UNIVERSITY OF SOUTHAMPTON

TOWARDS A GENERAL DUTY TO TRADE FAIRLY?

A research into the concept of a general duty to trade fairly and the desirability of introducing such a concept into the UK's consumer protection framework

by

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To my wife Gaenor, for her support and encouragement.

"We need our own flexible friend."

Peter Green,
Chief Trading Standards Officer for East Sussex, in a speech to the annual conference of the Institute of Trading Standards Administration, Blackpool, June 1987.

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ABSTRACT

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The objective of this thesis is to examine the idea of a general duty to trade fairly as an answer to the present deficiences of consumer protection.

The thesis charts the development of consumer protection law, both civil and criminal, and also the growth of self-regulation in its many forms. We note the growth of codes of practice of various kinds, ranging from purely self-regulatory codes through to statutory codes, and we consider their legal significance and their role in protecting the consumer.

In Chapter Four we take a hard look at the present system of consumer protection, not just looking at substantive rules but also considering the issue of consumer law enforcement. We note the growing interest in the use of legislation establishing general duties in particular sectors, and we consider the special problems of the home improvements sector and the idea of an overall general duty regime which has arisen as a result.

In Chapter Five we conduct a detailed examination of the parallels of a general duty to trade fairly in a number of overseas countries. And then in Chapter Six we look at the practical issues relating to the introduction of an overall general duty in the UK.

Lastly, we draw together the conclusions of the thesis and ask ourselves whether there is a problem and, if so, whether a general duty is the answer. We decide what form that duty should take and how it should be enforced, and what mechanisms are needed to improve self-regulation. Finally, we look at what steps should now be taken towards the introduction of a general duty.

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STATUTES

Australia

(i) Contracts Review Act 1980 (New South Wales).
(ii) Trade Practices Act 1974.
(iii) Trade Practices Revision Act 1986.

Belgium

Unfair Marketing Practices Act 1971.

Canada

(i) Alberta

Licensing of Trades and Businesses Act 1980.
Unfair Trade Practices Act 1980.

(ii) British Columbia

Motor Dealers Act 1979.
Trade Practices Act 1974.

(iii) Ontario

Business Practices Act 1974.

(iv) Quebec

Consumer Protection Act 1978.

The Federal Republic of Germany

Law Against Unfair Competition 1909.

New Zealand

Fair Trading Act 1986.

Sweden

Marketing Practices Act 1975.

United Kingdom

Agricultural Produce (Grading and Marketing) Act 1924.
Agriculture Act 1970.
Alcoholic Liquor Duties Act 1979.
Animal Health Act 1981.
Animal Health and Welfare Act 1984.
Assize of Bread and Ale 1266.
British Telecommunications Act 1981.
Broadcasting Act 1981.
Cable and Broadcasting Act 1984.
Companies Act 1985.
Competition Act 1980.
Consumer Credit Act 1974.
Consumer Protection Act 1961.
Consumer Protection Act 1987.
Consumer Safety Act 1978.
Control of Pollution Act 1974.
Copyright, Designs and Patents Act 1988.
Credit Unions Act 1979.
Criminal Justice Act 1982.
Development of Tourism Act 1969.
Electricity Act 1947.
Employment Protection Act 1975.
Employment Protection (Consolidation) Act 1978.
Energy Act 1976.
Estate Agents Act 1979.
European Communities Act 1972.

Explosives Acts 1875-1923.
Explosives (Age of Purchase) Act 1976.
Fair Trading Act 1973.
Farm and Garden Chemicals Act 1967.
Financial Services Act 1986.
Fireworks Act 1951.
Food Act 1984.
Forgery and Counterfeiting Act 1981.
Hallmarking Act 1973.
Health and Safety at Work etc. Act 1974.
Heavy Commercial Vehicles (Controls and Regulations) Act 1973.
Hire Purchase Act 1964.
Housing (Homeless Persons) Act 1977.
Immigration Act 1971.
Industrial Relations Act 1971.
Insolvency Act 1987.
Insurance Brokers Act 1977.
Insurance Companies Act 1982.
Magistrates Courts Act 1980.
Magna Carta (1215).
Medicines Act 1968.
Merchandise Marks Acts 1887-1953.
Mock Auctions Act 1961.
Moneylenders Act 1900.
Monopolies and Mergers Act 1965.
Monopolies and Restrictive Practices (Inquiry and Control) Act 1948.
Municipal Corporations Act 1835.
Petroleum Consolidation Act 1928.
Poisons Act 1972.
Post Office Act 1953
Powers of Criminal Courts Act 1973.
Prices Acts 1974-75.
Race Relations Act 1976.
Restrictive Trade Practices Act 1956.
Restrictive Trade Practices Act 1976.
Road Traffic Acts 1930-1974.
Road Traffic (Foreign Vehicles) Act 1972.

Sale of Goods Act 1893.
Sale of Goods Act 1979.
Shops Act 1950.
Solicitors Act 1974.
Sound Broadcasting Act 1972.
Supply of Goods (Implied Terms) Act 1973.
Supply of Goods and Services Act 1982.
Trade Descriptions Act 1968.
Trade Descriptions Act 1972.
Trade Union and Labour Relations Act 1974.
Trading Representations (Disabled Persons) Act 1958.
Trading Stamps Act 1964.
Transport Acts 1982-85.
Unfair Contract Terms Act 1977.
Unsolicited Goods and Services Acts 1971-75.
Weights and Measures Acts 1963-1985.

USA

Federal Trade Commission Act 1914.

STATUTORY INSTRUMENTS

The Consumer Credit (Advertisements) Regulations 1980, S.I. 1980 No. 54.

The Consumer Transactions (Restrictions on Statements) Order 1976, S.I. 1976 No. 1813.

The Control of Misleading Advertisements Regulations 1988. (Number not yet allocated.)

The National Metrological Co-ordinating Unit (Transfer of Functions and Abolition) Order 1987, S.I. 1987 No. 2187.

The Passenger Car Fuel Consumption Order 1983, S.I. 1983 No. 1486.

The Price Marking (Bargain Offers) Order 1979, S.I. 1979 No. 364, as amended by S.I. 1979 No. 633 and S.I. 1979 No. 1124.

The Textile Products (Indication of Fibre Content) Regulations 1986, S.I. 1986 No. 26.

The Weights and Measures (Packaged Goods) Regulations 1979, S.I. 1979 No. 1613.

The Weights and Measures (Packaged Goods) Regulations 1986, S.I. 1986 No. 2049.

CASES

All State Industries of North Carolina Incorporated case [1967] 72 F.T.C. 1020.

Bernstein v Parsons Motors (Golders Green) Ltd [1986] The Times, 26th October.

Bollinger v Costa Brava Wine Co [1960] 1 Ch. 262; [1961] 1 A11 E.R. 561.

Bulmer Ltd v Bollinger (SA) [1974] Ch 401; [1974] 2 A11 E.R. 1226.

Chilton v Saga Holidays plc [1986] 1 A11 E.R. 841, C.A.

Daniels and Daniels v R White and Sons Ltd and Tabard [1938] 4 A11 E.R. 258.

Devis (W) and Sons Ltd v R.A. Atkins [1977] I.C.R. 662; [1977] I.R.L.R. 314.

Donoghue v Stevenson [1932] A.C. 562, H.L.

Goke v Willett [1973] R.T.R. 422, C.A.

Handley and others v Snoid and others [1981] A.T.P.R. 40-219.

Lloyds Bank Ltd v Bundy [1974] 3 A11.E.R., 757.

Mills (A J) & Co Ltd v Williams [1964] 62 L.G.R. 354.

Nagle v Fielden and Others [1966] 1 A11 E.R. 689.

National Westminster Bank plc v Morgan [1985] A.C. 686; [1985] 1 A11 E.R. 821; [1985] 2 W.L.R. 588.

Nichol v Godts [1875] 10 Ex.191; [1875] 23 L.J.Ex 314.

Patchett v Leatham [1949] 65 T.L.R. 69.

Pharmaceutical Society of Great Britain v Dickson [1970] A.C. 403.

Printing and Numerical Registering Company v Sampson [1875] L.R. 19 Eq.462.

Queensway Discount Warehouses v Burke [1985] 150 J.P. 17.
R v Chappel [1984] 80 Cr.App.R. 31; [1984] Crim.L.R., 574.

R v Director General of Fair Trading ex parte F.H. Taylor & Co Ltd and Another [1981] I.C.R. 292.

R v Hillingdon LBC, ex parte Pulhofer [1986] A.C. 484; [1986] 1 All E.R. 467.

R v J Sainsbury Ltd [1982] (unreported).

Rogers and Others v Parish (Scarborough) Ltd [1986] The Times, 8th November.

Sears Roebuck Co v The Federal Trade Commission [1919] 258 F.307.

Shaw v Director of Public Prosecutions [1962] A.C. 220; [1961] 2 All E.R. 446.

Thomas and Others v National Union of Mineworkers (South Wales Area) and Others [1986] Ch. 20; [1985] 2 All E.R.1.

Woodman v Photo Trade Processing [1981], unreported, see Which? July 1981.

CHAPTER ONE

THE DEVELOPMENT OF CONSUMER PROTECTION LAW

(a) Early History

It is popularly thought that consumer protection law has resulted from the development of the consumer movement and the growth of 'consumerism' in the last two or three decades. However, although it is true to say that much of what we call consumer protection law has been heavily influenced in the last twenty or thirty years by the consumer movement, the origins of consumer protection law go back much further.

Most of the earliest legislation that we would now classify as consumer protection was in the field of weights and measures, since assessment by weighing and measuring was crucial to the development of early societies, particularly in establishing national standards. The oldest weights in existence are 9-10,000 years old[1]. More recently than that, in 1215, Magna Carta contained provisions concerning uniformity of measures for such things as wine, ale, corn and cloth:

> "Let there be one measure of wine throughout our Kingdom and one measure of ale and one measure of corn, namely the London quarter: and one width of cloth, whether dyed, russet or haberjet, namely two ells within the selvedges. Let it be the same with weights as with measures."[2].

Bread and ale were probably the two most important products bought by the consumer of the 13th century. Accordingly, the assize of bread and ale[3] was passed to regulate prices and modes of manufacture.

A similar system operated in respect of the pricing, weighing and making of coal from 1664 [4].

The late John O'Keefe describes the accuracy of weights and measures as the first duty of Government. He states: "... for the right of the people to it is as old as government itself and the law has been concerned with it since laws first emerged"[5].

Important though weights and measures were, statutory regulation began to spread to other issues as well, such as adulteration of food, particularly during the 18th and 19th centuries. The adulteration of tea was prohibited by Acts of 1730 and 1777, of coffee by Acts of 1718 and 1724, and of bread by Acts of 1758, 1822 and 1836 [6].

However, as Borrie and Diamond point out, all this detailed control of staple commodities was not with the object of consumer protection in mind, but trade protection although, of course, the consumer benefitted[7].

The administration of this early 'consumer protection law' was in the hands of the Petty Sessional Courts of the Justices of the Peace and the Manorial Courts Leet[8]. They appointed a number of colourful characters to act as officials, including the "Searchers and Sealers of Leather", the "Town Scavengers", the "Dog Muzzlers", the "Clerks of the Wheat, Fish and Butchery Markets" and the "Aleconner". The 'Aleconner' was, in many ways, the early predecessor of the modern trading standards officer. His duties were to "examine bread, weights, measures, ale and beer for sale, and to return such as offend against the assize or standard, or vend unwholesome liquor"[9]. Similar systems protected the consumer in relation to meat and fuel.

If statute law from its earliest days has provided for a measure of consumer protection, the common law was generally more unhelpful to the consumer. Since the end of the Middle Ages the general principle became caveat emptor - an expression which Hamilton believes appeared in print for the first time in the sixteenth century[10]. But in those days the idea of caveat emptor merely reflected a world in which transactions

between strangers was rare and most business was done in markets and fairs where goods were openly displayed and could be readily inspected. As Borrie says, it was taken for granted that only a fool would rely on the word of a stranger that he might never see again[11].

However, the common law position was slow in meeting the changes in society and the growth of the mass production and distribution of goods. The common law was particularly unhelpful to the consumer when the spirit of laissez faire pervaded the courts in the 19th century. This was especially noticeable in the approach of the civil courts to contractual disputes and to the notion of freedom of contract. The courts' philosophy was clearly articulated by Sir George Jessel MR in the case of Printing and Numerical Registering Company v. Sampson[12]:

> "...if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice"[13].

Rubin and Sugarman have commented that the rise of freedom of contract in the 19th century as the pre-eminent doctrine of English private law encouraged Parliament and the courts to extend considerably the degree of legitimate autonomy afforded to the private sphere. It all rested, so they claim, on the fiction that equal bargaining power must normally be assumed to exist in all commercial transactions[14].

However, there were circumstances where the courts would intervene to interfere with contracts, particularly in matters coming before equity judges[15]. In addition the courts evolved implied rights in contracts for the sale of goods, as to such matters as fitness for purpose, merchantable quality

and the concept of sale by description[16]. In Nichol v Godts[17], for example, a case in which the plaintiff sold to the defendant "foreign refined rape oil ... warranted only equal to samples", but was delivered a mixture of hemp and rape oil, Pollock CB said that the oil must:

> "...agree with the description of the contract of it as to its character"[18].

These implied terms were, of course, to be given statutory effect in the 1893 Sale of Goods Act during a period of enthusiasm for commercial codification. However, as implied terms they could be, and frequently were, excluded from operation by the express terms of a contract imposed by the stronger of the contracting parties. This was made possible by Section 55 of the Act.

It was to be a long time before it would become accepted that the implied terms should not be excluded, certainly in respect of consumer contracts - not until 1973. As Lord Devlin has put it: "...the courts could not relieve in cases of harshness and oppression; the basic principle of freedom of contract included freedom to oppress"[19].

Others have been equally damning in their indictment of the role of the courts. Professor Jackson states: "Whether we look at law reform as a matter of altering the law itself, whether substantive or procedural, or think of improving the form of the statute book or codifying the law, we cannot expect any substantial contribution from case law"[20].

The pre-eminence of the doctrine of caveat emptor was a major hinderance to the development of the law. As Hamilton put it:

> "In the purchase of soaps, drugs, canned fruits, bric-a-brac, vacuum cleaners, dictionaries, radios, motor cars, and many another article, the buyer's inability to judge the quality of the ware is in striking contrast to the general legal presumption of his competence"[21].

However, it would be wrong to say that the common law showed in its development a complete lack of interest in the well-being of the consumer. This is particularly so because, as Atiyah comments, the most significant influence on society and the law from 1870 onwards was the growing strength of the egalitarian ideal[22].

As we moved into the 20th century, the courts managed to bring about some major breakthroughs. One of the best examples is provided by the famous case of Donoghue v. Stevenson[23]. This case demonstrated a recognition by the courts that it was increasingly unrealistic to always put the emphasis on making the retailer liable for product defects through the mechanism of implied contractual terms. For whilst a man who bought faulty goods could sue the seller in contract no such possibility was open, for example, to the man's wife or son or anyone else.

More and more, the retailer was not the manufacturer and justice called for a remedy against the manufacturer, separate and distinct from a remedy against the retailer. This was provided for by developing the tort of negligence to impose on the manufacturer a duty of care towards his ultimate consumers. In that case, Lord Atkin laid down the principle which was to become a milestone in the development of consumer protection:

> "My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care"[24].

Sir Gordon Borrie, Director-General of Fair Trading, has noted that the case of Donoghue v Stevenson spawned a series of cases establishing a duty of care in relation to many types of goods and the duty has been extended from manufacturers to cover repairers, assemblers and retail dealers[25].

(b) Post-War Developments

It is often said that after a war things are never the same again. Certainly it is true of the development of consumer protection as a proper object of official attention after the Second World War. Clearly this was due to a number of factors, but chief amongst them must have been the vast increase of State involvement during the War in all areas of life, particularly those affecting ordinary consumers. Indeed, it was this unparalleled State involvement which inspired, for example, the creation of the citizen's advice bureaux movement in order to provide help and guidance round the myriad of rules and regulations[26].

The need for such a service to continue after the war became apparent when the Labour Government of the immediate post-war years established the modern welfare state and the National Health Service. The poorer, less articulate elements of society were not going to benefit from their new rights without advice -hence the continuing need for citizen's advice bureaux.

The post-war Labour Government was probably the first to recognise a distinct 'consumer interest' in the legislation by which it created the nationalised industries. Recognising that these State industries were often monopoly or quasi-monopoly concerns it was felt that a counterbalance was needed. This found its form in the nationalised industry consumer councils (NICCs)[27]. These Councils are empowered to take up complaints from individuals aggrieved at some matter relating to the provision of goods and services by the relevant industry. They can also report to the management of the

industry concerned and the relevant Government Minister on matters of concern to consumers. The latter can, in appropriate cases, direct the management to take action. The Chairman and members are appointed by the Secretary of State for Trade and Industry.

Although the 44 NICCs have been frequently criticised, and have been the subject of official review[28], they were an early post-war recognition of the need for special legislative protection for the consumer interest.

It was not, however, until 1961 and the Consumer Protection Act of that year that the consumer was expressly recognised as a beneficiary of legislation. Yet, by that time, it was quite clear that the consumer interest had already been generally recognised. In 1957 the Consumer's Association had been formed and was busily following American precedents and engaging in comparative product analysis, some of which was televised. The Association is now well established, not just as the publisher of 'Which?' magazine, but as a forceful advocate of the consumer interest. The establishment of the Consumers' Association also led to the formation of local consumer groups all over the country.

The establishment of the Consumer's Association was, in part, a recognition of the increasing sophistication of the goods available in the market place. As Smith and Swann have put it:

> "In early times the consumer may have been able to protect himself. Products were less sophisticated. They could be inspected before purchase. The retailer would quite probably be known to the purchaser and would be readily accessible in case of fault or deception. Today, although there are some who believe that consumer protection is unnecessary, it is fairly generally accepted that conditions have changed. The consumer is in need of at least some protection if, amid the welter of advertising, he is to make intelligent choices so that society's scarce resources may produce the maximum consumer satisfaction"29.

Encouraging fair competition has also been seen as a major and growing aspect of protecting the consumer. For it was generally believed that the interests of the consumer are threatened when a substantial part of the output of an industry is under one control. As Borrie and Diamond have said, monopoly power can readily exploit the consumer by fixing prices so as to provide excessive profits, limiting consumer choice, reducing efficiency and holding up the development of new techniques[30].

Hobsbawm tells us that, whereas in 1914 Britain was probably one of the least concentrated industrial economies, by 1939 it was one of the most concentrated[31]. This growth of industrial concentration saw the development in the post war period of controls on monopolies, and later restrictive trade practices. Rubin and Sugarman note that at the end of the 19th century the law did not impede the wave of mergers and amalgamations. Cartel agreements, contracts in restraint of trade, distributive agreements and intellectual property enabled companies to expand their enterprises whilst conforming to the letter of the law[32].

The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 provided for enquiries into monopoly conditions by a newly created body, the Monopolies and Restrictive Practices Commission (now the Monopolies and Mergers Commission). The Monopolies and Mergers Act 1965 extended the operation of the 1948 Act to include mergers and takeovers. The Commission has to be mindful of the public interest, which includes what one would regard as the consumer interest.

The Restrictive Trade Practices Act 1956 (now consolidated into the Restrictive Trade Practices Act 1976) took away some of the supervision of restrictive practices from the Commission. The new Act, which created a Registrar of Restrictive Trading Agreements (now the Director-General of Fair Trading), attempted to control restrictive agreements between two or more persons engaged in the production, processing or supply of goods where the agreement contains restrictions relating to:

(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods;

(b) the prices to be recommended or suggested as the prices to be charged or quoted in respect of the resale of goods supplied;

(c) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods;

(d) the quantities or descriptions of goods to be produced, supplied or acquired;

(e) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied; or

(f) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied[33].

Restrictive agreements relating to services were brought into the remit of the legislation, as a result of the Restrictive Trade Practices Act 1976.

This legislation was undoubtedly inspired, in part, by the belief that the consumer interest would be enhanced through the encouragement of competition and the breaking down of restrictive practices which could not be demonstrated to be in the public interest.

It was with this view in mind that Parliament enacted the Resale Prices Act 1964 which abolished, with limited exceptions, the previously widespread practice of manufacturers dictating to retailers the price at which goods could be sold.

More recently, in 1980, the Government enacted the Competition Act, designed to control anti-competitive practices which are defined as follows:

> "... a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it."[34]

Where the Director-General identifies an anti-competitive practice he may accept an undertaking or refer the matter to the Monopolies and Mergers Commission.

(c) The Molony Committee Report and Post-Molony

Further recognition of the consumer interest found expression in 1959 when the then President of the Board of Trade established a committee, under the chairmanship of J T Malony QC, to 'review the working of the existing legislation relating to merchandise marks and certification trade marks, and to consider and report what changes, if any, in the law and what other measures, if any, are desirable for the further protection of the consuming public'.

The Committee reported in 1962[35]. Its findings ranged far and wide across the whole field of consumer protection. Amongst its 214 separate recommendations, many of which have now been translated into appropriate legislation, are the following:

(a) The prohibition of misdescription of the significant characteristics of the goods on offer. This found expression in the 1968 Trade Descriptions Act which goes some way towards providing comprehensive protection against false or misleading statements as to goods, services and certain price indications. Originally styled the Protection of Consumers (Trade Descriptions) Bill, the legislation replaced the Merchandise Marks Acts which had been designed primarily to assist honest traders and created what most consumer affairs commentators regard as the cornerstone of modern consumer protection law.

(b) The prohibition of objectionable sales promotion methods, whether in the form of advertisements or otherwise, which are calculated to divert the shopper from a proper judgement of his best interests. Amongst the legislation which could be said to have given effect to this recommendation is the Fair Trading Act 1973.

(c) Increased provision of information annexed to goods which will assist consumers to judge for themselves whether they satisfy particular requirements. The Textile Products (Indication of Fibre Content) Regulations 1986[36] (previously 1973) is an example of this, as is the support given by the Government to the work of the British Standards Institution.

(d) Arrangements to give the consumer a positive assurance that goods on offer are safe and of sound quality. Legislation had already been enacted in the form of the Consumer Protection Act 1961, and greatly expanded by virtue of Part II of the Consumer Protection Act 1987.

(e) The assessment of the merits of the goods on offer by independent agencies. This has been the most difficult recommendation to implement and is still on the political agenda[37].

(f) The availability of adequate means whereby the justifiably aggrieved shopper may obtain fair redress. This has found expression chiefly in the establishment of the small claims procedure in the county courts, in the consumer publications of the Office of Fair Trading and in the encouragement of industry-based schemes of conciliation and arbitration[38]. It also found expression in the development of consumer advice centres and the considerable growth in the number of citizens' advice bureaux.

Undoubtedly, the Committee's report acted as a major spur during the '60s and '70s to the creation of the quite considerable volume of consumer protection legislation which was passed during that period. In particular, the Report recognised that technological and marketing developments posed new problems for the consumer:

> "Technological advances have produced a bewildering variety of consumer goods to meet the old needs. A wealthier community with greater social mobility had developed new needs. Advertising whets the appetite which inventiveness aims to satisfy. The consumer has the means and the urge to respond to the offer of unfamiliar merchandise often of great technical complexity. The art of salesmanship has developed new and not always creditable subtleties. These considerations compel recognition of the fact that the position of the domestic purchaser has worsened relative to the trader".[39]

The findings of the Committee reflected a conceptual change away from the notion of consumer self-help using the civil law, towards the increasing use of criminal law to regulate the relationship between the consumer and the trader. Atiyah has commented that consumer protection legislation has mostly been designed to afford better enforcement provisions where the

consumer is unlikely himself to take the initiative in bringing civil proceedings, because the individual grievance does not justify the cost and trouble[40]. Legislation was also used to help redress the balance in contractual relationships in favour of the consumer.

The '60s and '70s were the hey-day of consumer legislation[41] as a great body of statutory protection was built up -including the Consumer Credit Act 1974, following the Crowther Committee Report on Consumer Credit, the Supply of Goods (Implied Terms) Act 1973, the Unfair Contract Terms Act 1977 and the Consumer Safety Act 1978 -not to mention a plethora of statutory instruments. Commenting on this growth of legislation, Sir Gordon Borrie has said:

> "The development of consumer law was very much a period of advance by statute, rather than case law, and more by way of criminal law and administrative controls, than through civil law"[42].

That process of innovation by statute is continuing with the recent passing of the Consumer Protection Act 1987, with its provisions on consumer safety, product liability and misleading prices.

Mitchell can detect three distinct strands in the changes that have taken place: the quality, and sometimes the quantity of consumer information has improved; there has been tighter control of undesirable practices and the consumer's civil law rights have been improved[43].

As a result of this new legislation the concept of '<u>caveat emptor</u>' looked increasingly dated. More appropriate today, some would say, would be the maxim 'seller beware'. Particularly important was the Fair Trading Act 1973 which established, inter alia, the Office of Fair Trading (OFT) and the post of Director-General of Fair Trading (DGFT). The OFT was charged with keeping under review the consumer interest in the supply of goods and services and receiving and collating

evidence of practices which may adversely affect the consumer interest. The DGFT was given an impressive array of powers to act in the consumer interest, not just directly in the consumer affairs field but, as we saw, in the area of competition law and policy. In Sir Gordon Borrie's words: "My Office has three main activities in the field of consumer affairs: new initiatives to safeguard the public; information for consumers; and enforcement of the law"[44].

One important power which the DGFT possesses is the ability to seek assurances and, if necessary court orders, in respect of traders who engage in a course of conduct involving persistent breaches of civil and criminal law obligations to the consumer. This power in Part III of the Fair Trading Act owes much to the cease and desist orders which operate in the United States and in Sweden.

Another important function which the DGFT acquired after the passage of the Fair Trading Act was the power given to him under the Consumer Credit Act 1974 to license all those involved in consumer hire business, credit brokerage, debt adjusting, debt counselling and debt collecting. This is called 'positive' licensing. The DGFT also has 'negative' licensing functions under the 1979 Estate Agents Act by which he can issue warning and prohibition orders against estate agents who breach the requirements of the Act or regulations made under it.

The importance of the role of the DGFT is evidenced by the fact that the holder of the post has a status equivalent to a Permanent Secretary in a Government department.

The year 1973 was particularly crucial in other ways for the development of our framework of consumer protection. The 1st of January 1973 saw the UK's accession to the European Economic Community. In an effort to achieve a human face for a Community popularly characterised by wine lakes and butter mountains, the European Commission launched its first consumer action programme in 1975 [45]. Several draft directives

followed but the Commission experienced considerable difficulty in securing their passage. Different systems and approaches to consumer protection in the member states ensured constant deadlock in the Council of Ministers' Working Party. More recently, however, a more flexible and accommodating approach by the Commission has secured the passage via the Council of Ministers of a number of measures from the Consumer Action Programme, notably the Directives on Misleading Advertising[46], Doorstep Selling[47] and Product Liability[48].

Since the first programme the Commission has pressed ahead with the implementation of a second consumer action programme[49] and with what is now its 'New Impetus for Consumer Protection Policy'[50]. It is clear that the consumer interest is now firmly established in Europe, and it is also clear that legislative initiatives from Brussels are playing an increasingly important part in shaping the United Kingdom system of consumer protection. For example, the recently adopted EEC Directive on Product Liability has necessitated the introduction of "no fault" liability for defective products[51].

Of course one must not forget that by the 1970s, quite apart from our involvement with the European Community, the consumer interest had been recognised through the existence, since 1972, of a Government Minister responsible for consumer affairs. For some years that minister was of Secretary of State rank. Although the position is today held by a junior Minister, who is also Minister for Corporate Affairs and responsible for de-regulation, it does nonetheless illustrate the all-party recognition that now exists of the consumer interest.

Indeed, it would be true to say that nearly all Ministers are, in a sense, Consumer Ministers. For example, the Minister of Agriculture is very much concerned with matters impinging on the consumer interest and contributes significantly to consumer protection through the work of the Ministry on food standards

and labelling. Similarly the Secretary of State for Health and Social Security is concerned with the provision of services which are of considerable concern to consumers and consumer agencies, particularly in relation to the licensing of medicines under the 1968 Medicines Act.

In addition, the consumer interest is now protected and advanced by the National Consumer Council (NCC) which was set up in 1975 and which, to an extent, replaced the Consumer Council which was abolished by the Conservative Government in 1971. The Consumer Council had been set up in 1963, with a Government grant-in-aid, as one of the results of the Malony Committee Report. The latter had called for a consumer body "of national status and so constituted that its voice and actions would command the confidence and respect of the consumer, the Government and the trade"[52].

The principal function of the Council was to take up matters affecting the consumer interest and promote effective action on their behalf. In addition, the Council was to provide advice for the consumer.

The National Consumer Council is a company limited by guarantee. It is financed by a grant-in-aid from the Department of Trade and Industry. The Council's eighteen members are appointed by the Secretary of State, three of whom are appointed to chair separate councils for Wales, Scotland and Northern Ireland.

The Council has the following terms of reference set out in its Memorandum of Association:

(a) To promote action for furthering and safeguarding the interests of consumers.

(b) To ensure that those who take decisions which will affect the consumer can have a balanced and authoritative view of the interests of consumers before them.

(c) To insist that the interests of all consumers, including the inarticulate and disadvantaged, are taken into account.

It has been very successful in lobbying for new legislation to protect the consumer, notably the Supply of Goods and Services Act 1982[53], and has encouraged a trend towards a more cohesive consumer movement through its sponsorship of the annual National Consumer Congress. The issues the NCC campaigns on reflect the changing nature of our society and its concerns and the diversity of what today are regarded as consumer issues. For example, the NCC has involved itself in the issue of official secrecy as it affects consumers[54].

Views may differ about the best way to protect the consumer interest but it is clear that the consumer is now firmly established as a proper object of official policy and a substantial body of law, both criminal and civil, exists to protect him, quite apart from the self-regulatory arrangements which we shall consider in Chapter Two. But how effective is this legislation both in terms of its substantive provisions and in terms of enforcement? We shall look at these questions in Chapter Four.

CHAPTER ONE

References

1. J A O'Keefe, The Law of Weights and Measures, 2nd ed., 1987, Butterworths, p 0/2.

2. J C Holt, Magna Carta, 1965, Cambridge University Press, p 327.

3. See W S Holdsworth, A History of English Law, vol X, 1st ed., 1938, Methuen, p 167.

4. W S Holdsworth, A History of English Law, Vol XI, 1st ed., 1938, Methuen, p 470.

5. J A O'Keefe, The Law of Weights and Measures, 2nd ed., 1987, Butterworths, p 0/1.

6. Butterworths Law of Food and Drugs, ed by A A Painter, 1980, p A2.

7. G Borrie and A L Diamond, The Consumer, Society and the Law, 4th ed., 1981, Pelican, p 127.

8. See W S Holdsworth, A History of English Law, Vol X, 1st ed., 1938, Methuen, p 137. See also A Harding, A Social History of English Law, 1966, Penguin, p 325.

9. B W Harvey, The Law of Consumer Protection and Fair Trading, 2nd ed., 1982, Butterworths, p 3.

10. W H Hamilton, 'The Ancient Maxim Caveat Emptor', (1931) 40 Y.L.J. 1133 at 1164. The full expression was: "caveat emptor qui ignorari non debuit quod alienum jus emit".

11. G Borrie and A L Diamond, The Consumer, Society and the Law, 4th ed., 1981, Pelican, p 19.

12. [1875] L.R. 19 Eq.462

13. at 465.

14. G R Rubin and D Sugarman, Law, Economy and Society, Essays in the History of English Law 1750-1914, 1984, Professional Books, p 12.

15. J L Barton, 'The Enforcement of Hard Bargains', (1987) 103 L.Q.R.118 at 143.

16. See S J Stoljar, 'Conditions, Warranties and Descriptions of Quality in Sale of Goods - 1', (1952) 15 M.L.R. 425. See also Part II (1953) 16 M.L.R. 174.

17. [1875] 10 Ex.191; [1875] 23 L.J. Ex.314.

18. [1875] 10 Ex.191 at 193.

19. 'The Common Law, Public Policy and the Executive', (1956) 9 C.L.P. 1 at 10.

20. R M Jackson, The Machinery of Justice in England, 7th ed., 1977, Cambridge University Press, p 565.

21. W H Hamilton, 'The Ancient Maxim Caveat Emptor', (1931) 40 Y.L.J. 1133 at 1135.

22. P S Atiyah, The Rise and Fall of Freedom of Contract, 1979, Clarendon Press, Oxford, p 631.

23. [1932] A.C. 562.

24. at 599.

25. The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, p 9. For a critique of the common law position see Liability for Defective Products, 1977, Law Commission Paper No. 82. See also Daniels and Daniels v R White and Sons Ltd and Tabard [1938] 4 All E.R. 258 as an illustration of the limitations on a manufacturer's liability.

26. See 'The Citizens Advice Bureau Service', 1982, National Association of Citizens Advice Bureaux.

27. See, for example, the Electricity Act 1947, S.7, which established 12 area electricity consultative councils.

28. Consumers' Interests and the Nationalised Industries - A Consultative Document', 1981, Dept. of Trade.

29. P Smith and D Swann, Protecting the Consumer - An Economic and Legal Analysis, 1979, Martin Robertson, p 8.

30. G Borrie and A L Diamond, The Consumer, Society and the Law, 4th ed., 1981, Pelican, p 292.

31. E J Hobsbawm, Industry and Empire, 1970, Pelican, p 215.

32. G R Rubin and D Sugarman, Law, Economy and Society, Essays in the History of English Law 1750-1914, 1984, Professional Books, p 13.

33. S.6.

34. S.2.

35. Final Report of the Committee on Consumer Protection, 1962, Cmnd 1781.

36. S.I. 1986 No 26.

37. See, for example, Charter for the Consumer, 1986, Labour Party.

38. See, for example, Redress Procedures under Codes of Practice, 1981, Office of Fair Trading.

39. Final Report of the Committee on Consumer Protection, 1962, Cmnd 1781, para 889.

40. P S Atiyah, The Rise and Fall of Freedom of Contract, 1979, Clarendon Press, Oxford, p 703.

41. G Borrie, A Duty to Trade Fairly, (1984) 7 J.Cons.Pol. 197.

42. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, 1984, Hamlyn Lectures, Stevens, p 3.

43. J Mitchell, Marketing and the Consumer Movement, 1978, McGraw Hill, p 5.

44. Speech by Sir Gordon Borrie to the Greater London Branch of the Institute of Trading Standards Administration, February 1987.

45. Resolution on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975, O.J. C92.

46. Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 1984, O.J. L250.

47. Council Directive on Contracts Negotiated away from Business Premises, 1985, O.J. L372/31.

48. Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985, O.J. L210/29.

49. Second Action Programme of the European Communities for the Protection and Information of Consumers, 1981-86, O.J. C133, June 1981.

50. E C Bull Supp 6/86.

51. Consumer Protection Act 1987, Part I.

52. Final Report of the Committee on Consumer Protection, 1962, Cmnd 1781.

53. In this regard see Service Please; Services and the Law: a Consumer View, 1981, NCC.

54. Consuming Secrets - How Official Secrecy Affects Everyday Life in Britain, A Report for the National Consumer Council., Edited by R Delbridge and M Smith, 1982, Burnett Books.

CHAPTER TWO

THE DEVELOPMENT OF SELF-REGULATION

(a) Introduction

In the last chapter we looked at the development of the legal framework of consumer protection. In this chapter we look at the growth of self-regulation as a means of controlling trading practices and protecting the consumer.

As we shall see, self-regulation can manifest itself in a number of ways. An interesting definition is provided by the Bank of England who, in giving evidence to the Wilson Committee[1], said that self-regulation originated:

> "... in the realisation by a group of individuals or institutions that regulation of their activities is desirable in the common interest, and their acceptance that rules for the performance of functions and of duties should be established and enforced. Typical of such arrangements are those to which members of professional bodies subscribe in order to establish appropriate standards of professional conduct and competence. In some cases, the enforcement of such standards is entrusted to a committee of a profession or of practitioners in a market. Frequently, however, the enforcement of the regulations may be entrusted to an authority outside the group, which is or becomes customarily recognised and obeyed and which may also become the initiator of new regulations. In both cases the system can be described as self-regulation, the first intrinsically so, the second by common consent"[2].

(b) The Guilds

The earliest form of self-regulation in the consumer protection field was the guilds[3] which were very much a characteristic of medieval times. They normally existed to protect the

economic interests of the merchants in a particular town, although they had a consumer protection role in that they "inspected markets and measures, judged the quality of merchandise and laid down rules of both business and manners"[4].

The merchant guilds controlled all the trade in many medieval boroughs and the guild regulated the markets and fairs. London had no merchant guild as such but each craft formed its own guild, e.g. skinners, tailors and the apothecaries. Each guild controlled its own craft, including training apprentices, arbitrating in disputes between guild members and fixing prices. Guild officials supported borough magistrates in condemning all profiteering and sharp practice, although not always successfully[5].

Indeed, the guilds do appear to have been principally concerned with trade protection, rather than consumer protection. At Southampton we read that:

> "No-one shall bring into the town of Southampton to sell again in the same town unless he be of the guild merchant or of the franchise"[6].

The guilds were in many respects the forerunners of modern local authorities and their common seals confirmed corporate intentions and obligations[7]. In some towns we read that "it is impossible to distinguish between the personnel of local government and merchant guild, for the same prominent merchants held chief office in both"[8].

The 14th and 15th centuries saw a steady merging of the merchant guilds and the civic authorities and Gross, the eminent historian of the English merchant guilds, regards this as one of the distinctive characteristics of the period[9].

How effective the guilds were at protecting the consumer is difficult to ascertain, particularly because of the powerful cultural and moral influences at work. This manifested itself,

for example, in the widely held belief of medieval times, amongst traders and consumers, in the concept of the just price, although there was often a gap between theory and practice. Holdsworth tells us that the medieval state had aimed at a moral ideal - honest manufacturer, a just price, a fair wage and a reasonable profit[10].

Certainly the guilds had controls but they sometimes owed little to a concern for the consumer. For example, the Cordwainers and Cobblers had an ordinance that no person who "meddled with old shoes" should sell new ones[11]. Doubts about the efficacy of such ordinances came to a head in 1437 when legislation required the "masters, wardens and people of the guilds" to submit their ordinances to the justices of the peace or the "chief governors of cities and towns"[12]. Further legislation in 1504 referred to the many previous times the guilds had "made themselves many unlawful and unreasonable ordinances as well in prices of wares as other things, for their own singular profit and to the common hurt and damage of the people"[13].

In Tudor times, two major threats to the guilds grew up; the rise of "the over-mighty member" and the growth of the domestic system of industry[14].

The latter, Ramsey tells us, was the most serious enemy of all for the guilds in the long term[15]. The guilds had so successfully set up monopolies in the towns that new industries were established in the countryside, thereby escaping the restrictive practices of the guilds. This is an important reason why new industries such as iron manufacture and coal mining grew up in the country or in towns where the guilds were weak. In Birmingham and Wolverhampton, for example, there were no guilds[16].

During the 17th century the guilds' position was steadily eroded and with it the discipline they exerted over their members. The "just price" concept gave way under the pressure of inflation, following a long period of price stability[17]. And in 1545 it had become legal to charge interest on loans and centuries of legislation against usury came to an end[18].

Gross tells us that the machinery of the merchant guilds fell to pieces, but that its name often remained relating to certain craft fraternities, the town, polity as a whole, to the governing corporation, or to a private social-religious guild[19].

Major economic changes were taking place and with them a move away from a relatively high level of paternalism in protecting the consumer, both through the guilds and through legislation. The remnants of the merchant guild vanished before the new ideas of a more liberal age - the age of laissez-faire[20].

(c) The 20th Century and the Growth of Modern Industry Self-Regulation

As we saw in the first chapter, the move away from a paternalistic approach was pronounced in the 18th and 19th centuries. For example, in 1835 the Municipal Corporations Act provided that "every person in any borough may keep any shop for the sale of all lawful wares and merchandises by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale or otherwise, within any borough"[21]. Such legislation, often encouraged by local chambers of commerce, meant the end of the "onerous self destructive restrictions of the guilds"[22].

However, the 20th century saw a return to a more paternalistic and interventionist role for Governments. This was mirrored, in part, by the growth of trade associations. Trade associations began to grow in the 19th century, particularly towards the end of the century when "falling profits and higher costs produced a greater sense of urgency" about the need for industrial and commercial representation[23]. Grant and Marsh note that one or two modern trade associations can trace their origins back to the 18th century but, generally speaking, nationally organised trade associations did not develop on a significant scale until the latter years of the 19th century.

When they grew up they tended to do so in specific industries where there was a strong relationship with the Government, for example coal mining and engineering[24].

One major cause of the growth of associations was the First World War which brought systematic attempts to influence the development of a system for industrial representation. Most of the key sectors of the economic life of the country experienced direct State intervention and trade associations played a crucial role in the administration of war-time controls[25].

Stephenson and Cooke also see a connection between the growth of monopolistic enterprises, particularly in the 20s and 30s and the development of trade associations[26]. They detected in their development the same characteristics of defensive growth seen in the mergers in the manufacturing industry. This defensiveness found expression in the principal role of trade associations in price fixing and control which sometimes took the form of arranging quotas for internal and overseas markets[27].

As we saw in the previous chapter, Britain in 1914 was probably the least concentrated of the industrial economies but by 1939 it was one of the most concentrated[28]. For example, in 1914 there were about 50 trade associations, mainly in the iron and steel industry. By 1925 the Federation of British Industries (a forerunner of the CBI) had 250 associations affiliated to it and by 1945 there were nearly a thousand trade associations[29]. Today, it has been estimated that there are around two thousand trade associations[30].

The enormous growth of trade associations led to various initiatives at trying to establish self-regulation. One of the earliest examples of industry self-regulation was the growth of the British Standards Institution (BSI). It originated in 1901 as the Engineering Standards Committee, having been established by the Institution of Civil Engineers and other professional

bodies. A Royal Charter was granted in 1929 giving the BSI the role of drawing up voluntary standards and codes of good practice by agreement amongst all the interests concerned who wanted them - manufacturing, professional and distributive - and to promote their adoption.

(d) Advertising Self-Regulation

Perhaps more significant in the development of industry self-regulation was the establishment, at the 1937 Berlin conference of the International Chamber of Commerce (ICC), of the International Code of Standards of Advertising Practice. It was significant because the Code had the declared aim of safeguarding the legitimate interests of the public as consumers[31].

The ICC Code was also significant because of the widespread support it enjoyed from commercial interests, both nationally and internationally. The ICC was founded in 1919 by British, American and European business leaders who anticipated the need for increased dialogue between commerce and governments in the post-war re-construction of trade[32].

A particularly significant factor behind the development of the ICC Code has been pinpointed by Miracle and Nevett in the growing importance of repeat-purchase consumer goods. They make the point that awareness was increasing among certain industry leaders of the importance of ensuring consumer satisfaction in order to facilitate continuing sales. Advertising claims were particularly crucial to this because a repeat purchase was unlikely if the product failed to satisfy consumer expectations[33].

At their congress in June 1935 the ICC resolved:

> "To enquire into the effects of fraudulent or dishonest advertising on the profession, on industrialists and traders, and on public confidence; and the means best suited to suppressing such practices in international dealings."

A committee on advertising was established which concluded that the most effective way of dealing with the subject was to establish the ICC Code of Standards of Advertising Practice, to be administered by a consultative body to be called the International Council on Standards of Advertising.

The ICC were quite clear that few sanctions could be applied to enforce the Code except "bringing moral pressure to bear in order to obtain their observance"[34]. More significant, though, was the objective of using the Code as a model for action at national level[35]. Since 1937 the ICC has developed additional codes covering sales promotion and market research.

Action at national level had first found expression in the United Kingdom in 1926 in the establishment of the Advertising Investigation Department[36] by the Advertising Association - a federal trade association set up by the associations representing the various sectors of the advertising business. This Department's role was to investigate abuses in advertising and to take remedial action, and it continued in existence until 1972 when it handed over its remaining functions to the Advertising Standards Authority.

In 1955 the establishment of independent television brought into existence a statutory authority, the Independent Television Authority (now the Independent Broadcasting Authority (IBA)), charged with the responsibility for controlling advertisements on television. Independent local radio was brought under the supervision of the IBA as a result of the Sound Broadcasting Act 1972. Under the Broadcasting Act 1981 the IBA has the statutory duty to:

(a) draw up, and from time to time review, a code governing standards and practice in advertising and prescribing the advertisements and methods of advertising to be prohibited or prohibited in particular circumstances; and

(b) to secure compliance with the Code[37].

Although a statutory system of control, there is nevertheless a considerable amount of voluntary industry input into the working of the system through the IBA's Advertising Advisory Committee. It is also interesting to note that the first IBA Code was strongly influenced by the terms of the ICC Code on Advertising[38].

The publication of the first British Code of Advertising Practice to control all advertising not covered by the IBA Code took place in 1961 and a year later came the establishment, by the advertising trade associations, of a separate, independent, control body, the Advertising Standards Authority (ASA). It was under the initial chairmanship of Professor Sir Arnold Plant of the London School of Economics, who was assisted by ten other members, chosen as individuals from a wide range of backgrounds, but with a majority independent of advertising interests. The ASA's Memorandum and Articles of Association give it the object of:

> "The promotion and enforcement through the United Kingdom of the highest standards of advertising in all media so as to ensure in co-operation with all concerned that no advertising contravenes or offends against these standards having regard, inter alia, to the British Code of Advertising Practice."

The ASA took charge of dealing with public complaints about advertising whilst a related body, the Code of Advertising Practice Committee (CAP), took responsibility for drawing up and keeping under review the British Code of Advertising Practice and for dealing with intra-industry complaints. The CAP Committee was, and remains, a body composed of representatives of the various trade bodies which support the self-regulatory system.

The next major development came in 1974 at that year's Advertising Association Conference. The then Secretary of State for Prices and Consumer Protection, Mrs Shirley Williams,

threatened new legal controls on advertising unless improvements were made in the effectiveness of self-regulation[39]. As a result of these strictures the ASA's role and staffing was expanded, particularly to facilitate more pre-vetting of advertisements and monitoring, and it undertook a major publicity campaign to make people aware of it and to encourage complaints. To finance its expansion the advertising industry agreed to establish an automatic 0.1 per cent levy on all display advertising to be paid to a separate body, the Advertising Standards Board of Finance, which would be responsible for funding the self-regulatory system.

The year 1974 also saw the introduction of an additional code of practice, the British Code of Sales Promotion Practice, to control the operation and advertising of certain sales promotion devices, such as competitions.

In 1978 the OFT reviewed the advertising self-regulatory system and whilst their report recognises that the system was generally working well, they called for some form of statutory reinforcement of the system[40]. The DGFT acknowledged, however, that the use of such powers would only rarely be necessary, but that their existence would stimulate observance of the Code and strengthen compliance.

In 1980 a Department of Trade working party reported, whose terms of reference were to consider 'whether and, if so, to what extent, the existing self-regulatory system of advertising control in the United Kingdom requires reinforcement[41]'.

Noting the limitations identified in the DGFT's report, the working party recommended that a new injunctive procedure should be introduced and based on a new statutory duty not to publish an advertisement likely to deceive or mislead with regard to any material fact[42].

The EEC Directive on Misleading Advertising[43], which was approved by the Council of Ministers in 1984, gave the United Kingdom the opportunity to enact the legislation necessary to provide for statutory reinforcement of the system[44].

We shall be examining the nature and extent of this statutory reinforcement in the next chapter.

However, at this stage, no account of self-regulation in advertising would be complete without mentioning some related initiatives in self-regulation.

Firstly, there is the system which the Proprietary Association of Great Britain (PAGB) operates. The PAGB Code is operated by a process of pre-publication scrutiny backed up by an extensive monitoring operation. PAGB is a member of the Code of Advertising Practice Committee (CAP) and is therefore part of the wider advertising self-regulatory system. This means, inter alia, that the normal sanctions available in that system are also available to ensure the effectiveness of the PAGB Code[45].

Mail order has also seen its own special initiatives at self-regulation.

In 1975, the principal trade associations in the advertising business established, with the active co-operation of the OFT, the Mail Order Protection Scheme. Administered by the Newspaper Publishers Association (NPA) the scheme provides, with certain limited exceptions, for those who lose money in responding to mail order advertisements in the national press to be compensated from a fund. Mail order advertisers are required to contribute towards the fund and submit themselves to detailed examination, for example as to their financial standing. Similar schemes now operate in relation to the regional press and periodicals, although the OFT has suggested that the schemes should extend their coverage and bring themselves more into line with one another[46].

Apart from advertising in the press, mail order marketing also uses direct mail advertising. In this field, there have been two developments of note.

Firstly, as a result of the growth of direct mail and criticism of it by people who objected to receiving it, the trade associations in the direct marketing field established the Mailing Preference Service in 1981. This service enables members of the public to write and ask for their name to be deleted from the lists used for direct mail purposes. Alternatively, those wishing to receive direct mail can request their name to be added to lists for all, or any, classes of goods.

