VICTORIA

Report

of the

CONSUMER AFFAIRS COUNCIL

for the

Year ended 30 June 1982

Ordered by the Legislative Assembly to be printed

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No. 63

CONSUMER AFFAIRS COUNCIL

22nd November, 1982

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

Sir,

In accordance with the Consumer Affairs Act, 1972, Section 7, the Consumer Affairs Council of Victoria has much pleasure in presenting to you this Report concerning the activities of the Council for the year ended 30th June, 1982, for tabling before both Houses of Parliament.

Yours faithfully,

Maureen Brunt, Chairman

Council Members:

Roderic N. Armitage

Barry E. Coad, E.D.

K.T.H. Farrer, O.B.E.

Marilyn B. Head

Suzanne M. Russell

Yvonne Thompson

K.L. Vertigan

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C O N T E N T S

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1. FUNCTIONS AND MEMBERSHIP OF THE COUNCIL

1.1 Functions of the Council

Section 6 of the Consumer Affairs Act 1972 states:

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

1.2 Membership of the Council

Section 5 (1) of the Act states:

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

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The composition of the Council as at 30 June, 1982 was as follows:

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

"A person experienced in the manufacture of consumer goods"

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

"A person experienced in retail trading in consumer goods"

(Vacant)

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

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

"Persons representing the interests of consumers"

Roderic N. Armitage	Federal Secretary - States' Operations, Australian Finance Conference; wide knowledge of consumer credit law practices.
Suzanne Russell	Chairman, Consumers' Association of Victoria; Council member, Australian Consumers' Association; Senior Lecturer in Home Economics, R.M.I.T.
Marilyn B. Head	Solicitor; member, Law Institute Council of Victoria; member, Premier's Rape Study Committee; Co-ordinator, Box Hill Duty Solicitor Scheme; association with various community legal services and youth refuges.
Yvonne Thompson	25 years homemaker/consumer; three children; community worker particularly in areas relating to the handicapped; Government appointee, Metropolitan Transit Council; Government appointee, Special Transport Task Force; board member, Paraplegic and Quadraplegic Association of Victoria; partner in social and political research business.

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

At 30th June, 1981, there was one vacancy. That vacancy was filled on 12th August, 1981 by the appointment of Mr. Roderic N. Armitage.

Three vacancies occurred in the course of the year under review. As noted in our last Annual Report, Mrs. Prue Sibree, a consumer representative, resigned on 24th July, 1981, to enable her to stand for election to the Victorian Parliament. Mrs. Andrea M. Farran, also a consumer representative, resigned on 22nd February, 1982 because of the pressure of her other commitments. Mr. Ron Brooks, appointed as "a person experienced in retail trading in consumer goods" resigned on 10th June, 1982, unfortunately because of ill health.

One of the consumer vacancies was filled by the appointent of Ms. Marilyn Head on 26th March, 1982. As at 30th June, 1982 there were thus two vacancies. However the consumer vacancy was filled on 17th August, 1982 by the appointment of:

Vera Kent	Migrant Liaison Officer, Meat Workers' Union; member, Committee of Management, Migrant Trade Union Centre; member, Yugoslavian Welfare.

1.3 Resignation of Valued Members

The Council wish to record their appreciation of the contribution that both Mrs. Farran and Mr. Brooks have made to Consumer Affairs. For five years Mrs. Farran made a valuable contribution through her legal expertise and wide interest in public affairs. Mr. Brooks served on Council for two and a half years, and in that time his practical experience in retailing was invaluable.

1.4 Role of the Council

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

As well as taking formal advice on issues as appropriate, the various members of Council make a practice of canvassing opinion in informal consultations with individuals and groups in the Victorian community. The Council would welcome further opportunities of meeting with consumers and business groups to discuss matters of mutual interest. The Council is always pleased to hear from individual consumers or business firms.

Council recognizes that it is very desirable to engage in a consultative process when investigating any major topic. At times this has been difficult due to lack of resources. But as an example of what is possible we mention the press advertisements for submissions regarding our Deceptive Trade Practices inquiry to which the response was very good. We would hope to be in a position to develop further such systematic consultative techniques in the future.

2. OVERVIEW OF THE YEAR'S WORK

2.1 Changing Governments and Ministers

In the year under review the Council has served three Ministers and two Governments.

In June, 1981, the Hon. Haddon Storey, Q.C., M.L.C., succeeded the Hon. J.H. Ramsay, M.L.A., as Minister of Consumer Affairs. Then, following the State election held on 3rd April, 1981, the change of Government saw the appointment of the Hon. Jack Ginifer, M.L.A., to the portfolio. In a matter of weeks, however, Mr. Ginifer was forced to resign by reason of ill-health, and there occurred on 11th May, 1982, the appointment of the present Minister, the Hon. Peter Spyker, M.L.A.

The Council was soon to be saddened by news of the death of Mr. Ginifer. We would have liked the opportunity of working with him.

2.2 The Major Topics

During the year under review the Council concentrated upon ten major topics:

Inquiry into Deceptive Trade Practices Law

Self-Service Laundrettes and Unattended Machine Sales

The Standard Removals Contract

Warranties for Services

The Credit Legislation

The Work of the Small Claims Tribunals

Bogus Franchise Schemes and Misleading Business Opportunities

Shop Trading Hours

Review of the Reports of the Committee of Inquiry into Egg Marketing

Registration of Insurance Brokers

Work continues on the first topic, an important Ministerial reference. Our inquiry into bogus franchising schemes and misleading business opportunities, too, has fed into that project. Apart from these two, our discussion of the topics listed has been completed, at least for the time being. Indeed our discussion of the issues concerning shop trading hours was largely completed in the year 1980 - 81, it being this year's task only to prepare a submission to the Government's Committee of Inquiry.

The Council's work on these ten topics will be reviewed in succeeding sections.

2.3 Other Matters

A number of other matters was discussed during the year in sufficient detail to warrant some record in this Report.

Review of Consumer Pamphlets

It is part of Council's brief "in respect of matters affecting the interests of consumers to disseminate information and undertake educational work"(see Section 1.1 above). To this end Council takes a keen interest in the publications produced to assist consumers, both by the Ministry and other State Government departments and instrumentalities.

During the year Council reviewed the pamphlets and forms relating to Residential Tenancies. It also had the opportunity to examine and comment on Every Woman's Guide to Money and Credit produced by the Office of the Co-ordinator of Women's Affairs, Department of the Premier, in conjunction with the State Bank; and The Key to Buying a Home in Victoria produced by the Ministry of Housing.

Members were impressed with the valuable information provided by the above publications and commend them to the Victorian public.

Immunity from the Market Court

In the Report for the Year ended 30th June, 1981, Council noted its recommendation "that Section 3 of the Market Court Act 1978 be repealed". Members have re-affirmed that all traders - whether or not subject to statutory licensing schemes and whether or not supplying professional services - should be subject to the jurisdiction of the Market Court.

Our stance on this issue is related to the conclusions we have reached on the jurisdiction of the Small Claims Tribunals. Reference should be made to the detailed discussion contained in Appendix I.

Electronic Point of Sale Systems

Last year's Annual Report set down Council's views on this innovation. This followed a quite detailed investigation.

During the year under review Council has monitored the manner in which the new electronic checkout systems are being introduced.

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We have been impressed by the benefits to the public which can be achieved from a well-operating system, viz

(i) quicker check-out service for the customer;

(ii) itemized check-out receipts; and

(iii) economies and enhanced managerial control in the retailing function.

We are also pleased to note the availability of small and inexpensive systems suitable for relatively small retail stores.

At the same time the Council is critical of some aspects of retailers' implementation of the introduction of the scanning system. It is unfortunate that the Code of Practice being developed by the Australian Retailers' Association - Food Division has not yet been finalized. And given the apprehensions of some members of the consuming public, we regret that some of the industry's leading firms have not as yet established a number of "model stores" in Victoria to demonstrate best-practice techniques in implementing the system.

Three important features of the draft Voluntary Code of Practice that we fully endorse are:

1. the specification of the minimum acceptable print size for shelf labels to contain both price and product description;

2. the specification of minimum requirements for the format and content (e.g. product description, price, date, store) of the receipt tapes issued under the new system; and

3. the provision of information to consumers about computerized check-out systems, especially prior to their introduction.

Responses to the Council's Reports on Conveyancing and Product Safety

In the year 1980 - 81, Council made Reports on these two topics a central feature of the year's work. The Reports were reproduced as appendices to the Annual Report.

The Council was gratified by the response to each of these reports.

The Conveyancing Report, in particular, received wide coverage in the media, even extending to an editorial in the "Sydney Morning Herald"; and there was evidence of very considerable interest in the community at large. The Liberal Government of the time expressed its intention of enacting some of the technical reforms recommended, many of which had been recommended also by the Dawson Committee; and we note that, at the time of writing this Report, the new Labor Government has expressed its intention of proceeding either with the same or variants of these technical reforms. As to our more revolutionary proposals regarding the use of conveyancing agents and the abolition of fee scales, the former Government expressed its intention to give careful consideration to these; and we note moves within the Law Institute - not necessarily a response to our views but welcome nevertheless - to change long-standing rules with respect to fee scales and advertising.

The Report on Product Safety was especially welcomed by various consumer organizations who commended our specific proposals. The former Government expressed its intention to

enact the core recommendations of the Report; the present Minister has expressed his strong interest in the Report and his intention to introduce legislation on product safety.

2.4 Liaison with Other Consumer Affairs Councils

One very pleasing development this year has been the enhanced liaison we have had with our fellow Consumer Affairs Councils.

In the first instance the National Consumer Affairs Advisory Council invited members of this Council to meet with them in the course of their Melbourne meeting held in October, 1981. (The brief of the N.C.A.A.C. is to advise on Commonwealth consumer affairs, and the Council makes a practice of meeting in various capital cities). It proved a valuable session.

Then in February, 1982 there was a day-long meeting of Chairmen of the various Consumer Affairs Councils held in Canberra, again at the invitation of the National Council. This proved so useful it was decided to recommend to Ministers that there be annual meetings of Chairmen held in either Canberra, Sydney or Melbourne in late March or early April of each year.

Specific consumer affairs issues discussed at the meeting included -

Roles of Commonwealth and States in consumer affairs
Misleading advertising and misrepresentation
Insurance brokers
Product safety
Shop trading hours
Consumer representation on regulatory bodies

Travel insurance

Standard removals contract

Problems with Section 74 of the Trade Practices Act (warranties for services)

Consumer education

Electronic check-out systems

Considerable time was spent in discussing machinery for co-operation and exchange of information among Councils; and we are happy to report that this liaison is already proving valuable.

3. INQUIRY INTO DECEPTIVE TRADE PRACTICES LAW

In April, 1982, the Council initiated a project which may well prove to be the most important in its history. This is its investigation into desirable reforms to Victorian consumer legislation as regards misrepresentation, misleading advertising, and misleading or deceptive conduct generally.

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

Accordingly the Council was pleased to receive a formal reference from the Hon. J. H. Ramsay on this topic. In April, 1982, the Hon. Jack Ginifer, initially appointed as Minister of Consumer Affairs by the new Government, expressed his great interest in the project and indicated he was minded to confirm the original Ministerial reference. But his illness intervened. Then on 8th June, 1982, the succeeding Minister, the Hon. Peter Spyker, formally confirmed the reference and expressed his support. The reference reads as follows:

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

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

Council decided to concentrate its efforts in succeeding months upon this project. It appointed a Working Party consisting of the Chairman - Professor Maureen Brunt, Mr. Roderic Armitage, Mr. Barry Coad, Ms. Marilyn Head and Mrs. Suzanne Russell. The Ministry of Consumer Affairs has made available its Assistant Director (Policy), Mr. Glen Carleton, to meet with the Working Party in an advisory capacity.

