Discussion paper

National Competition Policy Review of the Fair Trading Act 1987 *- Final Report*

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Government of South Australia

Office of Consumer and Business Affairs

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Executive Summary

In 1995 the Council of Australian Governments entered into three agreements to give effect to national competition policy objectives. As part of their obligations under these agreements, each State and Territory government gave an undertaking to review existing legislation that potentially restricts competition. The Office of Consumer and Business Affairs reviewed the *Fair Trading Act* as part of this process.

Generally, the Competition Principles Agreement (CPA) requires that all existing legislation (including Acts and Regulations) be reviewed. The National Competition Council (NCC) oversees and assesses Governments' progress in meeting their obligations under National Competition Policy (NCP). The NCC has determined that jurisdictions' fair trading legislation does not require review where the legislation largely mirrors Part V of the *Trade Practices Act 1974* (TPA). The NCC has taken the view that the consumer protection provisions contained in the TPA are pro-competitive and do not act to restrict competition.

The NCC requires South Australia to review the provisions of the FTA that are not consistent with Part V of the TPA. The restrictions contained in these remaining provisions have been identified not to be serious or contentious and therefore the NCC has indicated that an in-house review of those provisions of the FTA without consultation is acceptable for the purposes of meeting the Government's NCP obligations.

The CPA also requires the review of sub-ordinate legislation that restricts competition. The *Fair Trading (General) Regulations 1999* have not been assessed as containing restrictions on competition. Accordingly, this Report includes consideration of the following regulations made pursuant to the FTA:

- the *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 1996;* and
- the *Fair Trading (Health and Fitness Industry Code of Practice) Regulations 1992.*

The purpose of this Report is to present the final conclusions of the Review Panel to the Minister for Consumer Affairs following completion of the in-house review of the relevant provisions of the FTA.

Door-to-door trading

Part 3 of the FTA regulates door-to-door trading. Part 3 applies to contracts for the sale of goods or services, provided negotiations between the consumer and dealer take place in each others presence at a place other than the trade premises of the supplier and otherwise than at the unsolicited invitation of the consumer.

Restrictions are placed on the hours during which door-to-door dealers may call on consumers and, where the value of the contract exceeds $50, on the form and content of door-to-door sales contracts. In particular, a 10 day cooling-off period is mandated for contracts worth in excess of $50. Suppliers and dealers are prohibited from accepting any payment for goods and services under the contract until the expiration of the cooling-off period and services must not be supplied before the expiration of the cooling-off period. The FTA also confers rights on consumers to rescind all door-to-door sales contracts within 6 months if the contract contains a prohibited term (eg a term purporting to exclude any rights conferred under Part 3) or where there has been contravention of other requirements placed on door-to-door dealers.

The door-to-door trading provisions were enacted to provide protection to consumers against high-pressure sales tactics in circumstances in which consumers were considered to be particularly vulnerable. Door-to-door sales activity has increased in recent years following the de-regulation of the telecommunications sector and this trend may be expected to continue as full retail contestability emerges in the electricity and gas markets. Increasingly sophisticated sales techniques are also emerging as more sophisticated products are sold door-to-door, including those mentioned above as well as the marketing of cable and satellite television services, thereby increasing the scope for consumer detriment as a result of misleading or unconscionable conduct or high-pressure sales tactics. The Review Panel concluded that the door-to-door trading provisions remain relevant and confer a net benefit on the community that cannot be delivered in a less restrictive manner. It is therefore recommended that the provisions be retained. However, the Review Panel recommends that consideration be given to increasing the threshold value of transactions to which the cooling-off right applies from $50 to $100 to account for inflation.

In addition, the Review Panel is concerned that the fact that some forms of off-premises sales such as telemarketing are not regulated results in an anti-competitive effect, with discrimination against those who conduct off-premises sales by the door-to-door method. Consideration should be given to whether other forms of off-premises sales should also be subject to the same or similar restrictions as door-to-door trading on the basis that the same or similar risks of consumer detriment apply to such sales.

In that regard, the Review Panel notes that a general review of the FTA is to be undertaken shortly by the Office of Consumer and Business Affairs and that that Review will encompass consultation with stakeholders. It is noted that it is intended that the above proposed changes be canvassed as part of that general review.

Mock auctions

Part 4 of the FTA prohibits auctions where goods are sold for less than the highest bid or part of the purchase price is repaid to the purchaser (for a reason other than the fact a defect is detected or damage is sustained after the auction), or where participation in the auction is restricted to persons who buy other goods or gifts are offered or given away during the course of the auction. The provisions were enacted in response to complaints about such practices, generally conducted by operators who tended to spend only a day or two at a particular location. Unlike other auctions, at the conclusion of a sale by mock auction a considerable portion of the amount bid was refunded to the successful bidder. This practice created an expectation in the minds of consumers that a refund would be forthcoming for all goods purchased at the auction. Consumers therefore bid more than they otherwise would have in the expectation of receiving a refund and it was found that the goods offered for sale at that stage of the auction were generally valued at far less than the amount bid.

There have not been any recent complaints to the Office of Consumer and Business Affairs about mock auctions. This may be because of the effectiveness of the legislation. It is not clear whether there are persons who would seek to engage in the practice if the prohibition were removed. However, on the basis that mock auctions, if they were to re-emerge, may cause loss to consumers, the objective of preventing that loss by prohibiting the practice is assessed to remain relevant. On the basis that the prohibition on mock auctions is not considered to be a true restriction on competition and that the prohibition confers a net consumer protection benefit to consumers that cannot be delivered in a less restrictive manner, it is concluded that the provisions should be retained.

Fair reporting

Part 5 of the FTA contains provisions regulating the activities of reporting agencies and traders where they provide a report to a person carrying on a business or letting premises in the State. Requirements are imposed on traders and reporting agencies to ensure the accuracy of the information contained in such reports, including to disclose the receipt, contents and source of the report to the individual the subject of the report and to allow the individual the opportunity to seek correction of the report. The principle of the provisions is that, if a person was denied a commercial benefit, that person should know of any information in the possession of the person denying the benefit and have the opportunity to correct that information.

Collection, storage and use of personal information by traders and reporting agencies remains an area of significant concern, as supported by the amendments in 2000 to the Commonwealth *Privacy Act 1988* (the *Privacy Act*) to extend its coverage to the private sector. The Review Panel is also aware that there is ongoing debate, particularly in other jurisdictions, about the issue of "bad tenant databases", which are used to store information about tenants that is used by real estate agencies and landlords to refuse applications from prospective tenants. The potential consequence of a bad tenant report could be that a person is unable to secure rental accommodation anywhere. In such situations it would be imperative that, at the least, the information contained in the database is correct and up to date. In light of this it is concluded that the objectives of ensuring accuracy of credit and other reports containing personal information, as well as consumer access to such reports and redress in the event of inaccuracy, remain relevant objectives.

Another potential alternative means of achieving the objectives of the fair reporting provisions, however, has been identified as reliance on the (Cth) *Privacy Act 1988*. However, in light of the uncertainty regarding the extent of coverage of the *Privacy Act* and the fact that that Act does not yet apply to any small businesses with an annual turnover not exceeding $3 million, it is not considered that the *Privacy Act* constitutes at this time a satisfactory alternative to the fair reporting provisions in Part 5 of the FTA. The Review Panel recommends that consideration be given to repealing the fair reporting provisions after the *Privacy Act* has applied to relevant small businesses for a sufficient period to enable assessment of the adequacy of the *Privacy Act* provisions in achieving the objectives of the fair reporting provisions.

Retail transactions

Retailers are prohibited by section 38 of the FTA to advertise or offer goods in a manner which limits the quantity or number of goods that may be purchased by any one purchaser. However, it is a defence to show that the trader did not have (or have ready access to) a sufficient quantity or number of the goods to meet the demand, or anticipated demand, of other customers.

The prohibition on limiting the quantity of goods supplied was designed to outlaw a practice whereby larger retail stores were seeking to attract customers by advertising a limited number of goods at a low price, often below cost.

Under section 40 of the FTA a trader must not display a statement of price or conditions of sale (relating to the availability of discounts or trade-in or other allowances) with any goods without including in a prominent, clear and legible manner the cash price of the goods. The provision was designed to enable consumers to compare the cash price with any other information contained on a price ticket or sign indicating weekly payments, discounts or trade-in allowances, which could tend to mislead the consumer.

The Review Panel has concluded that the s. 38 prohibition on limiting supply and the s. 40 price ticket requirements are trivial restrictions on competition and would only appear to restrict practices that would otherwise be misleading.

Recovery of trading debts
Part 8 of the FTA (section 43) imposes restrictions on the creditor or the agent of a creditor in relation to the recovery of trading debts.

Apart from a restriction on the hours of calling, the remaining restrictions on the conduct of creditors are designed to prevent unscrupulous creditors or agents who engage in unfair or unconscionable conduct with the potential to cause consumer detriment. As such the remaining restrictions are not considered to restrict competition to any significant degree.

The Review Panel has concluded that the recovery of trading debts provisions confer a net public benefit. The Review Panel is not convinced that the general harassment and coercion provisions afford satisfactory alternative protection, therefore recommends that the recovery of trading debts provisions be retained. However, it is recommended that consideration be given to whether the ACCC guidelines issued in relation to the *Trade Practices Act* harassment and coercion provision have improved compliance with and enforcement of the provision (and the equivalent FTA provision) in South Australia such that the specific recovery of trading debt provisions could be repealed. Consideration could alternatively be given to amending s. 69 to include examples of what types of conduct constitute a breach of that section.

Third-party trading schemes
The third-party trading scheme provisions in the FTA set out that a scheme may be prohibited by declaration if the Commissioner for Consumer Affairs is of the opinion that the scheme is not genuine and reasonable or is contrary to the interests of consumers. There is also provision for promoters of third-party trading schemes to apply for approval of a particular scheme. As there are currently no third party trading schemes prohibited by declaration pursuant to Part 9 of the FTA, the restriction and consequent costs of these provisions are considered trivial. However, the Review Panel suggests that it would be desirable in terms of minimising imposts on business if further certainty could be introduced into the provisions. This could potentially be done by prescribing a code of practice to be adhered to by promoters of third party trading schemes.

Pre-paid Funerals Code
The *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 1996* prescribe a mandatory code of practice for funeral directors who offer pre-paid funerals. The Code imposes various conduct restrictions on funeral directors regarding the form and content of pre-paid funeral contracts and handling of money received for pre-paid funerals as well as on investment managers regarding the manner of investment.

The Code of Practice was developed following concerns about the security of consumers' funds held by funeral directors for pre-paid funerals. There had been an instance of fraudulent conversion by a funeral director of a large sum of money held for the purposes of providing a future funeral. As the number of funeral directors offering or intending to offer pre-paid funerals increased, there was a need to protect the considerable investment of consumers. There was further concern to ensure that recipients received the funeral they contracted for, bearing in mind that many years may elapse between contracting for a pre-paid funeral and provision of the funeral.

Pre-paid funerals continue to be marketed by funeral directors in this State. Therefore, the objectives of ensuring security of money paid to funeral directors in anticipation of receiving a funeral at a later time, and that consumers receive the funeral they contracted for, remain relevant. It is not considered that the requirements contained in the Code involve any significant costs to funeral directors or approved investment managers or restrict competition. The Review Panel has concluded that the Regulations confer a net benefit on the community and should be retained.

Health and Fitness Industry Code
The *Fair Trading (Health and Fitness Industry Code of Practice) Regulations 1992* prescribe a mandatory Code of Practice ("Fitness Industry Code") for operators of health and fitness centres. The Code imposes prohibitions on entering into contracts to supply services for a period exceeding 12 months duration and on offering renewal of membership contracts prior to three months before expiry of a contract.

The Code was developed in consultation with the fitness industry in response to a large number of complaints in the late 1980s and early 1990s from consumers about losses sustained following the closure of a number of fitness centres in South Australia. The objective of the Code is to minimise potential financial losses to consumers by ensuring that they do not prepay large sums for long-term memberships. Consumers' losses in the event of failure of a particular fitness centre operator are limited by prohibiting membership contracts for periods exceeding 12 months.

