor; member, Law Institute Council of Victoria; member, Premier's Rape Study Committee; Co-ordinator, Box Hill Duty Solicitor Scheme; association with various community legal services and youth refuges.
Vera Kent	Migrant Liaison Officer, Meat Workers' Union; member, Committee of Management, Migrant Trade Union Centre; member, Yugoslavian Welfare.

Yvonne Thompson

26 years homemaker/consumer; three children; community worker particularly in areas relating to the handicapped; Government appointee, Metropolitan Transit Council; Government appointee, Special Transport Task Force; board member, Paraplegic and Quadraplegic Association of Victoria; partner in social and political research business.

K.L. Vertigan

Retired trade union official; 30 years association with manufacturing industry.

2. OVERVIEW OF THE YEAR'S WORK

2.1 Abolition of the Council

An intimation in the first half of the year that it was likely that the Council would shortly be abolished influenced the Council's programme of work.

The Council marshalled its energies to completing in good time its large Inquiry into Deceptive Trade Practices Law (initiated in April 1982). While the Report was finalized in March 1983, naturally no new project of any size could be instituted. Rather the Council has commented upon a series of specific consumer issues as they have arisen.

In September 1982 the Minister of Consumer Affairs instituted a review of the Ministry of Consumer Affairs and associated statutory bodies. The review, with very wide terms of reference, was undertaken by the Management Consultancy and Organizational Studies Division of the Public Service Board. The study team from the Board, led by Dr. M. Heppell, was augmented by Ms. F. Donovan of Frances Donovan Consulting Services, Ms. K. Setches - MLA for Ringwood, and Mr. I. Stewart of the Tenants Advice Service. The Review Report was finalized in December 1982.

The Review's recommendation concerning the Council was as follows:

The Consumer Affairs Council be replaced by a new body, the Victorian Consumer Affairs Committee. The Committee to be a Ministerial advisory committee with clearly defined policy advice functions and a composition reflecting a broad range of consumer and trader interests.

Further:

In view of the fact that the proposed Committee should provide a link between Minister and community, it would be appropriate for questions about the composition of the Committee and its functions to form part of a community consultation exercise.

The rationale for this recommendation was said to be two-fold. First, the Review Team observed that the functions of the Council are a reflection of the past history of Consumer Affairs in Victoria and involve a confusion of the roles of Ministry and Council: as they saw it, the Council's work extends beyond advising the Minister on Government policy to initiating and developing policy in a way that is inappropriate. Second, the Team said, the Council's composition is not apt to provide a link between the Minister and the community: there is a need for an advisory committee to reflect a broader "range of market and community interests".

In February 1983 the Minister made public his acceptance of this recommendation. In a Ministerial Press Release he said:

new means of consulting with the community were an important feature of the review. In order to ensure the Ministry was relevant to the community, the existing Consumer Affairs Council will be abolished and a new, more broadly-based ministerial advisory committee set up.

While the Council regrets the decision to abandon the concept of an independent Consumer Affairs Council, we wish the new Victorian Consumer Affairs Committee well.

2.2 Inquiry into Deceptive Trade Practices Law

In April 1982, the Council initiated a most important project, an investigation into desirable reforms to Victorian consumer legislation as regards misrepresentation, misleading advertising, and misleading or deceptive conduct generally.

This was in response to a Ministerial reference reading as follows:

- (i) Whether Part II, Division 2, of the Consumer Affairs Act offers adequate and appropriate protection to consumers as regards false or misleading advertising;
and
- (ii) Whether there is, on balance, a case for extending and strengthening Part II, Division 2, by incorporating provisions with respect to false representations and misleading or deceptive conduct generally.

The Council is pleased to record that a year later it was able to present to the Minister of Consumer Affairs a detailed report recommending fundamental reforms to Victorian law. Essentially the Report proposes the enactment of a new Victorian statute, a Deceptive Trade Practices Act.

In September 1982 an Interim Report, foreshadowing the likely main recommendations, was forwarded to the Minister. The Council's Final Report entitled "Inquiry into Deceptive Trade Practices Law" was finalized at its meeting of March 1983 and presented to the Minister on 22nd April, 1983.

The proposals are the product of wide consultation. Indeed the Council could not have produced such a substantial report within the space of twelve months without the very considerable assistance and support received. Fifty-eight formal submissions were received in response to an advertisement; and many more gave valuable advice, both oral and written. In the broad there has been a remarkable unanimity of advice (as set down in Section IV of the Report reproduced below), so that the Report we present can very appropriately be labelled a consensus document.

The Report is substantially reproduced as an Attachment to this Annual Report (at pp. 36-123). Here we reproduce the Summary, drawn from Section II of the Report.

"SUMMARY

4. The overall strategy - The Council is strongly of the view that what is needed is a new code of business conduct governing all business dealings in Victoria. We propose a new Victorian statute, a Deceptive Trade Practices Act, modelled upon the relevant provisions of the Trade Practices Act. The key proposal is that the State enact a law which has at its heart "prohibitions" or "protections" which mirror Ss. 52 - 61, 63A and 64 of Part V, Div. 1 of the Trade Practices Act. All overlapping provisions in the Consumer Affairs Act would be repealed. Our fundamental strategy is one of uniformity as between Commonwealth and State law.

5. We adopt the term "deceptive trade practices" to refer to the practices the subject of our reference - "false or misleading advertising", "false representations" and "misleading or deceptive conduct generally". The basic

concept of deceptive trade practices is all forms of business conduct that may mislead or deceive (i.e. lead into error) a participant in the market-place to his disadvantage. In addition to advertising, there are many other forms of marketing of goods and services which may be handled deceptively - e.g. salesmen's statements, labelling and business names, contractual documents and brochures. The challenge is to design efficient and fair legislation to control the activities of the dishonest and unduly careless firm.

6. The need - The Council has consulted widely in formulating its recommendations. Fifty-eight formal submissions were received in response to an advertisement. In addition, valuable advice was received from persons with expertise in the area, both oral and written. While there was some diversity of opinion expressed, in the broad there has been a remarkable unanimity of advice, indeed a collective establishment of three themes:

- the wide-ranging character of misrepresentation problems;
- the inadequacy of current Victorian law; and
- the great advantage to be derived from Victoria adopting a "Trade Practices Act approach" to a State law on misrepresentation, misleading advertising, and misleading conduct generally.

7. Significantly, even the small number of organizations submitting that there should be "no more legislation" gave as one of their reasons the existence of the Trade Practices Act.

8. It is notable that the submissions raise a very broad range of misrepresentation problems. The examples cited go far beyond the "published" "statements" that are at the heart of the present Victorian law. They go beyond false and misleading advertising to misleading salesmanship and false and misleading representations generally: e.g. in the course of negotiations and purchase of a swimming pool; in the conduct of a retail "sale"; in product packaging and labelling; in brochures and contractual documents. They go beyond consumer transactions to franchising practices and misleading employment opportunities, and to small business problems (such as those encountered in the purchase of a business or negotiation of a shopping centre lease). The misrepresentations etc. occur in the context of dealings in goods, in services, in land. The misrepresentations are made by all kinds of traders; they are directed to all kinds of purchasers - "consumers", "small businesses" and enterprises generally. Indeed the coverage (both in specific examples cited and in more abstract discussion) is upon misleading and deceptive business conduct in all its forms.

9. Thus the fundamental deficiency of existing Victorian law lies in its coverage. In particular, the prohibition of false and misleading advertising in Part II, Div. 2 (S. 13) of the Consumer Affairs Act is restricted to a narrow and specific form of misrepresentation, viz "statements" that are "published". The provisions governing deceptive business practices in Part II and "trade descriptions" in Part III are also unduly narrow and specific. There are restrictions upon the class of transaction and type of trader covered. In addition,

the provisions governing enforcement and remedies are totally inadequate: there is an almost total reliance upon criminal prosecutions, with no civil right of action by private persons; and the penalties for contravention are ludicrously inadequate. True it is that the Trade Practices Act offers very valuable protection to Victorians. But that protection is subject to well-known constitutional limitations.

10. As to the role of industry self-regulation, the Council believes that trade associations generally can play an important role in formulating appropriate standards of honesty and fair dealing. Advertising self-regulation can make a valuable contribution. But we agree with the conclusion of the Trade Practices Commission, in its Media Determination of 1976, regarding the relationship between industry and legislative controls; "industry consensus and action ... supplement the general law" (our emphasis).

11. Competition in markets is a powerful source of protection for consumers and purchasers generally, first and foremost through the generation of new and alternative sources of supply. In addition, there may be profit incentives for third parties to trade in information or expose misinformation. But such protection is not pervasive, and we have concluded that normal competitive processes need to be supplemented by legislative intervention.

12. A law of universal ambit - the coverage of the Trade Practices Act as to forms of deception is ample. The very general prohibition of "misleading or deceptive" "conduct" in S. 52 is coupled with a lengthy "laundry list" of prohibitions upon specific forms of deception or misrepresentation.

13. Furthermore it is now well settled in the courts that the application of Part V, Div. 1 is not confined to "consumer transactions"; it applies to business transactions generally, subject to the terms of each provision - and to constitutional limitations. Certain sections also refer explicitly to problems raised by the promotion of business opportunities (e.g. franchises) or of employment opportunities.

14. The Council has concluded that Victoria should seize the opportunity arising from the absence of relevant constitutional limitations to enact a law that would apply to the deceptive trade practices of all persons, incorporated and unincorporated, including the State government and its instrumentalities, and including the professions. It should seek to enact a code governing all business dealings in Victoria. We envisage that such a law would operate concurrently with the Commonwealth law.

15. Comprehensive enforcement and remedies - The enforcement and remedy provisions of the Trade Practices Act are a source of great strength; they are part of the logic of the Act; and we propose that for strength and consistency Victoria enact parallel provisions to the TPA scheme.

16. Accordingly, we recommend that reliance be placed upon enforcement in the ordinary State courts; that provision be made both for criminal and civil proceedings; that the rules as to "standing" (to bring an action) be at least as generous as those in the Trade Practices Act; and that the remedies available be at least as extensive as those set down in the Trade Practices Act.

17. Essential elements should include the enactment of the defences to a prosecution laid down in that Act (S. 85) and of a comparable provision to S. 75 (2), guarding against double jeopardy. The powers of the Trade Practices Commission to enforce the Commonwealth Act would need to be mirrored by comparable powers of the Director of Consumer Affairs, and perhaps certain other State officials, to enforce the Victorian Act; it would also be highly desirable for the Director (and perhaps other Victorian officials) to be empowered to bring actions under the Commonwealth Act where jurisdictional aspects make this appropriate.

18. However, consistent with this basic uniformity of approach, Victoria has the opportunity to supplement and strengthen the Commonwealth scheme. The Commonwealth's enforcement strategy is to rely primarily upon deterrence, as distinct from compensation. Moreover most proceedings are brought by the Commission or business firms protecting their commercial interests.

19. We propose four techniques to enhance access to compensation by injured persons, especially consumers. Three of these are court-oriented remedies - viz, *parens patriae* actions, reinstatement of the "old" S. 87 (1) of the Trade Practices Act, and "piggy-back" sequential damages or compensation actions. In addition, we recommend strengthening of the Small Claims Tribunals as supplementary institutions of enforcement.

20. The advantages - There are, the Council is convinced, clear and weighty advantages in taking a Trade Practices Act approach:

- (i) There is the opportunity to enact a Victorian statute which is virtually complete in its coverage of deceptive business conduct. First, the very content and structure of the prohibitions in the Trade Practices Act are comprehensive. In particular, the combination of the very general prohibition of misleading or deceptive "conduct" in S. 52 of the Act with the more specific prohibitions in the remaining sections is a strength, offering quite a high degree of predictability in the law yet eliminating the possibility of legalistic loop-holes and inventive evasiveness. Second, the absence of relevant constitutional restrictions creates the opportunity for the State to extend the ambit of the law to cover all business dealings.
- (ii) The Commonwealth Act has proved itself in almost a decade of existence and enforcement. There is a useful body of case law in being. There is widespread public knowledge and acceptance of the requirements of the law.
- (iii) A strategy of uniformity as between Commonwealth and State laws eliminates conflicting obligations for the one enterprise and discriminatory obligations as between different enterprises. It makes for economy in business compliance and in public administration and enforcement. It offers opportunities for

consultation between governments of different perspective and experience in the development of the law - an exercise in co-operative Federalism.

- (iv) The TPA approach has a number of features which make for a high degree of self-enforcement (voluntary business compliance). The language of the Act is direct and comprehensible. Clear law is coupled with strong sanctions for breach. There is available an unusually wide range of enforcement techniques, public and private actions of diverse kinds, enhanced by our proposals for improving access to redress.
- (v) The range of remedies available for breach is diverse and adaptable, again enhanced by our proposals for improving access to redress. Opening up the State courts and Small Claims Tribunals would improve access to relief, especially to consumers and smaller firms.

21. In sum, the overall cost implications of our proposals are modest in comparison with the benefit to be achieved. The Consumer Affairs Council has found existing legislation inadequate to control the actual problems posed by misrepresentation, misleading advertising and misleading or deceptive conduct generally. The main thrust of our strategy is to use the law to secure greater

business awareness of the need for honesty and the necessity for fair dealing. We see this as an economical approach, in the broad - a preventive strategy. The law would need to be enforced. But there would be considerable reliance as we have said upon private actions and much reliance upon deterrence flowing from suitably strong penalties and other remedies. As to the costs falling upon the business community, the core proposal is but to generalize the requirements of the Trade Practices Act with which business is already well acquainted."

2.3 Other Matters

While the central focus of the year's work has been the production of the Report on Deceptive Trade Practices Law, a number of other matters were considered in some detail.

A Commonwealth Consumer Education Foundation?

In a report on consumer education dated March 1982 to the Commonwealth Minister, the National Consumer Affairs Advisory Council has proposed the establishment of a Commonwealth Consumer Education Foundation. Comment upon the concept was requested by the then Commonwealth Minister, the Acting Attorney-General, the Honourable Neil Brown, Q.C.

The core recommendation of the Commonwealth Report is as follows:

"Council recommends that the Government promote the establishment of a consumer education foundation. The foundation, a national, free standing body financially supported by and involving appropriate interested parties is, in the opinion of this Council, the appropriate format to achieve a structured and professional approach to consumer education in Australia. This body would serve as a resource, research and referral centre, serving as a catalyst to bring about greater co-operative efforts between business, government and consumer groups and to advance consumer education in schools, community services and programmes for people out of school."

As we understand it, the impetus has come from a number of sources. For many years a wide variety of organizations, industry and consumer bodies and government departments, have been working in the field of consumer education. Money has been wasted through the duplication of programmes and sometimes the information produced has been simply incorrect. It is thus proposed to establish in effect a resource centre or clearing house on consumer education. It would be a national, co-ordinating body in the exchange of information on consumer education. It might also receive and direct funds to people working on specific programmes. It would not be initiating and developing programmes.

This Council has expressed its wholehearted support of the initiative.

"Buyer Beware"

In December 1982 the Ministry of Consumer Affairs released a 13 minute, animated consumer awareness film, "Buyer Beware", produced for it by Film Victoria. This is the second film to be made by the Ministry. It is described as a series of cautionary tales for consumers aimed at a broad audience. It uses examples of the problems people face in buying houses and cars and in entering upon credit contracts.

Council applauds the Ministry's initiative in creating this film and arranging for its wide distribution. It was to be screened extensively in Hoyts cinemas during the Christmas holidays. English, Greek and Italian versions have been available from the outset; and it was planned to prepare translations into a further eight or so languages. The Education Department has been given unlimited video dubbing rights, so that any school wanting a copy in any of the available languages has only to provide a film cassette.

After viewing the film, the Council proposed that the Ministry produce a kit which could be sent out with the film to aid teaching or discussion centering upon the film. It also urged that the Ministry conduct some systematic evaluation of the impact of films such as this, e.g. through distribution of a questionnaire to consumers as they leave the cinema.