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

Although the closing date for submissions lies beyond the year under review, it is appropriate to report that the number and character of the submissions make it plain that the project has attracted wide interest.

While the most substantial submissions have been from organizations and from lawyers, a small number of submissions were received from individual consumers. A number of very valuable submissions have been received from national bodies or from interstate (e.g. the Trade Practices Commission, the Australian Federation of Consumer Organizations, the Australian Association of National Advertisers). We have had the benefit of useful advice from our fellow Consumer Affairs Councils. We are especially appreciative of the assistance we have received from numbers of lawyers - from individual lawyers in Law Schools and in practice, and from the Victorian Law Institute. And finally it was also pleasing to receive submissions from a number of Victorian organizations, such as the Retail Traders' Association of Victoria, the Small Business Development Corporation and Job Watch.

Some of the submissions raise quite general consumer problems which are being transmitted to the Council for their consideration. Of the relevant submissions and advice, the greater number focus upon positive proposals for legislative reform. A few, indeed, submit that no additional or different controls are necessary. And some submissions discuss particular problems or instances of misrepresentation etc. not adequately covered by existing law.

It is notable that a very wide spectrum of misrepresentation problems is raised. The examples cited go far beyond the "published" statements that are at the heart of the present Victorian law. They go beyond false and misleading advertising to misleading salesmanship and false and misleading representations generally (e.g. in the course of negotiations and purchase of a swimming pool or in the conduct of a retail "sale"). They go beyond consumer transactions to franchising and small business problems and to misleading employment opportunities. The misrepresentations etc. occur in the context of dealings in goods, in services, in land. They are made by all kinds of traders. Indeed the coverage (both in specific examples cited and in more abstract discussion) is upon misleading and deceptive business conduct in all its forms.

4. SELF-SERVICE LAUNDRETTES AND UNATTENDED MACHINE SALES GENERALLY

4.1 The Problem

In his Annual Report for the year ended 30th June, 1979, the Director of Consumer Affairs commented on the problems arising from self-service laundrettes operating under a "cloak of anonymity".

He wrote:

> "When a consumer complains about the operations of such establishments, there are usually considerable difficulties in tracing the owners.
>
> There are several reasons for this unsatisfactory state of affairs. Laundrettes escape the Labour and Industry Act definition of a shop, so they do not have to be registered. They rarely use a business name and are, therefore, not required to be registered with the Commissioner of Corporate Affairs. Often the premises are rented from the owner, and local Councils may have a record of the name of the owner of a property but not the tenant.
>
> Complaints received by the Bureau relate mainly to -
>
> (a) Faulty machines which did not work properly or left grease or other stains on clothing;
>
> (b) Lack of operating instructions;
>
> (c) Hidden price increases, especially on dryers where the operating time cycle was reduced so that a second coin was required to dry the washing;
>
> (d) Lack of notices showing an address or telephone number where consumers can complain."

The Council resolved to support the Ministry's recommendation "that it is essential for all premises providing self-service laundrettes to exhibit prominently the full name, address and telephone number of the proprietor or any other person who is

authorised to receive complaints and to provide sufficient operating instructions for the machine".

Members are especially concerned that persons patronizing laundrettes are often poor, and that clothes can be badly damaged. It would frequently be difficult for them to shop around for satisfactory alternative facilities since people are largely restricted to laundrettes within their own neighbourhood.

4.2 Council's Recommendation

In Council's view, it is essential to establish a channel of communication between customers and suppliers when problems arise.

Moreover Council foresees increasing use of unattended machine marketing - vending machines, electronic cash and credit transactions, and other machine services (e.g. photographic services). It suggests that the time could now be ripe to enact some modest controls over the entire range of machine sales.

Accordingly, Council recommends that the Ministry of Consumer Affairs include within its legislation a requirement that all unattended premises, with facilities for machine sales of goods or services, exhibit prominently the name, address and telephone number of the proprietor or person authorised to receive complaints. Suitable penalties to ensure compliance would need to be laid down. However it is anticipated that the new law would largely be self-enforcing once one or two prosecutions had occurred and were given suitable publicity.

The Council notes that Regulation 109 of the Weights and Meaures Act 1958 requires that vending machines selling certain "goods in packages" display "particulars of the name and address of the seller of the goods". A question for decision, if our general approach were accepted, would therefore arise as to whether such sales be exempt from the Consumer Affairs legislation or alternatively be made subject to it.

4.3 Alternatives Considered

A number of alternative techniques were considered by the Council and rejected.

(1) Self-regulation through the industry association, the Coin Operated Laundries Association

As a result of a letter from Council, the Association undertook to recommend strongly to its members that all laundrettes should prominently exhibit the name and telephone number of the proprietor or any other person authorised to receive complaints and to provide sufficient operating instructions for machines.

The Association however represents only about one third of the industry and thus self-regulation would not be comprehensive.

(2) Control under the Health Act

Advice from the Health Commission of Victoria indicated that the desirability of registering self-service laundrettes had been considered some years ago and an inspection of premises was undertaken; that medical opinion was that there was no evidence to suggest that human infection could be caused through transmission of germs

following use of the machines and that therefore it was considered inappropriate to amend the Health Act. Health action is now only taken upon complaint of unsanitary conditions.

(3) Regulation by the Department of Labour and Industry

While Council members initially thought that regulation of machine selling and electronic transactions would logically be an extension of current Shops and Factories legislation, they accepted the view of the Departmental Secretary that the prime responsibility of the Department is for the safety and health of workers, not consumer protection.

(4) Extension of existing Weights and Measures Regulations

If this approach were to be adopted for laundrettes, it would require a radical change in the philosophy of Weights and Measures to encompass the monitoring of services. Council considered this unlikely, especially in view of that Office's advice to the Ministry that it considered the request to check tyre gauges at service stations outside its jurisdiction. (See Director's Annual Report for the Year Ended 30 June, 1981, Tyre Safety 2.9.1 - 2.9.9)

(5) Control through local Councils

The Municipal Association indicated that there are no real local government controls over the operation of laundrettes but that Councils might be able to exercise some controls under a town planning ordinance in relation to the siting of such a premise. However they are not empowered to play a regulatory role for the purposes of consumer protection.

It was found that Hawthorn City Council is one of the few Councils which has used and extended this approach. The following is a condition of the Town Planning Permit:

> "A Notice shall be erected and displayed in a position at all times clearly visible to the public disclosing the name(s) and telephone(s) number(s) of person(s) who can be contacted in the event of machinery break-down, burst pipe, flooding or similar occurrence."

This Condition was included in Town Planning approvals for laundrettes after a complaint that a loaded machine had broken down and the user was unable to finish the wash and retrieve the clothes without flooding the premises. No-one was in attendance or could be contacted.

The requirement applies only to newly built or converted premises and does not apply to an established laundrette where there has been a change of ownership.

Other Councils do not see that the problem is of sufficient magnitude to warrant intervention. The Municipal Association and the Local Government Department also questioned the strict legality of the condition employed by the Hawthorn Council.

(6) No Action Warranted?

Several of the bodies approached by Council were of the opinion that the problems associated with self-service laundrettes were of such a small magnitude as to rule out the need for legislative or other control.

Indeed the small number of complaints to the Ministry in recent months might serve to confirm this. Council was thus mindful that the costs and administrative complexities of any controls could outweigh the possible benefits to consumers.

However members doubted whether Ministry statistics revealed the true position; and they foresaw an increase in the incidence of unattended machine marketing and electronic transactions.

It was concluded, rather, that particular care should be taken not to recommend a technique of control that would be costly to the government and to the community as a whole.

5. AUSTRALIAN STANDARD REMOVAL AND STORAGE CONTRACT

The Council is pleased to report that an Australian Standard Contract for Removal and Storage, prepared under the auspices of the Standards Association of Australia, (S.A.A.) was agreed to in April, 1982.

The Council has been concerned that many removal and storage contracts have been heavily biased against consumers. Some contracts, too, have been virtually illegible without the aid of a magnifying glass.

Work upon this standard contract began in 1978. The contract was prepared by a national committee composed of representatives of consumer organizations, government departments and the removals industry. Although the discussions have been protracted it is noteworthy that agreement was finally achieved through the very genuine efforts of consumer and industry representatives alike to secure a clear, comprehensive, fair and flexible contract.

The Preface to the drafts that were circulated for comment sets down the purpose of the standard contract as follows:

> This standard was prepared by a working group of the Association's Committee on Consumer Transactions, as one of a series of standards dealing with contract conditions for a variety of consumer transactions. A standard form of contract for removals and storage was requested by the Ministry of Consumer Affairs, Victoria, who felt that some removals firms used contracts in which the conditions were unduly biased in favour of the removalist without reasonable rights being conferred on the consumer. It was also felt that there would be benefits to all parties if the conditions of the contract were set out clearly and unambiguously and this draft standard seeks to do this. The proposal for such standard conditions of contract envisaged their being available for use on a voluntary basis. The standard was prepared with the

active participation of the National Furniture Removers' Association and the State and Territory Consumer Affairs Bureaux.

As explained in last year's Annual Report, it was in fact the Consumer Affairs Council which initially proposed to the Ministry in 1976 that it consider requesting the preparation of a S.A.A. standard contract. This followed the preparation of a detailed report upon the Victorian Removals Industry by a Sub-Committee of Council.

The Council has acted as Victoria's representative upon the S.A.A. drafting committee with successive Chairmen, first Brigadier John Purcell and then Professor Maureen Brunt, attending the various meetings. The Council has worked strongly for the success of this project and can point to a number of important features of the contract which embody the Council's submissions or which reflect the discussions held with other consumer bodies participating in the project.

The task was a demanding one - to secure a contract which would offer appropriate and balanced protection both to consumers and removalists, and yet make adequate provision for individual negotiation and variation. There was also the need to achieve the clearest and simplest language and format consistent with these two main goals. As related in the succeeding Section, a particular stumbling-block was the clause governing warranties for storage (for which the statutory protection afforded by the Trade Practices Act is inadequate).

The draft contract went through a number of versions before the November 1981 Postal Ballot Draft, which in the event was rejected by five of the bodies represented on the working committee - this Council, the Trade Practices Commission, the W.A. Bureau of Consumer Affairs, the N.S.W. Department of

Consumer Affairs, and the S.A. Department of Public and Consumer Affairs. But then in April, 1982 a contract was finally hammered out which was acceptable to all participants - industry representatives, government representatives and consumer bodies.

The Standard Contract has now been printed, we are happy to report, to make an easily readable and practical document, available from the S.A.A. at a nominal price.

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6. WARRANTIES FOR SERVICES

6.1 The Problem

On a number of occasions over the last year, the Council has discussed the problem arising from the narrow definition of services for the purpose of conditions and warranties implied by statute in the sale of consumer services. The newly enacted Victorian Goods (Sales and Leases) Act repeats (in Section 84), the restrictive definition contained in Section 74 of the Trade Practices Act. The upshot is that, under both Commonwealth and State legislation, for many important services there are no statutory warranties (e.g., that the service is rendered with due care and skill); and the consumer may "sign away his rights" in a contract which excludes the seller from liability.

We are at a loss to understand why this restrictive approach has been followed. While some transactions excluded from the definition of services might arguably be said to be governed by other legislation, other exclusions appear quite arbitrary.

We note the editorial comment in the C.C.H. Student Edition of the Credit Act, 1981 and Related Legislation: Victoria (1982) at p. 39,061:

> "The limited definition of "services" contained in the Goods (Sales and Leases) Act would exclude such things as services provided by health studios, by medical and legal practitioners, by insurance companies and by banks. In addition, it appears that the definition would not cover services relating to the use or enjoyment of facilities for amusement, entertainment, recreation, education, or accommodation nor would it cover franchises. It would also exclude the provision of finance."