The Review Panel notes that New South Wales recently introduced similar regulation in the form of the *Fitness Services (Pre-paid fees) Act 2000,* which came into operation in March 2001. This legislation followed a number of fitness centre closures in that State in the late 1990s. This supports the suggestion that the risks associated with fitness centre closures are likely to recur. The Review Panel further notes that the number of complaints received by the Office of Consumer and Business Affairs regarding fitness centres decreased significantly following the introduction of the Code. The Review Panel has therefore concluded that the objectives of the Fitness Industry Code remain relevant and that the Regulations deliver a net benefit to the community and should therefore be retained. It is noted that the Regulations are subject to the automatic revocation program under Part 3A of the *Subordinate Legislation Act 1978*. The Regulations are due to expire pursuant to those provisions on 1 September 2003, at which time they will need to be reviewed to ascertain if they are still necessary and, if so, remade. The replacement Regulations will be subject to the CPA requirements for new legislation.

1 Introduction

1.1 Why Is The Act Being Reviewed?

Economic and social imperatives, not only in Australia but also globally, have in recent times required the imposition of more rigorous market conditions on every sector of the economy. This process has affected the agricultural, mining, manufacturing and utilities sectors of the economy, and is increasingly impacting on the occupational and professional fields.

Formal governmental recognition of this process came at the Council of Australian Governments meeting on 11 April 1995 with the adoption by the Commonwealth and all State and Territory Governments of the National Competition Policy package.

The package comprised three separate agreements aimed at facilitating the implementation of National Competition Policy objectives:

- The **Competition Principles Agreement** consisting of six distinct areas of competition reform:-
    - Legislative review;
    - Process oversight for government business;
    - Structural reform of public monopolies;
    - Competitive neutrality;
    - Access to essential infrastructure; and
    - Application of competition principles to local government.
- The **Conduct Code Agreement** committing all governments to implementation of uniform competition laws as set out in the schedule version of Part IV of the *Trade Practices Act 1974*. Under this code all persons, including governmental bodies and professional and occupational bodies, are now subject to competition laws.
- The **Agreement to Implement Competition Policy and Related Reforms** committing all signatories to a reform timetable. The Commonwealth is also committed to making payments to State and Territory Governments subject to their meeting the necessary reform timetables.

It is the legislative review element of the Competition Principles Agreement which forms the basis for this review. In this context it must be borne in mind that legislative reviews, such as this review of the *Fair Trading Act 1987* and the regulations under it, do not occur in isolation but rather form a part of a comprehensive policy agreed to by all Australian governments.

The legislative review process extends not only to existing legislation, but also to new legislation. Further, the concept of "legislation" encompasses all Acts, Regulations, Rules, Proclamations, Notices, Amendments and By-Laws. The reform timetable contained in the Agreement to

Implement Competition Policy and Related Reforms requires the legislative review process to be completed by the end of June 2002.

While competition is a notoriously difficult term to define globally, it may perhaps be most simply considered as a process of rivalrous behaviour by suppliers in a market that has many actual and potential buyers. National Competition Policy aims to make better use of competitive forces as a means to enhance overall material living standards, to improve Australia's social and environmental outcomes, and to extend the productivity enhancing effects of competition to virtually all sectors of the economy.

It has been said that National Competition Policy is about:-

> *"ensuring that the way markets work serves the whole community, rather than resulting in back-room deals which benefit a few. It is about improving efficiency of the public sector to provide better services at lower prices. And it is about ensuring that legal protections from competition genuinely promote the welfare of all Australians, rather than the narrow interests of the businesses protected. The policy doesn't prevent governments guaranteeing desirable social objectives."*[1]

Underlying National Competition Policy is the notion that greater competition will create incentives for producers:

- to use their resources more efficiently, resulting in higher productivity;
- to increase their efforts to constrain costs and therefore lower prices; and
- to be more responsive to users' demands in terms of improved quality.

It is important to acknowledge at the outset that many laws restrict competition. It is also important to acknowledge that often these restrictions are essential to achieve a significant community benefit. However, National Competition Policy requires that all laws restricting competition be identified, so that the community benefits they provide and the necessity for the restriction can be reviewed in an objective fashion.

In this sense, National Competition Policy embraces competition as a means, not an end in itself. Any increase in competition in a sector of the economy can therefore only be justified under Competition Policy Principles insofar as it provides an increase in net public benefit.

That said, any National Competition Policy review must start with the presumption that any identified restriction on competition should be repealed unless it can be demonstrated that a net public benefit arises from its existence. In line with Competition Policy Principles, those who wish to maintain a legislative restriction on competition bear the onus of proving that there is such a net public benefit.

This presumption arises from the text of the Competition Principles Agreement, which states at clause 5(1):

> *"The Guiding Principle is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:*

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[1] Mr G. Samuel, President, National Competition Council, *Australian Financial Review*, 22 June 1998, p 20

a) the benefits of the restriction to the community as a whole outweigh the costs; and

b) the objectives of the legislation can only be achieved by restricting competition."

Therefore, the only restrictions on competition permitted under the Competition Principles Agreement are those that are demonstrably in the public interest. However, clause 5(1)(b) further requires that those restrictions, which are so justified, must also be the most appropriate way of meeting the legislation's objectives. While a public interest defence is a necessary step for retention of a legislative restriction, it is not in itself a sufficient one; if the policy objectives can be achieved by other means, then the legislative restriction must be removed, even if they are in the public interest, and replaced by the less restrictive alternative.

The process of determining whether a restriction is in the public interest is known as the "public benefit test". Clause 5(1)(c) of the Competition Principles Agreement requires that competition and associated economic impacts be assessed under this test.

The Review Panel notes that in this regard clause 1(3) provides guidelines on the content of public benefits tests such that, without purporting to limit what may be considered, the following matters must be taken into account where relevant:

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

These criteria contain a clear expectation that social, environmental and regional concerns will be considered alongside the more narrow economic criteria in arriving at an assessment of overall benefits and costs. However, it should also be appreciated that, where relevant, matters beyond those set out in the Competition Principles Agreement, including rural issues, have been considered by the Review Panel.

1.2 What Is Being Reviewed?

Generally, the Competition Principles Agreement (CPA) requires that all existing legislation (including Acts and regulations) be reviewed. The National Competition Council (NCC) oversees and assesses Governments' progress in meeting their obligations under National Competition Policy (NCP). The NCC has determined that jurisdictions' fair trading legislation does not require review where the legislation largely mirrors Part V of the *Trade Practices Act 1974* (TPA). The NCC has taken the view that the consumer protection provisions contained in the TPA are pro-competitive and do not act to restrict competition.

Commonwealth, State and Territory Consumer Affairs Ministers agreed in 1993 to adopt nationally uniform consumer protection legislation, with the objective of promoting efficiency and reducing compliance costs. The scheme was modelled on the consumer protection provisions in Part V of the TPA, which contain general prohibitions against misleading or deceptive conduct in trade or commerce, as well as a list of more specific prohibited practices. South Australia has adopted these provisions in Part 10 of the *Fair Trading Act 1987* (FTA). They include prohibitions against misleading or deceptive conduct in trade or commerce, as well as a range of more specific prohibited practices.

The NCC requires South Australia to review the remaining provisions of the FTA that are not consistent with Part V of the TPA. The restrictions contained in these remaining provisions have been identified to be minor in nature and therefore the NCC has indicated that an in-house review of those provisions of the FTA without consultation is acceptable for the purposes of meeting the Government's NCP obligations.

There are three sets of regulations made pursuant to the FTA:

- the *Fair Trading (General) Regulations 1999;*
- the *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 1996;* and
- the *Fair Trading (Health and Fitness Industry Code of Practice) Regulations 1992*.

The *Fair Trading (General) Regulations* prescribe certain Acts to be "related Acts" for the purpose of picking up the enforcement provisions under the FTA, exempt life insurance contracts from the application of the door-to-door provisions of the FTA and prescribe the particulars and notices required to be served on consumers under the door-to-door provisions. These Regulations have been assessed not to contain restrictions on competition in themselves. Accordingly, this Review considers only the *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 1996* and the *Fair Trading (Health and Fitness Industry Code of Practice) Regulations 1992*.

1.3 The Review Panel

The review was conducted by a Review Panel consisting of officers of the Office of Consumer and Business Affairs, chaired by the Deputy Commissioner - Policy & Legal.

1.4 The Review Process

As set out above, the NCC has indicated that, given the nature of the restrictions contained in the Act, an in-house desk-top review of the FTA, without consultation, will be sufficient to discharge the South Australian Government's obligations under the CPA. Such a review has now been completed by the Review Panel and the purpose of this Final Report is to present to the Minister for Consumer Affairs the conclusions and recommendations of the Panel. A summary of the conclusions and recommendations of the Review Panel can be found at **Appendix 1.** The terms of reference for the review can be found at **Appendix 2.**

2 Legislative Framework

2.1 History and Objectives of the Act

The *Fair Trading Act 1987* (the FTA) was introduced in 1987. The long title of the FTA states that the purpose of the Act is:

> "…*to provide for the appointment and powers and functions of the Commissioner for Consumer Affairs, to make provision in respect of certain unfair or undesirable trade practices, and for other purposes.*"

Further information regarding the objectives of the FTA is found in the Parliamentary debates in relation to the Act, in particular, the Second Reading Speeches. The legislation was introduced in the form of two bills, the *Fair Trading Bill* and the separate *Trade Practices (State Provisions) Bill*.[2]

The overarching objective of the FTA is consumer protection and, in particular, the prevention of consumer detriment by prohibiting misleading or deceptive, harsh or unconscionable trading conduct.

It is apparent from the Second Reading Speech that the FTA was also designed to rationalise and consolidate various laws with the objectives of consumer protection and fair trading. The FTA is intended to regulate business practices generally, rather than specific types of businesses such as credit providers or second-hand dealers.

Conclusion 1.

The objective of the FTA is consumer protection and, in particular, the prevention of consumer detriment by prohibiting misleading or deceptive, harsh or unconscionable trading conduct and practices.

2.2 Structure of the Act

There are two aspects to the FTA, the first is the enactment of general consumer protections and fair trading provisions mirrored on Part V Division 1 of the (Cth) *Trade Practices Act 1974* (TPA). The second aspect is the specific regulation of particular practices that were previously the subject of separate Acts and which it was considered warranted more tailored regulation.

Part 1 of the FTA sets out the short title to the Act, defines terms referred to in the Act and provides that the Act binds the Crown. In so far as the definition of terms affects the scope of any restrictions contained in the FTA, the scope of the definition will be dealt with in the discussion of that restriction. Otherwise, Part 1 does not contain any restrictions on competition.

Part 2 of the FTA provides for the continued office of the Commissioner for Consumer Affairs and sets out the various functions of the Commissioner in administering the Act. Part 2 does not contain any restrictions on competition.

[2] See, for example, Hon C J Sumner, Legislative Council Hansard, 6/11/86, p 1914 ff.

Parts 3 to 9 of the Act regulate certain business practices and do contain restrictions on competition.

Part 7 of the FTA contains 2 provisions relating to misleading advertising. Section 41 prohibits a person from publishing or causing to be published without the Commissioner's approval an advertisement that claims to have the approval of a consumer affairs authority. Although this provision restricts conduct it cannot properly be considered a restriction on competition, rather is promotes competitive conduct in the same way as the provisions of the FTA that mirror Part V of the TPA. The Review Panel does not propose to further consider this provision. Section 42 empowers the Commissioner to require a person to provide proof of any claim or representation made in an advertisement for the sale of goods or services, or the letting of premises. Although this provision is technically a potential conduct restriction it is in the nature of an enforcement power designed to assist with the enforcement of the prohibitions relating to misleading and deceptive conduct, which mirror the pro-competitive provisions in Part V of the TPA. Accordingly, it is not considered that this provision represents a restriction on competition.

As discussed above, the NCC has determined that Part V of the TPA, and hence Part 10 of the FTA, does not restrict competition.

Accordingly, this review encompasses the following Parts of the FTA as follows:

PART 3	Door-to-door trading
PART 4	Mock auctions
PART 5	Fair reporting
PART 6	Retail transactions
PART 8	Recovery of trading debts
PART 9	Third-party trading schemes

3 Door-to-Door Trading

3.1 Restriction on Competition

Part 3 of the FTA regulates door-to-door trading. Part 3 applies to contracts for the sale of goods or services, provided:

- Negotiations between the consumer and dealer are in each others presence and at a place other than the trade premises of the supplier; and

- The dealer attends in the course of door-to-door trading and otherwise than at the unsolicited invitation of the consumer

3.1.1 Restrictions on the activities of door-to-door dealers

The following restrictions are imposed on salespersons, for the purposes of negotiating a door-to-door contract:

- they are prohibited from calling on a person on Sundays or public holidays, before 9 am and after 5 pm on Saturdays and before 9 am and after 8 pm Mondays to Fridays;

- they must as soon as practicable indicate the purpose of their visit and identify themselves;

- they must leave the premises on request;

- they must not harass or coerce a consumer during the course of negotiating a sale or to dissuade the consumer from exercising a right conferred on the consumer under Part 3.

