

19 Fair trading legislation and consumer legislation

States and Territories have enacted a range of legislation dealing with fair trading and consumer protection issues. This legislation regulates aspects of business conduct, including advertising, dealings with customers and the provision of information. Jurisdictions' fair trading and consumer protection legislation falls into three broad categories: general fair trading legislation, which includes jurisdictions' Fair Trading Acts; legislation regulating the provision of consumer credit, including the Consumer Credit Code; and trade measurement legislation, which deals with the measurement of goods for sale. Attempts have been made to achieve national uniformity in each of these areas, but variation between jurisdictions remains.

A subset of legislation aimed at protecting consumers deals with the licensing of occupations. The review of such legislation is discussed in chapter 18.

Legislative restrictions on competition

Fair trading and consumer protection legislation imposes a wide range of restrictions on business conduct. Jurisdictions' Fair Trading Acts, for example, regulate business conduct by prohibiting: misleading or deceptive conduct; the employment of harassment or coercion to win sales; and certain types of sales technique (such as pyramid and referral selling). These Acts and other related legislation also impose miscellaneous restrictions, including: price controls, mandatory cooling-off periods, requirements to disclose products from which goods are made, requirements to provide warranties, the banning of unsafe goods and the imposition of quality standards.

Regulation relating to the provision of consumer credit generally involves licensing requirements and restrictions on the conduct of credit providers. Such restrictions may take the form of documentary and disclosure requirements, provisions allowing for the change of contractual arrangements, limits on commissions and the types of product that may be offered, and restrictions on advertising and methods of sale.

Legislation dealing with trade measurement imposes restrictions on the method of sale of certain goods. These restrictions include labelling and licensing requirements, restrictions on the units of measurement in which

certain goods may be sold, restrictions on the type of measuring instruments that businesses may use, and requirements relating to verification, certification and servicing of measuring instruments.

Regulating in the public interest

Fair trading and consumer protection legislation aims to protect consumers by addressing market failure, such as information asymmetries between businesses and consumers, which may lead to some businesses gaining an unfair advantage. The legislation may encourage competition, for instance by promoting consumer confidence. However, it may also impose some costs. In particular, restrictions on business activities contained in the legislation may, by restricting market entry and competitive conduct, result in increased compliance costs for businesses and have an impact on product innovation and consumer choice.

Regulating to protect consumers' interests requires governments to balance these considerations. In assessing jurisdictions' compliance with the NCP, the National Competition Council looks for appropriate regulatory outcomes. In the Council's view, such outcomes require restrictions on business activity to be as closely targeted to market failure as possible, to be proportionate to the market failure's potential detriment, and to be the least restrictive means available of achieving the regulatory objectives.

The Council has used these principles to assess jurisdictions' review and reform activity against NCP obligations. Where restrictions in legislation generally reflect this framework, the Council has assessed the jurisdiction as meeting its NCP obligations in this area. Where legislation contains restrictions on competition in addition to those consistent with the principles of effective regulation, the Council's assessment takes into account the relevant government's public benefit arguments.

With respect to jurisdictions' Fair Trading Acts, the Council considers that they do not require NCP review where they essentially mirror part V of the *Trade Practices Act 1974* (TPA). The Council has taken this view because the consumer protection provisions contained in the TPA are pro-competitive and do not act to restrict competition. The Council has considered all other restrictions in the Acts against the general principles for appropriate regulation.

Review and reform activity

Fair trading legislation

Commonwealth, State and Territory consumer affairs Ministers agreed in 1983 to adopt nationally uniform consumer protection legislation, with the objective of promoting efficiency and reducing compliance costs. The model chosen for the uniform scheme was the consumer protection provisions (part V) of the TPA, which contains general prohibitions against misleading or deceptive conduct in trade or commerce, as well as a list of more specific prohibited practices. These provisions were adopted through mirror legislation in each jurisdiction.