Egg Production and Marketing

The Council continued to take a particular interest in this topic, following upon its Review of the Reports of the Committee of Inquiry into Egg Marketing undertaken at the request of the Minister of Agriculture (presented 15th September 1982 and reproduced in last year's Annual Report).

In the course of the year under review, Council welcomed the Government's decision to introduce legislation in the Autumn Session of 1983 to reform the existing pricing system for eggs.

However members were critical of the Egg Industry Stabilization (Amendment) Act 1982 passed in the Spring Session. That Act limits the hen quota that may be allocated to any one licensee to 10,000 birds (with each member of a partnership actively engaged in day to day operations on the one farm that is named in the licence entitled to quota of up to 10,000 birds).

Members consider that the consumer interest will not be served by limiting flock sizes to the levels envisaged. Rather, efficiencies of scale will be lost. We also question the enforceability of the proposals and the administrative costs to which they will give rise.

In our Review last year we called for an expansion in overall hen numbers within the State to reduce the value of hen quota to nominal levels. Such a policy would reduce the price of eggs to consumers through the elimination of excess profits. Unfortunately the new legislation gives rise to excess costs (both on the farm and in administration).

So while we welcome the Government's decision to reform the actual pricing system, we regret that Victorian consumers will still pay an excessive price for eggs, as a reflection of inefficiencies in the production system.

Council's views on these new developments have been communicated to the Minister of Consumer Affairs.

A Proposal for a Victorian Residential Building Disputes Tribunal

At the request of the Minister of Consumer Affairs and the Minister for Local Government, the Director of Consumer Affairs convened in May 1980 an informal working party to develop a framework for an alternative disputes handling mechanism for consumer complaints relating to the building industry. Members of the working party were the Housing Industry Association, the Master Builders' Association, the Housing Builders' Association Ltd., the Master Builders' Housing Fund Ltd., the Local Government Department and the Ministry of Consumer Affairs.

The working party's proposals were circulated for public comment in the latter months of 1982.

The Council's written comments were forwarded to the Director of Consumer Affairs and may be summarized as follows:

(i) Assessment Overall - Members saw the proposed Tribunal as a valuable forum for handling building disputes currently within and beyond the ambit of the Local Government (House Builders' Liability) Act. Nevertheless the view was expressed that the Tribunal would not address some of the more fundamental problems arising from the inadequacies of the Act itself.

(ii) Jurisdiction of the Tribunal - It was proposed that:

"the Tribunal will concern itself with matters where a contract provides that some person (the builder) contracts to construct, alter or add to a dwelling house or any building appurtenant to a dwelling place for some other person ("some other person" excludes corporations)."

Council commented that it would be necessary to extend this formulation to ensure comprehensive coverage to include

- sub-contracting by the consumer
- tradesmen as well as "builders"
- mortgagees assuming the responsibilities of a failed builder, and
- building and renovations for bodies corporate.

Further, the proposed \$5,000 limitation to the jurisdiction was judged to be totally inadequate. Members proposed that the upper limit to the total claim be set at two-thirds of the average (modal) price of constructing a new home and that this amount should be indexed.

- (iii) Composition of the Tribunal - It was proposed by the Working Party that the Tribunal composition be a Chairman (legally qualified) and an Advisor (person experienced in building, selected from an industry panel).

Council expressed concern that if a specialist Chairman were appointed, there might be the danger of "capture" by the industry. At the very least consumers could feel the Tribunal was biased towards the industry.

It was thus strongly recommended that the Chairman be appointed from the Small Claims Tribunals panel. The new Tribunal should thus form a division of the Small Claims Tribunals.

Council also recommended that the selection of an Advisor be not restricted to an industry panel; rather the emphasis should be on expertise in building techniques and problems. The Advisor could thus be drawn from, for example, local Council building inspectors, or instructors in building at various educational institutes.

- (iv) Remedies and enforcement - The Discussion Paper makes no reference to remedies or enforcement, in Council's view a significant gap.

For its part Council recommended:

- (i) The Tribunal be granted power to vary contracts and make compensatory orders.
- (ii) The Tribunal be granted the power to make an order against a consumer generally and, more specifically, be empowered to make an order against a consumer if he does not comply with the terms of settlement upon which he has agreed before the Tribunal.

- (iii) Costs should be an exemplary amount and not a real costs award.
- (v) Location within Ministry of Consumer Affairs - Members noted with approval that it is proposed that the new Tribunal would use the existing infrastructure of the Ministry, a scheme which would both enhance the independence of the new Tribunal and offer economies in administration.

At subsequent meetings of the Council, members discussed the proposal further, particularly in the light of submissions made to Council in its Deceptive Trade Practices Reference. It is plain that large issues are raised by current proposals within the Victorian community to extend the Tribunals system which were not explicitly raised by the document on which our comments were requested. Members would like to see the whole topic of the relationship between the Victorian Tribunals system and the ordinary system of courts of law pursued in depth.

Other Comments on New Legislation

Members also expressed their concern to the Minister over two features of the Local Government (House Builders' Liability) (Amendment) Bill 1982.

It is provided that a claim for less than \$250 may not be made. But all house purchasers have built into their contract price a "premium" paid by the builder to the guarantor body. The effect of this Clause is to discriminate as to which purchasers can claim for shoddy work, i.e. only where the repair bill is \$250 or more.

Members agreed that where a valid claim is made the total amount should be paid without impost of a minimum amount. House purchasers should not be penalized for the short-comings of another party, namely the builder.

The period for notification of a defect is extended from 12 to 18 months. But in view of the time taken for some defects to become apparent members thought a more realistic notification period would be two years. This, it was said, would parallel the time available for lodging a claim in the Small Claims Tribunals.

3. THE VICTORIAN CONSUMER AFFAIRS COUNCIL 1965 - 1983

The Victorian Consumer Affairs Council has made a unique contribution to consumer affairs in Victoria and, indeed, in Australia. In view of its approaching demise (see Section 2.1), it is appropriate to record its role over the years.

At the time of its formation in 1965 it was the first public body dedicated to the advancement of "consumer protection" or "consumer affairs", not only in Victoria but in Australia as a whole. No doubt its greatest achievement has been to demonstrate through practical experience that there is a field of "consumer affairs" which requires its own legislation and administrative institutions. But, in addition, it has played a distinctive role as a source of independent policy advice.

Some features of the Council's work have been constant or relatively constant. It has always been an independent statutory body concerned with "consumer protection" or "consumer affairs". It has always had a membership preserving a balance between consumer representatives and persons experienced in industry and commerce. It has had, since its inception, only four Chairmen: Mr. David T. Bottomley (September 1965 - August 1968), Major-General A. H. Hellstrom (October 1968 - February 1974), Brigadier J. D. Purcell (February 1974 - April 1980) and Professor Maureen Brunt (May 1980 - June 1983).

But in the beginning, the Council had to carry the entire weight of consumer protection in Victoria. Since 1970, as the Time Chart sets out (see pp. 31 - 34), Victoria has seen the creation of numbers of public institutions directed to furthering consumer interests - the Consumer Affairs Bureau, the Small Claims Tribunals, the Motor Car Traders Committee, the Market Court, the Residential Tenancies Tribunal and, in 1981, the independent

Ministry of Consumer Affairs. With this evolution, the work of the Council has become increasingly specialized to independent policy advice. Yet the distinctive nature of the Council, as a body, has always been the same in that its membership is independent of the departmental structure, and in that it can submit its own views, on matters of concern to consumers, direct to the Minister and to the wider community.

The history of the Council begins in 1964, with the enactment of the Consumer Protection Act, the first such statute to be enacted in Australia. It was a short Act, of only two pages, and its sole function was to establish a Consumers Protection Council (as this Council was originally named).

From the beginning the Council was given comprehensive and independent functions, expressed in the 1964 legislation as:

- (a) to investigate any matter affecting the interest of consumers referred to it by the Minister;
- (b) to make recommendations with respect to any matter calculated to protect the interest of consumers;
- (c) to consult with manufacturers retailers and advertisers relating to any matter affecting the interest of consumers; and
- (d) at any time but at least once in every year to furnish to the Minister for submission to the Parliament a report on its activities and on any matter affecting the interest of consumers which it thinks should be brought to the notice of the Parliament.

In practice, as the only creation of government charged with the specific task of consumer protection, the Council concentrated upon the two functions of receiving and resolving consumer

complaints and of formulating advice on consumer matters to the Minister (at that stage the Attorney-General). The first function fed the second. As well, it was an appropriate recipient of representations by consumer groups (leading to consultations with trade and commerce, or to recommendations for action by the Minister).

The first two Annual Reports of the Council establish convincingly the existence of consumer problems. In its first year of operations (1 September 1965 - 31 August 1966) the Council, and its staff of three, handled 464 consumer complaints, and two Ministerial references (door-to-door sales practices, and repairs to domestic electrical appliances). There were numbers of representations from consumer groups, and one in particular strikes a sympathetic chord with the present Council, namely the contention that "the present system of marketing eggs led to higher prices for consumers"!

With the second Annual Report (for the overlapping period 1 July 1966 - 30 June 1967) the number of consumer complaints handled for the year had risen to 1,530. The Report described a number of objectionable sales practices and repair practices. Prominent among these, it is significant to observe in view of the Council's current Report on Deceptive Trade Practices Law, were various deceptive trade practices - e.g. "deception in selling house cladding", "deception in door sales", "false inducements for part-time earnings", "bogus franchises", "accounts for unrequested services and products", and "dishonest advertising". The Report makes 14 recommendations to control undesirable practices, initiating a style of recommendation that was to continue for some years - essentially short sharp recommendations, expressed in the space of two or three lines, concerning the desirability in principle of "controlling" or "regulating" the practice discussed, or suggesting some specific ban or requirement (such as the disclosure of the annual interest rate in credit agreements).

The fourth Annual Report (1968 - 69) records a significant shift of emphasis. The Council had been asked to comment on the Rogerson Report (the Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law Relating to Consumer Credit and to Money Lending). This had been done, and the Council commented that it would like to be in a position to give more of its time to such study of issues in depth:

The Council wishes to afford a wider measure of protection to the whole community and therefore would like to concentrate more on research into "area" problems rather than have to place too much emphasis on the processing of individual consumer complaints.

It was becoming plain that an independent Council of consumer and business persons, albeit staffed by public servants, was an inappropriate body to handle consumer complaints. Accordingly, the Consumer Protection Act 1970 split the functions of the original Consumers Protection Council, to create the two present-day institutions, the Consumer Affairs Council and the Consumer Affairs Bureau (initially known as the Consumer Protection Bureau). The Council was to concentrate upon investigating and giving advice on "broad area problems confronting the community" (in the words of the Annual Report of the time). The Bureau was to receive and investigate individual consumer complaints, to advise consumers on their rights, to seek redress, and to institute legal proceedings for the rather mixed bag of existing "consumer legislation" entrusted to its administration.

Hence the year 1971 saw the first Annual Report of the Consumer Affairs Council, with its present-day name and present-day functions. Indeed it was the 1970 Act that first set down the set of four functions which still continue to govern its work. The 1971 Report also records, in gratified fashion, that the Governments of South Australia, Queensland, Western Australia,

Tasmania, the Northern Territory and the Australian Capital Territory "have or are about to set up statutory bodies to protect the interests of consumers".

Yet the Council was not to break free of its involvement with complaints handling and the associated bureaucracy until 1974 - 1975. For until the creation of the Ministry of Consumer Affairs in 1974, coupled with the creation of a full time Director of Consumer Affairs, the Council's Annual Report was the vehicle for reporting upon, and analyzing, consumer complaints and the associated remedial and policy work.

The year 1974 - 75 saw the beginning of the Council's studies of problems in depth, starting with the Funeral Industry, and Contracts for Furniture Removals and Storage. A rather substantial inquiry by a Sub-Committee on the Liquor Industry formed the basis of a detailed submission to the Davies Board of Inquiry in 1976 - 77. Other notable Reports have been completed on Product Safety and on Conveyancing (1980 - 81), as well, of course, as the current Report on Deceptive Trade Practices Law. In recent years, the Council has spent considerable time reviewing and commenting upon legislative proposals, especially the Credit legislation and the Residential Tenancies legislation. And finally it has directed much of its attention to reaching a considered and informed position on topics the subject of current controversy, such as the registration of insurance brokers, shop trading hours, electronic point of sale systems, introduction agencies, sales practices within the hair treatment industry, and bogus franchising schemes and misleading business opportunities.

Over the years of its existence, the Council has evolved from a body concerned mainly with immediate solutions stemming from individual consumer complaints to the broader fulfilment of its

legislated function. Most recently the Council's main proposals have been the product of research, consultation and considerable discussion. It has taken the approach that consumer policy consists as much in discovery and specification of appropriate means of reform as in identifying "problems". It has been aware of both the costs and the benefits of intervention. It has expressed its role in successive Annual Reports as follows:

The Council's brief is fundamentally to investigate, and make recommendations with respect to, consumer issues. It views its role not as "consumer protection" in a narrow sectional sense but as one of securing the resolution of consumer issues in the overall public interest. Its membership covers a wide spectrum of experience, expertise and interest. The Council affirms its belief that it should be seen as a balanced body, primarily representing consumers, but trying to achieve a harmonious and efficiently functioning market-place for both consumers and business alike.

Time Chart: Principal Developments in Victorian
Consumer Legislation and Administration

1964 -

Consumers Protection Act

Established Consumers Protection Council to advise the Minister (the Attorney-General) on consumer matters and investigate consumer complaints.

1968

Administration of the Act transferred from the Law Department to the Department of Labour and Industry.

1970 -

Consumer Protection Act

Enlarged the Council and changed its name to the Consumer Affairs Council; created the Consumer Protection Bureau as a branch of the Department of Labour and Industry, principally to receive consumer complaints and advise consumers; repealed the 1964 Act.

Time Chart (continued)

1972 -

Consumer Protection Act

Enactment of present day statute, largely a consolidation of certain provisions of the 1970 Act, the Goods Act, the Summary Offences Act, Footwear Regulation Act, Labour and Industry Act, and Door to Door Sales Act; new provisions in respect of unordered goods and services, and the safe design and construction of goods.

1973 -

Small Claims Tribunals Act

Made provision for establishment of Small Claims Tribunals, each constituted by a referee, to determine small consumer claims against traders.

1973 -

Motor Car Traders Act

Established Motor Car Traders Committee to license used car dealers; provided for regulation of car trading.

Time Chart (continued)

1973 -

Amendments to Consumer
Protection Act 1972
Ministry of Consumer
Affairs Act.

Created the Ministry of Consumer
Affairs and made provision for
the appointment of a Director of
Consumer Affairs to administer
the Consumer Affairs Act and the
Small Claims Tribunals Act.

1974 -

Amendments to Consumer
Protection Act 1972

Title of Act changed to "Consumer
Affairs Act", and of Bureau to
"Consumer Affairs Bureau".

1977

Administration of Motor Car
Traders Act transferred to the
Ministry from the Chief
Secretary's Department.

1978 -

Market Court Act

Provided for a Market Court con-
sisting of a County Court Judge
and two advisory members, to
make orders in respect of
traders who repeatedly engage in
unfair conduct and deeds of
assurance given to the Director.

Time Chart (continued)

1980 -

Residential Tenancies Act

Provided for comprehensive regulation of residential tenancies agreements and relationships, and for the creation of the Residential Tenancies Tribunal.

January, 1981

Ministry of Consumer Affairs became an independent Ministry with the Director of Consumer Affairs to serve as Ministerial Head.

1981 -

Credit Act and related legislation (Chattel Securities Act and Goods (Sales and Leases) Act))

Comprehensive revision of law governing credit transactions (in parallel with N.S.W.); provision for establishment of a Credit Tribunal.

1982

Management Review commissioned by new Government recommended changed role and structural reorganization for the Ministry.