This approach differs markedly from that of the South Australian Consumer Transactions Act 1972 - 1980. Section 2 of that Act extends the implied warranties in consumer service contracts (Sections 9 - 10) to any services "that may be prescribed"; and there is, in fact, a very lengthy list of prescribed services (which is added to from time to time) of wider practical coverage than the Commonwealth and Victorian provisions.

6.2 An Example: the Standard Removals Contract of the S.A.A.

The Council's attention was first drawn to this weakness in the Commonwealth and Victorian statutes by difficulties encountered in negotiating a Standard Removals Contract under the auspices of the Standards Association of Australia (see the preceeding Section). Specifically, there was little difficulty in negotiating a fair and appropriate clause to govern the contractor's warranties for loss or damage to household goods being transported; for these are governed by the requirements of Section 74 of the Trade Practices Act. But there was great difficulty in negotiating an acceptable clause to govern the contractor's warranties for loss or damage to household goods being stored; for industry representatives adamantly held that the storage of goods lies outside the "services" subject to Section 74. In consequence, it was seriously proposed by the industry that, in the matter of storage, this standard, Australia-wide contract should (inter alia)

- restrict liability to negligence only;
- restrict compensation to $50.00 per item or $500.00 per consignment; and
- require consumers in "ordinary circumstances" to notify loss within two (2) working days.

It was discovered that this draconian clause would conflict with the requirements of the South Australian Consumer Transactions Act; and there was some indication that other States could be interested in enacting consumer warranties legislation of the breadth of the South Australian law.

In the event a suitable clause governing warranties for storage was negotiated, and the Standard Removals Contract has been approved by all participating representatives of industry, consumer, and government bodies.

6.3 The Suggested Solution to the General Problem

Council spent some time comparing the appropriateness of the approach in the S.A. Consumer Transactions Act with that in the U.K. Competition Laws (Fair Trading Act 1973, Ss. 137(3) and 137(4) and Restrictive Trade Practices Act 1976, S. 20).

The seeming comprehensiveness of the U.K. approach is attractive; but there is some legal opinion to the effect that in practice legal technicalities may make it possible for some to avoid the requirements of the legislation. Thus the provision in the S.A. legislation for expanding the coverage of "services" by regulation has real merit.

We urge that the Victorian Act be amended and that initiatives be taken to secure amendment of the Commonwealth Act.

We have submitted to the Minister that it is important that urgent action be taken to secure a co-operative federal approach to remedying this deficiency in Commonwealth and State legislation. We have also enlisted the support of our fellow Consumer Affairs Councils in pursuing this essential reform.

7. THE CREDIT LEGISLATION

The new credit laws - the Credit Act, the Chattel Securities Act and the Goods (Sales and Leases) Act - which were finally passed in December 1981 have been a long time in the making, over a decade in fact. When the 1981 Bills came forward the Council took the opportunity to review some of the general features of the legislation and examine one specific issue, the "store currency" issue.

Generally speaking Council cannot but applaud the comprehensive reforms embodied in the new credit laws. Overall the legislation achieves modernization and a significant degree of consistency in the regulation of credit. Great improvements have been effected in the quantity and quality of credit information available to consumers in the market-place. A basic objective has been to achieve "truth-in-lending".

However members remain critical of two general features of the legislation - first, the decision to license certain credit providers and, second, the exemption of credit societies, banks and pastoral finance companies from certain requirements.

As regards the licensing of credit providers, members noted the views expressed by a former Consumer Affairs Council to the Minister of Consumer Affairs in September, 1978 when commenting on the 1978 version of the Bills.

> "Licensing of credit providers - The Council has severe reservations as to whether a system of licensing credit providers is really necessary. They recognise the immediate advantages to the State Treasurer, but question whether the administrative effort and expense involved in operating a licensing system, particularly, if as seems likely, the great majority of applications

> will be granted by the Tribunal. On the other hand, fears were expressed by some members of the Council as to whether, in the event, the discretion granted the Tribunal under the wide terms of Clause 67; might not be exercised, at times too restrictively. And there was also some doubt held by members as to whether the licensing net might not be cast too widely - e.g. solicitors, or the little old lady with some money to invest (say $10,000 at 15% annual percentage rate). It would appear to Council to be sufficient if there were introduced a system of negative licensing (whereby the generally available right to engage in the business of providing credit could be withdrawn by the Tribunal from any person whose conduct was found to infringe standards specified in the Bill). Such a system of negative licensing would seem to square rather well, too, with the overall approach to licensing envisaged by the Bill, whereby certain categories of credit providers are to be exempted in any event from the necessity of obtaining a licence from the Credit Tribunal."

Members continue to question whether a better technique than licensing might not be the use of negative licensing. Such a technique is likely to be less costly to administer and create less opportunity for undue restrictions upon admission to the business of credit provider.

The Council appreciates that a great attraction of licensing is the generation of licensing fees, thought to be a relatively painless means of financing the administration of the new credit laws. But members are concerned that the system envisaged imposes discriminatory charges upon particular types of credit providers and upon their customers. The licensing requirements do not apply to firms which are already the subject of licensing regulations under other laws, including banks, insurance companies, building societies, friendly societies, credit societies, co-operative housing societies, pawnbrokers and pastoral finance companies. Nor do they apply to the Crown, State or local government bodies, or statutory corporations. Council would much prefer the imposition of a general charge upon all financial institutions

without discrimination and without the need for licensing.

Council's second general criticism turns on the feature that credit societies registered under the Co-operation Act, and overdraft and related facilities of banks and pastoral finance companies, are exempt from many of the provisions of the legislation. Again the effect is to create discriminatory obligations. But more than this. The exemption results in disparate disclosure requirements for different credit providers, an outcome at odds with one of the most important of the original objectives of the reforms, namely to secure universal "truth-in-lending" with comparability in the expression of the terms on which credit is offered by various credit providers.

The status of store credit certificates, and their control, was discussed at some length at a number of meetings. This is the system whereby a particular retail firm makes available upon credit terms currency certificates (in such denominations as one, five, ten and twenty dollar "notes") which may then be spent in any department in the firm's own shops. The 1978 Bill had banned the provision of such "store currency". The 1981 Bill dropped the ban and substituted controls over its use. Members of Council were aware that there has been considerable criticism of the store currency system, expressed for example in the "Critique on the New Credit Bills" prepared by the Financial Counsellers Association (1981).

A number of concerns were expressed in the course of Council discussions:

> Would the (flat rate) interest accrue from the date of issue, rather than of use?

Would currency be given to consumers for future use without explanation of the interest accruing?

Would consumers be adequately advised of their right to return unused currency, and would this be without liability for interest?

How would change be given in the shop to store currency?

Might the upper credit limit be appropriately related to consumers' income or ability to repay?

What would be the scope for door-to-door "credit hawking", with psychological pressure upon a householder to assume too great a debt, or a debt on misunderstood terms?

Finally, in that persons seeking this type of credit would normally have difficulty in borrowing in more conventional ways (e.g. through Bankcard or the use of monthly accounts), would the availability of store currency compound their financial difficulties?

But after inquiries concerning the actual operation of the store currency system, study of the relevant provisions in the Credit Bill, and further discussion, members decided they were prepared to support the broad approach adopted in the legislation, viz that store currency should be permitted subject to detailed controls.

Members have concluded that it is a positive merit of store currency that it does provide a form of credit for those who would normally have very limited access to it. While some members still have reservations about the desirability of this type of credit, all accept the technical point that its great

advantage is that (unlike e.g. Bankcard and monthly accounts) it enables foolproof control of the upper limit of credit provided, with store currency being issued only to the "prior approved" level. Members are concerned that we do not cut off one of the very few sources of credit available to some members of the community.

It is true that the relevant date for determining the credit charge is, loosely speaking, the date of issue rather than the date of first use ("the date on which the agreement was entered into or if the agreement was entered into by the acceptance of an offer in writing signed by the debtor to the credit provider, the date on which the offer was made": S. 44(1) (c)). But if the system is to exist, it is a requirement that the debtor's liability be known in advance; and therefore the only practical safeguard is for this feature to be understood by the debtor/ customer so that he arranges to borrow at any one time what he expects to spend in the near future.

The Credit Act does seek to regulate the provision of this form of credit in some detail in Sections 40 - 45. These Sections set down a number of safeguards, indeed too many to summarize in this report, such as when the first repayment falls due, how change is given, and the right to return unused currency without liability. None however is more important than the specific disclosure requirements laid down - namely, that there be provided a copy of the agreement and the loan no later than the date when the store certificates are provided to the customer; a separate statement to the effect that no liability is incurred in respect of an unused certificate returned to the credit provider; and finally a statement of the rights of a debtor under the Act.

Nevertheless we are not satisfied that the prohibition of credit hawking contained in Section 126 of the Credit Act is sufficiently tight. As is noted by the C.C.H. commentary (Victoria: Credit Act 1981 and Related Legislation with Annotations by Jane R. Levine, 1982 at p.38,559): "Section 126(3) exempts an invitation in respect of credit for the purchase of particular goods to be supplied by a dealer in those goods or for the purchase of goods and services to be supplied by the credit provider. It is thought that this latter provision would also cover the offer of credit for the provision of store credit certificates."

Moreover, while endorsing the system of regulation over store currency envisaged, the Council stresses that if these regulations are to fulfil their purpose, the prescribed forms (Section 42) must be expressed in clear and simple English. Persons must be fully aware of the nature of the transaction into which they are entering.

The Council has written to the Minister expressing its concern that store currency be properly used; that, to this end, clear and simple documentation is essential; and that the prescribed forms generally, as contained within the regulations, should be in clear and simple English.

8. THE WORK OF THE SMALL CLAIMS TRIBUNALS

It was in 1973 that Victoria established its Small Claims Tribunals, a pioneering venture for Australia. Since that time the Tribunals have proved their great value as an inexpensive, accessible and fair technique for settling disputes between consumers and traders.

Last year, roughly a decade from the Tribunals' establishment, it seemed to the Council timely to review their work. It was decided to examine issues both of jurisdiction and procedure.

The Council was assisted by a letter received from the Boating Industry Association of Victoria Ltd., raising some specific procedural issues of importance. And helpful consultations were had, in particular, with the Senior Referee and Registrars of the Victorian Tribunals and with the Senior Referee of the N.S.W. Consumer Claims Tribunal.

The issues were discussed at a number of meetings and a report developed which is reproduced in Appendix I.

Here we reproduce our recommendations and make a few comments:

Recommendations

A. Jurisdiction

The Council strongly recommends that the jurisdiction of the Tribunals be extended:

(i) that the monetary limit to the jurisdiction be increased to $3,000 in accordance with the limit to the jurisdiction of the Magistrates' Courts (and thereafter mirror the Magistrates' monetary limit);

(ii) that the Tribunals be empowered to handle "small claims" whether or not they arise from a transaction with a professional person "except where the Referee has reasonable grounds to believe the matter should be referred to a professional regulatory or statutory authority";

(iii) that the Tribunals be empowered to handle "small claims" against statutory bodies and state government instrumentalities; and

(iv) that bodies corporate (in relation to dwellings) be classified as consumers to allow them to make claims, as in N.S.W.

B. Procedure

The Council believes that the following procedural changes would strengthen the Tribunal's role as a strong, impartial and respected institution for the resolution of disputes between consumers and traders:

(i) that the Small Claims Tribunals Act be amended to give the Referee discretionary power to make a nominal costs award (limited to a small sum such as $50 or some small percentage of the monetary limit of the jurisdiction);

(ii) that the Tribunals be empowered to make an award against a consumer, both where he has failed to prosecute a case and where he does not comply with the terms of a settlement before the Tribunal; and

(iii) that the hearings normally be public, with provision for a closed hearing at the discretion of the Tribunal (whether at the request of a party or on the Tribunal's own initiative).