Table 19.1 outlines jurisdictions' progress with reviewing their Fair Trading Acts. Jurisdictions also identified for review a range of legislation dealing with miscellaneous fair trading issues. Table 19.2 outlines jurisdictions' progress with these reviews.

Consumer credit legislation

In 1993 State and Territory governments entered into the Australian Uniform Credit Laws Agreement, which provides for the adoption of a national Consumer Credit Code. The code, which came into effect in November 1996, replaced various State and Territory statutes governing credit, money lending and aspects of hire purchase.

The code was developed to be applied equally to all forms of consumer lending and to all credit providers in Australia, without restricting product flexibility and consumer choice. It applies rules that regulate credit providers' conduct throughout the life of a loan, generally relying on competitive forces to provide price restraint but providing redress mechanisms for borrowers if credit providers fail to comply with the legislation. Types of credit covered by the code include personal loans, credit cards, overdrafts, housing loans and the hire of goods.

The code is enacted by template legislation, with Queensland being the lead legislator. All jurisdictions except Western Australia and Tasmania have enacted legislation applying the Consumer Credit Code as in force in Queensland. Western Australia has enacted alternative consistent legislation, which will require amendment by the Western Australian Parliament to remain consistent when the code is amended. Tasmania has enacted a modified template system.

State and Territory governments are jointly undertaking an NCP review of the Consumer Credit Code legislation. In addition to this review, several jurisdictions have identified other consumer credit-related legislation for

review, possible review or amendment. Table 19.3 outlines jurisdictions' progress with reviewing this legislation. Some jurisdictions are also undertaking reviews of regulations of the business of finance brokers and credit providers. These reviews are noted in chapter 20, which deals with financial services regulation.

Trade measurement legislation

Each State and Territory has legislation that regulates weighing and measuring instruments used in trade and controls for pre-packaged goods. Instruments regulated include shop scales, public weighbridges and petrol pumps. Governments (except Western Australia) formally agreed to a nationally uniform legislative scheme for trade measurement in 1990 to facilitate interstate trade and reduce compliance costs. Participating jurisdictions have since progressively enacted the uniform legislation. The legislation places the onus on owners to ensure instruments are of an approved type and maintained in an accurate condition.

Governments have identified that the national scheme involves legislation that may have an impact on competition. As a result, a national NCP review of the scheme for uniform trade measurement legislation is being undertaken. Some jurisdictions have indicated that they will review the Acts administering the national scheme, in addition to those applying it. Table 19.4 outlines jurisdictions' progress with reviewing their trade measurement legislation.

Table 19.1: Review and reform of Fair Trading Acts

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
New South Wales	<i>Fair Trading Act 1987</i>	Regulation of the supply, advertising and distribution of goods and services and the disposal of interests in land	Combined review with <i>Door to Door Sales Act 1967</i> underway. Terms of reference approved in 1997, steering committee formed in 1998. Issues paper released in August 2000, followed by public consultation. Final report being prepared.		Council to assess progress in 2002.
Victoria	<i>Fair Trading Act 1999</i>	Mandatory five-day cooling-off period for contact sales, cooling-off period of less than 5 days for off-business premises sales deemed to be five days	Act assessed against NCP principles at its introduction. Assessment recommended retention of restrictions on the grounds that they are the least restrictive means of achieving the Act's objectives, and so are in the public interest.	Restrictive provisions retained.	Meets CPA obligations (June 2001).
Queensland	<i>Fair Trading Act 1989</i>	Quality/technical standards, business conduct restrictions, measures that confer a benefit	Review to be commenced at the end of the legislation review period, to audit any reliance of other reformed legislation on common law safeguards housed within the Act.		Council to assess progress in 2002.
Western Australia	<i>Fair Trading Act 1987</i>	Regulation of the supply, advertising and distribution of goods and services	Review of the Act and the <i>Consumer Affairs Act 1971</i> to be undertaken in the second half of 2001.		Council to assess progress in 2002.
South Australia	<i>Fair Trading Act 1987</i>		Not scheduled for review.		Council to assess progress in 2002.