4. APPRECIATION

The Council expresses its warm thanks to Miss Anne Herla who, for a second year, has served as Secretary to the Council. Her contribution has been invaluable.

In this final Annual Report of the Council, we should like to pay particular tribute to the staff of the Ministry of Consumer Affairs - not only for their assistance to our own work but also for their assistance to the people of Victoria.

ATTACHMENT

VICTORIAN

CONSUMER AFFAIRS COUNCIL

INQUIRY INTO

DECEPTIVE TRADE PRACTICES LAW

REPORT TO THE MINISTER OF CONSUMER AFFAIRS

MARCH 1983

37
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I. REFERENCE

1. The Ministerial reference to the Consumer Affairs Council is as follows:

(i) Whether Part II, Division 2, of the Consumer Affairs Act offers adequate and appropriate protection to consumers as regards false or misleading advertising;

and

(ii) Whether there is, on balance, a case for extending and strengthening Part II, Division 2, by incorporating provisions with respect to false representations and misleading or deceptive conduct generally.

2. The original Ministerial reference was made by the Hon. J. H. Ramsay. In April, 1982, the Hon. Jack Ginifer, initially appointed as Minister of Consumer Affairs by the new Government, expressed his great interest in the project and indicated his intention to confirm that reference. But his illness intervened. Then, on June 8th, the succeeding Minister, the Hon. Peter Spyker, formally confirmed the reference and expressed his support. Thus in a very real sense this inquiry has been sponsored by both the present Government and its predecessor.

3. We now present our Report embodying our unanimous findings and recommendations:

II. SUMMARY

[Reproduced in the body of the Annual Report at pp. 8 - 16]

III. PROCEDURE

22. In recent years the Council has returned, again and again, in its discussions of specific consumer problems in the market place to what has seemed to be one of the key underlying causes, namely the use by a segment of the business community of misleading or deceptive trade practices. We stress that it would be only a small minority of the business community that would use such business practices, but it is a significant minority.

23. So in a general way the Council has been for some years convinced of the need for reforms to Victorian legislation as regards misrepresentation, misleading advertising, and misleading or deceptive conduct generally.

But the topic is a technical one. Further, any reforms of this kind go to regulating central features of our business system. Furthermore, any such legislation inevitably gives rise to costs (both for the government and the business community) as well as benefits; and we should want to be convinced that an appropriate balance had been struck. Accordingly we have been impressed by the need for careful, detailed work and for wide consultation.

24. In April 1982 Council decided to concentrate its efforts in succeeding months upon this project. It appointed a Working Party consisting of the Chairman - Professor Maureen Brunt, Mr. Roderic Armitage, Mr. Barry Coad and Ms. Marilyn Head. (Mrs. Suzanne Russell, originally appointed to the Working Party, was forced to resign because of the pressure of her other commitments. However, the group had the benefit of her participation in its early meetings.) The Ministry of Consumer Affairs made available its Assistant Director (Policy), Mr. Glen Carleton, to meet with the Working Party in an advisory capacity.

25. The first decision of the Working Party was to advertise widely for submissions and to write personally to many individuals and organizations, requesting their assistance. The advertisements appeared both in the daily press ("Age", "Australian", "Herald", "Sun") and in selected ethnic papers ("Il Globo", "La Fiamma", and "Neos Kosmos"). A copy of the advertisement is attached (Appendix VI).

26. Fifty-eight formal submissions were received. In addition, valuable advice was received from persons with expertise in the area, both oral and written. Appendix V lists the organizations and individuals making submissions and/or giving advice.

27. At a crucial stage in the Working Party's deliberations, it was fortunate to be afforded the opportunity to take proposals and problems to two technical Workshops for critical exposure and advice. First, the Chairman presented a paper on certain technical issues to the Trade Practices Workshop held at Newport (N.S.W.) on 8 - 10 October, 1982. Then, on October 21, 1982, the Law Institute offered hospitality for an ad hoc gathering of interested lawyers to meet with the Working Party.

28. It is a pleasure to acknowledge the very considerable assistance and support received from many individuals and organizations in preparing this Report.

IV. THE SUBMISSIONS

29. It is apparent from the number and character of the submissions that the project has attracted wide interest and serious consideration.

30. While the most substantial submissions have been from organizations and from lawyers, a small number of submissions were received from individual consumers. A number of very valuable submissions have been received from national bodies or from interstate (e.g. the Trade Practices Commission, the Australian Federation of Consumer Organizations, the Australian Association of

National Advertisers). We have had the benefit of useful advice from our fellow Consumer Affairs Councils. We are especially appreciative of the assistance we have received from numbers of lawyers - from individual lawyers in Law Schools and in practice, and from the Law Institute of Victoria. And finally it was also pleasing to receive submissions from a number of Victorian organizations, such as the Retail Traders' Association of Victoria, the Small Business Development Corporation and Job Watch.

31. Some of the submissions relate to general consumer problems which, while raising serious issues, are not really relevant to this particular project. These have been transmitted to the Council for its consideration. Of the relevant submissions and advice, the greater number focus upon positive proposals for legislative reform. A few, indeed, submit that no additional or different controls are necessary. And some submissions discuss particular problems or instances of misrepresentation etc., not adequately covered by existing law.

32. It is always difficult to give an adequate impression of the range and emphasis of numerous submissions received in response to an advertisement. Nevertheless the Working Party's strong impression is of the collective establishment of three themes:

- the wide-ranging character of misrepresentation problems;
- the inadequacy of current Victorian law; and
- the great advantage to be derived from Victoria adopting a "Trade Practices Act approach" to a State law on misrepresentation, misleading advertising, and misleading conduct generally.

33. As to the first, it is notable that a very broad range of misrepresentation problems is raised. The examples cited go far beyond the "published" "statements" that are at the heart of the present Victorian law. They go beyond false and misleading advertising to misleading salesmanship and false and misleading representations generally - e.g., in the course of negotiations and purchase of a swimming pool; in the conduct of a retail "sale"; in product packaging and labelling; in brochures and contractual documents. They go beyond consumer transactions to franchising practices and misleading employment opportunities, and to small business problems (such as those encountered in the purchase of a business or negotiation of a shopping centre lease). The misrepresentations etc. occur in the context of dealings in goods, in services, in land. The misrepresentations are made by all kinds of traders; they are directed to all kinds of purchasers - "consumers", "small businesses" and enterprises generally. Indeed the coverage (both in specific examples cited and in more abstract discussion) is upon misleading and deceptive business conduct in all its forms.

34. Those discussing the deficiencies of Victorian law in some detail include Messrs. A. D'Aloisio and A. J. Duggan, the Australian Federation of Consumer Organizations Inc. (AFCO), the Law Institute of Victoria, and the Trade Practices Commission.

35. Of those making substantive recommendations as to remedial action, the virtually unanimous recommendation is for Victoria to enact new legislation, adopting a Trade Practices Act approach. Those supporting a TPA approach include:

Mr. A. D'Aloisio
 Mr. A. J. Duggan
 Professor J. Goldring
 Professor W. A. Townsley (Consumer Affairs Council of Tasmania)
 Australian Consumers' Association (ACA)
 Australian Federation of Consumer Organisations (AFCO)
 Australian Finance Conference
 Consumer Credit Legal Service Co-operative Ltd.
 Law Institute of Victoria
 Trade Practices Commission
 International Franchising Nominees Pty. Ltd. (franchising)
 Job Watch (employment opportunities).

36. This is not to say that some of these persons and organizations would not wish the TPA approach to be supplemented (as noted to some extent below). But there is a central core of agreement and enthusiasm. By way of example we cite a passage from the AFCO Submission:

The Trade Practices Act is a piece of national Legislation that offers an excellent model. The Constitutional problems are well known and more recently, the retreat by the Commonwealth from this area (as exemplified in the Review of Commonwealth Functions Report) has further limited its applicability. It would be fair to say that the Trade Practices Act, especially Section 52, provides a basis for much better consumer protection than otherwise available. In order to provide Victorians with this better protection, it is strongly suggested that the Trade Practices Act model be adopted. This would also be an important and, perhaps, catalytic step towards uniformity.

37. But there are those who, as we have said, submitted that there should be "no more legislation". This is the view of the Retail Traders' Association of Victoria and of the various media and advertising organizations making submissions - the Advertising Federation of Australia, the Australian Association of National Advertisers, the Australian Newspapers' Council and the Media Council of Australia.

38. Essentially all expressed the same two reasons, the desirability of encouraging self-regulation and the adequacy of existing laws. Significantly, all commented on the effectiveness of the Trade Practices Act. The R.T.A.V. said for instance:

This industry regards the Trade Practices legislation as most extensive and long established and able to stand on its own feet, as it were.

39. The Australian Association of National Advertisers took this a step further:

In the main it appears that responsible marketing companies and advertisers have little to fear from the TPA since the basic prohibitions it contains are against untruth in advertising or business conduct generally. Responsible marketing companies and advertisers have, in our experience, adopted such a standard as an essential policy in any case since it is appropriate to good corporate citizenship. A reflection of the consumer protection provisions of the TPA in State legislation is not, per se, objectionable ... There are instances where a firm which is not incorporated and not involved in the other areas of Commonwealth jurisdiction is beyond the reach of the prohibitions in the TPA. It is fair and appropriate that this gap is filled by State legislation. It must be noted that any such approach to "mirror" provisions should include a "double jeopardy" provision whereby a person firm or corporation cannot be liable under both Federal provisions and equivalent State provisions.

V. THE NEED FOR A NEW STATUTE GOVERNING DECEPTIVE TRADE PRACTICES

40. We adopt the term "deceptive trade practices" to refer to the practices the subject of our reference - "false or misleading advertising", "false representations" and "misleading or deceptive conduct generally". The basic concept of

deceptive trade practices is all forms of business conduct that may mislead or deceive (i.e. lead into error) a participant in the market place to his disadvantage.

41. The Council is strongly of the view that what is needed is a new Victorian statute governing deceptive trade practices. The core of the proposal is the enactment of a state law which mirrors the relevant provisions of the Trade Practices Act. At the same time, certain provisions within the Consumer Affairs Act should be repealed.

42. In this Section we discuss the case for a new statute of some kind. In the following Section we discuss the advantages of the TPA approach.

43. That case rests essentially upon three elements:

- . the existence of deceptive trade practices in a market system;
- . the insufficiency of self-regulation to remedy the problem; and
- . the deficiencies of existing law in Victoria.

V.1 The Existence of Deceptive Trade Practices

44. We have earlier commented on the range and diversity of misrepresentation problems raised in the submissions (p.44); and no doubt there is much, too, that is common knowledge.

45. However, if more systematic evidence is needed, the Annual Reports of the Director of Consumer Affairs contain many examples of deceptive trade practices. Those references have been tabulated in Appendix II. Likewise the Annual Reports of the Trade Practices Commission are replete with Australia-wide examples. A summary of references has been supplied by the Commission and is reproduced in the same Appendix.

46. We have thought it best not to attempt to present an array of case studies in the body of this Report lest the selective description of particular practices in particular industries give an unbalanced view - and in itself constitute a misrepresentation of the situation! Rather we rely upon the tabulations in the Appendix to tell their own story.

47. Nevertheless we draw attention to a number of inferences to be drawn from the examples, of particular relevance in the light of our terms of reference. First, misleading and deceptive behaviour is by no means a monopoly of the advertising industry. There are many other forms of marketing of goods and services which may be handled deceptively - e.g. salesmen's statements, labelling and business names, contractual documents and brochures. Secondly, while some industries lead the parade, the industries involved are numerous and varied. Significantly, also, even a Consumer Affairs Ministry finds itself in receipt of complaints extending beyond the consumer field, from persons not knowing where else to turn, specifically complaints relating to bogus franchising and misleading employment opportunities. And third, the deceptions range from the patently dishonest activities of turning back car odometers, or issuing worthless vouchers for holiday accommodation or transport, to undue carelessness (e.g. the failure to correct a

travel brochure when itineraries change); they encompass both what is done and what is left undone (e.g. omissions in sales information which creates a falsely favourable impression).

48. Of course complaints and anecdotes do not establish the extent of the problem or its basic causes. Some may say, indeed, that this "evidence" reveals little more than the existence of gullible consumers and of cosseting public officials. The fundamental question to be addressed is why there is a need for legislative intervention into market processes. Why not rely upon competition to protect the consumer or purchaser? Would not the honest trader prosper? Should not consumers (or purchasers generally) be encouraged to act prudently and explore alternatives - i.e. to protect themselves?

49. When the issue is posed in this way it seems clear that the essential problem is that competition may not always be enough to protect even the reasonably careful purchaser from dishonest or unduly careless sales practices. Some traders, with the fly-by-night operator and the con man the most extreme example, lack a long-run interest in building customer goodwill; and the purchasers of some products will find intrinsic difficulty in assessing the qualities of the merchandise (e.g. patent medicines). Moreover while there are sometimes profit incentives for a third party to trade in information or expose misinformation, this is not always the case. In short, we recognize a problem of "market failure", such that the normal competitive processes need to be supplemented by legislative intervention to penalise the dishonest and unduly careless firm.

V.2 The Insufficiency of Self-Regulation

50. But what is the role of self-regulation? The various media/advertising bodies submitted that self-regulation of advertising by the introduction of voluntary codes and standards is "highly effective", flexible, speedy, inexpensive and often preventative in operation. The Australian Consumers' Association, on the other hand, commented that the advertising industry "does not enforce the codes well in practice" and that "many of the codes are vague and uncertain at present". In a wider context, the Retail Traders' Association of Victoria supported "reputable self regulation" from within the retailing industry.

51. For a balanced statement of the advantages and disadvantages of advertising self-regulation we can do no better than cite the recently published comprehensive survey of Australian advertising regulation by Barnes and Blakeney (Advertising Regulation, Law Book Co., 1982, at pp. 486-7):

The advantages of self-regulation ... are freedom from the rigidity and delays of the legal system, expertise in administration, breadth and practicality of standards, expedition in administration and, above all, acceptability to advertisers, advertising agencies and the media. The disadvantages of self-regulation include the lack of consumer representation, the lack of impartiality in administration and the denial of review of decisions taken, the lack of sanctions and the absence of mandatory obligations to comply with decisions of the self-regulatory authorities.

52. We note the conclusions expressed by the Trade Practices Commission in its Media Determination of 1976 (ATPR (1976) 35-200 at pp. 16,563 and 16,568-9):

The accreditation system does have a considerable ingredient of responsible industry regulation as to standards of advertising. This is an area where industry consensus and action can very helpfully supplement the general law, and it is difficult to see interference with competition unless there is abuse. There is no suggestion of that, and although all levels of the industry are not represented in administering, the advisory body on standards, the Advertising Standards Advisory Authority, under the independent chairmanship of Sir Richard Kirby, is broadly based and impartial. The present form of regulation of industry standards is relatively new and is capable of an increasing beneficial influence, particularly in matters that are ethical or moral and are not spelt out in explicit legislation. The system is the media's system, rather than the industry's system, but that is changing and may change more over time, and currently it is salutary that the media is taking responsibility because it controls the point of publication and can take immediate action when required.

.....

There are areas where legislation does not reach in specific terms, for example the specific provisions about broadcasting are not reflected in legislation about newspapers. Moreover, there can be flexibility and speed within an industry system. There can also be the same emphasis on prevention rather than cure that the Commission itself has tried to encourage by its own Guidelines on Advertising as well as on other matters. The Industry provisions for clearance beforehand of certain broadcasting and television material and of advertising on particular subjects, notably those affecting health, are matters of real value to the public and, be it remembered, to the industry itself in terms of its self-respect and public standing. The law speaks on some, but not all of these matters. The law has little to say, directly, in matters of what amounts to good taste in advertising in a general moral or ethical sense.

53. We agree with the Commission that "industry and legislative controls should be seen as "complementary and mutually reinforcing" (p. 16,568). But we also agree that the appropriate relationship is that "industry consensus and action ... supplement the general law" (p. 16,563, our emphasis).