3.1.2 Restrictions relating to door-to-door sales contracts generally

Restrictions are also imposed on the content of door-to-door sales contracts. Door-to-door sales contracts must not contain:

- contractual provisions purporting to provide that a contract is governed or justiciable by or under the law of another jurisdiction; or

- contractual provisions purporting to exclude, restrict or modify any right conferred on a consumer under Part 3.

3.1.3 Restrictions on prescribed contracts

Additional restrictions are imposed on the form and content of certain 'prescribed contracts'. 'Prescribed contracts' are door-to-door sales contracts for goods or services exceeding $50 in value, or in relation to which the total value payable is not ascertainable at the time of the making of the contract. Contracts of insurance and contracts solely for the provision of credit are exempted. The additional restrictions imposed in relation to prescribed contracts are generally as follows:

- the contract must be printed or typed and set out all the contractual terms in full;

- the contract must be executed by the supplier before the consumer and a copy of the completed contract given immediately to the consumer; and

- the contract must set out prominently in a prescribed manner the consumer's cooling off rights and be accompanied by prescribed notices explaining the consumer's right to rescind the contract.

Prescribed contracts are subject to a 10 day cooling-off period. Suppliers and dealers are prohibited from accepting any payment for goods and services under the contract until the expiration of the cooling-off period. Services (other than services of a kind excluded by regulation; although none are presently excluded) must not be supplied before the expiration of the cooling-off period.

3.1.4 Rights to rescind contracts

The FTA also confers rights on consumers to rescind all door-to-door sales contracts within 6 months:

- if the contract contains a prohibited term (eg a term purporting to exclude any rights conferred under Part 3); or

- for a contravention or failure to comply with the conduct requirements relating to hours of calling, identification and stating of purpose of calling and harassment or coercion by dealers.

A consumer also has the right to rescind a prescribed contract:

- at any time before the expiration of the cooling-off period; or

- within 6 months if there has been a contravention of or failure to comply with:

    - the requirements in relation to the form and contents of prescribed contracts; or

    - the prohibitions against accepting payment for goods or services, or supplying services, before the expiration of the cooling-off period.

3.2 Objectives of Regulation

Prior to the introduction of the FTA, door-to-door selling was regulated under the *Door to Door Sales Act 1971* (repealed). The legislation was introduced to address the practice of dealers attending a consumer's home or place of employment uninvited in an attempt to sell the consumer goods or services. It was considered that the circumstances of this type of dealing involved a risk of detriment to consumers. High pressure sales tactics employed in a situation where the consumer is unprepared, has had no opportunity to shop around to compare prices or products, and can not simply walk away as is the case where the consumer visits a dealer's place of business, were considered to place consumers at particular risk of suffering financial loss as a result of paying excessive prices for goods or services or purchasing goods or services that the consumer does not really want or that do not meet the consumer's specifications.

The requirements for door-to-door dealers to identify themselves and leave the premises on request, the requirements for door-to-door contracts and, in particular, the cooling-off period, are designed to minimise the potential for consumer loss as a result of door-to-door trading. The restrictions on calling hours are also designed to minimise the inconvenience to consumers of being disturbed by door-to-door dealers at inconvenient times when the consumer has no intention of purchasing the goods or services offered.

3.3 Justification for Continuing Regulation

3.3.1 Ongoing relevance of objectives

The door-to-door trading provisions were enacted to provide protection to consumers against high-pressure sales tactics. It may be that consumers today are more sophisticated and less vulnerable to such tactics. The Parliamentary debate regarding the *Door to Door Sales Bill* refers to an example of a "housewife" being persuaded by such tactics to purchase an item that she does not need and cannot afford. This is an antiquated idea, however, the fact remains that there are still vulnerable consumers in the community who may fall prey to such sales tactics, including, for example, elderly or intellectually disabled people and people from non English-speaking backgrounds.

Door-to-door sales activity has increased in recent years following the de-regulation of the telecommunications area and this trend may be expected to continue in the electricity and gas markets as full retail contestability emerges in these sectors. Increasingly sophisticated sales techniques are also emerging as more sophisticated products are sold door-to-door, including those mentioned above as well as the marketing of cable and satellite television services.

The ACCC has successfully taken action in the last few years against telecommunications companies and their agents in relation to instances of unauthorised transfers of customers to other carriers. The companies and the agents engaged in misleading and deceptive and unconscionable conduct as well as undue harassment. In particular, the companies targeted elderly consumers and those with disabilities or from non-English speaking backgrounds. They also failed to notify consumers of applicable cooling-off periods.[3]

In 2000, the ACCC also instituted action against a vacuum cleaner manufacturer alleging harassment and coercion and unconscionable conduct by its door-to-door sales agent, on the basis that he allegedly coerced an intellectually disabled woman in South Australia into signing a contract to purchase a vacuum cleaner.[4]

The above examples point to continued instances of unsound sales practices by door-to-door tradespersons and the continued relevance of the door-to-door trading provisions. There is, however, concern that traders are circumventing the cooling-off and other rights conferred by the door-to-door trading provisions by the use of telemarketing and other forms of non-contact marketing. These practices, although not conducted in the presence of the consumer, exhibit many of the same concerning features as door-to-door selling, such as taking place other than at the trader's place of business at times when a consumer is unprepared and high pressure sales tactics.

3.3.2 Cost/benefit assessment

The restrictions on dealer conduct, calling hours, contractual requirements and mandatory cooling-off period all involve costs to suppliers who sell their goods and services door-to-door. The costs include administration costs as well as the costs of lost sales as a result of restricted calling hours and the consumer's right to rescind a contract during the cooling-off period. However, although these costs may appear to place door-to-door dealers at a disadvantage to suppliers who supply their goods and services by traditional means, to a great extent, the restrictions could be considered in fact to level the playing field by applying to door-to-door sellers the same or similar trading hours restrictions as apply to the majority of retailers. Where a consumer rescinds a contract because the consumer was pressured into purchasing something that the consumer does not require or could purchase elsewhere for a lesser price, then the dealer may be considered to lose a sale that the dealer would not have secured anyway, but for

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[3] '*ACCC slams the Door on Phone Companies' Selling Practices*', ACCC Media Release, 14 December 2000 (www.accc.gov.au).

[4] "ACCC Alleges Unconscionable Conduct, Harassment in Vacuum Cleaner Sale", ACCC Media Release, 1 August 2000 (www.accc.gov.au).

the dealer's high-pressure or misleading selling methods. Nevertheless, it is conceded that the requirements in relation to the form and content of contracts and cooling-off will involve increased administrative and lost labour costs (in terms of labour expended on a sale that is subsequently rescinded) for door-to-door sellers. However, for the reasons set out above, these are less significant costs than would appear to apply on initial assessment. To the extent that the restrictions result in administrative and lost labour costs, these are balanced somewhat by reduced 'overhead' costs enjoyed by door-to-door dealers.

Allowing the consumer to enjoy a cooling-off period during which the consumer is able to verify that the product contracted for meets the consumers requirements and is competitively priced and to verify the competence of the service-provider (eg in the case of services such as building, plumbing or electrical work) will minimise the potential financial loss to consumers. The restricted calling hours and requirement to provide identification have added safety benefits for consumers and the community generally. Regulating door-to-door-dealing also reduces the cost to Government because consumer-trader disputes can be resolved by rescinding the contract without resort to assistance by agencies such as the Office of Consumer and Business Affairs.

After assessing the costs and benefits of the door-to-door selling provisions, the benefits of the restrictions in terms of minimising consumer detriment are considered to outweigh the costs to door-to-door dealers.

3.3.3 Less restrictive alternatives

3.3.3.1 Self-regulation

Self-regulation, possibly under a voluntary Code of Conduct, has been identified as a potential alternative to retaining the door-to-door trading provisions.

The Review Panel notes that the Australian Direct Marketing Association (ADMA), the peak industry body for direct marketing in Australia, has developed a "Direct Marketing Code of Practice" that binds its members. ADMA claims to have membership comprising 80% of the direct marketing market. The ADMA Code covers practices including telemarketing, mail order and catalogue marketing but appears also to apply to door-to-door marketing. The ADMA Code, although tailored more to distance marketing practices, provides for a 7 business day cooling-off period, to run from the date of receipt of goods or the date of the making of a contract for services. There is also a requirement of notification of the cooling-off period. The Code provides that sanctions apply in the event of a finding by the ADMA Code Authority of breach of the Code, including corrective advertising, refund or replacement of goods. The ultimate sanction for non-compliance is revocation of ADMA membership.

The problems with the ADMA Code are that not all direct marketers are members and therefore bound by the Code. Arguably, the unscrupulous, fly-by-night operators are least likely to be members. Given the nature of door-to-door marketing, it is doubtful that consumers would have an opportunity to make judgements about door-to-traders based on their membership or non-membership of ADMA. Further, it would be open to any door-to-door trader to simply cancel its membership of ADMA in the event of a finding of breach of the Code. In light of this, self-regulation is not considered to be an adequate alternative to the existing regulation of door-to-door trading.

3.3.3.2 Reliance on existing general laws

Another potential alternative to the present form of regulation would be to repeal the specific provisions and rely on existing general consumer protection provisions such as the prohibitions on misleading, deceptive and unconscionable conduct and undue harassment and coercion. These provisions may provide some redress to consumers who suffer financial loss as a result of unscrupulous practices by door-to-door dealers, however, they are generally reactive in operation. Although they may have a deterrent effect on dealers, they are not generally preventative in operation as the specific door-to-door restrictions are designed to be. Reliance on these general laws would lead to an increase in litigation and complaints to consumer affairs agencies, with attendant costs to the community.

Accordingly, it is concluded that there are no acceptable alternatives to reliance on the specific door-to-door provisions. However, the Review Panel has examined the scope of the provisions to ascertain whether the provisions in their current form are unjustifiably restrictive.

3.3.3.3 Reduce cooling-off period

Consideration was first given to whether the cooling-off period should be reduced, for example, to 5 days as applies presently in Victoria. Although this would decrease the costs to traders associated with delayed payment, the object of the provisions is to allow consumers sufficient opportunity to comparison shop and verify the credentials of service providers. The Victorian *Fair Trading Act 1999* provides for a cooling-off period of 5 clear business days, which amounts to an effective period of 8 days when weekend days are included. The ADMA Code provides for a cooling-off period of 7 business days, which gives an effective cooling-off period of 9 days. The 10 day cooling-off period under the FTA is only marginally longer than the period provided for by industry.

It is noted that a 10 day cooling-off period applies in all other Australian jurisdictions, apart from Victoria. Victoria is in the process of reviewing the door-to-door trading provisions in its *Fair Trading Act 1999,* however, and is considering increasing to a 10 day period.[5] There is merit in retaining this substantial uniformity as this minimises compliance costs for businesses trading in more than one State or Territory. There would not appear to be any significant benefit in competition terms in deceasing the cooling-off period.

3.3.3.4 Relax calling hours restrictions

Consideration was also given to the scope of the calling hours restrictions. Currently, door-to-door traders are prohibited from visiting consumers on Sundays or public holidays and outside the hours of 9am to 5pm Saturdays and 9am to 8pm on weekdays. Traders argue that evenings are the best or only opportunity they have to find all the household decision makers at home. There is a tendency for both people in a couple to work during the week and for people to work increasingly longer hours. Therefore, it is arguable that the effect of the calling hours provisions is more restrictive now than it was when the provisions were enacted. It could also be argued that there has been some relaxation in community attitudes as to what times are considered inappropriate for disturbance by traders. However, on overall assessment, it is considered that the restricted hours remain reasonable given their objective.

3.3.3.5 Increase threshold for prescribed contracts

A further option for narrowing the scope of the door-to-door trading provisions would be to increase the threshold amount that determines which transactions attract the cooling-off right and the other contractual requirements. Currently the threshold is $50, which was set when the door-to-door provisions were incorporated into the FTA. A $50 threshold also applies in at least

[5] Consumer and Business Affairs, *Review of the Fair Trading Act 1999. Issues Paper,* January 2002, Pt 3. It does not appear at the time of writing this report that a Final Report of the Victorian Review has been publicly released.

the Northern Territory, Queensland and Victoria. The NCP Review of the New South Wales' provisions has recommended that a threshold of $100 be introduced in that State.