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Table 19.1 continued

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
Tasmania	<i>Fair Trading Act 1990</i> Fair Trading (Code of Practice for Motor Vehicle Traders) Regulations 1996	Act assessed as not restricting competition. code of practice requires manufacturers to provide warranties for motor vehicles and to establish a system for dealing with customer complaints	Minor review of code of practice completed.	Restrictive provisions retained.	Meets CPA obligations (June 2001) in relation to non-motor vehicle dealer provisions. Motor vehicle dealer provisions discussed in chapter 18.
ACT	<i>Fair Trading Act 1992</i>	Regulation of the supply, advertising and distribution of goods and services	Intradepartmental review commenced, covering the Fair Trading Act, the <i>Door-to-Door Trading Act 1991</i> , the <i>Fair Trading (Consumer Affairs) Act 1973</i> , the <i>Lay-by Sales Agreements Act 1963</i> and the <i>Sale of Goods Act 1954</i> . Terms of reference developed.		Council to assess progress in 2002.
Northern Territory	<i>Consumer Affairs and Fair Trading Act</i>	Sundry provisions, including the regulation of advertising and the banning of potentially unsafe goods	Review completed, recommending a number of pro-competitive changes.	Government approved recommendations except in relation to the repeal of fair reporting provisions and motor vehicle dealers. The Government argued that the benefits of the fair reporting provisions outweigh the costs.	Council to assess progress in 2002.

Table 19.2: Review and reform of other fair trading legislation

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
New South Wales	<i>Business Licences Act 1990</i>	Licensing requirements	Review completed.	Act to be repealed. Repealing legislation passed and assented to, but not commenced.	Meets CPA obligations (June 2001).
	<i>Funeral Funds Act 1979</i>	Controls and regulations on contributory and pre-arranged funeral funds	Review underway. Issues paper released in early 2000. Final report being prepared.		Council to assess progress in 2002.
	<i>Prices Regulation Act 1948</i>	Regulation of prices and rates for certain goods and services	Review completed.	Prices Commission abolished and prices regulation powers transferred to the Independent Pricing and Regulatory Tribunal.	Council to assess progress in 2002.
	<i>Retirement Villages Act 1989</i>	Regulates the termination of occupation rights of residents, confers jurisdiction over certain matters to the Residential Tenancies Tribunal	Review completed.	Act repealed. Retirement Villages Act 1999 introduced, retaining certain requirements for terminating the occupation rights of residents.	Council to assess progress in 2002.
Victoria	<i>Funerals (Pre-Paid Money) Act 1993</i>		Scoping study showed that the Act does not restrict competition.		Meets CPA obligations (June 2001).
	<i>Retirement Villages Act 1986</i>		Scoping study showed that the Act does not restrict competition.		Meets CPA obligations (June 2001).

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Table 19.2 continued

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
Queensland	<i>Funeral Benefit Business Act 1982</i>	Limitations on the registration of corporations, business conduct requirements	Review completed.	Review report under consideration by relevant Minister.	Council to assess progress in 2002.
	<i>Profiteering Prevention Act 1948</i>	Price controls, restrictions on business conduct	Reduced NCP review completed. Repeal of the legislation recommended because the legislation lacks contemporary relevance.	Legislation expected to be repealed.	Council to assess progress in 2002.
	<i>Retirement Villages Act 1988</i>	Entry requirements, statutory charges, reduced requirements for charitable organisations	Reduced NCP review completed. New Bill assessed against NCP obligations.	New Bill passed in 1999, retaining some restrictions on competition.	Council to assess progress in 2002.
	<i>Sales of Goods Act 1896, Sale of Goods (Vienna Convention) Act 1986.</i>	Stipulations relating to the sale or purchase of goods affecting rights and remedies of buyers and sellers	Review to be commenced at the end of the legislation review process, to audit any reliance of other reformed legislation on common law safeguards housed within the Acts.		Council to assess progress in 2002.
Western Australia	<i>Retirement Villages Act 1992</i>	Restrictions on business conduct	Departmental review underway. Discussion paper issued and public consultation undertaken.		Council to assess progress in 2002.
South Australia	<i>Prices Act 1948</i>	Price controls, restrictions on business conduct	Review completed, recommending the removal of a number of restrictive provisions but the retention of price controls for infant foods, returns of unsold bread, towing, recovery, storage and quoting for repair of motor vehicles and the carriage of freight to Kangaroo Island.	Government enacted amendments in line with recommendations in 2000.	Meets CPA obligations (June 2001).