Finally, direct mail, although subject to the British Code of Advertising Practice, is not a medium where there is a media owner willing and able to refuse to carry advertising material which infringes the Code. Except where there is a statutory provision, as there is for example in the case of obscene material[47], the Post Office is a common carrier. Nevertheless, the Post Office recognised the problem and in 1983 established and funded the Direct Mail Services Standards Board (DMSSB).

The DMSSB operates a system of recognition for direct mail agencies which is dependent on the agency abiding by the British Code of Advertising Practice and any other relevant codes. Recognised agencies are entitled to use a logo denoting recognition and to be paid a 1 per cent commission on their postage bill.

(e) Section 124 of the Fair Trading Act 1973 and OFT Sponsored Codes

Although advertising has been one of the key sectors involved in the growth of self-regulation it is only one of a number. This was recognised in the Fair Trading Act 1973 which placed on the Director-General of Fair Trading, in a section concerned with the publication of information and advice, a duty to encourage the development of codes of practice. This provision is no doubt influenced, in part at least, by the increasing interest of governments in using non-statutory techniques of regulation[48]. Specifically Section 124(3) provides:

> "... it shall be the duty of the Director to encourage relevant associations to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers in the United Kingdom."

Using these powers the DGFT has negotiated with trade associations 23 such codes as follows:

1. Domestic laundry and cleaning services (1976) (Appendix A).
2. Domestic electrical appliances (Servicing by electricity boards) (1975).
3. Domestic electrical appliances (Servicing by Scottish electricity boards) (1975)
4. Direct selling (1980).
5. Footwear (1976).
6. Shoe repairs (1976).
7. Funerals (1979).
8. Furniture (1978).
9. Glass and glazing (1981).
10. Mail order publishers (1977).
11. Mail order traders (1978).
12. Motor industry (1976).
13. Vehicle body repairs (1975).
14. Photographic industry (1979).
15. Postal services (1979)
16. Telecommunications services (1979).
17. Selling and servicing of electrical and electronic appliances (1976).
18. Domestic electrical appliance servicing (1974).
19. Holidays (1975).
20. Motor cycle industry (1984).
21. Hiring of holiday caravans (1986).
22. Buying and siting of holiday caravans (1986).
23. Finance Houses Association (1987).[49]

In discharging its functions under Section 124 the OFT has concentrated on encouraging codes in those sectors where there

has been a high level of consumer complaint; where the trade association represents firms whose sales account for the majority of the market; and where the relevant association has the resources and authority to support the code and ensure compliance[50].

Terms of individual codes vary though most contain certain core requirements as follows:

(a) All advertising must be clear, honest and in accordance with the British Code of Advertising Practice and the IBA Code.

(b) Full information must be given to the consumer about the goods, price charged and credit facilities offered by the retailer.

(c) Realistic delivery dates must be given and adhered to by the retailer.

(d) Assistance and advice must be given to the consumer about general care and, where relevant, cleaning of the goods.[51]

In addition, the central core of all OFT sponsored codes is a clear and simple system of handling consumer complaints[52].

Where an industry code exists a four stage procedure for getting redress is envisaged[53].

Firstly, the consumer pursues his complaint with the trader concerned. If no satisfaction is achieved, the second stage is to consult a local advice agency. The third stage is to involve the relevant trade association who will normally attempt to conciliate. Finally, most codes offer independent arbitration facilities, through the Institute of Arbitrators, to provide an alternative to recourse to law.

The DGFT having encouraged the establishment of industry codes is under an obligation to keep then under review and attempt to improve them wherever possible. An example of the latter is the OFT's work on redress procedures. In 1980 the OFT conducted a review in this area, publishing a consultative paper in September of that year[54]. In 1981 it published its conclusions, the aim of which were in the words of the DGFT:

> "... to strengthen the codes of practice arbitration system so that it will more effectively offer the essential ingredient of fairness, simplicity and speed at minimum cost to all concerned."[55]

That Report made a number of recommendations to improve the operation of codes of practice in respect of redress for consumers. The main conclusions were as follows:

(a) Arbitrations under codes of practice should be on a documents-only basis, except in the very limited circumstances when the arbitrator is able to arrange a local hearing at no cost to the parties involved in the dispute.

(b) The Office, the Institute and trade associations should co-operate in working out ways to apportion responsibility for meeting the increased costs of arbitration; a standard scale of fees would seem appropriate for the consumer's contribution.

(c) Arbitrators should always give reasons for their decisions.

(d) Trade associations and organisations whose codes embody arbitration provisions should arrange, when so requested by the arbitrator, for independent technical advice to be provided.

(e) Trade associations should set a target, preferably of not more than three months, for completion of the conciliation stage. The target should be regarded as flexible in cases of particular complexity, and should not be invoked to prematurely terminate cases which are proceeding satisfactorily towards settlement. Parties in dispute should be informed in writing of the target times for the handling of cases, so that they can exert some pressure if there are unwarranted delays.

(f) The Institute should also adopt target times for the completion of the arbitration stage of redress.

(g) Trade associations and the Institute should provide reports to the Office, on an annual basis, on the time taken to process conciliation and arbitration cases, and on performance against the time targets set.

(h) Trade associations supporting codes of practice should consider adopting the Institute's new 'special' arbitration scheme, which will incorporate features recommended in this report.

(i) The Office's annual review of redress procedures under codes of practice will take the form of discussions with individual trade associations about performance against time targets and problems which may have arisen. A further review of all code redress procedures may be appropriate three years after the conclusion of the review.

(j) The Office intends, in collaboration with the Institute, to produce for publication suitably edited information about arbitration cases, preserving the anonymity of the parties.

(k) If staff and finance can be found, the Office will prepare a new leaflet designed to help the consumer decide whether to seek redress by a code arbitration[56].

The late Sir John Methven, the first Director-General of Fair Trading, saw his functions under Section 124(3) in these terms:

> "I attach great importance to the use of powers of persuasion as well as to the statutory powers. I believe it is greatly in the interest of trade and commerce in the UK to provide voluntary codes of practice, and I have tried to encourage this. The more effective voluntary codes there are, the less need for statutory control. Regulations are too often negative and tell people what they must not do. Codes are positive and lead to a greater understanding of the problems which exist on both sides of the counter and the ways in which they can be dealt with."[57]

This would appear to have been borne out, to some extent, by the research on codes of practice carried out by Pickering and Cousins for the Office of Fair Trading. This showed that consumers generally benefitted from better quality products and services, improved information, fewer undesirable practices, better handling of complaints and more awareness of consumers' rights[58] as a result of codes.

Before leaving Section 124(3) of the Fair Trading Act it is worth making the point that the 23 industry codes approved by the OFT form a minority of trade association codes. There are many other codes of practice which are not approved codes, for example because they do not provide a formal redress procedure for consumers.

One such example is the Code of Practice of the British Aerosol Manufacturers Association. Although it does not provide any redress procedures for consumers it sets out detailed guidance to manufacturers on the manufacture, labelling, transportation and distribution of aerosol products.

Some of these codes have a degree of official sanction because of consultation during the preparation of the code. For example, the British Herbal Medicine Code was drawn up in consultation with the Department of Health and Social Security.

(f) The Consumer Ombudsmen

Finally, an interesting form of industry self-regulation which has arisen in the 1980s is the phenomenon of the consumer ombudsman.

The Insurance Ombudsman Bureau was the first to be established and was the creation of the major insurance companies in 1981. Although financed by the industry the Bureau was nevertheless set up as an independent organisation. Its nine member council has seven members representing public and consumer interests, in addition to two representatives from the industry.

The Bureau deals with complaints, disputes and claims concerning policies taken out by or for private individuals with companies who are members of the scheme. The Ombudsman has the role of counsellor, conciliator, adjudicator or arbitrator in regard to cases submitted to him.

Another ombudsman scheme is that relating to banking, which came into operation on 1st January 1986. This scheme, whose membership covers all the major clearing banks, followed an NCC Report in 1983[59]. The scheme is very closely modelled on the Insurance Ombudsman scheme[60].

Finally, there is the Building Societies Ombudsman who became operational on 1st July 1987. He is empowered to deal with claims involving breach of legal rights, unfair treatment or maladministration. However, unlike the insurance and banking ombudsmen, the building societies scheme has a statutory basis provided by the Building Societies Act 1986 and the scheme covers all building societies[61].

In conclusion, it is clear that the enormous number of individual systems of self-regulation have made it an established element of our system of consumer protection. Its effectiveness we shall consider in Chapter Four.

CHAPTER TWO

References

1. Report of the Committee to Review the Functioning of Financial Institutions, 1980, Cmnd 7937.

2. Ibid, Second Stage Evidence, Vol 4 (1977), para 5.

3. R Cranston, Consumers and the Law, 2nd edn., 1984, Weidenfeld and Nicolson, p 31.

4. A Briggs, A Social History of England, 1983, Weidenfeld and Nicolson, pp 80-81.

5. J J Bagley, Life in Medieval England, 1967, Batsford, p 543.

6. A Briggs, A Social History of England, 1983, Weidenfeld and Nicolson, p 8. See also C Gross, The Gild Merchant, Vol II, 1890, The Clarendon Press, pp 213-324.

7. J J Bagley, Life in Medieval England, 1967, Batsford, p 53.

8. G W S Barrow, Feudal Britain, 1971, Edward Arnold, p 90.

9. C Gross, The Gild Merchant, Vol 1, 1890, The Clarendon Press, p 159.

10. W S Holdsworth, A History of English Law, Vol II, 1st ed., 1938, Methuen, p 468.

11. A Briggs, A Social History of England, 1983, Weidenfeld and Nicolson, p 99.

12. Ibid.

13. Ibid.

14. P Ramsey, Tudor Economic Problems, 1968, Victor Gollancz, p 101.

15. Ibid. p 101.

16. Ibid.

17. Ibid. p 153.

18. Ibid.

19. C Gross, The Gild Merchant, Vol 1, 1890, The Clarendon Press, p 163.

20. Ibid. p 164.

21. S.14.

22. C Gross, The Gild Merchant, Vol 1, 1890, The Clarendon Press, pp 164-165.

23 G Alderman, The Railway Interest, 1973, Leicester University Press, p 13.

24. W Grant and D Marsh, The CBI, 1977, Hodder and Stoughton, p 18.

25. Ibid. p 19.

26. J Stevenson and C Cook, The Slump; Society and Politics during the Depression, 1977, Jonathan Cape, p 14.

27. Ibid. p 15.

28. E J Hobsbawm, Industry and Empire, 1970, Pelican, p 215.

29. Ibid.

30. Put to the author by CBD Research Ltd.

31. Code of Standards of Advertising Practice, 1937, ICC, p 1. The ICC Code was not, in fact, the first advertising code. The first was the Code of Ethics and Standards of Practice which was adopted at the International Advertising Convention at Wembley in 1924.

32. British National Committee; International Chamber of Commerce; Background Notes, BNC, ICC (undated).

33. G E Miracle and T Nevett, Voluntary Regulation of Advertising; A Comparative Analysis of the United Kingdom and the United States, 1987, Lexington Books (Mass.), p 49.

34. Code of Standards of Advertising Practice, 1937, ICC, p 1.

35. Ibid. For a study of the development of national systems of self-regulation see E Burleton, 'The Self-Regulation of Advertising in Europe', (1982) I Journ. of Advertising 333.

36. Another early example of self-regulation in the UK was the establishment in 1936 of the Code of Standards of Advertising Practice by the Proprietary Association of Great Britain - the trade association for the manufacturers of non-prescription medicines.

37. S.9.

38. The coming of cable television led to the establishment of the Cable Authority with comparable powers in relation to advertisements to those enjoyed by the IBA. See the Cable and Broadcasting Act 1984, S.12.

39. Review of the UK Self-Regulatory System of Advertising Control; A Report by the Director-General of Fair Trading, 1978, OFT, Preface.

40. Review of the UK Self-Regulatory System of Advertising Control; A Report by the Director-General of Fair Trading, 1978, OFT.

41. The Self-Regulatory System of Advertising Control - Report of the Working Party, 1980, Dept. of Trade.

42. Ibid. p 29.

43. Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 1984, O.J. L250.

44. For a detailed analysis of the system of advertising control and recommendations for improvement see, The Systems of Control of Advertising Standards; Report of the Committee of Inquiry, 1987, Advertising Association.

45. As far as prescription medicines are concerned, there is a code of practice operated by the Association of the British Pharmaceutical Industry, although unlike the PAGB Code there is no pre-vetting.

46. Mail Order Protection Schemes; A Review by the Office of Fair Trading, 1986, OFT, para 10.4.

47. Post Office Act 1953, S.11.

48. J Beatson, "'Public' and 'Private' in English Administrative Law", (1987) 103 L.Q.R. 34.

49. The Encyclopaedia of Forms and Precedents, 5th edn., 1985, Butterworths, p 72. (Updated) It is interesting to note that other statutes now encourage the creation of trade association codes, for example the Data Protection Act 1984.

50. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 3.3.

51. The Encyclopaedia of Forms and Precedents, 5th edn., 1985, Butterworths, p 71. For a detailed examination of the codes of practice under S.124 see G Woodroffe 'Government Monitored Codes of Practice in the United Kingdom', (1984) 7 Journ. of Cons. Pol. 171.

52. J Humble, 'A New Initiative', taken from 'Marketing and the Consumer Movement', ed J Mitchell, 1978, McGraw Hill, p 146.

53. See 'I'm Going to Take it Further!'; Arbitration under Codes of Practice, 1984, OFT, pp 3-4.

54. Redress Procedures under Codes of Practice; Consultation Document, 1980, OFT.

55. Redress Procedures under Codes of Practice; Conclusions Following a Review by the Office of Fair Trading, 1981, OFT, Foreword.

56. Ibid. pp 27 and 28.

57. First Annual Report of the Director-General of Fair Trading to the Secretary of State, 1975, HMSO, p 10.

58. See: (a) J F Pickering & D C Cousins (1980), 'The Economic Implications of Codes of Practice, Report to Office of Fair Trading' 1980.

(b) J F Pickering & D C Cousins, 'Trade Associations and Business Self-Regulation through Voluntary Codes of Practice', (1982) 6 J.Cons.Studies and Home Economics 289.

(c) J F Pickering & D C Cousins, 'The Benefits and Costs of Voluntary Codes of Practice', (1982) 16 Euro.J.Marketing 31.

59. Banking Services and the Consumer, 1983, NCC.

60. For a discussion on the role of the Banking Ombudsman see P E Morris, 'The Banking Ombudsman - 1', (1987) J.B.L. 131.

61. For a detailed discussion on the role of consumer ombudsmen and self-regulation generally see R Thomas, 'Alternative Dispute Resolution - Consumer Disputes', a paper given to the Annual Conference of the Society of Public Teachers of Law, Cambridge, September 1987.

CHAPTER THREE

THE ROLE OF CODES OF PRACTICE AND THEIR LEGAL EFFECTS

(a) The Classification of Codes

In the last chapter, we noted the development of self-regulatory codes. However, the word 'code' is used to describe many different types of rules and practices which vary so enormously in their scope and effect. Accordingly, in this chapter we are going to take a look at codes of practice and examine their legal effects.

Our first task is to attempt some sort of categorisation. One way of categorising codes is on the basis of the body responsible for establishing them. On this basis, one can distinguish between individual company codes, trade association codes, international trade association codes and codes laid down by the Government or one of its agencies, or imposed by an international Government agency.

Another approach is to categorise codes according to how, if at all, they are enforced. Painter, for example, distinguishes between pious codes, which provide no redress procedures and no meaningful system of enforcement, remedial codes, which seek to provide redress for consumers, usually in the form of conciliation and arbitration facilities, and the self-regulatory advertising codes - the latter being the British Code of Advertising Practice and the British Code of Sales Promotion Practice[1]. Their significance lies in the fact that they are enforced, not directly, but by a separate and independent body, possessed of real powers against offenders.

Codes can also be distinguished on the basis of their subject matter, between 'horizontal' codes and 'vertical' codes[2]. An example of a horizontal code would be the British Code of Advertising Practice, which covers a business activity across

all or nearly all product and service sectors. On the other hand, the codes of practice sponsored by the OFT under the Fair Trading Act are vertical, in the sense that they are concerned with specific product sectors.

Other classifications can be made on the basis of the legal effect of breach and the motivations of those who establish codes[3].

Any classification one chooses is likely to cut across other classifications. For example, the National Consumer Council makes a distinction between genuinely self-regulatory codes, adopted without consultation or discussion with outsiders, self-regulatory codes which follow discussions with outside interests, such as Government or consumer bodies, and the 23 codes approved by the OFT under Section 124(3) of the Fair Trading Act 1973 [4].

However, the first two types of 'NCC code', for example, could cover those within Painter's category of 'remedial codes', and a genuinely self-regulatory code includes both vertical and horizontal codes.

One cannot even regard the NCC classification as exhaustive as to the types of self-regulatory code. For one thing, there is a curious and apparently self-contradictory categorisation to be added of 'imposed rules of self-regulation' - an example of which is the International Code of Marketing of Breast Milk Substitutes, promulgated by the World Health Organisation in 1981. And some would distinguish between self-regulatory codes which involve consultation, as in the NCC categorisation, and those which involve negotiations, as in the OFT sponsored codes[5].

What is clear is that codes can be classified in a number of ways. Since this thesis will be considering, amongst other matters, the role of codes within an overall legal framework, the most important classification, for our purposes, must be between:

(i) Statutory Codes

This rather general term covers a number of codes which have some statutory status or authority. Originally, they were looked on by the legal establishment as "neither fish, flesh, fowl nor good red herring"[6]. They include codes which are drawn up independently of Government, or quasi-independently, but given some form of statutory basis such as the IBA Code of Advertising Standards and Practice or the Code of the Insurance Brokers Registration Council, established under the Insurance Brokers Act 1977. Such codes may not receive direct Parliamentary approval but there is nevertheless a degree of public accountability, if only to a Minister. Secondly, the category
includes, as we shall see later, the type of code identified as the fifth type of code by the National Consumer Council. This code is directly promulgated by a Minister using the mechanism of a statutory instrument by which it receives Parliamentary approval.

Some of the codes, such as that of the Insurance Brokers Registration Council, leave an element of self-regulation to the particular sector in question. The most traditional example of this is provided by the Practice Rules made by the Law Society under the Authority of the Solicitors Act 1974. The Act provides that the Council of the Law Society:

> "...may, if they think fit, make rules, with the concurrence of the Master of the Rolls, for regulating in respect of any matter the professional practice, conduct and discipline of solicitors"[7].

Other forms of statutory code leave little room for a self-regulatory element, for example, the Highway Code, although extensive consultation may have taken place with affected interests prior to its promulgation.

Another important sub-division of statutory codes is between mandatory codes, 'evidential status' codes and guidance codes. The first is comparatively rare, although elements of the 1979 Packers Code made originally under The Weights and Measures (Packaged Goods) Regulations 1979 fall under this heading. The OFT comments that such codes are appropriate where it is necessary to have maximum precision in the context of criminal sanctions[8]. The second, where the code has evidential status in relevant proceedings, is by far the most common kind of statutory code as we shall see when we look at statutory codes in detail.

The third arises, for example, in the case of some of the codes under the Food Act 1984. Section 13(8) of the Act authorises Government Ministers to publish codes for advice and guidance. One such code, the Code for Hygiene in the Retail Meat Trade, says in its introduction:

> "The Code has no statutory force: it should not be regarded as an interpretation of the requirements of the Food Hygiene Regulations, and it should not be thought that observance or non-observance of any of its particular recommendations amounts to compliance or non-compliance with particular requirements in the legislation."

(ii) Self-regulatory codes with statutory reinforcement

Some would argue that the Solicitors Practice Rules are an example of a code that has statutory reinforcement because of the underpinning provided by the Solicitors Act. However, for our purposes, the best example must be the British Code of Advertising Practice.

(iii) Self-regulatory codes without statutory reinforcement

This category covers the largest number of codes and, like codes in general, they range enormously as to their

scope and significance. However, as we shall see later, although not given formal statutory reinforcement, they do sometimes carry legal implications.

So let us now consider these categories in some detail.

(b) Statutory Codes

There is an increasing tendency to use codes of practice within an overall statutory framework. This is probably, in part, a consequence of the increasing trend towards the use of subordinate legislation which has been going on since the First World War [9]. Often legislation lays down general duties, the practical application of which is, in a number of cases, assisted by reference to codes. One of the earliest examples was the Highway Code:

> "... comprising directions for the guidance of persons using roads ...".

It was first produced as a result of Section 45 of the Road Traffic Act 1930, which gave the Secretary of State the power to revise the Code by revoking, varying, amending or adding to the provisions of the Code as he thinks fit, although such changes need Parliamentary approval. Its statutory basis is now Section 37 of the 1972 Road Traffic Act, as amended by Section 60 of the Transport Act 1982. There is no better description of the nature and function of this Code than that provided by Lord Denning when describing his experiences on the Bench in dealing with road traffic cases:

> "The statute could not deal with all the details which would arise in the ordinary case of road users and therefore Parliament - and I think rightly - issued a code of practice, a Highway Code, for the guidance of individuals using the road. That was not a statute which was imperative and for which one could be punished for disobeying, but was for guidance. It could be taken into account by a magistrate or judge trying a civil or

> criminal case. It could be taken into account and is therefore not without legal significance. It is an important element in deciding the case. That was the function of the Code and, so far as my experience is concerned, I should have thought that worked admirably[10]."

The precise status of the Highway Code is set out in sub-Section 7:

> "A failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act, the Road Traffic Regulation Act 1967 or the Public Passenger Vehicles Act 1981) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

Failure to observe a provision of the Code does not then bring automatic criminal liability nor does it of necessity establish negligence[11].

Statutory codes have become quite common in the field of employment law and date back to the ill-fated Industrial Relations Act 1971, which provides for a Code of Practice on Industrial Relations. The provision in that Act was repealed by the Trade Union and Labour Relations Act 1974 and re-enacted, with minor amendments.

The provision of codes of practice in the employment and industrial relations field received a further boost in 1975 with the enactment of the Employment Protection Act. Section 6 of that Act provides that the Advisory Conciliation and Arbitration Service (ACAS) may, subject to Parliamentary approval, issue codes of practice containing practical guidance for the purpose of promoting the improvement of industrial relations.

Using these powers, ACAS has promulgated the following codes of practice:

1. Disciplinary Practice and Procedures in Employment (1986) (originally 1977).

2. Disclosure of Information to Trade Unions for Collective Bargaining Purposes (1977).

3. Time off for Trade Union Duties and Activities (1978).

Section 6(11) provides that a failure to comply with the terms of these codes does not of itself bring liability but such a failure "shall be admissable in evidence and if any of the provisions of such a Code appears to an industrial tribunal or the Central Arbitration Committee to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

To illustrate the operation of both the primary legislation and the codes, it is worth taking, as an example, what is probably the most important individual right in employment; the right not to be unfairly dismissed. Set out in Section 54(1) of the Employment Protection (Consolidation) Act 1978 it provides:

> "In every employment to which this Section applies every employee shall have the right not to be unfairly dismissed by his employer".

This is an example of how broad concepts can effectively be incorporated into law[12].

To successfully defend an unfair dismissal action, an employer must establish one of the potentially fair reasons set out in Section 57(2) and, in addition, he must show that he acted reasonably in treating it as a sufficient reason for dismissal - the latter being determined on the basis of equity and the

substantial merits of the case. The guidance to employers on whether their action would be fair, or unfair, is to be found in the ACAS Code 'Disciplinary Practice and Procedures in Employment'.

Woodroffe has commented that modern employment law involves businessmen's freedom of action being circumscribed by a number of general, indefinite and widely worded concepts[13].

As we saw earlier, an industrial tribunal hearing a case of alleged unfair dismissal is bound to take into account any provision of the Code which appears to it to be relevant. The precise status of the Code was considered in the case of W Devis and Sons Ltd v R A Atkins[14] in which Viscount Dilhorne commented:

> "It does not follow that non-compliance with the Code necessarily renders a dismissal unfair, but I agree with the view expressed by Donaldson J in Earl v Slater and Wheeler (Airlyne) Ltd (1972) that a failure to follow a procedure prescribed in the Code may lead to the conclusion that a dismissal was unfair, which, if that procedure had been followed, would have been held to have been fair".[15]

Statutory codes had therefore become commonplace in employment and related legislation by the mid-1970s. A particularly interesting example is provided by the Health and Safety at Work etc. Act 1974, which followed the work of the Robens Committee[16] which found that health and safety was the subject of vastly complex and inflexible statutory regulations. Yet this huge body of law did not cover all people at work, or all the potential hazards. Accordingly, the Report recommended that the new legislation should be based on clear general principles to be supported by a mixture of regulations and codes of practice. The Committee concluded:

> "We have outlined a number of major defects in the present statutory arrangements. These deficiencies are of a kind that cannot be cured by piecemeal improvements within the existing system".17

Sections 2-7 of that Act established a series of statutory general duties which were designed to progressively replace a large number of existing pieces of legislation in the field of health and safety, whilst providing immediate coverage in those areas not hitherto governed by specific legislation. For example, Section 2 provides:

> "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."

Guidance on the practical application of this general duty comes from two sources; further matters set out in Section 2 without prejudice to the general duty and the use of approved codes of practice.

For the purpose of providing practical guidance, Section 16(1) gives the Health and Safety Commission the power to:

> "(a) approve and issue such codes of practice (whether prepared by it or not) as in its opinion are suitable for that purpose;
>
> (b) approve such codes of practice issued or proposed to be issued otherwise than by the Commission as in its opinion are suitable for that purpose".

Section 17 sets out the legal status of the Code, which is similar to, but not identical to, the Highway Code. Section 17(1) provides:

> "A failure on the part of any person to observe any provision of an approved code of practice shall not of itself render him liable to any civil or criminal proceedings; but where in any criminal proceedings a party is alleged to have committed an offence by reason of a contravention of any requirement or prohibition imposed by or under any

> such provision as is mentioned in Section 16(1) being a provision for which there was an approved code of practice at the time of the alleged contravention, the following sub-Section shall have effect with respect to that code in relation to those proceedings."

Codes of practice in this regard are defined as including "a standard, a specification and any other documentary form of practical guidance."[18]

Approval of a code, or part of a code, requires the consent of the Secretary of State but does not require Parliamentary approval.

As in the case of the Highway Code and codes under the Trade Union and Labour Relations Act, failure to observe an approved code of practice does not, of itself, give rise to legal liability, although a breach of such a code shall be admissible in evidence in criminal proceedings.

The formulation of Section 17 of the Act does, however, go further than the Road Traffic Act in one important respect. Under Section 17(2):

> "Any provision of the code of practice which appears to the court to be relevant to the requirement or prohibition alleged to have been contravened shall be admissible in evidence in the proceedings; and if it is proved that there was at any material time a failure to observe any provision of the code which appears to the court to be relevant to any matter which it is necessary for the prosecution to prove in order to establish a contravention of that requirement or prohibition, that matter shall be taken as proved unless the court is satisfied that the requirement or prohibition was in respect of that matter complied with otherwise than by way of observance of that provision of the code."

In other words, proof of a breach may be taken as proof of any matter to which the provision of the Code in question appears relevant unless the Court is satisfied that the matter was complied with otherwise than by observance of the provision in the Code. Accordingly, a code can effectively shift the burden of proof to the employer in criminal prosecutions.

The earliest example of a statutory code in the consumer protection field, as we saw in Chapter Two, was probably the Code of Advertising Standards and Practice first established with the coming of independent television in 1955. It now exists by virtue of Section 9 of the Broadcasting Act 1981 which places on the Independent Broadcasting Authority, a statutory body, the obligation to draw up, keep under review and enforce, a code of practice for the control of advertising on independent television and local radio.

More recent examples are the Code of Practice on Price Indications under the Consumer Protection Act 1987, which we shall look at in the next chapter and, as we have seen, the Packers Code. This was given statutory effect by virtue of The Weights and Measures (Packaged Goods) Regulations 1979[19] and was made under the Weights and Measures Act 1979 (now the Weights and Measures Act 1985).

Section 47 of the 1985 Act sets out the duties of packers and importers. Section 47(3) provides that regulations with respect to the manner of selecting or testing packages, made by the Secretary of State, may make provision by reference to a document other than the Regulations (which may be or include a code of practical guidance issued by the Secretary of State). What is particularly interesting about the Packers Code, from a consumer protection viewpoint, is that it operates in the context of a statute involving criminal sanctions.

Normally these codes are not of direct legal effect but are nevertheless of evidential value, in differing degrees, in determining whether there is compliance with the law. An exception is provided by elements of the Packers Code and also

the Immigration Rules under the Immigration Act 1971. Bates, while identifying the latter as an example of a code with direct effect, nevertheless acknowledges that this is a rare case[20].

Often the relevant statutory provision is expressed in terms of a general statutory duty or as a broad concept. Consequently, the relevant code is normally produced by a Government department or Government agency, subject to extensive consultation procedures and often, though not always, laid before Parliament for approval.

There are a number of objections that are commonly laid against the use of statutory codes. Although concerned with Home Office circulars, rather than the codes of practice we have been discussing, the case of Patchett v. Leatham[21] is nevertheless worth referring to. In that case Streatfeild J. said:

> "Whereas ordinary legislation, by passing through both Houses of Parliament or, at least, lying on the table of both Houses, is thus twice blessed, this type of so-called legislation is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is unpublished and is inaccessible even to those whose valuable rights of property may be affected; thirdly, it is a jumble of provisions, legislative, administrative or directive in character, and sometimes difficult to disentangle one from the other, and, fourthly, it is expressed not in the precise language of an Act of Parliament or an Order in Council but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction"[22].

Although the first two of the learned judges' criticisms must be regarded as being related more to departmental circulars, they nevertheless have a relevance to formal statutory codes of practice. Although the latter are normally subject to

Parliamentary approval, there are cases, as we saw earlier, where it is sufficient to get the approval of the Secretary of State - a good example being the IBA Code of Advertising Standards and Practice[23]. This code, as we saw earlier, is approved by the Home Secretary but not formally presented to Parliament.

Even where a code is laid before Parliament, the procedure under which the accompanying statutory instrument is laid leaves much to be desired in terms of Parliamentary scrutiny[24]. And Ministers are not always enthusiastic at the prospect of having to take a code of practice to Parliament. Norman Tebbit has said that laying a code of practice before Parliament is like "a head waiter being asked to serve a bottle of Coca-Cola"[25].

It is for this reason that there is pressure in some quarters for a formal system of Parliamentary scrutiny of codes of practice[26] which would at least help to ensure greater Parliamentary consideration of codes.

It is worth taking particular note, though, of the learned judges' final two comments.

Normally, a statutory code involves legislation being linked with provisions which do not constitute legislation and do not, per se, create legal liability - although they have a significance in the operation of a particular statutory provision. This is a concept which is sometimes difficult to understand for those who need to know what action they must take, in order to comply with the law.

Understanding is not helped by the different forms of words used in the primary legislation which refers to the relevant code and is intended to give it its precise status. Since this difference of wording may affect a particular code's legal status, these differences cause some confusion and it may not be clear whether legal effects are authorised or intended[27]. In the recent House of Lords debate Lord Campbell of Alloway QC

said that although he knew of no books on the subject he could detect five differently worded forms of 'trigger clause' for statutory codes[27]. These were:

1. "Shall have regard to". An example is provided by Section 12 of the Housing (Homeless Persons) Act 1977 which provides: "In relation to homeless persons and persons threatened with homelessness a relevant authority shall have regard in the exercise of their functions to such guidance as may from time to time be given by the Secretary of State". In the debate the view was expressed that such a trigger meant that the relevant code lacked any legal significance[29].

2. "Shall be admissible in civil and criminal proceedings". For example, Section 47(10) of the Race Relations Act 1976 has such a clause. It provides: "A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Act before an industrial tribunal any code of practice issued under this section shall be admissable in evidence, and if any provision of such a code appears to the tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question".

3. "May be relied upon by any party in ... proceedings as tending to establish or negative any liability". An example of this is the Highway Code provided for, as we saw previously, by Section 37(5) of the Road Traffic Act 1972.

4. Breach of the code almost automatically involves breach of the criminal law because it shifts the burden of proof. This is the practical effect of Section 17(2) of the Health and Safety at Work etc. Act 1974, which we looked at earlier, where proof of a failure to observe a code of practice may be taken as proof of contravention.

The view has been expressed that breach of such a code could afford conclusive proof of a contravention of the requirements of the statute unless rebutted by the defendant, and such breach could be relied on in civil proceedings as tending to establish or negative liability[30].

5. "The Secretary of State shall from time to time issue guidance ...". This involves no legal effect whatsoever, for example in the case of the disabled under Section 125 of the Transport Act 1985. This Section provides for the establishment of the Disabled Persons Transport Advisory Committee and the Secretary of State is given the power to issue guidance on such matters as easier access to public service vehicles for disabled persons. Section 125(7) provides: "The Secretary of State shall from time to time issue guidance as to measures that may be taken with a view to:

   (a) making access to vehicles used in the provision of public passenger transport services by road easier for disabled persons; and

   (b) making such vehicles better adapted to the needs of disabled persons".

The final complaint by Streatfeild J was that one could not apply ordinary canons of construction to the colloquial language of such documents, although this may not be such a bad thing.

It is interesting, at this point, to note that some statutory codes operate in a framework outside the normal courts of law. For example, the codes in the field of employment and industrial relations law operate within a framework of industrial tribunals, where normal canons of construction and normal procedures are not considered appropriate[31].

There are those who suggest that all too often a statutory code is a way of heading off a complex legislative problem[32]. There may be an element of truth in that but it hardly matters if the resulting code is effective in dealing with the relevant problem. And one must remember that codes, whether they be statutory or self-regulatory, have major advantages over traditional legislation. Practices can be dealt with, such as lack of clarity in documentation, delays in servicing, or periods for which spare parts will be available, which would not be feasible to cover by the precise wording appropriate for conventional legislation[33].

Above all, the crucial advantage of a statutory code of practice is that it can facilitate the passing of primary legislation which is expressed in broad terms, leaving some, or all, of the detail to be provided by the code. This is becoming crucially important because it is fair to say that as society becomes more complex the normal process of Parliamentary drafting and the drafting of delegated legislation is being stretched beyond its capacity[34]. An example of this is the legislation on price claims which we examine in the next chapter.

Recently the former Lord Chancellor, Lord Hailsham, recognised the problem when he told the Statute Law Society that part of the problem of legislative complexity was due to the victory of the 'literalists' over the 'mischievites':

> "The victory of the literalists has led to an increased pressure for detail on the part of Departments. In so doing they have neglected the advice to Napoleon by Portalis, one of his Commissioners, when he said: 'We have guarded against the dangerous ambition of wishing to regulate and to see everything. The wants of society are so varied that it is impossible for the legislator to provide for every case or every emergency'"[35].

The problems of drafting legislation to cope with the needs of modern society are matched by the inability of Parliament to cope with both the volume and complexity of legislation[36].

From a consumer protection viewpoint it is necessary to create a framework which has a sufficient degree of flexibility to be able to control effectively increasingly sophisticated trading practices and prevent, as far as possible, the exploitation of loopholes and provide a framework readily understood by consumers and traders alike. These objectives can more readily be achieved with a statutory code of practice linked to a broadly expressed statutory obligation.

(c) Self-Regulatory Codes with Statutory Reinforcement

As we saw earlier, the best example of such a code is provided by the British Code of Advertising Practice which, as we saw in the last chapter, is a code administered by the Advertising Standards Authority (ASA) and the Code of Advertising Practice Committee. Here, the statutory reinforcement is a consequence of the implementation of the EEC Directive on Misleading Advertising[37] which was one of the measures flowing from the EEC's first Consumer Action Programme[38].

Article 4 of the Directive provides:

> "Member States shall ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public. Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in prohibiting misleading advertising may:
>
> (a) take legal action against such advertising; and/or
>
> (b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5."

Article 5 of the Directive provides:

"This Directive does not exclude the voluntary control of misleading advertising by self-regulatory bodies and recourse to such bodies by the persons or organisations referred to in Article 4 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article."

The definition of advertising and misleading advertising is fairly wide. Article 2 tells us that:

"1. 'Advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

2. 'Misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor."

In its earlier drafts, the Directive called for 'adequate and effective laws for the control of misleading advertising'. This would have severely undermined the self-regulatory system of advertising control under the auspices of the ASA. However, the United Kingdom was able to secure, by persistent and effective lobbying, a form of wording which protects the self-regulatory system.

To give effect to the Directive the UK Government has made The Control of Misleading Advertisements Regulations 1988[39], under powers provided by Section 2 of the European Communities Act 1972.

Article 4 of the Directive requires recourse to exist either in terms of direct legal action or by bringing a complaint before a competent administrative authority. Accordingly, the Regulations establish four administrative authorities to fulfil the role envisaged by the Article. The most significant of these is the Director-General of Fair Trading (DGFT). The other administrative authorities are the Independent Broadcasting Authority, which as we saw, is the statutory authority responsible for broadcast advertising, the newly established Cable Authority[40] and the Securities and Investments Board established under the Financial Services Act 1986 to oversee, amongst other things, certain investment advertising.

Each administrative authority can direct complainants to 'established means' for dealing with complaints. In the case of the DGFT, this includes, in particular, either the ASA or local trading standards departments - the latter being appropriate where there is a possible criminal offence under consumer law, for example the Trade Descriptions Act 1968.

The Regulations make it clear that self-regulation is to continue to be a normal way for complaints to be dealt with, by placing on the DGFT a duty to have regard to "the desirability of encouraging control, by self-regulatory bodies, of advertisements"[41]. Only exceptionally will the DGFT use his powers under the new legislation to institute High Court proceedings for an injunction prohibiting misleading advertising. In consultation papers it was made clear that this power would only be used where the ASA could not act, perhaps because the relevant media were outside of the subscribing organisations to the self-regulatory system, or because the ASA could not act fast enough in a particular case[42].

In taking a case to the High Court, the Director-General is required to take account of all the interests involved, in particular the public interest[43].

The High Court is also required to take into account all the interests involved. It is able to require persons to furnish evidence of the accuracy of factual claims and can regard factual claims as inaccurate if evidence is not provided or is inadequate[44]. Purists might object to this as being a way of reversing the burden of proof, but it introduces no new concept for advertising practitioners who are already required to substantiate claims under the self-regulatory system.

An accelerated procedure enables interlocutory injunctions to be available where the Court is satisfied that there is prima facie evidence of misleading advertising and material detriment is likely to be caused to those affected by it[45].

Of course, one obvious problem is preventing advertisers sliding away from a court order by subsequently making minor changes to their copy. Regulation 6(2) provides:

> "An injunction may relate not only to a particular advertisement but to any advertisement in similar terms or likely to convey a similar impression".

The British Code of Advertising Practice remains an entirely self-regulatory code but is now provided with a degree of statutory reinforcement. The creation of this reinforcement is a recent occurrence so one cannot, as yet, make a clear judgement on its effectiveness. However, the author feels that the new injunctive powers of the DGFT will do much to tackle the limitations of self-regulation whilst retaining and enhancing a proven system of self-regulation with the advantages that self-regulation can offer. However, the NCC makes the point that any reinforcement of a self-regulatory code should:

(a) permit the continuance of the flexibility inherent in codes of practice;

(b) maintain the existing nexus of arrangements which comprise the self-regulatory control system[46].

The advantages of such reinforcement is in tackling some of the traditional weaknesses of self-regulation, particularly the problem of lack of comprehensiveness of application and in reinforcing the sanctions available for the breach of a code.

However, statutory reinforcement of industry codes has dangers as well as advantages.

The biggest danger of statutory reinforcement of industry self-regulation is that it could undermine the self-regulatory system itself. Unless the reinforcement is seen as a limited device for ensuring the further effectiveness of the self-regulatory system, there is the danger of changing the character of the system. There must, logically, come a point at which the trade association and its members feel that the system has more of the characteristics of a legally based control system than a self-regulatory one[47]. At that stage there is the danger of a withdrawal of commitment and the financing of the system by the relevant trade.

Even where this does not happen there is the risk of blurring the distinction between legal and self-regulatory controls with two potential dangers.

Firstly, the consumer, or indeed a competitor, may see the statutory reinforcement element as a standing court of appeal or by-pass route from the self-regulatory system. This is why the DGFT has been at pains to reassure interested parties that he will not allow his position under The Control of Misleading Advertisements Regulations to be used in this way[48].

Secondly, traders may increasingly involve lawyers in the resolution of disputes involving codes of practice. This is

inappropriate because of the different nature of codes and their application and can stiltify the system, thus undermining its flexibility of application[49].

(d) Self-Regulatory Codes without Statutory Reinforcement

At the present time most self-regulatory codes fall into this category. They range from codes for individual companies, such as the code of practice adopted by Timpsons, the Northern shoe retailer, to the 23 trade association codes of practice sponsored by the OFT under Section 124 of the Fair Trading Act 1973.

What is interesting is that even self-regulatory codes without formal statutory reinforcement can, on occasion, result in legal consequences.

For example, the criminal law can be involved by virtue of Section 14 of the Trade Descriptions Act 1968. Section 14 makes it an offence to deliberately or recklessly make a statement which is false as to the provision in the course of a trade or business of any services, facilities or accommodation.

The operation of this Section in relation to codes of practice was put to the test when Shropshire Trading Standards Department prosecuted a garage who had supplied a Fiat motor car with a false odometer reading. The garage had not disclaimed the odometer reading and completed a car warranty on the basis of the lower mileage. The garage, which was a member of the Motor Agents Association (MAA), displayed a sign at the garage which read:

> "This establishment is a member of the Motor Agents Association and subscribes to the industry's code of practice, a copy of which is available for your inspection upon request".

On the basis of this statement the charge against the garage included an allegation that they had recklessly made a false statement as to the provision of a service i.e. that the

consumer had the benefit of the terms of the MAA Code. The defendants were convicted under Section 14 and fined £200 [50]. Although only a Magistrates Court decision, it has shown trading standards departments an avenue by which the courts could, indirectly, enforce industry codes of practice.

Another interesting case arose in relation to a shoe firm who were the subject of an application under Part III of the Fair Trading Act 1973 before the Restrictive Practices Court[51]. As we saw in Chapter One, Part III enables the DGFT to obtain court orders against traders who have a serious record of breaches of contract with consumers or breaches of consumer legislation.

In this case the trader, Allwear Trading Company Ltd, trading as Sacha Shoes, had experienced several hundred complaints about the company's refusal to refund money when obliged to do so by virtue of the operation of the implied terms in the Sale of Goods Act 1893 (now 1979). As a result of an application by the Director-General the matter was dealt with by a formal undertaking to the Restrictive Practices Court that the trader would comply with the terms of the Code of Practice of the Footwear Distributors Federation. This was so even though the trader was not a member of the Federation.

It is also fairly clear that, in appropriate circumstances, the terms of a trade association Code could have contractual effects in the dealings between a trader and its customers[52].

To ensure this, it is important that consumers are aware of codes of practice and make specific reference to them as being, in part, the reason for doing business with a particular trader. This may be one reason why the OFT has pressed trade associations to ensure a higher level of display of code insignia.

Also worthy of consideration is the case of Woodman v Photo Trade Processing[53], in which a code of practice was used to interpret the reasonableness test under Section 11 of the

Unfair Contract Terms Act 1977. In this case the county court Judge ruled that an exclusion clause in a contract for film processing was not fair and reasonable, one reason being that the clause did not comply with the recommendations of the Code of Practice for the Photographic Industry.

Finally, one should not overlook the way in which some codes can bring about changes in contract terms. For example, members of the British Holiday and Home Parks Association and the National Caravan Council are required under their code of practice to offer a written agreement which includes three months notice of any increase in pitch fees and a right for the caravan owner to sell his caravan and assign the contract for occupation of the pitch. So, in practice, code provisions can be translated into contractual provisions which are then enforceable through the courts or by arbitration.

What all this means, as Page puts it, is that although self-regulatory codes are by their nature private and informal, considerable scope exists for their judicial incorporation into law[54].

CHAPTER THREE

References

1. A A Painter, 'The British Experience; Consumer Protection and its impact on Business', taken from Consumer Legislation, 1981, ICC, p 28.

2. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 5.18.

3. See R Thomas, 'Codes of Practice in the United Kingdom and the Consumer Interest', (1984) 7 J. Cons. Pol. 198.

4. Self-Regulation of Business and the Professions, an NCC background paper, 1986, NCC, p 2.

5. Law and Self-Regulation; A Study Comparing Government Regulation and Self-Regulation as Means of Consumer Protection, 1984, ICC, pp 9-11.

6. Lord Hailsham, 'Addressing the Statute Law', (1985) Stat.L.R. 4 at 9.

7. S.31.

8. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 4.45.

9. Lord Campbell of Alloway, 'Codes of Practice as an Alternative to Legislation', (1985) Stat L.R. 127 at 128.

10. H.L.Deb., Vol. 469, Col. 1076 (15th January 1986).

11. Goke v Willett [1973] R.T.R. 422 C.A.

12. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 4.31.

13. G Woodroffe, Preliminary Research Study on the General Duty to Trade Fairly for the Office of Fair Trading, 1984. The trend is continuing with, for example, the Employment Act 1980 laying down some general statutory provisions with the Department of Employment being empowered to produce related codes of practice on, for example, Picketing and Closed Shop Agreements and Arrangements.

14. [1977] I.R.L.R. 314.

15. at 318.

16. Report of the Committee on Safety and Health at Work, 1972, Cmnd 5034, HMSO.

17. Ibid. para 40.

18. Health and Safety at Work etc. Act 1974, S.53.

19. S.I. 1979 No 1613. (Now replaced by The Weights and Measures (Packaged Goods) Regulations 1986, S.I. 1986 No. 2049.)

20. T St John Bates, 'Parliament, Policy and Delegated Power', (1986) Stat.L.R. 114 at 122.

21. [1949] 65 T.L.R. Vol LXV, 69 and see note [1949] 65 L.Q.R. 153.

22. at 70.

23. Broadcasting Act 1981, S.9.

24. See R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules', (1986) P.L. 239 at 270.

25. The Times, March 30, 1983.

26. T St John Bates, 'Parliament, Policy and Delegated Power', (1986) Stat L.R. 114 at 122. See also A Samuels, 'Codes of Practice and Legislation', (1986) Stat.L.R. 29 at 34.

27. See R Baldwin and J Houghton 'Circular Arguments: The Status and Legitimacy of Administrative Rules', (1986) P.L. 239 at 267. Lord Henderson of Brompton has suggested that the exact legal effect of a trigger clause should be set out in the explanatory memorandum. In this regard, see H.L.Deb. Vol. 489, Col. 1431 (11 Nov 1987).

28. H.L.Deb., Vol. 469, Col. 1076 (15 Jan 1986). For a commentary on Lord Campbell's observations, see A Samuels, 'Codes of Practice and Legislation', (1986) Stat.L.R. 29

29. Ibid. at Col. 1077. See also R v Hillingdon LBC, ex parte Pulhofer, [1986] A.C. 484; [1986] 1.All E.R. 467.

30. Lord Campbell of Alloway, 'Codes of Practice as an Alternative to Legislation', (1985) Stat. L. R. 127 at 132.

31. See, for example, Industrial Tribunals Procedure, 1986, Dept. of Employment, p 3.

32. See R Cranston, Consumers and the Law, 2nd ed., 1980, Weidenfeld and Nicolson, p 233.

33. G Borrie, 'Laws and Codes for Consumers', (1980) J.B.L. 315 at 322.

34. See, for example, Statute Law; A Radical Simplification, 2nd Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom, 1974, Sweet and Maxwell, pp 28-29.

35. Lord Hailsham, 'Addressing the Statute Law', (1985) Stat.L.R. 4 at 5. See also Lord Simon of Glaisdale, 'The Renton Report -Ten Years On', (1985) Stat.L.R. 133.

36. See R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules', (1986) P.L. 239 at 270.

37. EEC Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 1984, O.J. L250.

38. Resolution on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975, O.J. C 92.

39. S.I. 1988. (At the time of writing, the Regulations were in final form but a number had not yet been allocated.)

40. Cable and Broadcasting Act 1984.

41. Reg. 4(4)(b).

42. See Implementation of EC Directive on Misleading Advertising; Consultation Proposals, Dept. of Trade and Industry, July 1985.

43. Reg. 4(4)(a).

44. Reg. 6(3) and Reg. 6(4).

45. Reg. 6(1).

46. Self-Regulation of Business and the Professions, an NCC background paper, 1986, NCC, p 11.

47. See, for example, R Halstead, 'Consumer Protection -Retrenchment or Advance?', 'Looking Ahead', Report of a conference to mark the OFT's tenth birthday, 1984, OFT.

48. Put in a letter to the author by R J Thomas, Director of Consumer Affairs, OFT, August 1986. Reg. 4(3)(c) is designed, specifically, to prevent the OFT being used as a court of appeal.

49. P Circus, 'Cracking on with the Code', (1986) 24 Marketing 15.

50. See A A Painter, 'Legal Liabilities and Codes of Practice', (1981) B.L.R. 267 at 268.

51. See Annual Report of the Director-General of Fair Trading, 1980, HMSO, p 73.

52. A A Painter, 'Legal Liabilities and Codes of Practice', (1981) B.L.R. 267.

53. [1981], Unreported, see Which?, July 1981.