It could be argued that the present threshold should be adjusted for inflation since 1987. This would ensure that the door-to-door provisions, in particular the cooling-off period, continued to apply to the types of transactions contemplated by the Parliament when enacting the provision. The present value of $50 after adjustment by the Consumer Price Index would be approximately $89. Allowing for future inflation so that the amount stays current for a reasonable period, the threshold could perhaps be increased to a round figure of $100.

An argument against such an increase is the loss of uniformity with other States which retain the $50 threshold and the consequent compliance cost implications for businesses. It is not clear whether this would be negatived by the decreased costs to traders who no longer fall within the threshold amount.

3.3.4 Other jurisdictions

As discussed above, all other States and Territories regulate door-to-door trading. Apart from New South Wales and Victoria, the other jurisdictions' legislation largely mirrors that in South Australia, although Queensland's calling hours restrictions are slightly stricter. The Review Panel is aware that at least the ACT, NT, NSW and Queensland NCP Reviews have concluded that regulation of door-to-door trading is justified.

In NSW, the door-to-door trading restrictions are expressed only to apply to sales on credit. In Victoria, a cooling-off period of only 5 days applies. In NSW and Victoria there are presently no restrictions on the hours a door-to-door trader may call on consumers. However, the NCP Review of the NSW legislation has recommended that the legislation be amended to provide that traders not be allowed to call on consumers outside the hours of 9am and 8pm any day of the week. The Issues Paper of the Victorian Consumer and Business Affairs Review of the (Vic) *Fair Trading Act* has raised the question of whether restrictions on door-to-door calling hours ought to be introduced in Victoria.

The (Vic) *Fair Trading Act* regulates non-contact sales such as telemarketing, television and catalogue sales. No mandatory cooling-off right is conferred in relation to such sales, however certain requirements are imposed regarding information to be provided to consumers.

The Review Panel points out that the NCC is yet to assess other jurisdictions' compliance with the CPA. However, the Victorian *Fair Trading Act 1999* cooling-off restrictions were assessed as meeting CPA obligations.

3.3.5 Conclusion

The Review Panel considers that the door-to-door trading provisions remain relevant and confer a net benefit on the community that cannot be delivered in a less restrictive manner. It is therefore recommended that the provisions be retained. However, the Review Panel recommends that consideration be given to increasing the threshold value of transactions to which the cooling-off right applies from $50 to $100 to account for inflation.

In addition, the Review Panel is concerned that the fact that some forms of off-premises sales, in particular, telemarketing, are not regulated results in an anti-competitive effect, with discrimination against door-to-door off-premises sales. Consideration should be given to whether other forms of off-premises sales should also be subject to the same or similar restrictions as door-to-door trading on the basis that the same or similar risks of consumer detriment apply to such sales.

In that regard, the Review Panel notes that a general review of the FTA is to be undertaken shortly by the Office of Consumer and Business Affairs and that that Review will encompass consultation with stakeholders. It is noted that it is intended that the above proposed changes be canvassed as part of that general review.

Conclusion 2.

The Review Panel considers that the door-to-door trading provisions remain relevant and confer a net benefit on the community that can not be delivered in a less restrictive manner. It is therefore recommended that the provisions be retained.

However, the Review Panel recommends that consideration be given to increasing the threshold value of transactions to which the cooling-off right applies from $50 to $100 to account for inflation.

Consideration should be given to whether other forms of off-premises sales should also be subject to the same or similar restrictions as door-to-door trading on the basis that the same or similar risks of consumer detriment apply to such sales and the current discrimination against door-to-door trading has an anti-competitive effect.

It is noted that these issues will be considered in the forthcoming general review of the FTA.

4 Mock Auctions

4.1 Restriction on Competition

Part 4 of the FTA prohibits auctions where:

- goods are sold for less than the highest bid or part of the purchase price is repaid to the purchaser (for a reason other than the fact a defect is detected or damage is sustained after the auction.);
- participation in the auction is restricted to persons who buy other goods; or
- gifts are offered or given away during the course of the auction.

4.2 Objectives of Regulation

Part 4 of the FTA incorporates provisions that were initially enacted in the *Mock Auctions Act 1972* (repealed). That legislation was enacted in response to complaints about certain operators, many 'fly-by-night' operators who tended to spend only a day or two at a particular location, conducting the practice deemed to be a 'mock auction'.[6]

Unlike other auctions, at the conclusion of a sale by mock auction a considerable portion of the amount bid was refunded to the successful bidder. This practice created an expectation in the minds of consumers that a refund would be forthcoming for all goods purchased at the auction. Consumers therefore bid more than they otherwise would have in the expectation of receiving a refund and it was found that the goods offered for sale at that stage of the auction were generally valued at far less than the amount bid. It is this practice of inciting excessive bidding by misleading consumers that Part 4 of the FTA aims to prevent.

4.3 Justification for Continuing Regulation

4.3.1 Ongoing relevance of objectives

There have not been any recent complaints to the Office of Consumer and Business Affairs about mock auctions. This may be because of the effectiveness of the legislation. It is not clear whether there are persons who would seek to engage in the practice if the prohibition were removed.

However, on the basis that mock auctions, if they were to re-emerge, may cause loss to consumers, the objective of preventing that loss by prohibiting the practice is assessed to remain relevant.

4.3.2 Cost/benefit assessment

Consumers benefit from the prohibition of mock auctions, because it reduces the chance of them suffering financial loss as a result of making excessive bids based on false expectations.

The prohibition on mock auctions will have a negative impact upon persons who might otherwise employ the technique in terms of lost revenue. It limits their ability to obtain the maximum possible price for their goods. Nevertheless it should be remembered that there is still the possibility of goods being bought at auction at much higher prices than would be paid elsewhere, as some people at least seem to get carried away in the spirit of competitive bidding. There are also potential costs to the community of enforcing the provision although these appear to be negligible in actuality, as no complaints are being received or investigated.

The prohibition only restricts a seller's ability to obtain profits from actions which mislead consumers. On that basis it is considered that the prohibition on mock auctions does not constitute a true restriction on competition and that it confers a net benefit to the public in terms of consumer protection.

4.3.3 Less restrictive alternatives

Although it is not considered that the prohibition on mock auctions, prohibiting conduct considered to be misleading or fraudulent, is actually restrictive of competition, a less regulatory alternative to the current provisions could be to repeal the provisions and rely on the general prohibitions against misleading and deceptive conduct and false or misleading representations in the TPA (ss 52, 53 & 82) and the FTA (ss 56, 58 and 63).

6 Hansard, 15 March 1972, p 3876.

The disadvantage of reliance of these general laws, however, is that they are generally reactive in nature, offering redress to a consumer for loss already suffered, whereas the prohibition on the conduct aims to prevent consumers suffering that loss in the first place. Although these general provisions may deter persons from engaging in mock auctions, there is the converse possibility that reliance on consumers enforcing their rights under the general FTA provisions (assuming that consumers are not deterred by the costs of pursuing their claim) may lead to increased litigation, with consequent costs to consumers and the community. It is therefore not considered that reliance on the general misleading and deceptive conduct and false or misleading representations provisions is an acceptable alternative to the mock auctions prohibitions.

4.3.4 Other jurisdictions

Queensland and Victorian *Fair Trading Acts* contain similar provisions prohibiting mock auctions. New South Wales regulates mock auctions (of prescribed articles) under its *Mock Auctions Act 1973* and Western Australia regulates mock auctions under s 25 of its *Auction Sales Act 1973*. Tasmania, the Australian Capital Territory and Northern Territory do not regulate mock auctions. It is noted that the Victorian provisions were enacted pursuant to competition policy requirements in 1999 and that a recent NCP review in Queensland recommended retention of the mock auctions provisions.[7]

4.3.5 Conclusion

On the basis that the prohibition on mock auctions is not considered to be a true restriction on competition and that the prohibition confers a net consumer protection benefit to consumers that cannot be delivered in a less restrictive manner, it is concluded that the provisions should be retained.

Conclusion 3.

The mock auctions provisions are justified and should be retained.

5 Fair Reporting

5.1 Restriction on Competition

Part 5 of the FTA contains provisions regulating the activities of reporting agencies and traders, where:

- they provide a prescribed report to a person carrying on a business or letting premises in the State; and
- the report relates to a person domiciled or resident in the State.

[7] However, the NCC has yet to assess the Queensland review for compliance with the CPA.

Prescribed reports are any communications relating to a person, which are not known to the person, and which are made to a trader by a reporting agency or other trader of information.

The following restrictions have been identified:

- the requirement to take steps to ensure the accuracy of information contained in prescribed reports;
- restrictions on the content of prescribed reports;
- the requirement for traders to disclose the receipt, contents and source of a prescribed report to the individual the subject of the report and to allow the individual the opportunity to seek correction of the report.

5.1.1 Requirements in relation to content of reports

A reporting agency or trader must not include in any prescribed report information based on evidence that is not the best evidence reasonably available, or unfavourable personal information based upon hearsay evidence (unless the lack of substantiation is stated in the report). A reporting agency or trader is prohibited from including in a prescribed report information as to the race, colour or religious or political belief or affiliation of any person.

5.1.2 Duties of disclosure on traders and reporting agencies

A trader must inform a person that the trader has received a prescribed report relating to the person, and give the person the name and address of who provided that report, if:

- the trader denies a benefit (which is commercial in nature or relates to employment or a lease of premises) sought by a person or grants such a benefit upon terms less favourable than those upon which the trader grants similar benefits to other persons in the course of the trader's business;
- the trader received the report in the last 6 months; and
- the person makes a written request.

If a reporting agency has recorded information on a person, and the person makes a written application, then the agency must disclose all information in its files relating to a person and the name and address of every person to whom a prescribed report relating to that person has been provided within the last year, together with copies of the reports provided.

Where a person disputes the accuracy or completeness of any information, the reporting agency or trader must endeavour to verify or supplement the information and inform the person by whom the objection was made of the outcome. Where information is altered a reporting agency must notify every person provided by the agency with a prescribed report based on the information within the period of 60 days before the making of the alteration, as well as any other previous recipient of a report from the agency that is nominated by the person to whom the information relates. A trader must give notice in writing of the alteration to every person provided by the trader with a prescribed report based on the information and nominated by the person to whom the information relates.

5.2 Objectives of Regulation

The provisions currently contained in Part 5 of the FTA were originally enacted in the *Fair Credit Reports Act 1994* (repealed). The objective of that Act was stated to be to ensure the accuracy of information about persons accumulated by traders and reporting agencies for the purposes of making commercial decisions regarding whether to provide that person with a benefit, such as credit, insurance or a tenancy agreement. The principle of the legislation was stated to be that, if a person was denied a commercial benefit, that person should know of any information in the possession of the person denying the benefit and have the opportunity to correct that information.[8] When incorporated into the FTA, the fair reporting provisions were widened to enable persons denied a benefit to demand all sources of information underlying the denial and not just those sources that are reporting agencies.

5.3 Justification for Continuing Regulation

5.3.1 Ongoing relevance of objectives

Collection, storage and use of personal information.
by traders and reporting agencies remains an area of significant concern, as supported by the amendments in 2000 to the Commonwealth *Privacy Act 1988* (the *Privacy Act*) to extend its coverage to the private sector. The Office of the Federal Privacy Commissioner has stated that

> *"the importance of responsible information practices has been increasing over recent years. The information economy, and the technology that underpins it, has developed rapidly. This has made it cheaper and easier than ever before to collect, store, analyse, compare and share personal information."*[9]

The Review Panel is also aware that there is ongoing debate, particularly in other jurisdictions, about the issue of "bad tenant databases", which are used to store information about tenants that is used by real estate agencies and landlords to refuse applications from prospective tenants. The potential consequence of a bad tenant report could be that a person is unable to secure rental accommodation anywhere. In such situations it would be imperative that, at the least, the information contained in the database is correct and up to date.

In light of the above it is concluded that the objectives of ensuring accuracy of credit and other reports containing personal information, as well as consumer access to such reports and redress in the event of inaccuracy, remain relevant objectives.

5.3.2 Cost/benefit assessment

The requirements relating to what information may be included in reports covered by the fair reporting provisions may result in costs to traders and reporting agencies, however, it is suggested that it is in a prudent trader's or agency's interests to ensure that information included in reports is accurate in order to preserve customer confidence. Responsible traders and reporting agencies are likely to ensure that information included in their reports is based on the best evidence and not reliant on hearsay evidence in any event and compliance with this aspect of the fair reporting provisions is unlikely to involve additional cost to them.