We believe most of these recommendations to be quite straightforward and, upon reflection, almost beyond controversy. In particular, we cannot understand how the monetary limit to the jurisdiction of the Small Claims Tribunals, currently set at $1,500, has been allowed to lag behind the limit for the Magistrates' Courts. There are many ordinary household purchases, these days, such as carpet, curtains, rennovation and plumbing services which readily exceed a cost of $1,500.

There is one recommendation that we make, however, which could be controversial and which could, moreover, be misunderstood. This is that the Tribunals be empowered to handle "small claims" of a professional nature. We stress that implementation of this recommendation would not mean that all complaints regarding professional conduct would become subject to the Tribunals - only complaints relating to the commercial aspects of professional work.

The range of disputes subject to the Tribunals would be restricted by the requirement that they relate to "small claims" by a "consumer", two terms carefully defined in the existing

legislation. Moreover, we are suggesting this additional safeguard, that there be explicitly written into the power granted the Tribunal the proviso "except where the Referee has reasonable grounds to believe the matter should be referred to a professional regulatory body or statutory authority".

This understood, we believe there is a very strong case for giving the Tribunals undisputed power to handle all "small claims" including those arising from a transaction with a professional person. We commend to readers our full discussion of this issue contained in Appendix I. The case turns essentially on equality of treatment for all suppliers of goods and services, and on easy accessibility for consumers to an inexpensive and impartial institution for the resolution of disputes.

9. BOGUS FRANCHISE SCHEMES AND MISLEADING BUSINESS OPPORTUNITIES

The Annual Reports of the Director of Consumer Affairs for the Year 1978-79 and 1979-80 focused attention upon a relatively small but constant source of complaint, viz "fraudulent, misleading or unviable franchise schemes for the marketing or distribution of products or the carrying out of services."

It could be said that this is primarily a small business problem and thus outside the charter of the Council. However all modes of production and distribution ultimately impinge on consumers, sometimes the effect being direct and immediate - for example, extensive damage caused to consumers' carpets by franchisees who had invested in a carpet cleaning franchise or the loss of films deposited for processing by the scheme's sponsor.

The former Minister of Consumer Affairs, the Hon. J. H. Ramsay, requested the Council to co-operate with the Director of Consumer Affairs in seeking appropriate legislative controls over franchises and owner-operated businesses, a request which was subsequently confirmed by his successor as Minister, the Hon. Haddon Storey.

Accordingly the Council examined Ministry files on this topic and asked for a report from the officer handling complaints and requests for assistance. It examined the role of the Trade Practices Commission and the Victorian Small Business Development Corporation. The Council as a whole drew on the specific knowledge and experience of some of its members: one has legal experience of particular franchisees' problems with contractual arrangements; another has made a study of the economics of franchising; several have relevant business experience.

The main conclusions reached by the Council are as follows:

1. It is important to distinguish between franchising as a legitimate and, in the main, successful business practice and fraudulent and deceptive business schemes.

2. Adopting the formulation of a Canadian report (Report of the Minister's Committee on Franchising, 1971), we define a franchise as "essentially the grant of a right to operate a business, which business involves the use of the grantor's trade mark or trade name, and some substantial control of the grantee's operation of the business by the grantor."

3. In the nature of the case, most franchisors are better informed than most franchisees as to the nature of a contemplated franchise and its prospects for success. There is therefore a special need for prospective franchisees to become sufficiently informed to avoid one-sided agreements.

4. Bogus franchise schemes shade into the promotion of misleading business or employment opportunities, with the common feature that a person is deceived into making a payment for anticipated access to work.

5. The Council considers it desirable to strengthen State protection to small businesses and persons that may become victims of bogus franchise and related schemes.

It supports a two-pronged approach at this stage:

- Legislation controlling false or misleading advertising, false representations, and misleading or deceptive conduct generally; and

- Small business education.

6. Consideration was given to the enactment of mandatory disclosure requirements and the filing of prospectuses. While some members of Council are attracted to this approach, the Council as a whole does not support the approach at this time.

As described in Section 3 of the Report, the Council is undertaking a major investigation into desirable reforms to Victorian law governing misrepresentation, misleading advertising, and misleading or deceptive conduct generally. Accordingly, the Working Party for the project has been requested to give particular attention to the manner in which deceptive business and employment opportunities may be controlled. In particular, its attention has been drawn to the relevant provisions in the Trade Practices Act (Sections 52, 53B and 59) with the request that it consider the desirability of enacting a Victorian law which would mirror these provisions.

As to small business education, the Council endorses the value of past programmes undertaken by the Ministry of Consumer Affairs, specifically warnings to prospective franchise purchasers by way of press releases, advertisements, and a recorded telephone message. But we also consider it desirable for the Government to explore with the Small Business Development Corporation whether a more systematic educational programme might be mounted - by a small business authority.

A more detailed report on this topic is contained in Appendix II.

10. SHOP TRADING HOURS

In July, 1981, the Minister for Labour and Industry appointed a Committee of Inquiry into Shop Trading Hours, the charter of which was to receive the views of associations and persons wishing to comment on the existing shop trading provisions of the Labour and Industry Act and generally on the subject of shop trading hours, and to prepare a report for consideration of the Government.

The Committee members were:

Chairman -

Mr. P. F. Prior,
Secretary,
Department of Labour and Industry;

Members -

Professor Maureen Brunt,
Chairman,
Consumer Affairs Council;

Mr. J. L. Harrower,
Managing Director,
Victorian Chambers of Commerce and Industry;

Mr. K. E. Macdonald,
Secretary,
The Victorian Federation of
Retailers' Association; and

Mr. J. B. Maher,
Secretary,
Shop, Distributive and Allied
Employees' Association (Victorian Branch).

The Council decided to make a submission to the Committee based largely on the views it had formed in the course of its investigation and discussion last year (Annual Report of the

Consumer Affairs Council for the Year ended 30 June, 1981). That submission, dated 7 September, 1981, which incorporated the unanimous views of the Council, is reproduced in Appendix III.

11. REVIEW OF THE REPORTS OF THE COMMITTEE OF INQUIRY INTO EGG MARKETING

11.1 Reference to Council

On 21st January, 1982 the Minister of Agriculture wrote to the Minister of Consumer Affairs, asking him to refer the two Reports of the Committee of Inquiry into Egg Marketing made in 1980 and 1981 to the Consumer Affairs Council for "an independent opinion about the recommendations of the Inquiry, and particularly whether high quota prices reflect high industry profitability and hence the extent to which consumers pay more for eggs than they would without quotas".

On 22nd April, 1982 the present Minister of Agriculture confirmed the above request. He said "The matter is of some importance and it would be helpful to have an independent opinion about the recommendations of the Inquiry".

11.2 The Key Recommendations of the Committee of Inquiry

The key recommendations of the two reports were the following:

First Report

That the present Stabilization Scheme be discontinued.

In particular:

1. That hen quotas be phased out.

2. That the Egg Board be required to set a price which will control surplus production, initially at the level of domestic demand plus 8%.

Second Report

That the functions of the Egg Board be greatly curtailed.

In particular:

3. That the Board no longer be empowered to set prices but that prices be determined through an Egg Exchange.

4. That the prime responsibilities of the Board be restricted to quality control and market development.

5. That quality standards be re-formulated.

6. That producers with fewer than 1,000 hens be exempted from the system.

11.3 Scope of Council's Review

Council accepts that it has a responsibility to voice the consumers' interest in egg marketing. This is particularly the case since the removal of consumer representation from the various Boards marketing primary products. However it was decided to restrict comment primarily to the Egg Industry Stabilization Scheme (especially the hen quota and pricing systems). While the other issues raised by the Reports are clearly important (e.g. that quality standards be reformulated) members felt they have insufficient knowledge to comment on these.

11.4 The Report

On 15th September, 1982 the Council presented a Report to the Minister of Consumer Affairs for transmission to his colleague, the Minister of Agriculture. That Report expressed the unanimous views of the Council.

Since the bulk of the work underlying the Report was completed in the year under review, we have thought it appropriate to reproduce it as Appendix IV of this Annual Report.

The Report gives our findings in some detail. We also explain the procedure used to ensure that Council secured access to appropriate factual materials, and a range of opinion and analysis, before reaching its conclusions.

Here we highlight our main conclusions.

11.5 Summary of Conclusions

1. The Consumer Affairs Council's key concern is this, that there are certain features in the demand for eggs that make consumers of eggs very vulnerable to producer exploitation. Eggs are a staple commodity. Consumers will accept unduly high prices for eggs, and the burden of high prices is disproportionately borne by the poor.

2. The present Stabilization Scheme has undoubtedly resulted in unduly high prices reflecting high industry profitability. Further, features of the Scheme foster an inefficient structure of production. Furthermore, the Scheme has made it difficult for new producers to enter the industry, tending to produce a "closed shop".

3. If hen quotas are to be retained, we believe that explicit policies should be adopted to minimize the very real dangers of such a system, specifically a pricing/quota system which would

- reduce the value of quota to nominal levels

- yield a supply of eggs in approximate balance with domestic demand (allowing for the necessity to maintain continuity of supply)

- be responsive to change

- foster transferability of quotas.

4. In our view, the Victorian Egg Board should no longer be empowered to regulate egg prices. If price control is retained there needs to be a reform to the system to achieve the removal of pricing policies from industry domination. Alternatively, the creation of a (computer-operated) Egg Exchange has its attractions (possibly in conjunction with a reserve pricing system and certainly in conjunction with appropriate health safeguards).

5. These recommendations embody a rather conservative approach to the problems raised by the present Stabilization Scheme. Accordingly, we recommend that in due course the justification for the very existence of the hen quota scheme be re-examined.

12. REGISTRATION OF INSURANCE BROKERS

Having for several years affirmed the need for controls over the activities of insurance brokers, it was with considerable interest that Council examined the proposals of the Australian Law Reform Commission contained in its Report No. 16, Insurance Agents and Brokers (1980).

Members agreed with the Commission's analysis of the problems arising from the present unregulated character of the industry and whole-heartedly endorsed the Commission's proposals for regulation.

Essentially the Commission has identified two needs:

(i) protection of the public from the consequences of broker insolvency and financial malpractice; and

(ii) protection of the public from the consequences flowing from the ambiguous status of insurance intermediaries.

The elements of the Commission's proposals to which we give particular support are as follows:

(i) requirements regarding trust accounts, audit and inspections;

(ii) restrictions upon the holding and investment of insurance monies;

(iii) requirements of professional indemnity and fidelity guarantee insurance;

(iv) the making of the insurer responsible for the receipt of premiums by a broker and the payment of claims proceeds and return-premiums held by a broker; and

(v) the establishment of a clear distinction between agents and brokers, such that a purchaser of insurance may rely upon the impartiality of one who holds himself out as a "broker".

The Commission has proposed that to implement these controls there be established a system of "exclusionary registration". The attractive feature of the proposed system, we think, is that it maintains as little restriction upon entry to the insurance broking business as is compatible with maintaining financial integrity and broker impartiality.

While there may be more than one mechanism which might be used to implement the Commission's controls, Council cannot support the Federal Treasurer's proposal for a voluntary accreditation self-regulation scheme. Industry self-regulation, we believe, too readily lends itself to abuse and may be inappropriately restrictive. Nor, we think, would voluntary accreditation give the ordinary consumer sufficient protection.

In June 1982 the Council wrote to the Minister of Consumer Affairs urging that the Victorian Government do all in its power to persuade the Commonwealth Government to implement the Commission's proposals.