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Table 19.2 continued

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
Tasmania	<i>Door to Door Trading Act 1986</i>	Definition of a prescribed contract, prohibition of contractual terms, requirement for certain information to be incorporated under prescribed contracts, limitation on the hours in which a dealer may call on a person	Minor review of the Act completed. Restrictive provisions justified as being in the public interest.	Restrictive provisions retained.	Council to assess progress in 2002.
	<i>Flammable Clothing Act 1973</i>	Requirement to mark or label prescribed clothing (children's nightwear) with the flammability of the garment	Minor review of the Act completed. Restrictive provision justified as being in the public interest.	Restrictive provision retained.	Meets CPA obligations (June 2001).
	<i>Goods (Trade Descriptions) Act 1971</i>	Requirement for manufacturers to disclose the materials from which textile products are made, provisions relating to safety footwear	Minor review of the Act completed. Requirement relating to textile products justified as being in the public interest.	Restrictive provision relating to textile products retained. New regulations made to replace safety footwear provisions.	Meets CPA obligations (June 2001).
	<i>Mock Auctions Act 1973</i>	Prohibition on auctions where items are sold at a price lower than the highest bid		Act repealed.	Meets CPA obligations (June 2001).

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Table 19.2 continued

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
ACT	<i>Law Reform (Manufacturers Warranties) Act 1977</i>		Act assessed as not restricting competition and removed from NCP review timetable.	Act to be repealed by the proposed Fair Trading (Amendment) Bill 2001 because it duplicates more extensive provisions in the TPA.	Meets CPA obligations (June 2001).
	<i>Law Reform (Misrepresentation) Act 1977</i>		Act assessed as not restricting competition and removed from NCP review timetable.		Meets CPA obligations (June 2001).
Northern Territory	<i>Prices Regulation Act</i>	Price controls, restrictions on business conduct	Review completed, recommending the exercise of restrictions only at times of natural disaster, the specification of objectives and the regulation of monopoly behaviour under separate legislation.	Government agreed to review recommendations.	Council to assess progress in 2002.
	<i>Retirement Villages Act</i>	Regulation of the operation of retirement villages, court's powers in respect of certain matters relating to retirement villages	Review underway.		Council to assess progress in 2002.

Table 19.3: Review and reform of consumer credit legislation

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
National	<i>Review of Consumer Credit Code</i>	Licensing requirements, restrictions on the conduct of credit providers	Review underway. Consultant's final report under consideration by relevant official bodies. Report to be forwarded to the Ministerial Council on Consumer Affairs for consideration and response.		Council to assess progress in 2002.
Victoria	<i>Credit (Administration) Act 1984</i>		Scoping study showed that the legislation does not restrict competition.		Meets CPA obligations (June 2001).
	<i>Hire Purchase (Amendment) Act 1997</i>	Retention of the court's ability to reopen hire purchase agreements and order the return of goods repossessed from a farmer under certain circumstances	Victoria argued that there is benefit in using the restrictions to address rural sector difficulties in relation to hire purchase, while a more comprehensive policy is developed.	Restrictive provisions retained.	Council to assess progress in 2002.
	<i>Hire Purchase (Amendment) Act 2000</i>	Retention of the court's ability to reopen hire purchase agreements and order the return of goods repossessed from a farmer under certain circumstances	Victoria argued that there is continued benefit in the restrictions because further policy work is required to develop a comprehensive policy.	Restrictive provisions retained.	Council to assess progress in 2002.
Queensland	<i>Credit Act 1987</i>	Restrictions on business conduct	Review of this Act and regulation will be carried out at the same time as the national review of the Consumer Credit Code but under a separate process. Review due for completion in the third quarter of 2001.		Council to assess progress in 2002.