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[8] Hansard, Legislative Council, 19 November 1974 p 2010.

[9] Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles,* September 2001 (www.privacy.gov.au).

It is suggested that there is a community expectation that organisations should respect important privacy principles such as allowing individuals access to stored information pertaining to them and to challenge the accuracy of that information, irrespective of the application of legislation.[10] Again, the fair reporting provisions should therefore impose no greater costs on responsible businesses than they would take on themselves in the absence of regulation.

The potential detriment to consumers of being denied a benefit such as credit, insurance or a tenancy agreement are significant. A person could be potentially without the means to buy a car or without a place to live as a result of an adverse report. While this may be justified where the report is accurate, it would be an unjustified cost where the report is inaccurate. The protection against consumers suffering such detriment afforded by the fair reporting provisions is therefore considered to be a significant benefit, and to constitute a net benefit to the community.

5.3.3 Less restrictive alternatives

Alternative means of achieving the objectives of the current fair reporting provisions could be reliance on the common law or more general consumer protection legislation.

It may be that a person adversely affected as a result of an inaccurate report, eg as to his or her credit status or past record as a tenant, could obtain damages in a court by suing for negligent misstatement or for libel. Damages may also be available under the TPA (ss 52 & 82) or the FTA (ss 56 & 63) for misleading or deceptive conduct.

As discussed above, the disadvantage of reliance of these general laws, is that they are generally reactive in nature, offering redress to a consumer for loss already suffered, whereas the prohibition on the conduct aims to prevent consumers suffering that loss in the first place. There is also an assumption that consumers will take court action, which in many cases they may not due to the cost involved. Further, reliance on consumers retrospectively enforcing their rights under the common law or general TPA or FTA provisions may lead to increased litigation, with consequent costs to consumers and the community. It is therefore not considered that reliance on the common law or general misleading and deceptive conduct and false or misleading representations provisions is an acceptable alternative to the fair reporting prohibitions.

5.3.4 (Cth) Privacy Act 1988

Another potential alternative means of achieving the objectives of the fair reporting provisions is reliance on the (Cth) *Privacy Act 1988*.

Part IIIA of the *Privacy Act,* which commenced September 1991, regulates consumer credit reporting. It governs the handling of credit reports and other credit worthiness information about individuals by credit reporting agencies and credit providers but does not directly affect commercial credit information. Part IIIA requirements include limits on the type of information which can be held on a person's credit information file and the length of time the information may be kept on file as well as rights of access and correction for individuals in relation to their own personal information files held by credit reporting agencies and credit providers. In so far as the fair reporting provisions in Part 5 of the FTA apply to credit reporting agencies and credit

[10] Such principles, and the Australian Government's commitment to encouraging business adherence to them, are evidenced by the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, to which Australia is a signatory.

providers, those provisions could be considered to duplicate regulation under Part IIIA of the *Privacy Act*.

However, it is important to note that there are other organisations covered by the Part 5 fair reporting provisions (which apply to traders and reporting agencies generally, and are not restricted to businesses that hold information about individuals' credit worthiness) that would not fall within Part IIIA of the *Privacy Act*. In particular, it is doubtful that a business operating a "bad tenant database" would be considered to be a 'credit reporting business" for the purposes of Part IIIA of the *Privacy Act*.[11]

From 21 December 2001, application of the *Privacy Act,* generally, was extended to the private sector. The National Privacy Principles (NPPs) in the Act set out how private sector organisations should collect, use and disclose and provide access to personal information. They require such organisations to take reasonable steps to ensure that personal information that they collect is accurate complete and up to date (NPP 3). They give individuals a right to know what information is held about them (NPPs 1 & 6) and to correct inaccurate information (NPP 6). Where a person claims that an organisation has breached a NPP, or where there is a dispute about whether information is inaccurate and should be corrected, a complaint may be made to the Privacy Commissioner, who can make determinations including the payment of compensation and directing an organisation to correct information.[12]

However, small businesses with annual turnover not exceeding $3 million are exempt from the application of the *Privacy Act* unless they are small businesses of a certain kind. The small businesses to whom the Act applies (from 21 December 2002) include those that disclose personal information for a benefit, service or advantage, or that provide someone else with a benefit, service or advantage to collect personal information. These types of small businesses have been given an extended time to comply with the *Privacy Act*.

It appears that businesses operating 'bad tenant databases' offer a service such that they will be caught by the *Privacy Act* after 21 December, even if they have an annual turnover that does not exceed $3 million. It is not as clear that a real estate agent who provides information to a business for inclusion in a 'bad tenant database' would be caught by the Act. Similarly, it is not clear that the *Privacy Act* would apply to other small business traders who provide personal information about clients to other traders, eg a suppliers of building materials providing information about clients' bill paying history to credit providers or insurers. It may not be until the Act has applied to the private sector and specified small businesses for a reasonable length of time that it will become clearer which businesses are caught by the *Privacy Act* and which are not.

5.3.5 Other jurisdictions

It does not appear that New South Wales, Tasmania or Western Australia have equivalent fair reporting provisions. Queensland and Victoria regulate access to credit information only. The Northern Territory *Consumer Affairs and Fair Trading Act* contains similar provisions to those contained in Part 5 of the FTA.

A NCP Review has been completed of the Northern Territory's *Consumer Affairs and Fair Trading Act*. That Review recommended the repeal of the fair reporting provisions on the basis that the requirements contained in the *(Cth) Privacy Act*, together with the Reviewer's finding that credit

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[11] Office of the Federal Privacy Commissioner, *Credit Reporting Advice Summaries,* para 2.7 (www.privacy.gov.au).
[12] (Cth) *Privacy Act 1988* ss 36, 52. A determination of the Privacy Commissioner is enforceable in the Federal Court or Federal Magistrates Court.

providers voluntarily adhere to the same requirements in relation to commercial credit information as apply under the *Privacy Act* in relation to consumer credit information. However, the Review noted that the jurisdictions that do not presently regulate tenant databases were considering adopting provisions similar to the NT and SA fair reporting provisions.[13]

The Review Panel notes that in Queensland a Parliamentary Committee was formed to report to the Government on the issue of tenancy databases. The Committee reported on 2 September 2002, recommending amendment of the (Qld) *Residential Tenancies Act* to regulate the operation of tenancy databases. The Committee made this recommendation after considering the effect of the (Cth) *Privacy Act*, concluding that there was doubt regarding whether the *Privacy Act* would adequately deal with concerns about listing practices, disclosure of existence of listing to tenants, retention of information and dispute resolution. It recommended that the Queensland Government should proceed with Cabinet-approved legislative amendments already on foot to regulate tenant databases.

It does not appear that the NCC has assessed the NT review and the legislation proposed by New South Wales and Queensland for compliance with the CPA.

5.3.6 Conclusion

It is considered that the benefits of the fair reporting provisions exceed the costs.

In light of the uncertainty regarding the extent of coverage of the *Privacy Act* and the fact that that Act does not yet apply to any small businesses with an annual turnover not exceeding $3 million, it is not considered that the *Privacy Act* constitutes at this time a satisfactory alternative to the fair reporting provisions in Part 5 of the FTA.

However, the Review Panel recommends that consideration be given to repealing the fair reporting provisions after the *Privacy Act* has applied to relevant small businesses for sufficient period to enable assessment of the adequacy of the *Privacy Act* provisions in achieving the objectives of the fair reporting provisions.

Conclusion 4.

The fair reporting provisions are justified and should be retained until the (Cth) *Privacy Act 1988* provisions have been in operation with respect to small businesses that disclose personal information for a benefit, service or advantage, or that provide someone else with a benefit, service or advantage to collect personal information, for sufficient time to enable confident assessment of the adequacy of those provisions in providing a satisfactory alternative to the fair reporting provisions in Part 5 of the FTA.

[13] Eg, the New South Wales Council of Social Services recommended to the NSW Government in 2001 that provisions similar to SA's fair reporting provisions be incorporated into their *Residential Tenancies Act:* www.ncoss.org.au.

6. Retail Transactions

6.1 Restriction on Competition

Part 6 of the FTA contains provisions which regulate the actions of traders, where they offer goods for sale by retail.

6.1.1 Prohibition on limiting the quantity of goods per customer

A trader who offers goods for sale by retail must not advertise or offer the goods in a manner which limits the quantity or number of goods that may be purchased by any one purchaser. The trader must not refuse to supply the quantity of goods demanded, upon demand and tender of the appropriate price.

However, it is a defence in each case to show that the trader did not have (or have ready access to) a sufficient quantity or number of the goods to meet demand, or the anticipated demand of other customers (referred to below as the 'insufficient stocks defence'), or was acting with the approval of the Commissioner.

6.1.2 Requirement to display the cash price of goods

A trader must not display a statement of price or conditions of sale (relating to the availability of discounts or trade-in or other allowances) with any goods without including in a prominent, clear and legible manner the cash price of the goods.

6.2 Objectives of Regulation

The retail transactions provisions in Part 6 of the FTA ("the Part 6 provisions") were taken from the *Prices Act 1948,* which regulated prices following transfer of this role from the Commonwealth after the Second World War.

The prohibition on limiting the quantity of goods supplied was inserted into the *Prices Act* in 1963. It was designed to outlaw a practice whereby larger retail stores were seeking to attract customers by advertising a limited number of goods at a low price, often below cost. It was considered that this practice caused detriment to smaller retailers that could not afford to compete on those terms.[14]

The requirement to display the cash price prominently was inserted into the *Prices Act* in 1964 before being moved into the FTA. The provision was designed to enable consumers to compare the cash price with any other information contained on a price ticket or sign indicating weekly payments, discounts or trade-in allowances, which could tend to mislead the consumer.[15]

[14] Hansard, Legislative Council, 14 November 1963, p 1708.
[15] Hansard, Legislative Council, 7 October 1964, p 1290.

6.3 Justification for Continuing Regulation

6.3.1 Ongoing relevance of objectives

6.3.1.1 Prohibition on limiting supply

It is apparent from the Second Reading Speech explaining the provision prohibiting traders limiting the supply of goods that the object of the provision was to protect smaller retailers from competition from larger retailers. The Review Panel has not identified this as an objective of the FTA, the objective of which is considered to be consumer protection.

Under the terms of the Competition Principles Agreement, the factors which are to be considered in determining whether legislation is in the public interest include "economic and regional development, including employment and investment growth". Therefore, arguably protection of small businesses is in the public interest because it protects jobs in the small retail sector.

However, it could be argued that the protection afforded by the prohibition on limited supply is minimal at best. It would appear that a trader who orders in only a certain number of a particular good (eg, a department store orders a limited number of goods from overseas, which it intends to advertise and sell at a low price) could successfully make out the defence that it does not have, or have ready access to, a sufficient number of the good to satisfy a demand exceeding the number of goods ordered. The provision would not appear to afford a significant measure of consumer protection because the availability of the limited stocks defence means that consumers could still be misled by advertising such that they make a fruitless trip to a store that did not have sufficient stock of the good to satisfy demand. It appears that the only protection offered is to ensure that if the consumer wanted more than one of the particular good and the trader had sufficient stock or ready access to the number of the good sought by that consumer (as well as to satisfy the likely demand from other customers), the trader is required to supply the consumer with the number of goods requested. It appears that the main benefit of the provision would be to other traders - by precluding a trader (eg a large discount chain) from refusing to sell multiples of a good offered for below wholesale cost to other traders (eg delicatessens) who may intend to resell the goods. It is understood that the ACCC has received numerous complaints about large sellers refusing to supply commercial quantities of below wholesale price goods to smaller retailers.

The Review Panel considers that the benefit of the provision prohibiting traders limiting the supply of goods appears to be in favour of other traders rather than consumers. In light of this the Review Panel has concluded that the ongoing relevance of the provision in terms of consumer protection is doubtful.

6.3.1.2 Price tickets requirement

The objective of preventing consumers from being misled by price tickets or signs displaying a discounted price, or a price including a trade-in or other allowance, but not the cash price of the goods in the event that a discount or other allowance does not apply, would appear on face value to continue to be relevant in today's retail market. However, on further consideration, there is some doubt that today's consumers would proceed with a sale where the cash price demanded on purchase did not accord with the price that appeared to be offered on the price ticket or sign.