In addition to the arguments outlined above, it said:

"This is a national industry, and the problems are national problems. There is clear Commonwealth

> constitutional power. At a meeting of 14th November, 1980, the Consumer Affairs Ministers of the six States met in Melbourne and unanimously expressed the need for "urgent action" by the Commonwealth "to implement the Australian Law Reform Commission's proposals to regulate the activities of insurance brokers"."

It noted that on 28th May, 1981, Senator Gareth Evans introduced into the Senate a private members bill, the Insurance (Agents and Brokers) Bill, 1981, which is a replica of the draft bill presented in the Law Reform Commission's Report (with added clauses relating to penalties). While the Evans Bill was passed by the Senate (29th October, 1981), it lacks the support of the Commonwealth Government.

It concluded by saying:

> "We believe that in this matter a uniform approach is highly desirable. If Victoria is to enact its own legislation, this should be the Law Reform Commission Scheme, embodied in the Evans Bill. Not only is the Scheme fully considered and eminently sensible. The enactment of such a Victorian Act would then be consistent with hoped-for Commonwealth legislation in due course."

The Minister has been very receptive to these submissions. He has responded by stating that he supports our views in principle; that he would undertake a number of initiatives in an endeavour to secure Commonwealth action and interstate co-operation on this issue; and that he would seriously examine the option of introducing Victorian legislation should the Commonwealth persist in not acting on this matter.

As with our proposals concerning warranties for services (Section 6 of the Report), the Council has enlisted the support of our fellow Consumer Affairs Councils in pursuing this reform at this time.

13. APPRECIATION

The Council wishes to express its thanks for the support given to it by the staff of the Ministry of Consumer Affairs and for the ready co-operation received from those government departments and other organizations from whom the Council sought advice during the year.

The Council has been fortunate in the calibre of the Secretaries with which it has worked. Mr. Michael Brasher was Secretary to the Council for six years, a period of sterling service which came to an end in October, 1981. He has been succeeded by Miss Anne Herla who is making an invaluable contribution to the work of the Council. We thank them both.

APPENDIX 1

A REPORT ON THE WORK OF THE SMALL CLAIMS TRIBUNALS

1. The Inquiry

In the course of the year the Council undertook quite a wide-ranging inquiry into the work of the Small Claims Tribunals. Its study encompassed issues both of jurisdiction and procedure.

Over the years the Council has been impressed by the great value of this Victorian institution. It was Victoria and Queensland that were the first Australian States to make provision, in 1973, for small claims tribunals - an innovation now adopted by all States but Tasmania. It is now roughly a decade from the establishment of the Tribunals, and it seemed timely to review their work. In addition, the Council received a letter from the Boating Industry Association of Victoria Ltd., suggesting amendments to Small Claims Tribunals procedures. The letter was timely since it helped to focus attention upon some important issues.

In the course of its discussions, the Council sought factual information and advice from the Senior Referee of the Tribunals, Mr. Michael Levine; the former and current Registrars, Messrs. Jim Folino and Kevin Davies; the Senior Referee, Consumer Claims Tribunal, N.S.W; and Professor John Goldring of the Macquarie Law School.

We now set down our findings.

2. Jurisdiction

Monetary limit. When the Tribunals were first established they provided a ready, alternative jurisdiction to the Magistrates' Court. At that time (in 1973) the monetary limit of the Tribunals was $500, that of the Magistrates' Court $600.

In 1975, the ceiling of the S.C.T. was lifted to $1,000 while that of the Magistrates' Court remained at $600.

In 1981 however, an imbalance was created when the ceiling of the Magistrates' Court was lifted to $3,000 with no movement in the ceiling for the Small Claims Tribunals. The present limit in the Tribunals is $1,500.

So that the Tribunals might once again become an alternative to the Magistrates' Court, and in view of the cost of many consumer items (e.g. carpet), Council urges that the ceiling be lifted to $3,000. It further recommends that provision be made for the Tribunal's monetary limit automatically to mirror adjustments to the monetary limit for the Magistrates' Court.

Professional claims. It may be that the Tribunals already possess the power to handle claims in respect of professional services (see Section 2, Small Claims Tribunals Act). But some doubts have been expressed.

On the one hand, there is the call from some sections of the community that the question of power be settled beyond doubt: that unequivocally the Tribunals be given the power to handle all "small claims", including professional matters. But on the other hand, there is the diametrically opposed view: questions have been raised as to whether it is appropriate for the Small Claims Tribunals to resolve professional disputes on the grounds, first, of the technical complexity of some issues (e.g. medical matters) and, second, of the existence of specialized review bodies (e.g. the Taxing Master in relation to disputed legal charges).

There is, in our view, some basis for these questions. Some disputes concerning professional work raise questions purely of professional competence, which may well best be resolved by bodies with strong professional representation or with the capability of securing and testing detailed professional advice or testimony.

But the work of the Small Claims Tribunals is not directed to resolving all professional disputes; rather it is concerned with disputes arising from the commercial aspects of the provision of professional services. A typical dispute might raise the issue of whether services were provided that have been charged for.

Under the Small Claims Tribunals Act (Section 2), a "'small claim' means a claim for payment of money ... or a claim for performance of work that in either case arises out of a contract for the supply of goods or the provision of services". It is the consumer who makes the claim, and a "consumer" is defined as

> "....a person, not being a corporation, who buys or hires goods otherwise than for re-sale or letting on hire or than in the course of or for the purposes of a trade or business carried on by him, or than as a member of a business partnership, or for whom services are supplied for fee or reward otherwise than in the course of or for the purposes of a trade or business carried on by him, or than as a member of a business partnership."

Accordingly Council has concluded that it is quite inappropriate to exclude from the Tribunals such small claims relating to the provision of professional services. We stress that this does not mean that all professional complaints would become subject to the Tribunals - only complaints relating to the commercial aspects of professional work.

Council has concluded it is important that all suppliers of goods and services should be treated equally and subject to the same consumer legislation. On a similar issue the Council has in the past recommended that Section 3 of the Market Court Act be repealed so that it covers all classes of suppliers, professionals included.

Council questions the appropriateness of commercial complaints being handled by members of the same profession. There is a greater expectation of objectivity from a Referee handling a varied range of consumer transactions. But, in any event, empowering the Tribunals to handle claims relating to the professions does not rule out access to these professional bodies. Rather, in the words of the Senior Referee in N.S.W., it "gives the consumer another choice - an independent arbitrator to decide the issue".

Moreover the Small Claims Tribunals have the great advantage of being accessible - in a number of senses. It is felt that ordinary consumers might feel less intimidated in mounting a challenge against a professional supplier in the Small Claims Tribunals than before a specialized review body. Besides, not too many people know of the existence of these bodies, e.g., of the Taxing Master. And these other avenues of redress can be expensive.

In N.S.W. the Consumer Claims Tribunals were given jurisdiction to deal with claims concerning the professions in 1979, and we are satisfied that the system there is working well.

The Council recommends, therefore, that the Tribunals be explicitly empowered to handle "small claims" arising from a contract for the provision of professional services. But we think it appropriate to write into the Act this proviso, "except where the Referee has reasonable grounds to believe the matter should be referred to a professional regulatory body or statutory authority".

Statutory bodies and State Government intrumentalities. Council is strongly of the belief that these bodies should not be granted immunity from the jurisdiction of the Tribunals. Not only is it the case that they should have the same responsibilities as other traders, it is also frequently the situation that consumers are dependent upon these instrumentalities for supply, with no alternative supplier to whom they may turn. The potential for abuse is obvious.

There may be conflict with other legislation such as Section 197 (2) of the Railways Act 1958 which prevents the Small Claims Tribunals from dealing with claims against the Railways. Accordingly we suggest a clause in the Small Claims Tribunals Act to the effect that it overrides other legislation.

Bodies Corporate (in relation to dwellings). We regard this as a purely technical amendment to bring the Act up to date with the realities of a significant segment of consumer transactions, as has been done in N.S.W. Naturally the standard monetary limit to claims would apply.

3. Procedure

Relationship with the Consumer Affairs Bureau. One suggestion sometimes made (e.g. by the Boating Industry Association) is that a consumer should be compelled to go through the Consumer Affairs Bureau before lodging a claim in the Small Claims Tribunals. The rationale would be to promote pure conciliation and to weed out "frivolous complaints". Another suggestion is that the Act should make formal provision for interaction between the Tribunals and the Bureau, such as exists between the Residential Tenancies Tribunal and Bureau (see Residential Tenancies Act, 1980, Section 27).

Council does not accept either proposal. It accepts that there can be benefits from interaction between the Tribunals and Bureau but believes that this should remain informal and flexible as is presently the case, with a Referee free to adjourn a hearing and seek information from the Bureau if appropriate.

Members believe it to be vital that the Tribunals retain their independence and that consumers be guaranteed the right to lodge a claim directly without first going through the Bureau.

Further, we do not think it would be in the interests of business to compel intercession by the Bureau. As the former Registrar Mr. Folino expresses the point:

> "It could cost a trader far more in time and effort corresponding with the Bureau only to find that the dispute remains unsolved. The Inspector could tell a consumer that he believes that the trader has done no wrong but the consumer does not have to accept the Inspector's decision. This leaves the parties with litigation as the only alternative. The trader after having corresponded with the Bureau finds himself having to defend an action before the Tribunal or a Court."

Furthermore, in approximately 25% of cases heard, traders are pressing consumers for payment of outstanding accounts. If these consumers had to go through the Bureau first, traders would no doubt sue the consumers in some other jurisdiction thus preventing consumers from coming to the Tribunals (see Section 15 of the Small Claims Tribunals Act).

It is relevant, also, that a substantial fraction of matters are settled without the need for a Tribunal hearing. As Mr. Folino explained:

> "When a consumer lodges a claim with the Registrar of Small Claims Tribunals, a copy of the claim is served on the trader within about 48 hours of lodgement. When the Notice of Claim is served on the trader, there is an invitation to the trader to negotiate settlement with the Claimant should he so desire. As the period of time from the date of lodging to the date of hearing is approximately six weeks, the trader has in fact almost six weeks in which to attempt settlement. I have found that almost 30% of claims lodged with the Tribunals are settled prior to hearing."

Also it is well known in a general way that many consumers seek assistance from the Bureau before applying to the Tribunals. The Registrar has examined 1,000 recent claims at random and found that 320 consumers had been to the Bureau before coming to the Tribunals. But that is by their own choice.

Non-appearance, bonds and power to award costs. One sometimes hears the assertion by members of the business community that consumers quite often fail to appear, thus causing a significant waste of time and effort on the part of the traders concerned. We have examined this complaint.

Statistics supplied by the Tribunals do not support the view that non-appearance of Claimants is presently a problem. This happens only infrequently; indeed it is the Respondents that are more likely to stay away.

Comprehensive statistics are available for the period 1st July, 1979 to 30th June, 1980. In this period, there were 2,400 claims heard. Only 51 consumer Claimants did not appear (2.1% of the total claims), but 447 Respondents (18.6%) did not appear.

The requirement that a Claimant lodge a bond would hurt the poor, penalize the smaller Claimant, and give rise to administrative costs. Council however does favour the proposal that the Small Claims Tribunals Act be amended to give the Referee discretionary power to award costs. This power should only be available on applications for adjournment, renewal or rehearing and the failure of a Claimant to prosecute his case. There would be no power to award costs in normal proceedings as this would defeat the philosophy of a low cost jurisdiction.

Costs should be a nominal amount only and not a real costs award. The amount should be limited to a small sum such as $50 or some small percentage of the monetary limit of the jurisdiction.