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Table 19.3 continued

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
Queensland (continued)	<i>Hire Purchase Act 1959</i>	Restrictions on business conduct	Reduced NCP review underway. Issues paper proposing repeal of the Act released and public consultation undertaken. Review expected to be completed by third quarter 2001.	Legislation expected to be repealed, effective October 2001.	Council to assess progress in 2002.
Western Australia	<i>Credit (Administration) Act 1984</i>	Licensing requirements, restrictions on conduct of credit providers	Departmental review completed, recommending licensing requirements and related provisions be repealed but disciplinary provisions be retained on public interest grounds.	Government agreed to review recommendations and is drafting legislative amendments.	Council to assess progress in 2002.
	<i>Hire Purchase Act 1959</i>	Restrictions relating to surplus from sale of repossessed goods, equitable relief and farm goods purchases	Departmental review completed, recommending the removal of a number of restrictions but the retention on public interest grounds of three provisions aimed at providing protection to farmers and small businesses.	Government agreed to review recommendations and has introduced amending legislation to Parliament.	Council to assess progress in 2002.
Tasmania	<i>Hire-Purchase Act 1959</i>	Requirements relating to the form and contents of hire purchase contracts		Act repealed.	Meets CPA obligations (June 2001).
	<i>Lending of Money Act 1915</i>	Requirement that money lenders be registered		Act repealed.	Meets CPA obligations (June 2001).
ACT	<i>Consumer Credit (Administration) Act 1996</i>	Registration and conduct requirements	Departmental review underway.		Council to assess progress in 2002.
	<i>Credit Act 1985</i>		Act substantially repealed, remaining provisions assessed as not restricting competition.		Meets CPA obligations (June 2001).

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Table 19.3 continued

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
Northern Territory	<i>Consumer Affairs and Fair Trading Act</i>	Negative licensing requirements, requirement for credit providers to abide by the Consumer Credit Code and to act properly, competently and fairly	Review completed, recommending retention of the requirement for credit providers to act properly, competently and fairly. Restrictions imposed by the requirement to abide by the Consumer Credit Code are being considered in the national review.	Government agreed to review recommendations.	Meets CPA obligations (June 2001).

Table 19.4: Review and reform of trade measurement legislation

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
National (except Western Australia)	<i>Review of trade measurement legislation</i>	Restrictions on the method of sale of certain goods	Review underway. Review report prepared and under consideration by steering committee. Report to be considered by relevant official bodies before being forwarded to the Ministerial Council on Consumer Affairs for consideration and response.		Council to assess progress in 2002.
Queensland	<i>Trade Measurement (Administration) Act 1990</i>		Review and reform contingent on outcome of national review.		Council to assess progress in 2002.
South Australia	<i>Trade Measurement Administration Act 1993</i>		Review and reform contingent on outcome of national review.		Council to assess progress in 2002.
Western Australia	<i>Weights and Measures Act 1915</i>	Restrictions on the method of sale of certain goods	Government to introduce new trade measurement legislation in 2001 applying the uniform national legislation. NCP assessment to be undertaken, and drafting to take into consideration outcome of national review.		Council to assess progress in 2002.
ACT	<i>Trade Measurement (Administration) Act 1991</i>		Review and reform contingent on outcome of national review.		Council to assess progress in 2002.
Northern Territory	<i>Trade Measurement (Administration) Act</i>		Review and reform contingent on outcome of national review.		Council to assess progress in 2002.