54. A C Page, 'Self-Regulation and Codes of Practice', (1980) J.B.L. 24 at 31.

CHAPTER FOUR

THE PRESENT FRAMEWORK OF CONSUMER PROTECTION; IS THERE A PROBLEM?

(a) Consumer Civil Law

When we looked at the development of consumer protection law in Chapter One we noted that a number of statutes had improved the civil law position of consumers. However, some of the statutes gave statutory effect to principles which had been built up by case law[1]. So, for example, the Sale of Goods Act 1893 (now 1979) confirmed the existing common law position. Such codification is not important because it may be useful for consumers, when negotiating with traders, to be able to refer to specific statutory provisions rather than relying on the common law.

Since 1893, as we saw earlier, a great many statutes have improved and consolidated the consumer's civil law position, notable examples being the Supply of Goods (Implied Terms) Act 1973, the Unfair Contract Terms Act 1977 and the Supply of Goods and Services Act 1982.

Improvements have also been made to the procedures, particularly with the introduction of the small claims procedure in 1973. And further improvements are under consideration following the report of the Lord Chancellor's Civil Justice Review[2].

Nevertheless, despite the improvements that have taken place, the consumer still faces the following problems in pursuing claims. For a start, the consumer is not entitled to legal aid to pursue a case through the small claims procedure, and costs are not normally recoverable by the successful party. Often the loss suffered by individual consumers is relatively small, but the aggregate loss to consumers can be considerable.

In addition, as Smith points out, the decision of the Court of Appeal in Chilton v Saga Holidays plc[3] put the small claims procedure firmly back into an adversarial model and has hindered the process of deformalisation[4]. Other problems are:

1. It is difficult to take direct action against a manufacturer or ultimate supplier of goods.

2. Only the person who actually purchases goods can sue in contract law.

3. The need for consideration rules out contractual actions in relation both to free gifts and to manufacturers' guarantees where the latter have not induced the purchase.

4. All too often, traders can impose unfair terms on consumers, although the Unfair Contract Terms Act 1977 has gone some way to alleviating the problem.

5. The definition of merchantable quality in Section 14 of the Sale of Goods Act 1979 has caused problems, particularly in respect of minor defects and durability. (However, the Law Commission and the Scottish Law Commission have now published proposals for reform which go some way to alleviating these problems[5].)

6. The complexity of some legislation, such as the Consumer Credit Act 1974, may deter consumers from pursuing legitimate claims[6].

This concern at the practical effectiveness of legislation is shared by Ramsay, who expresses the view that consumer legislation may often be passed more in the hope of influencing changes in behaviour rather than on any solid knowledge of its potential impact[7].

Some would argue that one particular failing of the civil law in protecting the consumer is that the courts are not willing to recognise the central theme of unconscionability, particularly in respect of inequality of bargaining power, which lies behind many of the courts' decisions[8]. Some judges have positively rejected the notion of unconscionability, arguing that the question is one for Parliament. In National Westminster Bank plc v Morgan[9] Lord Scarman, in disapproving the dictum of Lord Denning in Lloyds Bank Ltd v Bundy, (see below) said:

> "... I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task - and it is essentially a legislative task - of enacting such restrictions upon freedom of contract as are in its judgement necesary to relieve against the mischief: for example, the hire purchase and consumer protection legislation, of which the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions"[10].

Nevertheless, using a variety of traditional techniques, contracts have been struck down by the courts on the grounds of mistake and misrepresentation, the absence of a proper offer and acceptance, duress and undue influence. Unreasonable covenants in restraint of trade have been ruled void on grounds of public policy and exclusion clauses have been prone to sustained judicial attack[11].

Some might say that the existence of such traditional techniques makes it unnecessary for any underlying principle to be recognised. Tiplady, for example, argues that traditional methods of adjudication already incorporate to a sufficient degree the end of justice and that the rejection of these methods is therefore essentially misguided and itself a source of potential injustice[12].

However, as Waddams points out, the failure to recognise an underlying theme of unconscionability has resulted in the striking down of agreements that ought to be enforced and the enforcement of agreements which ought not to be enforced[13]. And furthermore, he adds, the unwillingness to recognise a central theme has led to uncertainty[14].

The rationale for recognising an underlying principle of unconscionability was put by Lord Denning when he said:

> "There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, where the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them"[15].

'Traditional methods' have come under increasing criticism and, as we shall see in Chapter Five, quite a number of common law countries are moving away from the 'traditional techniques' towards recognising a general principle of unconscionability.

Whilst the criminal law has its deficiencies, as we shall see later, it has generally been far more significant than the civil law in the development of consumer protection[16]. Oughton, for example, comments that whilst the civil law is of use in the control of misleading trade practices, it must be underpinned by a system of enforcement backed up by the criminal law[17].

(b) Administrative Remedies

One important aspect of administrative remedies is licensing.

The Medicines Act 1968 provides one example of licensing - a system which Cranston notes operates on three levels[18].

Firstly, manufacturers, assemblers and wholesalers must obtain a licence by demonstrating that their facilities are suitable.

Secondly, a new drug cannot be clinically tested on humans unless a certificate has been obtained.

Thirdly, a manufacturer must obtain a product licence before marketing any particular drug; considerations are the safety, efficacy and quality of a drug and the proposed methods for securing its specified quality.

Medicine licensing has come up against two main criticisms, namely that it inhibits the development of new drugs[19] and that although it may ensure safe drugs it has little influence on the way drugs are actually used[20].

The power of the OFT to refuse or revoke licences under the Consumer Credit Act is another administrative remedy and one that we looked at in Chapter One. It can be used, however, only after serious malpractices have come to light, and there is no provision through the licensing system for the compensation of consumers who are victims of malpractice[21]. Probably, despite these weaknesses, licensing has proved useful in protecting the consumer although, as Ramsay points out, the economic theory of regulation suggests that devices such as licensing may be a response to the demands of producer interests for controls on competitors rather than to consumer interests[22].

However, even though the OFT's positive licensing powers only exist in the consumer credit field, the burden on the OFT has increased considerably. In 1986 there was an 11 per cent increase in licence applications and the DGFT is concerned that the resources do not exist to probe as deeply into some cases as he would like[23]. And resources are necessary not just for the purpose of monitoring those who have applied for licences, whose activities are becoming more sophisticated, but also for the purpose of driving out those who are acting illegally as unlicensed credit grantors[24].

The powers under the Estate Agents Act 1979, which are sometimes termed 'negative' licensing because one can operate as an estate agent until one is prevented from doing so by a prohibition order, have not been as effective as they might have been because it is not clear what minimum standards are necessary or desirable for an estate agent handling a typical private house purchase. One disadvantage of negative licensing is that it does not generate the fee income to resource the operation which is possible in a positive licensing system.

An interesting form of licensing, albeit an untested one as yet, is that provided by the new regime under the Financial Services Act 1986. Under this Act all investment businesses have to be authorised either by The Securities and Investments Board or by Self-Regulatory Organisations (SROs) representing the various facets of investment business or by Recognised Professional Bodies (RPBs). Failure to abide by the rules laid down by the SIB or the relevant SRO or RPB can lead, amongst other things, to the termination of authorisation.

Some time will need to elapse before a judgement can be made on the effectiveness of these new arrangements.

Turning to the Part III procedure under the Fair Trading Act, the OFT acknowledges that the procedures can only be brought to bear where the trader's breaches of the law have been going on for quite some time. And such traders can continue their misdeeds right up to the moment when the Court finally makes an order - a process which may take several years.

Unfortunately, there is no provision for any sort of interim order under the Part III procedure - hence the OFT comment:

> "There is thus no disincentive to prevent traders from continuing their misconduct for as long as possible if it is profitable for them to do so".[25]

The Part III procedure has come under considerable criticism from trading standards officers. The main complaints have been the length of time it takes to get an assurance from a trader, lack of liaison and communication, the lack of a clear policy on what the OFT is seeking to achieve and the suggestion that the OFT is not willing to act against major traders[26].

Improvements have, however, been made by the OFT to their servicing of the Part III procedure[27] and they point to the fact that by the end of 1986 a total of 555 assurances, court undertakings and court orders (including three for contempt of court) had been obtained[28]. In addition, the case of R v The Director-General of Fair Trading ex parte: F H Taylor & Co Ltd and Another[29] has established the right for the OFT to publicise their work in respect of Part III. This is likely to reinforce the value of Part III in controlling undesirable practices. As Donaldson L J put it:

> "Furthermore, the purpose of Part III of the Act is not, as I read it, to provide additional punishment for those who have persisted in a course of conduct which is detrimental to the interests of consumers. In particular, it is not intended to drive them out of business. Rather it is intended to provide additional deterrence to the continuance of this course of conduct in the hope that there may be reform and that the offender will rehabilitate himself"[30].

(c) Consumer Criminal Law

As we saw in Chapter One, the last twenty years or so has seen the creation of a vast body of criminal law designed to protect the consumer. But how successful has it been? There follows some examples of recent legislation which illustrate the problems which are being encountered.

One example of the problems created by consumer legislation is that of The Consumer Credit (Advertisements) Regulations 1980 [31], which lay down detailed rules on the form and content

of credit and hire advertisements. Mr John Fraser, a former Labour Consumer Affairs Minister, said this about the Regulations:

> "I spent several hours reading the definitions of 'simple, 'intermediate' and 'full' advertisements. Within a few hours, I had forgotten them again. I am in the same difficulty as anyone else. I am not in any way criticising, because I bear as much responsibility for these matters as anyone, but is any thought being given to the simplification of these Regulations and perhaps to a different approach, even if it involves changes in primary legislation?"[32]

These Regulations were reviewed by the Office of Fair Trading in 1986. The OFT acknowledge the following problems gave rise to their review:

> "(a) the Regulations have proved to be too complicated for the average creditor to understand;
>
> (b) the principles behind the construction of an advertisement which complies with the Regulations are difficult to understand. Whilst they may be understood for the purposes of constructing one advertisement, as soon as a new approach to advertising is needed and a new advertisement constructed, the principles are liable to be forgotten;
>
> (c) the intermediate category of advertisement was inserted in the Regulations at the request of the consumer credit industry but now it is felt to be unnecessarily complicated and many traders do not understand it."[33]

As a result of the review, new regulations are to be made which will, it is hoped, go some way to simplifying the rules and injecting a greater element of flexibility than at present.

It is also interesting that the Consumer Credit Act itself is being reviewed, and amongst the points for consideration are:

(i) Aspects of the Act or its regulations which give rise to uncertainty because the precise meaning of the provisions is unclear;

(ii) Provisions which give rise to genuine difficulty for lenders because the legal requirements are no longer consistent with commercial practice and it is impracticable for those methods to be adjusted[34].

Particular difficulty has arisen where the law is attempting to control sophisticated advertising and marketing practices. Another example of this is The Price Marking (Bargain Offers) Order 1979[35] - a piece of legislation which had to be amended twice within six months of the Order being made, and has now been replaced by Part III of the Consumer Protection Act 1987.

Ever since the abolition of resale price maintenance in 1964[36] there has been the problem of controlling the authenticity of price comparisons and bargain claims, particularly by retailers.

Laws on price comparisons go back to 1968 and Section 11 of the Trade Descriptions Act. This prevents false indications that the price at which goods are being offered is lower than it really is or false indications that a price is equal to, or less than, a recommended price or a seller's previous price. With this legislation comes the presumption that in the case of a claimed reduction from a previous price the relevant goods have been on offer at the higher price for a continuous period of at least 28 days during the previous six months.

However, Section 11 did not attempt to deal with the authenticity of claimed discounts off other retailer's prices, or the issue of whether manufacturers' recommended prices provide a realistic basis for price comparisons.

As a result, the Office of Fair Trading published in 1978 recommendations[37] that called for the prohibition of certain generalised and unspecific price comparisons together with an across-the-board ban on the use of recommended prices for comparative purposes. However, following industry pressure, the OFT came down against a comprehensive ban on the use of recommended retail prices. The result was The Price Marking (Bargain Offers) Order 1979 made under the Prices Act 1974.

The general idea behind the legislation was simple enough. It was to prohibit any express or implied price comparison unless it is with a particular price which falls within the exemptions set out in the Order. Article 3(1) said that the prohibition on price comparisons applied where a price is indicated and there was:

> "... any statement (however framed and whether express or implied) that the price indicated is lower than -
>
> (a) a value ascribed to goods, not being the amount of such a price as is mentioned in sub-paragraph (b) below; or
>
> (b) the amount of another price for the sale of goods of the same description (whether that price is, or is not, specified or quantified or is, or is not, the price which has been charged, indicated or proposed by any person.)"

The object was to make illegal such claims as "Worth £36; only £19.95", "This price up to £10 off", " Could cost at least £7.85 elsewhere"[38]. The wording was intended to produce a sweeping provision that would rule out ingenious attempts at trying to circumvent the law. This it did not achieve. What it did succeed in doing, however, was to put in doubt a number of well-known advertising slogans which, when used in relation to a price indication, could be taken to imply a comparison with another price.

So, for example, Sainsburys were succesfully prosecuted for the use of their 'Discount '81' slogan[39] on the basis that the slogan, when used in close proximity to specific prices in an advertisement, conveyed the impression that the prices shown were lower than previously. Since they were not reduced prices Sainsburys were convicted, under both the Bargain Offers Order and Section 11 of the 1968 Trade Descriptions Act.

The exemptions set out in the Order tried to establish a list of 'acceptable' price comparisons. Comparison was permissible with:

(a) Prices charged previously in the ordinary course of business by the person giving the price indication, such as '£5 - £1 off last week's price'.

(b) Prices charged in the ordinary course of business by another identified retailer provided that there is no reason to believe that the prices quoted are out of date, such as 'Our price £5 - Joe Smith's price £6'.

(c) Prices which will be charged by the same retailer from a specified future date, such as 'New 10p off until January 1st'.

(d) Prices for goods of the same description in specified different condition or quantity, or in different circumstances or on different terms; 'Shop-soiled £2 - Perfect £3, '10p each - 3 for 25p'.

(e) Prices charged for different combinations of goods: 'Table plus four Chairs -only £150'.

(f) Prices which relate only to specified groups: 'Price £1.50, Students £1.20'.

(g) Prices recommended or suggested by any person in the course of business where the relevant goods do not fall

in the list of prohibited goods set out in the Schedule to the Order (beds, carpets, furniture, household electrical goods and consumer electronic goods): e.g. 'MRP £50 - Our Price £40.'

These exemptions caused major problems for consumers, traders and enforcement officers. As one enforcement officer put it to the author "The feeling is that we have been lumbered with enforcing something that nobody understands". As far as comparisons with retailers' own previous prices are concerned, the requirement was that the goods must have been sold previously on the same or other identified premises. However, this caused immense practical difficulties in the case of a multiple store selling a wide range of goods. In the case of Queensway Discount Warehouses Ltd v Burke[40], Lloyd LJ commented:

> "(Counsel for Queensway) drew our attention to the practical difficulties which would ensue in the case of a composite advertisement, such as we have here, for numerous different articles if the premises at which the articles had been sold at a higher price are different for each of the different articles advertised. I can well appreciate that difficulty and I can well apreciate the irritation which it may cause. But it is what, as it seems to me, the Regulation requires"[41].

Some traders took to using one particular outlet where they know that all the goods will have been sold previously at the higher price, at least once, as their basis for making national sale promotions. Yet from the consumer viewpoint the outlet chosen as the basis for the comparison may have been quite irrelevant, for example a branch at the other end of the country.

Where comparisons with other retailers are concerned, the requirement was to identify a specific retailer. However, given the long lead-in times for advertisements, the prices may have been out of date by the time the advertisement appeared, quite apart from the fact that the retailer chosen as the basis

for the comparison may be unrepresentative of the prices generally available in the market place. In addition, there was the practical difficulty of getting newspapers to accept named comparisons with other traders which they may regard as 'knocking copy'.

Paradoxically, the legislation caused more difficulty for the honest trader than for those who wished to make dubious bargain claims. The latter were able to make use of the provision which permits comparisons with the price of goods of the same description in different circumstances, condition, quantity and so on. Although these exemptions were designed to deal with genuine claims they were used to create a number of new 'bench-marks' which were more misleading than the claims they replaced.

As a result, consumers were confronted with discounts off the 'Ready-Assembled Price' (RAP), The 'Special Order Price' (SOP) and the 'After-Sale Price' (ASP) in a way that enabled traders to present their normal selling prices as price reductions.

In addition, the Order allowed a retailer to put an artificially high price on one unit of a product and then offer customers substantial discounts off the price of two or more units.

The result was that legislation designed to eliminate misleading bargain claims spawned a whole host of new and novel claims which were far more misleading than those they had replaced.

It is these problems that led the then Consumer Affairs Minister - Sally Oppenheim, to order a review of the legislation paying particular attention to 'the increasing use of meaningless price comparisons which technically comply with the Order on the one hand, and the possibility that advertising slogans making generalised claims about value may be interpreted as contrary to the Order on the other hand'[42].

After years of consultation, the Government has finally enacted a new framework of law on price comparisons in the form of Part III of the Consumer Protection Act 1987. This has replaced The Price Marking (Bargain Offers) Order and Section 11 of the Trade Descriptions Act with a new general offence of giving:

> "... to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons)"[43].

Section 25 gives the Secretary of State power to produce a statutory code of practice for the purpose of:

> "(a) giving practical guidance with respect to any of the requirements of Section 20 above; and
>
> (b) promoting what appear to the Secretary of State to be desirable practices as to the circumstances and manner in which any person gives an indication as to the price at which any goods, services, accommodation or facilities are available or indicates any other matter in respect of which any such indication may be misleading".

The Code has an evidential status in any proceedings in that a contravention of the Code, whilst not giving rise of itself to any civil or criminal liability, may be relied on for the purpose of establishing that a person has committed an offence or to negative a defence. In addition, compliance with the Code may be relied on in relation to showing that the commission of an offence has not been established or that a person has a defence[44].

The idea of a general duty on misleading price comparisons was influenced by a growing realisation that a different legislative approach was needed. As Sir Gordon Borrie has put it in commenting on the experience of The Price Marking (Bargain Offers) Order:

> "This experience suggests to me that trying to deal specifically with current abuses through the medium of detailed regulation may be ineffective and self-defeating...it seems to me there is a need to build into the legislation a degree of flexibility to deal with the exploitation of loopholes and with unforseeable developments in pricing and marketing techniques"[45].

A solution may have been found for the problems of price claims but there remains widespread concern about the effectiveness of whole areas of modern consumer criminal law. Peter Green, Chief Trading Standards Officer for East Sussex, told the 1983 annual conference of the Institute of Trading Standards Administration that the 1968 Trade Descriptions Act needed urgent review[46] - a comment which confirmed the findings of the 1976 Review. He went on:

> "There are many more examples of legislation which for no good reason is hampering the efficiency of the service and wasting precious resources because the legislation was either poorly constructed or is now out-dated"[47].

The problems that have arisen in relation to recent legislation are clearly indicative of the limitations of the traditional legislative approach to protecting the consumer. As the CBI has put it:

> 'Consumer protection legislation has entered a period of diminishing returns and uncertainty as to future direction. It is time to make a critical examination of the subject as a whole, with the aim of defining a systematic approach to the objects of consumer protection and the means by which it can be achieved'[48].

(d) The Enforcement of the Criminal Law

As we saw in Chapter One, the modern trading standards officer is a descendant of the aleconner. More recently he would have been termed a 'weights and measures inspector' because until

the late 1960s-70s their principal function was the enforcement of weights and measures legislation. Some departments were re-styled consumer protection departments - the latter also bringing in the environmental health service in some cases. Most are now styled trading standards departments as a recognition of the breadth of legislation for which they are responsible and because the term implies a degree of neutrality between the consumer and the trader.

The range of legislation enforced by trading standards officers is fairly effectively gauged from the following list[49]:

Fair Trading

Trading Representations (Disabled Persons) Act 1958
Mock Auctions Act 1961
Trading Stamps Act 1964
Criminal Justice Act 1982
Trade Descriptions Acts 1968
Development of Tourism Act 1969
Unsolicited Goods and Services Acts 1971 and 1975
Fair Trading Act 1973
Hallmarking Act 1973
Consumer Credit Act 1974
Credit Unions Act 1979
Insurance Companies Act 1974
Prices Acts 1974 and 1975
Estate Agents Act 1979
Hire Purchase Act 1964
Shops Act 1950
Energy Act 1976
Competition Act 1980
Companies Act 1985
Magistrates Courts Act 1980
British Telecommunications Act 1981
Forgery and Counterfeiting Act 1981
Copyright, Designs and Patents Act 1988
Consumer Protection Act 1987

Quality Standards

Food Act 1984
Agricultural Produce (Grading and Marketing) Act 1928
Farm and Garden Chemicals Act 1967
Medicines Act 1968
Agriculture Act 1970
European Communities Act 1972

Metrology

Weights and Measures Acts 1963-1985
Alcoholic Liquor Duties Act 1979
Road Traffic Acts 1972 and 1974
Road Traffic (Foreign Vehicles) Act 1972
Heavy Commercial Vehicles (Controls and Regulations) Act 1973
Transport Act 1982

Safety

Consumer Protection Acts 1961 and 1987
Control of Pollution Act 1974
Health and Safety at Work etc. Act 1974
Consumer Safety Act 1978
Explosives Acts 1875-1923
Fireworks Act 1951
Petroleum Consolidation Act 1928
Poisons Act 1972
Explosives (Age of Purchase) Act 1976
Animal Health Act 1981
Animal Health and Welfare Act 1984

This is quite apart from numerous Statutory Instruments made under some of these Acts which one authority has estimated at 170 [50].

It is important to recognise the different types of legislation which trading standards departments enforce, the main distinction being between mandatory legislation and permissive legislation.

Local authorities are compelled, for example, to enforce the Consumer Credit Act 1974, the Consumer Safety Act 1978 and the Weights and Measures Acts 1963-85.

On the other hand, some legislation does not impose an enforcement duty on any particular agency. They can, however, be adopted by local authorities for enforcement. Examples of this sort of legislation are the Trading Stamps Act 1964 and the Unsolicited Goods and Services Acts 1971-75.

However, whether there is a statutory obligation on the local authority or the obligation is voluntarily assumed, the obligation rests on the authority as such. This means it is left to the decision of the individual authority how and by whom the legislation is enforced. In some areas of the country food labelling issues, for example, are dealt with by trading standards departments whilst in others it is dealt with by environmental health departments. In the 32 London Boroughs, for example, only five trading standards departments have a responsiblity for food and drugs administration, whilst outside Greater London in the 47 English and Welsh non-metropolitan counties 41 trading standards departments have some or all the responsibility for food and drugs[51].

The result of all this legislation is that approximately 1,500 officers, in some 126 authorities, are responsible for enforcing a wide range of laws from food labelling to poisons and explosives. In 1986 this involved over half a million complaints being dealt with by trading standards departments[52].

Recent years have produced some major problems in relation to enforcement of this legislation.

Firstly, the combination of a multiplicity of enforcement authorities and an extensive body of consumer law makes for differences of interpretation between trading standards departments. Whilst, of course, matters of interpretation are

ultimately for the courts, few traders are willing to run the risk of a criminal conviction in order to test uncertain points of consumer law. And one must remember that most offences under consumer law are offences of strict liability.

For this reason, the interpretation given to statutory provisions is of fundamental importance to traders. Differences of interpretation between departments create major problems, particularly for those traders who are operating across the boundaries of a number of trading standards departments. They may be marketing goods at a national level and be faced with some trading standards departments threatening to prosecute, whilst others may give them clearance. It also means that consumers may receive different answers to their complaints in different localities.

It is the large conurbations that present the most complex problems of control, particularly because business operations tend to overlap several local authorities. Yet, paradoxically, it has been in these urban areas where there has been the least willingness to work together[53]. This accounts for the fact that the voluntary consortia set up in Greater London in the 1960s have now almost completely broken down[54].

The problem has, therefore, been made worse by the abolition of the metropolitan counties which has meant the devolution of trading standards functions from six metropolitan counties to 36 individual metropolitan districts. This has not only aggravated the fragmentation of enforcement but imposed extra costs. It has also exacerbated the wide variation in the scale of administrative areas which, in population terms, ranges from under 100,000 to over 2 million.

In an analysis of the costs involved in abolition, Coopers and Lybrand estimated that the extra costs resulting from the devolution of the trading standards service will be something approaching £1 million if there is good co-operation between the district authorities and nearer £3 million if there is not[55].

These problems of differences of interpretation have to some extent been alleviated by the creation in 1978 of the Local Authorities Co-ordinating Body on Trading Standards (LACOTS), set up by the Association of County Councils, the Association of Metropolitan Authorities, the Convention of Scottish Local Authorities and the Association of District Councils. LACOTS is very much a successor to the Local Advisory Joint Committee on Food Standards set up in the 1960s. Its purpose is to co-ordinate enforcement of trading standards legislation, a function which it fulfils in the following ways:

(a) Advising central government and responding to consultation on legislative proposals.

(b) Promoting a uniform interpretation of the Acts and Regulations.

(c) Assisting the local authority Associations with the formulation and development of policies on trading standards.

(d) Co-ordinating the practical aspects of enforcement work.

(e) Providing an effective channel for the collection and exchange of technical information.

(f) Negotiating with trade associations voluntary standards for quality and good practice.

(g) Liaising with corresponding enforcement authorities in other countries[56].

Closely linked to the creation of LACOTS was the establishment of the National Metrological Co-ordinating Unit, although that body has now been abolished. Questions of uniformity have also been addressed through the establishment of a computerised information service for trading standards officers called 'TS Link' and operated by the Institute of Trading Standards Administration - the professional association for trading

standards officers. And particularly important has been the establishment of the 'Home Authority' principle by which trading standards departments will normally accept a ruling given by the department in which a trader is based.

In addition, some local authorities have a closer control over the day-to-day functioning of trading standards departments than others, particularly in relation to prosecutions. This brings with it the danger of political motives influencing the priorities for consumer law enforcement.

Another serious problem is that of lack of effective and uniform enforcement.

Much of this problem results, directly or indirectly, from the fact the enforcement is local authority based. For a start, as we saw, the size of trading standards authorities varies enormously. And as a result of the cut-back in central government grants to local government there has inevitably been restraints on expenditure on the trading standards service. Most local authorities have been compelled to cut expenditure across the whole range of local authority services, and this has meant either cuts in expenditure on trading standards or at best a 'no growth' position. When set against the increased responsibilities imposed on the trading standards service by recent legislation, the result has often been an effective cut in service. As one commentator put it:

> "The magnitude of the substantive law and the volume of unlawful activity make it virtually impossible for consumer agencies with limited manpower and finance to enforce the whole range of legislation"[57].

The manpower problems are increasingly serious. In 1987, whilst the number of established trading standards officer posts have increased over 1986, the number of qualified officers in post has declined[58].

As a result of these pressures individual trading standards departments have been compelled to adopt priorities for law enforcement and these will depend on a range of factors, including the particular expertise within the department and the nature of the locality. Rural areas, for example, will give greater prominence to the food industry. Other departments may put the emphasis on action against counterfeit goods, particularly where there are major street markets in the locality. The result is that different elements of consumer law receive different priorities for enforcement in different parts of the country. For example, The Price Marking (Bargain Offers) Order 1979 [59] was vigorously enforced in some local authorities whilst in others it was a very low priority[60]. In one local authority, known to the author, no active steps, such as monitoring, were taken to enforce the Order and action was only taken in the event of a specific complaint.

The position is aggravated by a widespread feeling amongst trading standards officers that when they do enforce the legislation and initiate prosecutions the courts fail to respond with meaningful penalties. As Ross Cranston puts it:

> "The maximum fine in consumer legislation is £400 (in 1979) if the prosecution is brought in a magistrates court - which compares with a figure for companies of approximately £31,250 in recent Australian legislation. Government committees, parliamentarians and consumer organisations have all pointed out that the fines fixed by consumer law are too low to provide an adequate deterrent. Combined with the fact that magistrates rarely impose the maximum, this contributes to a situation where fines can be treated as equivalent to a licence fee to infringe the law"[61].

Evidence of the level of fines was revealed by the Review of the Trade Descriptions Act 1968 by the Office of Fair Trading. During the Act's first six years of operation the average fine was £76 per offence[62]. However, there is evidence that the situation improved since the revision of maximum fines in 1978 in accordance with the Criminal Law Act 1977. Although even a

small fine may lead to a tightening up of a company's procedures, the courts still often fail to make the penalty fit the crime. Borrie gives the example of a second-hand car which has had the odometer turned back, thus adding £500 to the sale value of the car. Rarely does the fine reflect the extent of the profit made by the accused[63].

From the point of view of consumers and traders alike, the result is a situation where the law is not always adequately and uniformly enforced. This is clearly to the detriment of consumers and to conscientious traders who can find their less reputable competitors failing to comply with the law and, as a result, gaining an unfair competitive advantage. In the experience of the author, traders are much less concerned with the complexities of legislation per se than they are with the question of whether all their competitors are being compelled to operate within the same framework of control.

The likelihood is that the problem of resources will get worse still if the Eden Committee Report's[64] recommendations are implemented. Their main proposal is the introduction of an accreditation system for weighing and measuring equipment to replace the current system of individual verification by trading standards departments. This will result in a substantial loss of fees from manufacturers who will, to a large extent, be responsible for a system of self-certification of weighing and measuring equipment.

These problems of enforcement have been aggravated by the increasing complexity of much recent consumer legislation and doubts that trading standards departments have the necessary qualifications and expertise to cope with enforcement. This is why the Crowther Committee on Consumer Credit[65] advised against using trading standards officers to enforce their new legislative proposals which were enacted in the Consumer Credit Act 1974.

All these difficulties do raise the deeper issue of whether we should move towards a national enforcement service. For example, a specially commissioned study from the Institute of

Local Government Studies has concluded that the failure of local authorities to meet perceived national needs may well lead to central government imposing its own structures[66].

The main advantages would lie principally in terms of more consistency of enforcement policy. But there may also be advantages in terms of resources, as well.

Firstly, if the Government is not only responsible for creating legislation but also for enforcing it, there may be more attention given to ensuring adequate resources than at present where it is a local authority responsibility.

Secondly, there are economies of scale that can be achieved from larger units of enforcement. This was the experience of the trading standards departments in the metropolitan counties before they were abolished in 1984[67]. Particularly important was the provision of testing facilities which would not have been cost effective in a small trading standards unit[68]. In addition, the larger departments enable specialisation by individual officers[69]. And the pressures for specialisation are likely to grow with the increased scientific and technical sophistication of trade and industry.

Thirdly, the need for rapid access to information has made the trading standards service increasingly dependent on national public bodies, such as the National Weights and Measures Laboratory for the verification of national standards, the Office of Fair Trading, the Safety Unit of the Department of Trade and Industry and the Government Chemist. A national service would facilitate liaison with these bodies.

Fourthly, the draft EEC Directive on the Official Inspection of Foodstuffs envisages enforcement throughout the distribution chain, to include national sampling programmes. This trend towards nationally and internationally co-ordinated law enforcement will impose increasing burdens on the localised trading standards service. Indeed, Britain is the only country in the European Community where the full range of trading standards functions is the responsibility of local authorities.

Some support for moving away from the present system can be gleaned from the recent study from the Institute of Local Government Studies. It concludes:

> 'The need is for substantial resource bases for trading standards administrations well in excess of the current average size'.

However, there are potential disadvantages as well. The most major is that a national enforcement service might undermine the local nature of the service. In addition, as we noted earlier, trading standards officers do not necessarily exercise the same functions in different parts of the country. This would present a problem in terms of creating a national service because it would be difficult to achieve common terms of reference for all parts of the country, unless, perhaps, the environmental health service was also brought into a national service.

A national service could well operate under the auspices of the OFT, which would then help to ensure even greater consistency because of the OFT's general oversight of the consumer interest and its functions in respect of Part III of the Fair Trading Act. What is interesting is the extent to which many people already believe that trading standards departments are local branches of the OFT. There is no reason why a national service should not continue to retain the same level of local presence that they do at present. Even in the least populated Canadian provinces, to take an example, the centralised consumer protection service usually has a series of regional offices. The consumer protection service in Alberta is organised on the basis of a central office in Edmonton and seven local offices which have a high level of autonomy. And Alberta only has a population of 2,375,278[70] which makes it the least populated of the four Canadian provinces which we look at in Chapter Five. Its population would not even amount to a third of that of Greater London.

(e) The Strengths and Limitations of Self-Regulation

If the law and administrative remedies have their problems and limitations what of that other element in our system of consumer protection - self-regulation? Certainly, the existence of Section 124(3) of the Fair Trading Act is recognition of the fact that industry codes and self-regulation have important advantages to offer in protecting the consumer and helping to ensure fair trading. So what are these advantages? Jones and Pickering comment that the strengths of a self-regulatory system mirror the weaknesses of the legal process[71].

The most important advantage is that a code can be applied on the basis of the spirit of the code as well as its letter and therefore is less likely to be subject to 'loopholes'[72]. This is particularly important in dealing with sophisticated trading practices. The problems arising from some examples of modern consumer legislation, such as The Price Marking (Bargain Offers) Order 1979[73], illustrate the problems that can arise where one is not able to invoke the spirit behind a measure. In the British Code of Advertising Practice, for example, the Code's spirit is enshrined in three basic principles as follows:

1. All advertisements should be legal, decent, honest and truthful.

2. All advertisements should be prepared with a sense of responsibility, both to the consumer and to society.

3. All advertisements should conform to the principles of fair competition generally accepted in business.[74]

Secondly, the nature of industry codes is such that they can be changed relatively speedily to reflect changing circumstances, whereas pressures on Parliamentary time make changes to legislation a much longer process[75]. This process is aided by the fact that responsibility for the drafting and enforcement of codes lies with those who have specialised knowledge of the trade[76].

Even where one is dealing with delegated legislation, time necessarily spent on consultation with a very large number of interested bodies can make the process a fairly lengthy one. And, of course, codes deal with individual industries and their problems whereas legislation normally is of general application[77]. However, there is sometimes a degree of overlap between industry codes and legislation[78].

Thirdly, it can encourage a positive approach to trading standards and high standards in excess of the basic minimum. This is because the success of the code of practice is seen as being irrevocably tied to the standing and reputation of the relevant industry[79]. This is particularly so when the relevant business may believe, perhaps with good cause, that the alternative to self-regulation is direct legislative control which may be more onerous and costly to comply with[80].

Fourthly, an industry code can deal with those areas which are difficult to control by legal measures, such as heavily subjective concepts. For example, codes can be used to improve the standard of services - something which is ill-suited to statutory control[81]. As Sir Gordon Borrie has put it:

> "To adopt the words of a well-known advertisement for beer, codes are meant to refresh those parts of business life that laws cannot reach"[82].

An example of subjective concepts being dealt with in a code is that of decency in the context of the British Code of Advertising Practice. Paragraph 3.1 of Part B of the Code provides:

> "Advertisements should contain nothing which, because of its failure to respect the standards of decency and propriety that are generally accepted in the United Kingdom, is likely to cause either grave or widespread offence."

Fifthly, codes can encapsulate procedures which would not normally be regarded as acceptable within a legal framework. Let us take for example, again, the British Code of Advertising Practice. Under paragraph 1.2 of Part B an advertiser is under the following obligation:

> "Before offering an advertisement for publication, the advertiser should have in his hands all documentary and other evidence necessary to demonstrate the advertisement's conformity to the Code. This material, together, when necessary, with a statement outlining its relevance, should be made available without delay if requested by either the Advertising Standards Authority or the Code of Advertising Practice Committee".

In the absence of adequate substantiation the ASA will uphold a complaint against the advertiser. In other words, the advertiser is in breach of the Code unless he can prove otherwise.

Sixthly, a code can help to clarify the legal obligations of the trader and the legal rights of the consumer. This is an advantage to the consumer even where the code does not add to basic statutory rights.

For example, under Section 15(3) of the Energy Act 1976 and The Passenger Car Fuel Consumption Order 1983 [83] advertisements for new cars which mention fuel consumption must give official fuel consumption figures. The Code of Practice of the Motor Industry reminds the car trade of the legal provision and assists their compliance with it by providing that fuel consumption figures should conform to internationally agreed test procedures.

Another example is provided by the Code of Practice of the Soft Drinks Industry which explains, in plain language and with the minimum of statistics, what the soft drinks packer has to do to discharge his obligations under the Weights and Measures Act 1985[84].

This role of self-regulatory codes is aided by the simple non-legalistic language which is used in codes and which makes them more readable and understandable by consumers and traders alike[85].

Finally, in so far as codes can provide a measure of consumer protection they do so in a cost effective way, both for the consumer and in terms of conserving public resources which would otherwise go into law-making and law enforcement[86]. And, as the NCC has commented, the comparatively minor nature of many consumer offences and the necessity for strict liability in many cases makes the criminal law an inappropriate vehicle[87].

Making a complaint involves no direct cost to the consumer at all, except the cost of a postage stamp. Only when a consumer makes use of trade association arbitration facilities is there a cost, although it is a fairly nominal one and compares favourably with the costs involved in a county court claim, even using the small claims procedure. And apart from being relatively inexpensive, code procedures have few of the formalities attendant on legal procedures. These code procedures have been much improved over the years as a result of OFT involvement in the preparation and development of codes[88], although they are not used as often as they might be.

One important example of the effectiveness of self-regulation was provided by the review of the advertising self-regulatory system in 1978. In that year the DGFT prepared a report which included commissioned research to gauge the extent to which advertisements conformed to the Code of Practice. The Report concluded that the vast majority of advertisements conformed to the Code (93 per cent) and that few of the infringements seemed to the DGFT to amount to gross deception likely to cause consumers significant harm[89].

Another example of the effectiveness of self-regulation is evident from the 1978 Price Commission investigation into the proprietary medicines sector. In its report90, the Price

Commission commented on the effectiveness of both the legal controls and the self-regulatory system operated by the Proprietary Association of Great Britain:

> "The number of complaints about proprietary medicine advertising is about 0.2 per cent of all complaints and the number upheld is less than 0.1 per cent. The conclusion is therefore that the system of control is effective."[91]

However, despite their advantages, industry codes of practice have a number of significant disadvantages - although some of these vary substantially in degree from code to code.

The criticism made most often of industry codes is that they only apply to members, thus denying the consumer the advantages of the code when dealing with non-code traders.

For example, an OFT survey into the operation of the Code of Practice for the Motor Industry in 1978 showed that 70 per cent of complaints about used cars and car servicing involved dealers who were not in membership of the trade associations operating the Code and were therefore not bound by it[92].

In other words, codes often lack the comprehensiveness of application that can be achieved through legal controls. This is undoubtedly a major problem although one must not forget that some non-association traders nevertheless adhere to the standards of the industry code. In the advertising industry, for example, some media interests which are not in membership of the subscribing organisations to the self-regulatory system nevertheless operate the British Code of Advertising Practice in relation to advertising bookings[93]. And Cranston notes that monitoring has found that in some cases the standards of non-members had also improved after the introduction of a code[94].

Another disadvantage of codes is that they sometimes lack effective sanctions against non-compliance. Where there is a high level of membership of the trade body and membership is

seen as crucial, as in the case of the Association of British Travel Agents[95], then the trade association is in a strong position to threaten expulsion as the major sanction against non-compliance. However, where membership is not seen as crucial for a company, its expulsion from a trade association is a once and for all sanction enabling the trader to continue operating in defiance of the code[96].

Other sanctions available are warnings, reprimands and adverse publicity - and sometimes fines. An example of the latter is provided by the Association of British Travel Agents (ABTA), who are willing to fine members for contravention of the ABTA Code[97].

In the case of advertising, the sanction of withholding of advertising space to an advertiser who flouts the rules is available through the co-operation of the media. Since the overwhelming majority of major publishers are in membership of the relevant media associations, it is generally an effective sanction. And in addition to withdrawal of advertising space, there is the sanction of publicity of Code breaches through monthly case reports. However, where there are a great many traders outside membership of an association and not being a member carries no obvious disadvantages then policing a code can be difficult. For example, only a minority of members of the Motor Agents Association have been willing to comply with the Code requirement to display a pre-sales information report on car windscreens[98].

Some associations are not necessarily weak in terms of representation of the business but in terms of financial security. Such associations are loath to expel a member whose subscription may be vital to the financial well-being of the association - particularly if it is a major member[99].

Generally, the procedures for obtaining redress for consumers work quite well. However, there have been criticisms of the time taken to resolve some complaints. In their report on redress procedures, which we looked at in Chapter Two, the DGFT commented:

> "There is an obvious need to improve confidence in code redress procedures as a method of obtaining relatively quick, informal resolution of disputes". And again the Law Society, in their response, observed that code arbitrations seem to take at least as long to complete as cases taken through a county court[100].

The Advertising Standards Authority has been subject, on occasion, to complaints about the time taken to deal with complaints[101]. Although the requirements have been tightened up there has been a problem of advertisers prevaricating in the submission of substantiation for a claim in order, one suspects, that the advertising campaign will be finished by the time the ASA gives its ruling. Problems in dealing with complaints and delays in operating sanctions were picked up by the OFT review of the self-regulatory system of advertising control in 1978[102].

Part of the difficulty in dealing with complaints is the absence of the sort of powers which normally support the administration of the criminal law, such as search powers, powers to seize documents and to demand production of documents. However, this is partly compensated for, as in the case of the ASA, by the ability to regard a complaint as upheld in the absence of satisfactory documentary evidence.

One also has to remember that whilst it is often an advantage to traders to have codes tailor-made for their individual trade the result, from the consumer's point of view, is a large number of codes sometimes with different terms, particularly as to redress procedures. This is the reason the OFT has worked so hard to reduce the differences between codes, particularly as to procedures for conciliation and arbitration[103].

Another important point is that where self-regulation is by the trade association directly and not by a separate organisation the enforcement role may be incompatible with the representative role of the association. It is difficult for a

body which spends much of its time as an advocate of its members' interests with governmental organisations and the wider public to periodically adopt the function of disciplining members[104]. However, this problem has been overcome in the operation of the advertising codes and in relation to the consumer ombudsman schemes by the creation of a separate independent body to ensure enforcement.

Awareness is also another common problem with codes of practice. With one or two major exceptions, there is a widespread lack of awareness of their existence and the procedures necessary for pursuing a complaint[105] - although this is also a common problem with legal remedies. For this reason, the OFT has been trying to encourage greater public awareness of codes, partly through its own publicity activities and partly through encouraging trade associations to develop, amongst other things, logos for their code and ensuring that members display it[106]. However, the OFT has found that compliance with logo display requirements is often inadequate. For example, this was one of the conclusions of the recent OFT report on the Mail Order Protection Schemes[107].

There are also those who doubt the motives behind self-regulatory codes, believing that the motive is principally trade protection rather than consumer protection[108]. In one case involving the Code of the Pharmaceutical Society of Great Britain, the House of Lords found that provisions in the Code limiting the number of pharmacies in large retail establishments and the non-pharmaceutical products which could be sold by pharmacies was an unreasonable restraint of trade[109].

The NCC has suggested that where there is full coverage of a particular trade, there may be a strong tendency to anti-competitive behaviour, especially where self-imposed restrictions impose barriers to entry or make it difficult for consumers to exercise informed choices[110]. This argument can also be made about the operation of self-regulation within the professions.

Cranston suggests that self-regulation, to be successful, needs to be linked to the commercial interests of individual companies. Should self-regulation impinge on profits, many will ignore it[111].

Finally, Humble believes that self-regulatory codes are in the ever present danger of a 'Catch 22' situation. Immediate, 100 per cent observance of a code probably means the standard has been set too low and the code is therefore open to criticism as worthless. If the provisions are demanding and set at the standard of the best there will inevitably be failures and the code is again open to the criticism that it is ineffective[112]. However, to be fair, these are criticisms which can sometimes be levelled at legal provisions.

So what all this amounts to is that self-regulation, like law, has its strengths and limitations. This is why Sir Gordon Borrie in his 1982 annual report weighed up the respective merits of legislation and self-regulation in terms of "horses for courses"[113]. There does not have to be a stark choice between law and self-regulation. As the NCC has noted:

> "There are many stopping-points along the broad spectrum between completely unilateral self-regulation and precise, specific statutory control"[114].

(f) The Home Improvements Sector

The background to present discussion of the concept of a general duty to trade fairly lies in the work of the OFT in the field of home improvements. As a result of their work the OFT issued, in 1982, 'Home Improvements; A discussion paper', which examined the problems faced by consumers and the remedies open to them. The paper plots the enormous growth in the home improvement sector and the corresponding growth in the complaints received by trading standards departments and citizens' advice bureaux[115]. Although the precise size of the home improvements market is difficult to assess, the value of output by contractors in 1979, alone, was in excess of £3,300 million[116].

The problems arising in this field are varied, ranging from high-pressure sales techniques to companies going into liquidation and leaving jobs half done or worthless guarantees given on completed jobs which cannot be enforced[117]. This is borne out by the fact that in 1986 the biggest single category of bankruptcies in England and Wales was construction[118]. The work of the OFT in relation to consumer complaints generally shows that building work was a sector in which consumer dissatisfaction was particularly high[119].

In addition, the evidence from local consumer advice agencies showed that householders contracting for home improvements were widely subject to unfair practices including shoddy workmanship, poor service and sub-standard materials[120].

As far as legal controls are concerned, the OFT noted that existing legislation provided some help, notably the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977 [121]. And the paper anticipated the passage of what was to become the Supply of Goods and Services Act 1982[122]. The latter's significance was that it codified implied rights of common law in respect of work and materials contracts and contracts for pure services along the lines recommended by the Law Commission[123] and the National Consumer Council. In respect of the materials element in such contracts, consumers were brought into line with the rights enjoyed under the Sale of Goods Act as to title, description, merchantable quality and fitness for purpose and sale by sample[124]. As far as services are concerned, the Act codifies the implied rights as to quality of service, time and price[125].

The discussion paper also noted the provision in Section 75 of the Consumer Credit Act 1974 which, in certain circumstances, makes a credit grantor equally liable with the trader for any misrepresentation or breach of contract[126].

Whilst recognising a civil action using the county court small claims procedure was possible, the OFT expressed the view that it is in the interests of consumers to have an alternative form

of redress[127]. The Office noted, in this regard, the work it had done in encouraging trade associations to provide conciliation and arbitration facilities[128]. In particular, the discussion document noted that the Federation of Master Builders had introduced conciliation and arbitration in January 1981.

The OFT notes that a number of trade associations in this sector recognise the need to deal more effectively with consumer dissatisfaction and to take positive steps to improve the image of the industry.[129] In this regard, the paper acknowledges that self-regulation had an important part to play and noted that the Glass and Glazing Federation had recently introduced a revised code[130].

However, the OFT did not see the problems of protecting the consumer being solved by detailed legislation. On the contrary, concludes the OFT, the improvements sector, the important role of the small firm, and the problems of enforcement mean that there is every advantage in maintaining flexible methods of control of varied and often novel abuses.[131]

On the other hand, whilst self-regulation had obvious advantages, particularly in terms of flexibility, it was unlikely to provide the whole answer in improving trading standards within the home improvement sector. Accordingly, the OFT concluded that the answer may lie in a "change of direction".[132]

(g) A General Duty to Trade Fairly?

The change of direction suggested by the OFT was the creation of a statutory general duty to trade fairly. In the OFT's view, the paucity of strong and effective trade associations in the sector made it a particularly strong candidate for such a development. Codes existed and had some value for the consumer but the OFT believed they could be made more effective.[133]

What the OFT suggested was a statutory duty on all traders to trade fairly with codes providing the detailed meaning of what such a duty specifically required.[134] Such a general duty would operate as an umbrella and:

> "... it would be possible to incorporate particular requirements into new-style codes of practice which would represent the standards envisaged in the general duty to trade fairly. This would include such matters as cancellation rights, identification of salesmen, high-pressure selling, quotations and estimates, completion dates and guarantee protection schemes and would apply to all traders in the field irrespective of their membership or non-membership of trade associations".[135]

Such a duty would be operated by making use of a procedure comparable to that provided by Part III of the Fair Trading Act 1973.[136]

As we saw in Chapter One, under Part III the DGFT can seek injunctive relief in respect of traders who persistently breach civil or criminal law[137]. This procedure could be extended to allow the DGFT to seek court orders or undertakings in lieu of court orders, for persistently following a course of conduct in breach of the general duty. The onus would be on the trader to establish that the interests of consumers were being satisfactorily protected in some other way.

In June 1983, the OFT issued a report following the consultations on the discussion paper of the previous year[138]. The report revealed that the proposal to enact a general duty to trade fairly in relation to the home improvements sector had been the subject of much comment with many respondents being attracted to the concept. They considered that it would provide an adaptable method of establishing satisfactory trading standards without the inflexibility inherent in legislation for dealing with specific abuses[139].

Quite a number of those who had responded to the consultation document commented that the concept of a general duty to trade fairly would have a wider application than just the home improvements sector[140]. This was welcomed by the OFT who were concerned at the general level of consumer dissatisfaction[141].