Orders against consumers. Tied in with the power to award costs it is essential tht the Tribunal have the power to make an order against a consumer both where he has failed to prosecute a case and where he does not comply with the terms of a settlement upon which he has agreed before the Tribunal. For example an agreement might be reached whereby the trader agrees to pay the consumer $500 upon the return of some faulty curtains. The trader pays the money but the consumer then retains both money and curtains. The Tribunal might then make a monetary or other order against a consumer.

A Statutory Declaration of claim? Another suggestion made to us was that a Statutory Declaration be required to be lodged before the hearing to ensure accuracy and completeness of information.

The following points, however, have led us to reject this suggestion.

While it might be thought that the requirement of a Statutory Declaration would induce a consumer to take his claim seriously, Tribunal experience is that consumers already take their claims very seriously. Evidence before the Tribunal is on oath and the opportunity is afforded at that stage for any errors in the claim to be remedied. It is to be expected that greater accuracy and completeness would be obtained from evidence given on oath in the presence of the Respondent, and under questioning. Moreover inaccuracy of statements made by a consumer in a claim form would usually operate to the benefit of the trader, as the inaccurate passages could then be used to discredit the consumer's case at the hearing.

Hearings in public. Council accepts the view of the Senior Referee that it is important for the Tribunals to be open to public scrutiny. This would eliminate the feeling that they were "kangaroo courts" and would be beneficial in community education and in enabling applicants to sample hearings beforehand. The public hearings in the Residential Tenancies Tribunal are working well.

Settlement negotiations should continue to be conducted in private and there should also be a prohibition on the publication of names and addresses of parties to a hearing.

The right to request a closed hearing should extend to both parties and it is recommended that a similar clause is used as in Section 33 of the Residential Tenancies Act:

> Section 33 (3). Where the Tribunal, whether at the request of a party to proceedings or on its own initiative, is satisfied that it is desirable to do so, the Tribunal may direct that the hearing of the proceedings, or part of the hearing, shall take place in private and give directions as to the persons who may be present.

4. Summary of Recommendations

A. Jurisdiction

The Council strongly recommends that the jurisdiction of the Tribunals be extended:

(i) that the monetary limit to the jurisdiction be increased to $3,000 in accordance with the limit to the jurisdiction of the Magistrates' Courts (and thereafter mirror the Magistrates' monetary limit);

(ii) that the Tribunals be empowered to handle "small claims" whether or not they arise from a transaction with a professional person "except where the Referee has reasonable grounds to believe the matter should be referred to a professional regulatory or statutory authority";

(iii) that the Tribunals be empowered to handle "small claims" against statutory bodies and state government instrumentalities; and

(iv) that bodies corporate (in relation to dwellings) be classified as consumers to allow them to make claims, as in N.S.W.

B. Procedure

The Council believes that the following procedural changes would strengthen the Tribunal's role as a strong, impartial and respected institution for the resolution of disputes between consumers and traders:

(i) that the Small Claims Tribunals Act be amended to give the Referee discretionary power to make a nominal costs award (limited to a small sum such as $50 or some small percentage of the monetary limit of the jurisdiction);

(ii) that the Tribunals be empowered to make an award against a consumer, both where he has failed to prosecute a case and where he does not comply with the terms of a settlement before the Tribunal; and

(iii) that the hearings normally be public, with provision for a closed hearing at the discretion of the Tribunal (whether at the request of a party or on the Tribunal's own initiative).

APPENDIX II

A REPORT ON BOGUS FRANCHISE SCHEMES AND MISLEADING BUSINESS OPPORTUNITIES

1. The Problem

The Annual Reports of the Director of Consumer Affairs for the Year 1978-79 and 1979-80 focused attention upon a relatively small but constant source of complaint, viz "fraudulent, misleading or unviable franchise schemes for the marketing or distribution of products or the carrying out of services."

At the outset, a distinction must be made between franchising as a legitimate and, in the main, successful business practice and the scenario as presented by these dubious and exceptional schemes.

The general concept of a franchise has been well expressed in the Report of the Minister's Committee on Franchising, Department of Financial and Commercial Affairs, Ontario, July, 1971.

> "In our view, a franchise is essentially the grant of a right to operate a business, which business involves the use of the grantor's trade mark or trade name, and some substantial control of the grantee's operation of the business by the grantor. Without the trade mark or trade name, there can be no franchise at all, and it is the element of control that distinguishes, in our view, a franchise from either a bare licence or an employment contract. In a bare licence there is little or no control, and in an employment contract, there is almost complete control."

Some reward must accrue to the franchisor from the relationship and usually the franchisee pays directly or indirectly a franchise fee.

It is usual to distinguish between different types of franchise as follows:

- a product franchise - the franchisee acts as a wholesaler or retailer for the products of a manufacturer (as in motor vehicle retailing and petrol reselling);

- a system franchise - here the franchisor develops a unique method of doing business and allows the franchisee to use that system, under control, in the franchisee's independently owned business (as with fast food outlets, laundries and motels); and

- a manufacturing or processing franchise - here the franchisor provides a vital ingredient or the know-how (as in the soft drink industry).

The above presuppose the existence of a scheme which has operated or is likely to operate to some extent. In contrast, many of the franchise schemes which have come to the attention of the Ministry and the Trade Practices Commission involve the selling of something that does not exist at all, or else has only sufficient existence to give the franchisor something to sell. Very often, the schemes are better described as "misleading business or employment opportunities". In many cases, the franchise consists of nothing more than the "right" to canvass a defined "territory" for customers or outlets for a product or service which is in the process of being launched.

Bogus franchise schemes have generated a pattern of complaint akin to that of pyramid selling in the early 1970's. Indeed pyramid selling may be viewed as a type of franchise operation. In both schemes promoters offer attractive though rarely obtainable incomes; there is the payment of a high price for a franchise or selling right; and there is the promotion of a product or service which has often not been tested in the market place. Both have sought out investors who have little or no business experience and both involve one-sided agreements giving little protection to the investor.

Of 16 schemes investigated by the Bureau of Consumer Affairs since 1972, around two thirds involved the sale of the "right" to canvass a specified area or list of potential customers for sales of some products or services such as cigarettes, film development, chickens and eggs, smoke detection equipment and business card printing.

2. The Involvement of the Council

It could be said that this is primarily a small business problem and thus outside the charter of the Council. However all modes of production and distribution ultimately impinge on consumers, sometimes the effect being direct and immediate - for example, extensive damage caused to consumers' carpets by franchisees who had invested in a carpet cleaning franchise or the loss of films deposited for processing by the scheme's sponsor. Further, over the last decade the Ministry of Consumer Affairs has been receiving complaints and requests for assistance, mainly from small business, which no other agency is handling; and there are undoubtedly some points of similarity in "consumer protection" and "small business protection" problems.

The former Minister of Consumer Affairs, the Hon. J. H. Ramsay, requested the Council to co-operate with the Director of Consumer Affairs in seeking appropriate legislative controls over franchises and owner-operated businesses, a request which was subsequently confirmed by his successor as Minister, the Hon. Haddon Storey.

3. An Example of a Bogus Franchise

The Council has examined Ministry records relating to the schemes investigated by the Bureau since 1972 in response to complaints. In the absence of formal court findings relating to these schemes, it is inappropriate to discuss the schemes in any detail. However, we cite the findings relating to one Federal Court action under the Trade Practices Act which is typical of the problem before us:

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

Mr. Justice Smithers said of this scheme:

> "These proceedings arise out of a course of systematic, heartless and fraudulent exploitation by the defendants of persons of modest means in which the victims paid thousands of dollars to the defendant company for worthless contracts, were caused to incur expenses in performing unrewarding and onerous work, all lost their money and some were left with a load of debt which will be a heavy burden for years ahead."
>
> .....
>
> Early in 1979 the Company commenced business activities in Victoria. Those activities involved setting up a network of couriers throughout Victoria, later extending to South Australia, Tasmania and New South Wales, whose duty it was to collect and forward to the Company in Melbourne exposed films left at depots by persons who had used them in their cameras and to redeliver the films and photographs when developed and printed to the depots.
>
> .....
>
> By the procedure of advertising it acquired them as franchisees who paid sums of money, usually $7,500 for the privilege. A typical advertisement stated,

"Delivery Run

This is an opportunity with an established company to secure a light pick up and delivery run to contracted retail outlets in a named area".

The advertisement continued,

"This is a 5 day week business to such man or woman with a reliable car, potential earnings estimated around $300 per week. Full Price $7,500. For further information phone Geelong 9 2054..."

.....

On the evidence it is clear that such a statement was quite false. The Company could at no stage be said to be an established business and advertising to induce persons to deposit their exposed films with the Company's depots was quite insufficient to produce the intake required. Television and radio advertisements were not undertaken. The experience of franchisees from the commencement was one of complete frustration, disappointment and disillusionment. The evidence shows that of the more than seventy franchisees the most successful of all, one James, earned less than $60 in every week of his franchise. One earned nothing at all. Others earned practically nothing. Most had maximum earnings of around $20. All of these franchisees had car expenses, averaging about $200 per month and had to devote themselves for the greater part of five days a week calling at depots. They travelled daily for quite long distances up to about 200 miles on five days each week to pick up a trivial number of films, losing money every day. They did this because in most franchise contracts there was an agreement by the Company to buy back "the delivery run" after six months if the franchisee had faithfully fulfilled the terms of the contract. Several of the franchisees concerned in these prosecutions sought to be bought out, but without success, and in the closing months of 1979 the Company had no premises, no telephone and was not to be found.

.....

...The gross proceeds from the sale of franchises was $284,000.00. At approximately $7,500 each, this represented the sale of 30 franchises."

The defendants pleaded guilty. Heavy penalties were imposed by the Court - fines totalling $95,000 upon the company, and fines totalling $35,000 upon the Managing Director, with imprisonment for four years and six months in the event of his default in the payment of fines. The judge said that in imposing this "substantial" punishment, the Court had "regard to the degree of loss inflicted on unsuspecting persons, the nature of the false statements, and the absence of explanation of the defendants for their unlawful and reprehensible conduct".

4. Present Controls and Assistance

Putting aside the specific legislation controlling disclosure in relation to petrol franchises (the Commonwealth Petroleum Retail Marketing Franchise Act, 1980), the main general legislative control over misrepresentations in relation to franchises and business opportunities is contained within the Trade Practices Act.

The main provisions are as follows:

Section 52 Misleading or Deceptive Conduct.

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

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1).

Section 59 Misleading Statements about Certain Business Activities.

(1) (Statements about home-operated businesses).

A corporation shall not, in trade or commerce, make a statement that is false or misleading in a material particular concerning the profitability or risk or any other material aspect of any business activity that the corporation has represented as one that can be, or can be to a considerable extent, carried on at a person's place of residence.

(2) (Statements as to profitability or risk).

> Where a corporation, in trade or commerce, invites, whether by advertisement or otherwise, persons to engage or participate, or to offer or apply to engage or participate, in a business activity requiring the investment of moneys by the persons concerned and the performance by them of work associated with the investment, the corporation shall not make, with respect of the profitability or risk or any other material aspect of the business activity, a statement that is false or misleading in a material particular.

Also of relevance is:

> Section 53B False Representations in Relation to Employment.
>
> A corporation shall not publish or cause to be published an advertisement seeking a person or persons for employment, whether by the corporation or by another person, that contains a statement that is false or misleading in a material particular.

Finally, Section 61 of the Trade Practices Act prohibits pyramid selling.

Examples of Section 59 (2) prosecutions are:

> O'Dea v. Casnot Pty. Ltd. (1981);
>
> Wilde v. Menville Pty. Ltd. (1981); and
>
> Ducret v. Colourshot Pty. Ltd. (1981).

The above cases have all been guilty pleas. All gave rise to fines, heavy fines in respect of the last two cases with imprisonment in default of payment.

Apart from the provisions in the Consumer Affairs Act (Section 32A - 32E) which prohibit pyramid selling, Victoria has no specific legislation to control these bogus franchises.

