Fair Trading Amendment Bill.

Second Reading

Ms MEAGHER (Cabramatta—Minister for Fair Trading, and Minister Assisting the Minister for Commerce) [10.32 p.m.]: I move:

That this bill be now read a second time.

The Fair Trading Act 1987 is the principal statute that protects New South Wales consumers from deceptive and dishonest commercial conduct, and this bill will update the Act to reflect changes in the way transactions are undertaken and address the increasing sophistication of the operation of con artists. The Fair Trading Act provides a statutory framework for the operation of the New South Wales consumer marketplace. The legislation exists in relation to a broad range of transactions of varying value and complexity. These range from everyday consumer purchases–including such basic items as a newspaper or morning cup of coffee–to transactions as important as purchasing a home, car or expensive manufactured item. The legislation applies to more than $70 billion in annual consumer trade.

Governments around the world look to the marketplace to ensure that goods and services are produced that are appropriate to the demands of consumers. The underlying principle is that well-informed consumers know best what goods and services will satisfy their needs and wants. In economic terms, the efficient allocation of productive resources in a market economy relies upon the informed choices made by consumers and the competitive behaviour of market participants. Legislation such as the Fair Trading Act and the Commonwealth Trade Practices Act play an important part in facilitating pro-competitive conduct and the efficient operation of the economy. The provisions of the Fair Trading Act can be grouped under five major themes or objectives. They are to require traders to provide consumers with truthful information so that consumers can make informed choices, to prescribe information and practice requirements that are not adequately addressed by market forces, to prohibit unfair practices, to provide for a means of redress for consumers and enforce the provisions of the Act, and to provide protection against unsafe goods.

The Door-to-Door Sales Act 1967, one of the earliest consumer protection statutes in New South Wales, regulates unsolicited door-to-door credit sales of goods and services. The aim of the Door-to-Door Sales Act is to deal with problems that can occur when transactions are conducted in settings which are not normally places of business and where the seller is physically present with the consumer. The Act provides for a 10-day cooling off period during which consumers may terminate a contract that they may have entered into because of inadequate or misleading information or high-pressure sales tactics. The proposals in the bill are based on the recommendations of a National Competition Policy review of the Fair Trading Act and the Door-to-Door Sales Act.

The principal aim of National Competition Policy is to promote and maintain competition to increase economic efficiency and community welfare, while continuing to provide for consumer protection. While the steering committee that conducted the review was principally concerned to ensure that the State's fair trading legislation should not restrict competition unless it could be justified through a net public benefit analysis, it was also concerned about the potential impact of unfettered marketplaces.

The steering committee comprised representatives of State and Commonwealth government agencies, and business and consumer groups. Its task was made easier by a determination of the National Competition Council that where State Fair Trading Acts mirror the consumer protection provisions of the Commonwealth Trade Practices Act, a net public benefit analysis did not have to be undertaken. This is because the council found the provisions to be pro-competitive. Nevertheless, the steering committee took the opportunity to review the legislation to ensure that its operation and effect resulted in an efficient and/or effective marketplace. A comprehensive issues paper was publicly released and extensive consultation was undertaken with affected industry and consumer groups and individuals in Sydney and in rural and regional New South Wales.

During the review the steering committee tried, wherever practicable, to maintain parity with equivalent legislation from other States and Territories and particularly with the Commonwealth's Trade Practices Act. This is because interstate businesses operating within the New South Wales marketplace have the reasonable expectation that marketplace regulation will be largely similar, and the inconsistent regulation of business transactions may increase the cost of those transactions with flow-on effects for consumers. A final report produced by the steering committee identified the issues relevant to competition policy, uniformity and the effectiveness of the legislation, and potential areas of legislative reform.

The bill's provisions fall into seven categories: truthful information, product safety, direct commerce, conditions and warranties in consumer transactions, prohibited practices, consumer protection and redress, and penalties and enforcement. I will proceed to briefly outline the provisions of the bill under each of these areas. The requirements to provide truthful information are contained in part 5 of the Fair Trading Act and they mirror the provisions in the Trade Practices Act. The Act regulates both the conduct and representations of traders. Essentially, conduct must not be misleading and deceptive, or likely to mislead and deceive. It is an offence to make false or misleading representations about goods or services.

Provisions for truth in advertising were strengthened in April 2000, when the Act was amended to provide that the director general may issue a notice requiring a trader to substantiate claims made in advertising, such as get-rich-quick schemes and computerised gambling systems promising windfall profits, miracle health solutions for weight loss and baldness, mail order promotions, and unrealistic prices for goods and services, and special deals. A trader who failed to comply with the director general's notice or who knowingly provided false information committed an offence. However, it was not an offence to fail to substantiate the claim.