Accordingly, the OFT began a further round of consultation and announced its intention to prepare a further discussion paper dealing specifically with the concept of a general statutory duty to trade fairly[142].

A discussion paper on the issue was published in 1986[143]. It began by stressing the importance of establishing a policy objective and stated that objective to be raising trading standards generally and improving the means of redress for consumers[144].

From its considerations, the OFT concluded:

> "... an approach should be considered in which the existing body of statute and common law could be supplemented by the introduction into the law relating to consumer transactions of a broader concept of fair trading drawn up in such a manner as to increase the likelihood of satisfactory trading behaviour and improve consumer's opportunity of redress."[145]

As the DGFT has commented:

> "The UK has often been a pioneer in introducing laws to protect consumers but because of this we have a network of laws which has been built up bit by bit over many years. What is needed now is some kind of legal safety net to catch all 'rogue' practices which are still slipping through the mesh. The solution I have in mind is a basic piece of law which we have called a general duty to trade fairly. Under this cover-all duty, specific guidelines aimed at particular trades or methods

> of selling would also be introduced - perhaps one could call it designer law for shops, garages, builders, in fact for any firm or individual who serves the public. I think this could have the effect of raising trading standards generally, as well as dealing with some of the types of sharp practice that elude existing legal protection."[146]

Any general duty to trade fairly should, the paper suggests, meet the following criteria:

(a) It should have the twin overall objectives of raising trading standards generally and providing cheaper and readily accessible means for consumers to obtain redress.

(b) It should be structured to facilitate a rolling back of the criminal law, where possible and appropriate.

(c) Compliance costs to businessmen should be minimised.

(d) It should provide a range of sanctions.

(e) Enforcement should be quick and primarily local.

(f) There should be reasonable certainty as to what, in the context of any business, would constitute fair trading practice.

(g) The law should be flexible and adaptable to deal with new trading practices as they arise.

(h) It must be capable of dealing uniformly with unfair trading practices in particular sectors, and therefore apply to all traders, whether or not they are members of trade associations[147].

The Office was clearly influenced by what it saw as parallels or analogies to a general duty operating both at home and

abroad. Some of the domestic parallels we considered in Chapter Three in our examination of statutory codes of practice. In the next chapter we shall take a detailed look at the overseas parallels.

So what form does the OFT suggest such a general duty should take? Suggesting that such a duty should be a broad statutory duty, the OFT expresses the view that it should apply only to transactions between traders and consumers and not between traders and traders. The Discussion Paper envisages that the legislation would eventually apply to all sectors of trade and industry and that provision would be made for the general duty to be supported by approved codes of practice, which might include both industry codes and statutory codes. It is further suggested that it should be possible to decriminalise particular areas of consumer protection legislation when a general duty and codes are in place[148].

The Office concluded that it would not be appropriate for approved codes to contain redress procedures similar to those which exist in the present OFT sponsored codes because these are voluntarily supported and financed by trade associations. However, the OFT wants to see trade associations continuing to offer conciliation and arbitration facilities as an alternative to the enforcement provisions envisaged under the general duty[149].

The possible methods of implementation will be discussed in detail in Chapter Six. The OFT presents two possibilities:

(a) The obligations under a general duty would apply only to the extent spelt out in approved codes of practice and would be extended, sector to sector, as new codes come into existence[150].

(b) A general duty might apply to all consumer transactions, whether or not approved codes were in place. This would leave it for the courts, over time, to develop an interpretation of what is required and to define the relationship of the duty to existing law[151].

Finally, the Report examines enforcement and concludes that this could be shared between local trading standards departments and the Office of Fair Trading. The suggestion is that the duty would work something like this. A trading standards officer would approach a trader failing to comply with a relevant code and seek an undertaking to comply. If he agreed, that would be an end of the matter. If, however, the trading standards officer was unable to obtain a satisfactory response, the trading standards officer would serve a formal notice on the trader setting out the details of the allegation and inviting an undertaking in response. A failure to provide such an undertaking would enable the trading standards officer to apply to the local county court for an order requiring both compliance with the relevant code and, possibly, redress for the consumer. Ultimately, of course, the sanction for breach of such an order would be a fine or imprisonment for contempt of court[152].

In cases of general importance or where difficult questions of law were involved, the Director-General of Fair Trading could initiate the appropriate proceedings[153]. It would appear, however, that the OFT believes that the main operators of the system should be the local trading standards departments. In this, they would appear to be recognising one of the major criticisms levelled at the operation of the Director-General's powers under Part III of the Fair Trading Act 1973. In particular, it has long been the view of the trading standards service that the requirement to go through the DGFT to obtain Part III undertakings and court orders has done much to cause delay and reduce the effectiveness of that part of the Act[154].

Those then are the suggestions made by the OFT. In Chapter Six we shall consider the practical issues relating to the introduction of a general duty.

CHAPTER FOUR

References

1. J R Murdoch, 'Contracts for the Supply of Services under the 1982 Act', (1983) L.M.C.L.Q. 652.

2. Civil Justice Review; Small Claims in the County Court, 1986, Lord Chancellor's Dept. For a consideration of the problems surrounding small claims see T G Ison, 'Small Claims', (1972) 35 M.L.R. 18.

3. [1986] 1 All E.R., 841. But see G Applebey, 'Justice within Reach? - A Review of Progress in Reforming Small Claims', (1987) 6 C.J.Q. 214.

4. P Smith, 'Small Claims: Back to an Adversarial Approach?', (1986) 5 C.J.Q. 292 at 297.

5. Sale and Supply of Goods, 1987, Law Commission Paper No. 160 and Scottish Law Commission Paper No. 104. See also 'Buying Problems; Consumers, Unsatisfactory Goods and the Law', 1984, NCC. The recent case of Rogers and Others v Parish (Scarborough) Ltd [1986] The Times, 8th November, seems to overcome some of the difficulties for the consumer, but Bernstein v Parsons Motors (Golders Green) Ltd [1986] The Times, 26th October, has limited the value of that decision by showing that the right to reject for a breach of the condition of merchantability is a very short lived right.

6. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, p 53.

7. IDC Ramsay, Rationales for Intervention in the Consumer Marketplace, An occasional paper prepared for the Office of Fair Trading, 1984, OFT, pp 9-10.

8. S M Waddams, 'Unconscionability in Contracts', (1976) 39 M.L.R. 369.

9. [1985] A.C. 686; [1985] 1 All E.R. 821; [1985] 2 W.L.R. 588.

10. [1985] 2 W.L.R. at 600.

11. See B M Hannigan, 'Burmah's Dilemma', (1982) J.B.L. 105-6.

12. D Tiplady, 'The Judicial Control of Contractual Unfairness', (1983) 46 M.L.R. 601 at 602.

13. S M Waddams, 'Unconscionability in Contracts', (1976) 39 M.L.R. 369 at 371.

14. Ibid.

15. Lloyds Bank Ltd v Bundy [1974] 3 All E.R. 757 at 763.

16. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, p 3.

17. D W Oughton, 'Restructuring the Control of Price Indications', (1982) 1 L.M.C.L.Q. 117 at 123.

18. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 386.

19. Ibid. p 391.

20. Ibid. p 394.

21. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, Annexe C, para 38.

22. I C D Ramsay, Rationales for Intervention in the Consumer Marketplace, an occasional paper prepared for the Office of Fair Trading, 1984, OFT, p 60. See also W Gellhorn, 'The Abuse of Occupational Licensing', (1976) 44 Univ. of Chicago L.R. 6.

23. Annual Report of the Director-General of Fair Trading 1986, HMSO, p 11.

24. G Borrie, 'Licensing Practice under the Consumer Credit Act', (1982) J.B.L. 91 at 101.

25. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, Annexe C, para 46.

26. R M Crossley, 'Part III of the Fair Trading Act - A New Direction?', (1986) 94 The ITSA Monthly Rev. 139.

27. Letter from Sir G Borrie, (1986) 94 The ITSA Monthly Rev. 193.

28. Annual Report of the Director-General of Fair Trading, 1985, HMSO, p 20.

29. [1981] I.C.R. 292.

30. at 297.

31. S.I. 1980 No. 54.

32. H.C.Deb., Vol. 991, Col. 1045 (3rd November 1980).

33. Consultation Letter on Proposals for Revision of Advertisements and Quotations Regulations, 1986, OFT. See also P Circus, 'H.M. Government Health Depts WARNING: Consumer Protection can damage your sanity', 13th September 1978, Daily Telegraph.

34. Consultation Letter on the review of the Consumer Credit Act. The effectiveness of the Consumer Credit Act has also been the subject of a House of Commons Debate. See Vol. 107, Col. 987, (15th December 1986).

35. S.I. 1979 No. 364, as amended by S.I. 1979 No. 633 and S.I. 1979 No. 1124.

36. Resale Prices Act 1964. (now Resale Prices Act 1976)

37. (a) Bargain Offer Claims (Claimed reductions from recommended and similar retail prices).

(b) Bargain Offer Claims (Excluding claimed reductions from recommended and similar retail prices).

Recommendations by the Director-General of Fair Trading, 1978, OFT.

38. See 'Notes of Guidance for Enforcement Officers', 1979, Dept. of Trade, p 1.

39. R v J Sainsbury Ltd [1982], (unreported.)

40. [1985] 150 J.P. 17.

41. at 21. For other problems presented by the Order see M Carlisle, 'Practical Problems Arising from the Price Marking (Bargain Offers) Order 1979', (1979) 129 N.L.J. 815.

42. Minister's Parliamentary Written Answer to the House of Commons, Vol. 998, Col. 115 (18th February 1981).

43. S.20

44. S.25(2)

45. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, pp 64-65.

46. Ibid. p 61.

47. Ibid.

48. The Future Development of Consumer Protection Legislation, 1981, CBI.

49. Acts of Parliament Widely Enforced by Trading Standards Authorities, 1985, Local Authorities Co-ordinating Body on Trading Standards Report, Annexe 4. (Based on original but updated.)

50. Annual Report of the Trading Standards Division, London Borough of Richmond-upon-Thames, August 1985.

51. Trading Standards Statistics; 1985-86, Society of County Treasurers and the Society of County Trading Standards Officers, July 1985.

52. Speech by Sir Gordon Borrie to the Greater London Branch of the Institute of Trading Standards Administration, February 1987.

53. See (1987) 1 Fair Trader 10.

54. P Circus, 'Trading Standards in the Metropolitan Counties: Not a Suitable Case for Devolution', (1984) 92 The ITSA Monthly Rev. 201.

55. Streamlining the Cities; an Analysis of the Costs Involved in the Government's Proposals for Re-organising Local Government in the Six Metropolitan Counties, Coopers and Lybrand Associates, February 1984.

56. Taken from 'LACOTS; Local Authorities Co-ordinating Body on Trading Standards', issued by LACOTS. See also B W Beckett, 'The Problems of Uniform Enforcement', (1981) 1 Tr.L. 18.

57. R Cranston, Regulating Business; Law and Consumer Agencies, 1979, Macmillan Press, p 109.

58. (1987) 1 Fair Trader 11.

59. S.I. 1979 No. 364, as amended by S.I. 1979 No. 633 and S.I. 1979 No. 1124.

60. See, for example, P Circus, 'The Headaches of Law Enforcement', (1981) 131 N.L.J. 1067.

61. R Cranston, 'Regulating Business; Law and Consumer Agencies', 1979, Macmillan Press, p 141.

62. A Review of the Trade Descriptions Act 1968, 1976, Cmnd 6628 at p 109.

63. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, pp 66-67.

64. Report of the Committee on the Metrological Control of Equipment for use for Trade, 1986, Cmnd 9545.

65. Report of the Committee on Consumer Credit, 1971, Cmnd 4596.

66. See (1987) 1 Fair Trader 11.

67. See P Circus, 'Trading Standards in the Metropolitan Counties: Not a Suitable Case for Devolution', (1984) 134 N.L.J. 1045. See also 'The Future of the Trading Standards Service', (1983) 2 Tr.L. 139.

68. Ibid. p 1046.

69. Ibid.

70. 1986 Census.

71. T T Jones and J F Pickering, Self-Regulation in Advertising; A Review, 1985, Advertising Association, p 7.

72. T Fisher, 'Advertising Control in Britain', Advertising Quarterly, Summer, 1974.

73. S.I. 1979 No. 364, as amended by S.I. 1979 No. 633 and S.I. 1979 No. 1124.

74. British Code of Advertising Practice; 7th ed., 1985, p 3.

75. 'A Study Comparing Government Regulation and Self-Regulation as Means of Consumer Protection - Report adopted by the 36th Session of the Executive Board of the ICC, 1984, ICC, p2.

76. 'Self-Regulation of Business and the Professions' - an NCC background paper, 1986, NCC, p 2.

77. S E Marsh, 'Voluntary Codes of Practice', (1977) 127 N.L.J. 419.

78. T T Jones and J F Pickering, Self-Regulation in Advertising; A Review, 1985, Advertising Association, p 68. For example, false product claims in an advertisement would be subject to the British Code of Advertising Practice and the Trade Descriptions Act 1968.

79. Home Improvements - A Discussion Paper, 1982, OFT, para 6.3. For examples of code provisions in excess of the law's requirements see G Woodroffe, 'Government Monitored Codes of Practice in the United Kingdom', (1984) 7 Journ. of Cons. Pol. 171 at 175-7.

80. T T Jones and J F Pickering, Self-Regulation in Advertising; A Review, 1985, Advertising Association, p 2.

81. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 37.

82. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, p 74.

83. S.I. 1983 No. 1486.

84. Annual Report, National Metrological Co-ordinating Unit, 1983-84, 1985, Dept. of Trade and Industry, p 6. However, Woodroffe makes the point that unless a code makes clear what are legal obligations and what are code obligations people may not be able to distinguish the two and may wrongly believe that no recourse is available to the courts for conduct which breaches particular parts of the code.

85. See, for example, R Halstead, 'Consumer Protection -Retrenchment or Advance', paper given to a one day conference to mark the tenth birthday of the Office of Fair Trading, 1984.

86. T T Jones and J F Pickering, Self-Regulation in Advertising; A Review, 1985, Advertising Association.

87. 'Self-Regulation of Business and the Professions' - An NCC background paper, 1986, NCC, p 5.

88. See, for example, Redress Procedures under Codes of Practice -Conclusions Following a Review by the Office of Fair Trading, 1981, OFT. Most of the OFT's recommendations have now been implemented.

89. Review of the UK Self-Regulatory System of Advertising Control; a Report by the Director-General of Fair Trading, 1978, OFT.

90. Prices, Costs and Margins in the Production and Distribution of Proprietary Non-ethical Medicines, 1978, HMSO.

91. Ibid. para 5.16.

92. Annual Report of the Director-General to the Secretary of State, 1979, HMSO, p 18.

93. 'Advertising; Legislate or Persuade; Consumer Statement', 1977, NCC, p 9.

94. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 39.

95. See M Jones, 'The Keys to Success', taken from Marketing and the Consumer, 1976, OFT and Institute of Marketing, p 22.

96. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 41.

97. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 3.15.

98. Self-Regulation of Business and the Professions; An NCC background paper, 1986, NCC, p 9.

99. See R Adburgham, 'Codes in Practice', taken from Marketing and the Consumer, 1976, OFT and Institute of Marketing, p 18.

100. Redress Procedures under Codes of Practice - Conclusions Following a Review by the Office of Fair Trading, 1981, OFT, p 15.

101. Review of the UK Self-Regulatory System of Advertising Control - A Report by the Director-General of Fair Trading, 1978, OFT, p ii.

102. Ibid. para 5.7.

103. Redress Procedures under Codes of Practice - Conclusions Following a Review by the Office of Fair Trading, 1981,OFT .

104. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timorous Souls, Hamlyn Lectures, 1984, Stevens, p 75.

105. The Protection of Consumer Prepayments - A Report by the Director-General of Fair Trading, 1986, OFT, para 7.9. This problem of lack of awareness was also highlighted in the OFT Monitoring Survey of the Code of Practice for Vehicle Body Repairs Report, 1986, OFT, para 3.8.

106. See, for example, Mail Order Protection Schemes - A Review by the Office of Fair Trading, 1986, OFT, para 10.28.

107. See Mail Order Protection Schemes - A Review by the Office of Fair Trading, 1986, OFT.

108. European Consumer Law Group, 'Non-Legislative Means of Consumer Protection', (1983) 6 J.Cons.Pol. 325.

109. Pharmaceutical Society of Great Britain v Dickson [1970] A.C. 403.

110. 'Self-Regulation of Business and the Professions; An NCC background paper, 1986, NCC, p 7.

111. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 62.

112. J Humble, 'A New Initiative', taken from Marketing and the Consumer Movement, ed. J Mitchell, 1978, McGraw Hill, p 149.

113. Annual Report of the Director-General of Fair Trading, 1982, HMSO, p 9.

114. 'Self-Regulation of Business and the Professions; An NCC background paper, 1986, NCC, p 14.

115. 'Home Improvements; A Discussion Paper', 1982, OFT, para 1.4.

116. Ibid. para 1.3.

117. Ibid. para 1.5.

118. (1987) 25 British Bus. 36.

119. Consumer Dissatisfaction; A Report on Surveys Undertaken for the Office of Fair Trading, 1986, OFT, para 3.8.

120. 'Home Improvements; A Discussion Paper', 1982, OFT, para 1.4.

121. Ibid. paras 4.2-4.4.

122. Ibid. para 4.6.

123. Implied Terms in Contracts for the Supply of Goods, 1979, Law Commission Paper No. 95.

124. Sections 2-5.

125. Sections 13-15.

126. 'Home Improvements; A Discussion Paper', 1982, OFT, para 4.5.

127. Ibid. para 5.3.

128. See 'Redress Procedures under Codes of Practice - Conclusions Following a Review by the Office of Fair Trading', 1981, OFT.

129. 'Home Improvements; A Discussion Paper', 1982, OFT, para 5.8.

130. Ibid. para 6.3.

131. Ibid. para 6.2.

132. Ibid. para 6.5.

133. Ibid.

134. Ibid.

135. Ibid. para 6.6.

136. Ibid. para 6.7.

137. However, Part III has been the subject of much criticism. See, for example, R M Crossley 'Part III of the Fair Trading Act - A New Direction?', (1986) 94 The ITSA Monthly Rev. 139.

138. 'Home Improvements; A Report by the Director-General of Fair Trading', 1983, OFT.

139. Ibid. para 12.3.

140. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 1.4.

141. Consumer Dissatisfaction; A Report on Surveys Undertaken for the Office of Fair Trading, 1986, OFT.

142. As part of its consideration of the subject the OFT held a seminar in 1984 at which academics and others gave their views on the concept.

143. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT.

144. Ibid. para 1.2.

145. Ibid. para 5.11.

146. 'Law to Encourage Fairer Trading - views sought by the Office of Fair Trading', Press Release, 13th August 1986, OFT.

147. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 5.13.

148. Ibid. paras 5.14-5.15.

149. Ibid. para 5.22.

150. Ibid. para 5.23.

151. Ibid. para 5.24.

152. Ibid. para 5.28.

153. Ibid. para 5.29.

154. R M Crossley, 'Part III of the Fair Trading Act - A New Direction?', (1986) 94 The ITSA Monthly Rev. 139.

CHAPTER FIVE

TOWARDS A GENERAL DUTY; THE OVERSEAS EXPERIENCE

(a) Introduction

In Chapter Four we noted that there were a number of overseas parallels to the concept of a general duty to trade fairly. These parallels exist in both civil law and common law countries. In this chapter we consider these parallels in order that we can see to what extent they provide help to us in deciding whether there should be a general duty to trade fairly and, if so, what form it should take.

The common law countries we shall consider are Australia, Canada and the United States of America. The civil law countries are Belgium, West Germany and Sweden.

(b) Australia

The relevant Australian legislation is contained in the Trade Practices Act 1974. This is Commonwealth legislation, not State legislation, although some individual states, such as New South Wales, are now enacting comparable legislation in the field of unfair practices, because Commonwealth legislation is largely limited to inter-state trade. What is interesting to note is that until the 1970s Australian consumer protection legislation had consisted of ad hoc controls over a wide range of individual merchandising practices. This commitment to piecemeal responses, says Goldring and Maher, puts a premium on merchandising ingenuity and results in the seller, who trades by sharp practice, being one step ahead of the legislature[1]. Part V of the Trade Practices Act deals with consumer protection and Division 1 of the Part is concerned with unfair practices and unconscionable practices.

Section 52 of the Act provides as follows:

"(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)."

The general prohibition is followed by a list of specific prohibitions contained in Sections 53 to 65, including:

(a) false representations relating to the supply of goods or services;

(b) misleading employment advertisements;

(c) offering prizes, gifts, etc, with the intention of not providing them;

(d) misleading conduct as to the nature, manufacturing process, characteristics of goods or in relation to services;

(e) bait advertising;

(f) referral selling;

(g) accepting payment without intending to supply as ordered;

(h) misleading statements about profits and the practicability of home operated businesses;

(i) force, harassment, or coercion at a place of residence in respect of the supply to or payment by a consumer for goods or services;

(j) pyramid selling;

(k) supplying goods which do not comply with consumer product safety standards or without disclosing required product information;

(l) sending unsolicited credit cards;

(m) asserting without reasonable cause a right to payment for unsolicited goods or services.

Despite the detail and extent of the prohibitions, Section 52(2) does make it clear, as we saw above, that they are not to limit the generality of the duty set out in Section 52(1).

As a result of the Trade Practices Revision Act 1986 the Trade Practices Act 1974 has been amended. It now contains section 52A which seeks to control unconscionable conduct and is directed, in the words of the Australian Attorney General, "at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable"[2]. The Section provides as follows:

> "(1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened sub-Section (1) in connection with the supply or possible supply of goods or services to a person (in this sub-Section referred to as the 'consumer'), the Court may have regard to:
>
> (a) the relative strengths of the bargaining positions of the corporation and the consumer;
>
> (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation."

The inspiration for a specific section on unconscionable practices seems to have come, in part, from the existence of comparable legislation in some states, for example the Contracts Review Act 1980 of New South Wales[3]. This provides for judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts. Goldring and Maher describe the Contracts Review Act as a determined effort to redress economic imbalance and to provide a measure of relief for the economically disadvantaged[4].

As far as remedies are concerned, Part VI of the Trade Practices Act provides that any conduct within Division 1 (unfair and unconscionable practices) can be the subject of injunctive relief and any person suffering loss as a consequence of such conduct can recover damages under Section 82. A criminal prosecution can be undertaken by the Commission but such a prosecution must be based on one of the specifically defined practices and not the general duty in Section 52.

The reason for this is that it is felt that the stigma of criminality should not attach to conduct which cannot be determined in advance with a reasonable degree of certainty[5].

One of the consequences of this is that a person may be acquitted of a criminal charge under Part V but because of the different burden of proof be held liable in civil proceedings[6].

Injunctive relief may be granted on the application of the Commission, the Attorney General or any other person[7]. Except where the application is made under Section 52A relating to unconscionable conduct, the Court has power to order the disclosure of information and the publication of an appropriate corrective advertisement.

The majority of complaints are, however, dealt with by administrative action and only a relatively few cases are brought by the Commission before the Federal Court. The Commission are assisted in their resolution of complaints by considerable information gathering powers[8].

In the year 1985-86 four cases were taken to the Federal Court, three of which were prosecutions and one was an application for injunctive relief[9]. Although relatively few in number, the cases dealt with by the Court have established a useful body of case law on the interpretation of Part V[10]. During the same period 53 cases were settled by some sort of administrative action including undertakings by the traders concerned[11].

It is because of the importance of administrative action in resolving problems that the Commission is empowered under Section 28 of the Act to issue guidelines on the interpretation and application of the Trade Practices Act. Although these guidelines have no formal legal status they clearly have an important bearing on the administrative action taken by the Commission. This is because the guidelines set out the Commission's understanding of what the law requires in certain situations.

For example, the Trade Practices Commission has recently issued a general guide to the concept of unconscionable conduct as set out in Section 52A of the Act[12] (see Appendix B). Part One

sets out a discussion of the law and has been the result of input from a large number of sources, including academics and the enforcement officers. Part 2 sets out a number of market practices which the Commission believes can lead to unconscionable practices. These include:

"1. Where the sales techniques, by their very nature, produce a disadvantage to the other party.

2. Where the supplier knew or ought to have known that the consumer did not fully understand the transactions.

3. Where there is no real opportunity for the weaker party to bargain.

4. Where a contract is extremely one-sided"[13].

Part 3 then goes on to discuss the remedies for unconscionable conduct, both for individual litigants and for the Commission.

However, the Commission also produce guides on some of the specific practices which are set out in Sections 53-65.

If one takes origin marking as an example, Section 53(eb) of the Act provides that it shall be an offence to "make a false or misleading representation concerning the origin of goods".

The Commission has produced a guide for business called "The Trade Practices Act and Labelling the Origin of Goods"[14]. It uses this guide to make sure that traders know the Commission's views on the application of the Act to false and misleading indications of origin. If a trader is unwilling to accept the Commission's view and settle the matter at an administrative level he can force the Commission to either drop the case or take it to the Federal Court.

What is interesting to note is that sometimes, in the more specialist areas, the guideline is produced following consultation with trade and professional associations. For

example, the guide for the insurance industry on the Trade Practices Act involved extensive consultations with, amongst others, the Insurance Council of Australia, NRMA Insurance Ltd and the Life Insurance Federation of Australia [15] (see Appendix C).

Division 2 of Part V deals with conditions and warranties in consumer transactions and provides for a number of implied conditions and warranties with respect to contracts for the supply of goods. In relation to goods, these implied terms relate to title, correspondence with description or sample and merchantable quality and fitness for purpose. They therefore provide comparable implied conditions and warranties to those provided under the UK's Sale of Goods Act 1979. In relation to services, there are implied warranties as to due care and skill and fitness of materials for purpose. These are similar to some of the implied terms under the UK's Supply of Goods and Services Act 1982.

If a trader is in breach of any of these implied conditions or warranties, aggrieved consumers have the right to sue for damages in the civil courts. This usually means the Small Claims Court. However, the Trade Practices Commission cannot bring an action itself for a breach of any of these implied terms.

One noticeable difference between the regime under Part V of the Trade Practices Act and the general duty regime as envisaged by the OFT is that the former, although principally conceived of as a measure of consumer protection, is also available for use to protect traders against unfair competition[16]. To this extent there is an interaction between the operation of Section 52 and the tort of passing off. In Handley and Others v Snoid and Others[17], Ellicott J explained the importance of Section 52 for traders thus:

> "The general heading of Pt V is 'Consumer Protection' but it should not be assumed from this that the protection of consumers is its only object. Section 52 is only one of a number of very broad provisions in the Act which are

> designed to preserve the freedom and fairness of competition in the market-place. Part IV deals with restrictive trade practices ... These provisions are obviously designed to protect and benefit traders and consumers alike -likewise Section 52. It is designed to protect the market-place for both traders and consumers alike to ensure as far as practicable that only the truth will be disseminated about the goods and services available. Traders who are affected by false statements have as much interest in preventing their dissemination as consumers. It is not surprising therefore that although any person can bring an action to enforce Section 52, most actions to date have been brought by traders rather than consumers".[18]

This accounts for the fact that over 80 per cent of actions under Section 52 are brought by one businessman against another, rather than by the Commission or by consumers[19].

(c) Canada

In Canada the general duty experience is to be found primarily at a provincial level. Most of the eleven Canadian provinces have legislation which is, to some extent, analagous to the concept of a general duty to trade fairly, as we have been discussing it. Particularly significant are British Columbia, Alberta, Ontario and Quebec which are the most developed and populated of the Canadian provinces and, accordingly, we are limiting our examination to those provinces.

In all these provinces the approach is generally to make a combination of civil and criminal remedies available and private and public enforcement[20] in aid of the consumer whenever an 'unfair' or 'unconscionable' trade practice has occured.

Belobaba notes that there are significant differences between the provincial legislation in terms of the scope of legislation, the range of prohibited practices, the choice and

availability of remedies, the nature and extent of the administrative powers of the enforcing authority, and the availability and utilisation of the criminal sanction.

Nevertheless, he believes that they all reflect a general commitment to the idea that a substantial reform of the common law was a critical prerequisite for even minimally effective trade practices legislation[21].

Trebilcock has identified the main purpose of such legislation to be a combination of sanctions and procedures calculated to maximise the objectives of deterrence, compensation and efficiency[22]. Belobaba regards the end result as an integrated sanctions network in which public and private law enforcement streams have been recognised and tapped for their respective contributions to the attainment of the cited objectives[23]. He argues that in drafting such legislation there are six areas of concern: understandability, reasonable coverage, a full range of civil remedies, effective administrative measures, a sensible criminal sanction and rule-making powers[24].

However, he stresses the absolute importance of a properly funded and adequately staffed public enforcement authority[25]. This is supported by Feltham, who has commented that, although private action to enforce legal rights is important, it has not proved adequate[26] .

As far as the structure of Canadian trade practice legislation is concerned, the simple and non-specific prohibition is usually followed by examples of specific unconscionable practices which are deemed to fall within the general prohibition.

(i) British Columbia

British Columbia was the first Canadian province to enact comprehensive legislation to protect consumers against unfair and deceptive business practices, being marginally ahead of Ontario[27].

Section 3 of the Trade Practices Act 1974 prohibits deceptive acts or practices which include:

"(a) an oral, written, visual, descriptive or other representation, including a failure to disclose;

(b) any conduct having the capability, tendency or effect of deceiving or misleading a person".

Without limiting the generality of this provision Section 3(3) lists nineteen heads of deceptive act or practice.

Section 4 prohibits unconscionable acts or practices. There then follows a list of six factors which may be taken into consideration in determining whether the case for unconscionability has been made out, although these are said not to limit the generality of the Section. If unconscionability is proved, Section 4(3) makes the consumer transaction unenforceable by the trader against the consumer.

Section 5 empowers the Director of Trading Practices to enforce the Act by seeking declarations or injunctions. The Court can direct that the defendant advertise to the public the particulars of the declaration or injunction granted against him.

The Director has the novel power under Section 24 to take over, with the Minister's consent, a case already being conducted by a consumer. The Director must obtain an irrevocable written consent from the consumer and be satisfied that there is a cause of action or a defence to an action and that it is in the public interest. The Director can also bring an action on his own behalf, on behalf of consumers generally or of a designated class of consumers. Administrative action features strongly in the British Columbia situation, as it does in other jurisdictions. By Section 17, the Director may obtain an

undertaking to comply with the Act which may also include an undertaking to compensate consumers. Like the Trade Practices Commission in Australia, the British Columbia Ministry of Labour and Consumer Services issue guides on the operation of the Trade Practices Act. These guides have no formal legal status but are of significance in setting out the Ministry's interpretation of the law.

Breach of the Act or failure to comply with an undertaking, whether through the Director or the Court, constitutes an offence making the person concerned liable to prosecution. This includes not just the relevant corporate body but any director, officer or other person who authorised or acquiesced in the offence. A court which imposes a conviction under the Act can also make an order for compensation to aggrieved consumers under Section 25.1(1).

During 1984-85 there were three prosecutions by the Director, one substitute action and six assurances of voluntary compliance[28]. However, these figures do not reveal the fact that a number of cases are settled on a more informal basis and that in some cases the existence of the Director's powers have helped persuade traders that a settlement is to be preferred to formal action by the Director.

As well as the Director, any person can bring an action before the Court, whether or not that person has a special interest or is affected by a consumer transaction. As we saw, the Court can declare a contract unenforceable where the Act has been breached but it is not automatic, as it is in Australia.

British Columbia, in common with many of the other provinces in Canada, has legislation requiring certain types of trader to be licensed, for example, motor dealers[29]. Where such a registered trader engages in any deceptive or unconscionable practices he may have his licence suspended or revoked as a result.

(ii) Alberta

In Alberta the comparable legislation is the Unfair Trade Practices Act 1980, although this legislation does not, unlike British Columbia and Ontario, contain an omnibus provision against all unfair or unconscionable acts or practices. However, the legislation uses the term 'unfair'. Section 4(1) reads:

> "For the purposes of this Act, the following are unfair acts or practices".

There then follows a list of practices which cover both unconscionable practices and misleading and deceptive practices. Section 4(d) which deals with the latter is expressed very widely to include:

> "... any representation or conduct that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer or potential consumer and, without limiting the generality of the foregoing, includes any representation or conduct of the following kinds".

What then follows is a list of twenty-one specific types of misleading or deceptive conduct.

Belobaba notes that the Alberta legislation is concerned only with unfair practices that occur prior to contract[30].

The Unfair Trade Practices Act is a civil statute and the Director of Trade Practices is enabled under Section 10 to seek an undertaking where a trader has engaged in any unfair act or practice and has satisfied the Director that he has ceased engaging in the practice. The undertaking which the Director can seek is a formal document, which sets out the conduct which it is alleged

is in breach of the Act and contains an acknowledgement of failure to comply by the trader. In this respect the Alberta provisions are unique as no other provincial legislation provides for a formal admission of unfair trading[31]. However, also unlike the other provinces, non-compliance with the terms of an undertaking is not in itself an offence. Instead, the Director has to maintain an action against the defaulter under the same section that governs actions against those who have not signed an undertaking[32]. An undertaking can also make provision for costs in relation to the investigation of the original complaint and annexes to the undertaking can provide for compensation to named individuals. An advertisement may be required in which the trader admits his responsibility and details the action he has taken to prevent a recurrence (see Appendix D).

What this shows is that importance is put on the use of administrative procedures to settle cases. To assist in this the Director issues guidance booklets and guidance letters in which he sets out his department's position in respect of the application. As in British Columbia and Australia, this guidance has no formal legal status but is nevertheless an important practical element in the operation of the administrative action.

In the year 1984-85 the Department investigated 895 complaints under the Unfair Trade Practices Act[33]. Many cases were settled on the basis of warnings and informal undertakings. Three formal undertakings were received and one supplier was taken to court for a breach of a previous undertaking and was made to pay punitive damages of $100,000.[34]

Apart from actions by the Director, consumers are empowered by Section 11 to take individual actions and the Court may make a declaration, issue an injunction, make orders of specific performance or award damages, including punitive or exemplary damages.

Consumer organisations are empowered under Section 15 to seek a court order declaring that an act or practice is unfair and injunctive relief against a continuance of the conduct.

Finally, it is worth noting that, as in Australia, there is a system of licensing in Alberta under the Licensing of Trades and Businesses Act 1980.

(iii) Ontario

The Ontario legislation is less precise than that of British Columbia[35].

The relevant Ontario legislation is the Business Practices Act 1974. Section 3 provides:

> "(1) No person shall engage in an unfair practice.
>
> (2) A person who performs one act referred to in Section 2 shall be deemed to be engaging in an unfair practice."

Section 2 provides a list of specific practices which are prohibited as being unfair. Section 2(a) gives a list of 14 practices which are deemed to be false, misleading or deceptive. Section 2(b) gives a list of eight practices which are deemed to be unconscionable.

However, at present, the general duty does not make it clear that the specific practices do not limit the generality of Section 3. At the time of writing a major review of all Ontario's consumer legislation is taking place. It is likely that one result of the review will be new legislation making it clear that the specific provisions do not limit the general provision[36].

It is interesting to note that the Business Practices Act goes beyond procedural notions of unconscionability to substantive notions in relation to situations where the

vendor knew or ought to have known that the transaction was an unfair one[37]. For example, Section 2(b)(iv) provides, as an example of unconscionability: "that there is no reasonable probability of payment of the obligation in full by the consumer".

Unlike the Unfair Trade Practices Act of Alberta, the Ontario legislation gives rise to criminal as well as civil liability. Section 17 makes a person who knowingly engages in an unfair practice guilty of an offence. Also open to prosecution is any person who knowingly furnishes false information during an investigation, obstructs a person carrying out an investigation or fails to comply with any order or an assurance of voluntary compliance.

Under Section 6 of the Act the Director has power to make a cease and desist order where he has reasonable grounds for believing that any person is engaging or has engaged in an unfair practice. Anyone made subject to a cease and desist order can appeal to the Commercial Registration Appeal Tribunal.

An alternative avenue for the Director is to seek an assurance of voluntary compliance under Section 9. Such an assurance may include such undertakings as are acceptable to the Director.

Specific guidelines are not issued for traders although the Ministry of Consumer and Commercial Relations issues guidance leaflets for consumers on the whole range of consumer protection issues, including The Business Practices Act.

Consumers are entitled to bring actions as well as the Director. Notable is the provision under Section 4(j) giving consumers the right to rescind any contract induced by an unfair practice.

(iv) Quebec

Quebec's Consumer Protection Act is a revised and consolidated statute running to 364 sections and ten schedules. Title II deals with Business Practices and Section 219 provides:

> "No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer."

There then follows a number of specific prohibited practices. There is not, however, a general prohibition against unfair or unconscionable practices.

It is worth bearing in mind that whereas the other provinces we have been looking at have a common law tradition, Quebec has a civil law tradition. Therefore there is a predisposition towards legislation which is more generalised in its formulation than is normal in common law jurisdictions.

Under the Act, however, the President of the Office for the Protection of Consumers enjoys comparable powers to those enjoyed by the relevant official in the other provinces. For example, under Section 314 he can accept voluntary undertakings from persons that they will comply with the law. However, unlike British Columbia and Alberta, the Consumer Protection Act does not provide for a public record of all formal undertakings[38].

The President has a power to prosecute and has extensive powers in respect of licensing.

In the year 1986/86 there were 12 undertakings, one injunction and 70 prosecutions[39]. At the time of writing, a case is pending involving the allegation of a breach of an undertaking. In issue is likely to be the extent to which a breach of undertaking can be taken as evidence of a breach of the law40.

As with Ontario there are no formal guidance notes to traders but there are leaflets which are made available to consumers.

The consumer has remedies under the Consumer Protection Act, as well as the President.

(d) The United States

In terms of analogies with a general duty to trade fairly the oldest example must be the United States Federal Trade Commission Act of 1914. This was passed as a result, in part, of a desire by Congress to supplement the existing restrictive common law definition of "unfair competition" and to provide more complete relief to competitors and consumers against fraudulant, oppressive and unfair practices[41]. Section 5 of the Act provides:

> "Unfair methods of competition in or affecting commerce, are hereby declared unlawful."

The legislation does not support this general provision with a specific list of offences relating to unfair or deceptive practices and therefore contrasts with the model adopted in other countries, such as Australia and in the Canadian provinces. The general provision is therefore of paramount importance. In setting up this framework the Congress appears to have come to the conclusion that there were too many unfair practices to define.

This is supported by Kintner and Smith, who have commented that the adoption of such general statutory language constituted a rejection of the notion that Congress should carefully enumerate the specific practices which the Act was intended to proscribe[42].

The application of the general duty therefore depends to a large extent on the Federal Trade Commission which is endowed with considerable discretion and flexibility. This discretion

is only affected by the judicial decisions under Section 5, which have played a key role over the years in providing a definition of unfairness. The very wide role of the FTC is well illustrated by the case of All State Industries of North Carolina Incorporated[43]. In the words of one Commissioner:

> "The Commission, in short, is expected to proceed not only against practices forbidden by statute or common law but also against practices not previously considered unlawful, thus to create a new body of law - a law of unfair trade practices adapted to the diverse and changing needs of a complex and evolving competitive system."[44]

It is worth bearing in mind, in this connection, that the American courts have traditionally adopted a less strict and more liberal approach to statutory interpretation than, for example, the Australian courts[45]. Pridgen has commented that the major judicial pronouncements on the subject have emphasised the breadth of the Commission's discretion in defining the term 'unfair trade practice'[46].

The procedure for dealing with complaints usually starts with an allegation to the Commission by a consumer, competitor, trade association or Government agency. A case can commence, however, on the initiative of the Commission's staff.

Where the violation has ceased and is not considered serious, the matter can be disposed of by a voluntary agreement to discontinue the practice, or more accurately, an agreement not to engage in a particular practice in the future.

Where the matter is considered too serious for this informal approach, the Commission may give notice of an intention to issue a complaint. This can be answered by a formal consent order which has the same legal standing as a court order.

The origins of this procedure go back to 1925 to the introduction of a process called 'stipulating', or more formally: "Stipulation as to the Facts and an Agreement to

Cease and Desist"[47]. However, by the early 1960s, stipulating had given way to the more informal procedure of assurances[48]. These informal assurances were abandoned in 1977 and replaced by the consent order, as the principal enforcement procedure used by the Federal Trade Commission. Indeed, the majority of cases involving deceptive practices are handled by the consent order procedure[49]. Failing this, the case can proceed to a hearing before an administrative law judge, who gives an initial decision. This can be followed by a Commission decision and, where appropriate, a cease and desist order.

(e) Sweden

In an earlier chapter, we saw that the Swedish analogy to a general duty was to be found in the Marketing Practices Act 1975, which is basically concerned with unfair marketing practices. It has three general provisions dealing with improper marketing, information and safety of products.

Section 1 gives the object of the Act as follows:

> "... to promote consumers' interests in connection with the marketing of goods, services and other commodities by tradesmen and to counteract improper marketing which adversely affects consumers or other tradesmen".

Section 2 deals with improper marketing:

> "A tradesman who, in the marketing of any goods, service or other commodity, advertises or takes other action which, by conflicting with good commercial standards or otherwise, adversely affects consumers or tradesmen, may be prohibited by the Market Court from continuing therewith or undertaking any similar action. A prohibition may also be issued to an employee of a tradesman and to any other acting on behalf of a tradesman, as well as to any other person who has substantially contributed to the action."

The rationale behind Section 2 has been articulated by Bernitz and Draper:

> "The use of a general clause makes possible a continuously developing system of norms which can keep pace with developments in marketing methods and avoids the problem of loopholes which inevitably appear in connection with rigid legal rules."[50]

Section 3 deals with the subject of information to consumers:

> "A tradesman who, in the marketing of any goods, service or other commodity, omits to deliver information of particular significance to consumers, may be enjoined by the Market Court to give such information. An injunction may also be issued to an employee of a tradesman and to any other person acting on behalf of a tradesman."

To be controlled under the general section, activities must be undertaken by the trader for the purpose not only of increasing sales, but when it is likely to affect consumer demand. What is particularly interesting is that the general duty is expressly linked to the concept of 'good commercial standards'. Particularly noteworthy is the fact that in defining 'good commercial standards', the Market Court has been heavily influenced by the terms of the ICC International Code of Advertising Practice[51], which we looked at in Chapter Two.

Enforcement of the Act is in the hands of a public official, the Consumer Ombudsman. Since 1976 the Office of the Consumer Ombudsman has been merged with the National Board for Consumer Policies. The Consumer Ombudsman is now also the Director-General of the National Board.

This authority has the following functions:

(i) investigating the situation of consumers and focusing attention on consumer groups that are in a weak position for various reasons;

(ii) examining the supply of goods and services on the market and carrying out inquiries and making tests;

(iii) supervising the marketing of firms and the terms on which they make sales, and where necessary, intervening in accordance with the provisions of the Marketing Practices Act and the Unfair Contract Terms Act;

(iv) drawing up guidelines for marketing and the design of products and exerting an influence on the trade to make it adapt its activities to the needs of consumers;

(v) informing consumers about facts and conditions which are of importance to them and helping them to use their resources in the best possible way;

(vi) encouraging and participating in consumer education and supporting research within the National Board's area of activity;

(vii) making other bodies aware of consumer problems which call for measures that are outside the province of the National Board;

(viii) promoting the development of consumer activities by local authorities and taking responsibility for regional consumer activities;

(ix) being responsible for carrying out work on a trial basis within the Public Complaints Board[52].

Particularly noteworthy for our purposes is (iv) above. These guidelines are usually worked out in co-operation with relevant trade organisations and also individual firms. They relate to such matters as undesirable marketing practices, information and the safe design of products. Bernitz believes that they function very much in the manner of formally binding

regulations[53]. The Swedish Government has recently introduced a Bill which not only retains the system but allows for a greater measure of self-regulation in relation to the guidelines[54].

The secretariat of the Consumer Ombudsman issues injunctions, the breach of which can give rise to a financial penalty.

In minor matters, the Consumer Ombudsman issues injunctions. Prohibition injunctions forbid the trader to carry out a certain marketing practice, to sell or to hire to anyone a certain harmful or unsuitable commodity, or to use any unreasonable terms in a contract. An information injunction requires a trader to make certain information available to consumers. The vast majority of cases handled by the Consumer Ombudsman have been settled through voluntary measures, arrived at after negotiation[55].

Where matters cannot be resolved by negotiation or by an injunction, an action may be brought before the Market Court. The Ombudsman makes a recommendation to the Court which, if sanctioned, results in the issue of a prohibition or an injunction against a trader and normally involves a conditional financial penalty provision. If quick action is needed, the Market Court can issue an interim decision at the request of the Consumer Ombudsman. However, the Ombudsman has resorted to Market Court action in only just over one per cent of cases[56].

Failure to comply with an injunction usually results in the Public Prosecutor bringing the matter, with the consent of the Consumer Ombudsman, before an ordinary court where fines or imprisonment can be imposed.

The Marketing Practices Act also makes provision for certain criminal offences covering misleading advertising (Section 6), trading stamps (Section 7), and combination offers (Section 8). These offences are prosecuted in the ordinary courts by the Public Prosecutor.

The Market Court (Marknadsdomstolen) is a special tribunal headed by an independent president with a judicial background. It includes representatives of consumers, employees and business. It deals with about 20 cases a year[57] and its decisions cannot normally be appealed.

The procedures under the Marketing Practices Act are seen as a basis for establishing acceptable business standards or the future development of existing standards. In several cases the new standards have been a direct reflection of decisions by the Market Court and have accordingly given substance to the general provisions of the Act[58]. In particular, the Market Court has, by its decisions, established the following as being unfair:

(a) terms which shift the contractual balance under the Sale of Goods Act 1905 too much in favour of the trader;

(b) terms that are in conflict with mandatory law rules such as those of the Consumer Sales Act 1973;

(c) terms that through their wording are misleading as to the rights and obligations of the parties[59].

(f) BELGIUM

The Unfair Marketing Practices Act 1971 is primarily designed to protect the interests of traders. Article 54 of Chapter III:

> "... prohibits every act contrary to acceptable commercial practice whereby a trader or craftsman undermines or attempts to undermine the professional interests of one or more traders or craftsmen".

At the time of writing, there are proposals under discussion between the Flemish and French speaking regions to include an article specifically mentioning consumers[60]. The suggested provision would make it clear that the Act:

> "... prohibits either an act contrary to acceptable practice whereby a trader or craftsman undermines or attempts to undermine the interests of one or more consumers".

At the present time, Chapter III is headed 'Practices Capable of Undermining the Normal Conditions of Competition' and was conceived as a trade protection measure. However, the provisions of Article 54 in Chapter III can be used by consumers[61], who can also take action under a number of specific provisions in other parts of the Act which have a more direct consumer protection purpose. Chapter I, for example, deals with information for consumers in matters such as indications of price.

As far as remedies are concerned, competitors and affected consumers can sue for an injunction and/or compensation.

Administrative action can be taken by the Ministry of Economic Affairs. The Ministry can make a restraint order and can fine offenders. They can also bring an action before the Commercial Court for a failure to abide by a restraint order. Traders made subject to a fine can also appeal to the Commercial Court. However, no compensation to consumers can be awarded as a result of action by the Ministry and there are no guidelines issued by the Ministry on the interpretation of the Act.

The Commercial Court is made up of lawyers and non-lawyers with knowledge and experience of trade and commerce. What is interesting is that the Court can consider any appropriate industry rules in deciding cases. For example, as we saw in the case of the Swedish Market Court, the Commercial Court will take into consideration the terms of the ICC Codes of Marketing Practice[62]. To assist consumers, a small claims procedure has been started in two or three courts in Brussels with a ceiling of 50,000 B.F.[63] Consideration is also being given to the introduction of some sort of class action[64].

(g) THE FEDERAL REPUBLIC OF GERMANY

Germany's legislation in this field dates from 1909. Section 1 of the Law Against Unfair Competition provides:

> "Any person who, in the course of business activity for purposes of competition, commits acts contrary to honest practices, may be enjoined from these acts and held liable in damages."

As we have seen in so many other jurisdictions, the general clause is followed by a prohibition against certain specific behaviour.

As with Belgium, the initial intention of the legislation was to protect traders, rather than consumers[65]. However, over the last 50 years there has been a growing tendency to interpret the legislation in a way which protects the consumer as well as the trader[66]. As a result, a number of practices affecting the consumer have been found to be illegal:

(a) entrapping customers by giving them misleading information or subjecting them to undue pressure;

(b) touting in the street (except for markets and fairs);

(c) canvassing by telephone (unless the consumer has in writing requested a telephone approach beforehand);

(d) sending unsolicited goods, which has been extended to include inertia selling; and

(e) use of 'free' gifts as inducements to buy, which may in some circumstances include the unacceptable use of games and prize competitions.[67]

The statute only gives rise to civil remedies, including an injunction and damages. Actions may be brought by competitors, where they can show detriment to their business, and also representative consumer associations. Since January 1987 the

statute has been amended as a result of the EEC Directive on Misleading Advertising with the result that individual consumers now have a right of action in respect of misleading advertising.