However, the Ministry has issued warnings to prospective franchise purchasers, by way of press releases, advertisements, and a recorded telephone message. Special attention has been given to prospective owner-drivers.

The Small Business Development Corporation also sees its role as one of advising or counselling prospective franchisees as to the requirements and pitfalls of purchasing a franchise. They do not take an active role in mediating complaints.

At the moment the Ministry is accepting complaints from individual franchisees. The procedure is then to exchange information with the Trade Practices Commission, Company Fraud Squad and Corporate Affairs. Complainants (franchisees) are advised that the Ministry will attempt to negotiate redress on their behalf but that it can do nothing further. They are advised to seek legal advice and assistance.

5. Conclusions and Recommendations

(1) Council considers it desirable to strengthen State protection to small businesses and persons that may become victims of bogus franchise and related schemes.

(2) Nevertheless Council believes that caution must be exercised in formulating an appropriate policy. Members are impressed by the tremendous variety of business schemes which may fall under the "franchise" label. They believe that franchises may be quite legitimate and socially useful. While there is a need to catch or deter the perpetrators of bogus franchise schemes, the controls must not unduly restrict legitimate schemes. Moreover there is surely a limit to which the community can use its resources to protect persons hopeful of becoming entrepreneurs who enter upon hastily or ill-considered franchise schemes.

(3) In purchasing a franchise a franchisee is investing in a business which has yet to commence. Due to the prospective nature of the transaction, he relies on the representations of the franchisor as to the profitability etc., of the business. While most established franchisors probably provide the franchisee with adequate and accurate information, not all franchisors are ethical. There is also the feature that most franchisors are better informed than most potential franchisees.

This feature has led many commentators, both here and overseas, to suggest that a key control should lie in mandatory disclosure requirements. This was proposed by the Commonwealth Trade Practices Consultative Committee on Small Business and the Trade Practices Act, 1979; and it is a feature of the Commonwealth Petroleum Retail Marketing Franchise Act, 1980.

However while some members are attracted to the idea, the Council as a whole does not support the enactment of mandatory disclosure requirements for all Victorian, or indeed Australian, franchise schemes. Nor would most members support associated schemes for the filing of prospectuses for all franchise schemes.

This is for a number of reasons. Where only a small proportion of franchisors are at fault, the requirement is draconian, imposing in most members' view undue costs upon both government and the business community. Secondly, in view of the tremendous variety of such schemes, there are difficulties in establishing an appropriate standard list of matters to be disclosed. Thirdly, there is a problem of even establishing a legal definition of a "franchise scheme" which will catch all pedlars of misleading business opportunities. And finally, and most tellingly, mandatory disclosure requirements are unlikely to deter the con merchants.

(4) But on the basis of past experience it appears that if bogus schemes are not stopped very early after initial promotion, then investigation and action will achieve little. Bogus franchise schemes have a short life and often the best evidence is not available until after they have failed. And after they have failed, it is normally too late to secure redress for the duped franchisee. Better still would be policies designed to deter the very existence of these bogus schemes - yet in a suitably economic way.

Accordingly, the Council supports a two-pronged approach at this stage that may be summarised as:

- Legislation controlling false or misleading advertising, false representations, and misleading or deceptive conduct generally; and

- Small business education.

As to the first, members believe there is a strong case for enacting state legislation which parallels, and possibly extends, the provisions of the Trade Practices Act. They note, too, that with the Commonwealth withdrawing from much consumer and business protection activity, there is a need for enhanced state enforcement of relevant legislation.

As to the second, the Council endorses the value of the Ministry's programme of Warnings to Prospective Franchisees. But discussions by the Government with the Small Business Development Corporation are desirable, to explore whether a more systematic educational programme might be mounted - by a small business authority.

It may be that stronger controls over franchising will be found necessary in the future. But Council thinks it appropriate to implement these obvious programmes now - and take stock as to the desirability of more complex and controversial policies in the future when evidence as to the adequacy of this approach will have had time to accumulate.

APPENDIX III

SUBMISSION TO VICTORIAN COMMITTEE OF INQUIRY INTO SHOP TRADING HOURS

The Consumer Affairs Council

1. The Consumer Affairs Council of Victoria is appointed by the Minister of Consumer Affairs with functions as defined in Section 6 of the Consumer Affairs Act, 1972.

   6. The functions of the Council shall be -

      (a) to investigate any matter affecting the interests of consumers referred to it by the Minister;

      (b) to make recommendations with respect to any matter calculated to protect the interests of consumers;

      (c) to consult with manufacturers retailers and advertisers in relation to any matter affecting the interests of consumers; and

      (d) in respect of matters affecting the interests of consumers, to disseminate information and to encourage and undertake educational work.

2. The Council consists of a Chairman and up to nine other members. Its membership covers a broad spectrum of experience, expertise and interest. Half of its members represent consumers and half are experienced in commerce and industry. Presently there are nine members, four women and five men.

3. The Council is always conscious of the fact that its brief is "Consumer Affairs", rather than "Consumer Protection". Its stance is to inquire whether existing market place practices are in the public interest. As expressed in its last Annual Report (Year Ended 30 June, 1980), "the Council should be seen as a balanced body, primarily representing consumers, but trying to achieve a harmonious and efficiently functioning market place for both consumer and business alike".

The Development of Council's Views

4. The Council has taken a keen interest in the shopping hours controversy over the last 12 months. Members have felt it to be an extraordinarily important topic, and have discussed the issues on a number of separate occasions. The present submission contains the unanimous views of the Council as developed over that period.

5. In reaching these conclusions Council had before it much factual information and opinion. However it would like to draw to the attention of the Committee a speech delivered by Mr. M.J.S. Collins (Senior Lecturer in Retail Management of the David Syme Business School) to the Sixth National Convention of the Australian Retailers' Association, a speech which (in our view) canvasses many of the issues in a balanced and helpful way. We enclose a copy of that speech for the convenience of the Committee.

The Need for Deregulation

6. Council strongly supports a total relaxation of all legislative restrictions upon trading hours, including Sundays.

7. Members submit that it is not for the Parliament to determine shopping hours but rather to create the environment within which retail traders themselves can respond to perceived consumer demands. Under the present legislative structure the opportunity for retailers to respond to consumer needs is being stifled.

8. Council is generally opposed to any regulation of shop hours for the prime reason that if consumers need or wish to purchase goods or services outside existing trading hours from traders willing to supply such goods or services at a price that is economic for the trader, then any intervention by government will be to the detriment of consumers, employees and traders and costly to the community in terms of enforcement.

9. Retailing is a service industry and as such should provide its services when needed by the community. If existing legislative restrictions were repealed and shops could open when they pleased it would become a matter of "water finding its own level" as to what are the most economic times for retailers to offer their services.

10. As is evident from recent legal proceedings by the Department of Labour and Industry, some retailers are defying present regulations by trading on Saturday afternoons and Sundays. They would not be doing so if it was not economic for them, with a consumer demand for their services.

11. Much of the opposition to extending permissable trading hours is, in our view, orchestrated by vested interests. Consumers, on the other hand, vote with their feet; and the popularity of the exceptional forms of retailing over the week-ends, and the near-panic that rules upon the floors of certain types of stores at mid-day on Saturdays, both attest to consumer needs. We note also that 35,000 people are regularly reported as attending the Victoria Market on Sundays.

12. The present structure of shopping hours is plainly not suited to the times. The most obvious change in family life is the high proportion of working women who find difficulty even in scheduling routine purchases. But there is also a desire for shopping to become an activity participated in by both men and women - either singly or in joint "family excursions". And as there is evident a freeing of traditional roles within the family, so there is evident a freer attitude to the use of time. Council members see considerable value in shopping hours which would complement weekend activities centering upon maintenance and enjoyment of the family home. Shopping is appropriately a family activity.

13. Council notes the anxiety expressed by some sections of the retail industry as to the impact of change upon the trade itself. However, it is of the opinion that the removal of restrictions would really create opportunities for the trade as a whole. We have noted the relative drop in expenditure upon retail goods over the last decade and consider that more convenient trading hours would create more time to spend. There could also be a fillip to tourism.

14. The removal of restrictions on trading hours would not necessarily mean an expansion of trading hours. What is important is the possibility of rescheduling trading hours in a way which reflects current life-styles. There is the example of the continental pastrycook who already opens on Sundays but closes on Mondays.

15. There is the English system, which might well prove popular, whereby Saturday afternoon opening is balanced by half-day closing in the course of the week (with the precise practice varying by district).

16. Such a re-scheduling of shopping hours could, indeed, be associated with greater productivity in retailing through the smoothing out of peaks and valleys in trading hours.

17. While removal of restrictions upon trading hours, would, fundamentally, permit the interplay of market forces, there would be a need for much discussion and co-operative exploration of possibilities by retail and trade union organizations and by local governments. Any fears of employees regarding lengthening of the working week should be allayed. It would be the Shops Boards Determinations regarding payment of over-time and penalty rates which would then be the crucial determinant of the effects of liberalization upon actual trading hours, upon costs, and upon the structure of retailing. Members hope that the resolution of wage rates could be achieved in a way which would be in the interests of the community as a whole - and in the interests of those who might be attracted to an expanded and restructured retail sector that the changes could foster.

18. In our view, different trading hours could enhance employment opportunities for young people, married women and persons seeking part-time employment. It would be important to combine this enhanced employment flexibility with guarantees to those who wish to work a more traditional "working week".

Anomalies and Discrimination

19. In accordance with the general philosophy expressed, Council is strongly of the opinion that if there is to be any change in the legislative provisions falling short of total liberalization, there should be no discrimination as between sections of the industry: the same opportunities should be open to all trades and to all types of traders. This is seen partly as a matter of fairness but more fundamentally as permitting the full interplay of the forces of demand and supply in the market place. Moreover, to protect one section of the trade today is to create rigidity and vested interests for tomorrow.

20. However, should the Government opt to lift restrictions only on Saturdays, it is thought that the present opportunities to trade on Sundays should be preserved. Admittedly the present exemptions are complex and anomalous, but they are so keenly valued by the community that they should not be removed. In fact, the solution to the anomaly is not to remove the exemptions, but, in effect, to extend the exemptions 100 per cent!

The Question of Butchers' Meat

21. Council gave special attention to what is often regarded as an exceptional category of trade, viz, butchers' meat. It is agreed that the trade of the butcher is a demanding one, both physically and in terms of hours worked. Nevertheless, it is thought that meat trading hours should be freed. There is strong consumer demand for meat to be available at times disallowed by present legislative requirements - both within the supermarkets and outside. An effect of the restrictions must surely be to divert expenditure from butchers' meat to substitute products more conveniently marketed. The convenience of permitting supermarkets to trade in butchers' meat whenever they are open is obvious. A less obvious point which members would like to express is this: that current restrictions are putting those large numbers of families, who prefer to buy their meat from butchers' shops rather than supermarkets to considerable inconvenience at times to do so. It is suggested that butchers might take a fresh approach to their hours; some might close on Mondays, for example, or on certain half-days.

A Trial Period?

22. As has been said, the views expressed in this submission are unanimous and strongly held. Nevertheless we recognize that the liberalization of trading hours is a proposal viewed variously with scepticism and alarm in some other quarters. May we propose, therefore, that serious consideration be given to the possibility of a trial period of, say, six months for either Saturday afternoon trading or complete deregulation.

Conclusion: Progress and Flexibility

23. In the view we have formed, deregulation would have two prime advantages. First, it would afford an immediate opportunity for our retailing institutions to move forward in accordance with very fundamental currents of social change. But second, taking the long view, it would permit retailing facilities to respond flexibly and gradually to the preferences and attitudes of consumers, traders and employees as they evolve over time.