54. As to the more general role of industry self-regulation, extending beyond the advertising and media industries, we believe that trade associations play an important role in formulating appropriate standards of honesty and fair dealing. But such voluntary consultations, again, are a supplement to the general law.

V.3 The Deficiencies of Existing Law

55. While a central feature of the Ministerial reference to Council is the request that we assess the adequacy of Part II, Div. 2, of the Consumer Affairs Act, we have not found it necessary to spend much time in investigation, or space in exposition, of the adequacy of this Act. The deficiencies are so patently obvious that they can be quickly summarized and the relevant provisions of the Act dismissed. The deficiencies are so fundamental that we do not believe that there is any merit in even considering amendment. The provisions governing deceptive trade practices should be repealed. A totally new legislative approach should be pursued.

56. The main deficiencies of the Consumer Affairs Act in controlling deceptive trade practices are as follows:

First: The prohibition of false and misleading advertising in Part II, Div. 2 (S. 13) is restricted to a narrow and specific form of misrepresentation. It is confined to "statements" that are "published". Although "publication" is defined to include printed publications and some other public exhibitions, and the dissemination of statements by broadcasting television and cinematograph, it does not extend to other oral statements or representations. As Mr. Duggan comments:

Consequently, false or misleading statements made by salesmen to prospective purchasers fall outside the terms of the prohibition.

There is no warrant for excluding verbal statements in this way. In fact, there is a sense in which verbal statements give greater cause for concern than do published advertisements, in that statements which are made personally to a prospective purchaser in what will often be a high pressure situation are more likely to be acted on than are statements made at large.

More generally, the concept does not extend to misleading communication by way of conduct - whether by way of commission or omission - conduct which may convey a misrepresentation.

57. Second: Indeed the general approach of Part II as a whole, dealing with "Dishonest or Undesirable Trade Practices" has its limitations. This is to establish a series of Divisions, each of which controls a specific business practice (or set of connected practices), such as misleading marking of prices, mock auctions, pyramid selling, and door to door sales. In the main, these are useful controls. But, regrettably there is no attempt to achieve comprehensive

regulation of deceptive business conduct in all its forms, such as occurs with Ss. 52, 53 and 53A of the Trade Practices Act.

58. Third: There are however, in another Part of the Act, provisions prohibiting false trade descriptions (S. 36) and false representations as to Royal Warrant etc. (S. 37). The definition of "trade description" contained in S. 33 does extend to "any description statement indication or suggestion direct or indirect" as to specified matters; and the concept of falsity does extend to include "anything contained therein or omitted therefrom". But the concept of a false trade description is rather narrow - much narrower than the concept of "misleading and deceptive conduct" contained in S. 52 of the Trade Practices Act - and narrower even than the concept of false representation in S. 53 of that Act; the prohibition is restricted to the sale of "goods"; and the character of the representations contained in the trade description is confined to a limited list of features of the goods in question, significantly narrower than that contained in S. 53 of the Trade Practices Act. Again, the conduct the subject of the prohibition is unduly narrow and specific.

59. Fourth: There are restrictions upon the class of transaction and type of trader covered. While the general prohibition of false and misleading advertising applies to "real property", "personal property" and "services", the specific prohibition of bait advertising (contained in S. 13 (2A)) refers only to "goods". The prohibition upon false trade descriptions applies only to "goods". There is a complete absence of power to control misrepresentations in relation to employment or business opportunities.

60. Fifth: The provisions governing enforcement and remedies are totally inadequate. First, there is an almost total reliance upon criminal prosecutions. There is no civil right of action by private persons, i.e. consumers, traders or members of the public generally (subject to a small exception relating to another part of the Act). There is no provision for injunctive relief or for affirmative disclosure or corrective advertising. Second, the penalties for contravention, again in Mr. Duggan's words, are "grossly inadequate from the point of view both of the harm which may flow from the proscribed conduct and the potential profit to be made from contravention". Unlike the Trade Practices Act, there is no question of the penalties having, as the Trade Practices Commission express it, an "exemplary effect ... to achieve the objective of high standards of commercial behaviour". The fines that may be imposed for contraventions of S. 13 and Ss. 36 - 37 range between \$100 and \$500; and while imprisonment for three months is a possibility in respect of contraventions of S. 13, and for six months in respect of contraventions of S. 36, it is doubtful whether these are of much practical effect and deterrence.

61. Sixth: While S. 9B empowers the Director to institute or defend "proceedings" on behalf of consumers for infringement "of this Act or any other law relating to the interests of consumers", the scope of the power and, as the Law Institute says, the manner in which it would "interact with civil proceedings" is unclear. Even if the Director has the power to bring civil actions for damages in respect of infringements of the provisions of this Act on behalf of named consumers for breaches of statutory duty, this possibility is limited by the requirements, inter alia, that (a) "a consumer has made a complaint

under this Act"; (b) "the amount claimed or involved in the proceedings does not exceed \$10,000"; (c) "the Minister has given his consent"; and (d) "the consumer has given his consent".

62. Seventh: The standards of liability expressed by the Act may be criticised for a number of reasons. To begin with, there may be a requirement, depending upon the complaint, that the prosecution prove falsity in a "material particular" or "material respect" (cf S. 13 (1)(b) and S. 33). The alternative approach, as the Trade Practices Commission points out, less legalistic in its requirements, is to "specify in what particular respect falsity amounts to an offence" in the context of the particular misrepresentation. Then, too, in one respect the treatment of printers, publishers and proprietors may be unduly generous in that S. 13 (8) envisages that prosecution will proceed only if the printers etc. have not responded to warnings. Finally, there is a need for explicit provisions governing the circumstances in which liability of the corporation may arise from the acts or defaults of its directors, agents and servants.

63. Eight: So far our criticisms have largely been of omissions rather than commissions. But we have been convinced by submissions from the Australian Association of National Advertisers and the Retail Traders' Association of Victoria that there is one particular prohibition whose requirements are onerous, ambiguous and unworkable. This is contained in the sub-sections governing advertising of discounts or mark-downs (S. 13A (2) and (3)). The sub-sections provide that unless exemption regulations are in force any person offering goods or services who gives an indication that they are for sale at

less than the normal price must also indicate "in an equally distinct manner the present price of the goods or services". As it stands the reach of the provision, as the A.A.N.A. submits, is "unacceptably wide", extending to the use for example of sale banners and T.V. campaigns. To publish two prices for every good and service the subject of the price reduction "in an equally distinct manner" is scarcely practical, and attempts to conform could be positively confusing to the consumer. Finally, the meaning of the term "the present price of goods or services" is impossible to determine. Again the basic fault is that the legislation has been couched in too specific and narrow terms. By contrast, the Trade Practices Act, S. 53 (e), makes it unlawful to "make a false or misleading statement with respect to the price of goods and services".

64. In sum, the Consumer Affairs Act is of little practical effect in protecting Victorian consumers from deceptive trade practices. But is there really a need for Victoria to enact her own legislation? Why not rely upon the Trade Practices Act to achieve "enough" protection?

65. There are two limitations upon the coverage of the Trade Practices Act which we believe are truly significant.

66. First there are the well known Constitutional limitations upon the ambit of the Act. In general, conduct of persons, other than corporations, will be caught only if they are engaged in interstate, overseas or territorial trade or dealings with the Commonwealth, or if the conduct involves the use of postal or broadcasting facilities. (The exception is S. 55 which relies upon the Commonwealth's external affairs power.)

67. That these Constitutional limitations are of real practical importance is convincingly argued in a number of the submissions. To quote but two:

Mr. Duggan:

One large area of activity which would therefore not be covered by the Trade Practices Act is newspaper advertising by persons other than corporations. Another would be misleading or deceptive trading practices which were engaged in by persons other than corporations and false or misleading statements made by salesmen employed by persons who were not corporations. A third would be false or misleading statements made by persons other than corporations contained in hand delivered or 'help yourself' brochures, in posters, in contractual documents, on bill-boards or on product packaging or labelling.

Job Watch:

Job Watch has documented that there are a number of instances of exploitation of employment seekers by way of misrepresentation and misleading advertising carried out by unincorporated business or individuals.

68. Secondly, there can be limitations upon the enforcement of the Trade Practices Act.

69. In May 1981 the Commonwealth Minister for Business and Consumer Affairs issued a directive to the Trade Practices Commission which substantially restricted the ability of the Commission to enforce the consumer protection provisions of the Act. The directive stated that the Commission "... is not to undertake enquiries relating to a possible contravention of Division I of Part V of the

Trade Practices Act unless the matter is brought to its attention by another person and it raises issues of importance at the national level. Issues of importance at the national level are matters that affect, or could affect, consumers in more than one State or Territory or which involve companies operating nationally or which involve advertising or other conduct that is carried on nationally or in more than one State or Territory".

70. This directive, coupled with recent staff reductions and budgetary constraints, has effectively confined the Commission's work to a scope much narrower than that imposed by the Constitution, largely to national advertising and marketing practices, with much corporate activity and even advertising practices with a local impact (e.g. employment opportunities) left untouched.

71. It is true that one of the strengths of the Trade Practices Act is that it gives standing to enforce its provisions to the community generally. "A person who suffers loss or damage" by conduct in contravention of the Act may seek damages; and any person may seek an injunction. The Trade Practices Act is a Commonwealth Act but its protections are available to individual members of the Victorian community. Nevertheless these rights, generally speaking, cannot be enforced in State courts. As Professor Goldring says: "One of the problems with the Trade Practices Act has been that its provisions have been enforceable only through actions in the Federal Court, which is expensive".

72. Yet another limitation lies in the powers of the Director of Consumer Affairs. While the Trade Practices Act would permit the Director to bring criminal proceedings (subject to the consent of the Commonwealth Minister) or

civil proceedings for an injunction or declaration, it is doubtful whether the relevant State legislation would permit this. (See Ministry of Consumer Affairs Act, Ss. 4 and 8; Consumer Affairs Act, Ss. 8 and 9B.)

VI A DECEPTIVE TRADE PRACTICES ACT

VI.1 The Commonwealth Model

73. The Council is strongly of the view that what is needed is a new code of business conduct governing all business dealings in Victoria. We propose a new Victorian statute, a Deceptive Trade Practices Act, modelled upon the relevant provisions of the Trade Practices Act. The key proposal is that the State enact a law which has at its heart "prohibitions" or "protections" which mirror Ss. 52 - 61, 63A and 64 of Part V, Div. 1, of the Trade Practices Act. All overlapping provisions in the Consumer Affairs Act would be repealed.

74. We adopt the general strategy advocated by the Law Institute (among others):

To avoid loopholes and anomalies it is highly desirable that State and Federal legislation be uniform wherever possible, and therefore the Institute submits that the ... provisions of Division 1 of Part V of the Trade Practices Act be reproduced in the State legislation without substantive alteration. If it is thought desirable that further amendments be made to the provisions contained in the Trade Practices Act, these amendments should be made in due course in both State and Federal legislation, after consultation between the appropriate State and Federal authorities.

75. We have therefore resisted any temptation to recommend "improvements" in the language of the Commonwealth draftsman

or extensions to the TPA list of conduct or practices prohibited. Where the State and Commonwealth have enacted somewhat parallel prohibitions (e.g. on pyramid selling, unordered goods and services) we recommend substitution of the Commonwealth provision without inquiry - at this stage - as to which might be the "better". We do not regard the Commonwealth law as perfect; rather we place high value upon uniformity in this area of the law and upon Commonwealth-State collaboration in improvement.

76. The outcome of such uniformity would be clearer, stronger, more comprehensive, and fairer law. It would also be more cost-effective law, in terms both of business knowledge and compliance and of public administration and enforcement.

77. We also accept that the impact of the Trade Practices Act rests as much upon the system of enforcement and remedies created by the Act as it does upon the enunciation of a code of conduct. As the Commission point out in their submission, a fundamental strength of that law is the "existence of very clear legal obligations and severe sanctions for their breach". From this flows a high degree of self-enforcement (business compliance without the need for costly court actions). From this, too, flows the success of Commission administrative action ("education" and "persuasion").

78. Accordingly, we recommend that reliance be placed upon enforcement in the ordinary State courts; that provision be made both for criminal and civil proceedings; that the rules as to "standing" (to bring an action) be at least as generous as those in the Trade Practices Act; and that

the remedies available be at least as extensive as those set down in the Trade Practices Act. However while we should wish to adopt the TPA approach to enforcement and remedies in a comparable State law, we do not see in this context the same necessity to mirror the Commonwealth provisions (as we have argued applies in the context of the prohibitions). In particular, we believe the State has the opportunity to supplement and strengthen the Commonwealth scheme in certain desirable ways.

79. It is apparent, then, that even with a uniform State law there are two important design options: first, in the absence of constitutional restrictions, what should be the ambit of the new law? and second, how might the provisions governing remedies and enforcement be strengthened? We take up each of these issues in the two following sub-sections, in the course of discussing the proposals in more detail.

VI.2 The Scope of the Recommended Prohibitions

80. The recommended prohibitions to be drawn from Part V, Div. 1, of the Trade Practices Act are set out in Table I. The text of the sections has been reproduced in Appendix I.

81. By way of preliminary, a word of explanation as to the omissions is in order. It will be observed that we are recommending the enactment of all provisions within Part V, Div. 1, but two - viz Ss. 62 and 63 governing product safety standards and product information standards. This does not mean that Council has formed a view that some such legislation is undesirable. Indeed in our Report on Product Safety (reproduced in the Annual Report for

63
Table 1

RECOMMENDED "PROHIBITIONS" FROM THE
TRADE PRACTICES ACT (PART V, DIV. 1)

- S52 General prohibition of misleading or deceptive conduct (with "conduct" meaning doing or refusing to do any act: S4).
- S53 False or misleading statements or representations in relation to supply of goods or services:
- a) false representation that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use;
 - aa) false representation that services are of a particular standard, quality or grade;
 - b) false representation that goods are new;
 - c) representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
 - d) representation that the corporation has a sponsorship, approval or affiliation it does not have;
 - e) false or misleading statements with respect to the price of goods or services;
 - f) false or misleading statements concerning the need for any goods or services; or
 - g) false or misleading statement concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.
- S53A False representations in relation to land.
- S53B False or misleading advertisements re employment.
- S54 Offering gifts, prizes, etc. with the intention of not providing them, or not providing them as offered.
- S55 Misleading conduct by a person re nature, manufacturing process, etc. of goods.
- S55A Misleading conduct re nature, characteristics etc. of services.
- S56 Bait advertising.
- S57 Referral selling.
- S58 Accepting payment without intention to supply as ordered.
- S59 Misleading statements re business opportunities.
- S60 Coercion at place of residence.
- S61 Pyramid selling.
- S63A Unsolicited credit cards.
- S64 Assertion of right to payment for unsolicited goods, services or for entry in a trade directory.

1980-81) we argued the need for State controls upon dangerous goods and recommended a detailed scheme. However we do believe that Ss. 62 - 63 have a different character from the remainder of the Part. Their subject-matter is not dishonesty and deception, false and careless representations. And the regulatory technique is different: Ss. 62 - 63 rely upon the detailed prescription of standards by administrative means ("Thou shall"); the remaining provisions rely upon generally expressed prohibitions ("Thou shalt not") in a statute which is largely self-enforcing through business compliance. In short Ss. 62 - 63 are peripheral to our terms of reference; their desirability would need to be canvassed by those in a better position to assess their administrative and financial feasibility; and the present proposals constitute a self-contained system.

82. Turning now to the list of recommended TPA prohibitions displayed in the table, the outstanding feature is the breadth of coverage achieved. This is the product in no small measure of the structure of the Part - the combination of the general and the particular.

83. There is first the very general prohibition of S. 52 (1):

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

84. "Conduct", moreover, is defined in S. 4 to refer to "doing or refusing to do any act" where "refusing" may mean no more than "refraining (otherwise than inadvertently)".