(h) CONCLUSIONS

These examples show that there is experience in both civil law and common law systems of general duty regimes. However, none of these examples involves a positive general duty to trade fairly[68], as it has been envisaged for the UK by the OFT, although in one or two cases there are general duties against unfair trading.

Nearly all these examples have involved broadly expressed legislation controlling a mixture of false, deceptive and unconscionable practices. They mostly include, in addition to the general provision, specific prohibitions covering forms of unacceptable conduct which can be fairly clearly defined.

They provide a range of enforcement avenues, including private action and administrative procedures. As O'Grady has pointed out, there is a view that the failure of some existing statutes to provide a full, balanced and flexible range of remedies has the effect of emasculating them[69]. The primary purpose of these new avenues, according to Harland, is to ensure deterrence and prevention of future harm[70].

In this flexible range the employment of administrative remedies, particular various forms of undertaking, is firmly established. There is, to be fair, some dispute as to the effectiveness of such remedies. O'Grady, for example, believes that assurances of voluntary compliance are begining to fall out of favour, and that the procedure is seen as a sort of power of blackmail in the hands of the authorities[71]. Nielson does not appear to agree, and argues that there is no evidence that enforcement action is taken except where there is a reasonable belief of violation[72].

It is not the purpose of this thesis to evaluate the merits of administrative action. However, the continued widespread use of undertakings, both formal and informal, suggests that the authorities find it a useful device to help secure the overall intention of the legislation. And the comparatively few actions on which the authorities feel it necessary to take court action for breach of an undertaking must suggest that, generally, the procedures work well.

As far as self-regulation is concerned, none of the systems we have examined in this chapter have made use of national self-regulatory codes in the operation of their general duty regimes to set the parameters of what constitutes fair trading, either generally or in particular sectors. However, we did note that the official guidance produced by administrative agencies was sometimes influenced by the input of trade and business organisations - and these guidelines do have an important role to play in the administrative procedures.

It is probably true to say that self-regulation is not such an established part of the consumer protection systems in these countries, although it may become more significant. In Australia, for example, the Trade Practices Commission has been conducting a research study on self-regulation in order to get a clear picture of the nature and scope of self-regulation.

In other jurisdictions there are legal and constitutional impediments to self-regulation. In the USA, for example, anti-trust legislation and the constitutional safeguards for free speech have hindered the development of self-regulatory initiatives, particularly in advertising.

It is true that the Swedish and Belgian systems are influenced by the ICC Codes of Marketing Practice. But these are international codes which have only a very limited self-regulatory system attached to them, basically relating to disputes between multi-national companies. Their main role, as we saw in Chapter Two, has been to provide the inspiration for national systems of self-regulation.

Whether general duty regimes have proved successful is a difficult question to answer. Certainly, it is interesting to note that general duty regimes are spreading. As we saw, the Australian States are increasingly enacting legislation comparable to that existing at Commonwealth level in the Trade Practices Act. And New Zealand has just introduced legislation comparable to the Trade Practices Act in the form of its Fair Trading Act 1986[73]. It is interesting to note that Pengilley comments that the Fair Trading Act was necessary because of the inadequacy of traditional common law remedies[74].

O'Grady, talking about the Canadian experience, believes that there is not much visible evidence on the success or otherwise of the general duty regimes, although he does believe that the mere existence of the legislation may bring about an uplifting influence[75]. Nielson argues that the Canadian legislation cannot be clearly evaluated because, as yet, the authorities have been denied the technical, professional and investigative resources necessary for enforcement[76].

In Australia, commercial interests appear to have judged the Trade Practices Act a success[77]. Others, with experience of the UK regulatory scene, believe that general duties have proved successful[78].

In addition, we need to bear in mind that the circumstances of these countries are often very different from our own. Canada, Australia and West Germany have federal structures of government, whereas the UK has a unitary structure. Sometimes the general duty regime operates at a state or provincial level, sometimes at a federal level, and sometimes at both.

In none of these countries is the full range of consumer law enforcement the responsibility of local authorities, but of a central authority - although that central authority may have local offices. In addition, there are massive differences in terms of population and in terms of attitudes and traditions. And, indeed, there may be different objectives for the legislation[79]. Nevertheless, these regimes do have common

features, as we have seen, and provided we make appropriate allowances, there is no reason why we cannot draw some lessons from these parallels. This we will do in Chapter Seven, when we consider whether the case for a general duty has been made out and, if so, how such a general duty could operate within the United Kingdom.

CHAPTER FIVE

References

1. J L Goldring and L W Maher, Consumer Protection Law in Australia, 2nd ed., 1983, Butterworths (Australia), para 701.

2. Speech by Hon L F Bowen MP, Australian Attorney General, during the Second Reading Debate on the Trade Practices Revision Bill 1986, set out in Trade Practices Legislation and Materials 1986, Attorney-General's Dept., p 196.

3. Put to the author by W R McComas, Chairman, Australian Trade Practices Commission, March 1987.

4. J L Goldring and L W Maher, Consumer Protection Law in Australia, 2nd ed., 1983, Butterworths (Australia), para 318.

5. G Q Taperell et al, Trade Practices and Consumer Protection, 3rd ed., 1983, Butterworths (Australia), para 1904.

6. Ibid. para 1402.

7. S.80.

8. See R J Sadler, 'The Information-Gathering Powers of the Trade Practices Commission', (1983) 57 Australian L.J. 134.

9. Trade Practices Commission, Annual Report 1985-86, Australian Government Publishing Service, p 48.

10. See Sir N H Bowen, 'The Federal Court of Australia', (1977) 8 Sydney L.R. 285 at 286-7.

11. Trade Practices Commission, Annual Report 1985-86, Australian Government Publishing Service, p 48.

12. Unconscionable Conduct; a Guide to Section 52A of the Trade Practices Act, 1987, Trade Practices Commission. (See Appendix B.)

13. Ibid. pp 5-7.

14. Trade Practices Commission, September 1986.

15. Insurance and the Trade Practices Act, A Guideline for the Insurance Industry, 1985, Australian Government Publishing Service. (See Appendix C.)

16. W Pengilley, The New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of Australian Experience, (1987) N.Z.L.R. 59.

17. [1981] A.T.P.R. 40-219. See also M J R Huntingdon and A L Limbury, 'Some Observations on Recent Developments in Trade Practices', (1981) 55 A.L.J. 472.

18. Ibid at 42,972. See also A.L. Limbury, 'Protecting your Business Reputation - Trade Practices', (1983) 57 Australian L.J. 664.

19. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 488.

20. W A W Neilson, 'Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation', (1981) 19 Osgoode Hall L.J. 154 at 155.

21. E P Belobaba, 'Unfair Trade Practices Legislation; Symbolism and Substance in Consumer Protection', (1977) 15 Osgoode Hall L.J. 327 at 330.

22. M J Trebilcock et al, A Study on Consumer Misleading and Unfair Trade Practices, Ottawa, Information Canada, (1976), Vol.1, p 302.

23. E P Belobaba, The Resolution of Common Law Contract Doctrinal Problems through Legislative and Administrative Intervention, in Reiter and Swan, eds, Studies in Contract Law, 1980, Butterworths (Canada), p 423 at 426-27.

24. E P Belobaba, 'Unfair Trade Practices Legislation; Symbolism and Substance in Consumer Protection', (1977) 15 Osgoode Hall L.J. 327 at 375-7.

25. Ibid. p 387.

26. I R Feltham, 'The New Regulatory State; Economic and Business Regulation Tommorow', (1973) 51 Can.B.R. 207 at 210.

27. Ibid. p 329.

28. British Columbia Ministry of Consumer and Corporate Affairs (now the Ministry of Labour and Consumer Services) Annual Report 1985, p 64.

29. Motor Dealer Act 1979.

30. E P Belobaba, Unfair Trade Practices Legislation; Symbolism and Substance in Consumer Protection, (1977) 15 Osgoode Hall L.J. 327 at 338.

31. W A W Neilson, Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation, (1981) 19 Osgoode Hall L.J. 154 at 175

32. S.13.

33. Alberta Consumer and Corporate Affairs, Annual Report 1984-85, p 25.

34. Ibid.

35. E P Belobaba, Unfair Trade Practices Legislation; Symbolism and Substance in Consumer Protection, (1977) 15 Osgoode Hall L.J. 327 at 335.

36. Put to the Author by G Mazurk, Head of the Ontario Legislative Review Project, April 1987.

37. J O'Grady, 'Consumer Remedies', (1982) 60 Can.B.R. 549 at 561.

38. W A W Neilson, Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation, (1981) 19 Osgoode Hall L.J. 154 at 163.

39. Office de la Protection du Consommateur, Annual Report 1985-86, p 30.

40. Put to the author by J Dagenais, Directeur des Affairs Juridiques, Office de la protection du Consommateur, Quebec, April 1987.

41. W C Erxleben, 'The FTC's Kaleidoscopic Unfairness Statute: Section 5', (1975) 10 Gonzaga L.R. 333 at 334-5. See also Sears Roebuck Co v The Federal Trade Commission [1919] 258 F. 307.

42. E W Kintner and C Smith, 'The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency', (1975) 26 Mercer L.R. 651 at 655.

43. [1967] 72 F.T.C. 1020.

44. Ibid.

45. G Q Taperell, et al, Trade Practices and Consumer Protection, Butterworths (Australia), 3rd ed., 1983, para 1406.

46. D Pridgen, Consumer Protection and the Law, 1986, Clark Boardman (New York), para 9.01.

47. W A W Neilson, Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation, (1981) 19 Osgoode Hall L.J. 154 at 156. See also E W Kintner and C Smith, The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency, (1975) 26 Mercer L.R. 651 at 683-685.

48. Ibid. p 157.

49. Ibid. pp 158-9.

50. U Bernitz and J Draper, Consumer Protection in Sweden: Legislation, Institutions and Practice, 1981, Stockholm University, p 132.

51. A Edling, Deputy Consumer Ombudsman, notes given to the author on the Legal Protection of the Collective Interests of Consumers by Means of Public Control.

52. The National Swedish Branch for Consumer Policies, the Consumer Ombudsman, Functions, Organisation, Activities, Konsumentverket KO (undated) p 2.

53. V Bernitz, 'Guidelines Issued by the Consumer Board: The Swedish Experience', (1984) 7 Journ. of Cons. Pol. 161 at 163.

54. L. Frievaulds, Consumer Ombudsman, Swedish Consumer Policy, taken from Consumer Affairs, March/April 1986, no 80, p 20. See also U Bernitz, 'Guidelines Issued by the Consumer Board: The Swedish Experience', (1984) 7 Journ. of Cons. Pol. 161 at 164.

55. A Edling, Deputy Consumer Ombudsman, notes given to the author on the Legal Protection of the Collective Interests of Consumers by Means of Public Control.

56. Ibid.

57. The Swedish Ombudsman, Fact Sheets on Sweden, The Swedish Institute, May 1985.

58. A Edling, Deputy Consumer Ombudsman, notes given to the author on the Legal Protection of the Collective Interests of Consumers by Means of Public Control.

59. Ibid.

60. Put to the author by P de Win, Hon Judge, Commercial Court, Brussels, April 1987. For an account of the background to Belgian consumer law see M Fontaine and T Bourgoignie, Consumer Legislation in Belgium and Luxembourg, 1982, Van Nostrand Reinhold, Chap 1.

61. See N Reich and H W Micklitz, Consumer Legislation in the EC Countries; A Comparative Analysis, 1980, Van Nostrand, Reinhold, p 66.

62. Put to the author by P de Win, Hon Judge, Commercial Court, Brussels, April 1987.

63. Ibid.

64. Ibid.

65. N Reich and H W Micklitz, Consumer Legislation in the EC Countries; A Comparative Analysis, 1980, Van Nostrand, Reinhold, p 66.

66. Ibid.

67. Ibid. see especially p 72.

68. For a criticism of this approach see, for example, A J Dugan, 'Fairness in Advertising: In pursuit of the Hidden Persuaders', (1977) 11 M.U.L.R. 50

69. J O'Grady, 'Consumer Remedies', (1982) 60 Can.B.Rev. 549 at 562.

70. D J Harland, 'Unfair and Comparative Advertising', - a paper given to the 5th European Workshop on Consumer Law, Louvain, September 1986.

71. Ibid. p 563.

72. W A W Neilson, 'Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation', (1981) 19 Osgoode Hall L.J. 154 at 183.

73. W Pengilley, 'The New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of Australian Experience', (1987) N.Z.L.J. 59.

74. Ibid. p 67.

75. J O'Grady, 'Consumer Remedies', (1982) 60 Can.B.R. 549 at 564.

76. W A W Neilson, 'The Future of Canadian Consumerism: A Retrospective and Prospective View', in Ziegel, ed., Papers and Comments delivered at the Tenth Annual Workshop on Commercial and Consumer Law, Toronto, October 1980, 1982, Butterworths (Canada).

77. W Pengilley, 'The New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of Australian Experience', (1987) N.Z.L.J. 59 at 67.

78. D W Oughton, 'Restructuring the Control of Price Indications', (1982) 1 L.M.C.L.Q. 117 at 122.

79. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 4.46.

CHAPTER SIX

TOWARDS A GENERAL DUTY; THE PRACTICAL ISSUES

(a) The Form of a General Duty

(i) Negative or positive?

The notion of a general duty to trade fairly, as suggested by the OFT, consists of a general duty expressed in broad terms in primary legislation, supported in whole or in part by codes of practice, giving guidance on what constitutes fair trading - what Sir Gordon Borrie has described as 'Made to measure Law'[1]. These codes, it has been suggested, could include both horizontal codes and vertical codes[2], although horizontal codes are likely to be the most significant. This is because codes which are specific to particular trades can contain elements distinctive to those trades which do not apply elsewhere in business[3].

In deciding what form the primary legislation in a general duty regime could take, two possibilities emerge.

Firstly, there is the possibility of a broad statutory duty to trade fairly couched in positive terms - what we shall term a 'positive' general duty.

Secondly, the overseas experience suggests that one could enact a general prohibition on deceptive, misleading, and possibly unconscionable, practices. This would be designed to ensure a minimum standard of honest, fair trading -what we shall call a 'negative' general duty. A limited example of this in the criminal law field is provided by the provisions of Part III of the Consumer Protection Act 1987 dealing with misleading price indications. This we looked at in Chapter Four, where we noted that Section 20 of the Act established a general duty not to mislead in giving price indications.

In deciding which statutory formulation might be appropriate we need to remind ourselves of the objectives of a general duty to trade fairly. The OFT gave them as raising standards generally and improving means of redress for consumers[4]. However, such a division is an over-simplification because raising standards itself covers two distinct objectives.

In so far as a general duty would be given practical expression in codes of practice, a general duty would also be concerned with raising the standards of all traders in particular sectors towards those higher standards which are encapsulated in some self-regulatory codes of practice[5]. As we saw, these standards are binding on members of the relevant trade association but not normally on non-members. And as Mitchell reminds us, an advantage of codes of practice is that their provisions can benefit the consumer but that they may be difficult or impossible to embody in traditional legislative form[6].

On the other hand, one is concerned with bringing under control certain undesirable and injurious practices which currently escape control, wholly or in part, due to the limitations of consumer protection law, both civil and criminal, which we examined in Chapter Four. Particularly important in this regard are the problems created by traditional legislative drafting and the inadequacies of existing law enforcement.

These two quite separate objectives raise the question as to whether the same statutory formulation of a general duty is appropriate to cover both situations. One answer to this dichotomy is to separate the issues and consider the possibility of two separate formulations of a general duty.

One general duty might be a positive duty linked to approved codes of practice. It would be designed

primarily to try to raise the standards of all those in a particular sector to the level of that of the trade association member who currently complies with the terms of his trade association code.

The other general duty could be a negative duty providing a prohibition on deceptive and misleading practices. Its role would be something of a safety net to try to prevent standards across all sectors falling below an acceptable minimum. In so far as deceptive and misleading practices are currently catered for within our law they are covered by such legislation as the Trade Descriptions Act 1968, The Control of Misleading Advertisements Regulations 1988[7] and Part III of the Consumer Protection Act 1987.

However, it is arguable that the objective behind a positive general duty linked directly to codes of practice could, to some extent, be achieved by amending the provisions of Part III of the Fair Trading Act 1973. One possibility would be to enable the Director-General of Fair Trading to obtain undertakings from those who have engaged in a course of conduct involving persistent breaches of a code of practice approved under Section 124 of the Fair Trading Act[8].

There would be objections to such a course, not least because it could be said to undermine the essentially voluntary nature of self-regulation. Nevertheless, the courts could make much more use of the principle in the Sacha Shoes case[10], which we looked at in Chapter Two, in which an undertaking under Part III was made dependent on compliance with a relevant sectoral code of practice.

A number of amendments to the Part III procedure could improve its operation generally, in particular by giving trading standards officers a more direct role in its application[9]. One of the major limitations of Part III as it is currently drafted is the need to show a number of breaches of consumer law over a period of time in order to establish a 'course of conduct'. Possibly this feature could be modified.

In addition, as we shall see when we consider the role, if any, of codes in relation to a general duty, there is the danger that a positive general duty regime involving 'new style' codes of practice could destroy self-regulation, rather than improve its operation.

All this suggests that a positive general duty would not be the best solution to raising standards in those sectors where self-regulatory codes of practice exist.

This would leave us with a negative duty not to engage in misleading or deceptive practices. The existence of many overseas and UK parallels to such a negative form of general duty suggests that such a duty might well be an effective way of helping to ensure a satisfactory minimum framework of honest, fair trading. The problem of raising standards in particular sectors above an acceptable minimum could then be seen as the role of self-regulation, the latter possibly being supported by a modified Part III procedure. For one should not forget that English law is more accustomed and more suited to preventing sin than promoting virtue.

This negative duty could be extended to include a general prohibition on unconscionable acts or practices. For example, as we saw in the last chapter, the Trade Practice Act of British Columbia[11] has such a prohibition which covers certain harsh or oppressive conduct, such as unacceptable high pressure sales techniques and unfair contracts. Harland argues that a system of control of trade practices which dealt solely with misleading or deceptive practices would be seriously inadequate from the viewpoint of the consumer interest[12].

Something of a precedent for a probibition on unconscionable practices already exists in the Consumer Credit Act in the context of an extortionate credit bargain. This is defined as one requiring grossly

exorbitant payments or one which "otherwise grossly contravenes ordinary principles of fair dealing"[13]. And Bennion argues that this formulation is an up-to-date version of the expression "harsh and unconscionable" which appeared in Section 1 of the Moneylenders Act 1900[14]. Whilst the term 'extortionate' is probably more understandable in a credit context than 'unconscionable', the latter would seem to be more appropriate as a term to cover the whole spectrum of trading activities.

(ii) Definition of 'trading'

On the basis that there should be a negative duty, one then has to go on and define 'trading' from the point of view of that duty. Clearly it would detract from the logic of a general duty to limit such a duty to situations where there was a binding contract. Some help on this question can be gleaned from the overseas parallels.

In British Columbia, for example, we saw that a general prohibition on deceptive or misleading acts or practices can relate to practices which arise before, during or after a consumer transaction and cover any oral, written, visual, descriptive or other representation, including a failure to disclose.

(iii) Should it cover dealings between traders?

The next issue to be considered is whether the primary legislation for a negative general duty should cover dealings between traders or be limited to dealings between traders and consumers. The OFT's view is that such a duty should only be applicable to consumer dealings, largely because they believe that it would be difficult to determine what could be considered fair or unfair in the context of trader to trader dealings[15]. In addition, Harland makes the point that in disputes between traders, there is a danger that courts may

interpret the general duty restrictively in order to limit the effect of the new law on those provisions of the general law which have traditionally regulated business conduct[16].

Quite apart from such difficulties, it is true that there are already civil law remedies available to cover elements of what could be termed unfair trading in relation to trader dealings, notably unfair competition, though there is no law of unfair trading as such. Particularly, this includes the tort of passing off, which appears to be in a state of judicial development which is taking it beyond its traditional parameters. For example, in Bollinger v Costa Brava Wine Co[17] the judge said that the tort of passing off was not limited to cases where one individual was seeking to protect a name or description. In this case eleven companies took action to prevent a drink being called 'Champagne' which had not been manufactured in the Champagne region of France.

"The law should and does provide a remedy for the type of unfair competition" specified in the plaintiff's claim, said the judge[18]. In Bulmer v Bollinger[19] Lord Denning said that Bollinger v Costa Brava Wine Co had "opened up a new field of English law. It gave a remedy for unfair competition"[20].

Further development of the law of passing off would seem to be preferred by industry itself to the introduction of a general duty to trade fairly applicable as between traders. The CBI has called for detailed study by the Law Commission of the possibilities of reforming the law of passing off[21].

(iv) The position of manufacturers

If we accept that a general duty should only apply to consumer transactions one still has to decide whether the duty should also cover manufacturers and other traders

who deal indirectly with consumers. On this basis the rights of redress envisaged under a general duty could be extended to any consumer adversely affected by the breach of duty[22]. In the case of imports one could make the importer liable for breaches by the manufacturer[23]. There is a precedent for this in the product liability provisions of Part I of the Consumer Protection Act 1987.

In view of the problems experienced by consumers in pursuing claims against those with whom they have no direct contractual relationship, there would seem to be merit in extending the duty as widely as possible.

(v) Should there be specific prohibitions?

In the formulation of a general duty provision one also has to consider whether the legislation would be limited to a general duty provision or whether it would also include specific prohibitions against conduct which it was considered should be automatically regarded as being in breach of the general duty, but without limiting the duty. Without such prohibitions the general duty might be open to the objection that it leaves too much scope for 'judicial creativity'[24].

In the context of a general duty such prohibitions could cover some of the forms of conduct which are fundamental to existing criminal and civil law in the consumer protection field[25]. Such a course would have the attraction of making it easier to repeal elements of existing consumer law when a general duty was in place.

There could also be guidance within the statute as to what constitutes 'misleading', 'deceptive' or 'unconscionable'. For example, Part III of the Consumer Protection Act 1987 has a section giving guidance on the meaning of 'misleading'[26].

In addition, quite apart from specific prohibitions and guidance, the statute can provide a list of factors which

could be taken into consideration in deciding whether the general duty had been complied with. An example of such a device, in present legislation, is provided by Schedule 2 to the Unfair Contract Terms Act 1977, which lays down a number of factors to be considered in deciding, in certain circumstances, whether a contract provision is reasonable. In addition, as we have seen, Section 138 of the Consumer Credit Act 1974 sets out a number of factors to be taken into consideration in deciding whether a credit bargain is extortionate.

Such an approach is contained in most of the overseas parallels to a general duty. For example, as we saw in the last chapter, the Trade Practice Act of British Columbia provides that in determining whether an act or practice is unconscionable a court can consider all the surrounding circumstances including a list of factors such as whether the consumer was subjected to undue pressure to enter into the consumer transaction.

Thomas calls such factors a 'shopping list' and makes the point that where such an approach is used in relevant overseas legislation the statutes commonly confer a rule making power to allow additional items to be added to the list[27]. One of the advantages of this is that it helps overcome the problem of lack of Parliamentary time which is attendant upon changes in primary legislation.

(vi) The position of existing law

The extent of such 'shopping lists' may have a bearing on the possibilities for repealing at least some existing legislation, both civil and criminal. Painter, for example, envisages the eventual repeal of most of the Trade Descriptions Act 1968 on the grounds that accuracy of product and service descriptions would be one of the main purposes of the general duty to trade fairly[28]. However, this was probably said with the idea of a positive duty to trade fairly linked directly to new statutory codes of practice in mind. Similarly, he

argues, many elements of consumer civil law could be similarly repealed, including the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982[29]. The opportunities for repeal of existing law are something we shall consider further in Chapter 7.

However, at this stage one can say that the removal of some existing legislation would appear to be desirable if the idea of a general duty is to work effectively[30]. For otherwise, there might be a problem of overlaps between existing legislation and the general duty, with the danger that the courts might tend to interpret the general duty by reference to existing legislation, rather than by reference to any statutory guidelines, presumptions or codes of practice[31].

However, a great deal of existing legislation would need to remain in order to deal, for example, with cases where the criminal law and process is clearly appropriate. Painter also makes the point that the criminal law would also need to be retained to deal with matters of food hygiene, general quality standards, weights and measures and many areas of consumer safety[32]. And one also has to bear in mind that decriminalisation might convey the impression that certain practices were now considered less seriously.

(vii) Should there be a sectoral approach?

Finally, we have to consider whether a general duty regime should only apply where there are codes of practice in existence to set the parameters of what was acceptable, although this would be more of a problem were one to choose a positive general duty linked to new style statutory codes. If one was to adopt the sectoral approach, the general duty could then be extended to further sectors as and when appropriate codes were created. The remaining sectors would either remain

subject to existing law or, if one had established a positive general duty, be the subject of a separate general duty designed to establish minimum standards across all sectors.

The objections to this approach are obvious. It is arguable that it is a nonsense to have a general duty which is not general, in the sense that it will not apply to all consumer transactions. Consumers would have different rights and traders different responsibilities in different sectors. In addition, it is worth remembering that some of the main problems of existing consumer law have been in areas where codes do not exist[33]. Codes may have their limitations but there is some agreement that standards are higher in sectors where codes already exist[34]. Ironically, the sectoral approach will not therefore tackle those sectors where the need may be greatest. Another problem with this approach is the time it will take before a range of suitable codes are developed and are in place[35].

The alternative would be to make a general duty to trade fairly applicable to all consumer transactions irrespective of the existence of codes[36]. Where codes were in existence the code could be used to amplify the obligations of the general duty. Where no such codes existed, it would be for the courts to develop an interpretation of the general duty in particular circumstances, based on previous case law, trade practice, international agreements and, perhaps, voluntary codes of practice, i.e. codes drawn up by trade associations but not necessarily officially approved[37]. It has also been suggested that the court could, in addition, consider such matters as the trader's record of civil court judgements[38]. If this course were taken, the general duty could be accompanied, as we have seen, by some legislative guidance to assist in interpretation[39].

The latter course is open to the objection that, even with accompanying guidelines, the operation of a general duty in areas without detailed codes would be the cause of some confusion however that duty was formulated. And there may be difficulty in getting the necessary clarification from the courts if the key issues are not brought before them. Areas of doubt in consumer law have often tended to remain in doubt because of an unwillingness by trading standards officers to bring cases and a similar unwillingness on the part of traders, as we saw in Chapter Four, to play the role of 'guinea pig'[40]. This tendency has increased recently because the introduction of the Crown Prosecution Service has resulted in costs not being awardable from central funds to trading standards authorities in the event of a case being dismissed[41]. Were such a course to be adopted, it would probably be necessary for the primary legislation to prohibit, as suggested above, a number of specific unfair or deceptive practices, identifiable at the time the legislation is passed, in order to strengthen the element of certainty[42].

Having said all this, our dilemma largely resolves itself if we apply the earlier conclusion that there should not be a positive general duty to trade fairly but a negative one prohibiting misleading, deceptive and unconscionable practices. Such a duty would have to be applied across all sectors or else it would fail to achieve its purpose, i.e. establishing a minimum safety net of fair trading.

(b) The Role of Codes of Practice in a General Duty Regime

Having considered the form of a general duty we now need to consider what role, if any, codes of practice should have within such a duty.

Codes of practice could play a role within a general duty regime of either the positive or negative type, although they would be more appropriate to the former because, as we saw, a

positive duty would be seen as a way of attempting to bring all traders up to the standards encapsulated in some codes of practice. However, the use of codes of practice raises a number of questions.

(i) The status of codes

Were one to take the route of a general duty which was linked directly to statutory codes of practice one would firstly need to settle the precise legal status of the codes. As Lord Campbell has emphasised, the legal status of codes needs to be clear and unequivocal because many codes exist today with a legal status that is imprecise[43].

Clearly the codes would need to have some sort of evidential status, even though they would not be law in their own right. The form which would be most consistent with precedents in the consumer field would be to enable non-compliance with the code to be cited as evidence of a breach of the general duty. The codes of practice made under the Weights and Measures Act 1985 provide a good example of how this could be done.

However, Lord Campbell of Alloway has raised the concern that statutory codes of practice may create judicial precedents which will filter into the law, thus turning code obligations into direct legal obligations[44].

This fear arises partly from cases such as Thomas and others v National Union of Mineworkers (South Wales Area) and others[45]. In this case, the judge took note of paragraph 31 of the Code of Practice on Picketing, which provides that pickets and their organisers should ensure in general that the number of pickets does not exceed six at the entrance to any work place. Regarding this provision as guidance, Scott J granted an injunction preventing organising or demonstrating at the gates of a colliery by more than six persons[46].

It could be argued that this heralds a new dimension of jurisprudence of case law precedent, arising out of judicial acceptance of guidelines laid down by a code of practice[47]. However, so long as the courts regard code provisions of this sort as norms rather than absolutes there should not be a problem.

In relation to what are currently self-regulatory codes another major drawback of some form of evidential status is that this would probably necessitate a considerable degree of outside intervention in re-drafting the codes. This, as we shall see later when we consider the issue of form, may undermine the essential self-regulatory nature of the codes upon which much of their present strength depends. This is another reason for taking the route of modifying the procedures in Part III of the Fair Trading Act 1973. After all, the codes are already the subject of discussions with the OFT under the operation of the latter's powers under Section 124 of the Act. And, as we have seen, the courts have sanctioned a requirement of code compliance on non-members of trade associations as an element in a Part III undertaking[48].

However, such evidential status and the problems it may present are clearly less significant in relation to a negative statutory duty not to engage in deceptive, misleading and unconscionable practices, which appears to be the preferable formulation of a general duty. Certainly there would seem no reason why the courts should not have regard to existing self-regulatory codes and statutory codes as part of having regard to all the circumstances and, in so far as the provisions of a code were relevant to control of misleading and deceptive practices. Methven, for example, saw no reason why the courts should not have regard to a relevant code of practice in deciding whether a business has fulfilled a consumer contract. Such codes, he argues, embody the customary terms and usages of a trade[49]. And

Schmitthoff points out that one of the distinctive features of commercial law is that "its fabric includes the extra-legal usages, customs and codes of behaviour of the business community"[50].

An example of the courts making use of the standards of a particular trade is provided by the case of A J Mills & Co Ltd v Williams[51]. This involved the Court having to decide what percentage of meat was required in a product described as 'steak and gravy'. The actual tins contained 60 per cent meat, but expert evidence from the trade was adduced to establish that the tins ought to contain at least 75 per cent meat. Lord Parker C J stated the following principle of law:

> "This is a case in which there is no standard or minimum standard fixed by any regulation or order, and in those circumstances it is for the justices to fix what they consider is the proper minimum standard, it being, as I understand it, the standard which those in the trade would recognise as the proper standard. The justices can only fix the standard on the evidence before them"[52].

In sectors where no codes existed, or existing self-regulatory ones were not working well enough, statutory codes could be created or statutory reinforcement introduced. Indeed, the threat of a statutory code, perhaps as part of a licensing system, or some other form of statutory reinforcement, could be useful devices to encourage improvements in self-regulation. In addition, statutory codes could be developed along the lines of the Code on Misleading Price Indications, where there were seen to be particular problems in applying a negative duty to particular practices which cut across sectors. One advantage of such codes is that they can offer a useful structuring of judicial discretion[53].

(ii) The form of codes

Secondly, having considered the question of status, we must now consider the form of any associated codes of practice. The OFT comments that existing codes of practice sponsored by them under Section 124 of the Fair Trading Act are only partial in their coverage of consumer transactions[54]. What they envisage in relation to their idea of a positive general duty is new style codes endorsed by the Secretary of State and laid before Parliament[55].

Where there is no pre-existing code the Secretary of State would, presumably, promulgate a statutory code.

As we have seen, some existing statutory codes, such as the Code on Misleading Price Indications, could probably be fairly easily adapted for operation within a general duty regime of either a positive or negative type[56].

However, the biggest problem lies with existing self-regulatory codes of practice. It is generally agreed that such codes, even the Section 124 codes, would have to be amended to make them suitable for operating in a regime involving formal legal consequences. For judges are not happy giving effect to rules that have not received some Parliamentary or official sanction[57].

Accordingly, the implementation of a positive general duty along the lines suggested by the OFT would require the re-drafting of self-regulatory codes in order to make them suitable for Ministerial and Parliamentary approval and for operation in a formal legal framework. This would be unlikely to be an easy business[58]. One problem with bringing existing codes into a positive general duty regime is that the new style codes, although they would differ from sector to sector, would need to offer comparable standards of consumer protection with one another. Some present codes contain features which

are not common to other sectoral codes[59]. For example, the Code of Practice of the Glass and Glazing Federation gives consumers a cooling off period for cash contracts signed in the home[60].

As far as the actual content of new statutory codes is concerned, we have already seen that accuracy of product and service descriptions would be an obvious ingredient[61]. Other possibilities would be requirements to provide sufficient information about the goods or services, a ban on contract terms which unduly favoured the trader, an obligation on traders to keep a supply of spare parts for a reasonable period, an obligation to provide written estimates and receipts and a copy of any contract signed by a customer and a ban on pre-payments where there is no reasonable justification for them[62].

(iii) Would self-regulation survive?

What is clear, as we have noted, is that such re-drafting raises the question of whether self-regulation could survive. This is because of the risk of destroying, or at least undermining, the self-regulatory element and the advantages that this element has to offer. Mitchell, for example, notes that an advantage of self-regulation is that the principles and practices agreed to voluntarily by business are more likely to be adhered to in spirit than legislative controls[63].

Thomas goes even further and suggests that codes may prove a lot less successful if they switch from being instruments of voluntary self-regulation to instruments of external control[64]. In particular, it has already been noted that the OFT in its proposals for new style codes does not envisage existing conciliation and arbitration facilities remaining within the codes[65]. The clear danger must be that an association may see little point in retaining such facilities if most of their code, to which the redress procedures relate, is

subsumed into a new statutory code within an overall legal framework with its own redress procedures. And by removing an alternative avenue of redress the result will be a loss of consumer choice.

The formal incorporation of advertising self-regulation within a general duty regime is likely to create even more of a problem.

Whilst some have seen the British Code of Advertising Practice as being an integral part of the codes necessary in a positive general duty to trade fairly regime[66], it is true to say that the BCAP has always been regarded as being different from other self-regulatory codes. Mainly this is because, as we saw in Chapter Two, advertising self-regulation does not suffer the traditional weaknesses of self-regulation to anything like the degree experienced in other areas. In addition, the advertising system of self-regulation has been the subject of its own specific form of statutory reinforcement as the result of The Control of Misleading Advertisements Regulations 1988[67].

To bring it into a general duty regime would therefore have few of the advantages that would accrue were other self-regulatory codes to be brought within it. However, to do so would carry the risk of undermining the self-regulatory commitment which is a substantial element in its success[68]. In Chapter Three we noted how any statutory reinforcement of self-regulation carried a potential risk.

In addition, it is hard to see how any consistency of decision making could be retained if the BCAP was interpreted not just by the Advertising Standards Authority and the Code of Advertising Practice Committee, as at present, but also by trading standards officers and local county courts. This might result in significant variations from sector to sector, and from one part of the country to another, as well as between the courts and the ASA and the CAP Committee.

Given these concerns, could self-regulation continue to exist in such a framework? In a regime involving 'new style' codes approved by the Secretary of State and laid before Parliament, and giving rise to new avenues of redress, it is hard to see what element of self-regulation would remain. The only possible involvement of a trade association in such a regime would appear to be in trying to influence the drafting of the relevant statutory code.

It is true that if existing codes were simply to be made subject to a modified Part III procedure under the Fair Trading Act, as suggested, some re-negotiations might be necessary because the codes were originally created on the basis that they were not enforceable in the courts and were not binding on those who are not in membership of the relevant trade association.

However, given the choice of a negative general duty, and given the willingness of the courts to sanction undertakings by non-trade association members to abide by self-regulatory codes of practice, it ought to be possible to retain the existing character of the codes and self-regulation. And there are, of course, ways of making breaches of codes susceptable to the Part III Procedure which we looked at earlier.

(iv) Responsibility for new or modified codes

Finally, we have to consider who would have the responsibility for overseeing the creation of any new or modified statutory codes they felt to be needed. If we pursued the preferred option of a negative general duty and modifications to the Part III procedure there would be no role for an agency with responsibility for overseeing the re-drafting of existing self-regulatory codes into new style statutory codes. However, we noted that statutory codes might be established as a final resort in those sectors where either there was no self-

regulatory code approved under Section 124 of the Fair Trading Act or where the code was not proving effective. And existing statutory codes, such as the Code on Price Indications, would presumably continue in existence and might need amendment, or alternatively there could be a new comprehensive statutory code laying down clear, simple and broad principles of good and bad practice. It could subsume statutory codes, such as the Code on Price Indications, and draw on some of the points in sectoral, self-regulatory codes.

So who should have this responsibility? The OFT would seem a logical choice but there might be a conflict if, as we shall consider shortly, the OFT had any role in operating a general duty.

Another possibility would be LACOTS which, as we saw in Chapter Four, has a crucial role already in attempting to secure consistency and uniformity of consumer law. In fulfilling this task it often reaches agreements with trade associations which sometimes take the form of codes of practice. Examples of these relate to the labelling of cured meats and the measurement of bulk milk. However, LACOTS may be unacceptable because it has no statutory basis and, being a local authority body, does not have the necessary breadth of interests represented on it.

Professor Harvey suggests that supervision could be given to a new revitalised Consumer Protection Advisory Committee[69]. The Committee was originally set up under the Fair Trading Act 1973[70]. Its composition was of between ten and fifteen members appointed by the Secretary of State having regard to their experience in consumer protection work. Their function was to examine such consumer trade practices as were referred to it, either by a Minister or by the DGFT. If the Committee decided that the economic interests of consumers were adversely affected it could report to the DGFT. This

would set in motion a process under Part II of the Fair Trading Act by which statutory instruments could be made controlling the relevant practices. The Consumer Transactions (Restrictions on Statements) Order 1976 [71] was one example.

However, the Committee, though not formally abolished, has nevertheless been effectively suspended because the present Government was not willing to re-appoint to the Committee when the terms of office of the last members expired. Partly, this was because the Part II procedure was not as effective an instrument in creating legislation as had been envisaged. The constraints in the detailed statutory provisions were difficult to interpret and the requirement to establish a case of economic detriment to consumers difficult to satisfy[72].

Nevertheless, were it considered appropriate to re-establish the Committee one of its functions could be to make recommendations on new statutory codes to the appropriate Government Minister.

(c) How, and by Whom, Should a General Duty be Enforced?

In deciding how a general duty should be enforced one must first decide whether such a duty should give rise to civil or criminal sanctions.

The criminal law would seem inappropriate for a number of reasons.

Firstly, the criminal law requires the higher burden of proof which could make enforcement more difficult. For example, Cranston makes the point that courts construe criminal statutes narrowly[73].

Secondly, some of what is now contained in consumer criminal law and which might be subsumed into a general duty to trade fairly is presently considered to be inappropriate for criminal

sanctions. There is concern that some consumer protection legislation creates strict liability offences and it can seem unfair to convict a trader of a criminal offence in the absence of intent or recklessness[74].

Thirdly, if criminal sanctions were involved, any supporting statutory codes of practice would need to be more tightly drawn with the danger that the inherent flexibility of codes could be lost.

Fourthly, there is a philosophical objection to making generally expressed provisions the subject of the criminal process. When we looked at Australia, for example, we noted that it was felt that the criminal process should be reserved for those practices which can be defined with a reasonable degree of precision.

For these reasons, it would seem right that the sanctions under a general duty to trade fairly should lie in the civil law field.

As we saw in Chapter Four, the existing framework of consumer protection law has suffered through problems of enforcement. Chief amongst these has been a lack of resources, coupled with a localised and, to a degree, unco-ordinated enforcement service.

This being the case, it is crucial to consider by whom a general duty would be enforced. There are four possibilities: private initiative, local trading standards departments, the OFT or a combination of both trading standards departments and the OFT, or indeed a combination of all three.

Private initiative would seem highly appropriate, assuming that the general duty will give rise to civil law remedies. However, the need for individual initiative was perceived to be one of the limitations of the existing civil law in protecting the consumer, particularly because legal aid is not normally available in consumer cases[75]. Indeed, one of the motives

behind official encouragement of self-regulatory codes of practice has been the awareness of the need to make procedures for consumer redress easier and cheaper[76].

Having said that there would be nothing to prevent, as we shall see later, individuals taking their own action for redress on the grounds of a breach of the general duty[77]. And, in addition, the suggestion has been made that, quite apart from proceedings for an order under a general duty, the power could be given to local authorities and consumer organisations to bring civil actions on behalf of a group of consumers[78]. The body instigating such a suit could claim damages or other suitable redress. We shall consider this further in Chapter Seven.

The second possibility is to make enforcement the principal responsibility of trading standards officers. Certainly there are obvious advantages in such a course.

Firstly, local authority trading standards departments already have a vast experience of enforcing consumer protection law and are well acquainted with the needs and problems of their localities. Since they are usually in direct contact with aggrieved consumers, they probably have the greatest motivation to take speedy and effective action.

Secondly, it will be important for a general duty regime to be explained fully to local traders and consumers so that the rights and duties involved are understood. Trading standards officers, through their contact with traders and consumers, are well placed to fulfil this role.

Most important of all, perhaps, is the fact that they have the monitoring and recording systems necessary to make a reality of a general duty to trade fairly[79]. This experience is, in part, a result of their function in preparing the evidence for the OFT to seek assurances under the Part III procedure, as well as providing some of the information necessary for the OFT to operate its licensing functions under the Consumer Credit Act.

However, trading standards departments, as currently arranged, have the disadvantages which we noticed in Chapter Four -localised service, inadequate resources, and different priorities for law enforcement. The danger is that enforcement patterns could vary considerably from local authority to local authority, particularly since an important correlate of broad statutory standards is that a fairly wide discretion will repose in the relevant enforcement agency[80]. In the short term, it would be necessary for the Local Authorities Co-ordinating Body on Trading Standards (LACOTS) to play a major role in ensuring as great a degree of consistency as possible. And the 'home authority' principle would need to be applied to action under the general duty. This, we noted, is the arrangement under which other trading standards departments will not normally challenge the view of the trader's local department. And in the long term, as we saw, there is merit in considering the establishment of a national trading standards service.

Another problem in the minds of some commentators is the belief that enforcement of a general duty to trade fairly, however expressed, would be a fundamental change of role which would undermine the impartiality of the service[81]. This school of thought points out that hitherto trading standards officers have largely been responsible for the administration of criminal law, whereas the general duty would be founded in civil law. The reputation of the trading standards service for impartiality will suffer, it is argued, because a general duty would be partly concerned with negotiation for civil redress on behalf of complaining members of the public[82].

However, there are grounds for rejecting such concerns. For a start, trading standards departments have, to a lesser or greater extent, an existing responsibility in relation to consumer advice, which includes advice on civil remedies. Indeed, the Institute of Trading Standards Administration awards a Diploma in Consumer Affairs, principally for local authority staff concerned with consumer advice. And where

individual authorities have felt concern over this issue, this has usually been overcome by splitting the advice and enforcement functions, sometimes dividing them physically within the department[83].

Secondly, although the current role of trading standards officers lies in the criminal law field, the courts already have the power to award compensation under Section 35 of the Powers of Criminal Courts Act 1973. This provision supersedes a number of earlier scattered provisions and makes compensation possible, even where no special application is made, in respect of any personal injury, loss or damage caused by the offence. And the case of R v Chappel[84] shows that it is not necessary for there to be a potential civil liability to compensation[85]. The provisions are to be further strengthened by the requirement in the new Criminal Justice Act that the courts must consider the issue of compensation, even though it has not been specifically raised.

In 1981-2, for example, 94 compensation orders were made, with an average compensation of £308 in respect of those suffering loss as a result of offences under the Trade Descriptions Act[86].

Quite apart from the formal provisions in the Powers of Criminal Courts Act, the action of a trading standards officer may often result in compensation before the hearing itself. There are cases where a trader will provide appropriate compensation to a consumer in order to be able to refer to this in mitigation.

The third possibility is to entrust the enforcement of a general duty to the OFT. The reasoning behind such a move would be that this would be a logical extension of the OFT's present responsibilities under Part III of the Fair Trading Act. In addition, a centralised body could help to ensure a greater degree of consistency in the operation of a general duty. The main problem though is, as we saw in Chapter Four, the widespread criticism by trading standards officers, amongst others, of the way the OFT has exercised its existing powers under Part III[87].

The last option is to involve the OFT and local trading standards departments together in the enforcement process. The problem with this option will be setting the lines of demarcation between the OFT and local trading standards departments, although something of a precedent for this is the joint enforcement of certain aspects of the Consumer Credit Act 1974.

One way of doing it would be to give trading standards departments the major responsibility for securing undertakings and collecting evidence but requiring the OFT to sanction an application to the court for an order. Such an arrangement would not be likely to be welcomed by trading standards departments because of their experiences on the operation of the Part III procedure. A particular concern would be that such a procedure would lessen the ability of trading standards departments to react swiftly where the circumstances demand it.

Another way would be to leave to trading standards departments the power to conduct the majority of cases and for the OFT to take charge only of those cases which appear to raise matters of general public importance or involve difficult questions of law[88]. Such a scheme would require a continuous dialogue between the local trading standards departments and the OFT. This could involve an obligation on trading standards departments to keep the OFT informed of cases and for the OFT to maintain a register of notices and court decisions for consultation by trading standards officers and, possibly, by traders[89]. The OFT already operates a register of convictions under consumer law, so this should not present a problem. In addition, it would be useful if the OFT was empowered to issue guidance notes for trading standards departments on the operation of the general duty[90]. This could contribute to ensuring as great a degree of consistency as possible.

(d) Should there be a Separate Consumer Court?

Equally important as the question of who enforces a general duty is the question of what court or tribunal should be responsible. If one assumes that a general duty action will lie in civil law the obvious forum would be the county courts. Indeed, something of a precedent exists for this already in that the county courts can and do make orders under the Part III procedure.

The normal objection to the ordinary courts is the concern that consumer law matters are not viewed in a serious light. This would not seem to have presented a problem in relation to the operation of the Part III procedure. The criticism of the courts is usually concerned at the criminal courts and particularly at the level of fines imposed by magistrates courts for breaches of consumer criminal law[91], although the situation has shown some improvement over recent years[92].

There is, however, a new element in the operation of a general duty which takes it outside of the experience gained on Part III. This is the suggestion that the court, making an order under a general duty, could also compel compensation for consumers who have suffered as a result of the breach[93]. Another suggestion is that the OFT could make a compensation order for breach of a general duty to trade fairly, but subject to a right of appeal[94]. These suggestions owe much to the operation of Section 35 of the Powers of Criminal Courts Act 1973, under which, as we saw earlier, a court can order a person convicted of a criminal offence to pay compensation to the injured party. In the consumer field it has been particularly useful in relation to Trade Descriptions Act cases.

It is not, however, suggested, nor indeed would it be practicable, for such compensation to be a substitute for normal redress procedures available in the civil courts, should a consumer bring his own civil action. The OFT, for instance, notes that, should a consumer succeed in proving a breach of the general duty relevant to his contract, he will have similar

means of redress to those existing under the present law of contract[95]. The OFT envisage the courts being given an over-riding power to reinterpret contracts into which consumers have entered and, if necessary, they could vary a contract to ensure that its terms were fair[96]. However, this would seem too radical and undesirable a proposal for the sort of negative duty which this thesis has decided would be most appropriate. The courts already have power to disregard certain contractual terms and to provide an aggrieved party with the remedy of restitutio in integrum.

One commentator has said that the civil wrong involved in a breach of the general duty would be analagous to the tort of breach of statutory duty[97]. Precedents for this already exist in consumer legislation, for example, the Consumer Safety Act 1978. In this regard it is interesting to note that the Law Commission recommended in 1969 that there should be a general statutory presumption that breach of an obligation imposed by an Act of Parliament is intended to be actionable at the suit of any person who suffers loss by reason of that breach[98].

Those who are unhappy at the prospect of using the county courts have suggested that some sort of special administrative tribunal should be set up[99]. This idea is probably influenced, in part, by the operation of the industrial tribunals in applying the broad statutory obligations set out in employment legislation and given practical effect by codes of practice[100].

In part, too, the suggestion is influenced by the experience of Sweden, which is one of the overseas examples of a general duty to trade fairly which we looked at in Chapter Five. It is worth noting, particularly, that Section 2 of the Swedish Marketing Practices Act 1975 provides for recourse to a specially constituted Market Court. Cranston believes that a body modelled on the Swedish Market Court would treat consumer law seriously because it would acquire a knowledge of the adverse consequences on the consumer of traders' misdeeds[101]. He also believes that such a body would have a bureaucratic desire to demonstrate output[102].

However, the OFT believes that the majority of cases will be settled informally when breaches are pointed out to traders and proceedings are threatened. Thefore, they conclude that there is not a strong case for a separate court or tribunal[103]. This appears to be borne out by the experience of the overseas examples of a general duty which we examined in the last chapter. And this is also supported by the experience of dealing with Part III undertakings, where most cases are settled at an early stage[104].