Unlike the 'requirement to state cash price' provision contained in s. 61 of the FTA (mirroring s. 53C of the TPA), which applies to any representations of price that constitutes only part payment for goods (eg weekly or monthly payments), the s. 40 price tickets requirement applies where a price that includes a trade-in, or other discount or allowance, is displayed without also prominently displaying the cash price where no trade-in, allowance or discount applies. The s. 40 requirement appears only to apply to a price ticket or sign attached to, or displayed with, the relevant goods, whereas the s. 61 restriction applies to advertisements appearing independently of the goods (eg in the media) as well as price tickets and signs and applies irrespective of whether the omission was intentional.

In situations where only weekly or monthly payments are stated, a consumer may be induced by seemingly low payments to sign up to purchase goods or services without appreciating the total cost. It tends to be higher priced goods that are advertised in this manner, in particular cars and large home appliances. The potential for detriment to consumers who are misled into committing themselves to these expensive purchases is therefore relatively greater. The potential for consumer detriment in the case of the requirement to state the cash price in conjunction with any reduced price conditional on the application of a discount or allowance would not appear as great because in such cases consumers should have the opportunity not to proceed with the sale on learning the cash price, presumably at the time of payment.

It is apparent from the Second Reading Speech relating to the enactment of the s. 40 price ticket requirement that it was also intended to deal with the situation where weekly payment terms were displayed on price tickets.[16] However, this potentially misleading practice is adequately covered by s. 61 and to the extent that s. 40 could also apply to this practice this is an unnecessary duplication of regulation.

In light of the above, it is the Review Panel's view that the ongoing relevance of the s. 40 price ticket requirement is doubtful.

6.3.2 Cost/benefit assessment

6.3.2.1 Prohibition on limiting supply

The provisions prevent retailers from refusing to supply goods, therefore in that sense they would not appear to involve costs to traders in terms of revenue foregone. In line with the stated objective of the provisions, it would appear that the provisions could result in costs to traders of loss of potential additional market share that could otherwise have been gained by employing the practice of advertising goods at a low price to attract additional customers to a store in the hope that they will purchase other, regular-priced items. It is assumed that it may have been in the interests of the trader employing such a practice to be able to limit the advertised, low-priced goods to one per customer to maximise the number of additional customers and to deter other traders from purchasing the goods for re-sale. It is not clear to what extent consumers today would be likely to be attracted by such practices or to what extent traders would engage in such practices, but for the prohibition. It would appear that traders may currently engage in the practice anyway given the apparent breadth of the 'insufficient stocks defence'.

Neither the costs nor the benefits of the provision would appear significant, however, it could be said that there is some net benefit to the community in terms of benefits to small retailers.

6.3.2.2 Price tickets requirement

As discussed above, the benefit of s. 40 is questionable given that it appears that a consumer initially misled by a price ticket would be informed of the full cash price of an item prior to

[16] Hansard, Legislative Council, 7 October 1964, p 1290.

committing to a purchase and therefore have the opportunity not to proceed with the sale. It is only where a consumer might commit to a purchase without learning the full price (because it is not to be paid 'up front') that the potential for consumers to be misled appears to arise. In these situations, s. 61 of the FTA would also require the trader to state the full cash price, therefore the benefit of the additional s 40 requirement is minimal. In fact, the duplication of regulation, and the fact that the requirements are different (the requirements of s. 40 being more onerous), may lead to increased costs of compliance for traders.

Although the costs of printing or writing additional information on a price ticket or sign (bearing in mind that s. 40 would not appear to apply to advertisements in the media) would not appear to be significant, there is nevertheless doubt that the s. 40 price ticket requirement confers a net benefit on the community.

6.3.3 Less restrictive alternatives

6.3.3.1 Prohibition on limiting supply

Section 65 of the FTA prohibits bait advertising; it provides that a person must not advertise goods or services at a specified price if there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that the person will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable in the circumstances. It would appear that if a trader advertised certain goods at a very low price in order to attract customers into the store in the hope that those customers would purchase other regular-priced goods at the same time but that trader then refused to supply the advertised good, or the quantity of the good sought by a consumer, the trader may be in breach of s. 61 as well as the s. 38 prohibition on limiting supply. Although s. 65 would arguably not prevent a trader refusing to supply another trader with an unreasonable quantity of the good (which the other trader may intend for resale), it could provide adequate alternative protection to consumers.

6.3.3.2 Price tickets requirement

Section 58(g) of the FTA, which provides that a person must not make a false or misleading representation with respect to the price of goods or services and section 58(k) of the FTA, which provides that a person must not make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty guarantee, right or remedy, would appear to provide adequate alternative protection against consumers being misled by a price ticket as to the availability of discounts or trade-ins or other allowances. As discussed above, s. 61 provides alternative protection where periodic part payments are advertised.

6.3.4 Other jurisdictions

The Review Panel is not aware of any equivalent provisions in other jurisdictions' fair trading legislation.

6.3.5 Conclusion

The Review Panel has concluded that the ongoing relevance of the s. 40 price ticket requirements is questionable. Further, they would not appear to offer a net benefit to consumers and any benefit they do provide to consumers would appear to be afforded by other provisions in Part 10 of the FTA, which mirror provisions Pt V of the TPA.

However, as the restrictions in s. 38 and s. 40 are not significant and would only appear to restrict practices that would otherwise be misleading, the Review Panel has formed the view that the restrictions are a trivial restriction on competition.

Conclusion 5.

The Review Panel has concluded that the s. 38 prohibition on limiting supply and the s. 40 price ticket requirements are trivial restrictions on competition.

7. Recovery of Trading Debts

7.1 Restriction on Competition

Part 8 of the FTA (section 43) imposes the following restrictions on the creditor or the agent of a creditor in relation to the recovery of trading debts (ie debts owed to traders):

They must not -

- demand payment without indicating the identity of the creditor and the balance owing (and if made by an agent, the agent's identity and authority to make the demand);
- demand payment of an amount they do not honestly believe to be owed to the creditor;
- telephone or visit between 10pm and 7am or on public holidays;
- communicate with an employer, acquaintance, friend, relative or neighbour of the debtor, except as reasonably necessary to determine the debtor's whereabouts;
- falsely represent that criminal (or other) proceedings will lie for non-payment of the debt;
- falsely pretend to be authorised to claim or enforce payment; or
- falsely represent that a document has some official character that it does not have.

Apart from the restriction on the hours of calling, the remaining restrictions on the conduct of creditors are designed to prevent unscrupulous creditors or agents who engage in unfair or unconscionable conduct with the potential to cause consumer detriment. For example, a consumer could potentially feel threatened to the extent that the consumer pays money to the debt collector notwithstanding that the debt collector does not have a valid claim. As such the remaining restrictions are not considered to restrict competition to any significant degree.

7.2 Objectives of Regulation

The provisions are designed to protect consumers against unfair harassment from unscrupulous traders or their agents attempting to recover debts. During debate on the *Fair Trading Bill* there was reference to comments on the proposed provision by the Adelaide Central Mission. The Mission supported the provision and, particularly, the restrictions on the hours during which creditors are permitted to call on debtors, arguing that

> *"all consumers have a right to be protected from an action that is intentionally aimed at catching them while they are most vulnerable and have least access to legal and other professional advice and support".*

The provisions are designed to protect consumers against potential financial loss and fear or distress as a consequence of unscrupulous creditors using all means possible, including deception, to recover debts.

7.3 Justification for Continuing Regulation

7.3.1 Ongoing relevance of objectives

In 1998 the Australian Competition and Consumer Commission (ACCC) undertook research into the operation of s. 60 of the TPA, which prohibits the use of force or undue harassment and coercion in connection with the supply of, and payment for, goods and services. This was sparked by concerns arising from complaints by consumer organisations about widespread non-compliance with s. 60, targeted in particular at disadvantaged consumers. As part of its strategy to increase compliance with s. 60, the ACCC issued guidelines in relation to debt collection and compliance with s. 60.[17] It is not clear whether this action by the ACCC led to increased compliance. The Review Panel notes that the issue of debt collection practices was recently placed on the agenda of the Standing Committee of Officials of Consumer Affairs as a result of a resurgence of complaints. This suggests that the risk of consumer detriment as a consequence of harassment or other deceptive conduct by unscrupulous debt collectors or their agents remains. Therefore, it is considered that the objective of protecting consumers against such conduct remains relevant.

7.3.2 Cost/benefit assessment

The benefit of the restrictions has been identified as protection of consumers against potential financial loss and fear or distress as a consequence of unscrupulous creditors using all means possible, including deception, to recover debts.

A creditor has a right to enforce a debt owned to the creditor, although it is accepted that this does not extend to using any means to do so. The restrictions on hours of calling and on contacting the debtor's employer and other third parties could result in costs to traders who are unable to recover a debt owed because the debtor is successfully able to avoid the creditor or agent when they call or visit the debtor's home during more predictable periods of the day.

The majority of creditors are likely to have valid claims and can experience significant difficulty recovering debts from recalcitrant debtors. Debt collecting is a legitimate business activity and it is debtors not meeting their obligations that gives rise to the activity. The restrictions on the times at which they can call on debtors in an attempt to recover debts may make it considerably more difficult for traders to enforce their rights.

It must be remembered that the FTA also contains a prohibition against the use or physical force or undue harassment or coercion in connection with the payment for goods or services by a

[17] See '*ACCC warning about undue debtor harassment*', ACCC Media Release 110/98, 18 June 1998 and '*Clear Guidelines aid debt collectors, consumers*', 91/99, 10 June 1999 (www.accc.gov.au).

consumer (s 69). This provision is mirrored on s. 60 of the TPA. Arguably the conduct proscribed in s 43 would also be proscribed by s. 69. However, uncertainty has been identified as a problem with the wording of the TPA harassment and coercion provision mirrored in s. 69, in particular, there has been uncertainty about what constitutes "undue" harassment or coercion. This is what led the ACCC to issue guidelines on the interpretation of the provision. The ACCC guidelines set out what the ACCC considers is conduct that may be held to breach the provision. Those guidelines indicate that the types of conduct specified in the s. 43 prohibition would be likely to be held to be undue harassment or coercion. However, it is noted that the ACCC concluded that contacting a debtor outside the hours of 7.30am to 9pm without consent was undue harassment, whereas s. 43 prohibits contact outside the hours of 7am to 10pm and on public holidays. The ACCC guidelines also set out a much broader range of conduct that is indicated as likely to constitute a breach of the harassment and coercion provision. Although the ACCC guidelines are not law, they point to potential inconsistency between s. 43 and s. 69 of the FTA. A person could comply with s. 43 (ie by calling at 7.15am) but nevertheless be found to have breached s. 69. This inconsistency results in uncertainty and increased compliance costs for businesses required to comply with overlapping but different requirements.

Conversely, it could be argued that, notwithstanding the ACCC guidelines, the s. 69 harassment and coercion provision creates uncertainty whereas the specific restrictions set out in s.43 promote certainty and ease of compliance, therefore affording a greater degree of protection to consumers in relation to debt collection than is afforded by s. 69. This suggests that s. 43 does confer a net benefit, notwithstanding the existence of the more general harassment and coercion provision in s. 69.

7.3.3 Less restrictive alternative

A less restrictive alternative to the s. 43 restrictions on recovery of trading debts would be to rely on the FTA s. 69/TPA s. 60 harassment and coercion provisions. The ACCC guidelines to the interpretation of that provision suggest that a broader range of conduct by debt collectors would be proscribed under that provision. However, before the development of the ACCC guidelines, the ACCC reported complaints of widespread non-compliance with the provision by debt collectors. The section has received little judicial scrutiny,[18] hence, notwithstanding the ACCC guidelines, the scope and application of the provision remains uncertain.

Given the likelihood that the FTA s. 69/ TPA s. 60 harassment and coercion provision proscribes the types of conduct proscribed in s. 42, in addition to a further range of conduct, the Review Panel considers that sole reliance on FTA s. 69 and TPA s. 60 may be an acceptable alternative to the restrictions contained in s. 43. However, it is not clear whether the ACCC guidelines have resulted in a reduction in complaints of undue harassment or coercion in connection with the recovery of debts. If the level of non-compliance persisted, there may be good argument for retaining the specific prohibitions set out in s. 43.

It should also be pointed out that those who carry on business collecting debts are generally required to be licensed under the *Security and Investigation Agents Act 1995*. Debt collectors are required to undergo training and to be a fit and proper person, without convictions for certain offences. They are also subject to the possibility of disciplinary action under the *Security and Investigation Agents Act* if they act improperly or unfairly such that they can be prohibited from the industry. This legislation also provides protection to consumers in relation to conduct by debt collectors, although not in relation to traders or creditors themselves.

[18] R V Miller, *Miller's Annotated Trade Practices Act,* 22nd edn, 2001, para 1.60.5.