85. This is followed by the very lengthy and detailed specification of particular forms of misleading etc. conduct (e.g. a false representation that "goods are new") and also of controls upon particular business practices (e.g. pyramid selling, franchising). The prohibitions are expressed to apply to the sale of goods or services; transactions in land or an interest in land; and offers of employment or business opportunities.

86. It is now well settled in the courts that the application of Part V, Div. 1, is not confined to "consumer transactions"; it applies to business transactions generally, subject to the terms of each provision - and to constitutional limitations.

87. Thus the coverage of the Trade Practices Act as to conduct is ample. It extends, as the Commission says, generally speaking, to "conduct in all its forms in the context of trade and commerce". But its ambit of application, while extensive, is limited by the constitutional powers of the Commonwealth.

88. How far should the State go, to express the matter broadly, in extending the law to persons other than corporations, and to business dealings other than "trade and commerce?"

89. Numbers of submissions commented on this issue, almost all favouring an approach of what might be termed universal ambit. The exception was the Law Institute of Victoria which submitted that the law should not apply to solicitors.

90. As a first step in the argument there was widespread approval of the proposition that trader-trader relationships should be covered in a State law as well as consumer-trader relationships. As Mr. D'Aloisio put it:

In the field of misleading and deceptive conduct, all persons and companies may be subjected to the conduct, from large corporations to the man in the street. There is, in my view, no difference between a statement to a purchasing officer of BHP that a software package will carry out every facet of accounting, when it does not, and a statement by a used car salesman to a buyer that a car has done a particular mileage, when it has not.

91. To quote Mr. Noblet (Director-General, Department of Public and Consumer Affairs, South Australia):

Legislation which regulates general business practices, or which prohibits or otherwise controls undesirable business practices, should have comprehensive application without limitations as to particular areas of commerce or as to the type of person to be "protected". Generally speaking, if a practice is undesirable it should not matter by whom it is done nor to whom it is done.

92. We are reminded of the view of the Swanson Committee (Report to the Minister for Business and Consumer Affairs, 1976), para. 10.2:

We believe it to be extremely important that the Trade Practices Act should start from a position of universal application to all business activity, whether public sector or private sector, corporate or otherwise. Only in this way will the law be fair, and be seen to be fair, and avoid giving a privileged position to those not bound to adhere to its standards:

93. As to the professions, the Swanson Committee had this to say (paras. 10.31 and 10.35):

The Committee has already expressed its view that the Act should apply in a general fashion to those in the community engaged in trade or commerce. We regard as unrealistic the proposition that members of professions are not part of the business community.

.....

Division 1 of Part V sets certain minimum standards of business conduct. Most, if not all the professions, impose equal, if not stricter standards upon their members. We see no reason why those provisions should not apply to the professions nor would we expect its application to cause the professions any concern.

94. It was submitted also that now that the Commonwealth has implemented the Swanson Committee's recommendation that the Commonwealth Government and its instrumentalities should be subject to the Trade Practices Act, it would be appropriate for Victoria, in parallel fashion, to make the State Government and its instrumentalities subject to a corresponding State law.

95. The Council concludes that Victoria should seize the opportunity to enact a law that would apply to the deceptive trade practices of all persons, incorporated and unincorporated, including the State Government and its instrumentalities, and including the professions. It should seek to enact a code governing all business dealings in Victoria. We envisage that such a law would operate concurrently with the Commonwealth law. Section 75 of the Trade Practices Act expressly provides that, subject to the elimination of double jeopardy for an offence, Part V of the Act "is not intended to exclude or limit the concurrent operation of

any law of a State or Territory". (See General Motors Acceptance Corp. v. Credit Tribunal (and Ors) and State of South Australia (1977) ATPR 40-022).

VI.3 Enforcement and Remedies

96. The main elements in the TPA scheme of enforcement and remedies are set down in Table 2. For full details reference should be made to Part VI and S. 163A of Part XII of the Act, reproduced in Appendix I to this Report at page 99.

97. It is a fundamental characteristic of the Trade Practices Act that it is enforced in the ordinary courts of law by both public officials and private persons; that both civil and criminal proceedings may be instituted (only civil, however, in relation to S. 52); and that there is available an unusually wide set of remedies. Persons liable encompass corporations and natural persons, including the officers of corporations; they may encompass persons attempting to contravene and "involved in a contravention" as well as persons contravening the provisions of the Act.

98. Three particular features of the enforcement scheme are deserving of comment. First, there is the feature that commercial conduct can attract criminal procedures and penalties. While this treatment has not been beyond controversy in the past, it would appear that critics now accept that the defendant does have the benefit of the criminal standard of proof (beyond reasonable doubt) and of appropriate procedural safeguards (such as the necessity for permission to be given before an action can be brought). Some have, indeed, referred to the offences as "quasi-criminal" since no gaol penalties are envisaged, only fines.

Table 2

ENFORCEMENT AND REMEDIES UNDER THE
TRADE PRACTICES ACT, PART V, DIV. 1

Criminal (other than infringement of S. 52)

Section 79	Penalties up to \$50,000 for corporations and up to \$10,000 for individuals	Subject to consent of the Minister
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Civil

Section 80	Injunctions, including interim injunctions	May be sought by Minister, Commission or "any other person"
Section 80A	Affirmative disclosure and corrective advertising	May be sought by Minister or Commission
Section 82	Damages	May be sought by a "person who suffers loss or damage"
Section 87	Compensatory orders including orders for <ul style="list-style-type: none"> - voidance or variation of a contract or collateral arrangement - the refund of money or return of property - damages - repair of goods, or provision of parts for goods - supply of specified services 	May be sought by a person "who has suffered, or is likely to suffer, loss or damage"
Section 163A	Declarations and orders (prohibition, certiorari, mandamus)	May be sought by Minister or "a person" (but not the Commission)

Aside from the important consideration of uniformity with the Commonwealth law, we ourselves see the creation of a criminal offence as an altogether appropriate reminder of the gravity an offence may assume, making an appropriate contribution to deterrence.

99. A second feature deserving of comment is that not only the Minister or Trade Practices Commission but "any other person" may bring an action for injunction. The courts have not been averse to reading this phrase literally, opening up the possibility of "public interest" suits - where these can be funded. Moreover such a rule, as to initial standing, creates possibilities for joinder or supplementary actions from persons seeking compensation for injury.

100. Finally, there are special provisions facilitating access to the courts by persons seeking damages and compensation. We refer to the potentially important amendments to the Trade Practices Act in 1977 which provide that existing proceedings may provide a foundation for joinder by persons seeking compensatory orders (S. 87 (1)) and that prior proceedings may supply prima facie evidence in subsequent proceedings brought by persons seeking damages and compensatory orders (S. 83). This means that injured persons may hope to "ride on the back" of actions instituted by others especially, practically speaking, upon public actions.

101. The enforcement and remedy provisions of the Trade Practices Act are a source of great strength; they are part of the logic of the Act; and we propose that for strength and consistency Victoria enact parallel

provisions to the TPA scheme. Such an approach would also open up the State courts to enforcement of a general business code of the Commonwealth kind.

102. Essential elements should include the enactment of the defences to a prosecution laid down in that Act (S. 85) and of a comparable provision to S. 75 (2), guarding against double jeopardy. The powers of the Trade Practices Commission to enforce the Commonwealth Act would need to be mirrored by comparable powers of the Director of Consumer Affairs, and perhaps certain other State officials, to enforce the Victorian Act; it would also be highly desirable for the Director (and perhaps other Victorian officials) to be empowered to bring actions under the Commonwealth Act where jurisdictional aspects make this appropriate.

103. We turn now to the second design option that we earlier foreshadowed (above p. 62), the possibilities for extending the Commonwealth enforcement scheme.

104. The Commonwealth's enforcement strategy is to rely primarily upon deterrence, as distinct from compensation. Moreover most proceedings are brought by the Commission or business firms protecting their commercial interests. The Trade Practices Commission has calculated that of the 230 private actions instituted under Part V of the Act that are listed in their publication Private Actions under the Trade Practices Act (June 1981), over 80% were brought by commercial litigants.

105. We do not quarrel with this emphasis. It is far better for consumers that traders be deterred from using deceptive trade practices in the first place than that

consumers be put to seeking compensation after the event for their use. And if deceptive trade practices exist, litigation by competitors may provide a most effective sanction, of value to consumers and traders alike.

106. Nevertheless the enactment of a new Victorian statute would offer opportunities, at modest cost, for enhanced access to compensation by injured persons, especially consumers.

We propose:

- (i) provision for *parens patriae* actions whereby the Director of Consumer Affairs is empowered to represent a consumer or group of named or identifiable consumers in an application for relief (whether by way of damages, compensatory orders or injunctions);
- (ii) reinstatement of the "old" S. 87 (1) of the Trade Practices Act to enable the court to "make such other orders as it thinks fit to redress injury to persons";
- (iii) provision for "piggyback" sequential damages or compensation actions whereby the findings in one action for damages or compensation may (as appropriate to the nature of the remedy) supply *prima facie* evidence in another.

In addition to these court-oriented remedies, we recommend:

- (iv) strengthening of the Small Claims Tribunals as supplementary institutions of enforcement.

107. Although the Victorian Government has expressed its support, in principle, for the introduction of class actions we do not canvass their utility in the present context. We agree with the view expressed by the Law Institute of Victoria and by AFCO that, before any fundamental legislation of this kind is contemplated, it is desirable to wait upon the forthcoming Report of the Australian Law Reform Commission in response to the reference they have received on this topic. (See A.L.R.C., Access to the Courts - II: Class Actions, Discussion Paper No. 11, June 1979.)

108. Nevertheless it will be noted that the first three proposals on our list are all techniques for securing redress in cases of multiple injury.

109. As to the first of these, the Trade Practices Commission commented in its submission:

Parens patriae type actions where, for example the Director of Consumer Affairs is empowered to bring before the court applications for relief by a number of specified persons is a manageable way of ensuring practical group relief short of the full rigours of privately organized class actions Parens patriae type actions which have as their object the recovery of proven loss or damage also avoids further difficult legal policy questions about the administration of justice in the wider sense e.g. solicitor/client relations, the issue of notice to the class, definition of the class,

measurement of damage, all of which pose real difficulties for the introduction of class actions in the Australian context.

110. The *parens patriae* principle is already expressed in Part 1A (Ss. 9A and 9B) of the Consumer Affairs Act though, as previously discussed (p. 55), the Part is poorly drafted and subject to some debatable limitations.

111. As to the second proposal on our list, the Commission commented:

When it was first enacted in 1974, Section 87 of the Trade Practices Act gave the court very wide discretion to fashion ancillary orders to redress injury suffered by consumers as the result of contravention of the Trade Practices Act. On its face that could mean that having brought a prosecution before the courts, in addition to awarding a penalty in the form of a fine, the court could have entertained a motion that named consumers ought to have compensation, e.g. their money refunded. In one of its very early cases [TPC v. Glen Ion, trading as Hammersmith Storage Module Co. (1975) ATPR 40-008] the TPC obtained a consent order that the advertiser in that case refund monies (sent in mail orders) to some 23 consumers who had complained to the Commission. This parens patriae approach to consumer remedies can be a very efficient application of administrative resources and can ensure that the principal object of publicly funded enforcement litigation has consumer redress very firmly in mind.

112. The section contemplated that ancillary compensatory orders might be made whatever the nature of the proceeding (a "proceeding instituted under or for an offence against this Part"), or by whom initiated, and to persons not necessarily parties to the proceeding. In 1977 the section

was amended to cut back this discretion, in part it has been said for constitutional reasons, so that now each person securing compensation for loss, damage or injury must have proved his claim in court proceedings directed in whole or in part to assessing his claim.

113. The "old" Section 87 (1) and *parens patriae* actions are closely related procedures, partially overlapping in their potential operation. We believe that it is essential however to make explicit provision for *parens patriae* actions, both in the contemplated statute and in the powers of the Director expressed in the Consumer Affairs Act and in the Ministry of Consumer Affairs Act.

114. At the same time, it would also be useful, though lower in our priorities, to enact a very general provision of the S. 87 (1) type. Such a provision, coupled with the rules as to standing in an application for an injunction ("any person") would, *inter alia*, enable a consumer association to bring actions on behalf of groups of consumers. Two submissions, indeed, from AFCO and Professor Goldring, proposed that specific standing be given to consumer organizations to bring consumer actions generally. But the provisions already proposed by the Council would fill the bill.

115. As to the third item on our list, what is intended is an extension to the evidentiary assistance already contemplated by S. 83 of the Trade Practices Act (see p. 70 above). A comment by Donald and Heydon on this section of the Act in their text, Trade Practices Law (Vol. 2, Law Book Co., 1978, p. 857) explains what we have in mind:

Plaintiffs may be encouraged to start proceedings following findings in other proceedings taken, for example, by the public authorities against those defendants whose conduct has damaged the plaintiffs. There may be a reluctance to begin proceedings because of the cost and difficulty of proving the elements of a contravention, particularly in Part IV cases. Section 83 goes some way to removing that obstacle by deeming a finding of contravention in proceedings with respect to civil penalty (S. 77), criminal penalty (S. 79), injunction (S. 80), affirmative disclosure (S. 80A) or divestiture (S. 81) to be prima facie evidence of that fact. It is not clear why damages and compensation proceedings taken by others were excluded from the list; there can have been no intention to transfer findings only from proceedings begun by public authorities because injunctions and divestiture proceedings are available to anybody. The finding, it may be noted, is only prima facie evidence which can be rebutted.

116. Lastly we comment on our proposal that the Small Claims Tribunals be strengthened as a supplementary institution of enforcement. As with the preceding three proposals, the emphasis is upon access to redress.

117. As we have said, enforcement of the Trade Practices Act is court-centred. Yet passage of a parallel Victorian statute would strengthen the hands of the Ministry of Consumer Affairs in handling complaints and of the Small Claims Tribunals in resolving disputes. The Victorian Tribunals apply existing laws, whatever they might be.

118. The case for strengthening the Small Claims Tribunals rests essentially upon their role as an inexpensive, speedy and accessible technique for settling "small" disputes. There are, as the Law Institute warns in its submission,

"hidden costs" in that "the parties themselves are appearing for an artificially low fee". Nevertheless, as the Institute concludes, "below a certain amount, a balance can be struck between the finer points of law and justice and the need to find an inexpensive and reasonably fair solution".

119. The Council believes that the work of the Tribunals, generally, has been hampered by undue restrictions upon their jurisdiction as well as some procedural limitations. In 1981-82 Council reviewed the work of the Tribunals and presented a Report to the Minister. That Report is reproduced in the Council's Annual Report for 1981-82, to which reference should be made.

120. In addition, enactment of a Deceptive Trade Practices Act could point to further amendments to the Small Claims Tribunals Act, designed specifically to strengthening the Tribunals as an instrument in combating deception in trade. Specifically, the relationship giving rise to a small claim might well need to be expanded (beyond that which "arises out of a contract"), as might the range of orders open to the referee. It might also be desirable to make explicit provision for the amalgamation of claims of a like kind in the one hearing (e.g. an alleged misrepresentation regarding a group holiday).

121. On the first of these specific proposals, Mr. Duggan makes this comment:

There may be a difficulty with conferring jurisdiction on the Small Claims Tribunals in that 'small claim' is presently defined in the Small Claims Tribunals Act 1973 as a claim that 'arises out of a contract' (Section 2 (1)). Most claims based on

contraventions of the proposed legislation would not be contractual claims. In a recent case, Fairey Australasia Pty. Ltd. v. Joyce (1981) ASC s. 55-091, Yeldham J. of the New South Wales Supreme Court adopted a broad interpretation of the words 'arises out of a contract' as they appear in the Consumer Claims Tribunals Act, 1974 (N.S.W.). He held that a claim which arises out of a contract need not be a claim based on a contract, but that it is sufficient if the claim bears a reasonable relationship to, and exists in consequence of, a contract between a consumer (as defined) and a trader (as defined). If this view is correct, the definition of 'small claim' in the Victorian Act as presently drafted would be wide enough to incorporate most of the kinds of consumer claim that would be likely to arise under the proposed legislation. However, it might be preferable to put the matter beyond doubt by incorporating in the Small Claims Tribunals Act a statutory version of Yeldham J.'s ruling.