In addition, it is quite likely that as the county courts become familiar with the operation of a general duty regime their sympathy and understanding of the needs of consumers will grow.

CHAPTER SIX

References

1. Law to Encourage Fairer Trading - Views Sought by the Office of Fair Trading, Press Release 13th August 1986, OFT.

2. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.16.

3. J Mitchell, Government-Approved Codes of Practice: A New Approach to Reducing Friction between Business and Consumers, (1978) 2 J.Cons.Pol. 144 at 145.

4. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 1.2.

5. J Mitchell, 'Government-Approved Codes of Practice: A New Approach to Reducing Friction between Business and Consumers', (1978) 2 J.Cons.Pol. 144 at 146.

6. Ibid. p 145.

7. S.I. 1988. (At the time of writing the Regulations were in final form but a number had not yet been allocated.)

8. See P Circus, 'Part III of the Fair Trading Act: Consumer Protection or Bureaucratic Red Tape?', (1987) 8 B.L.R. 26.

9. Ibid.

10. See Annual Report of the Director-General of Fair Trading, 1980, HMSO, p 73.

11. S.4.

12. D J Harland, 'Unfair and Comparative Advertising' - a paper given to the 5th European Workshop on Consumer Law, Louvain, September 1986.

13. S. 138(1).

14. F Bennion, The Consumer Credit Act Manual, 1978, Oyez, p 37.

15. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.15.

16. D J Harland, 'Unfair and Comparative Advertising' - a paper given to the 5th European Workshop on Consumer Law, Louvain, September 1986.

17. [1960] 1 Ch.262; [1961] 1 All E.R. 561.

18. [1960] 1 Ch.at 284.

19. [1974] Ch.401; [1974] 2 All E.R. 1226.

20. [1974] 2 All E.R. at 1229.

21. Comments on Proposals by the Office of Fair Trading for a General Duty to Trade Fairly, 1984, CBI, para 13.

22. M Wasilewski, 'A General Duty to Trade Fairly' - paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986.

23. Ibid.

24. Ibid.

25. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.21.

26. S.21

27. R Thomas, address to an OFT seminar, 'A Statutory General Duty to Trade Fairly', 1984.

28. A A Painter, A General Duty to Trade Fairly, (1984) 3 Tr.L. 65 at 66.

29. Ibid. p 66.

30. Ibid.

31. Ibid.

32. A General Duty to Trade Fairly - a Report to the Council by the Director-General, 1984, British Direct Marketing Association, p 3.

33 See R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 39.

34. Ibid.

35. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.17.

36. Ibid. para 5.24.

37. A A Painter, A General Duty to Trade Fairly, (1984) 3 Tr.L. 65.

38. B Richardson, Towards a Legislative Duty to Trade Fairly, (1986) 92 The ITSA Monthly Rev. 55.

39. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.24.

40. See P Circus, 'The Headaches of Law Enforcement', (1981) 131 N.L.J. 1067.

41. Put to the author by G S Gresty, North Yorkshire County Trading Standards Officer, July 1987.

42. G Woodroffe, Preliminary Research Study on the General Duty to Trade Fairly for the Office of Fair Trading, 1984, unpublished, p 3.

43. Lord Campbell of Alloway, 'Codes of Practice as an Alternative to Legislation', (1986) Stat.L.R. 127 at 132.

44. Ibid. p 130.

45. [1986] Ch.20; [1985] 2 All E.R. 1

46. at 26.

47. Lord Campbell of Alloway, 'Codes of Practice as an Alternative to legislation', (1985) Stat.L.R. 127 at 130

48. See Annual Report of the Director-General of Fair Trading, 1980, HMSO, p 73.

49. M J Methven, 'The Role of the Office of Fair Trading', (1975) Lent C.L.L.R. 7 at 10.

50. C M Schmitthoff, Commercial Law in a changing Economic climate, 1977, Sweet and Maxwell, p 1.

51. [1964] 62 L.G.R. 354.

52. at 355.

53. R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules', (1986) P.L. 239.

54. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.17.

55. Ibid. para 5.16.

56. M Wasilewski, 'A General Duty to Trade Fairly' - paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986.

57. R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules', (1986) P.L. 239 at 246-7.

58. B W Harvey, 'Should there be a General Duty to Trade Fairly?', (1984) 3 Tr.L. 45 at 47.

59. See, for example, Redress Procedures under Codes of Practice -Conclusions Following a Review by the Office of Fair Trading, 1981, OFT.

60. M Wasilewski, 'A General Duty to Trade Fairly' - paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986.

61. A A Painter, 'A General Duty to Trade Fairly', (1984) 3 Tr.L. 65 at 66.

62. M Wasilewski, 'A General Duty to Trade Fairly' - paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986.

63. J Mitchell, 'Government-Approved Codes of Practice: A New Approach to Reducing Friction Between Business and Consumers', (1978) 2 J.Cons.Pol. 144 at 145.

64. R Thomas, Address to an OFT seminar, 'A Statutory General Duty to Trade Fairly', November 1984.

65. A General Duty to Trade Fairly: A Discussion Paper, 1986, OFT, para 5.22.

66. A A Painter, 'A General Duty to Trade Fairly', (1984) 3 Tr.L. 65 at 67.

67. S I 1988. (At the time of writing the Regulations were in final form but a number had not yet been allocated.)

68. R Halstead, Retrenchment or Advance, taken from 'Looking Ahead' - A report of the proceedings of a one day conference to mark the tenth birthday of the OFT, 1984, p 31.

69. B W Harvey, 'Should there be a General Duty to Trade Fairly?', (1984) 3 Tr.L. 45 at 47.

70. S.3.

71. S I 1976 No 1813.

72. G Borrie and A L Diamond, The Consumer, Society and the Law, 4th ed., 1981, Pelican, 154.

73. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 232.

74. G Borrie, 'Laws and Codes for Consumers', (1980) J.B.L. 315 at 320.

75. Ibid. p 317.

76. See, for example, Redress Procedures under Codes of Practice -Conclusions Following a Review by the Office of Fair Trading, 1981, OFT.

77. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.33.

78. M Wasilewski, 'A General Duty to Trade Fairly' - paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986.

79. B Richardson, 'Towards a Legislative Duty to Trade Fairly', (1986) 92 The ITSA Monthly Rev. 56

80. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 233.

81. Butterworths Law of Food and Drugs, 1981 (updated) Division A, (16).

82. Ibid.

83. R Manley, 'Consumer Protection in Local Government', taken from Marketing and the Consumer Movement, ed by J Mitchell, 1978, McGraw Hill, p 53.

84. [1984] 80 Cr.App.R. 31; [1984] Crim.L.R. 574.

85. For a general discussion of compensation orders under S.135 see S Weatherill, 'The Powers of Criminal Courts to Make Compensation Orders', (1986) 136 N.L.J. 459.

86. See G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Soulds, Hamlyn Lectures, 1984, Stevens, p 68.

87. See R M Crossley, (1986) 94 The ITSA Monthly Rev. 139.

88. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.29.

89. Ibid. para 5.31.

90. Ibid. para 5.24.

91. G Borrie, 'Law and Codes for Consumers', (1980) J.B.L. 315 at 320

92. Put to the author by G S Gresty, North Yorkshire County Trading Standards Officer, July 1987.

93. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.28.

94. B W Harvey, 'Should there be a General Duty to Trade Fairly?', (1984) 3 Tr.L. 45 at 47.

95. M Wasilewski, 'A General Duty to Trade Fairly' - paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986.

96. Ibid.

97. B W Harvey, 'Should there be a General Duty to Trade Fairly?', (1984) 3 Tr.L. 45 at 47.

98. The Interpretation of Statutes, 1969, Law Commission Paper No. 21, para 38.

99. A General Duty to Trade Fairly - A Discussion Paper, 1986, OFT, para 5.35.

100. For a discussion on the philosophy underlying the origins of industrial tribunals see IDS brief 139, August 1978, p 1.

101. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, pp 405-6.

102. Ibid. p 406.

103. Ibid.

104. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, Stevens, 1984, p 73.

CHAPTER SEVEN

TOWARDS A GENERAL DUTY TO TRADE FAIRLY?; CONCLUSIONS

(a) Is there a Problem?

This thesis has plotted the development of our present framework of consumer protection and considered the components of the present structure and their operation. A number of conclusions can be drawn from our consideration.

Firstly, it is clear that our present structure has evolved piecemeal over a period of centuries and that whilst today there is a vast body of law, both civil and criminal, the substantive law has significant limitations.

On the civil side remedies have grown up as the courts, to a degree, have retreated from the age of laissez faire and unfettered freedom of contract. Nevertheless, as we noted in Chapter Four, the courts have been unwilling to recognise the central theme of unconscionability which lies behind many of the courts' decisions, and this has resulted in the enforcement of agreements that ought not to be enforced and in the striking down of agreements that ought to be upheld[1]. And there seems to be grounds for arguing that the absence of recognition of such a principle has resulted in uncertainty[2]. For example, the absence of such a criterion prevented, amongst other things, the courts developing rational criteria in relation to issues such as contractual exclusion clauses[3].

Turning to consideration of the criminal law, we find that this has largely consisted of ad hoc measures adopted to deal with a series of specific issues, sometimes in specific sectors of commercial activity.

Despite the overview of the subject by the Malony Inquiry, there is still no comprehensive and integrated body of consumer law, either civil or criminal, such as we saw in some of the

overseas jurisdictions. A comprehensive and integrated approach to consumer law, involving perhaps just one or two consolidated statutes, would surely be greatly welcomed by both consumers and traders alike[4].

Secondly, it is clear that much consumer legislation, particularly in the criminal field, is unduly complex. This complexity is a particular problem, notes Thomas, because consumer protection affects daily life[5].

Thirdly, one can conclude that the traditional approach to legislative drafting, in which one tries to deal specifically with abuses through detailed regulations, is making it increasingly difficult for the law to control sophisticated trading practices. This is particularly so in the marketing field, where the law always seems to be one step behind trade practices.

Many now feel that Parliament cannot keep pace with trading practices. Cranston provides the example of the Consumer Credit Act 1974 and notes that finance houses can evade restrictions on repossession in the Act by the expedient of using a personal loan coupled with a bill of sale, instead of hire purchase[6].

Sir Gordon Borrie has likened some of this modern consumer legislation to "shooting at a moving target"[7]. Behind the traditional approach has been a concern for certainty, but certainty has not always been achieved and in many areas of both our civil and criminal law there is great uncertainty.

Fourthly, it is clear that the procedures for law enforcement pose major problems. On the civil side, many initiatives have been undertaken to improve civil redress, most notably the introduction of the small claims procedure in the county courts. Recently, the Lord Chancellor's Civil Justice Review has been reviewing access to civil justice[8].

One recent suggestion from the Law Society is that there should be a privately financed legal services fund to assist people in taking civil law actions. The fund would be underwritten by a major insurer and controlled by professional and consumer interests[9].

Another suggestion is the creation of a Director of Civil Proceedings. The role of such an officer, as put forward by Woolf LJ at the 1986 Conference of the British Legal Association, would be to represent the public interest in the courts and ensure that where the law requires enforcement by the civil courts the appropriate proceedings are brought[10].

There may be merit in this idea because there is evidence to suggest that consumers are particularly reluctant to pursue cases, particularly to take action in respect of complaints relating to services[11]. Despite the growth in this field, there are many consumers who feel that nothing can be achieved[12].

On the criminal side, we noticed in Chapter Four the major problems of enforcement, relating particularly to a localised and somewhat unco-ordinated trading standards service. This situation is aggravated by a lack of resources and by the complexity of much of the law which it is their responsibility to enforce. In addition, we noted that the level of fines imposed by magistrates' courts were often derisory and reduced the effectiveness of a criminal prosecution.

Fifthly, it is clear that the impetus for reform must come from statute. As Cranston points out, public regulation in the consumer protection field became important in the last century when it was realised that the courts were not a suitable vehicle for trying to achieve innovation in consumer protection[13]. And, as we noticed when we looked at the issue of unconscionability in Chapter Four, the courts themselves recognise that change must come from Parliament.

Sixthly, self-regulation, we noted, has a contribution to make to protect the interests of the consumer, but its performance

varies enormously. In advertising, it has proved relatively successful, largely because of the special factors working in its favour. Other systems of self-regulation are less successful, largely because of inadequate sanctions, lack of public awareness and, above all, insufficient industry commitment. These problems were confirmed recently, for example, in the OFT's monitoring surveys of the operation of the Glass and Glazing Code[14].

However, as we noted in Chapter Three, self-regulatory codes can and do have legal consequences and the increasing recognition of these consequences may do something to improve the effectiveness of self-regulation.

Finally, whilst present administrative remedies, such as licensing, have a role, they clearly cannot be regarded as a complete answer to the overall problems of unfair trading. Borrie sees licensing as a useful device underpinning other forms of legal control, provided it is used selectively[15].

The practical evidence of limitations of our framework of consumer protection lies in the existence of what appears to be a high measure of consumer dissatisfaction. For example, West Sussex Trading Standards Department have said that the average number of complaints they receive in one year is 10,000. Of these, about a quarter are considered to be unjustified, and a half are capable of being dealt with under the existing criminal or civil law or codes of practice. The remaining quarter are considered to be justified but cannot be handled under existing legislation[16].

This experience at a local level is confirmed in a study by the National Consumer Council which collected a considerable amount of material on the realities of consumer dissatisfaction[17]. It was the first national systematic study into the ways consumers respond to problems with the goods they have bought.

This experience is also confirmed by the OFT's recent Consumer Dissatisfaction Report[18]. Indeed, the latter revealed that

there were very many more incidents of consumer dissatisfaction than were revealed by the figures from trading standards and environmental health departments[19].

What that Report has shown is that of some 5,000 people interviewed 42 per cent believed that they had some cause for dissatisfaction as consumers[20]. Sectors where there was a high proportion of dissatisfaction included building work, as highlighted by the OFT's study of the home improvements sector[21], motor cars and accessories and repair and servicing of all types. A rank order correlation shows that there is high correspondence between the results of the survey and data from trading standards departments and citizens advice bureaux[22]. The latter's annual report for 1986-87 shows that there were 1,289,000 enquiries in the 'consumer, trade and business category', which includes the majority of consumer complaints[23].

Obviously, a certain degree of caution is needed when considering these figures. Particularly, this is because the existence of dissatisfaction does not necessarily mean that there is a justiciable issue involved. And there are commentators such as Olander who regard ratings of consumer satisfaction as inherently untrustworthy indicators of problems[24]. One also has to put these complaints in the context of the total volume of consumer transactions.

However, it is reasonable to conclude that at least some of these complaints could be remedied if the obvious limitations of existing consumer protection law and self-regulation could be successfully tackled. And one must not forget that consumer dissatisfaction, whilst important, is not the only justification for reform. One also has to consider the costs involved in the administration of a legal framework which has significant deficiencies. Accordingly, intelligent reform can also help to make more efficient use of the enforcement services, the courts and the Parliamentary draftsmen. Reform means finding an answer to the deficiencies in substantive law and improving the avenues of redress available to individuals and to the enforcement bodies.

(b) Is a General Duty the Answer?

In terms of the deficiences in substantive law there is now growing support, both at home and abroad, for more broadly expressed statutory duties in many areas of law, including consumer protection[25]. The reason for this is the increasing recognition that we noted earlier that more specifically drafted legislation can be easily circumvented. And, as we noted in Chapter Three, such broadly expressed duties have been employed in employment law and certain fields of consumer protection. The latest examples are the general duty in relation to consumer safety and the general duty in relation to misleading price indications, both of which are contained in the 1987 Consumer Protection Act.

Talking of these parallels, the OFT has concluded that their own commissioned research has:

> "... identified a significant number of instances of general duties being placed by statute on particular categories of people and in addition, areas of law in which the courts have proved themselves capable of applying legal rules couched in general terms"[26].

There is also support from a wide spectrum of opinion to move away from a narrow view of consumer protection and more towards the concept of fair trading, in which there is an effort to balance as fairly as possible the interests of consumers and traders[27]. Harland argues that the width of a general duty provision permits action to be taken against new forms of trading conduct as they emerge, or are recognised by enforcement officials[28].

However, the institution of some sort of general duty would not just be a remedy for the deficiencies of substantive law. A general duty regime could also offer the advantage of providing additional remedies. This was one of the clear lessons from our study of the overseas parallels to a general duty in Chapter Five. Belobaba, for example, stressed the importance of an effective combination of sanctions and procedures[29].

Particularly important is the introduction of an injunctive procedure by which traders can be ordered not to continue certain practices. And the injunctive procedure can provide not just an important additional weapon for enforcement authorities but also the possibility of an order containing compensation provisions. In this way, the general duty can improve means of redress for consumers. In Chapter Five, for example, our consideration of Alberta showed clearly how administrative undertakings could include a schedule setting out a list of aggrieved consumers and appropriate compensation. And such a list can cover relatively small sums of money which may not justify individual legal action.

The introduction of a general duty would provide the opportunity for a thorough review of existing legislation, both civil and criminal, and permit some possible simplification of existing consumer protection law and a useful consolidation. This is because the presence of a general duty will reduce, to a large extent, the need to draft legislation with every possible eventuality in mind. Lord Hailsham has said that traditional drafting involves wearing an ingenious hat to prevent avoidance or evasion[30]. He appears to blame this on the triumph of the Literalists over the Mischievites in the rules for the construction of statutes[31]. And he has the support of Lord Wilberforce who, over twenty years ago, told the House of Lords:

> "By presenting to the courts legislation drafted in a simple way by definition of principles, we may restore to the judges what they may have lost for many years to their great regret; the task of interpreting law according to statements of principle, rather than by painfully hacking their way through the jungles of detailed and intricate legislation. So I believe that a process of codification, intelligently carried out, will revive the spirit of the common law rather than militate against it"[32].

Some might argue that a general duty approach will increase uncertainty. However, a number of arguments can be advanced to alleviate such concerns.

Firstly, we have the precedents, both at home and abroad, for such an approach. Those precedents are increasing considerably witness, for example, the general duties set out in the Consumer Protection Act 1987. Another interesting recent parallel is provided by what is now Section 214 of the Insolvency Act 1986, which introduces the concept of 'wrongful trading'.

Secondly, uncertainty already exists in both civil and criminal law. As we saw earlier in the chapter, Waddams, for example, has pointed out the uncertainty that currently exists in relation to the areas of civil law that would relate to the concept of unconscionability[33]. This uncertainty extends even to such recent civil law consumer statutes as the Supply of Goods and Services Act 1982[34]. And on the criminal side we saw in Chapter Four the difficulties of interpretation which have arisen from unduly complex legislation and its enforcement by a localised service.

Thirdly, it is arguable that judicial creativity has long been a feature of the common law. In Shaw v Director of Public Prosecutions[35], for example, Viscount Simonds said:

> "In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for."[36]

It is interesting to note the readiness with which other judges have felt able to use the common law to satisfy the demands of public policy. In Nagle v Fielden and Others[37], for example, a case involving the refusal of the Jockey Club to give a trainer's licence to a woman, Lord Denning said:

> "The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it"[38].

In this regard, something of a historical analogy to the general duty can be made with the rise of equity. For it was the rigidities of the common law, particularly as to procedures, which led to the establishment of the Chancellor's Court as a "court of conscience" in which the Lord Chancellor answered petitions as he thought just, without reference to established rules of law[39]. Clearly, the analogy cannot be taken too far but the growth of equity does show how, in a previous age, there was a need to escape from an increasingly rigid and inflexible system and operate on simple basic principles of justice and fairness in order to ensure that the fundamental purpose of the law was achieved.

More recently, as Borrie points out, the judges have been given a creative role in relation to such legislation as the Unfair Contract Terms Act[40]. And Smith has observed that the common law itself is not a certain process because it admits of judicial extension rather than of interpretation[41]. A certain amount of judicial creativity must therefore be regarded as acceptable, provided it operates within clear boundaries.

Fourthly, certainty, whilst desirable, is by no means the only objective. The need for certainty also has to be balanced against the need for effectiveness.

Fifthly, a general duty not to engage in deceptive, misleading or unconscionable practices would not operate in a vacuum. In time, a body of case law would help set the parameters of a general duty and there would remain, of course, a number of

specific provisions to provide non-exhaustive examples of what was covered by the general duty and to provide the basis for criminal prosecutions, where that was appropriate. As we noted in our study of Australia, it was felt wrong to use a general duty provision for criminal prosecutions because it was not drafted with the requisite degree of precision for criminal proceedings. Also one needs to remember that the important thing is often to secure the 'rehabilitation' of a trader rather than just punish him. Civil sanctions attached to a general duty are more likely to achieve this.

In addition, one has to remember that many possibilities exist for guidelines and, if necessary, statutory codes of practice, to provide guidance on the operation of a general duty. These guidelines are likely to be particularly important in relation to unconscionable conduct since this includes, inevitably, a more subjective and value laden judgement than, for example, deceptive conduct which is relatively more objective. Guidelines already exist in certain sectors, such as the Code of Practice on Price Indications, and these could easily be adapted to operate within a general duty regime and they could be added to as necessary. However, unlike trade association codes, these statutory codes would relate to particular practices, rather than particular trades.

Having said that, there would be no reason why the courts, in administering a negative duty, should not have regard, as we discussed in Chapter Six, to self-regulatory codes to the extent that they were relevant to the issues in consideration. And one must also remember that one of the advantages of a self-regulatory code, which we looked at in Chapter Four, is that, irrespective of any formal legal status, it can help to clarify the legal obligations of the trader and the legal rights of the consumer.

Turning to the future of industry self-regulation and the possibilities for tackling some of its limitations, it is clear from our considerations in Chapter Six that a positive general duty regime would not be an answer to those problems.

We concluded that self-regulation would be unlikely to survive a general duty regime which involved turning existing industry codes into statutory codes. The present OFT-sponsored codes would, even on the OFT's admission, need considerable re-drafting and many provisions would not be suitable for retention. For example, it is hard to see how a statutory code in relation to a general duty to trade fairly could make use of the following, not untypical, provisions from the Code of Practice of the Association of British Launderers and Cleaners. As a result of this Code, members undertake to:

> "Train our staff to be competent, courteous and helpful at all times ... keep our shops, vans, containers and premises clean and tidy".

Particularly significant, we noted, is the OFT comment that the conciliation and arbitration facilities offered by trade associations could not be contained within the new style codes[42]. And, presumably, there could not remain provisions relating to the operation of customer advisory services, such as that run by the Association of British Launderers and Cleaners[43].

It is true that there is discussion about the effectiveness and usefulness of the existing conciliation arbitration facilities[44]. Nevertheless, as we saw, the handling of consumer complaints is regarded as central to the OFT-sponsored codes[45]. It is unlikely that trade association machinery for dealing with consumer complaints would survive the introduction of new style codes within an overall legislative framework giving new avenues of consumer redress.

In addition, one should ask whether raising standards to the best in a particular trade is properly a role for the law at all. It seems perfectly reasonable to conclude that the law should confine itself to providing a minimum standard of honest fair dealing in the market-place and leave the raising of standards beyond this to competition and industry self-regulation.

(c) What Sort of General Duty?

Our considerations leave us with the conclusion that the best course would be a negative general duty not to engage in misleading, deceptive and unconscionable practices. This duty should not be limited to situations where there is a contract in existence.

There is merit in following the example of British Columbia and defining 'trading', within the new legislation, to encompass acts or practices arising before or after, as well as during, a consumer transaction. This would mean that manufacturers, as well as retailers, would be covered by the general duty. An example of the sort of issue which could bring manufacturers within a general duty is the availability of spares. For if spares are not available for a reasonable period after purchase of a product the consumer may have to discard a product which in all other respects is in perfect working order.

In the United States general duty regime, it is interesting to note that manufacturers have been brought within its ambit in relation to such matters as a failure to identify safety risks on product packaging or the absence of necessary information for the care of clothing[46].

However, it would not just be manufacturers who could be affected by a general duty. Finance companies could be brought to task for cases of imprudent lending where unfair advantge has been taken of consumers.

The duty would be reinforced, as we saw earlier, by a mixture of statutory guidelines and factors and by a non-exhaustive list of specific examples of conduct which, without limiting the general provision, would be deemed to be misleading, deceptive or unconscionable. The Secretary of State should be given a power to add to the list by means of statutory instruments. In addition, there could be administrative guidelines and reference could also be made, as we also saw

earlier, to any relevant statutory codes and to self-regulatory codes, where they are appropriate. However, there would be no question of giving statutory status to the present sectoral codes.

The general duty provision could give rise to an injunctive procedure and what is retained from existing criminal legislation could give rise, as currently, to criminal enforcement. The general duty would therefore provide an important additional enforcement mechanism, both where the practice does not fit into a specific prohibition and also where the enforcement authorities do not believe that they can meet the criminal burden of proof. It would also be a valuable mechanism, additional to the Part III procedure, where successive criminal prosecutions have had little impact on a trader's business practices. It would be particularly useful if the court was empowered to make an appropriate order or orders as to compensation for aggrieved consumers, as well as prohibiting the offending practice. By so doing, it would also be supplementing existing civil law remedies.

Some might argue that the duty of the State is to regulate the market-place and not to enforce private rights. However, if this is an important principle it is one from which we have already departed, as we saw in Chapter Six. In addition, we now have the example of the Financial Services Act 1986 by which the Securities and Investments Board is empowered to go to court on behalf of investors who have suffered loss in order to obtain compensation[47].

Although we noted that the criminal law has been more influential than the civil law in protecting the consumer, this is only because, as Atiyah points out, criminal law enforcement was publicly funded[48]. Provided there is adequate public funding of the enforcement of a general duty there should be no objection to the fact that it gives rise to civil law remedies. In addition, the general duty should, of course, make the route of a civil action by an individual consumer a more attractive one.

However, although some useful consolidation and simplification work could take place, it is unlikely for a number of reasons that one could think in terms of major repeal of existing legislation, as suggested by Painter[49].

Firstly, it seems doubtful that Parliament would accept that any substantial amount of existing specific legislation should be repealed. This would be particularly so if, as has been suggested earlier, there was to be no major overall role for codes of practice to set the practical parameters of the general duty.

Secondly, to reduce the amount of specific legislation would be to limit the range of remedies open to the enforcement authorities. To repeal whole areas of existing criminal law and rely on the general duty would be to reduce the opportunities open to the authorities to take criminal action where they thought it appropriate.

What this means is that the general duty would not be a replacement of existing law but more a measure to reinforce the central purpose of it in terms of helping to achieve an environment of honest fair dealing and as a means of opening up the remedies available to enforcement officers and consumers alike. It would also have the effect, as Harland points out, of ensuring that the law clearly reflects and promotes certain basic ethical values of society, such as honesty and fair dealing. However, the general duty statute may have to set out the extent to which old precedents are discarded, in order to avoid the duty being unduly constricted.

In addition, the existence of a general duty with civil remedies will enable some types of conduct to be taken out of the criminal law where the stigma of criminality is not appropriate.

One way in which the reinforcement role could be emphasised is by creating the relevant general duty and its accompanying enforcement mechanisms by amending the Fair Trading Act and Part III in particular. This would be particularly appropriate

because Part III might also be modified, as we saw in Chapter Six, to tackle some of the problems presented by self-regulation. It should also be tactically easier to amend an existing statute in view of the pressures on Parliamentary time.

(d) Enforcement

In Chapter Six we concluded that, given the options currently available, the enforcement of a general duty should primarily be the responsibility of local trading standards officers because of their understanding of local trading practices and their experience, in particular, of collecting material for the operation of the Part III procedure.

The general duty regime envisaged in this thesis will be, despite the limited parallels that already exist, a major legislative innovation. Accordingly, it will be important to ensure the highest degree of consistency and uniformity, particularly if the powers under a general duty are to be exercised through local county courts, and not, as for example in Australia, by higher courts. However, the county courts seem appropriate, particularly in view of their experience of operating the Part III procedure, as well as the operation of the small claims procedure.

As we saw in the previous chapter, LACOTS clearly has a role in ensuring uniformity but LACOTS does have its critics, and at the time of writing, the future of LACOTS appears to be uncertain. This is because the Government has abolished the National Metrological Co-ordinating Unit which shared offices and secretariat with LACOTS[50].

In Chapter Four we concluded that the answer to the problems of enforcement may well be the establishment of a national trading standards service to replace the present local authority based system. However, it would be essential that however the trading standards service is organised, it must be adequately resourced in order to carry out its functions effectively. For it is pointless enacting new legislation to improve enforcement

of consumer protection law if the facilities and resources are not made available to turn it into a practical reality. This was a point stressed by Belobaba in relation to the general duty regimes in Canada[51].

Quite apart from enforcement by trading standards officers, there remains the question as to who else should be given a power to seek injunctions under a general duty.

It would seem reasonable to allow individual consumers to take action, particularly because the inclusion of unconscionability would be designed to overcome some of the problems that litigants face at present. However, it is more difficult to decide whether such bodies as consumer organisations and local authorities should have a right to take action. Certainly, there would be advantages, particularly because individual consumers are reluctant to take action and, in addition, a class action would have the logistical advantage of avoiding duplication of actions[52]. In addition, there is always the danger that increased possibilities for achieving consumer redress through official channels might further discourage individual initiative. Actions by consumer organisations might help to counterbalance any effect of this kind.

However, there are immense implications in permitting class actions and considerable thought and consideration will need to be given to the general issue. The problems which will have to be considered include how cases would be funded, the rights which organisations would have to settle cases out of court and the rules necessary to ensure proper accounting to consumers for any compensation received from the court.

Accordingly, it might be better to wait and see how the general duty is enforced by individual consumers and by trading standards officers. One alternative possibility is to adopt a comparable provision to that in British Columbia whereby, in a suitable case, the authorities can take over an action by an individual consumer.

Even more difficult still is the question as to whether traders should be allowed to bring actions in respect of actions by other traders. We concluded in Chapter Six that the general duty should not apply to dealings between traders, largely because traders did not seem interested and because it would be more difficult to determine what was fair in relation to trade relationships. However, should a trader be able to take action in respect of breaches of the general duty by other traders and thereby adopt a 'policing role' in relation to trade practices?

There would be a clear commercial motivation for such action in that it would be designed to prevent a competitor gaining an unfair commercial advantage. Nevertheless, such actions can be helpful in enforcing a general duty and is particularly noticeable in countries like Australia. Its main advantage is that at times of limited resources it enables the law to be enforced without cost to the public purse. It is almost a case of 'privatised' law enforcement. The danger would be that the action would be largely taken by the bigger traders with significant shares of their respective markets, and that the smaller traders might not experience the full force of the law.

It does not seem logical that such a right of action should be given to traders and not, for example, to consumer organisations and local authorities. Accordingly, as with the latter, it might be better to wait and see how the general duty develops. It is, after all, a novel departure in civil law to allow class actions and actions by those who do not have a direct interest in the subject matter of the case. A decision should therefore await not just experience of the general duty, but also more detailed consideration of who should have a right of action in English Law.

Finally, we need to remind ourselves that one of the interesting aspects of the overseas examples of general duty regimes is the importance of administrative procedures. Such procedures would play a useful part in the enforcement of a general duty regime and would be building on the experiences of administrative action under the Part III procedure. There is much to be said for a system of undertakings, similar to that

operating, for example in Alberta, where the undertaking can require certain remedial action by the trader, including compensation for named individuals. Such a system is crucially important because, if the Part III experience is anything to go by, the majority of cases under a general duty regime should be settled by administrative action.

Such administrative action would need to be supported by sufficient information gathering powers and also by a power to issue appropriate guidelines, where necessary.

Recourse to the courts for an injunction will need to be possible in the event of an undertaking being broken.

(e) Self-Regulation

In the previous chapter we concluded that the general duty to trade fairly was not an answer to the deficiencies of self-regulation, in so far as the latter is concerned with raising standards in particular trades above an acceptable minimum.

The main objection is that to impose certain standards across an industry would remove the self-regulatory element, not least because as we saw in Chapter Four, trade associations have no powers over non-members and this is one reason why it would not be possible to retain conciliation and arbitration facilities.

Another problem is that self-regulation is often concerned with standards of practice above what one regards as a minimum. Indeed, Humble makes the point that codes can be very effective in regulating practices which, though legal, are deemed to be unfair[53]. And the higher the standards the less appropriate they become to being made general requirements across all operators within a trade sector.

One leading trade association suggested to the author that, if trade association codes had a direct role in a general duty regime, the associations might be forced to try to find higher and higher targets for their members, simply as a way of

differentiating members from non-members, since a code of practice provides a reason why some traders join a trade association.

The higher the standard, the more difficult would be the chances of getting agreement from association members for their embodiment in a code of practice. This is because some individual companies would see these higher standards as purely a matter for competition in the market-place. And the higher the standards aimed at the more esoteric they become and consequently the harder to enforce. And comprehensive higher standards are not necessarily in the consumer interest and may prove to be anti-competitive. After all, higher standards of service may mean higher prices and some consumers would rather opt for a cheaper 'no frills' alternative. Therefore, to try to force all traders in a sector up to the level of the best may result in a reduction of consumer choice and may involve identifying with the interests of one group of consumers over another.

There are those who believe that trade associations would be reluctant to draw up codes in more specific terms lest this should increase the chances that members might fall foul of legislation[54].

Finally, an argument against trade associations being directly involved in a legal framework is put by Page. He argues, with self-regulation in the City in mind, that such associations should be made more accountable to the public and that without it governments may be exercising power without responsibility[55].

One can reasonably conclude that to bring the self-regulatory codes formally within a general duty regime would be to destroy self-regulation as it currently exists. Having said that, there are a number of ways in which self-regulation can be improved.

Particularly important is the continued patient monitoring of self-regulation by the OFT, as is the increased emphasis on

informing the consumer about the existence of industry codes and the redress facilities which they provide. For, as we saw, one of the most frequent complaints made about industry self-regulation is lack of public awareness of its existence.

Secondly, more use could be made of the 'Sacha Shoes' principle which we looked at in Chapter Four, by which the courts can sanction, as part of the requirements for a Part III undertaking, that a trader complies with the terms of an approved code of practice. And in terms of compliance by members of the association there are both the powers of the association to discipline members and the avenues which are sometimes open to the courts, for example, under Section 14 of the Trade Descriptions Act.

Thirdly, consideration might be given to extending the remit of Part III so that undertakings and orders could be sought for repeated breaches of an approved code of practice[56]. This would, however, need to be carefully thought through because some of the objections to a positive general duty regime which we noted could also apply here.

Fourthly, a trade association which did not ensure adequate compliance with an approved code could be threatened with the possibility of a statutory code covering the key commercial practices of that sector. Such a code could be linked to a requirement that practitioners in that sector be licensed by a public authority. As we saw in Chapter Five, such use of licensing is common in Canada and has a precedent in this country in the licensing provisions of the Consumer Credit Act 1974. The drawing up of a new statutory code or the modifying of an existing one could, as we saw in Chapter Six, be the role of a revitalised Consumer Protection Advisory Committee.

Finally, it is worth noting that the Director-General of Fair Trading believes that provided self-regulatory codes can bring about improvements among 70 per cent or 80 per cent of traders in a particular sector, that is sufficient justification for their existence[57]. And, notes the DGFT, this warrants

devoting time and resources to improving their content, their impact and public awareness of them[58]. This view is shared by the Government who have recently said that the Code of Practice of the Association of British Travel Agents has served both travellers and practitioners well[59].

(f) Next Steps

This thesis has attempted to show that a major new innovation is needed in our system of consumer protection if that system is not to be outwitted by sophisticated trading practices. Such an innovation can also add substantially to the remedies available to both consumers and enforcement officers.

However, being a major innovation, the introduction of a general duty needs to proceed with care. The first priority must surely be to secure widespread acceptance of both the deficiencies of the existing consumer protection framework and the merit in introducing a general duty.

In this regard it might be useful for the OFT to conduct further consumer research, not just on consumers' subjective feelings of dissatisfaction but applying more objective criteria. Olander gives a number of possible objective indicators. These include time series indexes of the quality of consumer goods, experimental tests of the willingness of firms to honour complaints, scrutiny of warranties and standard contracts and monitoring of trends in the policies of manufacturers and retailers[60].

The acceptance of a general duty approach is growing, as will have been evident from this thesis. A general duty will, of course, have to find acceptance by ordinary consumers. However, the National Consumer Council, for one, has no doubt that this can be achieved. In their response to the OFT on the latter's proposals, the NCC makes the point that the effectiveness of any piece of legislation is gauged by the extent to which the public is aware of it. They cite unfair dismissal legislation as a good example and they go on:

> "What the public knows about, the public will claim as its own and will make use of. It would not be long before a general duty became imbued in the public mind, and consumers were aware of infringements of their rights, thereby overcoming one of the major obstacles to private redress".

Particularly significant is Parliament's recent acceptance of the need for a general duty approach to the issues of consumer safety and misleading price indications. Accordingly, it may be wise to await some practical experience of the operation of this new legislation to see what further it can tell us about the desirability of an overall general duty and some of the practical problems such a duty may present.

On the basis that the experience of these duties in operation is supportive of the concept of a wider general duty, one could consider bringing the general duty we have discussed into operation in stages. For example, a general duty not to engage in misleading and deceptive practices could be introduced and then later extended to unconscionable practices - or, indeed, vice versa. One advantage of this approach is that it will give time for an assessment to be made of the extra burden likely to be imposed on the county court system and on the trading standards service. The latter could be the subject of a study by the Audit Commission.

The EEC is one route through which moves towards a general duty regime could be facilitated. The Commission's work on unfair contract terms might be a suitable vehicle[61]. Although a directive on this subject would be limited to contractual terms, it would nevertheless be a first step since it would introduce a far wider concept of unfairness than is presently contained in the Unfair Contract Terms Act.

Indeed, Braun believes that decisions regarding a general duty should not be taken unilaterally without regard to the European Community dimension[62].

The process of getting agreement within the Community institutions can take some time. In the meantime, the Law Commission could be asked to consider the matter. After all, their function is to review the law with a view to its systematic development and reform. Nevertheless, the Law Commission as an entity has come under considerable criticism of late[63]. Accordingly, it might be an idea to establish a working party or a special committee to be chaired by a Law Commissioner, but including a representative and expert group from such sources as the consumer movement, trade organisations and the enforcement authorities.

In addition, further research could be undertaken by academics in what is an area where there appears to have been a marked absence of academic discussion and consideration.

Yet none of these steps should become an excuse for failing to take action. This thesis has revealed that there is a nettle which faces those concerned with the future of our system of consumer protection and it needs to be grasped.

CHAPTER SEVEN

References

1. S M Waddams, 'Unconscionability in Contracts', (1976) 39 M.L.R. 369 at 371.

2. Ibid.

3. Ibid.

4. B Thomas, 'The Legal Framework of Consumer Protection', taken from Marketing and the Consumer Movement, ed by J Mitchell, 1978, McGraw Hill, p 24 at 49.

5. R Thomas, 'Plain English and the Law', (1985) Stat.L.R. 139 at 149.

6. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 401.

7. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, p 64.

8. Civil Justice Review; Small Claims in the County Court, 1986, Lord Chancellor's Dept.

9. (1987) 84 L.S.Gaz. 1934.

10. (1986) S.J. 762-4.

11. Consumer Dissatisfaction; A Report on Surveys Undertaken for the Office of Fair Trading, 1986, OFT, p 44.

12. Ibid.

13. R Cranston, Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson, p 403.

14. The Glass and Glazing Code; A Report on Monitoring Surveys, 1987, OFT.

15. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, p 97.

16. M Wasilewski, 'A General Duty to Trade Fairly' - a paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986.

17. Buying Problems; Consumers, Unsatisfactory Goods and the Law, 1984, NCC.

18. Consumer Dissatisfaction; A Report on Surveys Undertaken for the Office of Fair Trading, 1986, OFT, p 4.

19. Ibid. p 10.

20. Ibid. p 43.

21. Home Improvements; A Report by the Director-General of Fair Trading, 1983, OFT.

22. Ibid.

23. National Association of Citizens Advice Bureaux, Annual Report, 1986-7. The consumer, trade and business category showed a 15.6 per cent increase over the previous year.

24. F Olander, 'Can Consumer Dissatisfaction and Complaints Guide Public Consumer Policy?', (1977) 2 Journ. of Cons. Pol. 124 at 133.

25. D W Oughton, 'Restructuring the Control of Price Indications', (1982) 1L.M.C.L.Q. 117 at 122.

26. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 4.1.

27. J D Montgomery, 'Consumerism...a Company Lawyer's View', (1975) (March/April) Consumer Affairs 6-8.

28. D J Harland, 'Unfair and Comparative Advertising' - a paper given to the 5th European Workshop on Consumer Law, Louvain, September, 1986.

29. E P Belobaba, 'Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection', (1977) 15 Osgoode Hall L.J. 327 at 330.

30. Lord Hailsham, 'Addressing the Statute Law', (1985) Stat.L.R. 4 at 5.

31. Ibid. p 9.

32. H.L.Deb., Vol.264, Cols.1175-1176 (1 April 1965). See also H Kotz, 'Taking Civil Codes Less Seriously', (1987) 50 M.L.R.1.

33. S M Waddams, 'Unconscionability in Contracts', (1976) 39 M.L.R. 369. See also G Applebey and F Meisel, 'Hongkong Fir revisited: The House of Lords and Certainty in Contracts', (1982) 1 L.M.C.L.Q. 592 at 608.

34. J R Murdoch, 'Contracts, for the Supply of Services under the 1982 Act', (1983) L.M.C.L.Q. 652 at 662.

35. [1962] A.C. 220.

36. at 267.

37. [1966] 1 A11 E.R.689.

38. at 693.

39. N Underhill, The Lord Chancellor, 1978, Terance Dalton, p 92-3.

40. G Borrie, The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, Hamlyn Lectures, 1984, Stevens, p 19.

41. A T H Smith, 'Judicial Law Making', (1984) 100 L.Q.R. 46 at 76.

42. A General Duty to Trade Fairly; A Discussion Paper, 1986, OFT, para 5.22.

43. C Fricker, 'What a Trade Association Can Do: The Association of British Launderers and Cleaners', taken from Marketing and the Consumer Movement, ed J Mitchell, 1978, McGraw Hill, p 167.

44. See Redress Procedures under Codes of Practice - Conclusions Following a Review by the Office of Fair Trading, 1981, OFT.

45. J Humble, 'A New Initiative', taken from Marketing and the Consumer Movement, ed by J Mitchell, 1978, McGraw Hill, p 146.

46. D Pridgen, Consumer Protection and the Law, 1986, Clark Boardman, New York, para 9.0.5.

47. S.6.

48. P S Atiyah, The Rise and Fall of Freedom of Contract, 1979, Clarendon Press, Oxford, p 703.

49. A A Painter, 'A General Duty to Trade Fairly', (1984) 3 Tr.L. 65 at 66.

50. The National Metrological Co-ordinating Unit (Transfer of Functions and Abolition) Order 1987, S.I. 1987 No. 2187.

51. E P Belobaba, 'Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection', (1977) 15 Osgoode Hall L.J. 387

52. K Puttick, 'Trading Fairly: Would a 'General Duty' help?', (1986) B.L.R. 299 at 300.

53. J Humble, 'A New Initiative', taken from Marketing and the Consumer Movement, ed by J Mitchell, 1978, McGraw Hill, p 148.

54. Put to the author by G S Gresty, North Yorkshire County Trading Standards Oficer, July 1987.

55. A C Page, 'Self-Regulation and Codes of Practice', (1980) J.B.L. 24.

56. See P Circus, 'Part III of the Fair Trading Act; Consumer Protection or Bureaucratic Red Tape?', (1987) B.L.R. 26 at 27.

57. G Borrie, 'Legal and Administrative Regulation in the United Kingdom of Competition and Consumer Policies', (1982) 5 U.N.S.W.L.J. 80 at 91.

58. Ibid.

59. Lord Young of Graffham, Parliamentary Answer, Vol.488, Col. 30, (29th June 1987).

60. F Olander, 'Can Consumer Dissatisfaction and Complaints Guide Public Policy?', (1977) 2 Journ. of Cons. Pol. 124 at 135. See also M Pfaff, 'Who Decides What is Good for Whom?; A Comment on the Paper by Olander', (1977) 2 Journ. of Cons. Pol. 138.

61. See consultation letter on proposed EC Unfair Contract Terms Directive, 12th August 1987, Dept. of Trade and Industry. See also J Braun, 'A General Duty to Trade Fairly - The European Dimension', (1985) 4 Tr.L. 165.

62. J Braun, 'A General Duty to Trade Fairly: The European Dimension, Part Two - Enforcement', (1985) 4 Tr.L. 217.

63. See, for example, (1987) 137 N.L.J. 699.

APPENDIX A

THE CODE OF PRACTICE FOR DOMESTIC LAUNDRY AND CLEANING SERVICES

THE CODE OF PRACTICE

FOR DOMESTIC LAUNDRY AND CLEANING SERVICES

A FAIR DEAL FOR CUSTOMERS

THE CODE OF PRACTICE FOR DOMESTIC LAUNDRY AND CLEANING SERVICES

Prepared in Consultation with
The Office of Fair Trading

Published by
The Association of British Launderers & Cleaners Ltd
Lancaster Gate House, 319 Pinner Road,
Harrow, Middlesex, HA1 4HX
Telephone 01-863 7755

First Published 1976

FOREWORD

This booklet has been prepared by the Association of British Launderers and Cleaners Limited (ABLC) in consultation with the Director General of Fair Trading. It explains, in greater depth than the necessarily brief Code of Practice Statement can do, the principles underlying the quality and efficiency of the service provided by Members of the Association to the public.

These principles were not new when they were introduced in 1976 and a large majority of ABLC Members had used them as a basis for their terms of trading and customer relations policies for many years previously. Their significance for members of the public however is that they are set out in detail and incorporated in this Code of Practice which is accepted by the Association's Members, such acceptance being a condition of membership.

The Association is confident that this booklet will demonstrate that members of the public seeking the services of ABLC Members can be sure of a Fair Deal, including the opportunity to have any dispute settled through simple and inexpensive conciliation procedures. At the same time it is felt that the brief statements of current law which the booklet contains will go some way towards a fuller understanding of the general legal principles which apply.

It is the Association's policy to give every possible assistance to Trading Standards Departments of local authorities, Consumer Advice Centres, Citizens' Advice Bureaux and other recognised consumer bodies, to bring about speedy and satisfactory resolution of disputes in which an ABLC Member is involved. The Association is also pleased to provide these bodies, and individual members of the public, with advice and information on general aspects of laundering and drycleaning whenever requested.

CONTENTS

INTRODUCTION

DOMESTIC LAUNDRY AND CLEANING SERVICES

One of the main differences between buying a service, such as laundering and drycleaning, and buying a manufactured product is that in determining satisfaction with a service personal judgement and viewpoint play a very large part, whereas the acceptability and merchantability of a manufactured product is, in most cases, a matter of fact and clear to the purchaser.

As the success of the launderer or drycleaner in satisfying the customer depends so much on the view of the customer, it is obviously very important for the Industry to adopt a fair and understanding policy in dealing with customer complaints.

In normal circumstances domestic laundry and drycleaning customers should have no cause to complain about the service they receive, but in a very few cases justified complaints do arise. Many of these complaints, when looked at individually and objectively, are of a very minor nature but they can be made to appear worse by lack of effective communication between the launderer/cleaner and the customer.

In order to minimise the number of complaints and ensure that those that do arise are attended to speedily and effectively, Members of the ABLC set themselves clear objectives in their customer relations policies and apply practices, standards and procedures designed to achieve a level of service represented by the series of undertakings contained in the Code of Practice Statement.

The standards and procedures set out in this booklet are those laid down by the ABLC as an appropriate means of attaining an acceptable level of service in times of normal trading conditions. Many ABLC Members will, as a matter of their own policy, continue to provide levels of service, and use Codes of Practice, which in some respects exceed this standard Code. **The important thing from the customers' point of view however is that all those who use the services provided by ABLC Members can be assured of a Fair Deal.**

Members of the public will be able to tell which laundry and drycleaning firms are ABLC Members because they will display in a prominent position the ABLC symbol which proclaims their membership and therefore their adherence to the Code. Members' retail premises will display a copy of the Code of Practice Statement and laundry books will contain a reference to it, a copy being available on request.

The ABLC's Customer Advisory Service provides customers with an efficient and helpful procedure through which those disputes which cannot be resolved between the ABLC Member and the customer can normally be quickly settled.

CODE OF PRACTICE STATEMENT

A FAIR DEAL FOR CUSTOMERS

CODE OF PRACTICE FOR DOMESTIC LAUNDRY AND CLEANING SERVICES PRODUCED BY THE ASSOCIATION OF BRITISH LAUNDERERS AND CLEANERS LIMITED IN CONSULTATION WITH THE OFFICE OF FAIR TRADING.