The bill creates an offence in the case where a trader, who has been notified by the director general to substantiate a claim or representation made by the trader, fails to provide proof sufficient to support the claim or representation. Section 44 (i) of the Fair Trading Act deals with false or misleading representations concerning the place of origin of goods. The Office of Fair Trading has had difficulty following up complaints about country of origin labelling because of legal uncertainties regarding the minimum requirements for country of origin claims. The Commonwealth addressed this issue by amending the Trade Practices Act to clarify the circumstances under which phrases such as "made in Australia" and "product of Australia" may be used.

The bill inserts a new provision to mirror the Trade Practices Act provisions in relation to country of origin representations. The new section provides a test for determining whether a representation about where goods come from contravenes section 42, which relates to misleading or deceptive conduct, or section 44 (i). For example, to claim that a good has been "made in Australia" the good must meet two standards: 50 per cent or more of the production costs must have been carried out in Australia; and the goods must have been substantially transformed in Australia. The test to determine whether a good is a "product of Australia" is stricter and requires meeting the following criteria: each significant component, or ingredient, of the good must originate from Australia; and all, or virtually all, of the production processes must take place in Australia.

I turn now to product safety. During the NCP review some concern was expressed that the provisions of the Fair Trading Act in relation to compulsory product recall are insufficiently flexible to allow products to be quickly withdrawn from sale where they pose an obvious danger to the public. At present the Products Safety Committee is responsible for recommending to the Minister for Fair Trading that there should be a compulsory product recall. However, before this can occur, the Office of Fair Trading must undertake an informal inquiry into a potentially dangerous product and compile substantiating material with which to seek a referral from the Minister to the Products Safety Committee.

In urgent circumstances, the need to follow this process may give rise to public safety concerns. The bill addresses this by allowing the director-general, by order published in the *Government Gazette*, to undertake the mandatory recall of products based on the advice of the department. The bill provides that the recall order ceases to have effect after 28 days unless the order is confirmed by the Minister by notice published in the *Government Gazette*. The bill provides also that the Minister or the supplier may, within 14 days of the mandatory recall order, request the Products Safety Committee, an independent body of safety experts, to review the director-general's order. These provisions ensure that consumer exposure to potentially dangerous or unsafe products is minimised, and at the same time protect the suppliers' interests by giving them the opportunity to appeal the recall order if they consider it to be unjustified.

I now turn to the matter of direct commerce. The Door-to-Door Sales Act was introduced 35 years ago at a time of different social and economic circumstances. During debate in the Legislative Council one honourable member argued:

This bill is a protection to the working man and indeed any man whose wife is a lawful agent to enter into these contracts. He should be given an opportunity of ratifying the contract and discussing with his wife whether they can afford the purchase. There should be a proper place for repentance.

Today it might be said that consumers are more sophisticated and more aware of, and less sensitive to, high pressure sales tactics, whether in the home or otherwise. However, direct selling practices are also more sophisticated and widespread across a range of industries and products. It is also a growth area, as indicated by the marketing practices of pay television and telephone companies. Some of the most vulnerable groups in our society continue to be subjected to highly undesirable direct selling practices from disreputable traders. They include the elderly, especially older women living alone, consumers with a poor understanding of English, and the disadvantaged. Many direct selling firms will target particular suburbs or areas, including those with a high percentage of public housing.

There is also a particular and identifiable marketplace detriment—similar to unsolicited attendance at a person's home or workplace—in relation to unsolicited telephone contact with consumers. The inter-personal pressure exerted by sales people at a person's front door and on the phone is highly similar in nature. The NCP review found that modern telemarketing practices gave rise to sufficiently significant and widespread incidents of marketplace detriment and anti-competitive conduct to warrant regulation. The bill provides for the repeal of the Door-to-Door Sales Act and the inclusion of a new Direct Commerce division within the Fair Trading Act. The new provisions maintain the essence of the original Act and take into consideration the changing social, economic and technological environment of today's society. The aim is to ensure that the consumer is protected in circumstances where it is warranted, but that such protection is not unreasonably onerous for the trader and does not give rise to anti-competitive effects.

The new Direct Commerce division defines "direct commerce" to include both traditional door-to-door selling and telephone-based direct marketing, that is, telemarketing; applies to all unsolicited direct commerce contracts for the supply of goods and services to an individual where the total consideration payable by the consumer, in cash or credit, is more than $100; provides a cooling-off period of five clear business days during which a consumer may rescind a direct commerce contract; and requires dealers or suppliers to inform consumers in writing of their entitlements under the Act. Telemarketers must give consumers the information over the phone and follow up with written information.