VI.4 The Advantages of the TPA Approach

122. By way of recapitulation we now summarize the advantages of the TPA approach.

- (i) Building on the Trade Practices Act, there is the opportunity to enact a Victorian statute which is virtually complete in its coverage of deceptive business conduct. First, the very content and structure of the prohibitions in the Trade Practices Act are comprehensive. In particular, the combination of the very general prohibition of misleading or deceptive "conduct" in S. 52 of the Act with the more specific prohibitions in the remaining sections is a strength, offering quite a high degree of

predictability in the law yet eliminating the possibility of legalistic loop-holes and inventive evasiveness. Second, the absence of relevant constitutional restrictions creates the opportunity for the State to extend the ambit of the law to cover all business dealings - to enact a general business code applying to the deceptive trade practices of all persons, incorporated and unincorporated, including the State government and its instrumentalities, and including the professions.

- (ii) The Commonwealth Act has proved itself in almost a decade of existence and enforcement. There is a useful body of case law in being. There is widespread public knowledge and acceptance of the requirements of the law.

- (iii) A strategy of uniformity as between Commonwealth and State laws eliminates conflicting obligations for the one enterprise and discriminatory obligations as between different enterprises. It makes for economy in business compliance and in public administration and enforcement. It offers opportunities for consultation between governments of different perspective and experience in the development of the law - an exercise in co-operative Federalism.

- (iv) The TPA approach has a number of features which make for a high degree of self-enforcement (voluntary business compliance). The language of the Act is direct and comprehensible.

Clear law is coupled with strong sanctions for breach. There is available an unusually wide range of enforcement techniques, public and private actions of diverse kinds, enhanced by our proposals for improving access to redress.

- (v) The range of remedies available for breach is diverse and adaptable, again enhanced by our proposals for improving access to redress. Opening up the State courts and Small Claims Tribunals would improve access to relief, especially to consumers and smaller firms.

123. These advantages may be contrasted with the deficiencies in the Victorian Consumer Affairs Act previously summarized (pp.53-57). In addition, reference can be made to the very useful comparison of Part V, Div. 1 of the Trade Practices Act with the Consumer Affairs Act supplied by the Trade Practices Commission, reproduced as Appendix III.

124. We have found it instructive, also, to examine some of the cases which have been decided by the Federal Court under the Trade Practices Act, Part V, Div. 1, as indicative of the scope one might hope for under a comparable Victorian statute. A selection of summaries of such cases is reproduced in Appendix IV. The cases illustrate not just the breadth of conduct covered and range of persons protected; they also illustrate the variety of actions initiated by both the Commission and private parties and, too, the range of remedies and severity of penalties imposed. With even greater brevity, we set down below one-sentence summaries of the cases to emphasize this point. We

emphasize that we do not say that some of these practices would not be caught by the Consumer Affairs Act. We do say that the complete range would not, that the private actions could not be brought, and that the penalties and range or remedies would not be available.

125. So:

- a trade rival secures an injunction to restrain deceptive and misleading packaging of cricket helmets;
- false oral representations by used-car salesmen concerning an ex-rental car give rise to fines of \$20,000;
- a lessee in a shopping centre development secures a reduction in rent following a finding of misleading or deceptive statements by the developer's agent;
- false misrepresentations by a used car firm regarding car mileage result in fines totalling \$16,000;
- the display in the foyer of business premises of a brochure containing mis-statements in itself constitutes a false representation in "trade or commerce";
- a manufacturer making a false representation concerning testing of its microwave ovens in an advertisement is fined \$100,000;

- a person is held to have made false representations about land for sale in a telephone conversation;
 - a travel agency continuing to display an unaltered travel brochure, following a change of tour itinerary, is found to have engaged in misleading conduct;
 - a car dealer is found guilty of bait advertising (not making cars available to potential purchasers at the advertised special price) and fined \$25,000;
- and
- false advertising concerning the earnings potential of a franchise to act as courier for a film processing service gives rise to fines of \$120,000.

VII. ALTERNATIVE AND SUPPLEMENTARY APPROACHES

126. In Section III we reported that while there is widespread support for the TPA approach to reform, some persons and organizations did make supplementary recommendations. In this Section we discuss two of these.

VII.1 A Misrepresentation Act?

127. The Council received three submissions (from AFCO, the Law Institute of Victoria and Mr. Duggan) to the effect that provisions of the TPA type should be supplemented by amendments to the law of innocent misrepresentation after the

manner of the English Misrepresentation Act 1967. The English-style provisions have in fact been enacted by South Australia in its Misrepresentation Act 1971 - 72 and by the ACT in its Law Reform (Misrepresentation) Ordinance 1977. Shortly, the principal effect of the law would be, in the context of the law of contract, to create rights to rescind a contract or be awarded damages for innocent misrepresentation.

128. The Victorian Law Reform Commissioner in his Report on Innocent Misrepresentation of 1978 recommended that Victoria follow the English model as expressed in the ACT Ordinance. Indeed he envisaged a statute that would be an amalgam of (A) the English-style provisions, (B) Ss. 53, 55A, 55 and 55A of the Trade Practices Act, and (C) a recast version of S. 52 of the Trade Practices Act.

129. The central focus of the Law Reform Commissioner's work was deficiencies in the law of contract as regards innocent misrepresentation. He was then led to propose that the English style reforms to this element of the general law should be supplemented by drawing upon a "new and dramatic" Australian development (para. 27), the Trade Practices Act. The central focus of our Report is upon problems posed by misleading and deceptive conduct (including "misrepresentation") in business dealings. Should we then, in effect starting from the other end, propose that the recommended TPA provisions be supplemented by the English law?

130. Our conclusions, reached after considerable discussion with interested lawyers, are as follows. First, these English-style provisions constitute technical reforms to the law of contract whose desirability at this point in the

development of the law it is for others to decide. We note, in any event, that they have been partially incorporated in the Goods (Sales and Leases) Act 1981 as part of Victoria's recently enacted credit law package, albeit in the context of consumer transactions. (See Ss. 99, 100, 101, 111.)

131. But second, if the English-style reforms are to be fully implemented, it would be preferable not to tack them on to a Deceptive Trade Practices Act such as we propose. This is essentially because their ambit is different. Our proposals are concerned with misrepresentation etcetera in "trade and commerce" extended to include conduct in the course of business activity generally. This is a different ambit from misrepresentation in the law of contract, certainly wider in one respect and arguably narrower in another.

132. It is wider in that the phrase "trade and commerce" comprehends conduct that may not culminate in a contract or transaction - to take a specific example, an advertisement that may have been read only by the investigating officers of the Trade Practices Commission (Larmer v. Power Machinery (1977), ATPR 40-021). It is arguably narrower in this respect, that the law of contract regulates private dealings such as the private sale of a motor car, conduct which may lie outside "trade and commerce".

133. Finally it does appear that quite a deal of the practical importance of the English-style provisions has been overtaken by the success of overlapping provisions in the Trade Practices Act - a consideration that would be of even greater weight were Victoria to enact parallel legislation. Indeed the Victorian Law Reform Commissioner

wrote in his Report (para. 33):

It will be appreciated that for a very wide range of persons and in respect of a very wide range of transactions the Trade Practices Act cuts through the doubts and uncertainties which have been referred to earlier. Perhaps at the expense of creating a new set of uncertainties, in the area covered by the Act it abrogates completely the common law principle of no damages for innocent misrepresentation and indeed does not even require negligence as a condition of such an award. The availability of rescission also seems to have been immensely widened.

VII.2 "Unfair" and "Unconscionable" Conduct

134. Several submissions proposed that a prohibition of misleading or deceptive conduct in the S. 52 manner be supplemented by a prohibition of "unfair conduct" or "harsh and unconscionable conduct". However such a recommendation does seem to us peripheral to the Council's terms of reference. Further, whatever the merits of the proposal, we have urged a strategy of uniformity with the Trade Practices Act.

135. In any event the Market Court Act, 1978, is directed specifically to protecting consumers from the activities of traders that have "repeatedly engaged in conduct that is unfair to consumers".

136. There is much to commend in this innovatory approach. While few cases have been brought to date that is a failure on the enforcement side and Council would urge that more resources be allocated to exploring the usefulness of this institution.

VIII. IMPLEMENTATION

137. So far in this Report we have been discussing principles. We believe the case for the new legislation is compelling. But we would not wish our proposals to founder on some uncertainties as to how they should be implemented. Therefore in this final Section we attach a few practical notes on implementation.

VIII.1 The Approach to the Drafting

138. There is no question of attempting to patch up the existing Consumer Affairs Act. That statute, after the amendments set down below (pp. 95-96), would have a role to play. But to implement our proposals a new self-contained statute would be required, comprehending the prohibited practices, enforcement and remedies, and administration.

139. We have proposed that the name of the new statute should be the Deceptive Trade Practices Act, picking up both the subject-matter of the new law and making the link with the Trade Practices Act. Certainly any reference in the name to "consumers" should be avoided since what is envisaged is a general business code, as also should any reference to "misrepresentation" since that would risk confusion with the English Misrepresentation Act and related provisions.

140. The starting-point for drafting would, of course, be the relevant provisions of the Trade Practices Act. These we have reproduced in Appendix I. We reiterate that while certain changes must necessarily be made to suit the State context, and desirably made to extend the Act in accordance with our proposals, it is of the utmost

importance to follow a strategy of uniformity. Naturally the definitions of terms, so far as the State context allows, would need to be identical.

141. We envisage two main extensions to the TPA approach, and we have given some thought as to how these might be accomplished.

142. First, there is the proposal to take advantage of the absence of relevant constitutional limitations to enact a statute governing all business transactions, indeed dealings, in Victoria. Accordingly where the Commonwealth law speaks of a "corporation" we would substitute a "person"; and where it speaks of "trade and commerce" we must substitute - something wider. Would the phrase "in the course of a business" suffice?

143. Thus, for example, in place of S. 52:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

we would have:

A person shall not, in the course of a business, engage in conduct that is misleading or deceptive or is likely to mislead to deceive.

144. But still wider perhaps would be the phrase "in the course of a business activity" which might then be defined in the terms of S. 4 (3A) of the N.S.W. Consumer Claims Tribunals Act 1974:

a person is engaged in a business activity
if, whether in the course of a profession or

in the field of trade or commerce or otherwise, he carries on a business of supplying goods or providing services or holds himself out as carrying on such a business.

145. This would be accompanied by the TPA definition of "goods", "services", "supply" in S. 4 (1) and of "conduct" in S. 4 (2). Naturally, too, there would need to be a provision of somewhat similar cast to S. 2A to bind the State Government and its instrumentalities. One would presumably wish to catch incidental business conduct of such authorities which might suggest, again, the use of the phrase "in the course of a business activity" (as against the carrying on of a business).

146. Alternatively, and this was argued strongly at the specialist Trade Practices Workshop referred to above (p.42) it might be thought that a parallel Victorian statute should preserve as much of the TPA language as possible. If this approach were to be followed, in place of S. 52 we would have:

A person, shall not, in trade or commerce, engage in conduct etc.

with "trade or commerce" defined to include, without limiting its existing generality, the specific activities it is desired to catch.

147. This issue is of course technical and we do not express a view as to the desirable course. We have taken the discussion this far, however, to sketch in some practical implications of the policy objective.

148. Secondly, there are our proposals regarding enforcement and remedies. In addition to specific provisions in the new statute, there would need to be amendments to the Small Claims Tribunals Act, as well as amendments regarding the Director's powers to both the Ministry of Consumer Affairs Act and the Consumer Affairs Act.

149. Concerning the Director's powers, there would need to be amendments of Ss. 8 and 9B (in conjunction with Ss. 4 and 8 of the Ministry of Consumer Affairs Act) to empower the Director:

- with the consent of the Minister, to prosecute for offences against any relevant law (State or Commonwealth);
- to institute civil proceedings to enforce any relevant law (State or Commonwealth);
- with the consent of the Minister, to undertake *parens patriae* actions with a view to enforcing or protecting the rights of one or a number of consumers arising from any relevant law.

150. It is suggested that the aforesaid "relevant" laws should be those specified in a Schedule, in that the present phrase a law "relating to the interests of consumers" could be undesirably restrictive.

151. However thought would also need to be given to the role that should be played by the more general law enforcement bodies of the State - the Attorney General's Department and the Director of Public Prosecutions.

152. A final very important question as regards enforcement, to which we now turn, is which State courts should be given jurisdiction - and in what pattern.

VIII.2 Jurisdiction of the State Courts

153. It could not be said that the existing Victorian court system has been ideally designed to receive legislation such as this. There are problems. But this is not the first piece of modern legislation, of a broadly commercial character, to challenge the inherited State court system within the Federation. No doubt the court structure will gradually be adapted to accommodate legislation such as this more readily.

154. Meantime we believe that workable solutions are available, and we sketch in what is involved. It will be recalled that one of the Swanson Committee's recommendations was that State and Territory courts should be given jurisdiction over actions arising from Part V, Div. 1, of the Trade Practices Act, so that jurisdiction would be exercised concurrently by both Commonwealth and State courts (Report of the Trade Practices Act Review Committee, 1976, para. 9.35). The present proposal is precisely to open up the State courts for actions of this type.

155. Features of the contemplated law which complicate any jurisdictional recommendation are the following:

- the law would lay down heavy penalties and, at times, judicially demanding remedies;
- some of the actions would raise complicated questions of law and economic fact;

- the appropriate resolution of civil disputes could well entail the intersection of legal and equitable rules;
 - the defendants would often be corporations; and
 - the parallel offences created by the Trade Practices Act are tried in the Federal Court as summary offences.
156. In addition, the court system has these features:
- summary offences are the province of the Magistrates' Courts, indictable offences of the County Court;
 - Magistrates' Courts are not normally granted equitable jurisdiction, the County Court has some limited equitable jurisdiction;
 - there are limited rights of appeal from the Magistrates' Courts (although provision is made for an order to review or for decision on a case stated by the Supreme Court on questions of law), and in criminal matters there is a right of appeal to the County Court; and
 - the current jurisdictional limit for Magistrates' Courts in civil matters is \$3,000, and for the County Court \$12,000 (other than for personal injury cases where the limit is \$25,000).

157. In making its recommendations the Swanson Committee contented itself with the proposition that:

It should be possible ... for such action to be brought in any appropriate (having regard to the order sought) State or Territory Court.

158. The Tasmanian Fair Trading Bill 1978 which sought to implement Part V, Div. 1, in State law gave jurisdiction to the Supreme Court for actions seeking injunctions and for orders for affirmative disclosure and corrective advertising. The criminal proceedings were to be determined by a Magistrate sitting alone, though the maximum fines were reduced to \$5,000 for a corporation, and \$1,000 for other persons. Ancillary orders (of the S. 87 type) were to be made by the court with the initial jurisdiction.

159. What should be the guiding principles in reaching a jurisdictional recommendation? We would emphasize four. First, as far as possible one should aim for similarity of procedures as between Federal and State courts, to achieve uniformity of treatment of the parties and uniformity in development of the law. Second, one should take advantage of the structure of State courts to maximise access in civil disputes, especially claims for damages and ancillary relief. Third, in this trade practices area one should seek to achieve speedy resolution of prosecutions and proceedings. Fourth, it would be desirable to foster the development of some specialization and expertise within the State court system.