As a Member of the Association of British Launderers and Cleaners Limited we undertake not to restrict our liability under the general law and shall so far as is reasonably practicable:–

1. Handle all clothes, linens, furnishings and other items accepted by us for processing with proper and due care and attention.
2. Investigate any complaint promptly and, if requested, re-process, free of charge, any article which is unsatisfactory due to fault on our part.
3. Pay fair compensation for loss or damage due to negligence on our part.
4. Train our staff to be competent, courteous and helpful at all times.
5. Keep our shops, vans, containers and premises clean and tidy.
6. Maintain the highest possible standard of quality and service consistent with the price charged.
7. Display in shop premises a list of prices for standard articles.
8. Have all orders ready or delivered at the time stated, unless prevented by exceptional circumstances.

The ABLC's Customer Advisory Service is available to help resolve any disputes which arise between Members of the Association and customers. The Association's address is: Lancaster Gate House, 319 Pinner Road, Harrow, Middlesex HA1 4HX.
Telephone No. 01-863 7755

GENERAL PRINCIPLES OF THE CODE

GENERAL

1. This Code of Practice applies to all services, including repairing and dyeing, normally provided by domestic laundry and/or drycleaning Members to customers who are private individuals, but does **not** apply to services provided by launderettes and coin operated drycleaning establishments.

2. The Code of Practice Statement is set out in full on the previous page. The principles that underlie the series of undertakings contained in the Statement can best be explained by considering each undertaking individually in the following way:–

STATEMENT PREAMBLE

As a Member of the Association of British Launderers and Cleaners Limited we undertake not to restrict our liability under the General Law.

3. The Preamble sets the tone for the whole Code of Practice. By virtue of these words, ABLC Members undertake not to seek to contract out of liability imposed on them by the law of the land (see paras 15 and 16). The Code of Practice Statement then sets out the series of undertakings with which ABLC Members will, so far as is reasonably practicable, comply.

Legal Liability

4. In law, a launderer or cleaner who loses or destroys a customers's article through his or his employees' negligence is liable for the market value of the article at the time it is lost or destroyed i.e. allowing for depreciation but reflecting to some extent the cost of replacement at current costs. If the article is only damaged and is capable of adequate repair the launderer/cleaner is only liable for the cost of that repair save that if this exceeds the market value of the article at that time, the launderer/cleaner is only liable for the latter (see Para 14.).

5. The liability of the launderer/cleaner is a liability for negligence, that is to say for a breach of a duty or obligation, whether imposed by law or by an express or implied term in a contract, to take reasonable care or exercise reasonable skill in relation to the articles left with him. In considering negligence it must be remembered that the launderer/cleaner holds himself out as possessing specialised knowledge and might be held to be negligent if he uses an unsuitable process or fails to realise that a particular article would be damaged, at any rate where such a risk would be generally recognised by others in the industry.

6. It must be emphasised that because the launderer's/cleaner's liability is based on negligence, any damage which cannot be attributed to negligence cannot be the responsibility of the launderer/cleaner. Among the possible causes of damage for which neither the law nor common sense expects the launderer/cleaner to be responsible (unless, and to the extent that, the launderer/cleaner adds to the damage by his negligence) are:-

faulty manufacture (e.g. fugitive colours, relaxation of stretch imparted during manufacture, inadequate seaming, incorrect care labelling, etc.), (See Para 12).

prior misuse by the customer (e.g. drying of razor blades on towels, excessive use of bleach, spillage of acids or other corrosive liquids on fabrics etc.),

normal but unrecognised wear (e.g. weakening of curtains by exposure to light).

STATEMENT ONE

Handle all clothes, linens, furnishings and other items accepted by us for processing with proper and due care and attention.

7. This undertaking reflects the basic philosophy underlying the service provided by ABLC Members, and is self explanatory.

STATEMENT TWO

Investigate any complaint promptly and, if requested, re-process, free of charge, any article which is unsatisfactory due to fault on our part.

8. Any complaint should first be made to the ABLC Member concerned who will do all he can to resolve the complaint in a mutually acceptable fashion. If technical considerations are involved the two parties may agree to have the article examined by an independent testing house (see para 35) where such an examination is thought likely to lead to a mutually acceptable conclusion. Such an examination would normally be undertaken on the basis that the customer will pay the testing house's fee if the examination shows that the ABLC Member was not at fault.

9. If, whatever the circumstances, a mutally acceptable conclusion cannot be reached the complaint may be referred by the customer or by the Member to the Association's Customer Advisory Service (See paras 30 - 36).

10. ABLC Members accept that customer complaints should always be treated with respect. Every ABLC Member is expected to have a proper and efficient system for receiving and for promptly acknowledging and investigating customer complaints and for acting in response to justified complaints, both towards the complainant to give satisfaction and within the firm to avoid repetition. A customer should always receive an adequate and considered response to his complaint.

11. ABLC Members are encouraged to co-operate with Trading Standards Departments of local authorities, Consumer Advice Centres, Citizens' Advice Bureaux etc. to assist in resolving complaints which have been referred to those bodies by customers, although the ABLC Customer Advisory Service is always available to help in such cases.

12. ABLC members who find examples, in any particular range of articles, of a manufacturing fault (see Para 6) which prejudices successful laundering or drycleaning can refer the matter to the

Association which will arrange for the matter to be taken up with the manufacturers or retailer concerned to see how such fault (which may amount to a breach of the Sale of Goods Act) can be eliminated.

13. Where it is accepted by an ABLC Member that an article may have been been processed unsatisfactorily because of his fault the ABLC member will offer to reprocess the article, at no charge to the customer, in an attempt to obtain a satisfactory result.

STATEMENT THREE

Pay fair compensation for loss or damage due to negligence on our part.

14. ABLC members undertake to pay **fair** compensation in the above circumstances, and what is fair is a matter which has to be determined according to the facts of each case. The launderer/cleaner is not obliged at law to replace a lost or damaged article with a new article, nor to reimburse the customer the complete cost of buying a new article. Both parties should take into account the depreciation, wear and tear which had occurred to the article prior to the loss or damage as this may affect the article's value in respect of which compensation is assessed.

Exclusion Clauses

15. Any clause which is intended to exclude, limit or restrict the launderer's/cleaner's legal liability is contrary to the Code and may in certain cases be unenforceable at law. Members of the Association will therefore not attempt to restrict either their liability for certain types of damage caused by their negligence, or the amount of fair compensation which they will pay. They may however wish to ask the customer, at the time the article is accepted, for an indication of the value which the customer places on the article; this may be done when the article is clearly of exceptional value or of unusual manufacture (see para 20).

Owner's Risk Clauses

16. These clauses are only inconsistent with the Code if their

effect may be to exclude, limit or restrict legal liability; in such cases they may also be unenforceable at law. There may be certain articles however, such as curtains, where the Member can foresee that some damage may be an inevitable consequence of the application of the laundering, drycleaning or dyeing process even though that process will be expertly applied. In such cases therefore the Member may ask the customer to acknowledge (in writing) his acceptance of the risk of such damage occurring. Acceptance of this risk by the customer will not relieve the Member from liability if he is negligent and so this procedure is in complete accordance with the Code.

Fire and Burglary

17. Naturally if a customers's article is lost or damaged by fire or burglary whilst in an ABLC Member's custody, the customer will look to the Member for compensation. In law the customer is entitled to compensation only where the fire or burglary in question was caused by the launderer's/cleaner's negligence. To eliminate this potential source of dissatisfaction and hardship, and in the interest of good customer relations, ABLC Members undertake to pay fair compensation for loss or damage caused by fire or burglary – in cases where the article in question is not covered by the customer's own insurance policy – even though no negligence can be attributed to the Member.

STATEMENT FOUR

Train our staff to be competent, courteous and helpful at all times.

STATEMENT FIVE

Keep our shops, vans, containers and premises clean and tidy.

18. These two undertakings reflect ABLC Members' determination to ensure that the image of the Industry is maintained at a high level.

STATEMENT SIX

Maintain the highest possible standard of quality and service consistent with the price charged.

STATEMENT SEVEN

Display in shop premises a list of prices for standard articles.

19. ABLC Members will do all they can to ensure that customers are always made aware of the nature, extent and price of the service they are buying. Those Members who offer special services, whether relating to the time within which they are performed e.g. Express Service, Two Hour Service, Same Day Service, or to the nature of the process e.g. hand finish, re-pleating etc., will explain these terms and clearly state the circumstances in which such special services are available. Members undertake to ensure that all advertising in shop premises or elsewhere is clear and accurate, particularly relating to any special offers or discounts.

20. So far as price lists are concerned, the very wide range of different articles offered to ABLC Members for processing makes it impossible to prepare a printed price list covering every type of article that might be submitted by their customers. ABLC Members therefore display a list of prices covering principal standard articles and services. Prices for other standard articles or services will be quoted on request. Where articles are of exceptional value or of an unusual nature Members reserve the right to charge a special price (see Para 15).

21. In the case of collection and delivery services, prices for individual articles or services may be obtained from the van roundsman although in some cases requests for prices for unusual or exceptionally valuable articles may have to be referred to the main office.

22. It is accepted that it is in the interests of both customers and ABLC members that any doubts and uncertainties relating to price and service are eliminated before the service is performed. As a means of achieving this, ABLC Members undertake to enter, on receipts or tickets they issue from their retail premises, the price for cleaning the article or providing the service in question. In

certain cases however this will not be possible because of the very nature of the article or service:

- where an article of exceptional value or of an unusual nature is involved and the exact price will not be known until the article is examined at the main office; in these cases arrangements can be made between the Member and the customer for the price to be advised at a later date but before the work is carried out.
- where prices are expressed as a charge per unit of measurement e.g. repairs, where the price is often expressed per inch (or centimetre), or carpet cleaning where the unit may be square feet (or square metres); in such cases the customer will be told the charge per unit.
- in the case of a laundry bundle (for which an itemised receipt cannot be given).

STATEMENT EIGHT

Have all orders ready or delivered at the time stated, unless prevented by exceptional circumstances.

23. ABLC Members undertake that where they give customers an estimated date by which their orders will be ready or delivered they will adhere to that date, in so far as they are able to do so. Naturally ABLC Members cannot avoid delays which arise from exceptional circumstances, such as staff sickness, industrial action, power restrictions, breakdowns etc.

24. No one anticipates that in ordinary circumstances any monetary loss will be suffered by a customer purely as a result of delay in returning an article, and indeed in the great majority of cases no loss is suffered. Accordingly, it is the effect of the law that, unless special circumstances where delay would cause loss are brought to the attention of the launderer/cleaner when the

articles are delivered to him and the position is accepted by him, damages are not normally recoverable in respect of delay in returning the articles. Nonetheless, ABLC Members are well aware that delay can cause inconvenience to customers and, therefore, in cases where an article has been mislaid by the Member after acceptance and not returned to the customer within a reasonable time ABLC Members are recommended to consider favourably, in the interests of good customer relations, making a reduction in the standard process charge for the article concerned.

Trade Descriptions Act

25. A trader who makes a false statement as to the nature of the service he is offering, including the time within which the service will be performed, may be guilty of an offence under the above Act if he knows, when making it, that the statement is false or if he is reckless as to whether it be true or false. It therefore follows that if at the time his statement is made the trader genuinely expects to be able to keep to it no offence is committed.

26. Should exceptional circumstances arise which oblige ABLC Members temporarily to suspend the operation of special services such as Same Day Service or Two Hour Service, the notices relating to those special services will be withdrawn or qualified for so long as the exceptional circumstances persist.

Hours of Business

27. To avoid possible misunderstandings leading to inconvenience for customers, ABLC Members display a notice in their retail premises clearly stating their normal opening and closing hours. Advance notice of arrangements over public holiday periods will also be displayed during the days immediately preceding such periods.

Uncollected Goods

28. In law the launderer/cleaner is a bailee of articles accepted by him and he can only acquire the right to dispose of them, a) if that is specially agreed by the launderer/cleaner and the customer at

the time the contract is entered into or b) under the provisions of the Torts (Interference with Goods) Act 1977 insofar as England and Wales are concerned. ABLC Members are therefore entitled within the terms of the Code prominently to display a notice to the effect, or otherwise clearly make known to the customer, that any article not collected within six months, or such other longer periods as may be stated, may be disposed of by the Member and the proceeds applied to defray the process charge. Alternatively Members may rely on the terms of the Torts (Interference with Goods) Act 1977 insofar as England and Wales are concerned.

29. These rights will in any event be exercised only after all reasonable attempts have been made to contact the customer with a view to his collecting the articles and paying the process charge.

ABLC CUSTOMER ADVISORY SERVICE

30. The vast majority of laundering, drycleaning, dyeing, etc. is performed expeditiously and satisfactorily and the few complaints which do arise are usually settled by the Member concerned to the satisfaction of the customer.

31. However the ABLC Customer Advisory Service, which is an integral part of the ABLC's organisation, is available to provide conciliation to help resolve those relatively few disputes between Members and customers which for one reason or another cannot be resolved by the parties concerned. The Service will consider complaints referred to it by customers direct, by consumer bodies (such as Citizens' Advice Bureaux, Consumer Advice Centres, Trading Standards Departments of local authorities etc.) on behalf of customers, or by ABLC Members themselves.

Conciliation

32. The first step taken by the ABLC in each case is to make sure that the dispute has first been referred by the customer to the Member concerned. (see paras 8-13)

33. Once this has been established, the customer is invited, if he has not already done so, to provide the ABLC in writing with details of the complaint or dispute. There is no standard application form or other unnecessary documentation to worry about.

34. The ABLC will then look at each case individually and will use its good offices to try to bring the dispute to a conclusion which is satisfactory to both parties.

35. If the ABLC Customer Advisory Service feels that any particular dispute involves technical considerations of possible significance not merely to the dispute in question but also to the interests of the

laundry and drycleaning Industry as a whole it may, at its sole discretion, offer to have the article tested at the Association's expense. In such a case the customer will be offered test facilities at a choice of independent establishments e.g. The Fabric Care Research Association, British Leather Manufacturers' Research Association, WIRA, Manchester Testing House, London Textile Testing House etc. The customer will be expected and the ABLC Member obliged to abide by the findings of the test. A copy of the test report will be made available to the customer.

36. Should such a laboratory test however not be considered necessary by the ABLC for reasons made clear to the customer, and should the customer wish to have a laboratory test at his own expense, the Association will make the necessary arrangements on his behalf subject to prior payment of the test fee by the customer to the Association. The amount of the test fee will be returned to the customer if the findings of the test substantiate his claim.

A customer can of course at any stage seek redress from the County or Sheriff Court. A simple procedure for dealing with small claims is available in the County Court in England and Wales.

MONITORING OF THE CODE

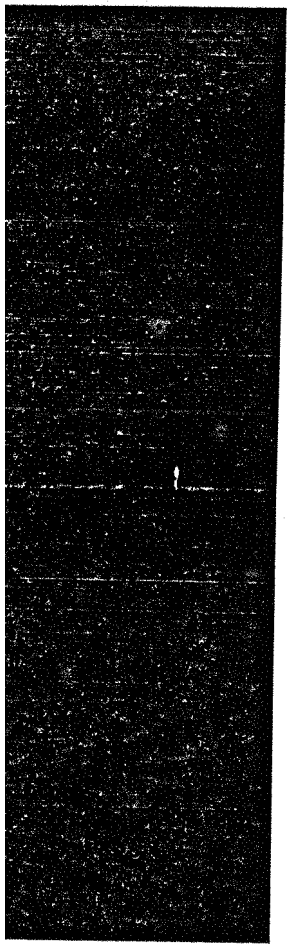
37. The Association will monitor compliance of its Members with the Code of Practice and discuss with a Member any continued breach of any provision. Every year the Association will publish in its annual report a summary of the operation of the Code and any action taken in connection therewith.

APPENDIX B

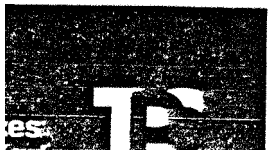
UNCONSCIONABLE CONDUCT; A GUIDE TO SECTION 52A OF THE TRADE PRACTICES ACT

Unconscionable conduct

a guide to section 52A of the Trade Practices Act



March 1987



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Ms Deborah Healy, Consultant Editor, *CCH*
Mr Michael Noblet, Commissioner for Consumer Affairs (South Australia)
Mr Greg Tanzer, Office of Consumer Affairs

Foreword

The principal aim of this guide is to indicate the Commission's present views on the operation of the recent addition to the *Trade Practices Act 1974*, s. 52A, that deals with unconscionable conduct. Ultimately, interpretation of the law is the prerogative of the courts.

What is unconscionable conduct?

Section 52A gives the Federal Court power to deal with any significant disparity in bargaining power between suppliers and purchasers. While the word 'unconscionable' is not defined in the Act, s. 52A(2) prescribes certain criteria which determine whether conduct is unconscionable. Such conduct is evident where one party has power (usually economic) and takes advantage of this power in a transaction.

The guide has been set out as follows:

Part 1

Discussion of the law. This part is designed to help the reader formulate tests to determine whether conduct falls within the description of conduct prohibited under s. 52A. It is not intended to be a substantive paper on the case law on unconscionability. Such material is available from other sources.

Part 2

Market practices. This part outlines some market situations where unconscionable conduct may occur and highlights some business practices that may, in certain circumstances, amount to unconscionable conduct in contravention of s. 52A. The primary aim of this section is to give guidance to industry on how to avoid contravening s. 52A.

Part 3

Remedies for unconscionable conduct. This part outlines the remedies available to people who suffer loss as a result of a contravention of s. 52A.

Contents

1

Discussion of the law

The following questions will help to determine whether conduct falls within the scope of s. 52A.

he unfair trading provi- s of the Trade Practices apply?

The unfair trading provisions cover the business and commercial activities of

- any corporation;
- any other person or a partnership whose activities
  - — cross State boundaries; or
  - — take place within a Territory; or
  - — are conducted by telephone or post, or on radio or television.

The provisions also apply to the conduct of the Commonwealth Government wherever it carries on a business.

there been supply?

Section 52A deals with conduct 'in connection with the supply or possible supply of goods or services to a person'. The reference to 'possible supply' reinforces the fact that s. 52A is concerned with unconscionable conduct generally. 'Possible supply' may cover promotional activities and precontractual negotiations.

he conduct involve umer goods or services?

Section 52A covers the conduct of individuals who buy *goods* or *services* that are normally purchased for personal use or for use around the home.

The section does not extend to *goods* that a business uses in trade: stock for sale; raw materials, as part of the manufacturing process; or products used up in producing something else, such as fertiliser for a market garden. But it may cover a business purchase 'ordinarily acquired for personal, domestic or household use or consumption' which is not trading stock — for example a microwave oven for a staff canteen.

Services are defined in broad terms in s. 4 of the Act. Services acquired for personal use or for use around the home include, for example, car repairs, repairs to domestic appliances, home building and extensions, provision of personal finance, and purchase of land for building a home. Conduct connected with the delivery of services that are 'ordinarily acquired for personal, domestic or household use' may be covered by s. 52A even if the services are being used by a business, for example repairs to a personal computer.

Contracts of insurance that fall within the *Insurance Contracts Act 1984* are excluded, but other contracts of insurance such as health insurance, compulsory third party insurance, and certain marine insurance are covered by s. 52A.

firm 'engage in t'?

The term 'engage in conduct' is defined in s. 4(2) of the Trade Practices Act and includes refusing to do an act (other than inadvertently) as well as doing an act.

alleged unconscion- nduct occur after 1986?

Section 52A applies only to conduct occurring after 1 June 1986, although the court may have regard to conduct engaged in or to circumstances existing **before** that date when it looks at conduct engaged in **after** 1 June 1986 (s. 52A(4)).

ıe circumstances of the t reasonably foresee-

Section 52A(4) provides that the court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the conduct.

e conduct unconscion-

On the basis of general law principles that courts have previously adopted to determine the type of unconscionable conduct, some questions that might be asked are:

Did the conduct of the supplier cause a disadvantage or was the consumer suffering a pre-existing disadvantage?

Was the disadvantage serious enough to affect the person's ability to look after his or her own interests?

Did the other party exploit this disadvantage when he or she knew or should have known about this disadvantage?

Questions raised by the criteria set out in s. 52A(2) include the following:

Does the size or strength of the company put it in a substantially stronger bargaining position than the consumer?

As inequality of bargaining power is a contributory factor in determining unconscionable conduct, the relative strengths of the parties should have some bearing on the conduct under consideration.

Is the consumer, as a result of the company's conduct, required to comply with conditions that do not protect legitimate commercial interests or protect legitimate commercial interests in an unreasonable way?

Because the term 'engage in conduct' includes refusing to do or refraining from doing an act, a court may infer that conduct is unconscionable if, in the negotiation stages, onerous or one-sided terms that are of some real importance to the average consumer are not brought to the person's attention in a manner which that particular consumer could be expected to understand.

In some circumstances the effect of a provision of the transaction may not be reasonably commensurate with the loss incurred by the supplier, for example repossession of goods on hire purchase when all but a few repayments have been made. It is possible that recourse to such a provision could be found to be unreasonable or beyond what is reasonably necessary to protect the firm's legitimate interests.

Other examples of conditions that may not be reasonably necessary to protect the supplier's legitimate interests are given on pages 11 and 12.

Did the consumer understand the documents?

The consumer may not understand the documents, perhaps because of its complexity or fine print, or because he or she is illiterate. It may be unconscionable conduct not to remedy an obvious lack of understanding by perhaps explaining the document or suggesting that the consumer seek advice elsewhere. If the consumer has little knowledge of English, particular care needs to be taken even if the documents are in 'plain' English.

Was undue influence, pressure, or unfair tactic used against the consumer or his/her representative?

Undue influence can arise when one person relies on the guidance or advice of another person who is aware of that reliance, and who may well benefit from the transaction or have an interest in it being concluded.

Pressure takes the form of coercive, direct forms of influence, such as physical or economic threats and includes compulsion or absence of real choice.

Unfair tactics are likely to affect the capability of one party to appreciate both the bargain which he or she has made and the comparative bargaining positions of the parties. A person's capability to appreciate the bargain would be determined by such things as precontractual representations and negotiations, the terms of the written agreement, and the operation of the transaction in practice.

For example, it would be unfair tactics to secure the sale of a property at a greatly undervalued price if the seller had agreed to sell at that price while temporarily incapacitated by alcohol or drugs. Similarly, it would be unfair tactics for one party to knowingly take advantage of the fact that the other party was labouring under some serious misapprehension about the value of a property.

Was any of the abovementioned conduct engaged in by a company or a person acting on behalf of the company?

By virtue of s. 84(2) a company does not have to give its agents or servants actual authority for the conduct to be attributable to it. Employees acting within the general scope of their employment have apparent authority to act on behalf of the company.

Was the amount paid for the goods or services higher or were the circumstances under which they could be acquired more onerous than generally applied elsewhere?

A firm may use its superior bargaining power to exact from a disadvantaged consumer a price that is unreasonable, given the nature of the goods or services being acquired and the day-to-day change in price and conditions that would be reasonable to expect for those goods or services in the market. The court may conclude that unconscionable conduct has occurred if the conduct

- supports the inference that a position of disadvantage existed; and
- tends to show that unfair use was made of the occasion.

A similar inference could be drawn in cases where consumers are required to meet commitments or obligations that they are obviously unlikely to be able to meet.

e company instituted ction or referred for ion any matter in tion with the supply or e supply of the goods ices?

Section 52A(3) provides that reference to arbitration or instituting legal action *will not itself* constitute unconscionable conduct. Such action will be taken into account in determining whether the conduct is unconscionable and may, when combined with other factors, be unconscionable. For example, unconscionable conduct may ocur when a stronger party institutes legal action to enforce a contract which purports to negate or limit the weaker party's rights by issuing a writ to coerce the other party into payment or performance.

ere the sales
ques, by their very
, produce a
rantage to the other

2

Market Practices

There are some situations where the risk of conduct being found to be unconscionable is high. Unconscionable conduct will not necessarily occur in these circumstances, and may occur in other circumstances. These high-risk situations are illustrated by the following four broad classes

Some sales techniques, for instance **door-to-door selling**, can lead to unconscionable conduct, where a salesman

- makes it clear that he will not leave the premises until a contract is signed;
- coerces a consumer into signing a finance contract (perhaps on unfavourable terms) without adequately explaining the terms and does not allow the consumer an opportunity to consider available alternatives;
- fails to disclose fully the total cost of goods and services
- fails to disclose fully the terms and nature of contracts;
- uses surprise, for example produces a document for immediate signature;
- makes misleading representations about the product, the effects of the contract, or the 'cooling off' period provided by State and Territory laws.

Other examples of such sales techniques are found in schemes such as low or no deposit housing finance that often attract inexperienced people and those with poor savings records who do not satisfy the normal lending criteria of banks and building societies. It might be unconscionable conduct to assure the customer that a mortgage can be refinanced later with a bank or building society when this is unlikely.

High pressure sales techniques are sales techniques designed to elicit an immediate decision, for example by offering a 'special' (perhaps illusory) price. **Unfair use of an influential relative or friend of the consumer as an intermediary** in negotiations is another sales technique that produces a disadvantage to the consumer.

Examples of conduct that is misleading or deceptive include failure to disclose full details of the financial obligations or the implications of a contract. It can also be misleading or deceptive to make positive misrepresentations, for example about the nature and effect of club memberships. Such conduct may also contravene other provisions of the Trade Practices Act.

ere the supplier knew or to have known that the ner did not fully under- the transactions

Such situations may arise:

- where the supplier realises that the consumer is under a serious misapprehension about either the terms or the subject matter of the transaction
- where consumers
  - — have difficulty with the language;
  - — suffer from some mental or physical infirmity;
  - — are incapacitated by drugs or alcohol; or
  - — are inexperienced or lack business acumen.

ere there is no real unity for the weaker o bargain

Standard form contracts are often beneficial in minimising the amount of time spent in negotiating and developing those contracts which have greater certainty or effect. But they may provide little or no scope for negotiation on important matters. Use of an industry-wide 'take it or leave it' standard form of contract may lead to unconscionable conduct if, in the particular circumstances,

- the terms of the contract are onerous and their onerous nature is disguised by using fine print, unnecessarily difficult language, or deceptive layout; and
- the customer is asked to sign the form without being given an opportunity to consider or to object to such terms, or is given an explanation in summary form which omits mention of onerous provisions.

re a contract is ely one-sided

When a contract is grossly one-sided a court may infer that a position of disadvantage existed and/or that some unfair use was made.

If complex or onerous terms are not adequately explained to the consumer, the court may find that they were more than was reasonably necessary to protect the legitimate interests of the stronger party and that the conduct is therefore unconscionable. Examples of one-sided terms are:

- terms that appear to exclude the legal rights or remedies of the weaker party;
- terms that state the weaker party has agreed to, read, or understood terms, when in truth this is not so;
- conditions that are so oppressive that they are designed to make a breach of the contract by the consumer inevitable; or clauses that purport that no misrepresentations have been made by the other party; or representations that the goods have been fully inspected when they have not;
- clauses that allow termination of contracts, forfeiture or penalties in favour of the stronger party for mere technical breaches and on terms oppressive to the weaker party;
- clauses that imply a smaller than actual liability;
- clauses that require the consumer to comply with onerous or unrealistic conditions;
- clauses that attempt to contract out of what is the main purpose of the contract;

- acceleration of penalty provisions that require payment of an amount out of proportion to the loss which might be experienced by the stronger party in the event of early termination.

If any of the four broad classes of conduct mentioned above involve consumers who are disadvantaged, for example by little knowledge of English, or by inexperience or by some mental impairment, the court may more readily infer that the conduct was unconscionable.

) lessen the risk of scionable conduct

It is possible to minimise the risk of unconscionable conduct by taking action in the following important areas.

)motional material

Ensure that all promotional material is accurate, and is neither ambiguous nor misleading in what it states or does not state.

)cuments

Wherever possible, *eliminate* technical wording and use 'plain' English in documents. Print should be legible and the layout of the document should make it easy to understand. Avoid potentially misleading wording such as clauses that expressly negate all conditions and warranties 'to the maximum extent that the law allows'.

Ensure that the effect of the contract as a whole and those clauses that are particularly important because of their unusual character or implications are clearly and unambiguously explained.

ff training

Ensure that staff give to the other party promotional material that accurately explains the transaction.

Instruct staff to explain clearly the effect of the transaction and tell consumers about important terms and conditions in standard forms as well as other forms of contract. It may sometimes be necessary to suggest the party seeks independent expert advice.

Ensure that staff understand what they are trying to sell and do not gloss over any restrictive or harsh terms, for example by suggesting that they are of little importance or would never be used.

Ensure that staff are aware of the dangers of targeting disadvantaged groups or engaging in high pressure tactics such as obtaining signatures on blank documents.

Ensure that all reasonable steps are taken to verify that the party is capable of meeting the obligations he or she is going to undertake.

Many firms include guidance on the Trade Practices Act in their staff training programs. Complaint-handling and recording procedures that alert senior management to the possibility of unconscionable conduct are also highly desirable.

Any business is welcome to seek advice on the Trade Practices Act from the offices of the Commission listed at the back of this guide. Commission staff cannot give legal advice but they are available to help business people understand the operation of the Act.

After a contract is signed

Ensure that provisions of a contract are not used vexatiously, for example to force a party into breaching or terminating the contract.

Ensure that a contract is not enforced in a way that does not accord with the representations originally made to the consumer.

3

Remedies for unconscionable conduct

Breach of the prohibition against unconscionable conduct does not attract criminal sanctions or give rise to a right to damage as such.

However, both the Commission and individuals can at present apply to the Federal Court of Australia for other remedies for contraventions of s .52A. *The Jurisdiction of Courts (Miscellaneous Amendments) Act 1986*, which was introduced into the House of Representatives on 22 October 1986, will also give State Supreme Courts and lower courts jurisdiction to hear claims by individuals based on a breach of s. 52A.

The jurisdiction of lower courts is limited by State law to the amount of claim that may be made in the lower court, the remedies that the court may give, or the subject matter of the claim. Some lower State courts may not, for example, hear claims involving title to land. The new legislation will also provide for the transfer of s. 52A cases from the Federal Court to lower State courts if the lower courts are able to give the remedies sought.

Related legislation, the *Jurisdiction of Courts (Cross-vesting) Act 1986*, will establish a system to 'cross-vest' State Supreme Court jurisdiction in the Federal Court. It will also permit either court to determine completely a matter instead of having State and Federal Court proceedings on essentially the same matter possibly running in parallel, or requiring one court to restrain a party from proceeding in the other court.

les available to uals

Section 52A of the Trade Practices Act does not affect an individual's right to seek redress, for example damages and orders, at general law. Unlike s. 52A, the general law is *not* limited in application to conduct involving the supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, or to conduct involving a business.

The New South Wales *Contracts Review Act 1980* also provides for remedies where a **contract** or **provisions of a contract** were 'unjust' in the circumstances relating to the contract at the time it was made. 'Unjust' in that Act includes 'unconscionable, harsh or oppressive'. Like s. 52A of the Trade Practices Act, the Contracts Review Act is limited to consumer-type transactions.

Some States have indicated their intention to introduce legislation that mirrors s. 52A so that conduct not within the constitutional reach of the Trade Practices Act will be caught by the legislation of those States. Under the proposed State laws, State consumer affairs agencies will be able to institute

proceedings and individuals will be able to bring their own action in State lower courts.

People who choose to take private action under the Trade Practices Act may seek redress in the form of an injunction (s. 80) and/or certain other orders (s. 87). These other orders, which a person must seek within two years of the contravention (s .87(1CA)), may take any form that appears to the court to be appropriate and include:

- compensating a party for loss or damage;
- declaring a contract void in whole or in part;
- varying a contract or arrangement;
- requiring a refund of money or return of property; or
- requiring that specified services be performed.

Although monetary compensation may be available at the court's discretion under s. 87(2) (c) and (d), damages as such are not available as a remedy for a breach of s. 52A (s. 82(3)).

Unconscionable conduct amounting to a contravention of s. 52A may be pleaded as a defence in State courts in circumstances where the conduct affects the validity of the contract the subject of litigation, and which the other party is attempting to enforce.

emedies available to the 'ade Practices Commission

The Trade Practices Commission may also take action against a corporation that has engaged in unconscionable conduct. Whether the Commission takes administrative or court action depends on the criteria it uses for case selection as well as the nature of the conduct.

Administrative action may take a number of forms. For instance, the Commission may request a company to cease certain conduct, for example by altering the terms in standard forms of contract or changing its trading practice. In more serious instances, the Commission might request or require formal undertakings from the company concerned and make these public.

Court action the Commission may take includes seeking an injunction (s. 80), but cannot include actions for a fine (s. 79(1)) or an order for corrective advertising (s. 80A(1)). Applications for 'other orders' must be made within two years of the contravention (s. 87(1CA)).

Once the Commission has commenced proceedings, it may seek orders to prevent the dissipation of property or money (s. 87A). Once a contravention of the Act has been shown, the Commission may apply for redress on behalf of one or more individuals named in the application (s. 87). The application must be made within two years of the contravention.

APPENDIX A

ST OF QUESTIONS TO DETERMINE A BREACH OF SECTION 52A

out below is a précis of the list of questions designed as a guide to determine whether conduct falls within A. Readers will need to refer to the discussion on each question to assist them in their answers. Questions (5)) cover discretionary criteria listed in s.52A(2) to which the court may have regard in determining whether duct is unconscionable. As such, it may be possible for the court to make a finding on one or more (or other) ria in these questions.

Questions (1) - (4) need to be answered in the affirmative if conduct is to come within the ambit of s. 52A.

1. Is the conduct to which the unfair trading provisions of the Trade Practices Act apply engaged in by a company or an individual, or partnership (whose trading activities are subject to the Act? (p.1) Yes/No

2. Did the conduct involve goods (p.1) or services (p.1) of a kind ordinarily acquired for personal, domestic or household use or consumption? Yes/No

3. Did the alleged unconscionable conduct occur after 1 June 1986? (p. 2) Yes/No

4. Were the circumstances of the alleged unconscionable conduct reasonably foreseeable? (p.2) Yes/No

An affirmative answer to any one of questions (5) - (10) will assist in determining whether conduct is unconscionable

5. Does the size or strength of the company put it in a substantially stronger bargaining position than the consumer? (p.2) Yes/No

6. Is the consumer, as a result of the company's conduct, required to comply with conditions that do not protect legitimate commercial interests or protect legitimate commercial interests in an unreasonable way? (p.2) Yes/No

7. Was the consumer able to understand the documents used? (p.3) Yes/No

8. Was any undue influence, pressure, or unfair tactics used against the consumer or his/her representative? (p.3) Yes/No

   If so, was any of the abovemantioned conduct done by a company or person acting on behalf of the company? (p.3) Yes/No

9. Was the amount paid for the goods or services higher or were the circumstances under which they could be acquired more onerous than generally apply elsewhere? (p.3) Yes/No

10. Has the company instituted legal action or referred to arbitration any matter in connection with the supply or possible supply of the goods or services without exhausting all reasonable alternative avenues? (p.4) Yes/No

APPENDIX B

TEXT OF SECTION 52A AND EXTRACTS FROM SECTION 87 OF THE TRADE PRACTICES ACT 1974

Section 52A - unconscionable conduct

52A. (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened sub-section (1) in connection with the supply or possible supply of goods or services to a person (in this sub-section referred to as the 'consumer'), the Court may have regard to -

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with

conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporationor a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

(3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim, in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a corporation has contravened sub-section (1) in connection with the supply or possible supply of goods or services to a person -

(a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce

Extracts from section 87

(1C) An application may be made under sub-section (1A) in relation to a contravention of Part V notwithstanding that a proceeding has not been instituted under another provision of this Part in relation to that contravention.

(1CA) An application under sub-section (1A) may be commenced -

(a) in the case of conduct in contravention of section 52A - at any time within 2 years after the day on which the cause of action accrued; or

(b) in any other case - at any time within 3 years after the day on which the cause of action accrued.

(1D) For the prupose of determining whether to make an order under this section in relation to a contravention of section 52A, the Court may have regard to the conduct of the parties to the proceeding since the contravention occurred.

(1E) The Court shall not make an order under this section in relation to a contravention of section 52A in relation to a contract of insurance to which the *Insurance Contracts Act 1984* applies.

(2) The orders referred to in sub-sections (1) and (1A) are -

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to syuch a contract,to be void and, if the Court thinks fit, to have been *ab initio* or at all times on and after such a date before the date on which the order is made as is specified in the order;

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(ba) an order refusing to enforce any or all of the provisions of such a contract;

(c) an order directing the person who engaged in the conduct or a person who was involved in the contraventionconstituted by the conduct to refund money or return property to the person who suffered the loss or damage;

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage; and

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged the conduct or a person who was involved in the contravention constituted by the conduct to execute an isstrument that -

(i) varies, or has the effect of varying, the first mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument.

rade Practices Commission offices

C.T. (Central Office)	Benjamin Offices BELCONNEN	(062) 64 1166
S.W.	75 Castlereagh St SYDNEY	(02) 230 9133
OLLONGONG, N.S.W.	Unit 5 8-10 Victoria St WOLLONGONG	(042) 27 1622
CTORIA	12th floor 200 Queen St MELBOURNE	(03) 606 1444
JEENSLAND	6th Floor Watkins Pl 288 Edward St BRISBANE	(07) 221 3022
UTH AUSTRALIA	10th floor 45 Grenfell St ADELAIDE	(08) 213 4242
STERN AUSTRALIA	2nd Floor East Point Plaza 233 Adelaide Tce PERTH	(09) 325 3622
SMANIA	Marine Board Bldg Morrison St HOBART	(002) 34 5145
RTH AUSTRALIA	143-211 Walker St TOWNSVILLE	(077) 72 9044

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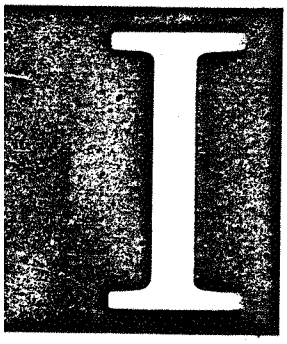
APPENDIX C

INSURANCE AND THE TRADE PRACTICES ACT; A GUIDELINE FOR THE INSURANCE INDUSTRY

Insurance and the Trade Practices Act

A guideline for the insurance industry



Insurance

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TRADE PRACTICES COMMISSION

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Life Insurance Federation of Australia
Insurance Council of Australia (ICA)

Because of the subject matter of the guideline the involvement of the ICA was necessarily greater and their contribution is especially acknowledged.

1. Introduction

Why a guideline?

1.1 The introduction of the Trade Practices Act in 1974 brought about many changes in the way industries conduct their business affairs. The Trade Practices Commission regards the dissemination of information to various industries as one of its most important roles in achieving compliance with the Trade Practices Act. Many business people are aware in general terms of the thrust of the legislation but not of their own obligations under the Act.

1.2 This guideline sets out to clarify these obligations as they apply to:

- documentation;
- advertising and promotion material;
- representations generally,

of general, life and health insurers. As a reference tool the guideline is designed to help the companies and all those engaged in the selling of various forms of insurance cover to avoid breaching the Act and risking court actions either by private litigants or by the Commission.

1.3 This guideline draws largely upon the Commission's experience as a competition and consumer protection agency. Actual complaints form the basis of examples used to show where compliance with the Act can be improved. The checklist at pages 18–22 brings together these examples and is designed to assist insurers in overcoming what the Commission sees as problem areas. If the checklist is acted upon, the Commission feels that this is likely to have the effect of reducing complaints, assisting compliance with the law and therefore reducing the potential for conflict between the Commission and insurers.

1.4 Based on this experience it seems that:

- consumers often do not understand the extent of their insurance cover or their own obligations to the insurers;
- consumers often do not fully understand their entitlements or the limitations thereto in the event of a claim.

1.5 The Commission recognises that insurance is a regulated industry. The following Commonwealth legislation aims specifically to protect the interests of policyholders:

- *Insurance Act 1973*
- *Life Insurance Act 1945*
- Insurance (Agents and Brokers) Act (scheduled to become operative during 1985)
- Insurance Contracts Act (also scheduled to become operative during 1985).

1.6 The Trade Practices Act dovetails with legislation to protect policyholders in that it contains specific provisions aimed at protecting

consumers against misleading or deceptive conduct. *The Trade Practices Act establishes a code of conduct for all industries, not just insurers.*

1.7 Ultimately whether or not conduct is misleading or deceptive is a matter for the Federal Court of Australia to decide. The Court has adopted the following test in determining whether conduct is misleading or deceptive within the meaning of section 52 of the Trade Practices Act:

> The advertiser must be assumed to know that the readers will include both the shrewd and the ingenuous, the educated and uneducated and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself or (often) herself omitted facts or to resolve ambiguities. An advertisement may be misleading even though it fails to deceive more wary readers.[1]

1.8 Consistent with this approach, in the *Big Mac* case[2] the trial judge said:

> The question of whether conduct falls within section 52(1) is to be determined by its likely effect on the type of person who is likely to be exposed to it. Broadly speaking, it is fair to say that the relevant persons are those not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is quite unusually stupid.

1.9 While the emphasis in this booklet is on identifying and eliminating areas of consumer misunderstanding arising from documents, it should be remembered that the *Trade Practices Act covers all types of conduct, including misleading statements made by counter staff and/or salespeople.*

1.10 Not only what is said by insurers but also what is left unsaid may be misleading or deceptive. Half-truths and non-disclosures of material facts may breach the law.

1.11 The critical question each insurer will need to ask is:

> *Is my promotional or business material or the conduct of those who sell my cover likely to mislead the average member of the public?*

In specific terms, it is an offence under the consumer protection provisions of the Trade Practices Act to:

- represent that insurance cover has benefits it does not have;
- make a false or misleading statement concerning the need for insurance cover;
- engage in conduct that is liable to mislead as to the nature, the characteristics or the suitability for their purpose of any insurance, cover or benefit;
- mislead a consumer about his or her rights to a claim.

Restrictive trade practices provisions

1.12 The Trade Practices Act also *prohibits conduct which restricts in an important way competition between competing insurers.*

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[1] CRW Pty Ltd *v.* Sneddon (1972) AR 17. Adopted in World Series Cricket Pty Ltd *v.* Parish (1977) 2 TPC 303.

[2] McDonalds Systems of Australia Pty Ltd *v.* McWilliams Wines Pty Ltd (1979) ATPR 40–108.

2. Promotion of insurance

Promotional material and representations

2.1 The Trade Practices Act applies to all forms of advertising and promotion, including broadcasting, newspapers, magazines, posters and the like, and sales talk. *There is therefore an obligation on insurers to ensure that precautions are taken so that advertising in all its forms is accurate.* While insurers can promote particular features of their policies, care should be taken not to give consumers a misleading impression about any aspect of the policy. Although some types of media (e.g. television and radio broadcasting) may by their nature lead the advertiser to concentrate on particular aspects, important qualifications that may directly affect choice of policy should be included.

2.2 The Commission's experience suggests that problems arising from promotional material and representations by those selling insurance can be grouped under the following main headings:

- Nature and extent of cover
- Exemptions and consumers' obligations
- Premiums, excesses, no claim bonuses
- Misunderstandings about benefits of endowment/whole of life and term policies
- Comparative advertising
- Actions by agents and brokers

Nature and extent of cover

2.3 Clear documentation of policy coverage aids compliance with the Trade Practices Act, assists insurance company staff, and results in more helpful and effective communication when consumer inquiries are made either at the time of purchase or when claims arise.

2.4 Consumers have, for example, a right to know if their *home and/or contents policy* covers them for fire, storm damage and all theft. Some consumers may think that storm cover will cover them for flood or that cover for burglary includes all theft. While provision has been made in the Insurance Contracts Act for the enactment of Regulations setting out the basic standard cover requirements which may overcome some of these problems, insurers will still be free to offer policies which contain more or less than the basic cover, provided that in the latter case the consumer's attention is drawn to the limitation of the cover or it could reasonably be expected that the consumer would be aware of these limitations. Where insurers choose to depart from the standard cover it may not be practicable to include all particulars in all advertising and promotional material; but this

information should be clearly documented and readily available, consistent with the Insurance Contracts Act requirements as to availability of policy documents.

2.5 In general terms the nature and extent of cover should be readily ascertainable from the policy document and promotional material. Pamphlets, brochures and the like are really important to consumers: they give essential information more concisely than formal policy documents. They help consumers make comparisons (assist the competitive process) and make up their minds as to which policy suits their needs (e.g. whether to choose a replacement or indemnity policy — see para 5.3). Accurate documentation that is readily understandable is much less likely to mislead or be deceptive in trade practices terms. There is little comfort in being insured if the consumer needs legal advice to understand the fundamental terms of cover.

Exemptions and consumers' obligations

2.6 Consumers should also be made aware of important qualifications or exemptions on cover. Insurers have an obligation in this regard. While the Commission acknowledges the use of exemptions by insurers as part of the competitive process, it is important that they be expressed unambiguously and given some prominence.

2.7 The Commission's complaint experience suggests two areas where consumers appear not always to be aware of important exemption provisions or of their own obligations — namely, qualifications in *contents policies* about the continuous occupation of premises and the loss of cover under *motor vehicle policies* for driving while over the prescribed alcohol limit.

Premiums, excesses, no claim bonuses

2.8 Premiums, excesses and no claim bonuses, as well as the cover offered, play an important part in a consumer's selection of a policy. In some cases, for example, the conditions on which no claim bonuses are retained after an accident for which the policyholder is not responsible are not made clear. This can be quite misleading in trade practices terms. In one such instance, advertising by the insurer concerned did not make it clear that a no claim bonus could be lost in such circumstances if the policyholder did not provide the name and/or licence number of the other driver involved in an accident.

2.9 Similarly, in the past the Commission's attention has been drawn to some instances where the premiums quoted by an agent for an insurer were quite unlikely to be the actual premiums finally applicable. And to compound what seems to have been quite misleading conduct in the first instance, it seems that rather than acknowledge to the policyholders that the lower premiums would not apply, in some cases at least this 'problem' was avoided by shortening the period of the cover. Such conduct, by agents or by

insurers themselves, would obviously be quite contrary to the spirit and letter of the Trade Practices Act.

2.10 In the same vein, imposition of excesses without proper notice and explanation of the reason for such action also runs the risk of being misleading in trade practices terms.

Misunderstandings about benefits of endowment/whole of life and term policies

2.11 Various misunderstandings of benefits attaching to life and term policies have come to the Commission's attention. It seems that in relation to this kind of insurance care needs to be taken not to mislead consumers in respect of such matters as:

- the characteristics of particular types of policies, e.g. whether it is endowment or life cover;
- predicted investment returns;
- ability to use the policy as a security for a loan;
- taxation benefits;
- surrender value; and
- cooling-off periods.

2.12 For example, policyholders in some cases thought they were buying term or endowment policies for their children, only to find that they have been sold a whole of life policy. A consumer, unfamiliar with such transactions, may well feel that he or she has been misled in such circumstances if the documentation and representations made leave any room for doubt.

2.13 In a particular instance relating to taxation benefits[3] the insurer represented to prospective purchasers of policies that the benefits from the policies would be free of death duties. In 1975 the Commissioner of Taxation informed the company that he disagreed with its view, but the company continued to issue policies with the representation until early 1976. The court found that the insurer had breached section 53(c) of the Trade Practices Act, as it had been prepared to sell its services when it entertained a doubt as to whether the material representation was true.

Comparative advertising

2.14 *Comparative advertising can provide consumers with very useful information provided always that comparisons are accurate.* Comparisons must not, even by non-disclosure of relevant information, create a false impression. In the Federal Court decision of *State Government Insurance Commission* v. *J.M. Insurance Pty Ltd*[4] the Court gave some guidance on comparative advertising. In that case an insurer's agent published tables making detailed comparisons of the cost of insuring with the insurer and two

[3] De Jong *v.* Prudential Assurance Co. Limited (1977) ATPR 40–119.
[4] (1984) ATPR 40–465.

of its competitors. The competitors argued that the premium comparisons were with respect to policies which carried different benefits. The Court made an order restraining further comparative advertising unless the comparison was accurate. In so doing the Court said that there was a heavy burden on the insurer's agent to ensure that comparisons were accurate because inaccurate comparisons were inherently likely to mislead the public.

Actions by agents and brokers

2.15 Because of their lack of expertise with insurance and in any event because they are dealing with a person who presents himself or herself as an expert and one whose representations can be accepted, consumers are generally influenced by what is said by those selling insurance. *An insurer is liable for any false or misleading statements, deliberate or otherwise, made on its behalf by its employee or agent.* Under the Insurance (Agents and Brokers) Act insurers will also be responsible for the conduct of their agents[5] or employees which is relied on reasonably and in good faith by consumers, *even if an agent acts outside the scope of his or her authority or employment. Agents or employees themselves may at the same time be in breach of the Trade Practices Act if they engage in misleading or deceptive conduct.* Agents would also include those persons selling insurance as a sideline to their main business, for example, travel agents, banks and airlines selling travel insurance, and a car or whitegoods salesperson selling consumer credit insurance.

2.16 The Commission is aware of instances where *consumer credit insurance and motor vehicle insurance* proposals were neither completed personally by, nor discussed with, the consumer before signing. Instead, proposals were filled out by the agent, for example a representative of a lending institution or retailer whose knowledge of the policies being sold is frequently limited and who is primarily interested in the sale of the goods and related credit arrangements. In such cases consumers were not made fully aware of important details, particularly their disclosure obligations.