Summary

24. (1) The Consumer Affairs Council strongly supports a total relaxation of all legislative restrictions upon trading hours, including Sundays.

(2) Such a relaxation - in company with appropriate Wages Board determinations - would permit retailing facilities to be determined largely by the interplay of market forces, and thus to respond flexibly and gradually to the preferences and attitudes of consumers, traders and employees as they evolve over time.

(3) Currently, the removal of restrictions on trading hours would not necessarily mean an expansion of trading hours. What is important is the possibility of rescheduling trading hours in a way which reflects current life styles - especially the high proportion of women in the work force and the development of shopping as a family activity.

(4) Such a change would not only serve consumer convenience. It could well increase total retail expenditure and thus expand opportunities for the trade as a whole; it could also enhance employment opportunities for young people, married women and persons seeking part-time employment.

(5) While removal of restrictions upon trading hours would, fundamentally, permit the interplay of market forces, there would be need for much discussion and co-operative exploration of possibilities by retail and trade union organizations and by local governments.

(6) As to anomalies resulting from existing exemptions under the Labour and Industry Act, the solution is not to remove the exemptions but to extend the exemptions 100 per cent. In any event, there should be no reversal of existing exemptions - which are so keenly valued by the community.

(7) A trial period of, say, six months, for either Saturday afternoon trading or complete deregulation is worthy of serious consideration.

APPENDIX IV

REVIEW OF THE REPORTS OF THE COMMITTEE OF INQUIRY INTO EGG MARKETING (1980 and 1981)

I Reference to Council

On 21st January, 1982 the Minister of Agriculture wrote to the Minister of Consumer Affairs, asking him to refer the Inquiry's Reports to the Consumer Affairs Council for "an independent opinion about the recommendations of the Inquiry, and particularly whether high quota prices reflect high industry profitability and hence the extent to which consumers pay more for eggs than they would without quotas".

On 22nd April, 1982 the present Minister of Agriculture confirmed the above request. He said "The matter is of some importance and it would be helpful to have an independent opinion about the recommendations of the Inquiry".

II Procedure

Following an initial review of the Reports Council members thought that, to ensure even-handedness, it would be desirable to approach some industry bodies directly to secure their views on these Reports. Comments were obtained, in due course, from the Victorian Egg Marketing Board, the Commercial Egg Producers' Association, the Egg Producers' Association of Victoria Ltd., and the Victorian Farmers and Graziers' Association.

In addition, arrangements were made for the Chairman of the Council to examine materials on the Victorian egg industry held in the Department of Agriculture. Finally, a letter was received (by way of the Minister of Consumer Affairs) from Mr. G. W. Edwards of the La Trobe University School of Agriculture commenting on the Egg Industry Stabilization Scheme.

III Scope of Review

Council accepts that it has a responsibility to voice the consumers' interest in egg marketing. This is particularly the case since the removal of consumer representation from the various Boards marketing primary products. However it has been decided to restrict comment primarily to the Egg Industry Stabilization Scheme (especially the hen quota and pricing systems). While the other issues raised by the Reports are clearly important (e.g. that quality standards be reformulated) members feel they have insufficient knowledge to comment on these.

What follows expresses the unanimous views of the Council.

IV Summary

1. The Consumer Affairs Council's key concern is this, that there are certain features in the demand for eggs that make consumers of eggs very vulnerable to producer exploitation. Eggs are a staple commodity. Consumers will accept unduly high prices for eggs, and the burden of high prices is disproportionately borne by the poor.

2. The present Stabilization Scheme has undoubtedly resulted in unduly high prices reflecting high industry profitability. Further, features of the Scheme foster an inefficient structure of production. Furthermore, the Scheme has made it difficult for new producers to enter the industry, tending to produce a "closed shop".

3. If hen quotas are to be retained, we believe that explicit policies should be adopted to minimize the very real dangers of such a system, specifically a pricing/quota system which would

- reduce the value of quota to nominal levels
- yield a supply of eggs in approximate balance with domestic demand (allowing for the necessity to maintain continuity of supply)
- be responsive to change
- foster transferability of quotas.

4. In our view, the Victorian Egg Board should no longer be empowered to regulate egg prices. If price control is retained there needs to be a reform to the system to achieve the removal of pricing policies from industry domination. Alternatively, the creation of a (computer-operated) Egg Exchange has its attractions (possibly in conjunction with a reserve pricing system and certainly in conjunction with appropriate health safeguards).

5. These recommendations embody a rather conservative approach to the problems raised by the present Stabilization Scheme. Accordingly, we recommend that in due course the justification for the very existence of the hen quota scheme be re-examined.

V Council's Conclusions in Detail

1. The vulnerability of egg consumers to producer exploitation

1.1 The Consumer Affairs Council's key concern is this, that there are certain features in the demand for eggs that make consumers of eggs very vulnerable to producer exploitation.

1.2 Eggs may be characterized as a staple commodity: in the absence of good substitutes for their consumption, quantities demanded are comparatively insensitive to the price charged; nor is there a significant increase in consumption according to income level. In the language of economics, there is a low price - elasticity of demand and low income - elasticity of demand.

The price elasticity is normally quoted as being less than -0.3, meaning that a 1% increase in price gives rise to a reduction in quantity demanded of less than 0.3%. It follows that price rises significantly increase the total dollar receipts from egg sales with comparatively little effect upon volume (quantity) of sales.

Moreover the distribution of such an impost is spread over income classes, with the poor paying (as a percentage of income) proportionately more. Producer marketing boards have been given a power, in effect, to tax consumption in a way which is highly regressive.

1.3 Thus in the absence of competitive conditions, we see the potential for an industry body to extract from consumers unduly high returns (above necessary production costs). These excess returns are then available for a variety of uses, such as

- creating an equalization pool to subsidize losses on exports;
- financing Egg Board activities of an unnecessary and hence wasteful kind;
- creating high returns for existing producers; and
- funding a degree of productive inefficiency.

We say "high returns for existing producers" since, in due course, these returns would no doubt be capitalized (e.g. through the price of hen quota) so that returns to investment by a newcomer to the industry drop back to normal levels.

1.4 Unfortunately if the industry returns have been dissipated in any or all of these ways, it appears that there is nothing in the characteristics of egg demand to prevent the whole

cycle from being repeated, with domestic egg prices rising still further.

On the other hand, it is likely that productivity in the industry will increase offering a producer-dominated Board the temptation not to reduce the price of eggs correspondingly - so that over time the value of hen quota will rise.

2. The effects of the present Stabilization Scheme

2.1 The letter from Mr. Edwards of the La Trobe School of Agriculture seems to us to summarize the bad effects of the Scheme admirably. He agreed with the Committee of Inquiry that the Scheme:

" . raised the consumer price of eggs by at least 10 cents a dozen

. channelled assistance mainly to producers with more than 10,000 birds who would make satisfactory profits in the absence of the higher prices brought about by the Scheme

. slowed the growth of efficiency in the egg industry

. increased by as much as 100% the cost of establishing a new egg farm

. created a need for regulations which are expensive to administer and which producers put a good deal of effort into evading".

2.2 We are satisfied that the high quota prices reflect high industry profitability and give rise to an unduly high price for eggs. As to the figures quoted in the Report, the Chairman (who is an economist) has examined the basis for estimating the excess cost to consumers as "at least 10 cents a dozen", or $5,000,000 per year and, as a technical matter, is satisfied that the estimate is a conservative one.

2.3 Further, while the direct evidence is of excess profits in the industry, we also think that the hen quota system would tend to promote inefficiency in the industry, and hence unduly high-cost production.

2.4 However the Scheme may be credited with the control of surplus production. This the Committee found. But they were "of the opinion that the same result might well have been achieved by the Victorian Egg Marketing Board exercising control through a more realistic pricing policy". (I, P.1). Thus the basic issue raised by the Committee is whether surpluses can be controlled without quotas through an appropriate pricing policy.

3. The Council's Recommendations

3.1 While it appears that there is quite a deal of evidence and argument to support the view that egg production is suitably responsive to price incentives, Council members are unwilling to express a conclusion on this issue, a technical economic question. Further we note that in any event the Minister of Agriculture has recommended that, in principle, he favours the retention of hen quotas. Moreover, there is something to be said for the consideration that, as a matter of prudence, hen quotas be retained, at least for the time being, while more realistic egg prices for the industry are sought and producers' responses to price movements are studied. However we would urge that in due course the justification for the very existence of the hen quota system be re-examined.

3.2 Rather, Council would wish to focus upon two key recommendations, whose implementation, we are of the unanimous opinion, would be in the public interest:

1. The Victorian Egg Board should no longer be empowered to regulate egg prices.

2. Explicit policies should be adopted to minimize the very real dangers of the hen quota system.

3.3 As to the first of our conclusions, there are severe problems in entrusting price-setting to a body such as the Egg Board. This is not just, in our view, because it is "producer-dominated". Even if there were wider representation on the Board, it would still be industry-specific and subject to "capture" by the industry. This suggests that if price-control is to be maintained, there should be

- strong Ministerial direction on pricing principles (which may be politically difficult) and/or

- a large input from an independent authority such as the planned Victorian Prices Commission.

On the other hand, the creation of a (computer-operated) Egg Exchange has its attractions and is deserving serious consideration. It might be desirable to empower an authority to operate a reserve pricing system in conjunction with such an exchange. However, if an Egg Exchange were established, members emphasize that it would be vital that it be properly supervised by the health authorities.

3.4 As to the second of our conclusions, it may be conceded that hen quotas offer producers the certainty that the industry will not be plagued with surpluses. But they carry with them very real dangers. Special care would need to be given to devising pricing and quota control mechanisms which minimize the risks of excessive prices, a "closed shop", and inefficiencies. Such administrative controls are naturally subject to political pressure and costly in themselves.

We see the problems raised by a regime of hen quotas as the following:

(1) the quota system may conceal over-pricing, since production surpluses are not generated. This is the other side of the coin (to the first sentence in the preceding paragraph). The very existence of surpluses is a signal that domestic prices are too high.

(2) The system makes it difficult for new farmers, young farmers, to enter the industry.

(3) Inefficiencies are fostered: state allocations of quota may run counter to state productivity; the quotas operate as a shield to existing producers; techniques of production will likely be too hen-intensive.

(4) There is the necessity of policing the industry and administering the system.

4. Policies in a regime of hen quotas

4.1 All this suggests that if a quota system is to be retained the following policies need to be adopted to minimize the potentially bad effects:

(1) There needs to be explicit adoption of a pricing/quota system which would

- reduce the value of quota to nominal levels, and
- yield a supply of eggs in approximate balance with domestic demand (allowing for the necessity to maintain continuity of supply).

Under current conditions this would entail some increase in overall state quota and a reduction in wholesale price.

(2) The pricing/quota system needs to be responsive to change; in particular, increased industry productivity needs to be reflected in lower (real) prices and lower state hen quota.

(3) It is desirable for quotas to be transferable: the quota capacity would then be allocated to those who can make most productive use of it; and a few newcomers might hope to enter the industry (without the necessity of having to buy an existing farm). Indeed, it could well be desirable for a percentage of quota to be periodically withdrawn to be redistributed through competitive tender. However we would be most opposed to any limitation on the size of farms that had the result of protecting high-cost producers.

(4) If price control were retained, there would need to be a reform to the system to achieve the removal of pricing policies from industry domination. In addition, the overall state quota would also need to be adjusted to yield only nominal values when traded.

(5) If an egg exchange were introduced, there could still be a need for an authority to operate a reserve price scheme. But prices would be established which cleared the market; and hen quota could then be <u>periodically</u> adjusted to a level giving rise only to nominal values.

4.2 In this way both the industry and consumers would be given an appropriate degree of protection.

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