160. These considerations lead us to propose the following scheme:

I	Civil claims for damages	Any court, in accordance with the standard jurisdictional rules
II	Prosecutions	Treated as summary offences (as with the Trade Practices Act) and tried in the first instance in the Magistrates' Courts
III	Other civil proceedings	
	Injunctions Orders for affirmative disclosure and corrective advertising Declarations	} Supreme Court
	Ancillary orders for compensation	Court with the initial jurisdiction

161. We comment on two features of this scheme, the treatment of prosecutions and the use of Magistrates' Courts.

162. The offences under the Trade Practices Act are summary offences. They can give rise to heavy penalties (up to \$10,000 in the case of an individual and up to \$50,000 in the case of a corporation). But, as noted, summary jurisdiction in Victoria is normally vested in Magistrates' Courts, and the usual limit to fines imposed by those Courts is around \$10,000 - and generally much less than this. For some indeed it is a desirable feature of the Victorian court system that serious crimes be tried by a jury. Should we then recommend that the offences under the contemplated new Victorian statute be indictable offences, or at least indictable offences triable summarily?

163. But drawing upon our earlier statement of principles, there are a number of objections to this approach which to us are very persuasive. First, there is the objective of maintaining consistency of law and procedure with the Federal Court. Second, as we have said, in trade practices cases speedy resolution is frequently vital. Third, the subject-matter would often not be congenial to juries; these are "commercial crimes"; the defendants would often be corporations for which a jury of one's peers is unavailable. Fourth, the use of juries would be costly and exacerbate the existing clogging of the County Court system.

164. One appealing feature of the summary treatment by the magistrates' system is that appeal would then lie to a single judge of the County Court (without a jury), a system which offers greater parallels with the Federal Court.

165. The jurisdictional scheme proposed would give important and, at times, demanding responsibilities to the Magistrates' Courts. They would be given the jurisdiction to hear prosecutions; they would determine claims for damages to the current jurisdictional limit of \$3,000; they would be given jurisdiction to make ancillary orders for compensation of the S. 87 type. Is this appropriate, in view of the heavy fines contemplated and the complicated questions of law and economic fact that might arise?

166. Certainly the jurisdiction should be confined to magistrates sitting alone (i.e. excluding justices). Certainly, too, there could well be merit in establishing a limited list of magistrates with jurisdiction (who could then develop expertise). It is also the case that magistrates are being given increasingly heavy responsibilities under modern "commercial" legislation - e.g. the

National Companies and Securities legislation, the Environment Protection Act, the Navigable Waters (Oil Pollution) Act. There is provision for interaction with the Supreme Court through the "order to review" or "case stated" procedures on questions of law. Mr. Duggan, too, has suggested that there is room for development of referrals of this kind, canvassing in his submission the possibility of providing for a magistrate on his own motion reserving a question in the form of a special case for opinion of the Supreme Court.

167. One proposal that is canvassed from time to time, in discussions of the State court system generally, is that it could be appropriate to establish a specialized Commercial Division of the Magistrates' Courts (following the precedents for specialized courts established by the Children's Court, the Coroner's Court, the Industrial Court). This is a technical question, and one which raises issues beyond our terms of reference. However it is plain that enactment of a Deceptive Trade Practices Act would strengthen the case for such a development. Alternatively - and these are large issues - if it should be a decision of legal policy not to strengthen the Magistrates' Court system, but rather to strengthen the County Court system, is it beyond the bounds of possibility to grant the County Court jurisdiction over summary offences of a serious kind?

VIII.3 Amendments to the Consumer Affairs Act

168. Mention has already been made of desirable amendments to the powers of the Director of Consumer Affairs (p.89).

169. The provisions to be repealed in favour of the TPA prohibitions would be as follows:

(1) Much of Part II - Dishonest or Undesirable Trade Practices

S.13 False or misleading advertising excluding provisions governing the use of box numbers which should be recast to form a new Div. 2.

S.13A (2)-(3) (Price reductions)

Ss.21-32 Unordered goods and services

Ss.32A-32E Pyramid selling schemes

S.32F Referral selling.

(2) Some of Part III, Div. 1 - Merchandise Marks

S.36 False trade descriptions (and associated definitions in S.33)

S.37 False representations as to Royal Warrant, etc.

170. The provisions to be retained in Part II of the Act would then consist of:

Div. 1 Trading Stamps or Coupons

Div. 2 Box Numbers

Div. 2A Misleading Marking of Prices (Ss.13A(1) and 13A(1A) only)

Div. 2B Mock Auctions

Div. 3 Door to Door Sales

VIII.4 Administrative and Cost Implications

171. We should foreshadow some administrative and cost implications of our proposals.

172. First, while it has been a theme of this Report that we are pursuing a central strategy of self-enforcement, it is nevertheless true - and of the utmost importance to recognize - that a Victorian Deceptive Trade Practices Act would give rise to significant staff requirements (in terms both of numbers and professional skills) for enforcement activity within the Ministry of Consumer Affairs. Some of that enforcement activity could well be administrative in nature - "persuasion" and "education" - an extension of existing practice. It is helpful that the Ministry already has responsibility for complaint handling and adjudication of small claims. And it would be possible to build on the existing work of the Trade Practices Commission (e.g. in the preparation and circulation of Guidelines to the Act). But considerably more use than hitherto would need to be made of selective court actions designed to contribute both to deterrence (through a wise pursuit of cases likely to aid the establishment of precedent) and to consumer redress (including the mounting of *parens patriae* actions).

173. Secondly, a question that would need to be resolved is whether it would be desirable to grant total responsibility for a general business code of the contemplated kind to a Ministry of Consumer Affairs. A related issue is the extent to which in the realm of purely business deception (i.e. deception of one business firm by another), there would be reliance upon private litigation in the enforcement of rights and development of the law. While we have made a plea for a law which operates without discrimination as between industries and forms of business, it is

arguable that some classes of business are deserving of special institutional support. The argument is most often put in connection with "small business". If public enforcement action were to be envisaged on behalf of small business (e.g. the prosecution of a bogus franchise scheme), whose responsibility should it be?

174. But finally, we submit that the overall cost implications of our proposals are modest in comparison with the benefit to be achieved. The main thrust of the strategy is to use the law to secure greater business awareness of the need for honesty and the necessity for fair dealing. We see this as an economical approach, in the broad - a preventive strategy. The law would need to be enforced. But there would be considerable reliance as we have said upon private actions and much reliance upon the deterrence flowing from suitably strong penalties and other remedies. As to the costs falling upon the business community, the core proposal is but to generalize the requirements of the Trade Practices Act, with which business is already well acquainted.

APPENDIX IRELEVANT SECTIONS OF THE TRADE PRACTICES ACT 1974 - 1982

[These are not reproduced in this Annual Report.
However we do list the relevant Sections below.]

- I CONDUCT PROHIBITED (From Part V, Div. I)
To be read in conjunction with S. 85 (Defences).
Ss. 52 - 61, 63A, 64
- II SCOPE: COMMONWEALTH AUTHORITIES (From Part I)
S. 2A
- III INTERPRETATION (From Part I)
Section 4 Interpretation [extracts therefrom]
S. 4 (1) ["acquire"
"business"
"document"
"goods"
"price"
"send"
"services"
"special price"
"supply"
"trade or commerce"
"unsolicited goods"
"unsolicited services"]
Ss. 4 (2), 4B, 4C, 4H, 4K, 4L, 5, 6
- IV CONSTITUTIONAL OPERATION AND RELATION TO OTHER LAWS
(From Part V, Div. 3)
S. 75
- V ENFORCEMENT AND REMEDIES (From Part VI)
Ss. 75 B - 84, 85 (1) - (3), 85 (6), 87
- VI POWER OF TRADE PRACTICES COMMISSION TO
OBTAIN INFORMATION, DOCUMENTS AND EVIDENCE
(From Part XII)
Ss. 155 - 157
- VII DECLARATIONS AND ORDERS (From Part XII)
S. 163A
- VIII LEGAL AND FINANCIAL ASSISTANCE (From Part XII)
S. 170]

APPENDIX IIEXAMPLES OF MISLEADING AND DECEPTIVE BEHAVIOUR DRAWN FROM
THE ANNUAL REPORTS OF THE DIRECTOR OF CONSUMER AFFAIRS AND
TRADE PRACTICES COMMISSION, 1975-1982DIRECTOR OF CONSUMER AFFAIRS ANNUAL REPORTS

INDUSTRY/PRACTICE	Annual Report Year Ending 30 June	Paragraph
<u>Automotive Industry (Motor Vehicles)</u>		
. Misrepresenting year/model	1981 1979 1978	2.7.21 - 2.7.23 2.1.1 - 2.1.15 4.2.1 - 4.2.2
. Misleading statements by salesmen re: insurance on test vehicles	1981	2.7.32 - 2.7.36
. Bait advertising	1980	13.1.4
. Price disclosure, used vehicles, misleading charges	1979	12.3.1 - 12.3.7 12.4.1 - 12.4.10
. Datsun conversions	1979	12.9.1 - 12.9.7
. Trader deceiving finance company	1979 1975	2.2.1 - 2.2.19 14.4.4
. Misleading advertising re: petrol consumption	1978	2.4.1 - 2.4.5
. Misleading information included on insurance proposal forms	1978	2.11.1 - 2.11.6

. Misleading statements by salesmen re: insurance	1978	7.1
. Salesmen misrepresenting consumers' financial capacity to finance companies	1977	2.9.1 - 2.9.5
. Misleading statements re: deposits, registration fees, price of vehicles	1977	11.1 - 11.12 14.1 - 14.5
. Misleading statements re: quality of vehicles	1976	31.1.1 - 31.1.4
. Misrepresentation of defect notices	1975	14.3.2 - 14.3.9
<u>Building Industry</u>		
. False promises as to commissions, rebates etc. - cladding	1981 1977	3.1.1 - 3.1.9 1.5.1 - 1.5.16
. Misuses of industry logo	1981 1979	3.1.10 - 3.1.15 1.6.1 - 1.6.8
. Misleading statements as to need for goods and services	1981 1978	3.2.26 - 3.1.36 1.6.1 - 1.6.5
. Abbreviation of company names misleading	1978	1.4.1 - 1.4.7
. Misrepresentation re: prime cost items	1977	1.1.3
<u>Business Schemes and Franchises</u>		
. Bogus franchise schemes	1980 1979	3.1.1 - 3.1.16 3.2.1 - 3.2.10 3.1 - 3.5

. Owner drivers	1982	5.3.1 - 5.3.10
	1980	6.1 - 6.15
	1979	8.1 - 8.8
	1978	3.1.1 - 3.1.8
both the above involve mis- representation as to potential earnings etc.		
<u>Misleading Trading Names</u>		
	1978	8.1 - 8.12
	1977	8.8 - 8.19
<u>Employment Opportunities</u>		
. Misleading advertisements	1980	6.1 - 6.5
	1976	37.1.11 - 37.1.18
<u>Medical Services, Hospitals</u>		
. Misrepresentation, failure to disclose charges etc.	1980	14.1 - 14.8
	1976	26.11
. Misleading advertising re: health insurance funds	1976	20.2 - 20.14
<u>Caravan Industry</u>		
. Accessories misrepresented	1981	2.8.1 - 2.8.2
. Fraud re: caravan investment and leasing schemes	1977	25 - 30.9
<u>Mail Order</u>		
. Quality of goods misrepresented	1981	2.11.1 - 2.11.4
	1977	24.1 - 24.6

Animals

- | | | |
|--|------|----------------|
| . Misrepresentation re:
pedigree | 1978 | 5.2.1 - 5.2.11 |
| . False statements re: age,
physical condition etc. | 1976 | 35.1 - 35.9 |

Insurance Industry

- | | | |
|--|--------------|---------------------------|
| . Misleading statements as to
policy cover (consultant) | 1981 | 3.4.1 - 3.4.7 |
| . C.C.I. - omission of facts as to
exclusion clauses etc. | 1980
1976 | 12.4.1
12.6.1 - 12.6.9 |
| . Misrepresentation of life
insurance policies | 1979 | 9.2.1 - 9.2.9 |

Fitness Centres

- | | | |
|-------------------------------|------|-------------|
| . Omission of pertinent facts | 1975 | 28.1 - 28.9 |
|-------------------------------|------|-------------|

Retail Sales

- | | | |
|--|--------------|----------------------------|
| . Misrepresentation of goods | 1980 | 4.1.1 - 4.1.8 |
| . Misleading advertising re:
"liquidation sales" | 1978 | 6.2 - 6.10 |
| . Misrepresentation re: rental
versus hire purchase | 1977
1976 | 17.1 - 17.4
39.1 - 39.5 |

Charity Fund Raising

- | | | |
|--|------|-----------|
| . Misrepresentation as to
destination of proceeds | 1979 | 6.1 - 6.7 |
|--|------|-----------|

False Trade Descriptions

- | | | |
|-----------------|------|----------------|
| . Meat and fish | 1980 | 3.1.1 - 3.1.13 |
|-----------------|------|----------------|

Hiring of Goods

- . Misleading clauses in contract

1980 10.1 - 10.8

Rural Real Estate/Investment Schemes

- . Omissions create false, favourable impression
- . Investment schemes misrepresented
- . Misrepresentation re: filled land
- . Winegrowers club - misleading advertising

1980 1.1 - 1.2

1979 8.1 - 8.7

1978 5.1.1 - 5.1.4

1975 26.1 - 26.8

1976 18.1 - 18.10

1975 21.1 - 21.11

1976 37.2 - 37.2.5

Door to Door Sales

- . Misrepresentation as to nature of employment
- . Misrepresentation as to identity of salesmen
- . Misrepresentation as to guarantee on products
- . Misrepresentation as to quality of goods
- . Misrepresentation re: installation of protective devices

1979 5.1 - 5.11

1978 10.1 - 10.10

1977 19.1 - 19.7

1977 16.1 - 16.5

1976 17.5.1 - 17.5.4

1976 32.1.1 - 32.1.11

Travel Industry

- . Length of advertised tour misrepresented
- . Brochures misleading

1981 2.4.15 - 2.4.17

1979 11.4.1 - 11.4.4

1982 4.4.26 - 4.4.31

. Travel insurance		
- non disclosure of conditions	1981	2.4.17 - 2.4.27
- misrepresentation re: coverage	1976	28.1 - 28.1.11
<u>Hearing Aids</u>		
. Misleading statements concerning the need for hearing aids	1982	4.7.1 - 4.7.5
<u>Rental Services</u>		
. Sale of incorrect and misleading information regarding rental properties	1982	5.8.1 - 5.8.9

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TRADE PRACTICES COMMISSION ANNUAL REPORTS

Automotive Industry (Motor Vehicles)

. Representing features vehicle does not have	1975	2.64
	1977	2.80 - 2.90
	1979	2.32
	1980	2.5.2
. Representing ex-rental cars as ex-executive or demonstrator vehicles	1975	2.63
	1976	2.115
	1977	2.91 - 2.92
		2.97 - 2.99
	1978	4.25
		4.45
	1979	2.32

. Misrepresenting as particular model vehicle or as new	1975	2.63
	1976	2.68 - 2.70
	1978	4.40
	1979	2.32
. Odometer alterations	1975	2.63
	1976	2.78
	1977	2.93 - 2.96
	1978	4.26
	1980	2.5.3
. Bait advertising	1980	2.7.1
	1981	2.4.2 - 2.4.3
. Misleading price reductions	1977	2.107 - 2.110
	1978	4.43
	1982	2.4.5
. Performance characteristics	1975	2.64
<u>Fuel Saving Devices</u> - Unsubstantiated Claims	1975	2.54 - 2.57
	1976	2.97
	1981	2.5
	1982	2.5
<u>Tyres</u> - Advertising of 'Special' Prices	1976	2.90
<u>Petrol</u> - Discounts	1976	2.91 - 2.95
<u>Unsolicited Directory Entries</u>	1975	2.67
	1976	2.63 - 2.67
	1978	4.41
	1979	2.37 - 2.38
	1981	2.13.10 - 2.13.11
	1982	2.12.10 - 2.12.11