The Direct Commerce division also prohibits a direct commerce supplier from collecting fees during the cooling-off period for services provided during this period; regulates the hours during which direct commerce may be carried out by providing that dealers or suppliers may not solicit business between the hours of 8.00 p.m. and 9.00 a.m. on any day of the week; requires that a telemarketer must immediately cease contact when requested to do so, and may not contact a consumer again by telephone for 30 days after a consumer has advised that he or she is not interested in the goods or services; requires that a dealer must leave the premises as soon as it is practicable when requested to do so by the consumer; and requires that a dealer must advise the consumer of the purpose of the call and produce an identity card. The bill also prohibits contracting out, does not permit consumers to waive their rights under the division, and provides for the regulations to exclude specific kinds of direct commerce contracts from the operation of the Act.

I now turn to conditions and warranties in consumer transactions. The Trade Practices Act contains provisions relating to conditions and warranties for the supply of both goods and services in divisions 2 and 2A of part V. Similar provisions were not included in the Fair Trading Act as there was already legislative coverage under the Sale of Goods Act. However, these provisions are limited to goods, and with the growth in the market for consumer services there is a gap in coverage. Corporations and nationally operating traders already comply with the Trade Practices Act provisions. For the sake of consistency with Commonwealth law, the bill amends the Fair Trading Act to mirror the relevant provisions of divisions 2, 2A and 3 of part V with respect to consumer goods and services, that is, goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

I turn now to deal with prohibited practices. Throughout the 1960s and early 1970s, mock auctions were a significant problem in the New South Wales consumer marketplace. Generally, consumers were enticed or tricked to pay more for goods than their real or near value by virtue of the conduct of mock auctioneers. The Mock Auctions Act was enacted in 1973 to prohibit persons from selling goods to bidders at a lower price than the highest bid and to prevent persons from crediting part of the price bid to the bidder for future use. While mock auctions are no longer considered to be a significant marketplace detriment, they should continue to be prohibited, consistent with legislation in other States. However, rather than prohibit them by stand-alone legislation, it is more appropriate that these provisions be incorporated in the Fair Trading Act, as is the case in several other States. Accordingly, the bill repeals the Mock Auctions Act and inserts a new section in part 5 of the Fair Trading Act, which prohibits the conduct of mock auctions.

Regarding consumer protection and redress, section 43 of the Fair Trading Act prohibits unconscionable conduct and lists several factors that may help in determining whether conduct is unconscionable. The list is not exhaustive, and a court may grant relief in any situation where unconscionable conduct is involved. Unconscionable conduct is conduct by which, in certain circumstances, one party acts to the detriment of another by unfairly taking advantage of a more powerful bargaining position. Section 43 is limited to conduct in connection with the supply, or possible supply, of goods or services normally purchased for personal, domestic or household use, or consumption. Goods or services acquired for re-supply or for use in commerce are not covered; hence small businesses are unable to use this provision in relation to unconscionable conduct arising from their dealings with suppliers. The exclusion also restricts the section's scope in relation to goods or services acquired for investment purposes.

Breaches of the unconscionable conduct provision do not attract criminal sanctions. Application may be made to the Supreme Court for civil remedies, including injunctions to stop the illegal conduct, monetary compensation, rescission or variation of a contract, refund or specific performance of a contract. Many small business operators are no better able to protect their interests than ordinary consumers and require protection from unconscionable conduct. Removing the restriction on section 43 applying to business transactions is also in keeping with the

provisions of the Trade Practices Act. Consequently, the bill amends section 43 to extend and clarify its operation so that the remedies available to consumers affected by unconscionable conduct may also be accessed by small businesses in relation to their dealings with suppliers.

Section 68 currently provides that actions for damages arising out of conduct that is in contravention of the principal parts of the Act must be commenced within three years after the date that the cause of action accrued. However, the Commonwealth has extended the time limit to six years under the Trade Practices Act. To restore parity with Commonwealth legislation, the bill provides that action under section 68 must be commenced within six years after the date on which the cause of action which relates to the conduct accrues.

A similar amendment is made in section 72, which provides for an application for compensation to the Supreme Court by a person who has suffered loss or damage by conduct of another person in contravention of the Act. The bill provides that such application must be made within six years. The bill also extends to the Local Court—which is where most of the department's cases are heard—the authority, in conjunction with proceedings for an offence under the Act, to make a range of reparation orders to the person who suffered loss or damage as a result of the offence. The bill provides for more stringent enforcement provisions that better address problems and issues which arise in today's marketplace or trading environment.

The department commonly finds that disreputable traders who have taken orders and deposits for goods and services which have not been supplied become insolvent and leave many consumers out of pocket. These traders may have a history of failed companies, often in the same type of business, and after each insolvency they start up again under another name, sometimes in another State or country, and repeat their dishonest practices. Moreover, consumers will have no recourse to compensation if traders arrange their personal affairs to minimise redress to creditors in the event that their business fails. In order to enhance the enforcement options available in this situation, the bill confers a statutory power on the director-general to require a person to show cause why he or she should be allowed to continue to trade. The intention is to enable the Department of Fair Trading to act before significant consumer detriment occurs, especially in relation to known disreputable individuals.