7.3.4 Other jurisdictions

The Review Panel is not aware of any equivalent provisions to s. 43 in other jurisdictions' fair trading legislation. However, the Review Panel notes that the Victorian *Fair Trading Act 1999* contains the harassment and coercion provision mirroring TPA s. 60 but also sets out a list of examples of what constitutes harassment or coercion. The examples, which are not intended to limit the operation of the provision, include making a misrepresentation to a debtor about the consequences of not paying a debt, impersonating a bailiff or member of the police force and unreasonable communication with a debtor. The list of examples encompasses many of the types of conduct proscribed in s. 43 but not the specific restrictions on the hours during which a debtor may be contacted. The reference to "unreasonable communication" with a debtor leaves a degree of uncertainty about hours of contact, however such a provision could provide a sensible compromise between the current FTA harassment and coercion provision and s. 43, although it may be undesirable to amend the FTA harassment and coercion provision such that it ceased to be consistent with the TPA provision.

7.3.5 Conclusion

The Review Panel has concluded that the recovery of trading debts provisions confer a net public benefit. The Review Panel is not convinced that the general harassment and coercion provisions afford satisfactory alternative protection, therefore recommends that the recovery of trading debts provisions be retained. However, it is recommended that consideration be given to whether the ACCC guidelines have improved compliance and enforcement of the harassment and coercion provisions such that the recovery of trading debt provisions could be repealed. Consideration could also be given to amending s. 69 to include examples of what types of conduct constitute a breach of that section.

Conclusion 6.

The Review Panel has concluded that the recovery of trading debts provisions confer a net public benefit. The Review Panel is not convinced that the general harassment and coercion provisions afford satisfactory alternative protection, therefore recommends that the recovery of trading debts provisions be retained.

8. Third-party Trading Schemes

8.1 Restriction on Competition

Part 9 of the FTA regulates third-party trading schemes.

A third-party trading scheme is, in general terms, a scheme under which a consumer acquires goods or services and as a result becomes entitled to a benefit (from a third-party) in the form of goods or services.

Where such a scheme is not genuine and reasonable or is contrary to the interests of consumers, the Minister may declare the scheme to be prohibited. If a scheme is prohibited it is an offence to participate in the scheme as a promoter or supplier of goods or services and to publish or cause to be published an advertisement relating to the scheme.

Under Part 9, the Minister also has the discretion to approve on application a third-party trading scheme that is genuine and reasonable and not contrary to the interests of consumers. However, a person is not prohibited from participating in a third-party trading scheme that has not approved (provided the scheme has not been declared to be prohibited).

8.2 Objectives of Regulation

Legislation was first introduced in South Australia in 1904 to ban third-party trading schemes (then called "third-party trading stamp schemes") to address concerns about retailers giving coupons to customers who purchased goods, with a certain number of coupons able to be exchanged for some item, usually stated to be worth far in excess of its actual market price. The object of the legislation was to prevent consumers being misled into believed they were making a saving, when in fact they were paying more for their purchases in order to offset the cost of the "free gift", and ensure that such schemes did not unjustifiably increase the cost of living.[19]

In 1924 the *Trading Stamps Act* was replaced with a stronger prohibition to ensure retailers as well as trading stamp companies were caught by the prohibition. The 1924 Act was repealed and its provisions incorporated into the FTA in 1987. In 1996, Part 9 of the FTA dealing with third-party trading stamps was replaced with the current third-party trading scheme provisions, which do not outright ban third-party trading schemes. This change was made in recognition of the fact that electronic transference and redemption of points has largely replaced the traditional stamp. Further, modern third-party trading schemes such as the "Fly Buys" and credit card reward point schemes are far more sophisticated than the trading stamp schemes that gave rise to the initial legislation. They are less easily defined and do not present the same risks to consumers.

8.3 Justification for Continuing Regulation

8.3.1 Ongoing relevance of objectives

The current third-party trading scheme provisions set out that a scheme may be prohibited by declaration if the Commissioner for Consumer Affairs is of the opinion that the scheme is not genuine and reasonable or is contrary to the interests of consumers.

No scheme has been declared to be prohibited under the current provisions. Various schemes, including credit card reward schemes, have been approved by the Minister on the application of the promoters of the schemes. It could be argued that consumers today are more sophisticated and less vulnerable to dubious third-party trading schemes such that the objective for retaining the ability to prohibit such schemes has become redundant. However, it is possible that, but for the present regulation of the practice, unscrupulous operators would seek to establish schemes that are calculated to mislead consumers about the value of the benefit or reward to be gained or where the operator has no intention of supplying the benefit when the consumer attempts to redeem it. Further, it is noted that there are effective bans on third-party trading schemes in

[19] Hansard, House of Assembly, 14 October 1924, p 1018.

other States, such as New South Wales, Western Australia and the Australian Capital Territory.[20] It is possible that national operators are deterred from establishing dubious third-party trading schemes because of the existence of the interstate bans and that this is to an extent the reason it has not been necessary to prohibit any such schemes in this State. The Review Panel is not prepared to conclude that the objective of the third-party trading scheme provisions is no longer relevant.

8.3.2 Cost/benefit assessment

No schemes are currently prohibited under the third-party trading scheme provisions. Therefore, there is no significant cost to business associated with this restriction. However, the ability to prohibit schemes, in the absence of clear guidelines as to exactly what types of schemes may be considered "not genuine and reasonable or contrary to the interests of consumers" leads to costs associated with uncertainty. These costs may include those of making an application for approval of a scheme by the Minister in order to gain certainty. Certainly some businesses have applied for such approval. These businesses tend to be represented by solicitors, which, despite the application process being relatively straightforward, suggests that the costs of application are not insignificant.

However, these costs are not considered to outweigh the public benefit associated with protecting consumers (usually a large number of consumers with respect to any one scheme) from suffering financial loss as a result of dubious practices by operators of third-party trading schemes deemed illegal.

8.3.3 Less restrictive alternative

Reliance on the general FTA provisions prohibiting misleading and deceptive conduct and offering gifts and prizes without the intention of providing them is a possible alternative to the specific third-party trading schemes provisions. It is essentially these types of conduct that the third-party trading schemes provisions seek to prevent. However, as the FTA s. 62 prohibition on offering gifts and prizes, etc refers only to specific types of benefits that could be offered under such a scheme, that provision may need to be widened in order to provide equivalent protection. This is undesirable without equivalent amendment to the TPA mirror provision.

8.3.4 Other jurisdictions

The Australian Capital Territory has assessed that its *Trading Stamps Act* does not restrict competition. NCP Reviews have been conducted in relation to the NT third-party trading scheme provisions, which are similar in operation to those in this State, and the NSW provisions. Outright repeal of the provisions was not recommended in either case. It is not known whether WA has reviewed its *Trading Stamp Act* for NCP purposes. It does not appear that the NCC has assessed these interstate reviews for compliance with the CPA.

8.3.5 Conclusion

As there are currently no third-party trading schemes prohibited by declaration pursuant to Part 9 of the FTA, the restriction and consequent costs of these provisions is considered trivial. However, the Review Panel suggests that it would be desirable in terms of further minimising imposts on business if further certainty could be introduced into the provisions. This could

[20] (NSW) *Fair Trading Act 1987* s 60B; (WA) *Trading Stamp Act 1981;* (ACT) *Trading Stamps Act 1972*.

potentially be done by prescribing a code of practice to be adhered to by promoters of third-party trading schemes. Provision is made in Part 9 for the prescription of such a Code of Practice. The problem may nevertheless remain that schemes differ so much in their structure and operation that it is impossible to cater for all eventualities in the legislation.

Conclusion 7.

The Review Panel recommends that Part 9 be retained. However, it is recommended that consideration be given in the forthcoming general review of the FTA to either repealing Part 9 and relying on the more general consumer protection provisions in the FTA or increasing the level of certainty in relation to the third-party trading scheme provisions by prescribing a code of practice for the operation of third-party trading schemes.

9. Pre-paid Funerals Regulations

9.1 Restriction on Competition

The *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 1996* prescribe a mandatory code of practice for funeral directors who offer pre-paid funerals.

The Code of Practice contains various conduct restrictions on funeral directors regarding the form and content of pre-paid funeral contracts and handling of money received for pre-paid funerals as well as on investment managers regarding the manner of investment.

Specifically, the Code requires that funeral directors verify the authority of a client to enter into a pre-paid funeral contract on behalf of a recipient who lacks legal capacity and that contracts contain specific details about the funeral to be provided, total cost of the funeral and other fees and charges, if and how a right of cancellation may be exercised and the financial arrangements to apply if the funeral director ceases to carry on business. Funeral directors must transfer the money received under the contract to an approved investment manager within 7 days of the signing of the contract. The Code sets out that the following are approved investment managers:

- life insurance companies;
- friendly societies;
- trustee companies;
- Public Trustee;
- Catholic Church Endowment Society Inc; or
- any other investment body approved by the Commissioner.

Approved investment managers are in turn required to invest within 28 days money received from a funeral director for a pre-paid funeral and then give the client and funeral director a notice setting out particulars including of the form of investment.

9.2 Objectives of Regulation

The Code of Practice was developed following concerns about the security of consumers' funds held by funeral directors for pre-paid funerals. There had been an instance of fraudulent conversion by a funeral director of a large sum of money held for the purposes of providing a future funeral. As the number of funeral directors offering or intending to offer pre-paid funerals increased, there was a need to protect the considerable investment of consumers in this inherently risky product.

There was further concern to ensure that recipients received the funeral they contracted for, bearing in mind that many years may elapse between contracting for a pre-paid funeral and provision of the funeral. For that reason also, the Code was designed to ensure that agreement was made about what was to happen to the money in the event that the funeral director ceased operating.

9.3 Justification for Continuing Regulation

9.3.1 Ongoing relevance of objectives

Pre-paid funerals continue to be marketed by funeral directors in this State. Therefore, the objectives of ensuring that money paid to funeral directors in anticipation of receiving a funeral at a later time is secure, and that consumers receive the funeral they contracted for, remain relevant.

9.3.2 Cost/benefit assessment

The Code of Practice was developed in consultation with funeral directors. The Code requirements apply to all funeral directors; there is no discrimination on market participants. The requirements relating to the form and content of contracts accord with responsible business practice and should not involve additional costs to prudent funeral directors. The requirements in relation to timing of transferring and investing money received for a pre-paid funeral are not onerous and again would appear to correspond with responsible business practice and fiduciary duties owed in any event by those holding money in trust for a funeral recipient. It is therefore considered that the requirements contained in the Code do not involve any significant costs to funeral directors or approved investment managers and do not restrict competition.

The benefits conferred on consumers are significant in terms of protecting against potential financial loss to consumers as a result of fraudulent conversion or poor record keeping or business practice by a funeral director. The contractual requirements should also prevent the costs associated with disputes over funeral arrangements and financial matters.

It is considered that the Pre-paid Funerals Code of Practice confers a net benefit to the community.

9.3.3 Less restrictive alternative

Alternatives to the Pre-paid Funerals Code of Practice could include industry self-regulation and reliance on laws of general application. However, it is not considered that the Code of Practice restricts competition in any significant way. Accordingly, the possible alternatives will not be considered in this report.

9.3.4 Other jurisdictions

New South Wales, Queensland and Victoria also have specific legislation regulating the pre-paid funeral industry.

The New South Wales and Queensland Acts are far more prescriptive and broader in scope than South Australia's Code of Practice. They include requirements for registration of providers, restrictions on business structures (ie requirements for single purpose business), restrictions on the number of directors and trustees and reporting requirements.

The Final Report of the NCP Review of the (NSW) *Funeral Funds Act 1979* recommended that a number of the restrictions in that Act be removed, including the single purpose business requirement and a cap on the maximum level of benefit.[21] The Report recommended that restrictions on the manner of investment of funds and contractual requirements, such as refund provisions and description of services to be provided, be retained. The Report considered but rejected the alternative options of deregulation and industry self-regulation. The NCC is yet to assess New South Wales' compliance with the CPA with respect to the NSW Act.

The (Vic) *Funerals (Pre-paid Money) Act 1993* is substantially similar to the South Australian Code of Practice, containing contractual and investment requirements. A scoping study of the Act was completed for NCP purposes, which concluded that the Act does not restrict competition. The NCC has assessed that Victoria has met its obligations under the CPA with respect to the Victorian Act.[22]

9.3.5 Conclusion

The Review Panel has concluded that the Pre-paid Funerals Code of Practice remains relevant and confers a net benefit on the community. In any event the Code of Practice does not restrict competition. The Regulations prescribing the Code of Practice should be retained.