2.17 Insurers should also note that section 73 of the Insurance Contracts Act requires that a supplier of goods (e.g. cars, whitegoods) or services (e.g. travel) who proposes to arrange a contract of insurance in connection with the supply of those goods and services *must, before the contract of insurance is entered into, clearly inform the consumer in writing:*

- *of the premiums payable under the contract;*
- *of the amount or rate of any remuneration or the nature of any benefit the supplier receives for arranging the insurance; and*
- *that the consumer may arrange the insurance with an insurer of his or her own choice.*

2.18 *Brokers who make false or misleading representations to consumers about cover or premiums are in breach of the Trade Practices Act.* However, in circumstances where they are using an insurer's material they may have a defence if the breach was due to reasonable reliance on that information.

[5] Gates *v.* The City Mutual Life Assurance Society Ltd (1982) 2 TPR 125.

What is reasonable depends on the circumstances in each case but it is probably not reasonable for a broker to represent something to a client on the basis of material from an insurer if the broker would be expected to know it was misleading.

3. The policy

Why the need for plain language policies?

3.1 Technically worded policies can be misleading to many policyholders unless they are clearly and unambiguously explained at the time the policy is being taken out. Even when the policy and explanatory brochures are made available consumer misunderstanding can still arise from over-reliance on legalistic wording or words with specialised meanings.

3.2 Fine-print qualifications of the more important aspects of the cover should not be used if they have a potential to mislead.

3.3 Commission experience with *motor vehicle policies* is that consumers are often not sure what they are entitled to when they make a claim. One area of confusion is whether an 'agreed' or 'market' value applies in the event of total loss. Also, the extent to which a damaged vehicle that was not in 'top' condition when damaged will be 'repaired' under the insurance policy is frequently not understood. Another area of contention between insurers and consumers has been right of choice of the repairer. Clear documentation must be a prerequisite if consumers are not to be misled as to what they are entitled to under the policy.

3.4 Similarly under *home insurance policies* consumers are sometimes surprised that they do not have unrestricted say as to:

- replacement materials;
- choice of builder;
- choice of supplier for replacement goods.

3.5 Cover under some *sickness and accident policies* can also be the subject of debate. The case of Mr Gates[6] is an example. On the faith of statements made to him by an insurance agent, Gates had an existing superannuation policy extended to include total disability cover. This cover entitled Gates to payment if the insurer accepted him as incapacitated to such an extent as to render him unlikely to ever to be able to attend *any* gainful profession, occupation or employment. However, the Court found that statements had been made to him to the effect that under the total disability cover, the full amount insured would be payable to him if he suffered an injury or illness which left him physically incapable of carrying on his occupation as a self-employed builder. Gates suffered injuries which left him physically incapable of carrying on his occupation as a self-employed builder but did not render him incapacitated to such an extent as to render him unlikely to be able to do any work. The Court found that the agent's representations were misleading and amounted to a breach of the Trade Practices Act.

[6] Gates *v.* The City Mutual Life Assurance Society Ltd (1982) 2 TPR 125.

When should a copy of the policy be made available?

3.6 Minimum requirements as to the supply of the policy document are contained in section 74 of the Insurance Contracts Act. A feature of insurance is that it is an area where copies of the full terms binding the parties to the contract are generally not readily available during negotiations. This can increase the likelihood of misunderstanding. The Commission supports the practice adopted by a growing number of insurers of making copies of policies readily available to those seeking insurance.

3.7 Insurers should note that section 14 of the Insurance Contracts Act provides that a party to a contract of insurance will not be able to rely on a provision of the policy if to do so would be to fail to act with the utmost good faith. In deciding whether an insurer has acted in good faith, whether the provision in question has been brought to the consumer's attention is relevant.

What matters should be taken into account with cover notes?

3.8 Many consumers take out *cover notes* without realising that either there may be limits to the cover or the cover may not match their expectations. Additionally they may be unaware of any qualifications on the cover or on their obligations in relation to the cover note itself. If a clearly stated policy or a comprehensive statement about the policy itself is made available at the time of the negotiations, consumers should then be in a position to ascertain the extent of the cover offered during the cover period and in particular whether the cover during this period is the same as that offered under the policy. *Prudent practice would be for insurers to make available to consumers (orally or in writing), prior to issuing the cover note, except where, for example, time does not permit, adequate information on:*

- *any qualifications on the cover note;*
- *any obligations in relation to the cover note;*
- *any variations between risk covered in the cover note and the policy itself.*

4. Consumers' obligations

Non-disclosure problems

4.1 Consumers may not fully appreciate the extent of their obligations when entering into a contract of insurance. In the past this has been the source of considerable argument between insurer and policyholder when claims have been denied on the grounds of alleged non-fulfilment by the policyholder of obligations. In such a situation the policyholder may well consider that the insurer's stand constitutes misleading or deceptive conduct.

4.2 The Insurance Contracts Act seeks to deal with this problem. For example, section 13 requires that each party to an insurance contract must act towards the other party with the utmost good faith, and section 21 sets out the insured's duty of disclosure. Section 22 requires the insurer to clearly inform the insured in writing of these obligations (this requirement is to be incorporated by Regulation into a prescribed form).

4.3 The Insurance Contracts Act further provides that a statement will not be treated as a misrepresentation unless the consumer knew that the statement would have been relevant to the risk (section 26). It will also not necessarily follow that a consumer will have made a misrepresentation 'by reason only that he failed to answer a question included in a proposal form or gave an obviously incomplete or irrelevant answer to such a question' (section 27).

4.4 In the Commission's experience problems arising from non-disclosure by consumers occur with some regularity in respect of:

- exclusions relating to pre-existing medical conditions in relation to personal *sickness and accident policies and travel insurance*;
- non-disclosure of matters such as prior traffic offences, accident history etc. in relation to *motor vehicle policies*;
- conditions in some *contents policies* requiring itemisation and professional valuation of some items as a condition of cover.

4.5 Unless insurers clearly indicate their disclosure requirements in their documentation and advice there will continue to be problems in this area, *including the potential for claims of misleading or deceptive conduct in trade practices terms.*

5. Renewal time

Underinsurance and overinsurance

5.1 Many general insurers remind their policyholders at renewal time of the hazards of underinsurance, particularly in relation to *home and contents insurance*. This is of course commendable to the extent that it results in more realistic levels of cover. But the effects of factors such as inflation, which increases values, should not be highlighted without at the same time taking into account particular factors that can result in the depreciation of values (e.g. wear and tear). To give a false impression of insurance needs by ignoring the latter could mislead consumers into taking cover in excess of their insurable interest.

Averaging

5.2 Averaging (i.e. proportionate payout on the basis of cover to total value) is worth separate consideration because its use by insurers *has the potential to mislead on a grand scale* as to the amount that will be paid in the event of a claim. Often, for example, consumers who are underinsured do not realise the serious consequences that flow from averaging. This problem was discussed by the Australian Law Reform Commission in its 1982 report *Insurance Contracts*. The result is that section 44 of the Insurance Contracts Act provides that insurers will not be able to rely on an average clause unless they have clearly informed consumers in writing of its nature and effect before the contract is entered into.

Indemnity and replacement

5.3 'Indemnity' (compensation for actual loss only) and 'replacement' ('new for old') are terms that are commonly used in insurance but which are not well understood by many consumers. Insurers can take steps to avoid confusion and possible misleading of consumers by providing clear, written explanations when terms such as these are used and by including in appropriate cases examples of the way payouts are calculated. This would also help consumers avoid underinsuring or overinsuring their assets.

Positive steps to help

5.4 At renewal time some insurers provide additional material or point to readily available material to assist consumers to add to their cover to take

into account increases in the value of their house and other items that are often covered in policies, for example architects' fees, debris removal and the cost of rent during rebuilding.

5.5 Some insurers also provide a checklist of items to help consumers estimate the value of *contents and personal effects* covered by the policy, as well as an increased assessment figure in the renewal notice to take account of the effect of inflation. Provided such a revised figure is an approximation of realistic values, is only recommended and is not likely to be understood to be the result of any independent valuation by the insurer, it should also serve to assist consumers. The Commission welcomes industry initiatives along these lines.

6. Health insurance

6.1 The majority of consumer complaints received by the Commission in the area of health insurance concern claims that have been disallowed on the grounds of non-disclosure or inadequate disclosure of material facts. Why this occurs is not clear, but on this complaint experience it seems that for some consumers their actual health insurance cover is less than they think it is. That this is misleading in trade practices terms does not necessary follow, but overall there would seem to be scope for improving the general level of understanding of health insurance cover.

6.2 It is important that consumers receive clear and complete information about what they must disclose. It is not satisfactory to have consumers under the impression that they are covered in the event of certain eventualities if in fact they are not.

6.3 The following is a classification of complaints received by the Commission and is indicative of some of the problems that have been encountered in relation to health insurance cover:

- Advertising by some commercial insurers suggesting that their cover offers refunds for certain hospital costs in addition to benefits receivable from registered health funds when in fact that may not be the case.
- Advertising that makes inaccurate or incomplete comparisons with the cover offered by competitors.
- Advertising claiming to offer cover in respect of all medical services when in fact there were limits and qualifications for some people.
- Advertising which fails to disclose basic facts such as threshold and ceiling limits before and after which benefits are not payable.
- Misleading information about waiting periods before benefits are available.
- Non-disclosure by an insurer about a reduction in the rate of refund on pharmaceutical benefits.

6.4 Insurers might review their own advertising, promotion material and instructions to sales and counter staff in the light of complaints of this nature. In doing so they would be taking a constructive approach to avoidance of misleading or deceptive conduct in trade practices terms.

7. Tied insurance

7.1 Tied insurance was the subject of literally hundreds of complaints to the Commission in the early days of its administration. Basically borrowers complained about having to insure with nominated insurers as a condition of a loan when considerably cheaper insurance rates were available from other reputable insurers.

7.2 Tied insurance is illegal under section 47(6) of the Trade Practices Act. However, the Commission has accepted some restrictions as to insurers provided consumers have real choice as to competitive alternatives.

7.3 Section 73 of the Insurance Contracts Act also provides that a supplier of goods or services who arranges insurance in connection with the supply of those goods or services must, before a contract of insurance is entered into, *clearly inform the consumer in writing* that the insurance may be arranged with an insurer of the consumer's choice.

8. Agreements on cover or premiums

8.1 The Commission notes that there is competition both by way of premium and product in the insurance market. If, however, insurers were to make *agreements which limit or prevent competition on cover or premiums,* such would be unlawful under the Trade Practices Act.

8.2 Provision has been made in the Insurance Contracts Act for the enactment of Regulations which will set out the basic standard cover requirements for motor vehicle insurance, house owners insurance, householders insurance, sickness and accident insurance, consumer credit insurance and travel insurance. Insurers are, however, free to offer policies which contain more or less than the basic cover provided that in the latter case the consumer's attention is drawn to the limitations on the cover or he or she could reasonably be expected to have been aware of them (section 35).

9. The role of the Commission

9.1 The Trade Practices Commission is an independent statutory authority which administers the Trade Practices Act by means of:

- Compliance
  — to deal with possible breaches of the Act
- Guidance of business and consumers
  — to advise business and consumers of their rights and responsibilities under the Act
- Adjudication (authorization)
  — to consider applications by business for exemption from certain restrictive trade practices provisions of the Act

Compliance

9.2 In dealing with complaints concerning possible breaches of the Act, the Commission can take:

- administrative action; or
- court action involving injunctions, other orders or penalties.

9.3 Administrative action can take a number of forms. For example, the Commission might request that a company cease certain conduct or change its trading habits in the future. In more serious instances the Commission might request or require formal undertakings from the company concerned and make these public.

Guidance of business and consumers

9.4 In addition to responding to individual inquiries about the application of the Act, the Commission makes general information available to the public in respect of its administration and of matters affecting consumers. The Commission prepares materials on particular topics for publication and distribution to business and consumer groups, e.g. information circulars, bulletins, brochures and booklets. It conducts seminars and participates in seminars arranged by others, for example industry associations. A trade practices reference library, to which there is public access, is also maintained by the Commission.

9.5 The Commission's guidance work complements its adjudication and compliance functions. Guidance work is aimed at:

- improving business's knowledge of its rights and obligations under the Act;

- encouraging the use of the Act by business in negotiating solutions to trading problems;
- drawing attention to the existence of private rights under the Act;
- providing information about the protection which the Act affords consumers.

Adjudication

9.6 Parties can make applications to the Commission for authorization of certain types of conduct which would otherwise be in breach of the restrictive trade practices provisions of the Act. If the Commission grants authorization, that conduct gains immunity from court action for contravention of the Act. Authorization is dependent on there being public benefit in the conduct and on the benefit outweighing any anti-competitive effect of such conduct.

9.7 In addition to applications for authorization, companies can lodge notice of exclusive dealing conduct other than for sections 47(6) and (7) (third line forcing). Notification gives automatic protection from court action to the conduct unless that protection is subsequently removed by the Commission.

10. Checklist for insurers

The following is a checklist which insurers may wish to consider when reviewing policies and promotional material. The list is designed to help insurers avoid the risk of breaching the Trade Practices Act. (N.B. Paragraph numbers from the text of this guideline for the insurance industry are referred to where appropriate.)

General approach to avoid breach of Trade Practices Act — all cover

Promotional material and conduct of those involved in selling insurance cover should not be likely to mislead average members of the public (paras 1.7–1.11).

Promotional material

Must be accurate (paras 2.1, 2.2).

Nature and extent of cover, particularly the major risks covered, should be clearly shown or readily ascertainable (para. 2.5).

Important exemptions and obligations should be disclosed (paras 2.6, 2.7).

Supply information on premiums (paras. 2.8, 2.9).

Explain under what conditions excesses and no claim bonuses operate (paras 2.8, 2.10).

Media advertising

Trade Practices Act applies to all advertising (paras 1.9, 2.1).

Qualifications that may be important to consumer choice to be disclosed in advertising (para. 2.1).

Comparative advertising must be accurate (para. 2.14).

Responsibility of employees, agents and brokers

Ensure employees and agents do not mislead consumers about cover (paras 2.15–2.17).

Ensure those who sign up insurance on an insurer's behalf (e.g. car and whitegoods salespeople, travel agents etc.) inform consumers clearly *in writing* of:

- premiums payable;
- the amount or rate of remuneration or the type of benefit the agent is receiving;
- that the consumer can insure with an insurer of his or her own choice (para. 2.17).

Brokers should make sure oral and written information is accurate (para. 2.18).

Policies

Minimise the use of legalistic wording and words with specialised meanings (para. 3.1).

Fine-print qualifications on important aspects of cover should not be used (para. 3.2).

The Trade Practices Commission encourages insurers to make policy documents readily available to consumers, if possible in negotiation stages (paras 3.6, 3.7).

Cover notes

Give to consumers, where possible, adequate information on:

- any qualifications on cover notes;
- any obligations in relation to cover notes; and
- any variations between risks covered in the policy and the cover note itself (para. 3.8).

Forms

Inform consumers of the risk of not filling in forms (proposals or claims) completely and correctly (paras 4.1–4.5).

Form design and content to cover all details requiring answers (para. 4.5).

Renewals

Assist by providing clear material on how to calculate adequate cover (paras 5.4, 5.5).

Give prominence to the fact that insurer's figures for higher cover are only recommended (para. 5.1).

Give reminder to policyholders about:

- their obligations and consequences of incomplete or inaccurate disclosure (paras 4.1–4.5);
- the type of cover and its consequences, e.g. 'indemnity' or 'replacement' (para. 5.3);
- effects of averaging (para. 5.2).

Aspects of specific cover

Home

Provide information or point to readily available material (at the proposal and renewal stages) on how to calculate adequate cover (para. 5.4).

Provide an explanation of 'replacement' and 'indemnity' policies (in promotional and renewal material) and the consequences of the different policies (para. 5.3).

In renewal material (and before contract is entered into) explain averaging and its effects (para. 5.2).

Provide information (e.g. in policies) on the process of selection of builders and replacement material (para. 3.4).

Contents and personal effects

Provide information or point to readily available material (at the proposal or renewal stages) to assist consumers in calculating adequate cover (para. 5.5).

Give clear guidance on the scope of the cover (paras 2.4, 2.5).

Provide information in policy on the process of repair/replacement in the event of loss or damage (paras 3.3, 3.4).

Provide clear and prominent information in promotional material and policies about important qualifications on cover (paras 2.6, 2.7).

Indicate factors that affect assessment of the risk prior to submitting of proposals and paying of premiums (para. 4.4).

Motor vehicles

Give clear guidance on the scope of the cover (paras 2.4, 2.5).

Provide clear and prominent information in promotional material and with the policy on:

- premium rates (paras 2.8, 2.9);
- when excesses apply (para. 2.10);
- under what conditions no claim bonuses operate (para. 2.8).

Make clear to consumers in proposal and claim forms (and where possible in the policy) their obligations to disclose, as well as penalties for non-disclosure of, for example:

- prior traffic offences (para. 4.4);
- accident history (para. 4.4).

Provide clear information in the policy on the basis of calculating payment in the event of a claim (para. 3.3).

Provide information in the policy about the selection of a repairer and parts in the event of damage to the vehicle (para. 3.3).

Give prominence in promotional and renewal material (and policy) to important qualifications to the cover, e.g. loss of cover for driving over the prescribed alcohol limit (para. 2.7).

Make sure car salesperson who arranges insurance *clearly* informs consumer in writing (before the contract is entered into):

- of the premiums payable under the contract;
- of the amount or rate of any remuneration or the nature of any benefit the supplier receives for arranging the insurance; and
- that the consumer may arrange the insurance with an insurer of his or her own choice (para. 2.17).

Whole of life/endowment

Provide prominent, comprehensible and accurate information in promotional material (where applicable) on:

- the characteristics of the policy;
- predicted investment returns;
- ability to use the policy as security for a loan;
- taxation benefits;
- surrender values;
- cooling-off periods (paras 2.11–2.13).

Health (paras 6.1–6.4)

Advertisements should be clear as to conditions under which payments are made.

Comparisons made in advertising should be accurate.

Claims about the extent of the cover should be accurate.

The basic elements of the health scheme should be disclosed.

Promotional material and sales talk should clearly specify waiting periods before benefits are payable.

Notice of reduction in pharmaceutical benefit refunds should be given to consumers before they are introduced.

Sickness and accident; travel

Provide prominent and clear information on:

- what events the insured is covered for (paras 2.4, 2.5, 3.5);
- how the exclusion on pre-existing illness or medical condition operates (para. 4.4).

11. Further information

The Trade Practices Act is complex legislation and it is not possible in a booklet such as this to explain many of the qualifications which apply to its provisions. While the Commission does not give legal advice as such, Commission staff will be glad to assist you if you have further queries on any aspects of the Commission's operations.

Office	Address	Telephone
N.S.W.	10th Floor, 130 Phillip Street, Sydney	(02) 230 9133
Vic.	12th Floor, 200 Queen Street, Melbourne	(03) 606 1444
Qld	6th Floor, Watkins Place 288 Edward Street Brisbane	(07) 221 3022
North Australia	Commonwealth Centre 143–211 Walker Street Townsville	(077) 72 9044
W.A.	2nd Floor, East Point Plaza 233 Adelaide Terrace Perth	(09) 325 3622
S.A.	10th Floor, 45 Grenfell Street Adelaide	(08) 213 4242
Tas.	Ground Floor Marine Board Building Morrison Street Hobart	(002) 34 5145
A.C.T.	Yellow Building Benjamin Offices Belconnen	(062) 64 1166

Commonwealth Government Bookshops

Sydney	120 Clarence Street	(02) 29 1940
Melbourne	347 Swanston Street	(03) 663 3010
Brisbane	294 Adelaide Street	(07) 229 6822
Perth	200 St Georges Terrace	(09) 322 4737
Adelaide	12 Pirie Street	(08) 212 3646
Hobart	162 Macquarie Street	(002) 23 7151
Canberra	70 Alinga Street	(062) 47 7211

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References are to paragraph numbers.

APPENDIX D

UNDERTAKING UNDER SECTION 10 OF THE ALBERTA UNFAIR TRADE PRACTICES ACT

IN THE MATTER OF
THE UNFAIR TRADE PRACTICES ACT
BEING CHAPTER U-3 OF THE
REVISED STATUTES OF ALBERTA 1980

THIS UNDERTAKING is made pursuant to Section 10 of the Unfair Trade Practices Act.

BY:

JARMAN MOTORS LTD., a body corporate registered pursuant to the laws of the Province of Alberta, having a registered office at #2200, 10303 Jasper Avenue, in the City of Edmonton, in the Province of Alberta, and operating under the trade and style of **Jarman Mazda**,

(hereinafter called the "Supplier")

TO:

The **DIRECTOR OF TRADE PRACTICES**,

(hereinafter called the "Director")

WHEREAS:

(A) The Supplier carries on the business of a retail automobile dealer in the City of Edmonton, in the Province of Alberta; and

WHEREAS:

(B) The Supplier, in the ordinary course of its business, through its employees, agents or representatives, caused numerous advertisements to be published in the Edmonton Sun and the Edmonton Journal between October 4, 1985 and November 1, 1985, in which it represented that consumers could purchase a 1986 Mazda B2000 truck and receive a "free canopy"; and

WHEREAS:

(C) The Supplier, in the ordinary course of its business, through its employees, agents or representatives entered into at least 5 different sales transactions during the aforementioned period in which the purchasers were obligated to pay an additional amount in order to obtain the canopy; and

WHEREAS:

(D) The Director asserts that he has reason to believe that the acts or practices of the Supplier described in recitals (B) and (C) constitute unfair acts or practices or are liable to constitute unfair acts or practices.

NOW THEREFORE THIS UNDERTAKING WITNESSES THAT:

1. The Supplier acknowledges and admits that it has failed to comply with the provisions of the Unfair Trade Practices Act and undertakes to the Director that the Supplier will not, at any time hereafter, engage in any acts or practices similar to the acts or practices described in recitals (B) and (C).

2. The Supplier will not make any representation or carry on such conduct that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer or potential consumer.

3. The Supplier will not make any representation that a specific item or accessory is available "free" or at no additional cost with the purchase of the vehicle when the actual purchase price of the vehicle has been increased as a result of the "free" item or accessory.

4. The Supplier will not make any representation that a specific item or accessory is available "free" or at no additional cost with the purchase of a vehicle when the purchase price of that vehicle can be negotiated downwards if the purchaser does not elect to take the "free" item or accessory.

5. The Supplier shall, to the best of its ability, ensure that all of its officers, employees, representatives, servants and agents are forthwith acquainted with the requirement to refrain from the acts or practices described in paragraphs 1-4.

6. The Supplier will pay to the Director, for deposit with the Provincial Treasurer of Alberta, a portion of the costs of this investigation in the amount of $500.00.

7. The Supplier undertakes to provide compensation to all affected consumers in the manner set out in Schedule A of this Undertaking.

8. The Supplier undertakes to the Director that at its own expense it will comply with the provisions of Schedule "B".

9. The Supplier understands that this Undertaking becomes part of the Public Record, maintained pursuant to the Unfair Trade Practices Act, such record being located at all offices of the Department of Consumer and Corporate Affairs.

10. The Supplier understands that the Director has a right to release a summary of this Undertaking to the media for publication.

11. This Undertaking will be binding upon the Supplier and its successors and assigns but:

(a) May be terminated by the Director or varied with the consent of the Supplier;

(b) May be varied by an Order of the Judge of the Court of Queen's Bench where the Judge is satisfied that the circumstances warrant varying the provisions of this Undertaking; or

(c) May be terminated by an Order of a Judge of the Court of Queen's Bench where the Judge is satisfied that the act or practice that the Supplier has undertaken to refrain from engaging in was not unfair.

12. The Supplier acknowledges that the Director may, upon breach by the Supplier of any term of the Undertaking, institute such proceedings and take such action under The Unfair Trade Practices Act as he may consider necessary.

IN WITNESS WHEREOF the Supplier has on the 27th day of January, ~~1986~~ 1987, caused its common seal to be hereunto affixed and attested by the signatures of its proper officers duly authorized in that behalf.

JARMAN MOTORS LTD.

PER: _____

PER: _____

ACCEPTED by the Director of Trade Practices this 29 day of January, 1987.

_____

DIRECTOR OF TRADE PRACTICES

SCHEDULE "A"

The Supplier, JARMAN MOTORS LTD., hereby agrees that upon receipt of a release in satisfactory form from each of the individual consumers listed hereunder, the Supplier will provide redress to each of the individual consumers listed hereunder in the amount identified. This amount represents what the consumers actually paid for their canopies. Such payment to be made within 10 days of the date this Undertaking is signed.

Henry Mayhew $300.00

[redacted]

Clint Ward..... $100.00

James Shamchuk $500.00

Compensation to each of the consumers noted above shall constitute complete and full satisfaction to the consumers by the Supplier in the consumer transactions pertaining to the "free canopy" representations described in this Undertaking.

SCHEDULE "B"

Within ten (10) days of the date this Undertaking is concluded, the Supplier will place in the Edmonton Sun a 1/4 page notice in the following form:

Not less than 3/4" type:

Apology

Not less that 1/2" type:

Jarman Motors Ltd.

10 point type:

Between October 4, 1985 and November 1, 1985, Jarman advertised that consumers could purchase a 1986 Mazada B2000 pick-up truck and receive a $545.00 canopy at no extra cost. In fact, the price of the vehicles had been increased in order to cover a portion of the cost of the canopy. We acknowledge this practice was incorrect and apologize for our error.

In accordance with the terms of an agreement under the Alberta Unfair Trade Practices Act we have undertaken to abide by the terms of the Act and provide this notice to you. We have also reimbursed those individuals who purchased trucks during this promotion by refunding an amount equal to the improper price increase.

A copy of the agreement is available to the public at the Alberta Department of Consumer and Corporate Affairs offices through the province

Jarman Motors Ltd.

BIBLIOGRAPHY

ADBURGHAM, R.

'Codes of Practice', taken from Marketing and the Consumer, 1976, OFT and Institute of Marketing.

ADVERTISING ASSOCIATION

The Systems of Control of Advertising Standards; Report of the Committee of Inquiry, 1987.

ALBERTA CONSUMER AND CORPORATE AFFAIRS DEPARTMENT

Annual Report 1984-5.

ALDERMAN, G.

The Railway Interest, 1973, Leicester U.P.

APPLEBEY, G.

(i) (with Meisel, F.) 'Hong Kong Fir Revisited: The House of Lords and Certainty in Contracts', (1982) L.M.C.L.Q. 592.

(ii) 'Justice within Reach? - A Review of Progress in Reforming Small Claims', (1987) 6 C.J.Q. 214.

ASSOCIATION OF BRITISH LAUNDRY, CLEANING AND RENTAL SERVICES

Code of Practice for Domestic Laundry and Cleaning Services, 1983.

ATIYAH, P.S.

The Rise and Fall of Freedom of Contract, 1979, Clarendon Press, Oxford

AUSTRALIAN ATTORNEY-GENERAL'S DEPT

Trade Practices Legislation and Materials, 1986.

AUSTRALIAN TRADE PRACTICES COMMISSION

(i) Annual Report 1985-86.

(ii) Unconscionable Conduct: a Guide to S.52A of the Trade Practices Act, 1987.

(iii) The Trade Practices Act and Labelling the Origin of Goods, 1985.

(iv) Insurance and the Trade Practices Act: A Guideline for the Insurance Industry, 1985.

BAGLEY, J.J.

Life in Medieval England, 1967, Batsford.

BALDWIN, R. (with Houghton, J.)

'Circular Arguments: The Status and Legitimacy of Administrative Rules'; (1986) P.L. 239.

BARROW, G.W.S.

Feudal Britain, 1971, Edward Arnold.

BARTON, J.L.

'The Enforcement of Hard Bargains' (1987) 103 L.Q.R. 118.

BATES, T. ST. JOHN

'Parliament, Policy and Delegated Power', (1986) Stat.L.R. 114.

BEATSON, J.

''Public' and 'Private' in English Administrative Law', (1987) 103 L.Q.R. 34.

BECKETT, B.W.

'The Problems of Uniform Enforcement', (1981) 1 Tr.L. 18.

BELOBABA, E.P.

(i) 'The Resolution of Common Law Contract, Doctrinal Problems through Legislative and Administrative Intervention', in Reiter and Swan, eds, Studies in Contract Law, 1980, Butterworths (Canada).

(ii) 'Unfair Trade Practices Legislation; Symbolism and Substance in Consumer Protection', (1977) 15 Osgoode Hall L.J. 327.

BENNION, F.

The Consumer Credit Act Manual, 1978, Oyez.

BERNITZ, U.

(i) (with Draper, J.), Consumer Protection in Sweden, Legislation Institutions and Practice, 1981, Stockholm U.P.

(ii) Guidelines Issued by the Consumer Board - The Swedish Experience (1984) 7 Journ. of Cons. Pol. 161.

BORRIE, G.

(i) (with Diamond A.L.) The Consumer Society and the Law, 4th ed., 1981, Pelican

(ii) The Development of Consumer Law and Policy - Bold Spirits and Timerous Souls, 1984, Hamlyn Lectures, Stevens.

(iii) 'A Duty to Trade Fairly', (1984) 7 J.Cons.Pol. 197.

(iv) 'Laws and Codes for Consumers', (1980) J.B.L. 315.

(v) 'Legal and Administrative Regulation in the United Kingdom of Competition and Consumer Policies' (1982) 5 U.N.S.W.L.J. 80.

(vi) 'Licensing Practice under the Consumer Credit Act', (1982) J.B.L. 91.

(vii) Speech to the Greater London Branch of the Institute of Trading Standards Administration, February 1987 (unpublished).

BOURGOIGNIE, T. (with Fontaine, M.)

Consumer Legislation in Belgium and Luxemburg, 1982, Van Nostrand Reinhold.

BOWEN, N.H.

'The Federal Court of Australia', (1977) Sydney L.R. 285.

BRAUN, J.

(i) 'A General Duty to Trade Fairly - The European Dimension', (1985) 4 Tr.L. 165.

(ii) 'A General Duty to Trade Fairly: The European Dimension Part Two - Enforcement', (1985) 4 Tr.L. 217.

BRIGGS, A.

A Social History of England, 1983, Weidenfeld and Nicolson.

BRITISH COLUMBIA, MINISTRY OF CONSUMER AND CORPORATE AFFAIRS

Annual Report 1985.

BURLETON, E.

'The Self-Regulation of Advertising in Europe', (1982) 1 Journ.of Advertising 333.

CAMPBELL OF ALLOWAY, LORD

'Codes of Practice as an Alternative to Legislation', (1985) Stat.L.R. 127.

CARLISLE, M.

'Practical Problems Arising from the Price Marking (Bargain Offers) Order 1979', (1979) 129 N.L.J. 815.

CIRCUS, P.J.

(i) 'Cracking on with the Code', (1986) 24 Marketing 15.

(ii) 'H.M. Government Health Depts WARNING: Consumer Protection can damage your sanity', 13th September 1978, Daily Telegraph.

(iii) 'The Headaches of Law Enforcement', (1981) 131 N.L.J. 1067.

(iv) 'Part III of the Fair Trading Act: Consumer Protection or Bureaucratic Red Tape?', (1987) 8 B.L.R. 26.

(v) 'Trading Standards in the Metropolitan Counties: Not a Suitable Case for Devolution', (1984) 134 N.L.J. 1045.

CODE OF ADVERTISING PRACTICE COMMITTEE

British Code of Advertising Practice, 7th ed., 1985.

COMMAND PAPERS

Final Report of the Committee on Consumer Protection, 1962, Cmnd. 1781.

Report of the Committee on Consumer Credit, 1971, Cmnd. 4596.

Report of the Committee to Review the Functioning of Financial Institutions, 1980, Cmnd. 7937.

Report of the Committee on Safety and Health at Work, 1972, Cmnd. 5034.

A Review of the Trade Descriptions Act 1968, 1976, Cmnd. 6628.

Report of the Committee on the Metrological Control of Equipment for use for Trade, 1986, Cmnd. 9545.

CONFEDERATION OF BRITISH INDUSTRY

(i) Comments on Proposals by the Office of Fair Trading for a General Duty to Trade Fairly, 1984 (unpublished).

(ii) The Future Development of Consumer Protection Legislation, 1981.

COOK, C. (with Stevenson, J.)

The Slump; Society and Politics during the Depression, 1977, Jonathan Cape.

COOPERS AND LYBRAND ASSOCIATES

Streamlining the Cities; an Analysis of the Cost Involved in the Government's Proposals for Re-organising local Government in the Six Metropolitan Counties, 1984.

COUSINS, D.C. (with Pickering, J.F.)

(i) 'The Benefits and Costs of Voluntary Codes of Practice', (1982) 16 Euro.J.Marketing 31.

(ii) The Economic Implications of Codes of Practice, Report to Office of Fair Trading, 1980.

(iii) 'Trade Associations and Business Self-Regulation through Voluntary Codes of Practice', (1982) 6 J.Cons.Studies and Home Economics 289.

CRANSTON, R.

(i) Consumers and the Law, 2nd ed., 1984, Weidenfeld and Nicolson.

(ii) Regulating Business: Law and Consumer Agencies, 1979, Macmillan.

CROSSLEY, R.M.

'Part III of the Fair Trading Act - A New Direction?', (1986) 94 The ITSA Monthly Rev. 139.

DEVLIN, LORD

'The Common Law, Public Policy and the Executive', (1956) 9 C.L.P. 1.

DIAMOND, A.L. (with Borrie, G.)

The Consumer, Society and the Law, 4th ed., 1981, Pelican.

DRAPER, J. (with Bernitz, U.)

Consumer Protection in Sweden, Legislation, Institutions and Practice, 1981, Stockholm U.P.

DUGAN, A.J.

'Fairness in Advertising: In Pursuit of the Hidden Persuaders', (1977) 11 M.U.L.R. 50.

EMPLOYMENT, DEPARTMENT OF

Industrial Tribunals Procedures, 1986.

ENCYCLOPAEDIA OF FORMS AND PRECEDENTS

5th ed., 1985, Butterworths.

ERXLEBEN, W.C.

'The FTC's Kaleidoscopic Unfairness Statute: Section 5', (1975) 10 Gonzaga L.R. 333.

EUROPEAN CONSUMER LAW GROUP

'Non-Legislative Means of Consumer Protection', (1983) 6 J.Cons.Pol. 325.

FELTHAM, I.R.

'The New Regulatory State; Economic and Business Regulation Tomorrow', (1973) 51 Can.B.R. 207.

FISHER, T.

'Advertising Control in Britain', Summer 1974, Advertising Quarterly.

FONTAINE, M. (with Bourgoignie, T.)

Consumer Legislation in Belgium and Luxemburg, 1982, Van Nostrand Reinhold.

FRIEVAULDS, L.

'Consumer Ombudsman, Swedish Consumer Policy', Consumer Affairs, March/April, 1986.

GELLHORN, W.

'The Abuse of Occupational Licensing', (1976) 44 Univ. of Chicago L.R. 6.

GOLDRING, J.L. (with Maher, L.W.)

Consumer Protection Law in Australia, 2nd ed., 1983, Butterworths (Australia).

GRANT, W. (with Marsh, D.)

The CBI, 1977, Hodder and Stoughton.

GROSS, C.

The Gild Merchant, (1890), Clarendon Press.

HAILSHAM, LORD

'Addressing the Statute Law', (1985) Stat.L.R. 4.

HAMILTON, W.H.

'The Ancient Maxim Caveat Emptor', (1931) 40 Y.L.J. 1133.

HANNIGAN, B.M.

'Burmah's Dilemma', (1982) J.B.L. 105.

HARLAND, D.J.

'Unfair and Comparative Advertising' - a paper given to the 5th European Workshop on Consumer Law, Louvain, September 1986 (unpublished).

HARVEY, B.

(i) The Law of Consumer Protection and Fair Trading, 2nd ed., 1982, Butterworths.

(ii) 'Should there be a General Duty to Trade Fairly?', (1984) 3 Tr.L. 45.

HOBSBAWM, E.J.

Industry and Empire, 1970, Pelican.

HOLDSWORTH, W.S.

A History of English Law, 1st ed., 1938, Methuen.

HOLT, J.C.

Magna Carta, 1965, Cambridge U.P.

HUNTINGDON, M.J.R. (with Limbury, A.L.)

'Some Observations on Recent Developments in Trade Practices', (1981) 55 A.L.J. 472.

INCOMES DATA SERVICES

IDS Brief 139, August 1978.

INTERNATIONAL CHAMBER OF COMMERCE

(i) Background Notes (ICC UK), (Undated).

(ii) Code of Standards and Advertising Practice (1937).

(iii) Consumer Legislation, 1981.

(iv) Law and Self-Regulation: A Study Comparing Government Regulation and Self-Regulation as Means of Consumer Protection, 1984.

ISON, T.G.

'Small Claims', (1972) 35 M.L.R. 18.

JONES, M.

'The Keys to Success', from Marketing and the Consumer, 1976, OFT and Institute of Marketing.

JONES, T.T. (with Pickering, J.F.)

Self-Regulation in Advertising; A Review, 1985, Advertising Association.

KINTNER, E.W. (with Smith, C.)

'The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency', (1975) 26 Mercer L.R. 651.

KONSUMENTVERKET

The National Swedish Branch for Consumer Policies, The Consumer Ombudsman, Functions, Organisation, Activities (Undated).

LABOUR PARTY

Charter for the Consumer, 1986.

LAW COMMISSION

(i) Implied Terms in Contracts for the Supply of Goods, 1979, No. 95.

(ii) The Interpretation of Statutes, 1969, No. 21.

(iii) Liability for Defective Products, 1977, No. 82.

(iv) Sale and Supply of Goods, 1987, No. 160 and Scottish No. 104.

LAW OF FOOD AND DRUGS

ed. by A.A. Painter, 1980, Butterworths.

LIMBURY, A.L.

(i) (with Huntingdon, M.J.R.), 'Some Observations on Recent Developments in Trade Practices', (1981) 55 A.L.J. 472.

(ii) 'Protecting your business reputation - Trade Practices', (1983) 57 Australian L.J. 664

LOCAL AUTHORITIES CO-ORDINATING BODY ON TRADING STANDARDS (LACOTS)

Acts of Parliament Widely Enforced by Trading Standards Authorities, 1985, LACOTS Report Annex 4.

LORD CHANCELLOR'S DEPARTMENT

Civil Justice Review; Small Claims in the County Court, 1986.

MAHER, L.W. (with Goldring, J.L.)

Consumer Protection Law in Australia, 2nd ed., 1983, Butterworths (Australia).

MARSH, D. (with Grant, W.)

The CBI, 1977, Hodder and Stoughton.

MARSH, S.E.

'Voluntary Codes of Practice', (1977) 127 N.L.J. 419.

MEISAL, F. (with Applebey, G.)

'Hong Kong Fir revisited: The House of Lords and Certainty in Contracts', (1982) 1 L.M.C.L.Q. 592.

METHVEN, M.J.

'The Role of the Office of Fair Trading', (1975) Lent C.R.L.R. 7.

MICKLITZ, H.W. (with Reich, N.)

Consumer Legislation in the EC Countries: A Comparative Analysis, 1980, Van Nostrand, Reinhold.

MIRACLE, G.E. (with Nevett, T.)

Voluntary Regulation of Advertising; A Comparative Analysis of the United Kingdom and the United States, 1987, Lexington Books (Mass.).

MITCHELL, J.

(i) ed. Marketing and the Consumer Movement, 1978, McGraw Hill.

(ii) 'Government-Approved Codes of Practice: A New Approach to Reducing Friction between Business and Consumers, (1978) 2 J.Cons. Pol. 144.

MONTGOMERY, J.D.

'Consumerism ... a Company Lawyer's View', (1975), (March/April), Consumer Affairs.

MORRIS, P.E.

'The Banking Ombudsman - 1', (1987) J.B.L. 131.

MURDOCH, J.R.

'Contracts for the Supply of Services under the 1982 Act', (1983) L.M.C.L.Q. 652.

NATIONAL ASSOCIATION OF CITIZENS ADVICE BUREAUX

(i) Annual Report 1986-87.

(ii) 'The Citizens Advice Bureau Service', 1982.

NATIONAL CONSUMER COUNCIL

(i) Advertising; Legislate or Persuade, 1977.

(ii) Banking Services and the Consumer, 1983.

(iii) Buying Problems; Consumers, Unsatisfactory goods and the Law, 1984.

(iv) Consuming Secrets - How Official Secrecy Affects Everyday Life in Britain, ed. by R. Delbridge and M. Smith, 1982, Burnett Books.

(v) Self-Regulation of Business and the Professions, (NCC Background paper), 1986.

(vi) Service Please; Services and the Law; a Consumer View, 1981.

NEILSON, W.A.W.

(i) 'Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation', (1981) 19 Osgoode Hall L.J. 154.

(ii) The Future of Canadian Consumerism: A Retrospective and Prospective View, in Zeigel ed., Papers and Comments delivered at the Tenth Annual Workshop on Commercial and Consumer Law, Toronto, 1980, 1982, Butterworths (Canada).

OFFICE OF FAIR TRADING

(i) Annual Reports, 1975, '79, '80, '82, '85, '86.

(ii) Bargain Offer Claims (Claimed Reductions from Recommended and Similar Prices).

(iii) Bargain Offer claims (Excluding Claimed Reductions from Recommended and Similar Retail Prices).

(Recommendations by the Director-General of Fair Trading, 1978.)

(iv) Consumer Dissatisfaction; A Report on Surveys Undertaken for the OFT, 1986.

(v) A General Duty to Trade Fairly; A Discussion Paper, 1986.

(vi) The Glass and Glazing Code; A Report on Monitoring Surveys, 1987.

(vii) Home Improvements - A Discussion Paper, 1982.

(viii) Home Improvements - Report, 1983.

(ix) 'I'm Going to take it Further!; Arbitration under Codes of Practice', 1984.

(x) 'Looking Ahead'; Report of a conference to mark the OFT's tenth birthday.

(xi) Rationales for Intervention in the Consumer Maket Place, An Cccasional Paper Prepared for the OFT, 1984.

(xii) Redress Procedures under Codes of Practice, Consultation Document, 1980.

(xiii) Redress Procedures under Codes of Practice, Conclusions Following a Review by the Office of Fair Trading, 1981.

(xiv) Review of the UK Self-Regulatory System of Advertising Control; A Report by the Director-General of Fair Trading, 1978.

(xv) Mail Order Protection Schemes - A Review, 1986.

(xvi) Monitoring Survey of the Code of Practice for Vehicle Body Repairers, 1986.

(xvii) The Protection of Consumer Prepayments - a Report by the Director-General of Fair Trading, 1986.

O'GRADY, J.

'Consumer Remedies', (1982) 60 Can.B.R. 549.

O'KEEFE, J.A.

The Law of Weights and Measures, 2nd ed., 1987, Butterworths.

OLANDER, F.

'Can Consumer Dissatisfaction and Complaints Guide Public Consumer Policy?', (1977) 2 Journ.of Cons. Pol. 124.

OUGHTON, D.W.

'Restructuring the Control of Price Indications', (1982) 1 L.M.C.L.Q. 117.

PAGE, A.C.

'Self-Regulation and Codes of Practice', (1980) J.B.L. 24.

PAINTER, A.A.

(i) 'A General Duty to Trade Fairly', (1984) 3 Tr.L. 65.

(ii) 'Legal Liabilities and Codes of Practice', (1981) B.L.R. 267.

PENGILLEY, W.

'The New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of Australian Experience, (1987) N.Z.L.R. 59.

PFAFF, M.

'Who Decides What is Good for Whom?: A Comment on the Paper by Olander', (1977) 2 Journ. of Cons. Pol. 138.

PICKERING, J.F. (with Cousins, D.C.)

(i) The Benefits and Costs of Voluntary Codes of Practice', (1982) 16 Euro.J. Marketing 31.

(ii) The Economic Implications of Codes of Practice, Report to the Office of Fair Trading, 1980.

(iii) 'Trade Associations and Business Self-Regulation through Voluntary Codes of Practice, (1982) 6 J.Cons. Studies and Home Economics 289.

(iv) (with Jones, T.T.) Self-Regulation in Advertising: A Review, 1985, Advertising Association.

PRICE COMMISSION

Prices, Costs and Margins in the Production and Distribution of Proprietary Non-ethical Medicines, 1978, HMSO.

PRIDGEN, D.

Consumer Protection and the Law, 1986, Clark Boardman, (New York).

PUTTICK, K.

'Trading Fairly: Would a 'General Duty' help?', (1986) B.L.R. 299.

QUEBEC OFFICE DE LA PROTECTION DU CONSOMMATEUR

Rapport Annual 1985-86.

RAMSEY, P.

Tudor Economic Problems, 1968, Victor Gollancz.

REICH, N. (with Micklitz, H.W.)

Consumer Legislation in the EC Countries: A Comparative Analysis, 1980, Van Nostrand, Reinhold.

RICHARDSON, B.

'Towards a Legislative Duty to Trade Fairly', (1986) 92 The ITSA Monthly Rev. 55.

RICHMOND-UPON-THAMES LONDON BOROUGH COUNCIL, TRADING STANDARDS DEPARTMENT

Annual Report 1985.

RUBIN, G.R. (with Sugarman, D.)

Law, Economy and Society, Essays in the History of English Law 1750-1914, 1984, Professional Books.

SADLER, R.J.

'The Information Gathering Powers of the Trade Practices Commission', (1983) 57 Australian L.J. 134.

SAMUELS, A.

'Codes of Practice and Legislation', (1986) Stat.L.R. 29.

SCHMITTHOFF, C.M.

Commercial Law in a changing Economic Climate, (1977), Sweet and Maxwell.

SMITH, A.T.H.

'Judicial law making', (1984) 100 L.Q.R. 46.

SMITH, C. (with Kintner, E.W.)

'The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency, (1975) 26 Mercer L.R. 651.

SMITH, P.

(i) 'Small Claims: Back to an Adversarial Approach?', (1986) 5 C.J.Q. 292.

(ii) (with Swann, D.) Protecting the Consumer - An Economic and Legal Analysis, 1979, Martin Robertson.

SOCIETY OF COUNTY TREASURERS AND THE SOCIETY OF COUNTY TRADING STANDARDS OFFICERS

Trading Standards Statistics, 1985-86.

STATUTE LAW SOCIETY

A Radical Simplification, 2nd Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom, 1974, Sweet and Maxwell.

STEVENSON, J. (with Cook, C.)

The Slump, Society and Politics during the Depression, 1977, Jonathan Cape.

STOLJAR, S.J.

'Conditions, Warranties and Descriptions of Quality in Sale of Goods, 1', (1952) 15 M.L.R. 425, Part II, (1953) 16 M.L.R. 174.

SUGARMAN, D. (with Rubin, G.R.)

Law, Economy and Society, Essays in the History of English Law, 1750-1914, 1984, Professional Books.

SWANN, D.

Protecting the Consumer - An Economic and Legal Analysis, 1979, Martin Robertson.

SWEDISH INSTITUTE

The Swedish Ombudsman, Fact Sheets on Sweden, 1985.

TAPPEREL, G.Q. et al

Trade Practices and Consumer Protection, 3rd ed., 1983, Butterworths (Australia).

THOMAS, R.

(i) 'Alternative Dispute Resolution - Consumer Disputes', Paper to the Society of Public Teachers of Law, 1987 (unpublished).

(ii) 'Codes of Practice in the United Kingdom and the Consumer Interest', (1984) 7 J.Cons.Pol. 198.

(iii) 'Plain English and the Law', (1985) Stat.L.R. 139.

TIPLADY, D.

'The Judicial Control of Contractual Unfairness', (1983) 46 M.L.R. 601.

TRADE, DEPARTMENT OF

(i) Consumers' Interests and the Nationalised Industries - A Consultative Document, 1981.

(ii) The Self-Regulatory System of Advertising Control - Report of the Working Party, 1980.

(iii) Notes of Guidance for Enforcement Officers, 1979. (On the Price Marking (Bargain Offers) Order 1979.)

TRADE AND INDUSTRY, DEPARTMENT OF

(i) Annual Report, National Metrological Co-ordinating Unit, 1983-4, 1985.

(ii) Implementation of EC Directive on Misleading Advertising; Consultation Proposals.

TREBILCOCK, M.J. et al

A Study on Consumer Misleading and Unfair Trade Practices, 1976, Ottawa, Information Canada.

UNDERHILL, N.

The Lord Chancellor, 1978, Terance Dalton.

WADDAMS, S.M.

'Unconscionability in Contracts', (1976) 39 M.L.R. 369.

WASILEWSKI, M.

'A General Duty to Trade Fairly' - a paper given to a conference, 'Recent Developments in Consumer Law', London, December 1986 (unpublished).

WEATHERILL, S.

'The Powers of Criminal Courts to make Compensation Orders', (1986) 136 N.L.J. 459.

WOODROFFE, G.

(i) 'Government Monitored Codes of Practice in the United Kingdom', (1984) 7 Journ. of Cons. Pol. 171.

(ii) Preliminary Research Study on the General Duty to Trade Fairly, 1984.