The bill inserts a new provision under which the director-general may issue a notice to a trader who has engaged in unlawful conduct on more than one occasion, whether in New South Wales or elsewhere, to show cause why he or she should not be banned from trading. "Unlawful conduct" is defined to include conduct that would be a contravention of the Fair Trading Act, whether or not proceedings have been brought in respect of the contravention. The bill also provides that the director-general may, after issuing the notice and taking account of any submissions made in relation to the matter, apply to the Supreme Court for an order prohibiting the person from carrying on business indefinitely or for a specified period.

The current provisions of the Act only provide for monetary penalties of $22,000 in the case of an individual and $110,000 for a body corporate. As described above, some traders have a history of dishonest and disreputable behaviour and are able to avoid any monetary penalties by structuring their affairs to minimise any redress. The Government believes that, in the face of what appears to be an habitually dishonest trader who deliberately avoids the possibility of redress for consumers, the court should have the option of sentencing such persons to a term in prison. In this respect, it is difficult to draw a meaningful distinction between offences involving obtaining benefit by deception, as set out in the Crimes Act 1900, and the circumstances of serious or repeat breaches of the Fair Trading Act whereby dishonest traders may deliberately, and sometimes systematically, deceive consumers with a view to obtaining financial benefit.

The relevant Crimes Act offences attract a penalty of imprisonment for five years. This bill allows the court to impose a three-year prison term for repeated breaches of part 5 of the Act, which deals with unfair practices, in addition to or instead of a monetary penalty. Currently the maximum penalty which may be imposed by the Local Court under the Act is 50 penalty units or $5,500. Other more recent fair trading legislation has set 100 penalty units or $11,000 as the maximum penalty that local courts can impose. The bill amends the Act to provide a maximum penalty of 100 units. This will enhance the capability of local courts to deal with more serious offences prosecuted by the department in local courts.

Part 7 of the Act currently provides for the preparation of codes of practice for a particular class of consumers, suppliers or persons. A code of practice is an agreed set of rules for members of a particular industry to follow to ensure integrity and fair trading in that industry or sector. Codes of practice can be created for adoption on a voluntary or mandatory basis. The key features of any code are strong disclosure provisions and an effective dispute resolution mechanism. The Act enables the prescription of mandatory codes of practice by regulation. The national competition policy review found that mandatory codes of practice have an impact on competition. Their obligatory nature means that restrictions within codes on how a trader may operate can be compared to restrictions within specific purpose legislation. Accordingly, a mandatory code that prevents certain practices or establishes minimum standards of trading will impact on competition by potentially restricting entry to the marketplace to those who can comply with the standards, and by limiting product innovation by the minimum standards imposed.

The review also noted that the legal standing of mandatory codes prescribed under the Fair Trading Act has been

questioned in a 1998 judgment by the New South Wales Court of Appeal in respect of the case of *Murphy v Overton Investments* concerning the Retirement Village Industry Code of Practice. The judgment raised doubts about the effectiveness of prescribed codes of practice as regulatory mechanisms, due mainly to difficulties in enforcement. It highlighted the conflict between the adoption of an instrument set in a broad framework, employing a flexible format to set guidelines for good practice—in other words, a code—and the setting of rules that require mandatory compliance. The Court found that, in so far as the code had the effect of overriding express agreements between parties, it was ineffectual. In the result, the terms of the code were subsequently codified in the Retirement Villages Act 1999. Of the three mandatory codes once prescribed under the Fair Trading Act, all have been absorbed into specific purpose legislation.

As a matter of regulatory policy and practice, mandatory codes do not justify their anti-competitive effect. The bill therefore repeals part 7. The Government considers that any marketplace failure is best addressed by relevant legislative prescription, rather than by the making of a potentially unenforceable code of conduct. This bill also amends the Fair Trading Act in line with the provisions of the Civil Liability Amendment (Personal Responsibility) Bill 2002 to prevent the recovery of damages under the Fair Trading Act for death or personal injury resulting from a contravention of relevant sections of part 5 of the Act; provide that a contract for the supply of recreational services will be able to exclude, restrict or modify liability for harm resulting from failure to exercise due care and skill; and provide that limitation periods under the Act do not apply to a cause of action to which division 6 of part 2 of the Limitation Act 1969 applies. In conclusion, the provisions of this bill add "teeth" to an Act that is already effective in ensuring consumer protection and trader honesty in the New South Wales marketplace. I commend the bill to the House.

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