Conclusion 8.

The *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 1996* remain relevant and confer a net benefit on the community. In any event, the Regulations do not restrict competition. The Regulations should be retained.

[21] NSW Department of Fair Trading, *National Competition Policy Review of the Funeral Funds Act 1979,* Final Report, p 6 (www.fairtrading.nsw.gov.au).

[22] National Competition Council 2001 Assessment, Ch 19 Fair trading and Consumer legislation, table 19.2 (www.ncc.gov.au).

10. Health and Fitness Industry Regulations

10.1 Restriction on Competition

The *Fair Trading (Health and Fitness Industry Code of Practice) Regulations 1992* prescribe a mandatory Code of Practice ("Fitness Industry Code") for operators of health and fitness centres. The following conduct restrictions are contained in the Code:

- a prohibition on entering into contracts to supply services for a period exceeding 12 months duration and on offering renewal of membership contracts prior to three months before expiry of a contract; and

- contractual requirements, including the requirement to set out particulars of the services to be provided under the contract and details of fees payable.

10.2 Objectives of Regulation

The Code was developed in consultation with the fitness industry in response to a large number of complaints in the late 1980s and early 1990s from consumers about losses sustained following the closure of a number of fitness centres in South Australia.

Between 1989 and 1991 a total of 171 complaints involving total losses of $53,000 in membership fees were received by the then Office of Fair Trading. These losses occurred in conjunction with aggressive marketing techniques, frequently involving the offering of lifetime memberships. In March 1992, a fitness centre operator was convicted of breaching s. 67 of the FTA for accepting payment for memberships after the company had been ordered to quit the premises. In excess of $200,000 in membership fees was also diverted by the operator to support an interstate company. Although the operator was convicted and there was a measure of redress for consumers, consumers nevertheless sustained significant financial losses as a result of the dishonest actions of the operator.[23]

The objective of the Code of Practice is to minimise potential financial losses to consumers by ensuring that they do not prepay large sums for long-term memberships. Consumers' losses in the event of failure of a particular fitness centre operator are limited by prohibiting membership contracts for periods exceeding 12 months.

10.3 Justification for Continuing Regulation

10.3.1 Ongoing relevance of objectives

The Fitness Industry Code of Practice came into operation on 1 March 1992, initially subject to a sunset clause that limited its operation to three years. The large number of closures of fitness centres that precipitated the making of the Code coincided with a sharp downturn in the economy that saw the financial failures of many corporations. On that basis it could be said that the Code addressed a problem associated with that particular period of time and that there is not today the same risk of business failure in the fitness industry. However, although there may to a certain extent have been a rationalisation of the fitness industry following periods of economic

[23] Commissioner for Consumer Affairs Annual Report 1991/92.

downturn, logic dictates that the problem of fitness centre closure is likely to be cyclical - in line with the economic cycle.

After extending the operation of the Fitness Industry Code for one year, the Regulations were amended in 1996 to remove the sunset clause on the basis of the success of the Code in achieving its objectives and concern that repeal of the Code would lead to a re-emergence of the problems it sought to address. Industry was supportive of the continued operation of the Code on the basis that it enhanced the reputation of the fitness industry.

The Review Panel notes that New South Wales recently introduced similar regulation in the form of the *Fitness Services (Pre-paid fees) Act 2000,* which came into operation in March 2001. This legislation followed a number of fitness centre closures in that State in the late 1990s.[24] This supports the suggestion that the risks associated with fitness centre closures are likely to recur.

The Review Panel further notes that the number of complaints received by the Office of Consumer and Business Affairs regarding fitness centres decreased significantly following the introduction of the Code. In 1990/91 the number of complaints about fitness centres investigated was 191, which had dropped to only 21 for the same category by 1992/93 (after the Code came into effect on 1 March 1992).[25]

The Review Panel concludes in light of the above that the objectives of the Fitness Industry Code remain relevant.

10.3.2 Cost/benefit assessment

There are no discriminatory effects arising from the Code as it applies to all operators of health and fitness centres.

The restriction on the length of membership periods involves potentially significant costs to fitness centre operators in terms of lost revenue. If operators were able to secure members for 3 year, 5 year or lifetime membership periods, the value of pre-paid membership fees would increase due to the ability to invest the money and earn a return on it. The operator would also gain an advantage, for example, if the operator were establishing a new business, of a significant capital injection into the business to assist with start-up expenses. Operators offering such long term memberships would also have a competitive advantage over other operators because they could be guaranteed to retain their market share over a longer period.

However, the Code also confers significant benefits to consumers in terms of avoiding financial loss to consumers arising from fitness centre closure. Long term membership contracts would involve significant sums of money, perhaps several thousand dollars for each contract, of which a major proportion could be lost if the fitness centre went out of business early in the membership term. With each fitness centre potentially having several thousand members, the closure of one centre could lead to losses of many thousands of dollars to consumers.

On a crude calculation, if a fitness centre signed up 3,000 members to three year memberships at a cost of between $1,500 to $3,000, the fitness centre operator has access to between $1,000 to

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[24] *New Gyms Law Starts in NSW,* Department of Fair Trading Media Release, 2 March 2001 (www.fairtrading.nsw.gov.au).

[25] Commissioner for Consumer Affairs Annual Reports, 1990/91 and 1992/93. Statistics are not available for 1994/95 and 1995/96 due to a change in categorisation of complaints. In recent years, the number of complaints has been consistently low: Commissioner for Consumer Affairs Annual Reports, 1996/97 to 2000/01.

$2,000 in advance for the first year and between $500 to $1,000 in advance for the second year of the membership, which the operator could invest at, say, 5% interest per annum. By having the ability to receive and invest such fees in advance, the operator may have the potential to earn in the vicinity of between $50 to $100 per member ($150,000 to $300,000 total) in interest in the first year and $25 to $50 per member ($75,000 to $150,000 total) in the second year of the three year membership period. The prohibition on membership contracts exceeding 12 months could therefore lead to a potential loss of between $225,000 to $450,000 to the operator in foregone investment revenue. To this would need to be added the competitive advantages associated with retaining market share for a longer period than those operators only offering 12 month maximum memberships.

Against this, if the fitness centre were to close down after year one, the 3,000 members would stand to lose up to between $1,000 and $2,000 each in pre-paid fees, totalling losses of up to $3,000,000 to $6,000,000.

Conversely, it is possible that consumers forego potential savings that could be achieved if they entered into long term contracts.

In balance, however, the Review Panel considers that the benefits conferred by the Code exceed the costs.

10.3.3 Less restrictive alternative

A potential alternative to the Code prescribed in the Regulations is self-regulation - perhaps under a voluntary Code of Conduct. However, self-regulation relies on a cohesive industry that is able to coerce all entrants into compliance. Although those who have supported the mandatory Code in the Regulations on the basis that it enhances the reputation of the fitness industry may be prepared to comply with a voluntary Code, there may be fly-by-night operators, ie those most likely to go out of business quickly, that may seek to adopt aggressive marketing tactics such as offering lifetime memberships in order to establish themselves in the market.

The Review Panel notes that a voluntary Code of Practice for fitness centres was in operation in New South Wales prior to the enactment of the (NSW) *Fitness Services (Pre-paid fees) Act 2000* but that it was not considered that the voluntary Code was effective in protecting consumers.[26]

Reliance on general consumer protection laws, including FTA s 67, prohibiting the acceptance of payment without being able to supply, is another possible alternative to the current form of regulation. However, this section would not provide protection in situations where operators had no reason to believe at the time of accepting payment for a fitness centre membership that the fitness centre would cease operating during the period of the membership. Arguably, the longer the membership, the less likely the operator is to have grounds to believe they would cease operating during the period of the membership.

In light of the above, it is not considered that there is an acceptable, less restrictive means of achieving the objective of the Regulations.

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[26] '*New Gyms Law Starts in NSW*', Department of Fair Trading, 2 March 2001 (www.fairtrading.nsw.gov.au).

10.3.4 Other jurisdictions

It does not appear that any other jurisdiction apart from New South Wales has specific legislation regulating fitness centre operators. The NSW legislation was enacted in 2000 and it is assumed that the legislation complied with the CPA requirements in relation to new legislation.

10.3.5 Conclusion

The Review Panel has formed the conclusion that the *Fair Trading (Health and Fitness Industry Code of Practice) Regulations* deliver a net benefit to the community and should be retained. It is noted that the Regulations are subject to the automatic revocation program under Part 3A of the *Subordinate Legislation Act 1978*. The Regulations are due to expire pursuant to those provisions on 1 September 2003, at which time they will need to be reviewed to ascertain if they are still necessary and, if so, remade. The replacement Regulations will be subject to the CPA requirements for new legislation.

Conclusion 9.

The Fair Trading (Health and Fitness Industry Code of Practice) Regulations deliver a net benefit to the community and should be retained.

Appendix 1

Conclusions

Conclusion 1.

The objective of the FTA is consumer protection and, in particular, the prevention of consumer detriment by prohibiting misleading or deceptive, harsh or unconscionable trading conduct and practices.

Conclusion 2.

The Review Panel considers that the door-to-door trading provisions remain relevant and confer a net benefit on the community that can not be delivered in a less restrictive manner. It is therefore recommended that the provisions be retained.

However, the Review Panel recommends that consideration be given to increasing the threshold value of transactions to which the cooling-off right applies from $50 to $100 to account for inflation.

Consideration should be given to whether other forms of off-premises sales should also be subject to the same or similar restrictions as door-to-door trading on the basis that the same or similar risks of consumer detriment apply to such sales and the current discrimination against door-to-door trading has an anti-competitive effect.

It is noted that these issues will be considered in the forthcoming general review of the FTA.

Conclusion 3.

The mock auctions provisions are justified and should be retained.

Conclusion 4.

The fair reporting provisions are justified and should be retained until the (Cth) *Privacy Act 1988* provisions have been in operation with respect to small businesses that disclose personal information for a benefit, service or advantage, or that provide someone else with a benefit, service or advantage to collect personal information, for sufficient time to enable confident assessment of the adequacy of those provisions in providing a satisfactory alternative to the fair reporting provisions in Part 5 of the FTA.

Conclusion 5.

The Review Panel has concluded that the s. 38 prohibition on limiting supply and the s. 40 price ticket requirements are trivial restrictions on competition.

Conclusion 6.

The Review Panel has concluded that the recovery of trading debts provisions confer a net public benefit. The Review Panel is not convinced that the general harassment and coercion provisions afford satisfactory alternative protection, therefore recommends that the recovery of trading debts provisions be retained.

Conclusion 7.

The Review Panel recommends that Part 9 be retained. However, it is recommended that consideration be given in the forthcoming general review of the FTA to either repealing Part 9 and relying on the more general consumer protection provisions in the FTA or increasing the level of certainty in relation to the third-party trading scheme provisions by prescribing a code of practice for the operation of third-party trading schemes.

Conclusion 8.

The *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 1996* remain relevant and confer a net benefit on the community. In any event, the Regulations do not restrict competition. The Regulations should be retained.

Conclusion 9.

The Fair Trading (Health and Fitness Industry Code of Practice) Regulations deliver a net benefit to the community and should be retained.

Appendix 2

Terms of Reference

In February 2002, the National Competition Council (NCC) requested the Government to undertake a review of the *Fair Trading Act 1987* (the FTA) pursuant to the Government's obligations under the Competition Principles Agreement.

The NCC has determined that jurisdictions' fair trading legislation does not require review where the legislation largely mirrors Part V of the *Trade Practices Act 1974* (TPA). The NCC has taken the view that the consumer protection provisions contained in the TPA are pro-competitive and do not act to restrict competition. Accordingly, this review has not considered the provisions contained in Part 10 of the FTA.

The review focussed on those parts of the legislation which restrict competition or which impose costs or confer benefits on business. Consistent with the Competition Principles Agreement, the review assessed whether the restrictions on competitive conduct contained in the FTA are justified in the public interest by:

- identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address;
- identifying the objectives of the Act;
- identifying the extent to which the Act restricts competition;
- identifying relevant alternatives to the Act, including less intrusive forms of regulation or alternatives to regulation;
- identifying which groups benefit from the Act and which groups pay the direct and indirect costs which flow from its operation; and
- determining whether the benefits of the Act's operation outweigh the costs.

In accordance with NCC advice, the review has been undertaken by policy staff of the Office of Consumer and Business Affairs, without consultation.

The report of the review is to be publicly released.