<u>Business Schemes and Franchises</u>		
. Bogus Franchises	1979	2.41 - 2.43
. Misleading in respect to profitability	1977	2.104 - 2.106
	1980	2.2.1
	1981	2.13.2 - 2.13.9
	1982	2.12.2 - 2.12.9
. Home operated businesses - misleading re profit	1978	4.31 - 4.39
<u>Therapeutic and Health - Misleading Claims</u>		
. Slimming products	1980	2.7.1
	1981	2.10.1 - 2.10.5
. Weight reducing programs	1980	2.4.2
<u>Cigarette Advertising</u>		
	1981	2.11
<u>Soaps and Detergents - Claims and General Advertising</u>		
	1976	2.113
	1977	2.124 - 2.135
<u>Health Funds</u>		
. Misleading re need for service	1977	2.100 - 2.103
. General advertising	1981	2.12
<u>Credit Cards - Unsolicited</u>		
	1976	2.97
	1978	4.47
<u>Travel</u>		
. Overbooking	1978	4.45
	1981	2.6.2 - 2.6.4
. Misrepresentation re package tours	1981	2.6.5 - 2.6.8
	1982	2.6.4 - 2.6.11

<u>Mail Order</u>		
. Misleading advertising	1975	2.58 - 2.60
	1977	2.115 - 2.117
	1978	4.43
	1981	2.9
	1982	2.9
. Accepting payment without intent to supply	1978	4.30
	1975	2.60
. Repayment to complainants (court judgement)	1975	2.60
	1975	2.61
<u>Warranties - Effect and Existence</u>		
	1976	2.61 - 2.62
<u>Food - Nutritional Claims</u>		
	1981	2.10
	1982	2.10
<u>Household Goods - Claims of Standard</u>		
	1975	2.50 - 2.53
<u>Car Burglar Alarms - Claim of Reduced Insurance</u>		
	1976	2.71 - 2.73
<u>Retail Goods</u>		
. Unavailability of advertised goods	1981	2.8.1 - 2.8.2
	1982	2.8.7 - 2.8.8
. Quality of Goods	1981	2.8.3
	1982	2.8.1 - 2.8.6
<u>Land</u>		
. Misleading statements	1976	2.115 - 2.117
	1978	4.34, 4.38
	1980	2.4.3, 2.5.9, 2.2.2, 2.7.1
	1981	2.7
	1982	2.7

. Payment without intent to supply	1975	2.66
<u>Auctions</u> - Antiques	1977	2.118 - 2.119
	1978	4.43
<u>Insurance</u> - Claim to be Free of Death Duty	1977	2.74 - 2.79
<u>"Top Quality"</u> (Shoes)	1977	2.111 - 2.112
	1978	4.43
<u>Employment Advertising</u>		
. Misleading job advertisements	1982	2.14

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APPENDIX III

COMPARISON OF DIVISION I OF PART V OF THE TRADE PRACTICES ACT WITH THE VICTORIAN CONSUMER AFFAIRS ACT

TRADE PRACTICES ACT, Div. I Part V	EQUIVALENT PROVISIONS IN VICTORIAN CONSUMER AFFAIRS ACT* (*Comparison does not include other Victorian legislation)
S 52 General prohibition of misleading or deceptive <u>conduct</u>	NIL
S 53 False or misleading statements or representations in relation to supply of <u>goods or services</u>	<p>No real equivalent, but under -</p> <ul style="list-style-type: none"> . S 13 (1) is an offence to <u>publish</u> statements re goods, real property or services which are false, misleading or deceptive; or which claim Government approval when not given. . S 13A cash <u>price</u> of goods or services to be indicated when advertised at 'special' price. . Ss 34, 35, 36, 38 <u>prohibit sale</u> of certain goods unless <u>trade description</u> (includes <u>country of origin</u> in some cases) is applied; <u>false</u> trade descriptions also prohibited. . S 37 <u>false representations</u> re goods concerning Royal Warrant attracts a penalty of not more than \$100. <p><u>PENALTY:</u></p> <p>\$500 or 6 months imprisonment or both - S 13 (1)</p> <p>\$400 - S 13A</p>

		not more than \$100 - first offence*
		" " " \$500*, or
		" " " 3 months imprisonment subsequent offences*
		* Ss 34, 35, 36, 38
S 53A	False representations in relation to <u>land</u>	No real equivalent, but under S 13(1) is an offence to <u>publish</u> statements re real property which are false, misleading or deceptive; or which claim Government approval when not given
S 53B	False or misleading advertisements re <u>employment</u>	NIL
S 54	Offering gifts, prizes, etc. with the intention of not providing them, or not providing them as offered	NIL - except for the general S 13(1)
S 55	Misleading conduct by a person re nature, manufacturing process, etc. of goods	Ss 34, 35, 36, 38 prohibit sale of certain goods unless <u>trade description</u> is applied; false <u>trade descriptions</u> are prohibited (plus the general S 13 (1))
S 55A	Misleading conduct re nature, character- istics etc. of <u>services</u>	NIL - except for the general S 13 (1)
S 56	Bait advertising	S 13 (2A) - relates to <u>goods</u> only <u>PENALTY: \$500</u>
S 57	Referral selling	S 32F - give or offer rebate, commission etc. (no mention of <u>induce</u> as in TPA) <u>PENALTY: \$500</u>
S 58	Accepting payment without intention to supply as ordered	NIL

S 59	Misleading statements re home operated businesses	NIL
S 60	Coercion at place of residence	NIL
S 61	Pyramid selling	Part II Division 5 (S 32A - S 32E) <u>PENALTY</u> : \$5,000 or imprisonment for 1 year or both
S 62	Product safety standards	Part IV (S 58 - S 61) - Safe design and construction of goods <u>PENALTY</u> : not more than \$100
S 63	Product information standard	S 61A - Governor in Council may make regs re packaging of goods <u>PENALTY</u> : not exceeding \$100
S 63AA	Power of Minister to declare safety or information standards	S 59, S 61A - Governor in Council may make regs
S 63A	Unsolicited credit cards	NIL
S 64	Assertion of right to payment for unsolicited goods, services or for entry in a trade directory	Part II Division 4 (S 21 - S 29) . Assertion of right to payment for unordered goods, directory entries or prescribed services prohibited <u>PENALTY</u> : \$500 . False orders prohibited <u>PENALTY</u> : \$200 Note: Do not have the ordinarily used in the course of profession, trade, etc. 'defence' of the TPA S 64 (2) and (2B) . S 11 - Issuing of <u>trading stamps</u> prohibited <u>PENALTY</u> : Not more than \$200

- Part II Division 2B - Mock Auctions (S 13B - 13F) prohibited

PENALTY: \$1,000

- Part II Division 3 - Door to Door Sales (S 14 - S 20A) Cooling off period

PENALTY: \$200

- Part III Division 2 - Footwear Regulations (S 42 - S 49)

- Part III Division 3 - Furniture Regulations (S 50 - S 57)

- S 61B - Invoice to be supplied on request

PENALTY: not more than \$100

- S 61C - Repairer to offer to return replaced parts to customer

PENALTY: not more than \$100

WHO CAN BRING ACTIONS

(1) Minister*

(2) Commission*

- * S 79 Prosecutions
- S 80 Injunctions
- S 80A Corrective advertising and disclosure of information

but cannot seek Court orders to redress individual damage

- (3) Individuals or companies
 - S 80 Injunctions
 - S 82) damages and other
 - S 83) orders - including
 - S 87) variation of contracts

WHO CAN BRING ACTIONS

S 66 (1) Inspector (appointed under S 62 of Act)

(2) Any other person authorized by Minister

(3) Any person whose rights are impaired or who is specially aggrieved

S 8 Director charged to "take and initiate action for remedying infringements"

- S 9B Director may institute or defend proceedings on behalf of consumers if in public interest re
 - (1) infringement of consumers' rights, or
 - (2) infringement of Vic. Consumer Affairs Act, or
 - (3) infringement of any other law relating to interests of consumers

ENFORCEMENT AND REMEDIES

- . Penalties up to \$50,000 for companies, and up to \$10,000 for individuals
- . Injunction
- . Corrective advertising
- . Damages
- . Ancillary orders

ENFORCEMENT AND REMEDIES

- . Penalties of various small amounts except for pyramid selling (\$5,000). General penalty of \$100
- . Imprisonment for some offences

CONCILIATION ROLE

S 8(e) Director shall attempt to settle the dispute if it is deemed that such action is in the best interests of the parties

PROCEDURAL MATTERS

- . Willingness to use deeming provisions e.g. S 13(3), S 36, S 64
- . Willingness to use reverse onus of proof, e.g. S 13 (4)
- . Wide powers of inspection e.g. S 65, S 36

SOURCE: TRADE PRACTICES COMMISSION

APPENDIX IVILLUSTRATIVE CASES DECIDED BY THE FEDERAL COURT UNDER
THE TRADE PRACTICES ACT, PART V, DIVISION 1Injunction to restrain deceptive and misleading
packaging of cricket helmets

A manufacturer offered cricket helmets for sale in boxes on which appeared photographs of another manufacturer's helmets. The latter succeeded in securing an interlocutory injunction restraining the display on the basis of a prima facie contravention of Section 52.

Superstar v. Coonan and Denlay
(1981) ATPR 40-253

False representations by used-car salesmen concerning
an ex-rental car

A company pleaded guilty (under Section 53) to two charges that it had represented, by salesmen's statements to two successive purchasers, that a particular car was a General Motors - Holden executive car or a car that had come from G.M.H. when in fact it was an ex-rental car. The company was fined a total of \$20,000.

Eva v. Southern Motors Box Hill
(1977) ATPR 40-026

Reduction in rent payable under shopping-centre lease

A lessee in a shopping-centre development succeeded in his claim that statements by an agent of the developer prior to the signing of the lease constituted misleading or deceptive conduct under Section 52. The court found that the applicant was entitled to damages based upon the difference between reasonable rents and rents payable under the lease; it took advantage of the "wide discretion" conferred by Section 87 to make compensatory orders to vary the provisions governing rental both retrospectively and prospectively.

Mr. Figgins v. Centrepoint Freeholds
(1981) ATPR 40-226

False representations by used car firm regarding car mileage

A used car firm was found guilty of two false representations (under Section 53) by reason of displaying an odometer with an incorrect reading and, further, recording the information on a business card. Fines totalled \$16,000.

Finger v. Malua Motors
(1978) ATPR 40-061

Mis-statements in brochure on display in the foyer of business premises constitute a false representation in trade or commerce

A company incorrectly stated that some models of machines had the approval of the State Electricity Commission of Victoria in a brochure displayed in the foyer of its business premises. It was found guilty of a false representation in trade or commerce (Section 53): the display of the offending brochure in itself constituted a representation in trade or commerce.

Larmer v. Power Machinery
(1977) ATPR 40-021

Heavy fine for false representation in advertisement

A manufacturer who advertised that its microwave ovens had been tested and approved by the Standards Association of Australia when they had not been so tested and approved was fined \$100,000.

Hartnell v. Sharp Corporation
(1975) ATPR 40-003

False representations about land made in a telephone conversation

A person was held to have infringed Section 53A by reason of false representations about land for sale made in a telephone conversation. The judge declared the subsequent contract void and ordered that the person refund the deposit and pay damages representing the legal and other costs of the applicant.

Smolonogov v. O'Brien
(1982) ATPR 40-312

Unaltered travel brochure left on display following change of tour itinerary

A travel agency continued to display a brochure stating that a tour was of 13 days duration when (due to alteration of flight schedules after the publication of the brochure) it was reduced to 11 days duration. Although the company informed those who had booked the tour, it was found to have infringed Section 55A (conduct misleading the public as to quantity of services).

Doherty v. Associated Travel
(1982) ATPR 40-323

Bait advertising of a motor car

The defendant advertised a particular model of car at a special price for a limited time; however employees were not authorized to make cars available to potential purchasers at this price. The company was found guilty of infringing Section 56 and fined \$25,000.

Reardon v. Morley Ford
(1981) ATPR 40-190; 40-205

False advertising concerning earnings potential
of a franchise

A company advertised for sale franchises to act as a courier for its film processing service. Included within the advertisements was an estimate of potential earnings grossly in excess of the actual earning rate and of what might reasonably be expected from the actual circumstances of the company. It was found to have breached Section 59 (2); and fines totalling \$95,000 were imposed upon the company and \$35,000 upon its Managing Director (with imprisonment in the event of his default).

Ducret. v. Colourshot
(1981) ATPR 40-196

APPENDIX VINDIVIDUALS AND ORGANIZATIONS MAKING SUBMISSIONS
AND/OR OFFERING ADVICE TO COUNCIL

Abela J.

Advertising Federation of Australia

Anti-Cancer Council of Victoria

Australian Association of National Advertisers

Australian Consumers' Association

Australian Federation of Consumer Organizations Inc.

Australian Finance Conference

Australian Newspapers Council

Barnes S., Lecturer in Law,
University of N.S.W.

Blums A.

Chapman M., Chartered Accountant

Consumer Affairs Council of the
Australian Capital Territory

Consumer Affairs Council, Tasmania

Consumer Credit Legal Service Co-operative Ltd.

Cook J.

Corran E.

Cranston R., Faculty of Law,
Australian National University

D'Aloisio A., Solicitor,
Mallesons

Dennis B., Solicitor,
Department of Labour and Industry

Dent G., Legal Officer,
Department of Labour and Industry

Department of Consumer Affairs, N.S.W.

Department of Public and Consumer Affairs,
South Australia

De Vrye. C.

Duggan A., Sub-Dean, Faculty of Law,
University of Melbourne

Electoral Lobby for Humane Reform

Ellett R.

Estate Agents Board

Finemore J., Chief Parliamentary Counsel

Fogarty W., M.L.A.
Member for Sunshine

Gallagher G.

Gatt C.

Geschke N., Ombudsman

Golden G., Stipendiary Magistrate

Goldring J. (Professor), School of Law,
Macquarie University

Haslam D.

Hazlett W., Solicitor,
Tolhurst, Duce and Emmerson

International Franchising Nominees Pty. Ltd.

Jacobsen W.

Job Watch

Kirby M.D. (Hon. Justice)
Chairman, Australian Law Reform Commission

Koenigseder S.

Law Department, Victoria

Law Institute of Victoria

Ludeman B.

Maher L., Solicitor,
Lethlean, Howie and Maher

Malecki T.

Media Council of Australia

Mignon E.

Molan F.

National Consumer Affairs Advisory Council

National Council of Women of Victoria

Newman R.

Nunawading Legal Service

O'Donnell B.

Public Relations Institute of Australia

Real Estate Agents Association of Victoria

Redfern M., Barrister and Solicitor

Retail Traders' Association of Victoria

R.E.T.R.A.

Rowson W. Solicitor,
Rowson, Eddey and Co.

Ryan K. (Professor), Law Reform Commission,
Queensland

Salmat Direct Marketing (Vic) Pty. Ltd.

Saunders C., Law School,
University of Melbourne

Small Business Development Corporation

Telfer A.

The Melbourne Chamber of Commerce

Trade Practices Commission

Ullner K.

Waller L. (Professor),
Victorian Law Reform Commissioner

Warburton Health Care Centre and Hospital

Zamprogno S.

APPENDIX VI

ADVERTISEMENT INVITING SUBMISSIONS FROM INTERESTED PARTIES

Reforms to Victorian Consumer Legislation

Victorian Consumer Affairs Council is investigating desirable reforms to Victorian Consumer Legislation as regards misrepresentation, misleading advertising, and misleading or deceptive conduct generally.

The Council invites written submissions as to:

1. Specific consumer problems inadequately or inefficiently addressed by existing legislation.
2. Desirable changes to Victorian law and procedures.

Written submissions from all interested parties should arrive by the 16/7/82 addressed to:

Miss Anne Herla, Secretary,

VICTORIAN CONSUMER AFFAIRS COUNCIL

2nd Floor, 500 Bourke Street, Melbourne, 3000.

Phone 602 8114 for further information.

REPORT OF THE CONSUMER AFFAIRS COUNCIL